# California State Assembly

## PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR



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## AGENDA

Tuesday, April 11, 2023
9 a.m. -- State Capitol, Room 126

## REGULAR ORDER OF BUSINESS

## HEARD IN SIGN-IN ORDER

## LIMITED TESTIMONY FOR SUPPORT AND OPPOSITION

| | | | |
|---|---|---|---|
| 1. | AB 28 | Gabriel | Firearms and ammunition: excise tax. |
| 2. | AB 79 | Weber | PULLED BY AUTHOR |
| 3. | AB 574 | Jones-Sawyer | Firearms: dealer records of sale. |
| 4. | AB 642 | Ting | Law enforcement agencies: facial recognition technology. |
| 5. | AB 709 | McKinnor | Transcripts: criminal proceedings: exculpatory evidence. |
| 6. | AB 750 | Rodriguez | Menace to public health: closure by law enforcement. |
| 7. | AB 762 | Wicks | PULLED BY AUTHOR |
| 8. | AB 793 | Bonta | Privacy: reverse demands. |
| 9. | AB 798 | Weber | Female genital mutilation. |
| 10. | AB 808 | Mathis | Crimes: rape. |
| 11. | AB 851 | McCarty | PULLED BY AUTHOR |
| 12. | AB 856 | Stephanie Nguyen | Peace officers: active shooter and rescue training. |
| 13. | AB 945 | Reyes | Criminal procedure: expungement of records. |
| 14. | AB 1090 | Jones-Sawyer | County officers: sheriffs. |
| 15. | AB 1133 | Schiavo | Firearms: concealed carry licenses. |
| 16. | AB 1214 | Maienschein | Courts: remote technology. |
| 17. | AB 1260 | Joe Patterson | Parole: notice of release date. |
| 18. | AB 1261 | Santiago | Crime: witnesses and informants. |
| 19. | AB 1291 | McCarty | Law enforcement settlements and judgments: reporting. |
| 20. | AB 1306 | Wendy Carrillo | State government: immigration enforcement. |
| 21. | AB 1360 | McCarty | Hope California: Secured Residential Treatment Pilot Program. |
| 22. | AB 1378 | Essayli | Criminal procedure: protective order violation. |

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| 23. | AB 1380 | Berman | Crimes: disorderly conduct. |
| 24. | AB 1412 | Hart | Pretrial diversion: borderline personality disorder. |
| 25. | AB 1497 | Haney | PULLED BY AUTHOR |
| 26. | AB 1507 | Gallagher | PULLED BY AUTHOR |
| 27. | AB 1544 | Lackey | Child Abuse Central Index. |
| 28. | AB 1551 | Gipson | PULLED BY AUTHOR |
| 29. | AB 1582 | Dixon | Secure youth treatment facilities. |
| 30. | AB 1643 | Bauer-Kahan | Juveniles: informal supervision. |
| 31. | AB 1708 | Muratsuchi | PULLED BY AUTHOR |
| 32. | AB 1726 | Kalra | Crimes: sentences. |
| 33. | AB 1739 | Sanchez | Human trafficking: vertical prosecution program. |
| 34. | AB 1746 | Hoover | Inmate firefighters: credits. |

## COVID FOOTER

SUBJECT:

All witness testimony will be in person; there will be no phone testimony option for this hearing. You can find more information at www.assembly.ca.gov/committees.

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 28 (Gabriel) – As Amended March 23, 2023

**SUMMARY**: Establishes an excise tax on licensed firearms dealers, firearms manufacturers, and ammunition vendors to fund programs that address the causes and harms of gun violence. Specifically, **this bill**:

1) Establishes the Gun Violence Prevention, Healing, and Recovery Fund within the State Treasury, which will be funded by an excise tax on licensed firearms dealers, firearms manufacturers, and ammunition vendors, as specified.

2) Requires all moneys in the fund, including interest or dividends earned by the fund to be distributed according to the specified allocation formula.

3) Requires the dollar amounts specified in the allocation formula to be annually adjusted to account for changes in the California Consumer Price Index.

4) Requires moneys in the fund, upon appropriation by the legislature, to be annually allocated in the following order:

   a) The first $75,000,000 available in the fund, or as much of that amount as is available, shall be annually allocated to the Board of State and Community Corrections (BSCC), or other successor agency designated by law as the administering agency for the California Violence Intervention and Prevention (CalVIP) Grant Program, to fund CalVIP Grants and administration and evaluations of CalVIP-supported programs.

   b) The next $3,000,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to the University of California, Davis, California Firearm Violence Research Center, if those funds are accepted by the Regents of the University of California, for gun violence research and initiatives to educate health care providers and other stakeholders about clinical tools and other interventions for preventing firearm suicide and injury.

   c) The next $15,000,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to the State Department of Education to fund school mental health and behavioral services and school safety measures.

   d) The next $2,500,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to the Department of Justice (DOJ) to support activities to inform firearm and ammunition purchasers and firearm owners about gun safety laws and responsibilities, such as safe firearm storage, and to promote implementation and coordination of gun violence prevention efforts through activities such as technical

assistance, training, capacity building, and local gun violence data and problem analysis support for local governments, law enforcement agencies, community-based service providers, and other stakeholders.

e) The next $12,500,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to the Judicial Council to support a court-based firearm relinquishment grant program to ensure the consistent and safe removal of firearms from individuals who become prohibited from owning or possessing firearms and ammunition pursuant to court order, including, but not limited to, domestic violence restraining orders, gun violence restraining orders, civil harassment restraining orders, and workplace violence restraining orders.

f) The next $7,000,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to the Office of Emergency Services (OES) to provide counseling and trauma-informed support services to direct and secondary victims of mass shootings and other gun homicides and to individuals who have experienced chronic exposure to community gun violence.

g) The next $15,000,000 available in the fund, or as much of that amount as is available, if any, shall be annually allocated to DOJ for a justice for victims of gun violence program to support evidence-based activities to equitably improve investigations and clearance rates in firearm homicide and firearm assault investigations in communities disproportionately impacted by firearm homicides and firearm assaults.

h) Any remaining moneys available in the fund each year after the allocations shall be allocated to fund and support activities and programs focused on preventing gun violence, supporting victims of gun violence, and otherwise remediating the harmful effects of gun violence.

5) Imposes, commencing on July 1, 2024, an excise tax on licensed firearm dealers, firarms manufacturers, and ammunition venders at the rate of 11% of the gross receipts from the retail sale of any firearm, firearm precursor part, or ammunition.

6) Exempts from the excise tax the gross receipts from the retail sale of any firearm, firearm precursor part, or ammunition to a peace officer or any law enforcement agency employing that peace officer, for use in the normal course of employment.

7) Exempts from the excise tax the gross receipts of any licensed firearms dealer, firearms manufacturer, or ammunition vendor in any quarterly period in which the total gross receipts from the retail sales of firearms, firearm precursor parts, or ammunition by that licensed firearms dealer, firearms manufacturer, or ammunition vendor is less than $5,000.

8) Requires the California Department of Tax and Fee Administration (CDTFA) to administer and collect the excise tax.

9) Authorizes CDTFA to prescribe, adopt, and enforce rules and regulations, including emergency regulations as necessary, relating to the administration and enforcement of this part, including, but not limited to, collections, reporting, refunds, and appeals.

10) Provides that the excise taxes are due and payable to the CDTFA quarterly on or before the last day of the month next succeeding each quarterly period of three months.

11) Requires, on or before the last day of the month following each quarterly period, a return for the preceding quarterly period to be filed with the CDTFA using electronic media.

12) Requires returns to be authenticated in a form or pursuant to methods as may be prescribed by the CDTFA.

13) Requires all amounts required to be paid, as prescribed, to be paid to CDTFA in the form of remittances.

14) Requires revenues, net of refunds, and costs of administration, to be deposited in the Gun Violence Prevention, Healing, and Recovery Fund, as prescribed.

15) Provides that the excise tax does not preclude or preempt a local ordinance that imposes any additional requirements, fee, or surtax on the sale of firearms, ammunition, or firearm precursor parts.

16) Provides that the excise tax is in addition to any other tax or fee imposed by the state, or a city, county, or city and county.

17) Authorizes CDTA, if any provision of this act or its application is held invalid, to issue guidance or adopt regulations necessary to address the invalidity and to promote the purposes of this act, as specified.

18) Requires CDTA, if any provision of this act or its application is held invalid, to seek to ensure minimal disruption to funding and operations of programs and initiatives supported by the fund.

19) Provides that, if any section, subsection, sentence, or clause of this act is for any reason declared unconstitutional, invalid, or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity, or enforceability of the remaining portions of this act or any part thereof, and declares that the Legislature would have adopted this act notwithstanding the unconstitutionality, invalidity, or unenforceability of any one or more of its sections, subsections, sentences, or clauses.

20) Requires the Director of Finance to transfer, as a loan, $2,400,000 from the General Fund to the CDTA to implement the excise tax.

21) Requires any loan made to the fund to be repaid with moneys collected by the excise tax and prior to making any expenditures or appropriations to specified entities and programs.

**EXISTING FEDERAL LAW**:

1) States that the right of the people to keep and bear Arms, shall not be infringed. (U.S. Const., 2nd Amend.)

2) Establishes the Pittman-Robertson Act, which imposes an 11% levy on firearms, ammunition and archery equipment and distributes the proceeds to state governments for wildlife-related projects. (26 U.S.C. § 4181.)

**EXISTING STATE LAW:**

1) Declares legislative intent to be the following:

   a) To develop community violence prevention and conflict resolution programs, in the state, based upon the recommendations of the California Commission on Crime Control and Violence Prevention, that would present a balanced, comprehensive educational, intellectual, and experiential approach toward eradicating violence in our society; and,

   b) That these programs shall be regulated, and funded pursuant to contracts with the OES. (Pen. Code, § 14112.)

2) States that first priority shall be given to programs that provide community education, outreach, and coordination, and include creative and effective ways to translate the recommendations of the California Commission on Crime Control and Violence Prevention into practical use in one or more of the following subject areas:

   a) Parenting, birthing, early childhood development, self-esteem, and family violence, to include child, spousal, and elderly abuse;

   b) Economic factors and institutional racism;

   c) Schools and educational factors;

   d) Alcohol, diet, drugs, and other biochemical and biological factors;

   e) Conflict resolution; and,

   f) The media. (Pen. Code, § 14114, subd. (a).)

3) States that first priority programs may additionally provide specific direct services or contract for those services in one or more of the program areas as necessary to carry out the recommendations of the commission when those services are not otherwise available in the community and existing agencies do not furnish them. (Pen. Code, § 14115.)

4) States that second priority shall be given to programs that conform to the same requirements as first priority programs, except that the educational component shall not be mandatory in each subject area, but shall be provided in at least three of those areas, and the programs shall provide specific direct services or contract for services in one or more program areas. (Pen. Code, § 14116.)

5) States that each program shall have a governing board or an interagency coordinating team, or both, of at least nine members representing a cross section of existing and recipient, community-based, public and private persons, programs, agencies, organizations, and institutions. Specifies the duties of the governing board or coordinating team. (Pen. Code, §

14117.)

6) Requires the OES to prepare and issue written program, fiscal, and administrative guidelines for the contracted programs that are consistent with this title, including guidelines for identifying recipient programs, agencies, organizations, and institutions, and organizing the coordinating teams. (Pen. Code, § 14118, subd. (a).)

7) Requires OES to promote, organize, and conduct a series of one-day crime and violence prevention training workshops around the state, as specified. (Pen. Code, § 14119.)

8) States that programs will be funded, depending on the availability of funds for a period of two years, with OES required to provide 50%of the program costs, to a maximum amount of $50,000 per program per year. The recipient shall provide the remaining 50% with other resources which may include in-kind contributions and services. (Pen. Code, § 14120.)

9) Imposes an $0.18 tax on each gallon of fuel sold in the state. (Rev. & Tax. Code, § 7360.)

10) Imposes taxes on cigarettes. (Rev. & Tax. Code, §§ 30101, et. seq.)

11) Imposes taxes on cannabis. (Rev. & Tax. Code, §§ 34010, et. seq.)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "Californians are counting on us to do everything possible to keep them safe from mass shootings and gun violence. AB 28 is a common-sense measure that will fund school safety measures and gun violence prevention programs that have proven to be some of the most effective ways of stopping gun violence. A modest tax will provide us with a permanent, sustainable funding source for these essential programs and help protect communities across our state."

2) **Brief Overview of Gun Violence in California:** The amount of gun violence in California is relatively low compared to other states. In 2020, California's firearm mortality rate was 8.5 deaths per 100,000 people, the seventh lowest in the nation. (Centers for Disease Control and Prevention, National Center for Health Statistics, *Firearm Mortality by State* <https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm> [last viewed Apr. 21, 2022].) When accounting for both shooting deaths and non-fatal shootings, California has the 37th-highest rate of gun violence in the county. (Everytown, *Gun Violence in California* (Jan. 2021) <https://maps.everytownresearch.org/wp-content/uploads/2021/02/Gun-Violence-in-California-2.9.2021.pdf> [last visited Apr. 21 2022].)

   Nevertheless, gun violence in California is increasing, with communities across the state seeing shooting deaths reaching levels not seen in more than a decade. (See Lofstrom, *Gun Deaths Drive California's Largest-Ever Rise in Homicides*, PPIC (July 12, 2021) <https://www.ppic.org/blog/gun-deaths-drive-californias-largest-ever-rise-in-homicides/> [last viewed Apr. 21, 2022].) Oakland, for example, saw more gun violence in 2021 than in any year since 2006, and Los Angeles saw more gun violence in 2021 than in any year since

2007. (DeBolt, *2021 is Oakland's deadliest year since 2006*, The Oaklandside (Dec. 23, 2021) <https://oaklandside.org/2021/12/23/2021-oakland-deadliest-year-since-2006-homicides-shootings-gun-violence/> [last viewed Apr. 21, 2022]; Rector, *Gun Violence hits 15-year high in L.A., taking lives and erasing hard-fought gains*, L.A. Times (Dec. 31, 2021) <https://www.latimes.com/california/story/2021-12-31/gun-violence-los-angles-15-year-high> [Apr. 21, 2022].)

Moreover, a spate of recent mass shootings have drawn attention to the destruction gun violence reaps on families and communities. (See e.g.,Salahieh, *Half Moon Bay suspect is charged with 7 murder counts as US tallies more mass shootings than days so far in 2023* (Jan. 26, 2023) <https://www.cnn.com/2023/01/26/us/us-shootings-half-moon-bay-monterey-park-yakima/index.html > [last visited Jan. 26, 2023]; *1 dead, 3 hospitalized in Easter shooting in Sacramento, sheriff says*, KCRA (Apr. 17, 2022) <https://www.kcra.com/article/sacramento-county-fatal-shooting/39744613> [last viewed Mar. 31, 2023]; Hutchinson, *6 killed, at least 12 injured in mass shooting in Sacramento, California: Police*, ABCNews (Apr. 4, 2022) <https://abcnews.go.com/US/multiple-people-shot-downtown-sacramento-california-police/story?id=83843793> [last viewed Mar. 31, 2023]..)

This bill would establish the Gun Violence Prevention, Healing, and Recovery Fund—funded by an excise tax on licensed firearms dealers, firearms manufacturers, and ammunition vendors—to distribute money to programs addressing gun violence and its effect on the state and its citizens.

3) **Excise Taxes in California and Effect of This Bill:** An excise tax is a tax imposed on a specific good or activity, and generally related to the manufacture, sale or consumption of specific commodities, or licenses to pursue certain occupations. A subset of excise taxes are known as "sin" or "vice" taxes, and are levied on specific goods believed to be harmful to society and individuals, such as alcohol, tobacco and gambling, among other things. Sin taxes are generally intended to lower demand for the targeted good by increasing its price. California imposes excise taxes – many of which may be considered "sin" taxes – on several types of goods including gasoline, cigarettes, cellphones and cannabis. Even though excise taxes are collected from businesses, virtually all California merchants pass on the excise tax to the customer through higher prices for the taxed goods. This bill imposes a new excise tax on licensed vendors of firearms, ammunition and precursor parts, at a rate of either 10% or 11% depending on the item sold.

Based on the findings and declarations included in the bill, it is evident that this tax is not intended to operate as a sin tax, discouraging the sale and purchase of firearms, ammunition and precursor parts: "The modest tax proposed in this measure mirrors the Pittman-Robertson federal excise tax on other firearm and ammunition industry participants, is similarly dedicated to funding programs to remediate the harmful externalities of firearm industry commerce, and is similarly unlikely to discourage lawful sales and commerce in firearms or ammunition." The provision establishing this finding also cites research suggesting that moderate tax increases on guns or ammunition would do little to disrupt hunting or recreational gun use. (https://www.rand.org/research/gun-policy/analysis/essays/firearm-and-ammunition-taxes.html)

Rather, this tax more closely resembles what is known as a Pigovian tax, or one intended to

correct for the negative externalities caused by a specific market activity – in this case, societal costs related to the sale of firearms, ammunition and precursor parts. Generally, Pigovian taxes are calculated by assessing the marginal costs of these negative externalities, which, in the case of firearms, would be equal to losses – like injury, death, and lost wages – resulting from crimes, accidents, and suicides. This bill, however, takes a different approach and sets the rate of the tax imposed on firearm sales to resemble an existing federal tax on firearm and ammunition. That tax, established by the Federal Aid in Wildlife Restoration Act of 1937 (also known as the Pittman-Robertson Act), imposes an 11% levy on firearms, ammunition and archery equipment and distributes the proceeds to state governments for wildlife-related projects. (26 U.S.C. § 4181) Proceeds from that tax generate tens of millions of dollars annually for conservation efforts across California.

Opponents of this bill observe that, "[t]his year alone, the California Department of Fish and Wildlife will be allocated well over $30 million in federal [Pittman-Robertson] dollars." By comparison, the cost of gun violence in California is estimated to be roughly $18 billion dollars per year—or a little under $500 per resident. (Giffords Law Center, *The State of Gun Violence in California* <https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-California-2020.pdf> [last visited Mar. 29, 2023].)

Unlike the Pittman-Robertson Act, this bill seeks to establish a tighter nexus between the tax it imposes and the target of the proceeds it generates. Specifically, the proceeds of the tax imposed under this bill would be directed exclusively toward gun violence prevention programs, education, and research. The bill, however, specifies no further details regarding these objectives.

4) **Existing Fees Related to Firearm, Ammunition and Precursor Part Purchases:** California currently imposes several fees related to the purchase of a new firearm in the state. The total state fee for a firearm purchase is $37.19, the bulk of which consists of the Dealer Record of Sale (DROS) fee, which covers the costs of the required background check prior to purchase. The DROS fee also funds several firearm-related responsibilities of the DOJ, including enforcement efforts and management of the Armed Prohibited Persons System. The balance of the state fee consists of a $1.00 Firearms Safety Act Fee and a $5.00 Safety and Enforcement Fee. These fees are imposed on the vendors but are generally paid by the purchasers. Additionally, in the event of a private party transfer, a firearms dealer may charge an additional fee of up to $10.00 per firearm. (https://oag.ca.gov/firearms/pubfaqs)

5) **The *Post-Bruen* Second Amendment:** The Second Amendment to the U.S. Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Recently, the United States Supreme Court issued an opinion striking down New York's proper cause requirements for applicants wishing to obtain a CCW license. (*N.Y. State Rifle & Pistol Assn., Inc. v. Bruen*, (2022) 597 U.S. ___.) The Court stated that New York's Concealed Carry Weapon (CCW) issuance regime is similar to California's. (*Id.* at 5-6.) As the opinion is quite new, it is difficult to determine how the lower courts will interpret it. However, the Supreme Court reiterated "that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." (*Id.* at 15; see also *id.* at 8 ["To justify its regulation, the government may not

simply posit that the regulation promotes an important interest."].) Under *Bruen*, "how and why the regulations burden a law-abiding citizen's right to armed self-defense" matters. (*Id.* at p. 2132.)The Court said, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." (*Id.* at p. 2133.)

Regarding taxes, generally, while the Supreme Court usually "declines to closely examine the regulatory motive or effect of revenue-raising measures," they have noted a point at which a tax becomes "a mere penalty with the characteristics of regulation and punishment." (*Nat'l Fed'n of Indep. Bus. v. Sebelius* (2012)567 U.S. 519, 573; *Bailey v. Drexel Furniture Co.* (1922) 259 U.S. 20, 38.) In the context of firearms, the Pittman-Robertson Act has evaded or withstood legal challenge for over 100 years, which pre-*Bruen* would have strongly suggested that firearm taxes do not run afoul the Second Amendment, provided they do not make firearm ownership so infeasible as to burden the rights that the amendment protects. Whether excise taxes on firearms will survive in the post-*Bruen* world is an open question.

6) **Multiple Attempts to Impose an Excise Tax on Firearms:** This bill is substantially similar to three previous bills attempting to impose an excise tax on firearms and ammunition. AB 1227 (Levine), of the 2021-2022 Legislative Session, as amended on May 5, 2022, included provisions related to an excise tax on firearms. The author introduced substantially similar measures in 2021 (AB 1223) and in 2019 (AB 18). AB 18 was held on suspense in the Assembly Appropriations Committee. AB 1223 made it to the Assembly floor and AB 1227 made it to the Senate floor. However, both contained urgency clauses, requiring a two-thirds vote to pass. Despite receiving majority support, the bills failed to receive the required two-thirds vote.

   Unlike AB 1223 and AB 1227, this bill does not contain an urgency clause.

7) **Argument in Support**: According to the *Family Violence Law Center*, "As part of our mission to support survivors of domestic violence it is imperative to acknowledge the intersection of gun violence and domestic violence and the impacts it has on survivors. When guns are present in a home where domestic violence has occurred a survivor is five times more likely to be killed. In over half of the domestic violence homicides nationwide a firearm was used to harm the victim. At Family Violence Law Center we believe it is imperative for our team to advance for survivor safety by supporting policy initiatives that educate survivors and youth on the harms of gun violence and how to seek safety. It is for this reason that the Family Violence Law Center seeks to educate survivors on various pathways to seeking safety including the use of legal avenues such as gun violence restraining orders and domestic violence restraining orders. AB 28 would allow the state of California to continue investing in this very urgent and important matter.

   "As you know, gun violence is a public health, safety, and equity crisis. Since the start of the pandemic, our nation has seen record-setting gun and ammunition sales, alongside record nationwide increases in shootings, homicides, and related traumas. This has been a time of record profits for some and brutal pain and loss for too many others. This national gun violence crisis has also imposed an enormously unequal toll on communities of color in our state, where over 84% of youth homicide victims are Black or Latino, and where gun violence was already, prior to recent spikes in violence, by far the leading cause of death for

young Black men and boys. This violence also imposes enormous burdens on those who are not direct victims too: experts at the National Institute of Justice have noted that "youth living in inner cities show a higher prevalence of post-traumatic stress disorder than soldiers" in our wartime military.

"In addition to its brutal human toll, gun violence also causes enormous economic harm and imposes enormous fiscal burdens on state and local governments and taxpayers. A report from the National Institute for Criminal Justice Reform in 2020 determined that each firearm homicide in Stockton, California cost taxpayers at least $2.5 million in direct government costs such as medical, law enforcement, court expenses, and lost tax revenue; nonfatal shootings with a single suspect were also estimated to directly cost taxpayers nearly $1 million on average. A 2021 report by Everytown for Gun Safety found that gun deaths and injuries cost California $22.6 billion annually, of which $1.2 billion is paid directly by taxpayers every year. Gun violence also imposes broader indirect costs in the form of reduced home values and reduced profitability for local businesses. A report by the Urban Institute found that each additional homicide in a census tract in Oakland, California, was 'significantly associated with five fewer job opportunities among contracting businesses (businesses losing employees) the next year.'

"To promote community safety and mitigate the enormous collateral harms that flow from firearm industry commerce, California has in recent years acted to invest in violence intervention initiatives that work to interrupt entrenched cycles of shootings, trauma, and retaliation. These programs support and heal victims of firearm violence, and provide targeted intervention services to other individuals identified as at highest risk of being shot or involved in cycles of violence in the near future. The state's investment in these programs, primarily through the California Violence Intervention and Prevention (CalVIP) grant program, has provided a critical lifeline to temporarily sustain and expand programs employing frontline violence intervention workers and saving lives today.

"However, these investments have thus far relied on short-term General Fund commitments. Sustained reductions in gun violence will require sustained investments in prevention and intervention efforts and longer-term planning to entrench virtuous cycles of trauma recovery, retaliation prevention, peace-building, and safety. That is why it has been a top priority for our organizations to establish a dedicated revenue stream to sustain this lifesaving work through the California Violence Intervention and Prevention program and related efforts.

"This bill is analogous to other firearm and ammunition industry tax measures that have been repeatedly upheld by the courts. Similar firearm, ammunition, and related industry excise taxes have also been in place at the federal level for over a century, and the gun industry has supported them. Since 1919, federal law has placed a 10 to 11% excise tax on the sale of guns, ammunition, and related products by licensed manufacturers, producers, and importers. Revenues from this excise tax have been used to fund wildlife conservation efforts that remediate the effects that guns and ammunition have on wildlife populations through hunting, particularly through grants to state wildlife agencies and for conservation-related research. The NRA has referred to this federal Firearms and Ammunition Excise tax as a 'legislative model' and 'friend of the hunter.'

"Just as the federal tax on firearm industry manufacturers reasonably generates revenue to remediate the harmful effects that firearm industry commerce can have on wildlife, AB 28

would place an identical tax on retail sellers profiting from the sale of the same products in order to fund programs that effectively remediate the devastating human toll these products take on families and communities across the state. This tax is a modest and reasonable excise tax on sellers whose lawful and legitimate commercial activity still imposes enormous harmful externalities on California's families, communities, and taxpayers.

"This bill is not intended to penalize firearm sellers or otherwise discourage lawful firearm sales and commerce whatsoever, but would reasonably generate revenue to sustain programs that are targeted and effective at mitigating the harms that firearms and related products too often cause. It would stop shootings, save lives, and make California a better, safer place."

8) **Argument in Opposition**: According to the *California Rifle & Pistol Association*, "All of California's law-abiding citizens benefit from efforts to implement programs which remediate the impacts of illegal gun violence upon our public, and all should equally help to fund their implementation. Yet, AB 28 would unjustifiably place the entire burden of funding efforts to address illegal gun violence on the backs of law-abiding citizens who legally purchase and lawfully use firearms and ammunition.

"Additionally, by substantially raising the cost of purchasing a firearm and ammunition in California, AB 28 would disproportionately impact the ability of economically disadvantaged communities and individuals to legally purchase a firearm and ammunition to protect themselves and their loved ones. Further, AB 28 would impede their equitable access to hunting and shooting sports – at a time when the Administration and the Legislature are seeking to increase participation in outdoor recreation and access for all Californians.

"Firearms and ammunition are already taxed at the federal level pursuant to the federal Pittman-Robertson Act (PR). But those dollars are allocated back to states to fund beneficial programs – including wildlife habitat projects that benefit game and non-game species. This year alone, the California Department of Fish and Wildlife will be allocated well over $30 million in federal PR dollars – monies which will fund a substantial portion of our state's wildlife management, conservation, and research efforts. By doubling the excise tax law-abiding hunters and shooters already pay on all firearms and ammunition, AB 28 would effectively raise the total tax rate on these items to nearly 30% – notably reducing their sales and, in turn, the associated federal PR funding allocated back to California for critical wildlife conservation and management efforts.

"All of California's citizens support and benefit from efforts intended to address the negative impact the criminal use of firearms has upon our law-abiding public. Yet, AB 28 would wrongly place the entire burden of funding initiatives intended to mitigate the harms caused by illegal gun violence on a small segment of our law-abiding public. AB 28 would do nothing to reduce criminal use of firearms but would inequitably impact the ability of the disadvantaged communities and economically challenged individuals to protect themselves and their families, and unjustly affect California's lawful hunters, shooters, and our wildlife and their habitats."

9) **Related Legislation**:

a) AB 724 (Fong), would require DOJ to develop firearm safety certificate materials and tests in other specified languages besides English and Spanish. AB 724 is pending

hearing in the Assembly Appropriations Committee.

b) AB 1252 (Wicks), would establish the Office of Gun Violence Prevention within DOJ that, contingent upon sufficient state or private funding, must convene a Commission to End Gun Violence. AB 1252 is pending hearing in this committee.

c) AB 1598 (Berman), would require DOJ to prepare a firearm safety certificate study guide, in English and in Spanish, that explains the information covered on the firearms safety test. AB 1598 is pending hearing in this committee.

d) SB 243 (Seyarto), would exempt from sale and use taxes the gross receipt from the sale of, and the storage, use, or other consumption of, a gun safety system. SB 243 is pending hearing in the Senate Governance and Finance Committee.

e) SB 637 (Min), would prohibit a state agency from entering into a contract with, depositing state funds with, or receiving a loan from a financial institution that invests in or makes loans to a company that manufactures firearms or ammunition. SB 637 is pending hearing in Senate Governmental Organization Committee.

10) **Prior Legislation**:

a) AB 1227 (Levine), of the 2021-2022 Legislative Session, was substantially similar to this bill. AB 1227 failed passage in the Senate.

b) AB 1223 (Levine), of the 2021-2022 Legislative Session, was substantially similar to this bill. AB 1223 failed passage in the Assembly.

c) AB 2253 (Bonta), of the 2021-2022 Legislative Session, would have established the Office of Gun Violence Prevention within DOJ to address gun violence as a public health crisis and develop a strategy for incorporating a public health approach to address gun violence. AB 2253 was held on suspense in the Assembly Appropriations Committee.

d) AB 18 (Levine), of the 2019-2020 Legislative Session, would have codified the CalVIP Grant Program and imposed a $25 excise tax on the sale of a new firearm, the proceeds of which would be deposited into the CalVIP firearm Tax Fund, which the bill also created. AB 18 was held on suspense in the Assembly Appropriations Committee.

e) AB 1669 (Bonta), Chapter 736, Statutes of 2019, among other things, raised the DROS fee associated with the purchase of a firearm from $14 to $32.19.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Alameda Health System
California Partnership for Safe Communities
City of Oakland - Department of Violence Prevention
Equal Justice USA

Everytown for Gun Safety Action Fund
Family Violence Law Center
Giffords
Greater Sacramento Urban League
Jewish Community Relations Council of Silicon Valley
Jewish Public Affairs Committee
Johns Hopkins Center for Gun Violence Solutions
Juma Ventures
Lakeshore Avenue Baptist Church
Los Angeles County Hospital-based Violence Intervention Consortium
March for Our Lives Action Fund
Moms Demand Action for Gun Sense in America
Movement 4 Life
National Institute for Criminal Justice Reform
Prosecutors Alliance California
San Diegans for Gun Violence Prevention
Shaphat Outreach
Soledad Enrichment Action, INC.
Southern California Crossroads
Students Demand Action for Gun Sense in America
The Health Alliance for Violence Intervention
Toberman Neighborhood Center
Urban Peace Institute
Women Against Gun Violence
Youth Alive!

382 Private Individuals

**Opposition**

Arcadia Police Officers' Association
Black Brant Group, the
Burbank Police Officers' Association
Cal-ore Wetlands and Waterfowl Council
California Bowmen Hunters/state Archery Association
California Chapter Wild Sheep Foundation
California Coalition of School Safety Professionals
California Deer Association
California Hawking Club
California Houndsmen for Conservation
California Rifle and Pistol Association, INC.
California Waterfowl Association
Claremont Police Officers Association
Congressional Sportsmen's Foundation
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Ducks Unlimited
Fullerton Police Officers' Association

Golden Gate Chapter - Safari Club International
Gun Owners of California, INC.
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
National Rifle Association - Institute for Legislative Action
Newport Beach Police Association
Nor-cal Guides and Sportsmen's Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Rocky Mountain Elk Foundation
Sacramento Chapter - Safari Club International
Safari Club International - California Chapters
San Diego County Wildlife Federation
San Francisco Bay Area Chapter - Safari Club International
Santa Ana Police Officers Association
Suisun Resource Conservation District
Tulare Basin Wetlands Association
Upland Police Officers Association

**Analysis Prepared by:** Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 79 (Weber) – As Amended March 9, 2023

**PULLED BY AUTHOR**

**Analysis Prepared by**: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Mureed Rasool

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 574 (Jones-Sawyer) – As Amended March 9, 2023

**SUMMARY**: Requires individuals in the process of purchasing a firearm, to verify on the dealer record of sale whether they have, within the past 30 days, checked and confirmed possession of all firearms they currently own or possess.

**EXISTING LAW**:

1) Requires every person owning or possessing a firearm to report the loss or theft of the firearm, including the serial number of the firearm, to a local law enforcement agency within five days of when they know, or reasonably should have known, that the firearm had been stolen or lost. (Pen. Code, §§ 25250 & 25270.)

2) Requires licensed firearms dealers to post a sign in a conspicuous place that informs persons of the requirement to report a lost or stolen firearm to law enforcement within five days of knowing, or reasonably should have known, it was lost or stolen. (Pen. Code, § 26835, subd. (a)(9).)

3) Requires law enforcement officials to submit a description of a reported lost or stolen firearm into the Department of Justice (DOJ) Automated Firearms System. (Pen. Code, § 25260.)

4) Prohibits the sale, lease, or transfer of firearms unless the firearm dealer has been issued a license by the DOJ, and establishes various exceptions to this prohibition. (Pen. Code, §§ 26500-26625.)

5) Requires firearms dealers to keep a register or record of electronic or telephonic transfer of firearms, unless certain specified circumstances apply. Makes a failure to comply a misdemeanor. (Pen. Code, § 28100.)

6) Defines a "firearm" for purposes of records of transfer of firearms, as including the frame or receiver, or a firearm precursor part; excludes the provision governing the reporting of lost or stolen firearms. (Pen. Code, §16520, subd. (b)(15).)

7) States that the DOJ may conduct onsite inspections of firearm dealer locations to determine compliance with firearms laws, including the keeping of registers or records of electronic or telephonic firearms transfers, and authorizes the DOJ to remove a firearm dealer's license for noncompliance of such recordkeeping requirements. (Pen. Code, §§ 26700; 26715, subd. (b)(1); 26720; 16575, subd. (a)(20).)

8) States that the register required to be kept by firearms dealers must be prepared and obtained from the State Printer. In the case of electronic transfer of applicant information, the DOJ

must develop standards for all appropriate electronic equipment. (Pen. Code, § 28105.)

9) Provides that the DOJ must prescribe the form of the register and the record of electronic transfer. (Pen. Code, § 28155.)

10) Requires the firearm register or record of electronic transfers to include the following information, among other things:

   a) Date and time of sale;

   b) Make of firearm;

   c) Serial number or any assigned identification number or mark;

   d) Caliber;

   e) Type of firearm;

   f) Barrel length;

   g) Full name, date of birth, and purchaser's address;

   h) Purchaser's phone number;

   i) Purchaser's gender;

   j) All of the purchaser's legal names or aliases;

   k) Yes or no answer to questions inquiring whether the purchaser is prohibited from possessing a firearm;

   l) Signature of purchaser;

   m) Right thumbprint of the purchaser; and,

   n) A statement of the penalties for signing a fictitious name or address, knowingly furnishing any incorrect information, or knowingly omitting any information required to be provided for the register. (Pen. Code, § 28160.)

11) States that on or after January 1, 2003, all firearm purchaser information shall be made exclusively by electronic transfer, subject to limitations. (Pen. Code, § 28205.)

12) Provides that the dealer or salesperson must ensure all required information has been obtained and be informed that incomplete information will delay sales. (Pen. Code, § 28175.)

13) Makes it a misdemeanor for a person to furnish a fictitious name or address, or knowingly furnish incorrect information, or knowingly omit any information on the register or electronic transfer forms. (Pen. Code, § 28250, subd. (a).)

14) Makes it a felony for a prohibited person to knowingly furnish a fictitious name, address, incorrect information, or to omit any information on the register or electronic transfer forms. (Pen. Code, § 28250, subd. (b).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "There are too many examples in our country's recent history that show what a firearm can do in the hands of the wrong people. There must be commonsense accountability and safety measures for those who utilize their rights to own and bear arms. In an effort to promote responsible firearm ownership and safety, AB 574 creates a process that ensures gun owners know where their guns are located before they buy a new one."

2) **Significance of Tracing Lost or Stolen Firearms**: According to the US Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), "Lost and stolen firearms pose a substantial threat to public safety and to law enforcement. Those that steal firearms commit violent crimes with stolen guns, transfer stolen firearms to others who commit crimes, and create an unregulated secondary market for firearms, including a market for those who are prohibited by law from possessing a gun… Lost firearms pose a similar threat. Like stolen firearms, they are most often bought and sold in an unregulated secondary market where law enforcement is unable to trace transactions." (US Bureau of Alcohol, Tobacco, Firearms and Explosives, (2013). *2012 Summary: Firearms Reported Lost and Stolen*. <https://www.atf.gov/resource-center/docs/2012-firearms-reported-lost-and-stolenpdf-1/download> [as of Mar. 30, 2023].)

   Such lost or stolen firearms may become "crime guns" which are defined as, "any firearm used in a crime or suspected to have been used in a crime. This may include firearms abandoned or otherwise taken into law enforcement custody that are either suspected to have been used in a crime or whose proper disposition can be facilitated through a firearms trace." Upon recovery of a crime gun, law enforcement officers "trace" it, which involves systematically tracking the movement of a recovered firearm back to its importation into, or manufacture in, the United States through the distribution chain and to the point of its first retail sale. (ATF. (2011). *Firearms Tracing Guide: Tracing Firearms to Reduce Violent Crime*. <https://www.atf.gov/file/58631/download> [Mar. 30, 2023].)

   From a general perspective, tracing a crime gun back to its origins can help law enforcement identify patterns in the supply of gun trafficking by locating, and investigating, the circumstances surrounding a gun that leaves the legal marketplace and enters the illicit secondary market. (Brady Campaign to Prevent Gun Violence. *The Sources of Crime Guns: How City Officials Can Reduce Gun Deaths & Injuries in Their Communities*.) For individual cases, tracing can help develop potential witnesses, prove ownership, and can generate investigative leads. (ATF. (2011). *Firearms Tracing Guide: Tracing Firearms to Reduce Violent Crime*. <https://www.atf.gov/file/58631/download> [Mar. 30, 2023].)

   From 2017 to 2021, law enforcement agencies submitted 1,922,577 crime guns to the ATF for tracing purposes. (ATF. *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns – Volume Two. Part III: Crime Guns Recovered and Traced Within the United States and Its Territories*. (Jan. 11, 2023) <https://www.atf.gov/firearms/national-

firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two> [as of Apr. 2, 2023] at p. 1.) The ATF was able to trace 77% of the firearms to a purchaser. (*Id.* at 2.) Of the firearms that were successfully traced back to a purchaser, 58% of them were possessed by someone other than the purchaser, 29% were recovered without a known possessor, and only 12% had the same purchaser and possessor. (*Id.* at 26.)

At the federal level, there is no requirement for private citizens or law enforcement agencies to report lost or stolen firearms; only federal firearm licensees (FFLs) are required to report within 48 hours of discovery. (US Bureau of Alcohol, Tobacco, Firearms and Explosives. (2013). *2012 Summary: Firearms Reported Lost and Stolen*. <https://www.atf.gov/resource-center/docs/2012-firearms-reported-lost-and-stolenpdf-1/download> [Mar. 30, 2023]; 27 C.F.R. § 478.39a (a) (1).) According to Everytown For Gun Safety, there are only fifteen states that do have a reporting requirement. (Everytown. *Which states require reporting of lost or stolen guns?* (Last updated Jan. 12, 2023) <https://everytownresearch.org/rankings/law/lost-and-stolen-reporting/> [as of Mar. 30, 2023].)

Because there is no reporting requirements for private citizens at the federal level, there is significant underreporting; with some estimates indicating only 75% of private gun thefts are reported to law enforcement. (ATF. *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns – Volume Two. Part V: Firearm Thefts*. (Jan. 11, 2023) <https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two> [as of Apr. 2, 2023] at p. 1.) This is concerning considering the fact that thefts from private citizens account for nearly 96% of all firearms reported stolen from 2017 to 2021. (*Id.* at 23.)

Under existing law, California gun owners are already required to report a lost or stolen firearm within five days of when they knew, or reasonably should have known, that the firearm was lost. (Pen. Code, § 25250.) According to one study, crime guns originating in states with lost/stolen reporting requirements were 30% less likely to end up in another state, indicating the reporting requirements help reduce interstate gun trafficking. (Bloomberg et al. "Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws," in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (2013) <https://muse.jhu.edu/pub/1/oa_monograph/chapter/757454> [as of Apr. 2, 2023] at p. 117; Giffords. *Reporting Lost & Stolen Guns*. <https://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/reporting-lost-stolen-guns/#footnote_8_5611> [as of Apr. 2, 2023].)

This bill would expand on California's current reporting law by requiring firearm owners who are seeking to purchase a new firearm to affirm that they have checked and confirmed, within the past 30 days, that they are still in possession of any firearm they currently own or possess. By doing so, this bill will help encourage firearm owners to check where their firearms are before they purchase additional firearms. This may also help facilitate the reporting of a lost or stolen firearm, which could result in the firearm being traced by law enforcement before it is used in a crime.

3) **Argument in Support**: None received.

4) **Argument in Opposition**: According to the *Gun Owners of California*, "New gun buyers or transferees will be signing this record under penalty of perjury. This is a wholly unreasonable requirement that serves no purpose except to force gun buyers to check all their firearms 30 days before they buy a new gun. Many lawful gun owners have very large collections and often times, they are not kept at the same location and sometimes out of state. This bill requires everyone, with no exceptions, who buys or transfers a firearm to comply with this mandate. That is the same as requiring someone who buys or transfers a new knife to sign under penalty of perjury that they have checked and confirmed the possession of all of their knives, kitchen, hunting, camping, work related and everyday cutlery. After all, more people in California are killed or assaulted with knives than guns.

   There is no apparent purpose for this legislation other than to create yet another hurdle that Californians must overcome in order to legally purchase a firearm.

   Our organization has a 40-year history of fighting for *effective* crime control and opposing *ineffective* gun control. The safety of Californians is at the very foundation of our mission, and it has been our consistent goal to work toward common sense solutions regarding the issue of crime and firearm ownership; this can be done, however, without sacrificing our Constitutional rights and the ability of the law abiding to protect their families."

5) **Related Legislation**:

   a) SB 2 (Portantino), would, among other provisions, disqualify an individual from the ability to obtain a concealed carry (CCW) permit if they failed to report the loss of their firearm as required by any local, state, or federal law. SB 2 is currently pending hearing in the Senate Appropriations Committee.

   b) SB 8 (Blakespear), would hold any firearm owner civilly liable for incidences of property damage or bodily injury that results from use of their firearm unless they previously reported their firearm lost or stolen. SB 8 is currently set to be heard in the Senate Insurance Committee on April 26.

   c) AB 725 (Lowenthal) would require that firearm frames, receivers, and precursor parts be defined as a "firearm" for purposes of reporting a lost or stolen firearm, and makes the failure to do so punishable as an infraction. AB 725 is pending in the Assembly Appropriations Committee.

6) **Prior Legislation**:

   a) AB 1621 (Gipson) Chapter 76, Statutes of 2022, required, in part, that firearm precursor parts be defined as firearms for various purposes.

   b) AB 2222 (Quirk) Chapter 864, Statutes of 2018, among other things, shortened the timeline for all law enforcement agencies to report to the DOJ of a recovered lost or

stolen firearm to 7 days.

c) Proposition 63 of the November 2016 general election, required, in part, that every person owning or possessing a firearm report its theft or loss to law enforcement within five days of when they reasonably should have known it was lost or stolen.

d) AB 1060 (Liu), Chapter 715, Statutes of 2005, required every sheriff or police chief executive to enter information about certain firearms into the Automated Firearms System and required such information to remain in the system until the reported firearm was found, recovered, no longer under observation, or was determined to be entered erroneously.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

None received.

**Oppose**

Gun Owners of California, INC.

**Analysis Prepared by**: Mureed Rasool / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 642 (Ting) – As Amended April 4, 2023

**SUMMARY**: Sets minimum standards for use of facial recognition technology (FRT) by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use when a peace officer has reasonable suspicion that an individual has committed a felony, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. Specifically, **this bill**:

1) Defines "facial recognition technology" or "FRT" as a system that compares a probe image of an unidentified human face against a reference photograph database, and, based on biometric data, generates possible matches to aid in identifying the person in the probe image.

2) Provides that FRT includes any surveillance system that actively uses FRT to identify persons in a surveilled area in real time.

3) Authorizes a peace officer to use or request the use of FRT for any of the following reasons:

   a) To assist in identifying a person that officer has reasonable suspicion to believe has committed a felony;

   b) To assist in identifying a person who is deceased or who has been reported missing, as specified;

   c) To assist in identifying any person who has been lawfully arrested, during the process of booking or during that person's custodial detention; or,

   d) To assist in identifying any person if a peace officer determines that an emergency situation exists that involves immediate danger of death or serious physical injury to any person and the identification of that person is necessary to prevent that death or injury.

4) Requires, if a peace of uses or requests the use of FRT, to document all of the following information:

   a) The identity of the peace officer using or requesting the use of FRT, and, if applicable, the officer authorizing the use or request;

   b) A detailed description, as available, of the person being identified;

c) Any photograph or video being used as a probe image; and,

d) Any details regarding other investigative measures taken to identify the person and an explanation of why those measures failed or are reasonably unlikely to succeed.

5) Requires the custodian of any arrest photograph database being used in conjunction with FRT, beginning on July 1, 2024 and every six months thereafter, to remove from the database any of the following images:

a) Any photograph of a person under 18 years of age;

b) Any photograph of an arrested or detained person who has been released without being charged with an offense, or whose charges have been dismissed;

c) Any photograph of an arrested or detained person who has subsequently been acquitted of the charged offense; or,

d) Any photograph of a person whose conviction has been expunged, has been exonerated of the crime, or who has had their conviction reversed on appeal.

6) Provides that the image removal requirement applies only to the use of a reference photograph database for the use of FRT and shall not be construed to prohibit a peace officer from using any other investigative database including a fingerprint database.

7) Requires any agency that maintains and operates an arrest photograph database to establish procedures to ensure compliance with the image removal requirement.

8) Prohibits a peace officer using or requesting the use of FRT from doing any of the following:

a) Using FRT to identify any person solely on the basis that the person is exercising rights guaranteed by the United States Constitution, including free assembly, association, and speech;

b) Relying on actual or perceived race, ethnicity, national origin, religion, disability, gender, gender identity, or sexual orientation in selecting a person to identify using FRT, except when there is trustworthy information, relevant to the locality and timeframe, in the context of a particular area and for a particular period of time, that links a person with a particular characteristic described to an identified criminal incident or scheme;

c) Sharing FRT data with any state or federal agency for the purpose of enforcing federal immigration law;

d) Providing the results of, or information derived from, the use of FRT to any individual or to any agency or department in another state regarding the provision of lawful gender-affirming health care or gender-affirming mental health care performed in this state;

e) Providing the results of, or information derived from the use of FRT to any individual or agency or department in another state regarding the provision of abortion services in this

state;

f) Using an FRT match as the sole basis upon which probable cause is established for a search, arrest, or affidavit for a warrant, and provides that any peace officer using information obtained from the use of FRT shall examine results with care and consider the possibility that matches could be inaccurate; and,

g) Using FRT in conjunction with any reference photograph databse that contains information, including images, obtained by any of the following means:

   i) In a manner that violates federal or state law;

   ii) In a manner that violates a service agreement between a provider of an electronic communication service to the public or a provider of a remote computing service and customers or subscribers of that provider;

   iii) In a manner that is inconsistent with the privacy policy of a provider, as specified;

   iv) By deceiving a person whose information was obtained;

   v) Through the unauthorized access of an electronic device or online account;

   vi) In violation of a contract, court settlement, or other binding legal agreement; or,

   vii) From unlawful or unconstitutional practices by any governmental official or entity.

9) Provides that, for the purpose of prohibiting sharing FRT results regarding persons receiving abortion servicers or gender-affirming health care and gender-affirming mental health care, "information derived from the use of FRT" means information that would not have been discovered or obtained but for the use of FRT, regardless of any claim that the information would inevitably have been discovered or obtained through other means.

10) Requires each law enforcement agency using FRT or requesting the use of FRT of another agency, by no later than January 31, 2025, and annually thereafter, to prepare and submit a report to the California State Auditor containing only the following information regarding the use of FRT, as applicable:

   a) The information a peace officer is required to document when using or requesting the use of FRT;

   b) Whether modifications were made to any probe images and what those modifications were;

   c) The arrests that FRT results contributed to, and the offenses for which the arrests were made, disaggregated by race, ethnicity, gender, and age;

   d) A description of the reference photograph database that was used;

e) A description of the FRT system that was used;

f) The total number of searches performed;

g) The total number of times FRT results were shared with another law enforcement agency, an outside agency, or a third party; and,

h) The actions taken to comply with requirement that a law enforcement agency remove certain images from a reference photograph database, as specified.

11) Requires each district attorney's office, city prosecutor's office, and the Attorney General, by no later than January 31, 2025 and annually thereafter, to report to the California State Auditor the following information regarding information obtained from FRT:

a) The number of convictions that FRT results contributed to and the offenses for which the convictions were obtained, disaggregated by race, ethnicity, gender, and age; and

b) The number of motion to suppress made related to FRT results, and the number granted or denied.

12) Requires the State Auditor, on or before July 1 of each year, to release to the public, post online, and transmit to the Legislature a full and complete report concerning the use of FRT by law enforcement agencies and prosecutors, including any violations identified.

13) Requires any law enforcement agency using FRT to keep and maintain FRT activity logs or other required records, as specified.

14) Prohibits a law enforcement agency from operating an FRT system that has not been evaluated under the National Institute of Standards and Technology Face recognition Vendor Testing Program and achieved an accuracy score of 98 percent true positives within two or more datasets relevant to investigative applications on a program report.

15) Prohibits a peace officer from using FRT in any manner that reduces the program's competency score below 98 percent.

16) Requires a law enforcement agency that uses FRT to have a written policy that includes, without limitation, all of the following:

a) A requirement that FRT use be limited to specifically authorized personnel who have received certified training in the use of FRT by the Commission of Peace Officer Standards and Training;

b) A requirement that a manger authorized to use FRT be assigned to oversee the FRT program;

c) A policy that describes the parameters of acceptable inputs to be used as probe images and that prohibits the use of sketches or other manually produced images; and,

d) An acceptable use policy that includes specific allowances and restrictions on use.

17) Requires each law enforcement agency using FRT, by no later than July 1, 2024, to post the required written policy on its website.

18) Prohibits a law enforcement agency or peace officer from requesting or entering into an agreement with another law enforcement agency or other third party to perform FRT search on behalf of the requesting officer or agency if the program operated by the other agency or party does not meet the specified accuracy requirements.

19) Requires a law enforcement agency, if the State Auditor identifies any violations by that agency, to cease using FRT until all violations have been corrected.

20) Requires the law enforcement agency to notify the public if its use of FRT is suspended for violations, as specified.

21) Requires a law enforcement agency that uses FRT to attempt to identify an individual who is arrested to provide the individual with both of the following:

a) A notice of the name of the law enforcement agency that operated the FRT system used, and the name of the database, if any, the was used to identify the individual; and

b) A copy of the required accuracy or bias report, each probe image that was used by the agency, any modifications made to the probe image, the candidate list, in rank order, produced by the facial recognition system, and any other documentation related to the use of FRT in the law investigation.

22) Requires the notice provided by the law enforcement agency to the individual arrested to be an appropriate language for the person if they are not fluent or literate in English.

23) Provides that, if a court or law enforcement agency determines that a peace officer has used FRT in violation of the law, and the court or agency finds that the circumstances surrounding the violation raise serious questions about whether or not the officer acted intentionally with respect to the violation, the agency shall promptly initiate a proceeding to determine whether disciplinary action against the officer is warranted.

24) Provides that, notwithstanding any other law, a violation of this title is not punishable as a crime.

25) Authorizes a person who is subject to identification or attempted identification through FRT in violation of the law to bring a civil action against the peace officer or law enforcement agency responsible for the violation.

26) Provides that a person who is the subject of disparate treatment or adverse impact on the basis of race, ethnicity, gender, or age, whether individually or as a member of a class of individuals, due to use of FRT or any technological element, criteria, method, or design feature thereof, by a law enforcement agency, may bring a cause of action against the peace officer, law enforcement agency, or maker of the facial recognition or face surveillance

technology responsible for the violation.

27) Provides that the following relief may be recovered or obtained in a civil action for an FRT use violation:

   a) Any actual damages sustained by that person as a result of the violation;

   b) The greater of either of the following:

      i) Statutory damages of $50,000 per violation; or

      ii) Profits earned as a result of each violation.

   c) Exemplary damages, as specified;

   d) Injunctive, equitable, or declaratory relief as may be appropriate, including preliminary injunctive relief; and,

   e) Costs of the cation, together with reasonable attorney's fees.

28) Provides that a good faith reliance on a statutory authorization, or a good faith determination that the conduct complained of is permitted, is a complete defense against a civil action.

29) Prohibits a civil action from commencing later than two years after the date upon which the claimant discovered or first had a reasonable opportunity to discover the violation.

30) Defines "arrest photograph database" as a database populated primarily by booking or arrest photographs or other photographs of persons with law enforcement contacts.

31) Defines "probe image" as an image of a person that is searched against a database of known, identified persons or an unsolved photograph file.

32) Defines "reference photograph database" as a database populated with photographs of individuals that have been identified, including databases composed of driver's licenses or other documents made or issued by or under the authority of the state, a political subdivision thereof, databases operated by third parties, and arrest photograph databases.

33) Provides that FRT does not include any access control system used by a law enforcement agency that uses biometric inputs to confirm the identity of employees or other approved persons for the purpose of controlling access to any secured place, device, or system.

**EXISTING LAW**:

1) Declares that it is the intent of the Legislature to establish policies and procedures to address issues related to the downloading and storage data recorded by a body-worn camera worn by a peace officer; these policies and procedures shall be based on best practices. (Pen. Code, § 832.18, subd. (a).)

2) Encourages agencies to consider best practices in establishing when data should be downloaded to ensure the data is entered into the system in a timely manner, the cameras are properly maintained and ready for the next use, and for purposes of tagging and categorizing the data. (Pen. Code, § 832.18, subd. (b).)

3) Encourages agencies to consider best practices in establishing specific measures to prevent data tampering, deleting, and copying, including prohibiting the unauthorized use, duplication, or distribution of body-worn camera data. (Pen. Code, § 832.18, subd. (b)(3).)

4) Encourages agencies to consider best practices in establishing the length of time that recorded data is to be stored. States that nonevidentiary data including video and audio recorded by a body-worn camera should be retained for a minimum of 60 days, after which it may be erased, destroyed, or recycled. Provides that an agency may keep data for more than 60 days to have it available in case of a civilian complaint and to preserve transparency. (Pen. Code, § 832.18, subd. (b)(5)(A).)

5) States that evidentiary data including video and audio recorded by a body-worn camera should be retained for a minimum of two years under any of the following circumstances:

   a) The recording is of an incident involving the use of force by a peace officer or an officer-involved shooting;

   b) The recording is of an incident that leads to the detention or arrest of an individual; or,

   c) The recording is relevant to a formal or informal complaint against a law enforcement officer or a law enforcement agency. (Pen. Code, § 832.18, subd. (b)(5)(B).)

6) States that the recording should be retained for additional time as required by law for other evidence that may be relevant to a criminal prosecution. (Pen. Code, § 832.18, subd. (b)(5)(C).)

7) Instructs law enforcement agencies to work with legal counsel to determine a retention schedule to ensure that storage policies and practices are in compliance with all relevant laws and adequately preserve evidentiary chains of custody. (Pen. Code, § 832.18, subd. (b)(5)(D).)

8) Encourages agencies to adopt a policy that records or logs of access and deletion of data from body-worn cameras should be retained permanently. (Pen. Code, § 832.18, subd. (b)(5)(E).)

9) Encourages agencies to include in a policy information about where the body-worn camera data will be stored, including, for example, an in-house server which is managed internally, or an online cloud database which is managed by a third-party vendor. (Pen. Code, § 832.18, subd. (b)(6).)

10) Instructs a law enforcement agency using a third-party vendor to manage the data storage system, to consider the following factors to protect the security and integrity of the data: Using an experienced and reputable third-party vendor; entering into contracts that govern the vendor relationship and protect the agency's data; using a system that has a built-in audit trail to prevent data tampering and unauthorized access; using a system that has a reliable

method for automatically backing up data for storage; consulting with internal legal counsel to ensure the method of data storage meets legal requirements for chain-of-custody concerns; and using a system that includes technical assistance capabilities. (Pen. Code, § 832.18, subd. (b)(7).)

11) Encourages agencies to include in a policy a requirement that all recorded data from body-worn cameras are property of their respective law enforcement agency and shall not be accessed or released for any unauthorized purpose. Encourages a policy that explicitly prohibits agency personnel from accessing recorded data for personal use and from uploading recorded data onto public and social media Internet websites, and include sanctions for violations of this prohibition. (Pen. Code, § 832.18, subd. (b)(8).)

12) Requires that a public agency that operates or intends to operate an Automatic License Plate Recognition (ALPR) system to provide an opportunity for public comment at a public meeting of the agency's governing body before implementing the program. (Civil Code, § 1798.90.55.)

13) Prohibits a local agency from acquiring cellular communications interception technology unless approved by its legislative body. (Gov. Code, § 53166, subd. (c)(1).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "I authored AB 1215 in 2019 which banned the use of biometric surveillance through police body cameras. The bill only passed with a three year moratorium that expired January 1, 2023. Consequently, current law has absolutely no parameters set regarding law enforcement's use of facial recognition technology. It is critical that we ensure there are safeguards in place in order to avoid another year of unregulated use. We can't go another year with no protections. AB 642 is a response to a battle that we cannot afford to risk losing. The bill includes critical safeguards such as codifying an accuracy level, oversight and reporting, and prohibits law enforcement from using a match alone to arrest someone, to request a warrant, to violate someone's constitutional rights, and to discriminate against protected characteristics. Most importantly, this bill does not prohibit nor deter local governments from choosing to ban the use of facial recognition technology."

2) **Facial Recognition Technology:** Facial recognition technology is capable of identifying an individual by comparing a digital image of the person's face to a database of known faces, typically by measuring distinct facial features and characteristics. Early versions of the technology were pioneered in the 1960s and 1970s, but true facial recognition technology as we understand it today did not come about until the early 1990s. In 1993, the United States military developed the Facial Recognition Technology (FERET) program, which aimed to create a database of faces and recognition algorithms to assist in intelligence gathering, security, and law enforcement. ("Facial Recognition Technology (FERET).") The National Institute of Standards and Technology, United States Department of Commerce. https://www.nist.gov/programs-projects/face-recognition-technology-feret).) Since that time, advances in computer technology and machine learning have led to faster and more accurate

recognition software, including real-time face detection in video footage and emotional recognition.

Today, facial recognition technology is used in a variety of applications. It is often a prominent feature in social media platforms, such as Facebook, Snapchat and TikTok. For instance, DeepFace, a "deep learning" facial recognition system created by Facebook, helps the platform identify photos of users so they can review or share the content. (See Heilweil, *Facebook is backing away from facial recognition. Meta isn't.* Vox.com (Nov. 3, 2021) https://www.vox.com/recode/22761598/facebook-facial-recognition-meta> [last visited Apr. 5, 2023].) Snapchat employs similar technology to allow users to share content augmented by "filters," which can add features or alter an image of the user's face. Facial recognition technology has also seen increasing use as a method of ID verification, such as with Apple's Face ID and Google's Android "Ice Cream Sandwich" systems.

As facial recognition technology has become more widespread, so have concerns about its shortcomings and potential for misuse. Many critics highlight that the use of facial recognition systems result in serious privacy violations, and that mechanisms to protect against the unwanted sale or dissemination of personal biometric data are insufficient. (Schwartz, *Resisting the Menace of Face Recognition*, Electronic Frontier Foundation (Oct. 26, 2021) <https://www.eff.org/deeplinks/2021/10/resisting-menace-face-recognition> [last visited Apr. 5, 2023] Others suggest that the technology is still too inaccurate and unreliable to be used in such a broad array of applications. For instance, facial recognition technology may not be less accurate when identifying transgender people, women, or persons with darker complexions. (See e.g., *Facial Recognition Software Has a Gender Problem*, National Science Foundation (Nov. 1, 2019) <https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=299486>[last visited Apr. 5, 2023]; Buolamwini et al., *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification* PMLR 81:77-91, 2018 <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>[last visited Apr. 5, 2023] (Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University Graduate School of Arts and Sciences Blog (Oct. 24, 2020) <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/> [last visited Apr. 5, 2023].)

3) **Law Enforcement Uses of Facial Recognition Systems:** Despite growing concerns, law enforcement agencies at the federal, state and local level continue to use facial recognition programs. A Government Accountability Office report revealed that 20 federal agencies employ such programs, 10 of which intend to expand them over the coming years. (Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks, United States Government Accountability Office. (June 3, 2021) <https://www.gao.gov/products/gao-21-518> [last visited Apr. 5, 2023].) One study found that one in four law enforcement agencies across the country can access some form of FRT, and that half of American adults – more than 117 million people – are in a law enforcement face recognition network. (Garvie et al., *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, Georgetown Law Center on Privacy and Technology (Oct. 18, 2016) <https://www.perpetuallineup.org/> [last visited Apr. 5, 2023].) Very few of these agencies have a formal facial recognition policy, but one such agency, the New York Police Department, defines the scope of its policy as follows: "Facial recognition technology enhances the ability to investigate criminal activity and increases public safety. The facial

recognition process does not by itself establish probable cause to arrest or obtain a search warrant, but it may generate investigative leads through a combination of automated biometric comparisons and human analysis." (Facial Recognition Technology Patrol Guide, City of New York Police Department (Mar. 12, 2020) <https://www1.nyc.gov/assets/nypd/downloads/pdf/nypd-facial-recognition-patrol-guide.pdf> [last visited Apr. 5, 2023].) Proponents of facial recognition technology see it as a useful tool in helping identify criminals. It was reportedly utilized to identify the man charged in the deadly shooting at The Capital Gazette's newsroom in Annapolis, Maryland in 2018. (Singer, *Amazon's Facial Recognition Wrongly Identifies 28 Lawmakers, A.C.L.U. Says*, New York Times, (July 26, 2018) <https://www.nytimes.com/2018/07/26/technology/amazon-aclu-facial-recognition-congress.html?login=facebook> [last visited Apr. 5, 2023].)

The inaccuracy, biases, and potential privacy intrusions inherent in many facial recognition systems used by law enforcement have led to criticism from civil rights advocates, especially in California. In March 2020, the ACLU, on behalf of a group of California residents, filed a class action lawsuit against Clearview AI, claiming that the company illegally collected biometric data from social media and other websites, and applied facial recognition software to the databases for sale to law enforcement and other companies. (*Clearview AI class-action may further test CCPA's private right of action*, JD Supra (Mar. 12, 2020) <https://www.jdsupra.com/legalnews/clearview-ai-class-action-may-further-14597/> [last visited Apr. 5, 2023].) An investigation by Buzzfeed in 2021 found that 140 state and local law enforcement agencies in California had used or tried Clearview AI's system. (Mac et al., *Your Local Police Department Might Have Used This Facial Recognition Tool To Surveil You. Find Out Here.* Buzzfeed News, (Apr. 6, 2021) <https://www.buzzfeednews.com/article/ryanmac/facial-recognition-local-police-clearview-ai-table> [last visited Apr. 5, 2023].)

The controversy surrounding law enforcement use of facial recognition has led many California cities to ban the technology, including San Francisco, Oakland, Berkeley, Santa Cruz and Alameda. Despite the ban in San Francisco, officers there may have skirted the city's ban by outsourcing an FRT search to another law enforcement agency. (Cassidy, *Facial recognition tech used to build SFPD gun case, despite city ban*, San Francisco Chronicle (Sept. 24, 2020) < https://www.sfchronicle.com/bayarea/article/Facial-recognition-tech-used-to-build-SFPD-gun-15595796.php> [last visited Mar. 23, 2023].)

In September 2021, the Los Angeles Times reported that the Los Angeles Police Department had used facial recognition software nearly 30,000 times since 2009, despite years of "vague and contradictory information" from the department "about how and whether it uses the technology." According to the Times, "The LAPD has consistently denied having records related to facial recognition, and at times denied using the technology at all." Responding to the report, the LAPD claimed that the denials were just mistakes, and that it was no secret that the department used such technology. Although the department could not determine how many leads from the system developed into arrests, it asserted that "the technology helped identify suspects in gang crimes where witnesses were too fearful to come forward and in crimes where no witnesses existed." (Rector et al., *Despite past denials, LAPD has used facial recognition software 30,000 times in last decade, records show,* Los Angeles Times, (Sept. 21, 2020) https://www.latimes.com/california/story/2020-09-21/lapd-controversial-

facial-recognition-software.)

4) **Facial Recognition Technology Legislation in California:** In 2019, the Legislature passed Assembly Bill 1215 (Ting), Chapter 579, Statutes of 2019, which banned the use of facial recognition technology and other biometric surveillance systems in connection with cameras worn or carried by law enforcement, including body-worn cameras (BWC), for the purpose of identifying individuals using biometric data. This ban covered both the direct use of biometric surveillance by a law enforcement officer or agency, as well as a request or agreement by an officer or agency that another officer or agency, or a third party, use a biometric surveillance system on behalf of the requesting party. The ban also included narrow exceptions for processes that redact a recording prior to disclosure in order to protect the privacy of a subject, and the use of a mobile fingerprint-scanning device to identify someone without proof of identification during a lawful detention, as long as neither of these functions result in the retention of biometric data or surveillance information. AB 1215 included a sunset date of January 1, 2023.

   SB 1038 (Bradford), of the 2021-2022 Legislature, would have extended the ban on biometric surveillance and facial recognition systems in connection with cameras worn or carried by officers indefinitely. At its core, the question involved balancing the purported investigatory benefits of facial recognition technology against its demonstrated privacy risks, technical flaws and racial and gender biases. Committee staff did not identify or receive any evidence demonstrating that the ban on facial recognition technology used in connection with BWC had significantly hampered law enforcement efforts in the two years since it became operative. (Sen. Com. on Public Saf., com. on Sen. Bill No. 1038 (2021-2022 Reg. Sess.).) SB 1038 failed passage in the Senate.

   This year, the Legislature is asked once again to determine whether the investigatory benefits of facial recognition technology outweigh the risk to the communities served by law enforcement. This bill would set minimum standards for use of FRT by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use when a peace officer has reasonable suspicion that an individual has committed a felony, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. It does not include any limitation on the source of the input image submitted for comparison against the database of persons. Police could use traffic cameras, CCTV, and images from BWCs or dashcams.

   In contrast, AB 1034 (Wilson) would prohibit a law enforcement officer or agency from installing, activating, or using a biometric surveillance system solely in connection with a law enforcement agency's body-worn camera or any other camera. This bill would allow for input images from more sources than AB 1034 would ban—the two bills are reconcilable.

5) **Reasonable Suspicion to Use FRT**: This bill provides that law enforcement may use FRT when they have reasonable suspicion to believe that the person either has committed or is committing a crime. Reasonable suspicion exists "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231, citing *U.S. v. Cortez* (1981) 449 U.S. 411, 417-418.) If, during the detention, a reasonable person would believe that the individual is armed and dangerous, the officer may also conduct a brief patdown (or "frisk") of an individual's

outer clothing for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 21.). A brief detention based on reasonable suspicion, and the possible subsequent patdown for weapons, is known as a *Terry* stop.

The U.S. Supreme Court has not yet decided whether law enforcement may require an individual produce identification during a *Terry* stop. Law enforcement may request that a person stopped based on reasonable suspicion disclose their name during the stop. (See *Hiibel v. Sixth Judicial Dist. Court* (2004) 542 U.S. 177, 185.) However, a suspect is not required to provide identification to law enforcement during a *Terry* stop as a matter of law. In California, the authority to require a suspect to produce identification is limited. (See *Lawson v. Kolender* (9th Cir. 1981) 658 F.2d 1362; *Martinelli v. Beaumont* (9th Cir. 1987) 820 F.2d 1491, 1494; *People v. Garcia* (2006) 145 Cal.App.4th 782, 788.) This bill would circumvent those limitations by allowing for FRT whenever a peace officer has reasonable suspicion that a person has committed a felony.

Moreover, there is little question about which communities are most likely to be subject to FRT use by law enforcement based on reasonable suspicion. According to a recent report, "Relative to other racial/ethnic groups, Black individuals had the highest proportion of their stops reported as reasonable suspicion." (Racial and Identity Profiling Advisory Board (RIPA), Annual Report 2023 (Jan. 1, 2023) p. 8 <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf> [last visited Mar. 23, 2023].) Both transgender men/boys and transgender women/girls reported substantially higher proportions of stops as reasonable suspicion—ranging from 42.9% to 45.4% of the total reported stops, respectively—than cisgender and gender nonconforming individuals (Id. at p. 40.) RIPA further found, "Individuals perceived to be LGBT had…a higher proportion of their stops reported as reasonable suspicion…than individual who officers did not perceive to be LGBT." (Id. at p. 41.)

Given existing limitations on requiring identification based on reasonable suspicion and the disproportionate application of reasonable suspicion against marginalized communities, would requiring a higher standard (e.g. probable cause) to justify the use of FRT by law enforcement be more appropriate?

6) **Argument in Support**: According to the *League of California Cities*, "Facial recognition technology is one of many tools utilized in identifying an individual by comparing a digital image of the person's face to a database of known faces, typically by measuring distinct facial features and characteristics. This technology does not by itself result in ultimate identification, but it may generate investigative leads necessary for combatting crime within our communities. Technology assists our law enforcement partners in doing their jobs more efficiently and ultimately improves public safety.

"Cal Cities supports accountability on the part of law enforcement agencies concerning police technology and policies, as well as related oversight by local governing bodies. However, we do not support policies that restrict law enforcement agencies from utilizing technologies that would otherwise enhance their ability to prevent criminal activity in the communities they serve."

7) **Argument in Opposition**: According to *ACLU California Action*, "**AB 642 Places Often-Targeted Communities at Risk**

"If AB 642 becomes law, California will see an explosion of the sensitive databases containing face prints and biometric information that are part and parcel of FRT. These databases are routinely and disproportionately populated with millions of mugshots of Black and Brown victims of the War on Drugs and other discriminatory laws. As a result, Black and Brown people may be more likely to be identified by systems running on this technology, profiled, stopped, detained, and entered into these databases, magnifying a cycle of racially biased policing and incarceration. Unfortunately, recent amendments to AB 642 make this problem worse, sanctioning the expansion of mugshot databases while explicitly permitting police to make use of unaccountable for-profit databases sold by data brokers and other private companies.

"The amendments to AB 642 fail to meaningfully limit the dangerous sharing of information with other agencies, risking serious consequences for women and LGBTQI people. The national attacks on abortion rights, bodily autonomy, and trans people demand that California provide a haven for those seeking reproductive or gender-affirming care. Amendments to AB 642 merely limit police from sharing info about the literal 'the provision' of these services, preserving wide latitude for police to share information about people who plan to seek care or have already done so and are travelling within California. AB 642 incentivizes uses of FRT that could be exploited to identify and prosecute people who travel to our state to visit a doctor's office or a Planned Parenthood clinic.

**"AB 642 Places Communities in Danger and Unjustifiably Erodes Civil Rights**

"AB 642 threatens more than our privacy. It is also foreseeable that out-of-state and federal agencies will demand access to and exploit the biometric databases ushered in by AB 642, placing dangerous pressure on our state's sanctuary laws. ICE has already been caught tapping into and demanding access to facial recognition databases in other states. Amendments to AB 642 do nothing to address the inherent vulnerability of biometric databases to outside demands. California has chosen not to proactively use state resources for immigration enforcement, and it should continue to protect immigrants.

"By allowing police to scan and identify people with few limitations, AB 642 will also increase unnecessary interactions with innocent residents. With regularity, we are learning stories about Black men like Robert Williams. Mr. Williams was wrongfully arrested in his driveway with his wife and daughter watching; he was jailed because police misused facial recognition. In Mr. Williams' case, police ignored warnings like those contained in AB 642, so we know this bill will not prevent egregious mistakes. Indeed, recent amendments would actually prevent people like Mr. Williams from bringing a lawsuit and seeking justice wherever police claim they were acting in good faith. By legally sanctioning the widespread use of FRT, AB 642 will magnify the bias and over-policing already disproportionately harming communities of color, immigrants, and other minority groups. Too often we have seen that police labeling results in unjustified interactions that have the potential to easily escalate into fatal encounters. This will remain true regardless of how accurate FRT becomes. Thus, AB 642 also puts lives at risk.

**"AB 642 Ignores the Evidence**

"FRT is an inherently dangerous form of surveillance that gives governments the power to automatically identify us without our consent and track where we go, who we know, and even how we feel, and there is no way to prevent this encroachment on personal privacy. Rather than meaningfully constrain this power, amendments to AB 642 explicitly specify that police may use FRT for 'real time' surveillance of entire areas, exposing entire communities to the scanning of

their faces and identities by police cameras mounted on streetlights, buildings, and attached to officers. Simply put, this is how authoritarian states use this technology to track, target, and control their populations and marginalized communities.

"As a result, the face surveillance systems permitted by AB 642 will chill the exercise of important civil rights, including at protests, places of worship, and political gatherings. There are no acceptable standards under which law enforcement can use face surveillance. Rather than aligning with the civil rights community and national consensus, AB 642 grants law enforcement agencies sweeping statutory authority to use face recognition technology to identify and track people across the state.

"There is a strong and growing public consensus that FRT is simply too dangerous and corrosive to our rights to be used by law enforcement. Companies like Amazon, Microsoft, and IBM refuse to sell FRT to police, as has Axon, the most prominent police body camera maker. At least 20 U.S. cities, including your hometown of San Francisco, have banned the government use of face recognition technology. Progressive leadership in the United States Congress recently introduced a bill that would prohibit the government's use of facial recognition and condition funding to localities on their adopting the same. These local laws and federal bill recognize that the most responsible standard for FRT is a ban on its use by governments. Prohibitions on the government use of facial recognition protect our privacy, reduce dangerous encounters and wrongful detentions, safeguard our freedom of speech, and impede the creation of dangerous biometric databases."

8) **Related Legislation**:

a) AB 1034 (Wilson), would prohibit a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other officer camera. AB 1034 is pending hearing in the Assembly Committee on Privacy and Consumer Protection.

b) AB 79 (Weber), would prohibit a peace officer from using deadly force against or intending to injure, intimidate, or disorient a person by utilizing any unmanned, remotely piloted, powered ground or flying equipment except under specified circumstances. AB 79 is pending hearing in this committee.

c) AB 793 (Bonta), would provide that a government entity may not seek, from any court, a compulsory process to enforce a reverse-location demand or a reverse-keyword demand, as defined. AB 793 is pending hearing in this committee.

d) AB 742 (Jackson), would prohibit 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 is pending hearing in the Assembly Appropriations Committee.

9) **Prior Legislation**:

a) SB 1038 (Bradford), would have deleted the January 1, 2023 sunset date on provisions of law that prohibit a law enforcement officer from installing, activating or using a biometric surveillance system in connection with a body-worn camera or data collected

by a body-worn camera. SB 1038 died on the inactive file in the Senate.

b) AB 1281 (Chau), Chapter 268, Statutes of 2020, would require a business in California that uses facial recognition technology to disclose that usage in a physical sign that is clear and conspicuous at the entrance of every location that uses facial recognition technology.

c) AB 1215 (Ting), Chapter 579, Statutes of 2019, prohibited a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other camera.

d) SB 21 (Hill), of the 2017-2018 Legislative Session, would have required local law enforcement agencies to have a policy, approved by the local governing body, in place before using surveillance technology. SB 21 was held in the Assembly Appropriations Committee.

e) AB 69 (Rodriguez) Chapter 461, Statutes of 2015, requires law enforcement agencies to follow specified best practices when establishing policies and procedures for downloading and storing data from body-worn cameras.

f) SB 34 (Hill) Chapter 532, Statutes of 2015, imposed a variety of security, privacy and public hearing requirements on the use of automated license plate recognition systems, as well as a private right of action and provisions for remedies.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

League of California Cities
Orange County Board of Supervisors - Supervisor Vicente Sarmiento
Security Industry Association

**Opposition**

A New Way of Life
Access Reproductive Justice
ACLU California Action
All of Us or None Riverside
Anti Police-terror Project
Asian Americans Advancing Justice - Asian Law Caucus
Asian Law Alliance
Bend the Arc California
California Association of Black Lawyers
California Coalition for Women Prisoners
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent
California Public Defenders Association (CPDA)
California United for A Responsible Budget (CURB)

Care First California
Central American Resource Center of San Francisco
Citizens for A Better Los Angeles
Coalition for Homelessness San Francisco
Electronic Frontier Foundation
Equal Justice Society
Family Reunification Equity & Empowerment (F.R.E.E.)
Free Speech Coalition
If/when/how: Lawyering for Reproductive Justice
Indivisible CA Statestrong
Indivisible Ca: Statestrong
Initiate Justice
Initiate Justice Action
Lawyers Committee for Civil Rights of The San Francisco Bay Area
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoners With Children
Long Beach Immigrant Rights Coalition
Media Alliance
Mediajustice
National Center for Lesbian Rights
Oakland Privacy
Orange County Rapid Response Network
People's Budget Orange County
Positive Women's Network - USA
Privacy Rights Clearinghouse
Safer Streets LA
San Francisco Public Defender - Racial Justice Committee
Secure Justice
St James Infirmary
St. James Infirmary
Starting Over INC.
Stop the Musick Coalition
Tenth Amendment Center
Training in Early Abortion for Comprehensive Health Care
Transforming Justice Orange County
Transgender, Gendervariant, Intersex Justice Project
Urge: Unite for Reproductive & Gender Equity

**Analysis Prepared by**: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 709 (McKinnor) – As Introduced February 13, 2023

**SUMMARY**: Allows a prosecutor to provide an unofficial copy of a transcript that contains exculpatory or impeaching material involving a peace officer-witness to a defendant during informal discovery. Specifically, **this bill**:

1) Permits a prosecutor with actual possession of a transcript that contains potentially exculpatory or impeaching material involving a peace officer-witness to provide an unofficial copy of the transcript, or a relevant portion thereof, to defense counsel or defendants appearing in propia persona during informal discovery.

2) Provides that the defendant may reproduce a copy of the transcript, or portion thereof, as an exhibit pursuant to court order or rule, or for internal use, but shall not otherwise provide or sell copies to any other party or person.

**EXISTING LAW**:

1) Provides that any court, party, or person who has purchased a transcript prepared by a court reporter may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit, or for internal use, but shall not otherwise provide or sell a copy or copies to any other party or person. (Gov. Code, § 69954.)

2) Requires the prosecuting attorney to disclose to the defendant or their attorney all of the specified materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies, including among other things, all relevant real evidence seized or obtained as a part of the investigation of the offenses charged; any exculpatory evidence; and relevant written or recorded statements of witnesses whom the prosecutor intends to call at the trial. (Evid. Code, § 1054.1.)

3) Provides that a prosecutor who intentionally withholds relevant, exculpatory information is guilty of a felony punishable by imprisonment in a county jail for 16 months, or 2, or 3 years. (Pen. Code, § 141, subd. (c).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "AB 709 would allow for a narrowly-tailored exception to allow disclosure only when an individual prosecutor has a transcript containing Brady or potential Brady information. This makes it easier for DA's to comply with their

discovery obligations while allowing defense counsels to properly defend their client."

2) **The Prosecutor's Duty to Provide Exculpatory Evidence to the Defense**: In *Brady v. Maryland* (1963) 373 U.S. 83, 87, the United States Supreme Court held that federal constitutional due process creates an obligation on the part of the prosecution to disclose all evidence within its possession that is favorable to the defendant and material on the issue of guilt or punishment. *Brady* evidence includes evidence that impeaches prosecution witnesses, even if it is not inherently exculpatory. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155.) Further, the prosecution's disclosure obligation under *Brady* extends to evidence collected or known by other members of the prosecution team, including law enforcement, in connection with the investigation of the case. (*In re Steele* (2004) 32 Cal.4th 682, 696-697, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437.) In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles*, *supra*, 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)

   Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The prosecution's duty to disclose exists whether or not the defendant specifically requests the information. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Failure to disclose evidence favorable to the accused violates due process irrespective of the good or bad faith of the prosecution. (*Brady*, *supra*, 373 U.S. at p. 87.)

   California's Criminal Discovery Statute, as codified in Penal Code Section 1054 et seq. contains additional discovery requirements. Section 1054.1 requires the prosecuting attorney to disclose to the defendant materials and information known to the prosecution, including among other things, all relevant real evidence seized or obtained as a part of the investigation of the offenses charged; any exculpatory evidence; and relevant written or recorded statements of witnesses whom the prosecutor intends to call at the trial. (Evid. Code, § 1054.1.)

   Additionally, Rule 3.8 (Special Responsibilities of a Prosecutor) of the California Rules of Professional Conduct requires that prosecutors timely disclose all evidence or information that tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when relieved of this responsibility by a protective order of the court.

   Moreover, if the favorable material evidence is contained in the files of an agency connected to the investigation of the case, the prosecutor is in constructive possession of it, and has a duty to disclose it. (See *People v. Lucas* (2014) 60 Cal.4th 153, 274.)

   Prosecutors often encounter *Brady* information after trial, post-conviction. The obligation to disclose *Brady* information continues after trial. (See *Imbler v. Pachtman* (1976) 424 U.S. 409, 427 n. 25 [stating that "at trial" a prosecutor's duty to disclose evidence comes from the Due Process Clause, while "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."].)

   Prosecutors often encounter *Brady* information contained in court transcripts. Under Government Code section 69954, a prosecutor who has purchased a transcript may, without

paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but cannot not otherwise provide or sell a copy or copies to any other party or person, including the defendant. There is no exception for transcripts that contain *Brady* material. Thus, under current law, a prosecutor who has a transcript which contains *Brady* information may use the transcript internally within the prosecutor's office, but cannot actually disclose the transcript directly to defense counsel to satisfy their constitutional discovery obligations.

This bill would allow the prosecutor to provide an unofficial copy of the transcript, or a relevant portion thereof, to the defense, during informal discovery. This exception would only apply in limited circumstances in which a prosecutor has evidence of potentially exculpatory or impeaching material involving a peace-officer witness. This bill would further allow defense to reproduce a portion of the transcript as an exhibit, pursuant to a court order or rule, or to use the transcript for internal use, but does not allow the defense to otherwise provide or sell copies of the transcript to any other person.

3) **Argument in Support**: According to the *California District Attorneys Association* (CDAA), "This bill facilitates the discovery process by helping to avoid disputes over the costs of providing such transcripts."

3) **Related Legislation**: SB 441 (Bradford), would require prosecutors to disclose to the defense, among other things, exculpatory evidence, before or at the preliminary hearing. SB 441 is pending in the Senate Public Safety Committee.

4) **Prior Legislation**: AB 788 (Wagner), of the 2013-2014 Legislative Session, would have authorized, transcripts to be reproduced for internal use or in response to a request for discovery, without paying a further fee to the reporter, as specified. AB 788 was never heard in the Senate Judiciary Committee.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Los Angeles County District Attorney's Office (Co-Sponsor)
California Attorneys for Criminal Justice
California District Attorneys Association

**Opposition**

None.

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

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 750 (Rodriguez) – As Amended April 6, 2023

**SUMMARY**: Clarifies that an authorized media representative, as specified, cannot facilitate the entry of a person into, or facilitate the transport of a person within an area closed due to a menace to the public safety or health, if that person is not also an authorized media representative, unless for the purposes of safety of the person.

**EXISTING FEDERAL LAW:** Secures the right to freedom of speech, of the press, and the right of the people peaceably to assemble. (U.S. Const., 1st Amend.)

**EXISTING STATE LAW:**

1) Provides that a law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, § 2.)

2) States that, whenever a menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster, specified peace officers and public safety officials may close the area where the menace exists for the duration of the menace by means of ropes, markers, or guards to any and all persons not authorized to enter or remain within the enclosed area. If the calamity creates an immediate menace to the public health, the local health officer may close the area where the menace exists. (Pen. Code, § 409.5, subd. (a).)

3) Provides that specified public safety officials may close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating any calamity or any riot or other civil disturbance to any and all unauthorized persons. (Pen. Code, § 409.5, subd. (b).)

4) Allows a duly authorized representative of a news service, newspaper, or radio or television station or network to enter the closed areas. (Pen. Code, § 409.5, subd. (d).)

5) Provides that an unauthorized person who willfully and knowingly enters a closed area and who willfully remains within the area after receiving notice to evacuate or leave shall be guilty of a misdemeanor. (Pen. Code, § 409.5, subd. (c).)

6) Provides that a person who, after receiving notice to evacuate or leave, willfully and knowingly directs an employee to remain in, or enter, a closed area shall be guilty of a misdemeanor. (Lab Code, § 6311.5.)

7) Makes it a misdemeanor for a person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined, in the discharge or

attempt to discharge any duty of their office or employment. (Pen. Code, § 148, subd. (a).)

8) Provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. (Pen. Code, § 835a.)

9) Provides that every person who participates in any riot or unlawful assembly is guilty of a misdemeanor. (Pen. Code, § 408.)

10) Makes it a misdemeanor for any person to remain present at the place of any riot or unlawful assembly, after being lawfully warned to disperse. (Pen. Code, § 409.)

11) Provides that, if two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor. (Pen. Code, § 416.)

12) Provides that every person who goes to the scene of an emergency, or stops at the scene of an emergency, for the purpose of viewing the scene or the activities of emergency personnel, and thereby impedes emergency personnel, in the performance of their duties in coping with the emergency, is guilty of a misdemeanor. (Pen. Code, 402.)

13) Provides that every person who willfully commits a trespass, as specified, is guilty of a misdemeanor. (Pen. Code, § 602.)

14) Provides that it is trespass to drive any vehicle upon real property belonging to another and known not to be open to the general public, without the consent of the person in lawful possession. (Pen. Code, § 602, subd. (n).)

15) Provides that it is trespass to refuse or to fail to leave any property belonging to another and not open to the general public upon being requested to leave by a peace officer, as specified. (Pen. Code, § 602, subd. (o).)

16) Provides that it is trespass to enter any land declared closed because of a hazard, as specified, if the closed areas have been posed with notices declaring the closure. (Pen. Code, § 602, subd. (p).)

17) Provides that any person concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, have advised and encouraged its commission, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed. A person who aids and abets a crime faces the same punishment as the one who directly commits the crime. (Pen. Code, § 31.)

18) Provides that when two or more people conspire to commit any crime they are guilty of a felony. (Pen. Code, § 182.)

19) Provides that a duly authorized representative of any news service, online news service, newspaper, or radio or television station or network may enter any area closed by public safety officers or peace officers where individuals are engaged in protected first amendment activity,

including a demonstration, march, protests or rally. (Pen. Code, § 409.7.)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "Under current law, peace officers may close an area where a calamity, including a flood, storm, fire, earthquake, explosion, accident, or disaster, creates a menace to public health or safety. Any unauthorized persons who willfully and knowingly enter a closed area and remain in the area after being notified to evacuate or leave are guilty of a misdemeanor. Last year, there were reports of media personnel transporting non-authorized persons into closed areas. For example, the Siskiyou County Sheriff's Office reported they were investigating reports that the media brought civilians into evacuation zones during the McKinney Fire in 2022.

   "While members of the press are critical to evaluating emergencies and informing the public on the events impacting our communities, transporting individuals into closed areas places residents in unnecessary risk. AB 750 would clarify that a representative of a press organization shall not transport a civilian into a closed area. This bill would allow press members to continue their duty of keeping the public informed while keeping the public safe."

2) **Contours of Penal Code Section 409.5**: Under Penal Code section 409.5, law enforcement officers and other designated officials may cordon off and close a disaster area to the general public where the disaster has created "a menace to the public health or safety." A person is guilty of a misdemeanor if they willfully and knowingly enter a closed area and willfully remain within the area after receiving notice to evacuate. (Pen. Code, § 405, subd. (c).) However, law enforcement may not prevent "duly authorized" newspersons from entering an area otherwise closed to the general public. (Pen. Code, § 405, subd. (d).)

   The phrase "duly authorized" refers to the news station, newspaper, or radio or television station or network having "duly authorized" the individual to be its representative at the site. The "duly authorized" news media exception does not refer to someone authorized to be in the area by the law enforcement officer. Otherwise, the entire exception would be superfluous. (66 Ops.Cal.Atty.Gen. (1983) 497, 498-499.)

   The exception does not prevent law enforcement officers from taking appropriate action to prevent the news media representatives at a disaster site from violating any specific laws. (See e.g. Pen. Code, §§ 402, 409; 66 Ops.Cal.Atty.Gen. 497, supra, 499, fn. 2.) For example, press representatives access may be restricted if police personnel at the scene reasonably determine that their unrestricted access will interfere with emergency operations. (See, e.g., *Los Angeles Free Press, Inc. v. City of Los Angeles* (1970) 9 Cal.App.3d 448, 456.) If such a determination is made, the restrictions on media access may be imposed for only so long and only to such an extent as is necessary to prevent actual interference. (*Ibid.*)

   However, officers cannot exclude the press on the sole basis of there being a safety hazard. The power to exclude the general public from a disaster site only arises where the disaster creates "a menace to the public health or safety." Thus, the press access exception "assumes the existence of an already-determined safety hazard. Notwithstanding such a safety hazard,

the Legislature has concluded that the public's right to know is more important." (*Leiserson v. City of San Diego* (1986) 184 Cal.App.3d 41, 50-51 [legislative goal that the maximum possible press access be provided].)

3) **Impetus for this Bill:** According to background materials provided by the Author, the Siskiyou County Sheriff's Office reported they were investigating incidents in which the the media brought civilians into evacuation zones during the McKinney Fire in 2022. (Record Searchlight, *Siskiyou sheriff investigating media conduct during McKinney Fire* (Aug. 8, 2022) <https://www.redding.com/story/news/local/2022/08/08/siskiyou-sheriff-investigating-media-conduct-during-mckinney-fire/10268419002/> [as of March 30, 2023].) While members of the press are critical to evaluating emergencies and informing the public, transporting individuals into closed areas could pose an unnecessary safety risk. This bill would clarify that an authorized representative of a press organization cannot transport a civilian into a closed area.

4) **Freedom of the Press:** The First Amendment explicitly protects the freedom of the press. (U.S. Const. 1st Amend.) "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." (*Houchins v. KQED* (1978) 438 U.S. 1, 17.) However, "it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." (*Pell v. Procunier* (1974) 417 U.S. 817, 833.) As the U.S. Supreme Court observed: "newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." (*Branzburg v. Hayes* (1971) 408 U.S. 664, 684-685.)

   The First Amendment does not give the media a right of access to the scenes of crimes and disasters superior to that of the general public. (*Los Angeles Free Press, Inc. v. City of Los Angeles* (1970) 9 Cal.App.3d 448, 455.) "Restrictions on the right of access to particular places at particular times are consistent with other reasonable restrictions on liberty based upon the police power, and these restrictions remain valid even though the ability of the press to gather news and express views on a particular subject may be incidentally hampered." (*Ibid.*)

   A special statutory right of access, however, may be given by state legislatures to news media representatives. (*Branzburg v. Hayes* (1971) 408 U.S. 664, 706.) This is precisely what the Legislature has done in Section 409.5. "The statute represents the Legislature's considered judgment that members of the news media must be afforded special access to disaster sites in order that they may properly perform their function of informing the public. (*Leiserson v. City of San Diego* (1986) 184 Cal.App.3d 41, 51.) This right of special access, however, does not give members of the press the ability to lure unauthorized individuals into potentially dangerous disaster areas. Thus, consistent with the First Amendment, this bill would clarify that an authorized media representative cannot facilitate the entry of a person into a closed emergency area if that person is not also an authorized media representative.

5) **Argument in Support**: According to *California State Sheriffs' Association* (CSSA), "While bona fide members of the press have access to closed areas, this access does not extend to transporting non-press civilians into or within areas that have been deemed dangerous and

subsequently closed. Existing law is less than clear though, as failing to leave upon being instructed to do so is prohibited but the act of facilitating the entry or movement of a person who is not a member of the press into or within a closed area is not clearly forbidden.

"This bill would retain the media's ability to access closed areas as appropriate but clarifies that this access is not transferable to people who are not bona fide members of the press."

6) **Prior Legislation**:

a) SB 98 (McGuire) Chapter 759, Statutes of 2021, authorized members of the press to enter areas that have been closed by law enforcement due to a demonstration, march, protest, or rally and prohibits officers from citing members of the press for failure to disperse, a violation of a curfew, or a violation of resisting, delaying, or obstructing, as specified.

b) AB 2658 (Burke), Chapter 288, Statutes of 2020, provided that a person who, after receiving notice to evacuate or leave, willfully and knowingly directs an employee to remain in, or enter, an area closed due to a menace to the public health or safety shall be guilty of a misdemeanor.

c) AB 3212 (Beaver) Chapter 1402, Statutes of 1957, authorized police to close off an area due to a public health or safety calamity, created a misdemeanor for trespassing, and authorized press members to come into the closed area.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

California State Sheriffs' Association (Sponsor)

**Opposition**

None.

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

Date of Hearing: April 11, 2023
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 762 (Wicks) – As Amended March 9, 2023

**PULLED BY AUTHOR**

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

Date of Hearing: April 11, 2023
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 793 (Bonta) – As Amended March 16, 2023

**SUMMARY**: Prohibits a government entity from seeking or obtaining information from a reverse-location demand or a reverse-keyword demand, and prohibits any person or government entity from complying with a reverse-location demand or a reverse-keyword demand. Specifically, **this bill**:

1) Defines "reverse-keyword demand" as any action by any government entity seeking or obtaining records or information capable of identifying persons who electronically searched or queried for a particular word or words, phrase or phrases, character string or strings, or website or websites, or who visited a particular website through a link returned in response to such a search or query, regardless of whether the request is limited to a specific geographic area or timeframe.

2) Provides that "reverse-keyword demand" includes any compulsory process, as defined, seeking such records or information and any action seeking to obtain such records or information in exchange for valuable consideration.

3) Defines "reverse-location demand" as any action by a government entity seeking records or information pertaining to the location of unspecified electronic devices or their unspecified users or owners, whose scope extends to the electronic devices present in a given geographic area at a given time, whether such device location is measured via global positioning system coordinates, cell tower connectivity, Wi-Fi positioning, or any other form of location detection.

4) Provides that "reverse-location demand" includes any compulsory process seeking such records or information and any action seeking to obtain such records or information in exchange for valuable consideration.

5) Prohibits a government entity from making a reverse-location demand or a reverse-keyword demand.

6) Prohibits a government entity from seeking, from any court, a compulsory process to enforce a reverse-location demand or a reverse-keyword demand.

7) Prohibits a government entity from seeking, securing, obtaining, borrowing, purchasing, using, or reviewing any information or data obtained through a reverse-location demand or a reverse-keyword demand.

8) Prohibits a court subject to the laws of this state from enforcing, including through a compulsory process, a reverse-location demand or a reverse-keyword demand.

9) Provides that a person in this state or a California entity shall not be obligated to comply with a reverse-location demand or a reverse-keyword demand issued by the State, or a political subdivision thereof, or any other state or political subdivision thereof.

10) Provides that a person or entity shall not be obligated to comply with a reverse-location demand issued by the State of California or a political subdivision thereof or any other state or a political subdivision thereof, when the reverse-location demand seeks information about a location within the State of California or a reverse-keyword demand where the search or query that the recipient of the demand has reason to know pertains to a location in the State of California.

11) Provides that a court or government entity of the State of California, or a political subdivision thereof, shall not support, assist, or enforce a reverse-location demand or reverse-keyword demand issued by the State of California or a political subdivision thereof, or any other state or a political subdivision thereof, including the domestication of any such demand.

12) Provides that a government entity shall not seek the assistance of a nongovernmental entity, an agency of the federal government, or an agency of the government of another state or subdivision thereof in obtaining information or data from a reverse-location demand or reverse-keyword demand if the government entity would be barred from directly seeking that information.

13) Allows a person in a trial, hearing, or proceeding claiming that information was obtained or retained in violation of the California or United States Constitutions or these provisions to file a motion to suppress.

14) Requires any information obtained or retained in violation of the California and United States Constitutions or these provision to be suppressed.

15) Authorizes the Attorney General to commence a civil action to compel a government entity to comply with these provisions.

16) Authorizes an individual whose information is disclosed in a manner that is inconsistent with these provisions or the California or United States Constitutions, or a service provider or any other recipient of the reverse-location demand or reverse-keyword demand, to file a petition to void or modify the reverse-location demand or reverse-keyword demand, or to order the destruction of any information obtained.

17) Requires that a person whose information was obtained by a government entity in violation of these provision be immediately notified of the violation and of the legal recourse available to that person, as specified.

18) Authorizes a person whose information was unlawfully obtained by a government entity to institute a civil action against the government entity for one or any combination of any of the following:

a) $1,000 per violation or actual damages, whichever is greater;

b) Punitive damages;

c) Injunctive or declaratory relief; and/or,

d) Any other relief that the court deems proper.

19) Requires a court to consider all of the following in assessing the amount of punitive damages:

a) The number of people whose information was disclosed;

b) Whether the violation directly or indirectly targeted persons engaged in exercises of activities protected by the California or United States Constitutions; and,

c) The persistence of violations by the particular government entity.

20) Requires the court to award reasonable attorney's fees to a prevailing plaintiff in any successful action brought for a violation of the prohibition on reverse location demands or reverse keyword demands.

21) Defines "government entity" as a department or agency of the state or a political subdivision thereof, or an individual acting for or on behalf of the state or a political subdivision thereof.

22) Defines "California entity" as a California corporation or a corporation whose principal executive offices are located in California.

23) Defines "compulsory process" as any court order, including a search warrant, a subpoena or administrative subpoena, or any other legal process seeking to compel the disclosure of records or information.

24) Provides that the provision of this act are severable. If any provision or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

25) Includes legislative findings and declarations.

**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., 4th Amend.)

**EXISTING STATE LAW:**

1) Provides that all people are by nature free and independent and have inalienable rights, including privacy. (Cal. Const., art. I, § 1.)

2) 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.)

3) Prohibits exclusion of relevant evidence in a criminal proceeding on the ground that the evidence was obtained unlawfully, unless the relevant evidence must be excluded because it was obtained in violation of the federal Constitution's Fourth Amendment. (Cal. Const., art. I, § 28, subd. (f), par. (2) .)

4) Defines a "search warrant" as a written order in the name of the people, signed by a magistrate and directed to a peace officer, commanding them to search for a person or persons, a thing or things, or personal property, and in the case of a thing or things or personal property, bring the same before the magistrate. (Pen. Code, § 1523.)

5) Provides the specific grounds upon which a search warrant may be issued, including when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony. (Pen. Code, § 1524.)

6) Provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Pen. Code, § 1525.)

7) Requires a magistrate to issue a search warrant if they are satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence. (Pen. Code, § 1528, subd. (a).)

8) Provides that a defendant may move to suppress as evidence any tangible or intangible thing obtained a result of a search or seizure on either of the following grounds:

    a) The search or seizure without a warrant was unreasonable; or

    b) The search or seizure with a warrant was unreasonable because of any of the following:

        i) The warrant is insufficient on its face;

        ii) The property or evidence obtained is not that described in the warrant;

        iii) There was not probable cause for the issuance of the warrant;

        iv) The method of execution of the warranted violated federal or state constitutional standards; or,

v) There was any other violation of federal or state constitutional grounds. (Pen. Code, § 1538.5, subs. (a)(1).)

9) Requires a provider of electronic communication services or remote computing services to disclose to a governmental prosecuting or investigating agency the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of that service, and the types of services the subscriber or customer utilized, when the governmental entity is granted a search warrant. (Pen. Code, § 1524.3, subd. (a).)

10) States that a governmental entity receiving subscriber records or information is not required to provide notice of the warrant to a subscriber or customer. (Pen. Code, § 1524.3, subd. (b).)

11) Authorizes a court issuing a search warrant, on a motion made promptly by the service provider, to quash or modify the warrant if the information or records requested are unusually voluminous in nature or compliance with the warrant otherwise would cause an undue burden on the provider. (Pen. Code, § 1524.3, subd. (c).)

12) Requires a provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, to take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the peace officer. (Pen. Code, § 1524.3, subd. (d).)

13) Specifies that no cause of action shall be brought against any provider, its officers, employees, or agents for providing information, facilities, or assistance in good faith compliance with a search warrant. (Pen. Code, § 1524.3, subd. (e).)

14) Provides for a process for a search warrant for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where the records would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent or from those customers, or the content of those communications. (Pen. Code, § 1524.2.)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "In the face of a growing slate of anti-abortion and anti-trans laws in states across the country, California must remain a safe haven for those seeking reproductive and gender-affirming care. To do that, we must say 'no' to invasive surveillance that would target people seeking needed healthcare here in California and beyond. AB 793 would preserve our right to safely seek reproductive and gender-affirming care in the digital age and protect us from invasive and harmful, 'reverse warrants' that reveal our highly personal information without sufficient legal process.

"Reverse geofence and keyword warrants request the disclosure of multiple people's private information simply because they were at a particular location during a specific time frame, or entered certain keywords into a search engine. Reverse warrants can place hundreds or thousands of unsuspecting and innocent people in the crosshairs of law enforcement, threatening their Fourth Amendment rights to be free from unreasonable government searches.

"As a worldwide leader in technology and innovation, we are uniquely positioned to divest from digital surveillance that would target people for having an abortion or seeking reproductive and gender-affirming care here in California and beyond. In order to truly protect our right to abortion, reproductive health care, and gender-affirming care, we must build on existing law and unequivocally reject the use of reverse warrants. By prohibiting reverse warrants, AB 793 puts a stop to this kind of indiscriminate government surveillance – preserving our digital privacy and protecting Californians' right to live life on our own terms."

2) **Search Warrant Requirement**: The Fourth Amendment of the U.S. Constitution and Article I, Section 13 of the California Constitution provide safeguards against unreasonable search and seizures. Generally, a "search" is a governmental intrusion upon, or invasion of a person's security in an area in which they have a reasonable expectation of privacy. (*People v. Mayberry* (1982) 13 Cal.3d 35, 341.) These constitutional provisions both generally require the police to secure a warrant before conducting a search, and specify that the warrant must be issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched."

   Penal Code section 1523 defines a "search warrant" as an order, in writing, signed by a magistrate, commanding a peace officer to search for personal property and bring it before a magistrate. Section 1524 outlines the statutory grounds for issuance of search warrants and mandates that they be supported by probable cause. The standard for probable cause to issue a search warrant is "whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.)

   The search warrant requirement is subject to some exceptions, such as warrantless vehicle searches, searches to preserve life or property, searches of probationers and parolees, temporary searches incident to detention and arrests, and school searches. Consent searches are also an exception to the warrant requirement of the Fourth Amendment.

3) **Geofence Warrants**: This bill would prohibit a government entity from seeking, or a court from enforcing, a reverse location demand, commonly known as a "geofence warrant." A recent article examining the use of geofence warrants by law enforcement describes how they work:

   > Geofence warrants "work in reverse" from traditional warrants. Instead of law enforcement requesting that a third-party provider produce the location history of a particular suspect's device, geofence warrants proceed first by giving investigators access to data for all cellular devices that were present near a crime scene around the time when the crime occurred. Through a series of iterative steps between the provider and law enforcement—without the further involvement of a magistrate judge—the provider

> produces additional location data with the goal of (1) helping law enforcement figure out which devices could have been those of the perpetrators; and (2) ultimately revealing the identities of the suspects.

(Note, *Against Geofences* (2022) 74 Stan. L.Rev. 385, 388.)

Geofence warrants can cover large geographical areas over long periods of time, causing user data from many users to be disclosed to law enforcement without any indication that the users have committed, or have participated in the commission of, a crime. As one article observes, "Such sweeping searches can unearth the location history of a startling number of users. One 2019 geofence warrant authorized a geofence covering a total of 29,387 square meters (or 7.4 acres—about the size of five and a half American football fields) over a period of nine hours. In response, the provider returned to law enforcement the location data of 1,494 cell phones." (Note, *Against Geofences* (2022) 74 Stan. L.Rev. 385, 389.)

Law enforcement has sought increasing numbers of geofence warrants in recent years, and Google has received the largest share of those warrants.

> According to data released by Google, geofence warrants recently constituted more than 25% of all U.S. warrants received by the company. Good disclosed that it received 982 geofence-warrant requests in 2018. This figure, Google explained in a court document represented over a 1,500% increase in the number of geofence requests as compared to 2017. In 2019, the number of geofence warrants received by Google increased by further 755% over the previous year to 8,396. In 202, the last year for which specific statistics are publicly available at the time of writing, Google received 11,554 geofence warrants. California law enforcement represents the most frequent geofence-warrant requester, having submitted 3,655 of the 20,932 requests logged by Google over the three-year period.

(*Against Geofences*, *supra*, at 390-391.)

Google developed a three-step process for geofence warrants. First, when law enforcement requests location information for all devices in a given place at a given time, Google responds with anonymized list of devices, including the device ID, timestamps, estimated coordinates, and the data source. (*Id.* at 399-400; see generally *U.S. v. Chatrie* (E.D.Va 2022) 590 F.Supp.3d 901.) Because the location coordinates are not always precise, "law enforcement may obtain data for users outside of the warrant's geographic parameters." (*Against Geofences*, *supra*, at p. 401-402.) Second, law enforcement reviews the data from Google, and requests more location history for devices on the list. The subsequent request might not be reviewed by a magistrate and may exceed the geographic and temporal ranges of the original request. (*Id.* at 404) Finally, after reviewing this subsequent data, law enforcement requests from Google subscriber information, such as the name of the person on the account, their address, and their email address. (*Id.* at 405-406.)

Reverse keyword demands work in much the same way as reverse location demands, but law enforcement requests information for all devices from which a search was conducted using a certain keyword of phrase.

This bill would prohibit a government entity from seeking, or any court subject to the laws of

California from enforcing, a reverse-location demand or a reverse-keyword demand in this state.

4) **Geofence Warrants and the Fourth Amendment**: The U.S. Supreme Court has not yet decided whether geofence warrants violate the Fourth Amendment as a matter of law. The Court has applied Fourth Amendment principles to evolving technologies and law enforcement tools. (See e.g. *Katz v. U.S.* (1967) 389 U.S. 347 [recording devices in public telephone booths]; *Kyllo v. U.S.* (2001) 533 U.S. 27 [thermal-imaging equipment].) For example, the Court recently held that law enforcement conducts a search under the Fourth Amendment when it obtains cell-site location data from wireless carriers, holding that "the Government must generally obtain a warrant supported by probable cause before acquiring such records." (*Carpenter v. U.S.* (2018) 138 S.Ct. 2206, 2221.)

The Ninth Circuit Court of Appeals and the California Supreme Court have not yet weighed in on the issue either. Indeed, there is limited case law on the constitutionality of such warrants. In *U.S. v. Chatrie*, a Virginia district court found that the geofence warrant in that case "plainly violat[ed]" the Fourth Amendment. (E.D.Va 2022) 590 F.Supp.3d 901, 905.) That case involved a defendant who was charged with the armed robbery of a local bank. (*Id.* at 906.) During the course of its investigation, local police reviewed security footage of the defendant entering the bank while speaking on a cell phone. (*Id.* at 917.) With few other leads in the case, local police sought and obtained a warrant that "drew a geofence with a 150-meter radius—with a diameter of 300 meters, longer than three football fields—in an urban environment…encompass[ing] 17.5 acres." (*Id.* at 918.) "The Warrant sought location data for every device present within the geofence" for the hour during which the robbery occurred. (*Id.* at 919.)

The court ruled that the geofence warrant lacked sufficient probable cause to satisfy the Fourth Amendment. According to the court, "[T]he warrant simply did not include any facts to establish probable cause to collect such broad and intrusive data from each one of these individuals." (*Id.* at 929.) The court observed, "To be sure, a fair probability may have existed that the Geofence Warrant would generate the *suspect's* location information. However, the warrant, on its face, also swept in unrestricted location data for private citizens who had no reason to incur Government scrutiny." (*Id.* at 929-930 [emphasis in original].) The court concluded:

> At bottom however, particularized probable cause cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Court finds unpersuasive the United States' inverted probable cause argument—that law enforcement may seek information based on probable cause that some unknown person committed an offense, and therefore search every person present nearby. In essence, the Government's argument rests on precisely the same "mere propinquity to others" rationale the Supreme Court has already rejected as appropriate basis for a warrant. This warrant therefore cannot stand.

(*Id.* at 933 [internal citations omitted]; but see *U.S. v. Rhine* (D.D.C. Jan.24, 2023, Crim. A. No. 21-0687) 2023 U.S.Dist. Lexis 12308 [a geofence warrant is constitutionally permissible when it precludes "disclosure of deanonymized device information except after separate order of the court based on a supplemental affidavit"].) Recently, the San Francisco superior

court granted a defendant's motion to quash a geofence warrant and suppressed geolocation evidence obtained as a result. (https://www.eff.org/document/people-v-dawes-order-granting-motion-quash-geofence-warrant-california)

Rather than wait for the courts to sort out the constitutional issues, this bill would prohibit a government entity from seeking, or any court subject to the laws of California from enforcing, a reverse-location demand or a reverse-keyword demand.

5) **The Exclusionary Rule and Proposition 8**: The exclusionary rule requires suppression of evidence seized during an unreasonable search or seizure in violation of the Fourth Amendment. (U.S. Const., amend. IV, XIV; *Wong Sun v. United States* (1963) 371 U.S. 471, 484-487.) Penal Code section 1538.5 requires courts to suppress evidence that was obtained in a way that violates the California Constitution or the U.S. Constitution.

In 1982, the California voters passed Proposition 8. Proposition 8 enacted article I, section 28 of the California Constitution, which provides in relevant part: "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings." (Cal. Const., art. I, § 28, subd. (f); *People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1069.) The "Truth-in-Evidence" provision of Section 28 "was intended to permit exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution." (*In re Lance W.* (1985) 37 Cal.3d 873, 890 (*Lance W.*).) Thus, Section 28 federalized California's search and seizure law. A trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution. (*Lance W., supra*, 37 Cal.3d at p. 896.)

This bill would require suppression of evidence obtained through a reverse location demand or a reverse keyword demand, even if the violation did not require exclusion under the federal Constitution. Accordingly, this bill may implicate Proposition 8.

6) **Argument in Support**: According to the *California Women's Law Center*, "The legislature has recognized the threat that faces these communities, passing A.B. 2091 (Bonta, 2022), A.B. 1242 (Bauer-Kahan, 2022), and S.B. 107 (Wiener, 2022). Those bills were a good first step, but more must be done. Unfortunately, police can skirt the protections in last year's laws if, for example, they don't say specifically why they want the data. By taking some of the most invasive surveillance warrants off the table, A.B. 793 would continue to solidify California's status as a sanctuary for those seeking reproductive or gender-affirming care.

"The bill specifically addresses the problem of 'reverse demands' and would put a stop to them. Normal warrants seek information about a particular person police have probable cause to believe merits investigation. A reverse warrant seeks the opposite: the identity of all the people who were present at a particular location (geofence demands) or who looked up a particular term in a search engine (keyword demands) simply because of where they were or what they searched for. Reverse demands have the same practical effect as unconstitutional general warrants, and courts have found geofence demands unconstitutional.

"These demands, already used to target protestors, can be used to conduct broad fishing expeditions for those who are seeking needed healthcare. A police investigator could ask for

everyone who was outside an unrelated business across the street from a reproductive health clinic, for example, and get information about who has been near that clinic's entrance—along with anyone who happened to be in the area at that moment – while skirting around the reproductive privacy protections enacted last year.

"Thousands or even millions of people can be included in a single, overbroad request without any probable cause at all. For example, a single warrant issued in Los Angeles County sought to identify all devices within a total geographic area equivalent to about 24 football fields during five morning commute hours on a Friday. The area included several of the most densely populated cities in the greater Los Angeles area, including Lynwood, with a population of 13,894 people per square mile and Paramount, with a population of 11,367 people per square mile. In this way, rather than help law enforcement find a needle in a haystack, reverse warrants give law enforcement a haystack to search through without any guarantee the needle they want is anywhere inside. Someone might have left their cellphone at home and so not be included in a geofence warrant, for example, or they could have used one of dozens of search engines to avoid inclusion in a keyword search warrant to a particular search engine company.

"Reverse demands have the same practical effect as unconstitutional general warrants. General warrants are expansive and invasive searches by the government that fail to identify specific persons, devices, or places to be searched with evidence of probable cause. They date back to pre-Revolutionary War times when the King used 'writs of assistance' to authorize his agents to 'carry out wideranging searches of anyone, anywhere, and anytime regardless of whether they were suspected of a crime. These 'hated writs' spurred colonists toward revolution and directly motivated James Madison's crafting of the Fourth Amendment.' Since our Nation's founding, general warrants have been deemed a significant threat to personal freedom, privacy, and liberty, and the Supreme Court has repeatedly held that the Fourth Amendment to the United States Constitution prohibits the use of these general warrants. It is not surprising then that courts have found reverse-location demands unconstitutional.

"The use of reverse demands poses a unique threat to those who are seeking reproductive or genderaffirming care, particularly if they are coming to California from other states. These mass surveillance demands are dangerous because they allow local law enforcement in states across the country to request the names and identities of people whose digital data trail shows they've visited California abortion or gender-affirming care providers. They could also indicate if people searched for revealing particular keywords online such as 'mifepristone,' 'abortion drugs,' 'top surgery,' or for care options in California.

"Taking reverse warrants off the table would solidify California's place as a protector of those who are merely seeking healthcare. It would also provide needed clarity for companies that receive these warrants, which have often spoken out against such requests because of the lack of scrutiny applied before they are issued." (footnotes omitted)

7) **Argument in Opposition**: None submitted.

8) **Related Legislation**:

a) AB 642 (Ting), would set minimum standards for use of facial recognition technology (FRT) by law enforcement, including requiring law enforcement agencies to have a written policy for FRT use, allowing for FRT use to identify both individuals who are suspects in a crime and those that are not, and providing that an FRT-generated match of an individual may not be the sole basis for probable cause for an arrest, search, or affidavit for a warrant. AB 642 will be heard today in this committee.

b) AB 79 (Weber), would prohibit a peace officer from using deadly force against or intending to injure, intimidate, or disorient a person by utilizing any unmanned, remotely piloted, powered ground or flying equipment except under specified circumstances. AB 79 is pending hearing in this committee.

c) AB 1034 (Wilson), would prohibit a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other officer camera. AB 1034 is pending hearing in the Assembly Appropriations Committee.

d) AB 742 (Jackson), would prohibit 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 is pending hearing in the Assembly Appropriations Committee.

9) **Prior Legislation**:

a) AB 1242 (Bauer-Kahan), Chapter 627, Statutes of 2022, prohibits the issuance of, among other things, an ex parte order authorizing interception of wire or other electronic communication or a trap and trace devise for purpose of investigating or recovering evidence arising out of the lawful abortion services.

b) SB 1038 (Bradford), of the 2021-2022 Legislative Session, would have deleted the January 1, 2023 sunset date on the prohibition on law enforcement from installing, activating or using a biometric surveillance system in connection with a body-worn camera or data collected by a body-worn camera. SB 1038 failed passage in the Senate.

c) AB 1215 (Ting), Chapter 579, Statutes of 2019, prohibits a law enforcement officer or agency from installing, activating, or using a biometric surveillance system in connection with a law enforcement agency's body-worn camera or any other camera.

d) SB 21 (Hill), of the 2017-2018 Legislative Session, would have required local law enforcement agencies to have a policy, approved by the local governing body, in place before using surveillance technology. SB 21 was held in the Assembly Appropriations Committee.

e) SB 178 (Leno), Chapter 651, Statutes of 2015, prohibits a government entity from compelling the production of, or access to, electronic-communication information or electronic-device information without a search warrant or wiretap order, except under specified emergency situations.

f) SB 34 (Hill) Chapter 532, Statutes of 2015, imposes a variety of security, privacy and public hearing requirements on the use of automated license plate recognition systems, as well as a private right of action and provisions for remedies.

g) SB 467 (Leno) of the 2013-2014 Legislative Session, was similar to SB 178. The Governor vetoed SB 467.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Access Reproductive Justice
ACLU California Action
All Above All
All Family Legal
American Atheists
Asian Americans Advancing Justice - Asian Law Caucus
Atheists United Los Angeles
California Church Impact
California Coalition for Women Prisoners
California Immigrant Policy Center
California Latinas for Reproductive Justice
California LGBTQ Health and Human Services Network
California News Publishers Association
California Nurse Midwives Association (CNMA)
California Public Defenders Association
California Women's Law Center
Citizens for Choice
Consumer Attorneys of California
Consumer Federation of California
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Equal Rights Advocates
Equality California
Grace - End Child Poverty
If/when/how: Lawyering for Reproductive Justice
Indivisible CA StateStrong
Indivisible Yolo
Lawyers Committee for Civil Rights of The San Francisco Bay Area
Los Angeles County Democratic Party
Media Alliance
Mujeres Unidas Y Activas
Mya Network
Naral Pro-choice California
National Abortion Federation
National Center for Youth Law
Oakland Privacy
Planned Parenthood Affiliates of California

Privacy Rights Clearinghouse
Reproductive Health Access Project
Reproductive Health Access Project (RHAP)
Restore the Fourth
San Francisco Black, Jewish and Unity Group
Santa Monica Democratic Club
Secure Justice
Smart Justice California
St James Infirmary
Starting Over INC.
Tgi Justice Project
The Greenlining Institute
The Women's Foundation California

**Opposition**

None

**Analysis Prepared by**: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 798 (Weber) – As Amended April 4, 2023

**As Proposed to be Amended in Committee**

**SUMMARY**: Redefines female genital mutilation (FGM) and prevents an individual from using religion, custom, or consent as a defense for crimes arising from the practice of FGM. Specifically, **this bill**:

1) Redefines FGM to mean "any procedure that involves partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical purposes."

2) Provides that it is not a defense to a FGM enhancement or to any crime arising from the commission of a FGM, including child abuse and mayhem, that the conduct is required as a matter of religion, custom, ritual, or standard practice, or that the individual on whom it is performed, or the individual's parent or guardian, consented to the procedure.

3) States that evidence that a person removes, causes, permits, or facilitates the removal of a minor from this state can be used as circumstantial evidence to establish a violation, or an attempt, of child abuse, the FGM enhancement, mayhem, aggravated mayhem, torture, or any other crime arising from the commission of female genital mutilation.

4) Specifies, for purposes of the Child Abuse and Neglect Reporting Act, that FGM is a crime, and that it is not a defense to the crime that the procedure was performed with consent of the parent's minor or because of religious or cultural reasons.

5) Requires the State Department of Public Health to establish and implement, on or before January 1, 2027, appropriate education, prevention, and outreach activities, focusing on new immigrant populations that traditionally practice FGM, for purposes of informing members of those communities of the prohibition and of the criminal penalties.

**EXISTING STATE LAW**:

1) Provides that any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts unjustifiable physical pain or mental suffering, or having the care or custody of a child, willfully causes or permits that child to be injured, or willfully causes or permits that child to be placed in a situation where their person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years. (Pen. Code, § 273a.)

2) States that if a conviction for felony child abuse was based on the commission of female genital mutilation the defendant shall be punished by an additional consecutive term of

imprisonment in the state prison for one year. (Pen. Code, § 273.4, subd. (a).)

3) Defines "female genital mutilation" as "the excision or infibulation of the labia majora, labia minora, clitoris, or vulva, performed for nonmedical purposes." (Pen. Code, § 273.4, subd. (b).)

4) Provides that every person who unlawfully and maliciously deprives a human being of a member of their body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem. Mayhem is punishable by imprisonment in the state prison for two, four, or eight years. (Pen. Code, §§ 203 & 204.)

5) Provides that every person who unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another or deprives them of a limb, organ, or member of their body is guilty of aggravated mayhem. Aggravated mayhem is punishable by imprisonment in the state prison for life with the possibility of parole. (Pen. Code, § 205.)

6) Provides that every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury upon another, is guilty of torture, Torture is punishable by imprisonment in the state prison for a term of life. (Pen. Code, §§ 206 & 206.1.)

7) Provides that every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall generally be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. (Pen. Code, § 664.)

8) Establishes the Child Abuse and Neglect Reporting Act. (Pen. Code, § 11164.)

9) Lists the categories of individuals who are mandated reporters. (Pen. Code, § 11165.7.)

10) Requires a mandated reporter to make a report whenever, in their professional capacity or within the scope of their employment, they have knowledge of or observe a child whom they know or reasonably suspect has been the victim of child abuse or neglect. (Pen. Code, § 11166.)

**EXISTING FEDERAL LAW**:

1) Makes it a crime punishable by up to 10 years in prison to knowingly:

   a) Performs, attempts to perform, or conspires to perform female genital mutilation on another person who has not attained the age of 18 years;

   b) Being the parent, guardian, or caretaker of a person who has not attained the age of 18 years facilitates or consents to the female genital mutilation of such person; or,

c) Transports a person who has not attained the age of 18 years for the purpose of the performance of female genital mutilation on such person. (18 U.S.C.S §116, subd. (a).)

2) States that it is not a defense to prosecution that female genital mutilation is required as a matter of religion, custom, tradition, ritual, or standard practice. (18 U.S.C.S §116, subd. (c).)

3) Provides that "transport" includes, among other things, the fact that the defendant or victim traveled in interstate or foreign commerce, or traveled using a means, channel, facility, or instrumentality of interstate or foreign commerce, in furtherance of or in connection with the female genital mutilation. (18 U.S.C.S §116, subd. (d)(1).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "FGM is a practice that can cause serious lifelong health problems. It is a practice that has no medical benefits. While it is a challenge to know the exact number of women and girls who are at risk of FGM in the U.S., the Centers for Disease Control and Prevention estimates more than 500,000 are at risk or have already undergone FGM in the U.S. AB 798 will hold anyone who takes a minor to another country to undergo FGM accountable for that action. It also will prevent religion or culture to be a criminal defense for FGM under state law. This bill sends a strong message that FGM is not tolerated in California."

2) **FGM**: The World Health Organization defines FGM as "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons." (See *World Health Organization FGM Fact Sheet*, January 31, 2023, https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation [as of April 5, 2023].) "FGM has no health benefits, and it harms girls and women in many ways. It involves removing and damaging healthy and normal female genital tissue, and it interferes with the natural functions of girls' and women's bodies." (*Ibid.*) It is also associated with health complications ranging from infection, to urinary problems, cysts, complications in childbirth and increased risk of newborn deaths. (*Ibid.*)

"FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against girls and women." (*WHO Fact Sheet, supra.*) More than 200 million girls and women alive today have been subjected to FGM in 30 countries in Africa, the Middle East and Asia where FGM is practiced. (*Ibid.*)

The World Health Organization classifies FGM into four types:

Type 1: The partial or total removal of the clitoral glans, and/or the prepuce/clitoral hood.

Type 2: The partial or total removal of the clitoral glans and the labia minora, with or without removal of the labia majora.

Type 3: Infibulation, which is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoral prepuce/clitoral hood and glans.

Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, such as pricking, piercing, incising, scraping and cauterizing the genital area. (*WHO Fact Sheet, supra.*)

California's definition of FGM differs from that of the World Health Organization. Under California law, FGM is defined as "the excision or infibulation of the labia majora, labia minora, clitoris, or vulva, performed for nonmedical purposes." (Pen. Code, § 273.4, subd. (b).) This definition excludes certain forms of Type 1 FGM (such as cutting of the clitoral hood) or Type 4 FGM which includes all other harmful procedures to the female genitalia for non-medical purposes.

This bill would conform California's definition of FGM with that of the World Health Organization such that all forms of FGM are specifically prohibited under the law.

3) **Criminalizing FGM**: Forty states, including California, and the federal government have laws prohibiting FGM. (See US Laws Against FGM - State by State - Equality Now [as of April 6, 2023].)

California generally considers FGM prosecutable under the child abuse statute (Pen. Code, § 273a) and has an additional sentencing enhancement of one year in state prison specifically required if the child abuse conviction was based on a FGM. (Pen. Code, § 273.4.) Felony child abuse is punishable by two, four, or six years in state prison (Pen. Code, § 273a), so with the additional mandatory and consecutive one-year enhancement, the maximum sentence is seven years in state prison.

However, there are other statutes under which a FGM can be charged. Specifically, an FGM can be charged under the mayhem or aggravated mayhem statutes, Penal Code sections 203 and 205. To prove that a person is guilty of mayhem, the prosecution must prove, in pertinent part, that the defendant unlawfully and maliciously: removed a part of someone's body, or disabled or made useless a part of someone's body and the disability was more than slight or temporary, or permanently disfigured someone. (CALCRIM 801.) A disfiguring injury may be permanent even if it can be repaired by medical procedures. (*Ibid.*) A defendant acts maliciously when they do a wrongful act or when they act with the unlawful intent to annoy or injure someone else. (*Ibid.*) Mayhem is punishable by two, four, or eight years in prison. (Pen. Code, § 204.)

To prove that a person is guilty of aggravated mayhem, the prosecution must prove that: (1) the defendant unlawfully and maliciously disabled or disfigured someone permanently, or deprived someone else of a limb, organ, or part of their body; (2) when the defendant acted, they intended to permanently disable or disfigure the other person, or deprive the other person of part of their body; and, (3) under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person. (CALCRIM 800.) Aggravated mayhem is punishable by life with the possibility of parole. (Pen. Code, § 205.)

This bill would declare that it is not a defense to the above crimes, or to any crime arising out of the commission of a FGM, that the procedure was done for religious, ritual, or customary reasons and/or that the minor or the minor's parents consented.

In addition, this bill would specify that evidence that a person removes, causes, permits, or facilitates the removal of a minor from this state can be used as circumstantial evidence to establish the commission, or attempted commission, of any crime arising from a FGM.

4) **Child Abuse and Neglect Reporting**: The Child Abuse Neglect and Reporting Act (Pen. Code, §§ 11164 et seq.) provides "a comprehensive reporting scheme aimed toward increasing the likelihood that child abuse victims [will] be identified." (*Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 90.) "The Act requires persons in positions where abuse is likely to be detected to report promptly all suspected and known instances of child abuse to authorities for follow-up investigation." (*Ibid.*; accord, *James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 253-254.)

   The Act identifies over 40 separate categories of mandated reporters. (Pen. Code, § 11165.7, subd. (a)(1)-(49).) A mandated reporter must report known or reasonably suspected child abuse or neglect to a designated agency, specifically "any police or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive such reports, or county welfare department." (Pen. Code, § 11166, subd. (a).) Failure to make the required report is a misdemeanor. (Pen. Code, § 11166, subd. (c).)

   This bill would specify for purposes of the Child Abuse and Neglect Reporting Act that FGM is a crime and that it is not a defense to any crime arising out of the commission of a FGM that the procedure was done because of a religious, cultural, or customary ritual, and that it is also not a defense that the parent minor, or the minor consented.

5) **Argument in Support**: According to the *American College of Obstetricians and Gynecologists (ACOG) District IX*, "FGM, sometimes annotated as female genital cutting or female circumcision, is described by the World Health Organization (WHO) as comprising "all procedures that involve partial or total removal of the external female genitals, or other injury to the female genital organs for non-medical reasons." Although these procedures are more commonly performed in Africa, the Middle East, and Asia, it is estimated that more than 513,000 girls and women in the U.S. have experienced or are at risk of FGM. People may arrive in the U.S. having already had the procedure performed, but there are reports of these procedures being performed in immigrant populations by traditional practitioners, or children being sent to the family's home country to have the procedures performed.

   "Female genital mutilation is internationally recognized as a human rights violation and is considered an extreme form of discrimination against women. ACOG condemns the practice of FGM and supports all efforts to eliminate the practice of FGM in the U.S. as well as internationally."

6) **Prior Legislation**: AB 2125 (Figueroa), Chapter 790, Statutes of 1996, provides that a person who commits felony child abuse by an act of female genital mutilation shall be

punished by an additional term of imprisonment in the state prison for one year.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

American College of Obstetricians and Gynecologists District IX
California Catholic Conference
California District Attorneys Association
Equality Now
Nile Sisters Development Initiative
Racial and Ethnic Mental Health Disparities Coalition
SWF International

**Opposition**

None on file.

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

# Amended Mock-up for 2023-2024 AB-798 (Weber (A))

## Mock-up based on Version Number 98 - Amended Assembly 4/4/23
## Submitted by: Sandy Uribe, Assembly Public Safety Committee

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

**SECTION 1.** Section 124170 of the Health and Safety Code is amended to read:

**124170.** The State Department of Public Health shall, on or before January 1, 2027, establish and implement appropriate education, preventative, and outreach activities, focusing on the new immigrant populations that traditionally practice female genital mutilation, for the purpose of informing members of those communities of the health risks and emotional trauma inflicted by this practice and informing those communities and the medical community of the prohibition and ramifications of Section 273.4 of the Penal Code.

**SEC. 2.** ~~Section 273.3 is added to the Penal Code, to read:~~

~~**273.3.** (a) Any person who removes, causes, permits, or facilitates the removal of a person under 18 years of age from this state for the purpose of female genital mutilation of that person is punishable pursuant to subdivision (h) of Section 1170.~~

~~(b) It is not a defense to this section that the conduct described in subdivision (a) is required as a matter of religion, custom, ritual, or standard practice, or that the individual on whom it is performed, or the individual's parent or guardian, consented to the procedure.~~

~~(c) For the purposes of this section, "female genital mutilation" has the same meaning as defined in Section 273.4.~~

~~**SEC. 3.**~~ Section 273.4 of the Penal Code is amended to read:

**273.4.** (a) If the act constituting a felony violation of subdivision (a) of Section 273a was female genital mutilation, as defined in subdivision (c), the defendant shall be punished by an additional term of imprisonment in the state prison for one year, in addition and consecutive to the punishment prescribed by Section 273a.

(b) ~~It is not a defense to this section that the conduct described in subdivision (a) is required as a matter of religion, custom, ritual, or standard practice, or that the individual on whom it is performed, or the individual's parent or guardian, consented to the procedure.~~

~~(c)~~ "Female genital mutilation" means any procedure that involves partial or total removal of the external female genitalia, or other injury to the female genital organs for nonmedical reasons.

**(c) Evidence that a person removes, causes, permits, or facilitates the removal of a minor from this state can be used as circumstantial evidence to establish a violation, or an attempt, under this section, Section 273a, 205, 205, 206, or any other crime arising from the commission of female genital mutilation.**

(d) Nothing in this section shall preclude prosecution under Section 203, 205, or 206 or any other provision of law.

**(e) It is not a defense to this section, Section 273a, 205, 205, 206, or any other crime arising from the commission of female genital mutilation that the conduct is required as a matter of religion, custom, ritual, or standard practice, or that the minor on whom it is performed, or the minor's parent or guardian, consented to the procedure.**

**SEC. 3.** Section 11165.16 is added to the Penal Code, to read:

**For purposes of this article, female genital mutilation is child abuse pursuant to Section 273.4. "Female genital mutilation" means any procedure that involves partial or total removal of the external female genitalia, or other injury to the female genital organs for nonmedical reasons. It is not a defense to female genital mutilation that the conduct is required as a matter of religion, custom, ritual, or standard practice, or that the minor on whom it is performed, or the minor's parent or guardian, consented to the procedure.**

**SEC. 4.** 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 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 808 (Mathis) – As Amended March 30, 2023

**SUMMARY**: Provides that rape of a developmentally disabled person shall be punished by the same prison sentences that apply to rape of a minor accomplished by force, duress, or threats. Specifically, **this bill**:

1) Makes the penalty for the crime of rape of a person who is under 14 years of age, who has a developmental disability which is known, or reasonably should be known, to the perpetrator, imprisonment in the state prison for 9, 11, or 13 years.

2) Requires, however, that if the developmentally disabled minor is 10 years of age or younger than the perpetrator, the perpetrator be prosecuted under the law pertaining to sex acts with a child 10 years of age or younger.

3) Makes the penalty for the crime of rape of a person who is 14 years of age or older, who has a developmental disability which is known, or reasonably should be known, to the perpetrator, imprisonment in the state prison for 7, 9, or 11 years.

4) Provides this does not preclude prosecution under any other provision of law, including aggravated sexual assault of a child which is punishable by 15-years-to-life in state prison.

5) Defines "developmental disability" to mean a disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and for which a regional center finds eligibility for services under the Lanterman Developmental Disabilities Services Act. The term includes intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.

**EXISTING LAW**:

1) Includes within the definition of rape an act of sexual intercourse with a person other than a spouse, who is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. (Pen. Code, § 261, subd. (a)(1).)

2) Provides that a person who commits an act of rape against a victim who is incapable of giving legal consent due to a mental disorder or developmental or physical disability, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 264.)

3) Provides that all rape is a serious felony subject to increased penalties, including under the Three Strikes Law. (Pen. Code, § 1192.7, subd. (c)(3).)

4) Provides that a person who commits rape upon a child who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another, shall be punished by imprisonment in the state prison for 9, 11, or 13 years. When the victim is 14 years of age or older, the punishment is imprisonment in the state prison for 7, 9, or 11 years. (Pen. Code, § 264, subd. (c)(1) & (c)(2).)

5) Defines unlawful sexual intercourse as an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person under 18 years of age. (Pen. Code, § 261.5, subd. (a).)

6) Provides that a person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor. (Pen. Code, § 261.5, subd. (b).)

7) Provides that a person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the county jail for 16 months, two or three years under realignment. (Pen. Code, § 261.5, subd. (c).)

8) Provides that a person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in a county jail for two, three, or four years under realignment. (Pen. Code, § 261.5, subd. (d).)

9) Provides that a person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger shall be punished by imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 288.7, subd. (a).)

10) Provides that a person 18 years of age or older who engages in oral copulation or sexual penetration with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life. (Pen. Code, § 288.7, subd. (b).)

11) Provides that a person who commits an act of sexual penetration by foreign object or sodomy against a victim who is incapable of giving legal consent due to a mental disorder or developmental or physical disability shall be punished by imprisonment in the state prison for a period of three, six, or eight years. If both the defendant and victim are confined in the state hospital or a treatment facility of the mentally disordered, the offense is punishable by 16 months, two, or three years in state prison, or up to one year in the county jail. (Pen. Code, §§ 286, subds. (g) & (h), 289, subds. (b) & (c).)

12) Defines "sexual penetration" as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the

defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.

13) Provides that a person who commits an act of sexual penetration upon a child who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years. (Pen. Code, § 289, subd. (a)(1)(B).)

14) Provides that a person who commits an act of sexual penetration upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 6, 8, or 10 years. (Pen. Code, § 289, subd. (a)(1)(C).)

15) Provides an additional punishment of one year when the defendant knows or reasonably should know that the victim of an enumerated offense, including rape or sexual penetration accomplished by force, duress or threats, is 65 years of age or older, blind, deaf, developmentally disabled, a paraplegic, a quadriplegic, or under 14 years old. (Pen. Code, § 667.9, subd. (a).)

16) Provides an additional punishment of two years when the defendant knows or reasonably should know that the victim of an enumerated offense is 65 years of age or older, blind, deaf, developmentally disabled, a paraplegic, a quadriplegic, or under 14 years old, and where the defendant also has a prior conviction for one of those crimes. (Pen. Code, § 667.9, subd. (b).)

17) Defines "developmentally disabled" for purposes of the vulnerable victim enhancement as "a severe, chronic disability of a person, which is all of the following:

    a) Attributable to a mental or physical impairment or a combination of mental and physical impairments;

    b) Likely to continue indefinitely; and,

    c) Results in substantial functional limitation in three or more of the following areas of life activity:

        i) Self-care;

        ii) Receptive and expressive language;

        iii) Learning;

        iv) Mobility;

        v) Self-direction;

vi) Capacity for independent living; or,

vii) Economic self-sufficiency." (Pen. Code, § 667.9, subd. (d).)

18) Provides that a person who commits an enumerated offense, including rape or sexual penetration accomplished by force, duress or threats, upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child. (Pen. Code, § 269, subd. (a).)

19) Makes aggravated sexual assault of a child punishable by imprisonment in the state prison for 15 years to life and requires the court to impose a consecutive sentence for each offense that results in a conviction under this provision if the crimes involve separate victims or involve the same victim on separate occasions. (Pen. Code, § 269, subds. (b) & (c).)

20) Provides that a person who commits any lewd or lascivious act upon or with the body of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 288, subd. (a).)

21) Defines lewd and lascivious acts upon a child under the age of 14 years as a serious and violent felony subject to increased penalties, including under the Three Strikes Law. (Pen. Code, §§ 667.5, subd. (c)(6), 1192.7, subd. (c)(6).)

22) Provides that a person who commits a lewd or lascivious act, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. (Pen. Code, § 288, subd. (c)(1).)

23) Defines "developmental disability" to mean a disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. The term includes intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "Ensuring the rights of our most vulnerable is a bipartisan issue. This bill isn't being pushed to promote one ideological agenda on crime or another. It's being introduced to solve a problem that is disproportionately affecting disabled children. AB 808 is compassionate. It is the type of law government was formed to pass. Those who sincerely care about equity and protecting the marginalized will recognize that[.]"

2) **Current Penalties:** An act of sexual intercourse committed with a mentally disordered, developmentally disabled, or physically disabled person who is unable to give legal consent is rape and punishable by up to eight years in prison. (Pen. Code, §§ 261, subd. (a)(1); 264,

subd. (a).) The penalties are increased where any victim of rape is a minor and the act was accomplished by force, duress or threats. If the minor victim was under 14 years of age, the offense is punishable by 9, 11, or 13 years in state prison. If the minor victim was 14 years of age or older, the offense is punishable by 7, 9, or 11 years in state prison. (Pen. Code, § 264, subd. (c).)

Moreover under current law, it is always illegal to have sexual intercourse with a person under 18 years of age who is not your spouse. (Pen. Code, § 261.5, subd. (a).) The law deems minors incapable of giving legal consent to have sex. Depending on the circumstances, the act may be charged as a felony or a misdemeanor. Age difference is a significant factor regarding penalties. For example, if the defendant is 21 years of age or older, and the minor is under the age of 16, the penalty is a term of up to four years. (Pen. Code, § 261.5, subd. (d).) If the person 18 years of age or older and the minor is 10 years of age or younger, the punishment is 25-years-to-life in state prison. (Pen. Code, § 288.7, subd. (a).)

Lewd or lascivious acts upon a child under 14 years of age is punishable by three, six, or eight years in prison. (Pen. Code, § 261.5, subd. (a).) If the child is 14 or 15 years of age, and the perpetrator is at least 10 years older, the act is punishable by a term up to three years. (Pen. Code, § 261.5, subd. (a).)

This bill would make the rape of a developmentally disabled person punishable by the same prison sentences that apply to rape of minor that is accomplished by force, duress or threats. Where the victim is under 14 years of age, the punishment would be 9, 11, or 13 years in state prison. Where the victim is 14 years of age or older, the punishment would be 7, 9, or 11 years in state prison. These increased penalties would apply irrespective of whether the perpetrator themselves was a minor, including a minor with developmental disabilities themselves.

As a practical matter, as introduced this bill was directed at minor victims. As amended, the increased penalties in this bill would now also apply to adult victims with a developmental disability. Importantly, an act of sexual intercourse with a developmentally disabled adult falls under the rape statute and is punishable by up to eight years in prison, where the developmentally disabled person cannot give legal consent. The inability to legally consent due to a developmental disability is what makes the sexual act rape and, in particular, in the case of an adult victim. (A minor can never legally consent to sexual acts). The enhanced penalty under this bill would apply to an adult victim. Yet there are no distinguishing circumstances that would trigger the enhanced punishment where the victim is an adult.

3) **Increased Penalties and Lack of Deterrent Effect:** 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.) Rather than penalty increases, the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. (*Ibid.*)

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.)

4) **Background**: In 2010, Disability Rights California (DRC) "issued an advisory to every law enforcement agency in the state, reminding them about the increased risk of sexual assault for individuals with disabilities and challenging the bias that people with developmental disabilities and cognitive impairments are not reliable reporters of abuse. DRC called for law enforcement agencies to follow Commission on Peace Officer Standards and Training (POST) guidelines for sexual assault investigations. Children with disabilities, in particular, are three times more likely to be victims of sexual abuse than children without them." (https://www.disabilityrightsca.org/post/sexual-assault-awareness-month.) DRC has pushed for reforms ensuring that assaults are promptly reported and investigated. (*Ibid.*)

According to a study in the Journal of Law and Human Behavior, "Children and adolescents with intellectual disabilities are especially likely to be sexually abused. Even so, their claims are not likely to be heard in court, possibly because people assume that jurors will not believe them." (https://link.springer.com/article/10.1023/A:1022551314668.)

According to the California Coalition against Sexual Assault (CALCASA), "Research has shown that programs that address the root causes of sexual violence, by modifying risk factors and/or enhancing protective factors, can prevent sexual violence perpetration (DeGue et al., 2014)."(https://www.calcasa.org/wp-content/uploads/2018/02/CALCASA_CCofSV_FINALSpreads_2018.pdf at p. 3.) "Prevention programs would lead to substantial cost savings: every prevented rape of an adult could save up to $163,800, and every prevented rape or sexual assault of a child could save up to $227,700. Preventing future incidents of sexual violence, while maintaining and improving services, would reduce costs to victims, governments and society. (*Ibid.*)

This bill is not directed at ensuring these assaults are promptly reported and investigated nor is it directed at prevention programs. Rather, it would increase the penalty for rape of a developmentally disabled person.

5) **Argument in Support**: According to the *California District Attorneys Association*, "Minors are already vulnerable to sexual predators because of their age. That vulnerability is compounded when a child suffers from a mental disorder, a developmental disability, or a physical disability. AB 808 will hold child rapists properly accountable for their crimes."

6) **Argument in Opposition**: According to the *California Public Defenders Association*, "AB 808 is confusing and unnecessary. The bill takes a law, Penal Code section 261(a)(1), that is intended to protect adults who are unable to consent to sexual intercourse due to a mental/physical disorder or developmental disability and extends it to minors. This is problematic for two reasons. Case law about whether a particular adult's disability rises to the level of the inability to consent to sexual intercourse has been a fact specific inquiry on a case by case basis. (Capacity to Consent to Sexual Activity Among those with Developmental Disabilities, Stanford Intellectual and Developmental Disabilities Law and Policy Project available online at https://law.stanford.edu/publications/capacity-to-consent-

to-sexual-activity-among-those-with-developmental-disabilities/ ) Contrast, existing law already prohibits sexual intercourse with a minor, regardless of whether or not the minor consented. A minor can never "consent" to sexual intercourse with an adult; it is always illegal. Children are already protected from sexual intercourse and consent is never an issue.

"Further, the law already has harsh penalties for anyone who has sexual intercourse with a minor, particularly a younger minor. For instance, the penalty for sexual intercourse with a minor who is 10 years or younger is already 25 years to life much more than the 9, 11 or 13 years proposed by AB 808. Any sexual contact with a child under 14 years old, including touching with a lewd or lascivious intent, is already punishable by 3, 6, or 8 years."

7) **Prior Legislation**:

a) AB 1335 (Maienschein), of the 2013-2014 legislative session, would have made specified sex crimes committed against developmentally disabled victims, as defined, qualifying crimes under the One Strike life-term sentencing scheme and the vulnerable victim sentence enhancement, as specified. AB 1335 was held in the Senate Appropriations Committee.

b) SB 922 (Knight), of the 2013-2014 legislative session, would have provided that a sex crime against a mentally disordered, developmentally disabled, or physically disabled person by force, duress or threats shall be punished by the same prison sentences that apply to sex crimes accomplished by force, duress or threats against a child under the age of 14. SB 922 was not heard in this committee at the author's request.

c) AB 1844 (Fletcher), Chapter 219, Statutes of 2010, enacted "Chelsea's Law", which increased the punishment for rape, sodomy, oral copulation, or sexual penetration upon a child who is under 14 years of age to imprisonment in state prison for 9, 11, or 13 years, and if committed upon a minor who is 14 years of age or older, to imprisonment in state prison for 7, 9, or 11 years.

d) AB 313 (Zettel), Chapter 569, Statutes of 1999, added deaf and developmentally disabled persons as qualifying victims to the existing enhancement statute for serious crimes committed against the elderly, children under age 14, and persons who are either blind, a paraplegic, or quadriplegic.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Arcadia Police Officers' Association
Association of Regional Center Agencies
Burbank Police Officers' Association
California Coalition of School Safety Professionals
California District Attorneys Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association

Crime Victims Alliance
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Officers Association
Newport Beach Police 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
Upland Police Officers Association

**Opposition**

California Public Defenders Association (CPDA)
San Francisco Public Defender
Sister Warriors Freedom Coalition

**Analysis Prepared by**: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Mureed Rasool

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 851 (McCarty) – As Amended March 9, 2023

**PULLED BY AUTHOR**

**Analysis Prepared by**: Mureed Rasool / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Mureed Rasool

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 856 (Stephanie Nguyen) – As Amended March 9, 2023

**SUMMARY**: Creates the Statewide Active Shooter and Student Rescue Training Facility, which will be developed and administered by the Sacramento County Sheriff's Department to train law enforcement, first responders, school educators, and other personnel on active school shooter situations. Specifically, **this bill**:

1) Establishes the Statewide Active Shooter and Student Rescue Training Facility for the purposes of training law enforcement agencies, emergency medical and fire personnel, school educators, and other personnel across the state for preparedness in active school shooter situations.

2) States that the training facility for the active shooter program will be located at the Sacramento County Sheriff Department's (SCSD) shooting range in Elk Grove, California.

3) Provides that training at the facility will be conducted by law enforcement officers employed or under contract with the SCSD and other experts that have a memorandum of understanding with the SCSD.

4) Requires that the training facility provide simulations for neutralizing active shooters and rescuing individuals located on campus grounds.

5) Provides that the training be consist with SCSD policies and training standards developed by the California Commission on Peace Officer Standards and Training (POST).

6) States that training may be provided on:

   a) Less than lethal force application;

   b) Critical incident communication and negotiations;

   c) Intelligence-gathering equipment such as drones;

   d) Emergency medical response and care;

   e) School staff awareness and policy for lockdowns and escape plans; and,

   f) Live scenario training and classroom instruction.

7) Mandates that the training facility also be used for purposes of human trafficking-related incidents and provide simulation training on rescuing victims of human trafficking.

**EXISTING LAW**:

1) Establishes POST and requires POST to set minimum standards for the recruitment and training of peace officers, develop training courses and curriculum, and establish a professional certificate program that awards different levels of certification based on training, education, experience, and other specified criteria. (Pen. Code, §§ 13500 *et seq.*)

2) Requires POST, when establishing standards for training, to permit the training to be obtained at institutions approved by POST. (Pen. Code, § 13511.)

3) Requires POST to consult with the Department of Justice and other knowledgeable individuals about active shooter incidences and develop a training that addresses current theory, terminology, historical issues, and procedures necessary to appropriately respond to and effectively mitigate the effects of such incidences. (Pen. Code, § 13519.12, subds. (a) & (e).)

4) Requires POST to develop guidelines for law enforcement response to human trafficking in consultation with appropriate experts. The guidelines must stress the dynamics and manifestations of human trafficking, identifying and communicating with victims, and protection of the victim, among other things. (Pen. Code, § 13519.14.)

5) States that POST administers the Course Certification Program to provide needed and quality training to law enforcement personnel and that references to a course being "POST-certified" means that POST has approved presentation of the course in accordance with specified POST regulations. (11 C.C.R. § 1051.)

6) Outlines the minimum training standards for instructors of POST-certified specialized training. (11 C.C.R., § 1070.)

7) Requires school safety plans to include procedures for conducting tactical responses to criminal incidents such as active shooters, among other things. (Ed. Code, § 32282.)

8) Creates the Peace Officers' Training Fund, renames it the State Penalty Fund, and states that any city, county, or other district desiring to receive state aid from the fund must apply to the commission for aid. (Pen. Code, §§ 13520, 13522.)

9) States that POST may not allocate monies from the State Penalty Fund to any city, county, or other jurisdiction that is not adhering to the standards established by POST. (Pen. Code, § 13523.)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "AB 856 will create a first of its kind statewide active shooter and student rescue training facility regionally located in Sacramento County. The location is important as it is centrally located in the middle of the state and is easily accessible. The facility would serve as a training center for Sheriff's Departments,

Municipal Police Departments, School Law Enforcement Agencies (LEA'S), Statewide LEA'S, Municipal Emergency Medical and Fire Personnel, school educators/personnel from across the state to prepare and train for active shooter situations at school facilities.

"The training facility would provide simulations for neutralizing active shooters, rescuing students, personnel and extraction of students in all k-12 schools, higher education sites and facilities used for educational related events. At this facility, training would be provided on:

- Less lethal force application
- Communications and Critical Incident Negotiations
- Intelligence gathering equipment such as indoor drones
- Emergency medical response and care
- School staff awareness and policy/procedures for lockdowns, escape plans for student and other staff safety
- Live scenario training as well as classroom instruction

"Furthermore, the training facility would have a secondary component and would serve as a training facility for the purposes of human trafficking related incidents and would provide simulation training to LEA's on the Rescue and extraction of victims of human trafficking from structures used to illegally house and transport victims of human trafficking."

2) **Active Shooter Training**: Active shooter situations have been on the rise nationwide. According to a 2017 California State Auditor (State Auditor) Report, which examined FBI data between 2000 and 2015, school campuses have been the second most common location for active shooter incidences to occur. (State Auditor. *School Violence Prevention*. (Aug. 2017) <https://www.auditor.ca.gov/pdfs/reports/2016-136.pdf> [as of Apr. 3, 2023] at p. 1.) Currently, California is the state with the most school shootings having at least one victim injury or death since 2012. (U.S. News. *States With the Most School Shootings*. (Mar. 31, 2023) <https://www.usnews.com/news/best-states/articles/2022-05-27/states-with-the-most-school-shootings> [as of Apr. 6, 2023].)

Indeed, the most recent active shooter incident garnering national headlines occurred at The Covenant School in Nashville, where an assailant murdered three children and three school employees before officers gunned the assailant down. (Associated Press. *Nashville police: School shooter planned attack for months*. <https://apnews.com/article/nashville-school-shooting-covenant-5233141e86bd91f1289a1989c3e54bfd> [as of Apr. 3, 2023].) The active shooter training received by officers in Nashville, and the outcome in comparison with that in Uvalde, highlighted to many the importance of such training, although others have pointed out potential key situational differences that may have altered the results. (N.Y. Times. *How Nashville Prepared for the Day it Never Wanted to Face*. (Apr. 2, 2023) <https://www.nytimes.com/2023/04/02/us/nashville-uvalde-shooting-preparation.html> [as of Apr. 3, 2023]; N.Y. Times. *The Nashville shooting response draws comparisons to Uvalde, but there are key differences.* (Mar. 28, 2023) <https://www.nytimes.com/2023/03/28/us/nashville-uvalde-school-shooting-response.html> [as of Apr. 3, 2023].) In Uvalde, only 20% of the deputies at the Uvalde County Sheriff's Office had received any active-shooter training at all. (ABC News. *Uvalde county report reveals lack of active shooter training within sheriff's department*. (Dec. 12, 2022) <https://abcnews.go.com/US/uvalde-county-report-reveals-lack-active-shooter-training/story?id=95095874> [as of Apr. 6, 2023].) In Nashville, the city held repeated

trainings for rank-and-file officers and senior staff members, and some of the active training sessions actually took place in a local middle school building. (N.Y. Times. *How Nashville Prepared for the Day It Never Wanted to Face.* (Updated Apr. 4, 2023) <https://www.nytimes.com/2023/04/02/us/nashville-uvalde-shooting-preparation.html> [as of Apr. 6, 2023].)

In California, AB 1598 (Rodriguez), Chapter 668, Statutes of 2014, among other things, required POST to establish training standards and develop a course of instruction relating to active shooter incidences. According to information provided by POST, there are currently 16 courses that are either active shooter centric or cover active shooter situations as a component. Since 2020, 56 agencies or organizations have completed over 1,300 presentations that cover active shooter situations. The California Highway Patrol (CHP) has conducted the highest number of such presentations, followed by San Jose PD and the State Threat Assessment Center.

This bill, among other things, would require that an active shooter course be established specifically within a SCSD range facility, and be run by the SCSD in accordance with POST and SCSD standards. While the author says Sacramento is centrally located, what differentiates this facility from the CHP Academy? Moreover, would it be a better idea to explore the feasibility of conducting trainings at local schools? As mentioned above, at least some of the training conducted in Nashville occurred in a middle school building. Although part of this bill states that any training must be in accordance with POST standards, another part states that it must also be in accordance with SCSD standards. If a POST training standard did not cover a certain aspect of an active shooter situation, would SCSD be authorized to fill in the blank with any policy they deem fit?

Moreover, is there some aspect of the current process that is currently deficient? As mentioned above, POST already certifies active shooter trainings, and there is already an outlined process as to how such trainings get certified. Furthermore, POST has issued regulations that require a POST-certified course to be recertified at specified biennial intervals. (11 C.C.R § 1056.) This bill would not require the SCSD course to be certified at all, which, unlike certified trainings, would leave open who decides whether or not SCSD is complying with POST training standards. This bill specifically states that training could be provided on less than lethal force application, intelligence-gathering equipment such as drones, live scenario training, and classroom instruction. Would this lead to a state-created program without a state body overseeing it? To be sure, an agency could create noncertified training on their own that deals with active shooter incidences, however, this leads back to questions regarding the necessity of this bill.

Lastly, this bill would require that the training facility also serve as a training facility for human trafficking-related incidents and training on the rescue and extraction of human trafficking victims from structures used to illegally house them. This portion of the bill seemingly faces the same questions posed above.

3) **Argument in Support**: According to the *Sacramento County Sheriff's Office*, "Like many of these incidents, the Uvalde shooting demonstrated many failures that, if corrected, could save lives. The shortcomings in response to that incident show that 1) better training for law enforcement, fire, emergency medical services (EMS), and school staff is needed, 2) a coordinated response to these events is critical, and 3) mistakes continue to be made at a

response level from management decisions to operations on the ground.

"The crisis of school shootings is not decreasing; it is increasing. 2022 was the deadliest year, recording 51 school-related shootings, a 69% increase. In almost all of these incidents, there were things that law enforcement, fire, EMS, and educators could have done better. Many of which would have saved the lives of students and staff.

"The crime of human trafficking has become a growing national concern and is on a steep rise. Two thousand one hundred ninety-eight persons were referred to U.S. Attorneys for human trafficking offenses in the fiscal year 2020, a 62% increase from 2011. The number of person prosecuted for human trafficking increased from 729 in 2011 to 1,343 in 2020, an 84% increase. California consistently has the highest human trafficking rates in the United States, with 1,507 cases reported in 2019. Most of the sex trafficking victims in California are held in facilities that operate illicit massage and spa businesses and hotels or motels.

"Crimes of mass school shootings and human trafficking are two of the top issues facing law enforcement today. This is why a state-of-the-art regional training center that co-trains law enforcement, fire, EMS, and educators are critical.

"The funding for this project will be used to construct a regional training facility. The primary focus will be active school shooters, including a human trafficking rescue. It will be a one-of-a-kind facility not replicated anywhere in the region or State.

"The facility will provide simulations for neutralizing active shooters and extracting and rescuing students and staff during these events. To include less-than-lethal force application; communication and critical incident negotiations; Intelligence gathering operations; emergency medical response and care; school staff awareness and policy and procedures for lockdowns and escape plans for student and staff safety; live scenario and classroom instruction, and; human trafficking operations to include victim extraction and care. The facility will include life like strategies and classroom instruction in which law enforcement, fire, EMS, and educators can coordinate an effective training response and rescue plan."

4) **Argument in Opposition**: None received.

5) **Related Legislation**: SB 553 (Cortese), would require employers to, among other things, include in their workplace violence prevention plans a response strategy for active shooter situations. SB 553 is set to be heard in the Senate Committee on Labor, Public Employment, and Retirement on April 12.

6) **Prior Legislation**:

   a) AB 1888 (Flora), of the 2021-2022 Legislative Session, would have required the City of Fresno and the Fresno Unified School District to collaborate with the California College and University Police Chiefs Association to establish an active shooter and mass emergency coordinated response program for local education agencies, as outlined. AB 1888 was never heard in the Assembly Education Committee.

   b) AB 229 (Holden), Chapter 697, Statutes of 2021, required certain private investigators, security guards, and other specified individuals to undergo training, that among other

things, covers active shooter situations.

c) AB 1499 (Flora), of the 2019-2020 Legislative Session, would have required a grant program to be administered by the Office of Emergency Services for a pilot program establishing radio and media interoperability between schools and local fire agencies. AB 1499 was held in the Assembly Appropriations Committee.

d) AB 3168 (Quirk-Silva), of the 2019-2020 Legislative Session, would have required school safety plans to include, among other things, active shooter plans, active shooter drills, and required notice to be given to guardians of pupils informing them of such active shooter safety activities. AB 3168 was held in the Assembly Education Committee.

e) AB 1747 (Rodriguez), Chapter 806, Statutes of 2018, required comprehensive school safety plans to include procedures for conducting tactical responses to active shooters.

f) AB 767 (Santiago), Chapter 83, Statutes of 2015, required community colleges to consider developing a response plan for active shooters on campus.

g) AB 1598 (Rodriguez), Chapter 668, Statutes of 2014, among other things, required POST to establish training standards and develop a course of instruction on active shooter incidences.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Sacramento County Sheriff Jim Cooper

**Opposition**

None.

**Analysis Prepared by**: Mureed Rasool / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 945 (Reyes) – As Amended March 16, 2023

**SUMMARY**: Requires courts to report specified data to the Department of Justice (DOJ) regarding petitions for expungement relief filed on the basis of having successfully participated as an incarcerated fire camp member or at an institutional firehouse. Specifically, **this bill**:

1) Provides that on or before May 1, 2024, and on or before May 1 of every other year thereafter, each superior court shall report the following information to the DOJ regarding petitions filed for expungement relief on the basis of having successfully participated in the California Conservation Camp program, or a county incarcerated individual hand crew, or an institutional firehouse:

    a) The number of petitions filed requesting relief;

    b) The date a petition was filed;

    c) The date a decision was issued for the petition;

    d) The number of petitions granted;

    e) The number of petitions denied;

    f) The number of pending petitions at the time of the report to the DOJ; and,

    g) Whether the petition was filed by a public defender's office, defense counsel, nonprofit organization, or a self-represented defendant.

2) Requires that on or before June 1, 2024, and on or before June 1 of every other year thereafter, the DOJ shall compile the data received from each superior court and submit a report to the Legislature containing the statewide data for each of the categories of information requested.

**EXISTING LAW**:

1) Provides that the following defendants, after having been released from custody, are eligible to petition for expungement relief:

    a) A defendant who successfully participated in the California Conservation Camp program as an incarcerated individual hand crew member, as determined by the Secretary of the Department of Corrections and Rehabilitation (CDCR);

b) A defendant who successfully participated as a member of a county incarcerated individual hand crew, as determined by the appropriate county authority; or,

c) A defendant who participated at an institutional firehouse, as determined by the Secretary of CDCR. (Pen. Code, § 1203.4b, subd. (a)(1).)

2) Makes incarcerated individuals who have been convicted of any of the following crimes ineligible for expungement relief:

a) Murder;

b) Kidnapping.

c) Rape by force or threats of retaliation;

d) Lewd acts on a child under 14 years of age;

e) Any felony punishable by death or imprisonment in the state prison for life;

f) Any sex offense requiring registration;

g) Escape from a secure perimeter within the previous 10 years; or

h) Arson. (Pen. Code, § 1203.4b, subd. (a)(1).)

3) Provides that any denial of relief pursuant to this section shall be without prejudice. (Pen. Code, § 1203.4b, subd. (a)(2).)

4) States that successful participation in a conservation camp program or a program at an institutional firehouse and successful participation as a member of a county incarcerated individual hand crew, as determined by the appropriate county authority, means the incarcerated individual adequately performed their duties without any conduct that warranted removal from the program. (Pen. Code, § 1203.4b, subd. (a)(3).)

5) Provides that the defendant may file a petition for relief with the court in the county where the defendant was sentenced. The court shall provide a copy of the petition to the secretary, or, in the case of a county incarcerated individual hand crew member, the appropriate county authority. (Pen. Code, § 1203.4b, subd. (b)(1).)

6) States that if the secretary or appropriate county authority certifies to the court that the formerly incarcerated individual successfully participated in the conservation camp program, or institutional firehouse, or successfully participated as a member of a county incarcerated individual hand crew, as determined by the appropriate county authority, as specified, and has been released from custody, the court, in its discretion and in the interests of justice, may issue an order for relief, as specified. (Pen. Code, § 1203.4b, subd. (b)(2).)

7) Provides that to be eligible for relief, the defendant is not required to complete the term of their probation, parole, or supervised release. Notwithstanding any other law, the court, in providing relief, shall order early termination of probation, parole, or supervised release if the

court determines that the defendant has not violated any terms or conditions of probation, parole, or supervised release prior to, and during the pendency of, the petition for relief. (Pen. Code, § 1203.4b, subd. (b)(3).)

8) Provides that all convictions for which the defendant is serving a sentence at the time the defendant successfully participates in a program are subject to relief. (Pen. Code, § 1203.4b, subd. (b)(4).)

9) States that a defendant who is granted an order of relief shall not be required to disclose the conviction on an application for licensure by any state or local agency. Specifies this does not apply to an application for licensure by the Commission on Teacher Credentialing, a position as a peace officer, public office, or for contracting with the California State Lottery Commission. (Pen. Code, § 1203.4b, subd. (b)(5).)

10) Provides that if the requirements of this provision are met, the court, in its discretion and in the interest of justice, may permit the defendant to withdraw the plea of guilty or plea of nolo contendere and enter a plea of not guilty, or, if the defendant has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty, and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which the defendant has been convicted, except revocation or suspension of the privilege to drive a vehicle. (Pen. Code, § 1203.4b, subd. (c)(1).)

11) Prohibits relief if the defendant is currently charged with the commission of any other offense. (Pen. Code, § 1203.4b, subd. (c)(2).)

12) Allows the defendant to make the application and change of plea in person or by attorney. (Pen. Code, § 1203.4b, subd. (c)(3).)

13) Provides that relief granted is subject to the following conditions:

    a) In any subsequent prosecution for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if it had not been dismissed;

    b) That the order does not relieve the defendant of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for licensure by the Commission on Teacher Credentialing, a peace officer, public office, or for contracting with the California State Lottery Commission;

    c) That dismissal does not permit a person to own, possess, or have in the person's custody or control any firearm or prevent their conviction for being a prohibited person in possession of a firearm;

    d) That dismissal does not permit a person prohibited from holding public office as a result of that conviction to hold public office; and,

    e) That dismissal does not release the defendant from the terms and conditions of any unexpired criminal protective order that has been issued by the court, as specified. These protective orders shall remain in full effect until expiration or until any further order by

the court modifying or terminating the order, despite the dismissal of the underlying accusation or information. (Pen. Code, § 1203.4b, subd. (d).)

14) Prohibits granting relief unless the prosecuting attorney has been given 15 days' notice of the petition for relief. (Pen. Code, § 1203.4b, subd. (e)(1).)

15) Presumes that the prosecuting attorney has received notice if proof of service is filed with the court. (Pen. Code, § 1203.4b, subd. (e)(2).)

16) States that if, after receiving notice, the prosecuting attorney fails to appear and object to a petition for dismissal, the prosecuting attorney may not move to set aside or otherwise appeal the grant of that petition. (Pen. Code, § 1203.4b, subd. (e)(2).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Author's Statement**: According to the author, "AB 945 will require a report be submitted to the legislature detailing the rate of expungements granted to individuals who successfully participated in the California Conservation Camp program as an incarcerated hand crew member. In 2020, AB 2147 was signed into law to provide individuals with the opportunity to apply for an expungement once they were released from custody and had participated in the Conservation Camp Program. AB 2147 was a step in the right direction in providing individuals with a pathway towards rehabilitation and integration. Since its passage, the opportunity for meaningful employment has been granted, now it is time to review the data of the rate of the expungements granted. AB 945 will require the collection of data and help ensure that there is appropriate follow-through on the effectiveness of previous legislation."

2) **Expungement Relief for Successful Participation as a Member of an Incarcerated Fire Camp or at an Institutional Firehouse**: Under Penal Code section 1203.4b, a person who successfully participated in a fire camp or at an institutionalized firehouse is eligible to petition the court for expungement upon release from incarceration. Penal Code section 1203.4b excludes people convicted of: murder; kidnapping; rape by force or threats; lewd acts on a child under 14 years of age; any felony punishable by death or imprisonment in the state prison for life; any sex offense requiring registration; escape from a secure perimeter within the previous 10 years; and arson. Any of these convictions disqualifies a person from participating in a fire camp. The Secretary of CDCR or the appropriate county agency is responsible for certifying to the court that the petitioner has successfully participated in such a program. It is within the court's discretion and in the interests of justice to grant the petition. If the petitioner is still subject to some form of supervised release, and if the court determines that the defendant has not violated any terms of probation, parole or supervised release prior to, and during the pendency of, the petition for expungement, the court shall order early termination of supervision. Expungement relief pursuant to this section has the same limitations that exist in other expungement sections: (1) the conviction may be used in a subsequent prosecution to prove a prior conviction; (2) the conviction must be disclosed in an application for a peace officer, public officer, licensure by the Commission on Teacher Credentialing, or contracting with the California State Lottery Commission; (3) firearm prohibitions remain; (4) does not permit holding public office if the conviction would otherwise prohibit it; and does not relieve the person of the terms and conditions of specified

unexpired criminal protective orders.

The benefits of expungement and its impacts on public safety have been studied and evaluated. One study, in particular, found that people who get their records expunged tend to have lower recidivism rates than the general population. (Prescott and Starr, *The Case for Expunging Criminal Records: A new study shows the benefits of giving people a clean slate*, New York Times (Mar. 20, 2019); Prescott et al. *Expungement of Criminal Convictions: An Empirical Study* (2019) Harv. L. Rev. 133 < https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html.>)

This bill would require courts to report specified data regarding petitions for expungement relief for incarcerated firefighters to the DOJ. The DOJ would, in turn, be required to provide a report to the Legislature to facilitate evaluating the implementation of this relief.

3) **Argument in Support**: According to the *Anti-Recidivism Coalition*, "The California Conservation Camp Program was initiated by the California Department of Corrections and Rehabilitation (CDCR) to provide incarcerated individuals the opportunity to work on meaningful projects throughout the state. These projects include clearing fire breaks, restoring historical structures, maintaining parks, sand bagging and flood protection, reforestation and clearing fallen trees and debris.

"However, despite their time providing critical services to the state of California, many who participated struggled to find permanent and stable employment once released from custody. This was in part due to the significant barriers in place for individuals with prior convictions.

"In response, AB 2147 (Reyes, 2020) was introduced and signed into law which allowed an individual who successfully participated as an incarcerated hand crew member under the California Conservation Camp Program to apply for an expungement upon release from custody. AB 2147 set a pathway for many individuals who served our state as hand crew members to seek meaningful employment, reintegration, and true rehabilitation.

"ARC is a partner in the Ventura Training Camp (VTC), which trains and develops participants for careers in firefighting, providing emergency response, and resource conservation while enhancing rehabilitative efforts in the State of California. ARC has helped 53 of our participants apply and at least 14 members have been granted expungement under AB 2147. With roughly 35 people still awaiting decisions, we have seen a broad range of interpretations to the law.

"Two years since this this landmark piece of legislation, the rate of expungements granted to these individuals is unclear. Without this information, the Legislature cannot determine the effectiveness of the intent of AB 2147 or the opportunities being provided to our previously incarcerated hand crew members.

"AB 2147 was a step in the right direction in providing individuals with a pathway towards rehabilitation and integration. Since its passage, the opportunity for meaningful employment has been granted, now it is time to review the data of the rate of the expungements granted. AB 945 will require the collection of data and help ensure that there is appropriate follow-through on the effectiveness of previous legislation."

4) **Argument in Opposition**: None on file.

5) **Related Legislation**: AB 1746 (Hoover), provides that a person convicted of specific child endangerment or abuse crimes resulting in death of the child ineligible to earn enhanced credits for participation as an inmate firefighter or after completing inmate firefighting training. AB 1746 is pending hearing in this committee today.

6) **Prior Legislation**:

   a) AB 160 (Budget Committee), Chapter 771, Statutes of 2022, clarified that incarcerated individuals who successfully participate in an institutional firehouse program may petition to have their pleading dismissed, consistent with existing policy for incarcerated individuals who participate as hand crew members in conservation camps.

   b) AB 1281 (B. Rubio), Chapter 209, Statutes of 2021, provided that expungement of a criminal conviction does not release the defendant from specified, unexpired criminal protective orders issued by the court in the underlying case.

   c) AB 2147 (Reyes), Chapter 60, Statutes of 2020, allowed a defendant who successfully participated in the California Conservation Camp Program (Fire Camp) or a county inmate hand crew to petition for a dismissal of their conviction.

   d) AB 2808 (Cervantes), of the 2019 - 2020 Legislative Session, would have provided that expungement of a criminal conviction does not release the defendant from any unexpired criminal protective order. AB 2808 was not heard in the Senate Public Safety Committee.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Anti Recidivism Coalition

**Opposition**

None on file

**Analysis Prepared by**: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: April 11, 2023
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1090 (Jones-Sawyer) – As Amended April 4, 2023

**As Proposed to Be Amended In Committee**

**SUMMARY**: Authorizes the board of supervisors of a county to remove a sheriff from office for cause. Specifically, **this bill**:

1) Provides that the board of supervisors may remove a sheriff from office for cause, by a four-fifths vote, after both of the following have occurred:
   a) The sheriff is served with a written statement of the alleged grounds for removal; and,
   b) The sheriff is provided a reasonable opportunity to be heard regarding an explanation or defense at a removal proceeding.
2) Defines "cause" as:
   a) Violation of any law related to the performance of a sheriff's duties;
   b) Flagrant or repeated neglect of a sheriff's duties;
   c) Misappropriation of public funds or properties committed by a sheriff or their direct reports in the course and scope of their duties;
   d) Willful falsification of a relevant official statement or document committed by a sheriff in the course and scope of their duties; or,
   e) Obstruction of an investigation into the sheriff or a sheriff's department.
3) States that the board of supervisors may establish procedures for a removal proceeding held pursuant to these provisions.
4) Provides that these provisions shall not be applied in a manner that interferes with the constitutional functions of a sheriff.

**EXISTING LAW**:

1) Requires the Legislature to provide for county powers, elected sheriffs, district attorneys, assessors, and the governing bodies in each county. (Cal. Const., art. XI, § 1, subd. (b).)
2) Provides that the Legislature may provide for the recall of local officers, including sheriffs. (Cal. Const., art II, § 19.)

3) Requires charters of charter counties to provide for the appointment, compensation, terms and removal of elected sheriffs. (Cal. Const., art. IX, § 4.)

4) Provides that a sheriff is an officer of a county. (Gov. Code, § 24000.)

5) States that the county officers to be elected by the people include the sheriff, among others. (Gov. Code, § 24009, subd. (a).)

6) Provides that elected county officers shall hold their office until their successors are elected or appointed and qualified. (Gov. Code, § 24201.)

7) Sets forth the duties of sheriffs. (Gov. Code, §§ 26600 et seq; Pen. Code, §§ 4000 et seq.)

8) Requires each county to have a board of supervisors consisting of five members. (Gov. Code, § 25000.)

9) Requires each county board of supervisors to publish notices of proceedings to the public and requires that all meetings of a legislative body, including county board of supervisors, be open and public, pursuant to the Ralph M. Brown Act, as specified. (Gov. Code, §§ 25150, 25151, & 54950 et seq.)

10) Authorizes county boards of supervisors to do and perform all acts and things required by law to the full discharge of the duties of the legislative authority of the county government. (Gov. Code, § 25207.)

11) Provides that the board of supervisors shall supervise the official conduct of all county officers, particularly insofar as the functions and duties of such county officers relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties. (Gov. Code, § 25303.)

12) States that the board of supervisors shall not obstruct the investigative function of the sheriff. (Gov. Code, § 25303.)

13) Allows counties to create a sheriff oversight board, comprised of civilians to assist the board of supervisors with its duties that relate to the sheriff. (Gov. Code, § 25303.7.)

14) Allows counties to establish an office of the inspector general, appointed by the boards of supervisors, to assist the board of supervisors with its duties that relate to the sheriff. (Gov. Code, § 25303.7.)

15) Allows an accusation to be brought by a grand jury for the removal of any officer of a county, including a sheriff, for willful or corrupt misconduct in office. The trial shall be by a jury, and conducted in all respects in the same manner as the trial of an indictment. Upon a conviction the officer shall be defendant be removed from office. (Gov. Code, §§ 3060, et seq.)

**FISCAL EFFECT**: Unknown

**COMMENTS:**

1) **Author's Statement**: According to the author, "No government official should have unchecked power. Regardless of the office or role, public officials take an oath to support and respect the rights of their constituents and represent the common good. But when a Sheriff abuses their power, our tools for meaningful accountability are tragically far and few. As such, AB 1090 ensures government accountability by authorizing a county board of supervisors to remove a sheriff from office for cause."

2) **Removal Must Be For Cause**: This bill would provide that a board of supervisors may remove a sheriff from office *for cause*, by a four-fifths vote. Consequently, this bill would not allow a county board of supervisors to vote to remove a sheriff at their will, for any reason whatsoever.

   This bill would define "for cause" as a violation of any law related to the performance of a sheriff's duties, flagrant or repeated neglect of duties, misappropriation of public funds, willful falsification of a official statement or document, or, obstruction of a investigation into the conduct of a sheriff. This bill would further provide that authority to remove cannot be applied to interfere with the constitutionally designated function of a sheriff. Therefore, a sheriff could not be removed for performing law enforcement functions. In addition, Government Code section 25303 expressly bars the local governing body from obstructing the sheriff's investigative functions.

3) **Due Process Afforded to Sheriffs**: The due process right, established by the Fourteenth Amendment, guarantees that the government cannot take a person's basic rights to "life, liberty, or property, without due process of law." The right is designed to protect citizens from actions taken by state government, counties, towns, and cities. At a minimum, due process means that a citizen who will be affected by a government decision must be given advance notice and an opportunity to be heard. (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.)

   The provisions of this bill affords sheriff's such procedures prior to their removal. Specifically, a sheriff cannot be removed unless (1) the removal is for cause only; (2) there is a supermajority (four-fifths) vote by the county board of supervisors to remove the sheriff; (3) the sheriff is served with a written statement of the alleged grounds for removal; (4) the sheriff is provided a reasonable opportunity to be heard and present an explanation or defense at a removal proceeding; and, (5) the county supervisors may establish additional procedures for a the removal proceedings. In addition, under existing law, the public must be given notice, all meetings and meetings of the board of supervisors must generally be held in public and pursuant to the Ralph M. Brown Act. (Gov. Code, §§ 25150, 25151, & 54950 et seq.)

   Thus, it is likely that this bill comports with the requirements of due process in that sheriffs may only be removed from office after the board has provided reasonable notice, to both the officer and the general public, and only after the sheriff has had an opportunity to be heard.

4) **Similar Local Measures**: Relying on their powers as charter counties[1], Los Angeles and San Bernardino Counties have adopted local measures that would authorize them to remove an elected sheriff for cause. This bill would provide the statutory authority for all counties to remove their sheriff for cause. This bill would further set minimum guidelines across all county boards of supervisors for the sheriff's removal.

   a) **Los Angeles County - Measure A "Charter Amendment – Providing Authority to Remove an Elected Sheriff for Cause" (November 8, 2022)**: In the November 2022 Elections, Los Angeles County Measure A was on the ballot and was approved by 71.84% of the vote. (Los Angeles County Registrar-Recorder/County Clerk, *LA County Election Results* <https://results.lavote.gov/#year=2022&election=4300> [as of April 3, 2023].) Measure A amended the Los Angeles County Charter to authorize the Los Angeles County Board of Supervisors to remove the sheriff from office for cause, by a four-fifths vote. (*Ibid.*)

      This bill is substantially similar to Measure A.

   b) **San Bernardino County - Ordinance No. 3875 (2002)**: In 2002, the San Bernardino County Board of Supervisors adopted Ordinance No. 3875, (involving the removal of county officers, including the sheriff. (San Bernardino County Code § 13.0404.) The ordinance provides, in part, that removal for cause may be accomplished by a four-fifths vote of the board: "Any County officer other than supervisor may be removed from office in the manner provided by law; also any such officer may be removed by a four-fifths vote of the Board of Supervisors, for cause, after first serving upon such officer a written statement of alleged grounds for such removal, and giving him a reasonable opportunity to be heard in the way of explanation or defense." (*Ibid.*) The ordinance also clarified that it could "not be applied to interfere with the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and the district attorney." (*Ibid.*)

      In response to the ordinance, the San Bernardino District Attorney sought an opinion from the California Attorney General, of whether a county may "grant the board of supervisors the authority to remove for cause by a four-fifths vote the sheriff [...] upon due notice and opportunity to be heard." (84 Ops.Cal.Atty.Gen. 88 (2001).) In response, the Attorney General found "that the removal of county officers is a subject that may be contained in a county charter" and "the Constitution has not expressly provided otherwise. (*Ibid.*)

      The San Bernardino County Sheriff also filed a civil complaint, contending that the ordinance is unconstitutional. The California Court of Appeal rejected the Sheriff's challenges and held that the ordinance is facially constitutional and valid. (*Penrod v. County of San Bernardino* (2005) 126 Cal.App.4th 185, 188.) The court determined that the ordinance is specifically authorized by the California Constitution, and is consistent

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[1] The Legislature provides for the recall of local officer in general law counties. (Cal. Const. art II, § 19.) The charter of charter counties provide for the "compensation, terms and removal" of the sheriff." (Cal. Const., art. XI, § 4.)

with the Government Code. (*Ibid.*)

**5) Other Existing Options for Removing Sheriffs:**

a) **Grand Jury Accusation and Trial**: An accusation against any officer of a district, county, or city, including a sheriff, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for, or in, which the officer accused is elected or appointed. (Gov. Code, §§ 3060 et seq.) These grand jury accusations are usually initiated by the district attorney who is statutorily authorized to present evidence of crime or official misconduct to the grand jury. The district attorney will have had the offense investigated and will have marshalled the evidence relevant thereto prior to its presentation to the grand jury. The grand jury then evaluates the evidence in secret deliberations and decides by vote whether to issue an accusation. An accusation can be found only with the concurrence of 12 grand jurors (8 for 11 member grand juries and 14 for 23 member grand juries.) (*Ibid.*)

b) **Quo Warranto Removal**: Quo warranto (Latin for "by what authority") is a legal action most typically brought to resolve disputes concerning the right to hold public office. (Code Civ. Proc., §§ 803 et seq.) In California, a Quo warranto proceeding may be brought by the Attorney General to determine whether holders of a public officer are legally entitled to hold that office or exercise those powers. The court may not hear the action unless it is brought or authorized by the Attorney General. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633.) Quo warranto tries *title* to public office, i.e. the right to hold public office; it may not be used to remove an incumbent for misconduct in office. (*Wheeler v. Donnell* (1896) 110 Cal. 655.)

c) **Vacancies for Reasons other than Misconduct**: Death, resignation, mental or physical incapacity, relocating, and other such situations that may create vacancies in the office of an elected sheriff law. Courts have ruled that vacancies for reasons other than removal may be filled without any sort of hearing or proceeding. (*Klose v. Superior Court in & for San Mateo County* (1950) 96 Cal.App.2d 913, 917; *People ex rel. Tracy v. Brite* (1880) 55 Cal. 79.)

d) **Recall by Voters**: A county sheriff can be recalled by the voters under the terms set forth in the Election Code. Article II, section 19 of the California Constitution requires the Legislature to "provide for recall of local officers."[2] Accordingly, the Legislature established a statutory recall procedure for recalling sheriffs and other general law county officers. (Elec. Code, § 11000, et seq.)

Nothing in this bill limits any of these existing options for the removal of a sheriff. However, this bill would extend to circumstances in which a board of supervisors may

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[2] General law counties possess only those powers expressly conferred upon them by the California Constitution and the Legislature, and therefore they cannot create their own recall or removal procedures absent statutory authorization. (*Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870.) A charter county, on the other hand, has authority to adopt its own procedure to recall its sheriff. (Cal. Const., art. XI, § 4.) When presented with a county charter contains no recall procedure, the California Supreme Court held that "in such a situation the recall proceedings must conform to the general law" as set forth in statute. (*Muehleisen v. Forward* (1935) 4 Cal.2d 17, 19.)

need to act expeditiously to remove a county sheriff, rather than wait for a grand jury to convene or a recall election to be held.

6) **Argument in Support**: According to *Oakland Privacy*, "In recent years, many county sheriffs have taken actions and run their departments in ways that have caused friction in the community and distress on elected county boards of supervisors. Prominent examples include Alameda County, where for a number of years the former Sheriff Gregory Ahern continued to voluntarily detain inmates on behalf of ICE despite Board of Supervisor resolutions and strong community sentiments to end the practice, and Los Angeles where former sheriff Alex Villanueva obstructed an investigation into an in-custody death and threatened criminal charges against a reporter, before walking that back. In addition, some sheriffs throughout the state declined to enforce public health mandates put into place by county health officers and supervisors.

"According to current law, the remedy for such situations is an electoral one, with voters having the power to administer a rebuke to a current sheriff by voting for another candidate for the position in the next election, which can be as long as four years into the future. In the cases cited above, voters did exactly that by replacing Sheriff Gregory Ahern with Sheriff Yesenia Sanchez and replacing Sheriff Alex Villanueva with Sheriff Robert Luna.

"However, such remedies are not always available to the voters, especially in the smaller counties of California. The majority of sheriff elections are uncontested, meaning there is only one candidate, and voters can only vote yes or abstain. California's rural and small counties deserve an equal level of accountability to that of California's larger counties, and it is far from guaranteed that in all cases, even large and urban counties will have a regular voter referendum on their sheriff. In Alameda County, prior to 2022, the then-incumbent sheriff Ahern faced no opposition for four consecutive election cycles, a period of sixteen years beginning in 2006.

"The current accountability measures in place, apart from elections, derive from the Board of Supervisor's power of the purse in setting a sheriff's department budget. This is not an insignificant source of leverage, but it risks distorting the budget process to address issues of policy and accountability that are not primarily financial in nature. We would argue that good governance dictates not shoving misconduct issues into the budgetary process.

"There is no doubt that is a sobering thing to allow one elected body to potentially remove an elected officer. Nonetheless, our State and Federal governments permit such through the process of impeachment - with a 2/3rds vote. AB 1090 is simply a recognition that an elected sheriff, unlike an elected body of more than one person, has no collegial process to address issues of misconduct that are addressed by a removal process on a board, council or commission, or by impeachment at the State and Federal levels, and that the electoral remedy is often not practicably available to the voters.

"In essence, AB 1090 asks what is misconduct by a sheriff, and if and when it occurs, where is the remedy that is available in a timely and consistent manner? Under current law, there really isn't one. Here in Alameda County, the former sheriff's declaration that policy mandates from the Board of Supervisors and overwhelming public sentiment would not impact the conduct of the sheriff's office with regard to ICE became a long-term public wound. It did enormous damage to the faith of the county's voters in the sheriff's department

and in the efficacy of the Board of Supervisors. After a decade of no available remedy, the damage had already been done and the new sheriff has a big job to restore trust and relationships.

"We would argue that the democratic process i.e. what the voters wanted, was delayed for an unforgivably long time due to the limitations of current law and held hostage to the "personal beliefs" of the former sheriff and the difficulty of finding candidates willing to run against a powerful incumbent.

"Unlike sheriffs, it is a rare occasion, although not unheard of, that a county supervisor position is elected in an uncontested election. The voter "check and balance" is more consistent and AB 1090 allows for a county board of supervisors to develop a due process procedure that can include additional steps to protect against an ideologically-based removal process. We encourage making that process as robust as possible, but given the limitations in current law, *a* process beyond waiting for the next election should be implemented."

7) **Argument in Opposition**: According to the *California Statewide Law Enforcement Association* (CSLEA), "Sheriffs, like county boards of supervisors are elected and held accountable by the voters.

"Shifting power and accountability from the voters to the Board risks injecting politics and petty disagreements into the removal of a Sheriff, overriding the will of the voters.

"By nullifying the will of the voters, the Board of Supervisors will become the judge, jury, and executioner for the Office of the Sheriff. We believe these decisions are best left to the voters."

8) **Related Legislation**: AB 797 (Weber), would require the governing body of each city and county to, by January 15, 2025, create an independent community-based commission on law enforcement officer practices.

9) **Prior Legislation**: AB 1185 (McCarty), Chapter 342, Statutes of 2020, authorized counties to create a sheriff's oversight board and an office of inspector general.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Black Lives Matter – Los Angeles
Initiate Justice
Oakland Privacy
Secure Justice

**Opposition**

Association of Orange County Deputy Sheriffs
California Fraternal Order of Police
California State Sheriffs' Association
California Statewide Law Enforcement Association

Deputy Sheriffs Association of San Diego County
Long Beach Police Officers Association
Sacramento County Deputy Sheriffs' Association
San Bernardino County Sheriff's Employees' Benefit Association

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

# Amended Mock-up for 2023-2024 AB-1090 (Jones-Sawyer (A))

## Mock-up based on Version Number 98 - Amended Assembly 4/4/23
## Submitted by: Liah Burnley, Assembly Public Safety Committee

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

**SECTION 1.** Section 25303.8 is added to the Government Code, to read:

**25303.8.** (a) The board of supervisors may remove a sheriff from office for cause, by a four-fifths vote, after both of the following have occurred:

(1) The sheriff is served with a written statement of the alleged grounds for removal.

(2) The sheriff is provided a reasonable opportunity to be heard regarding an explanation or defense at a removal proceeding.

(b) The board of supervisors may establish procedures for a removal proceeding held pursuant to this section.

(c) This section shall not be applied in a manner that interferes with the constitutional functions of a sheriff.

**(d) For the purposes of this Section, "cause" means:**

**(1) Violation of a law related to the performance of a sheriff's duties;**

**(2) Flagrant or repeated neglect of a sheriff's duties;**

**(3) Misappropriation of public funds or properties committed by a sheriff in the course and scope of their duties;**

**(4) Willful falsification of relevant official statements or documents committed by a sheriff in the course and scope of their duties; or,**

**(5) Obstruction of an investigation into the conduct of a sheriff or a sheriff's department by a government agency, office, or commission with jurisdiction to conduct an investigation.**