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ASSEMBLY COMMITTEE ON
PUBLIC SAFETY
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AGENDA

9:00 a.m. – July 9, 2019
State Capitol, Room 126

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
1.	SB 55 (Jackson)	Mr. Billingsley	Firearms: prohibited persons.
2.	SB 145 (Wiener)	Mr. Fleming	Sex offenders: registration.
3.	SB 269 (Bradford)	Ms. Black	Wrongful convictions.
4.	SB 273 (Rubio)	Ms. Uribe	Domestic violence.
5.	SB 338 (Hueso)	Ms. Moore	Senior and disability victimization: law enforcement policies.
6.	SB 360 (Hill)	Ms. Uribe	Mandated reporters: clergy.
7.	SB 376 (Portantino)	Mr. Billingsley	Firearms: transfers.
8.	SB 439 (Umberg)	Ms. Moore	Criminal procedure: wiretapping: authorization and disclosure.
9.	SB 459 (Galgiani)	Mr. Pagan	Crimes: rape: great bodily injury.
10.	SB 485 (Beall)	Mr. Fleming	Driving privilege: suspension or delay.
11.	SB 545 (Hill)	Mr. Billingsley	Driving under the influence: ignition interlock devices.

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| 12. SB 555 (Mitchell) | Ms. Moore | Jails and juvenile facilities:
communications,
information, and commissary
services: contracts. |
| 13. SB 580 (Wilk) | Mr. Billingsley | Animal abuse: probation:
treatment. |
| 14. SB 716 (Mitchell) | Ms. Black | Juveniles: delinquency:
postsecondary academic and
career technical education. |

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Date of Hearing: July 9, 2019
Counsel: David Billingsley

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

SB 55 (Jackson) – As Amended May 17, 2019

SUMMARY: Makes it a crime to possess a firearm within 10 years of conviction of specified alcohol and drug related misdemeanors that occur within a designated time period. Specifically, **this bill:**

- 1) Imposes a 10-year prohibition on owning or possessing a firearm, ammunition, or reloaded ammunition to a person who has been convicted of the following:
 - a) A second conviction for possession with the intent to sell specified controlled substances, including synthetic cannabinoids and ketamine, or vehicular manslaughter while intoxicated, in any combination, in a three-year period.
 - b) A third or subsequent conviction for DUI related offenses, which occurs within 10 years of the first offense.
 - c) Committing another of those misdemeanors listed above during the initial 10-year prohibition period.
- 2) Specifies a violation of this prohibition would be a misdemeanor punishable by imprisonment in a county jail for up to six months, a fine of up to \$500, or both the fine and imprisonment.
- 3) Specifies that these prohibitions are not retroactive to the extent that, although the convictions that occurred prior to January 1, 2020 may be counted as priors, the conviction that ultimately results in the firearms prohibition must occur after January 1, 2020.

EXISTING LAW:

- 1) Provides that persons convicted of specified serious or violent misdemeanors are prohibited from possession of firearms for a period of 10 years after a conviction for specified serious/violent misdemeanors and that a violation is punishable as a misdemeanor with imprisonment up to one year or as a state prison felony. (Pen. Code, § 29805, subd. (a).)
- 2) Includes within the list of misdemeanors triggering a 10 year firearm prohibition the crimes of stalking, sexual battery, assault with a deadly weapon, battery with serious bodily injury, brandishing a firearm of deadly weapon, assault with force likely to produce great bodily injury, battery on a peace officer, and threats of bodily injury or death. The list includes a number of other misdemeanor crimes as well. (Penal Code, § 29805, subd. (a).)

- 3) Provides that persons convicted of a felony are prohibited for their lifetimes from owning or possessing a firearm. (Pen. Code, § 29800, subd. (a)(1).)
- 4) Specifies that a felon in possession of a firearm is guilty of a felony with a maximum of three years in the state prison. (Pen. Code, § 29800, subd. (a)(1).)
- 5) Prohibits a person from possessing or owning a firearm that is subject to specified restraining orders related to domestic violence and punishes a violation of the prohibition as a misdemeanor with a maximum sentence of one year in the county jail. (Pen. Code, § 29825.)
- 6) Specifies that any person who is convicted, on or after January 1, 2019, of a misdemeanor violation of domestic violence, and who subsequently owns or has possession of a firearm is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year or guilty of a felony punishable by up to three years in the state prison. (Penal Code, § 29805, subd. (b).)
- 7) Specifies that a person who has been taken into custody on a 72-hour hold because that person is a danger to himself, herself, or to others, assessed as specified, and admitted to a designated facility because that person is a danger to himself, herself, or others, shall not own or possess any firearm for a period of five years after the person is released from the facility. (Welf. and Inst. Code, 8103, subd (f)(1(A)).)
- 8) States that a person prohibited from possessing a firearm, as specified is prohibited from possessing ammunition. (Pen. Code, § 30305, subd. (a)(1).)
- 9) Provides for an automated system for tracking firearms and assault weapon owners who might fall into a prohibited status. The online database, which is currently known as the Armed Prohibited Persons Systems (APPS), cross-references all handgun and assault weapon owners across the state against criminal history records to determine persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon. (Pen. Code, § 30000, et seq.)
- 10) Prohibits persons who know or have reasonable cause to believe that the recipient is prohibited from having firearms and ammunition to supply or provide the same with firearms or ammunition. (Pen. Code, §§ 27500 and 30306; and Welf. & Inst. Code, § 8101.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "California law seeks to remove firearms from the possession of people likely to misuse them. There are several classes of people prohibited from possessing firearms including felons, people addicted to narcotics, the mentally ill, and persons subject to a protective order. Included also are people who commit certain misdemeanors.

"While there is little evidence linking many of the above actions/behaviors to firearm abuse, a strong correlation has been shown between certain alcohol-/drug-related misdemeanor convictions and future gun violence. Among the most direct of these studies was performed

at the Violence Prevention Research Program (VPRP) at U.C. Davis which is part of the University of California Firearm Violence Research Center (UCFC) and which has for more than thirty years conducted firearm research and policy development.

“SB 55 adds several crimes which this research has shown to be linked to later firearm violence to the list of criminal convictions that result in a 10-year prohibition on firearm ownership. Multiple crimes must be committed within a certain time period to invoke the prohibition.

“Research by VPRP and others has shown that convictions for some non-violent crimes involving drugs and alcohol correlate strongly to a later conviction for a firearm-related crime -- in some instances a four-to-five-times greater chance of a future crime.

“In an effort to prevent future gun violence, this bill adds these research-correlated drug and alcohol convictions to the list of 10-year prohibitions. They are:

- Possession with intent to sell synthetic cannabinoid drugs;
- Possession with intent to sell certain tranquilizers;
- Possession with intent to sell ketamine;
- Vehicular manslaughter while intoxicated;
- Driving while under the influence of alcohol; and
- Causing an injury while driving under the influence of alcohol

“The prohibition applies when a person commits the above drug crimes or vehicular manslaughter two times within a three-year period, or is convicted of three DUIs within a ten-year period.

“The prohibition is for ten years because research indicates that persons who have not been convicted of any crimes within a ten-year period are almost as unlikely to commit a crime as persons who have never been convicted of a crime.”

- 2) **Individuals Prohibited from Possessing Firearms in California:** California has several laws that prohibit certain persons from purchasing firearms. All felony convictions lead to a lifetime prohibition, while a conviction of specified misdemeanors result in a 10-year prohibition. A person may be prohibited from possessing a firearm due to a protective order or as a condition of probation. If a person communicates to his or her psychotherapist a serious threat of physical violence against a reasonably-identifiable victim or victims, the person is prohibited from owning or purchasing a firearm for five years, starting from the date the psychotherapist reports to local law enforcement the identity of the person making the threat. (Welf. & Inst. Code, § 8100, subd. (b)(1).) If a person is admitted into a facility because that person is a danger to himself, herself, or to others, the person is prohibited from owning or purchasing a firearm for five years. (Welf. & Inst. Code, § 8103, subd. (f).) For the provisions prohibiting a person from owning or possessing a firearm based on a serious threat of violence or based on admittance into a facility as a threat to self or others, the

person has the right to request a hearing whereby the person could restore his or her right to own or possess a firearm if a court determines that the person is likely to use firearms or other deadly weapons in a safe and lawful manner. (Welf. & Inst. Code, §§ 8100, subd. (b)(1) and 8103, subd. (f).)

DOJ developed the Armed Prohibited Persons System (APPS) for tracking handgun and assault weapon owners in California who may pose a threat to public safety. (Pen. Code, § 30000 et seq.) APPS collects information about persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon. DOJ receives automatic notifications from state and federal criminal history systems to determine if there is a match in the APPS for a current California gun owner. DOJ also receives information from courts, local law enforcement and state hospitals as well as public and private mental hospitals to determine whether someone is in a prohibited status. When a match is found, DOJ has the authority to investigate the person's status and confiscate any firearms or weapons in the person's possession. Local law enforcement also may request from DOJ the status of an individual, or may request a list of prohibited persons within their jurisdiction, and conduct an investigation of those persons. (Pen. Code, § 30010.)

This bill would make it a crime to possess a firearm within 10 years of conviction of specified alcohol and drug related misdemeanors that occur within a designated time period. From a logistical standpoint, it will be difficult for DOJ to determine whether a conviction for one of the offenses in this bill triggers a firearm prohibition. Because this bill does not require prohibition upon conviction for crimes specified in this bill unless it occurs within a certain time period of other convictions, DOJ would have to examine the conviction records in each case to determine if a prohibition was warranted. This would involve a significant amount of resources if the process could not be automated.

- 3) **California Prohibits Possession of Firearms for Specified Misdemeanor Convictions That Involve Violence or the Threat of Violence:** Existing law prohibits possession of a firearm for 10 years if a person is convicted of specified misdemeanors that involve violence or the threat of violence. The list of violent misdemeanors, conviction of which triggers the firearm prohibition, contains over 30 offenses. That list of misdemeanors includes the crimes of stalking, assault with a deadly weapon, battery with serious bodily injury, brandishing a firearm of deadly weapon, assault with force likely to produce great bodily injury, battery on a peace officer, sexual battery, and threats of bodily injury or death, possession of prohibited ammunition, and various crimes involving misuse of a firearm. (Penal Code, § 29805.) The misdemeanors triggering firearm prohibition in this bill are not consistent with the nature of misdemeanors on the current list.
- 4) **APPS Backlog:** DOJ cross-references APPS with five other databases including the California Restraining and Protective Order System (CARPOS), a statewide database of individuals subject to a restraining order. New individuals are added to the APPS database on an ongoing basis as the system identifies and matches individuals in California who are prohibited from purchasing or possessing firearms. DOJ is required to complete an initial review of a match in the daily queue of APPS within seven days of the match being placed in the queue. (Pen. Code, § 30020.)

DOJ has limited resources to investigate and seize firearms from persons on the list. Since

the early 2000s, DOJ has requested additional funding to decrease the backlog. The APPS has largely been funded by fees collected when an individual purchases a firearm, which is deposited in the Dealer's Record of Sale (DROS) Special Account. However, the DROS Special Account has experienced operational shortfalls since 2012-13. In 2013, the Legislature appropriated \$24 million with SB 140 (Leno), Chapter 2, Statutes of 2013, to aid the DOJ in reducing the backlog to its current levels, but the DOJ has been unable to eliminate it entirely. Adding new categories of prohibited person increases the number of people on the APPS list. This bill would increase the number of prohibited persons on the APPS list.

An AP article from March 2019, discussed the APPS backlog. The article pointed out that \$24 million given to DOJ in 2013 provided with the intent that those funds would be sufficient to clear the backlog. But despite clearing a record 10,681 cases in 2018, the department still had about 9,400 active cases as of March 2019, about 800 fewer than it did a year ago. (<https://www.apnews.com/d92903c08d52411fae595954896df659>)

Attorney General Becerra was quoted in the article and stated "More cases are coming in than our 50 agents can process, and so if we don't do something ... we will continue to see an incremental rise in the number of cases that we haven't touched," Becerra said. "No one wants that." (Id.)

- 5) **Argument in Support:** According to the *Los Angeles County Supervisors*, "SB 55 also would apply that ten-year prohibition to individuals who have been convicted of two or more specified misdemeanors, or two or more convictions of a single specified misdemeanor in a three-year period, including misdemeanors related to possession of a controlled substance with intent to sell and driving under the influence of alcohol and/or drugs. Finally, this bill would make it a misdemeanor for an individual prohibited from owning or possessing a firearm pursuant to these provisions to own, possess, or have under their custody or control, any ammunition or reloaded ammunition.

"The County's Department of Public Health (DPH), and their Injury and Violence Prevention Program (IVPP) indicate that the Journal of the American Medical Association conducted a study analyzing purchasers of handguns in California and found that purchasers with at least one prior misdemeanor conviction were more than seven times as likely as those with no prior criminal history to be charged with a new offense after a handgun purchase. DPH-IVPP indicates that prohibitions for misdemeanors are grounded in research that shows low-level violent offenders are more likely than other groups to commit more serious violent crimes in the future. A 1998 study led by Dr. Garen Wintemute found that handgun purchasers who had more than one prior conviction for a violent offense were 10 times as likely to be charged with new criminal activity, and 15 times as likely to be charged with murder, rape, robbery, or aggravated assault, as were those with no prior criminal history. DPH-IVPP notes that the study also found nonviolent misdemeanor offenders to be at an increased — though substantially lower — risk for later violent offenses."

- 6) **Argument in Opposition:** According to the *Peace Officer Research Association of California*, "Current law provides that any person who has been convicted of certain misdemeanors may not, within 10 years of the conviction, own, purchase, receive, possess, or have under their custody or control, any firearm. SB 55 would add possession with intent to sell synthetic cannabinoid drugs, possession with intent to sell certain tranquilizers, possession with intent to sell ketamine, vehicular manslaughter while intoxicated, public

intoxication such that the person 'is unable to exercise care for his or her own safety or the safety of others' or such that the person obstructs a public way, driving while under the influence of alcohol, and causing an injury while driving under the influence of alcohol to the list of misdemeanors, thus, a conviction would violate the 10-year prohibition on possessing a firearm.

"While PORAC agrees that guns need to be kept out of the hands of those who would abuse them, the Department of Justice cannot keep up with the over 20,000 people currently on the 'prohibited persons' list. Many of those on the list have been convicted of serious and/or violent felonies. Until California can reduce the serious backlog that currently exists, PORAC feels we should not be adding additional misdemeanants to the list."

7) Related Legislation:

- a) SB 120 (Stern), would prohibit a person who is convicted of a misdemeanor violation of carrying a concealed firearm, carrying a loaded firearm, or openly carrying an unloaded handgun, from possessing a firearm for a period of 10 years. SB 120 is awaiting hearing in the Assembly Public Safety Committee.
- b) SB 701 (Jones), would lower the penalty to make it a misdemeanor for a person with an outstanding arrest warrant, as specified, to own or possess a firearm. SB 701 is on the Assembly Floor.
- c) SB 172 (Portantino), would add criminal storage offenses to those offenses that can trigger a 10 year firearm prohibition. SB 172 is awaiting hearing in the Assembly Human Services Committee.
- d) AB 276 (Friedman), would prohibit any person convicted of specified firearm safe storage provisions preventing access to children or prohibited persons, on or after January 1, 2020, from possessing a firearm for 10 years. AB 276 was held in the Assembly Public Safety Committee.

8) Prior Legislation:

- a) AB 3129 (Rubio), Chapter 883, Statutes of 2018, prohibits a person who is convicted on or after January 1, 2019, of a misdemeanor domestic violence offense that currently results in a 10-year prohibition against possessing a firearm, from possessing a firearm for life.
- b) AB 785 (Jones-Sawyer), Chapter 784, Statutes of 2017, added two hate crimes to the list of misdemeanors that result in a ban on the right to possess a firearm for 10 years.
- c) SB 347 (Jackson), of the 2015-2016 Legislative Session, would have added specified firearms and ammunition misdemeanor offenses to the list of misdemeanors that result in the defendant being prohibited from possessing a firearm for ten years. SB 347 was vetoed by the governor.
- d) SB 755 (Wolk), of the 2013-2014 Legislative Session, would have provided that any person convicted of a misdemeanor violation of two or more specified offenses

(including DUI) within a three-year period be prohibited from possessing a firearm for 10 years. SB 755 was vetoed by the Governor.

REGISTERED SUPPORT / OPPOSITION:

Support

Alameda County District Attorney's Office
Alcohol Justice
Bay Area Student Activists
Brady California United Against Gun Violence
California Chapter of the American College of Emergency Physicians
California Police Chiefs Association
Coalition Against Gun Violence, A Santa Barbara County Coalition
Coalition to Stop Gun Violence
Giffords Law Center to Prevent Gun Violence
Laguna Woods Democratic Club
Los Angeles City Attorney
Los Angeles County Board of Supervisors
Prosecutors Against Gun Violence
Riverside Sheriffs' Association
Santa Barbara District Attorney
Santa Barbara Women's Political Committee
Ventura County Board of Supervisors
Violence Prevention Coalition of Orange County
Women For: Orange County

4 private individuals

Oppose

California Attorneys for Criminal Justice
California Sportsman's Lobby, Inc.
California Waterfowl
Gun Owners of California, Inc.
Outdoor Sportsmen's Coalition of California
Peace Officers Research Association of California
Safari Club International - California Chapters

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: July 9, 2019
Counsel: Matthew Fleming

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

SB 145 (Wiener) – As Amended May 21, 2019

As Proposed to Be Amended

SUMMARY: Exempts defendants convicted of specified, non-forcible sex offenses involving minors from mandatory registration as a sex offender. Specifically, **this bill:**

- 1) Exempts a person convicted of non-forcible sodomy with a minor, oral copulation with a minor, or sexual penetration with a minor, as specified, from having to automatically register as a sex offender under the Sex Offender Registry Act if the person was not more than ten years older than the minor at the time of the offense, and the conviction is the only one requiring the person to register.
- 2) Specifies that a person convicted of one of those specified offenses may still be ordered to register in the discretion of the court, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification.

EXISTING LAW:

- 1) Criminalizes the acts of non-forcible sodomy, oral copulation, and sexual penetration, with a minor, and punishes those offenses as either alternate felony/misdemeanors (“wobbler” offenses) or as felonies, depending on the age difference between the perpetrator and the minor. (Pen. Code §§ 286 subd. (b), 287 subd. (b), and 289 subds. (h) and (i).)
- 2) Requires, until January 1, 2021, lifetime sex offender registration for persons convicted of various offenses, including offenses that criminalize the acts of non-forcible sodomy, oral copulation, and sexual penetration, with a minor. (Pen. Code, § 290, subds. (a) - (c) [effective until January 1, 2021, repealed as of that date].)
- 3) Requires, as of January 1, 2021, sex offender registration for persons convicted of various offenses for a period of 10 years, 20 years, or life, depending on the nature of the conviction. For persons convicted of non-forcible sodomy, oral copulation, and sexual penetration, with a minor, the registration period is 10 years. (Pen. Code, § 290, subds. (c) and (d)(1)(A) [operative January 1, 2021].)
- 4) Criminalizes the act of vaginal sexual intercourse with a minor, punishes a violation of that offense as either a misdemeanor or an alternate felony/misdemeanor (a “wobbler”), and does not require sex offender registration for a violation of that offense. (Pen. Code, §§ 261.5 and 290 *et. seq.*)

- 5) Criminalizes the act of willfully and lewdly committing any lewd or lascivious act upon or with the body, or any part or member thereof, 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; punishes that conduct as a prison felony and requires sex offender registration for life until January 1, 2021, and for twenty years thereafter. (Pen. Code §§ 288, subd. (a) and 290, subds. (a) - (c).)
- 6) Requires a person who must register as a sex offender to register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation with the local law enforcement agency. (Pen. Code, § 290.015, subd. (a).)
- 7) Provides that within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the DOJ. (Pen. Code, § 290.015, subd. (b).)
- 8) Authorizes the court to order a person convicted of an offense that does not require registration as a sex offender to nonetheless register as such if it finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and states on the record the reasons for its findings and the reasons for requiring registration. (Pen. Code § 290.006.)
- 9) States that registration as a sex offender shall consist of the following:
 - a) A statement signed in writing by the person, giving information as shall be required by DOJ and giving the name and address of the person's employer, and the address of the person's place of employment, if different from the employer's main address;
 - b) Fingerprints and a current photograph taken by the registering official;
 - c) The license plate number of any vehicle owned by, regularly driven by or registered in the name of the registrant;
 - d) Notice to the person that he or she may have a duty to register in any other state where he or she may relocate; and,
 - e) Copies of adequate proof of residence, such as a California driver's license or identification card, recent rent or utility receipt or any other information that the registering official believes is reliable. (Pen. Code, § 290.015, subd. (a).)
- 10) Provides that a willful violation of any part of the registration requirements constitutes a misdemeanor if the offense requiring registration was a misdemeanor, and constitutes a felony if the offense requiring registration was a felony or if the person has a prior conviction of failing to register. (Pen. Code, § 290.018, subds. (a) and (b).)
- 11) Provides that a misdemeanor failure to register shall be punishable by imprisonment in a county jail not exceeding one year, and a felony failure to register shall be punishable in the state prison for 16 months, 2 or 3 years. (Pen. Code, § 290.018, subds. (a) and (b).)

- 12) Requires the Department of Justice ("DOJ") to make information about registered sex offenders available to the public on its internet website, as specified. (Pen. Code, § 290.46, subd. (a).)
- 13) Requires the DOJ to include on its website a registrant's name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, the home address at which the registrant resides, and any other information that the Department of Justice deems relevant unless expressly excluded under the statute. (Pen. Code, § 290.46, subd. (b).)
- 14) Imposes a 20 year parole term for persons convicted of a felony offense of sodomy, oral copulation, or sexual penetration in which one or more of the victims of the offense was a child under 14 years of age. (Pen. Code § 3000, subd. (b)(4)(A).)
- 15) Imposes specified restrictions on persons registered as sex offenders with respect to employment in certain areas, such as in education (Education Code §§ 35021, 44345), community care facilities (Health and Safety Code § 1522), residential care facilities (Health and Safety Code § 1568.09), residential care facilities for the elderly (Health and Safety Code § 1569.17), day care facilities (Health and Safety Code § 1596.871), engaging in the business of massage (Government Code § 51032), physicians and surgeons (Business and Professions Code § 2221), registered nurses (Business and Professions Code § 2760.1), and others.

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 145 ends blatant discrimination against young people engaged in voluntary sexual activity by providing courts the discretion to decide, at sentencing, if registering the defendant as a sex offenders is appropriate, regardless of the sex act they performed. Under current law (Penal Code 261.5), if a young person has voluntary sexual intercourse with a minor then the offense is not automatically registerable if they are within 10 years of age of the minor and the minor is 14 years or older. In these 'Romeo and Juliet' cases the court has discretion, based on the facts of the case, to decide whether or not to place the defendant on the sex offender registry. On the other hand, if the sex act performed is oral or anal sex, then the court must always place the defendant on the sex offender registry, regardless of the facts of the case. This disparate treatment of these sex acts originates from laws that criminalized 'gay' sex until the 1970s.

"Tragically, in 2019, our sex offender registry still mandates that a young person in a consensual relationship who performs these 'gay' sex acts must be placed on the sex offender registry and our courts are prohibited from using their discretion to keep them off, even if the couple is close in age and in a healthy relationship. In other words, if a 19-year-old man is convicted of having sex with his 17-year-old boyfriend, he must register as a sex offender. But that may not be the case for a 24-year-old man who gets a 15-year-old girl pregnant — he can avoid sex offender registration if a judge decides it's unnecessary. This distinction in the law is irrational and discriminatory towards LGBTQ youth as it treats oral and anal sex as a more egregious crime than penile-vaginal sex, with the former mandating sex offender registration, but giving discretion to the courts for the latter.

“Nothing in this bill prohibits anyone from being placed on the registry if a prosecutor recommends it or the court orders it. SB 145 corrects a shameful decision by the California Supreme Court – a ruling that validated discrimination. It’s now on us to end that discrimination and to stop destroying the lives of young people do not belong on our sex offender registry.”

- 2) **Sex Offender Registration:** In 1947, California became the first state in the nation to require sex offender registration for persons convicted of specified offenses. Sex offender registration is a regulatory means of assisting law enforcement in dealing with the problem of recidivist sex offenders. (*In re Alval* (2004) 33 Cal.4th 254, 279.) Until recently, California was one of the few states that required lifetime registration for all registerable offenses with no discernment for the type of offense or the characteristics of the offender. In a 2010 report, the California Sex Offender Management Board (CASOMB) recommended moving to a tiered registration system in California, in which persons would be required to register for ten or twenty years, or life, depending on their nature and characteristics and their risk of reoffending:

“Recommended Changes to California Law on Sex Offender Registration and Internet Notification.

“It’s recommended that California amend its law on duration of registration, which should depend on individual risk assessment, history of violent convictions, and sex offense recidivism.

“The proposed changes to California law take into consideration the seriousness of the offender’s criminal history, the empirically assessed risk level of the offender, and whether the offender is a recidivist or has violated California’s sex offender registration law. Duration of registration would range from ten (10) years to lifetime (10/20/life). For purposes of the tiering scheme.” (*CASOMB Recommendations Report: Decrease Victimization Increase Community Safety*, Jan. 2010, at p. 96, available at: http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf [as of Jul. 1, 2019].)

In its 2016 annual report to the Legislature, CASOMB noted, “[t]he state now has over 97,000 registered sex offenders. Close to 75,000 of them live in California communities. Most of the others are in custody.” (*CASOMB Annual Report 2016*, at pp. ii, 5, available at: http://www.casomb.org/docs/2016_CASOMB_Annual_Report-FINAL.PDF [as of Jul. 1, 2019].) In its report, CSOMB noted that its highest priority for 2017 was advocating for a system of tiered registry, because “The proposed change in the law would allow law enforcement, with their limited resources, to focus on those sex offenders who pose the higher risk of reoffending.” (*Id.* at p. ii.) In response, the Legislature passed SB 384 (Wiener) Chapter 541, Statutes of 2017, which will establish a three-tiered sex offender registry which is set to take effect on January 1, 2021.

- 3) **Registration for “Hofsheier Offenses”:** This bill specifies that the offenses of non-forcible sodomy, oral copulation, and sexual penetration with a minor would no longer require mandatory sex offender registration unless there is a ten year gap between the minor and the perpetrator. These offenses, when committed without force, where the minor was a willing participant and under the age of 14 are sometimes referred to colloquially as “Hofsheier

offenses.” The reason for this is that a California Supreme Court decision in 2006, *People v. Hofsheier*, found that requiring mandatory sex offender registration for one such an offense – oral copulation – was unconstitutional if the state did not also require registration for a person convicted of the offense of non-forcible sexual intercourse with a minor. (37 Cal. 4th 1185.) Offenses in which the victim is under the age of 14 are not considered Hofsheier offenses and they are typically prosecuted as a “lewd and lascivious act with a minor” under a separate penal code section. Lewd and lascivious acts refer to any sort of touching of a person with the intent to sexually arouse the perpetrator or the minor. (Pen. Code § 288; CALCRIM No. 1060.) Sex offender registration is mandatory for lewd and lascivious acts with minors, even if the conduct was non-forcible and the minor was a willing participant.

- a) *Hofsheier*: The *Hofsheier* case involved a 22-year old offender who was convicted of engaging in non-forcible, voluntary oral copulation with a 16-year old. (*Id.* at 1193.) Under existing law, he was required to register as a sex offender for life. During his sentencing, the defendant argued that the mandatory registration requirement he was forced to undergo was an unconstitutional violation of equal protection because if he had engaged in voluntary vaginal intercourse instead of voluntary oral copulation with the same minor, the registration would be a discretionary decision on the part of the judge. (*Ibid.*) Both the prosecutor and the judge at the trial level agreed that the mandatory registration for oral copulation was “out of whack” with the discretionary registration for vaginal intercourse but nonetheless the court imposed mandatory sex offender registration. (*Ibid.*) The Court of Appeal held, and the California Supreme Court affirmed, that the mandatory registration for oral copulation was a violation of the defendant’s Constitutional right to Equal Protection under the law. (*Id.* at 1194, 1208.) Specifically, the Supreme Court ruled that the government had no legitimate reason to treat the similarly situated offenses of oral copulation and sexual intercourse differently. (*Id.* at 1204-05.)

The Supreme Court rejected the government’s argument that the disparate treatment by the Legislature was due to the fact that one offense (sexual intercourse) could result in impregnation and the other (oral copulation) could not. (*Ibid.*) The rationale for the government making this argument was that the risk of impregnation could cause stigmatization of the parent registrant and that the behavior would be more likely to be committed again if impregnation was not possible. (*Ibid.*) Therefore, the government argued, it was “rational” for the Legislature to require registration for one offense and not the other. (*Ibid.*) The court rejected these arguments and instead posited that the likely reason for the disparate treatment was the fact that oral copulation was a criminal act in California, even between consenting adults until 1975; sex offender registration was implemented in California in 1947. (*Id.* at 1205-06.) The conduct was seen as distinguishable in 1947, but was treated the same amongst consenting adults as of 1975.

The Court remanded the case to the Superior Court with instructions to strike the mandatory registration and instead use its discretion to determine whether the defendant should be required to register in the same manner as if he been convicted of an offense involving voluntary sexual intercourse. (*Id.* at 1208-09.) One justice dissented from the *Hofsheier* decision. (*Id.* at 1210.) Over the next several years the holding in *Hofsheier* was expanded to several offenses other than oral copulation, including sodomy and sexual penetration. (See *People v. Thompson* (2009) 177 Cal. App. 4th 1424, 1431 and

People v. Ranscht (2009) 173 Cal. App. 4th 1369, respectively.)

- b) *The Johnson Case*: Nine years after the *Hofsheier* decision, the California Supreme Court reversed course. (*Johnson v. Department of Justice* (2015) 60 Cal. 4th 871.) The *Johnson* opinion was drafted by the author of the dissenting opinion in *Hofsheier*, and ruled that the same arguments that the *Hofsheier* court rejected regarding pregnancy were actually valid reasons for distinguishing voluntary intercourse with a minor from oral copulation with a minor. (*Id.* at 875.) The court specifically found that teen pregnancy and its “costly consequences” was a rational basis to distinguish between the offenses. (*Id.* at 885-86.) The court further found that the stigmatization of sex offender registration might interfere with employment opportunities and the support of children conceived as a result of unlawful intercourse, which would not be a factor if the conduct could not result in impregnation. (*Id.* at 885.)

As the *Johnson* court tacitly acknowledged, it is rather unusual for the court to overrule itself in less than a ten year period, particularly when the rationale for overruling the case was presented in the first instance. (*Id.* at 875.) Regardless, *Johnson* is current law, and *Hofsheier* has been overruled. The *Johnson* opinion was based on what the intent of the Legislature was in 1947. (*Id.* at 899, (J. Werdegar, *dissenting*.) Even though the offense in question in the *Johnson* and *Hofsheier* cases (oral copulation) was illegal between consenting adults prior to 1975, and sexual intercourse was not, the Court was convinced that a rational basis for the disparate treatment was that one could result in impregnation and the other may not. (*Id.* at 885-86.)

Using the potential for pregnancy as the Legislature’s rationale, the court concluded that penile/vaginal sexual intercourse with a minor could properly be categorized as an offense that does not require registration, even if other forms of sexual activity that fall short of intercourse do require registration. This rationale to exclude sexual intercourse with a minor as a registerable offense appears somewhat out of line with other case law that treats pregnancy as a factor in aggravation. Specifically, the California Supreme Court has found that evidence of pregnancy, without medical complications, that resulted from an unlawful, non-forcible sex offense can constitute “great bodily injury” for the purposes of increasing a prison sentence. (*People v. Cross* (2008) 45 Cal. 4th 58.) Synthesizing the cases of *Johnson* and *Cross* yields the somewhat paradoxical conclusion that the possibility of pregnancy is mitigating on one hand, in that it keeps perpetrator from having to register as a sex offender, and on the other hand, if a perpetrator actually gets a victim pregnant, it is an aggravating factor that can result in an additional three years in prison. (*Id.*; see also Pen. Code § 12022.7, subd. (a).)

This bill would effectively restore the state of the law as it was after the *Hofsheier* decision, but prior to *Johnson*. It would remove the mandatory registration requirement for the non-forcible *Hofsheier* offenses meaning that sex offender registration would not discriminate on the basis of whether or not a perpetrator engaged in penile/vaginal intercourse, or whether some other kind of sex act was committed. According to the proponents of the bill, this change will avoid blatant discrimination against persons who prefer same-sex relationships, and would instead allow courts to impose sex offender registration as a matter of discretion for all forms of non-forcible, voluntary sex acts with minors, regardless of whether they are same-sex acts or opposite-sex acts.

- 4) **Argument in Support:** According to the bill's co-sponsor the *Los Angeles District Attorney*: "Currently, there are several non-forcible, 'consensual' sexual offenses involving minors which require mandatory sex offender registration. These cases involve minors who are having a sexual relationship with someone over age 18. Although minors cannot legally consent to sexual activity, the cases are viewed as 'consensual' or 'voluntary' in that the sexual activity is not forced and the minor is a willing participant.

"The California Supreme Court and Appellate Courts had previously found that mandatory registration violated equal protection laws under these circumstances. Under current law the sex offender registration requirements differ between the 'consensual' acts of oral copulation, sodomy, sexual penetration and sexual intercourse. This has a direct discriminatory effect for people in same sex relationships. For example, if a 19-year-old male in a romantic relationship with a 17-year-old male were to be prosecuted for sodomy or oral copulation with a person under 18, he would be required to register as a sex offender. However, a 24-year-old male who had vaginal intercourse with a 15-year-old girl and impregnated her is not required to register."

- 5) **Related Legislation:** AB 884 (Melendez) would make any person convicted of committing a lewd act upon a child under 14 years of age subject to lifetime registration as a sex offender. AB 884 failed passage in the Assembly Public Safety Committee and reconsideration was granted.

6) **Prior Legislation:**

- a) SB 384 (Wiener) Chapter 541, Statutes of 2017, recasts, as of January 1, 2021, the California sex offender registry scheme into a three-tiered registration system for periods of 10 years, 20 years or life, for a conviction in adult court of specified sex offenses, and five years, 10 years, and possibly life, for an adjudication as a ward of the juvenile court for specified sex offenses.
- b) AB 1640 (Jones-Sawyer) of the 2013 – 2014 Legislative Session was substantially similar to this bill. AB 1640 failed passage on the Assembly Floor.
- c) AB 1844 (Fletcher) Enacted "Chelsea's Law," which increased penalties for forcible sex acts against minors, created a penalty of life without the possibility of parole (LWOP) for specified sex acts against minors, created safe zones around parks, and mandated lifetime parole for specified sex offenses.

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (Co-Sponsor)
 Los Angeles County District Attorney's Office (Co-Sponsor)
 American Civil Liberties Union of California
 Anti-Defamation League
 California Coalition Against Sexual Assault
 California District Attorneys Association
 California Police Chiefs Association

Stonewall Democratic Club
William A. Percy Foundation for Social and Historical Studies

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Amended Mock-up for 2019-2020 SB-145 (Wiener (S))

**Mock-up based on Version Number 97 - Amended Senate 5/21/19
Submitted by: Matthew Fleming, Assembly Public Safety Committee**

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

SECTION 1. Section 290 of the Penal Code, as amended by Section 51 of Chapter 423 of the Statutes of 2018, is amended to read:

290. (a) Sections 290 to 290.024, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to “the Act” in those sections are to the Sex Offender Registration Act.

(b) Every person described in subdivision (c), for the rest of the person’s life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall register with the chief of police of the city in which the person is residing, or the sheriff of the county if the person is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if the person is residing upon the campus or in any of its facilities, within five working days of coming into, or changing the person’s residence within, any city, county, or city and county, or campus in which the person temporarily resides, and shall be required to register thereafter in accordance with the Act.

(c) (1) The following persons shall register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 287, 288, or 289 or former Section 288a, Section 207 or 209 committed with intent to violate Section 261, 286, 287, 288, or 289 or former Section 288a, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 287, 288, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, or former Section 288a, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or

any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

(2) Notwithstanding paragraph (1), a person convicted of a violation of subdivision (b) of Section 286, subdivision (b) of Section 287, or subdivision (h) or (i) of Section 289 shall not be required to register if, at the time of the offense, the person is not more than 10 years older than the minor, as measured from the minor's date of birth to the person's date of birth, and the conviction is the only one requiring the person to register. This paragraph does not preclude the court from requiring a person to register pursuant to Section 290.006.

(d) This section shall remain in effect only until January 1, 2021, and as of that date is repealed.

SEC. 2. Section 290 of the Penal Code, as amended by Section 52 of Chapter 423 of the Statutes of 2018, is amended to read:

290. (a) Sections 290 to 290.024, inclusive, shall be known, and may be cited, as the Sex Offender Registration Act. All references to "the Act" in those sections are to the Sex Offender Registration Act.

(b) Every person described in subdivision (c), for the period specified in subdivision (d) while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall register with the chief of police of the city in which the person is residing, or the sheriff of the county if the person is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if the person is residing upon the campus or in any of its facilities, within five working days of coming into, or changing the person's residence within, any city, county, or city and county, or campus in which the person temporarily resides, and shall register thereafter in accordance with the Act, unless the duty to register is terminated pursuant to Section 290.5 or as otherwise provided by law.

(c) (1) The following persons shall register:

Every person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 287, 288, or 289 or former Section 288a, Section 207 or 209 committed with intent to violate Section 261, 286, 287, 288, or 289 or former Section 288a, Section 220, except assault to commit mayhem, subdivision (b) or (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 287, 288, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, or former Section 288a, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the offenses described in this

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subdivision; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the offenses described in this subdivision.

(2) Notwithstanding paragraph (1), a person convicted of a violation of subdivision (b) of Section 286, subdivision (b) of Section 287, or subdivision (h) or (i) of Section 289 shall not be required to register if, at the time of the offense, the person is not more than 10 years older than the minor, as measured from the minor's date of birth to the person's date of birth, and the conviction is the only one requiring the person to register. This paragraph does not preclude the court from requiring a person to register pursuant to Section 290.006.

(d) A person described in subdivision (c), or who is otherwise required to register pursuant to the Act shall register for 10 years, 20 years, or life, following a conviction and release from incarceration, placement, commitment, or release on probation or other supervision, as follows:

(1) (A) A tier one offender is subject to registration for a minimum of 10 years. A person is a tier one offender if the person is required to register for conviction of a misdemeanor described in subdivision (c), or for conviction of a felony described in subdivision (c) that was not a serious or violent felony as described in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(B) This paragraph does not apply to a person who is subject to registration pursuant to paragraph (2) or (3).

(2) (A) A tier two offender is subject to registration for a minimum of 20 years. A person is a tier two offender if the person was convicted of an offense described in subdivision (c) that is also described in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, Section 285, subdivision (g) or (h) of Section 286, subdivision (g) or (h) of Section 287 or former Section 288a, subdivision (b) of Section 289, or Section 647.6 if it is a second or subsequent conviction for that offense that was brought and tried separately.

(B) This paragraph does not apply if the person is subject to lifetime registration as required in paragraph (3).

(3) A tier three offender is subject to registration for life. A person is a tier three offender if any one of the following applies:

(A) Following conviction of a registerable offense, the person was subsequently convicted in a separate proceeding of committing an offense described in subdivision (c) and the conviction is for commission of a violent felony described in subdivision (c) of Section 667.5, or the person was subsequently convicted of committing an offense for which the person was ordered to register pursuant to Section 290.006, and the conviction is for the commission of a violent felony described in subdivision (c) of Section 667.5.

(B) The person was committed to a state mental hospital as a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(C) The person was convicted of violating any of the following:

(i) Section 187 while attempting to commit or committing an act punishable under Section 261, 286, 287, 288, or 289 or former Section 288a.

(ii) Section 207 or 209 with intent to violate Section 261, 286, 287, 288, or 289 or former Section 288a.

(iii) Section 220.

(iv) Subdivision (b) of Section 266h.

(v) Subdivision (b) of Section 266i.

(vi) Section 266j.

(vii) Section 267.

(viii) Section 269.

(ix) Subdivision (b) or (c) of Section 288.

(x) Section 288.2.

(xi) Section 288.3, unless committed with the intent to commit a violation of subdivision (b) of Section 286, subdivision (b) of Section 287 or former Section 288a, or subdivision (h) or (i) of Section 289.

(xii) Section 288.4.

(xiii) Section 288.5.

(xiv) Section 288.7.

(xv) Subdivision (c) of Section 653f.

(xvi) Any offense for which the person is sentenced to a life term pursuant to Section 667.61.

(D) The person's risk level on the static risk assessment instrument for sex offenders (SARATSO), pursuant to Section 290.04, is well above average risk at the time of release on the index sex offense into the community, as defined in the Coding Rules for that instrument.

(E) The person is a habitual sex offender pursuant to Section 667.71.

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- (F) The person was convicted of violating subdivision (a) of Section 288 in two proceedings brought and tried separately.
- (G) The person was sentenced to 15 to 25 years to life for an offense listed in Section 667.61.
- (H) The person is required to register pursuant to Section 290.004.
- (I) The person was convicted of a felony offense described in subdivision (b) or (c) of Section 236.1.
- (J) The person was convicted of a felony offense described in subdivision (a), (c), or (d) of Section 243.4.
- (K) The person was convicted of violating paragraph (2), (3), or (4) of subdivision (a) of Section 261 or was convicted of violating Section 261 and punished pursuant to paragraph (1) or (2) of subdivision (c) of Section 264.
- (L) The person was convicted of violating paragraph (1) of subdivision (a) of Section 262.
- (M) The person was convicted of violating Section 264.1.
- (N) The person was convicted of any offense involving lewd or lascivious conduct under Section 272.
- (O) The person was convicted of violating paragraph (2) of subdivision (c) or subdivision (d), (f), or (i) of Section 286.
- (P) The person was convicted of violating paragraph (2) of subdivision (c) or subdivision (d), (f), or (i) of Section 287 or former Section 288a.
- (Q) The person was convicted of violating paragraph (1) of subdivision (a) or subdivision (d), (e), or (j) of Section 289.
- (R) The person was convicted of a felony violation of Section 311.1 or 311.11 or of violating subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, or 311.10.
- (4) (A) A person who is required to register pursuant to Section 290.005 shall be placed in the appropriate tier if the offense is assessed as equivalent to a California registerable offense described in subdivision (c).
- (B) If the person's duty to register pursuant to Section 290.005 is based solely on the requirement of registration in another jurisdiction, and there is no equivalent California registerable offense, the person shall be subject to registration as a tier two offender, except that the person is subject to registration as a tier three offender if one of the following applies:

(i) The person's risk level on the static risk assessment instrument (SARATSO), pursuant to Section 290.06, is well above average risk at the time of release on the index sex offense into the community, as defined in the Coding Rules for that instrument.

(ii) The person was subsequently convicted in a separate proceeding of an offense substantially similar to an offense listed in subdivision (c) which is also substantially similar to an offense described in subdivision (c) of Section 667.5, or is substantially similar to Section 269 or 288.7.

(iii) The person has ever been committed to a state mental hospital or mental health facility in a proceeding substantially similar to civil commitment as a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(5) (A) The Department of Justice may place a person described in subdivision (c), or who is otherwise required to register pursuant to the Act, in a tier-to-be-determined category if the appropriate tier designation described in this subdivision cannot be immediately ascertained. An individual placed in this tier-to-be-determined category shall continue to register in accordance with the Act. The individual shall be given credit for any period for which the individual registers towards the individual's mandated minimum registration period.

(B) The Department of Justice shall ascertain an individual's appropriate tier designation as described in this subdivision within 24 months of the individual's placement in the tier-to-be-determined category.

(e) The minimum time period for the completion of the required registration period in tier one or two commences on the date of release from incarceration, placement, or commitment, including any related civil commitment on the registerable offense. The minimum time for the completion of the required registration period for a designated tier is tolled during any period of subsequent incarceration, placement, or commitment, including any subsequent civil commitment, except that arrests not resulting in conviction, adjudication, or revocation of probation or parole shall not toll the required registration period. The minimum time period shall be extended by one year for each misdemeanor conviction of failing to register under this act, and by three years for each felony conviction of failing to register under this act, without regard to the actual time served in custody for the conviction. If a registrant is subsequently convicted of another offense requiring registration pursuant to the Act, a new minimum time period for the completion of the registration requirement for the applicable tier shall commence upon that person's release from incarceration, placement, or commitment, including any related civil commitment. If the subsequent conviction requiring registration pursuant to the Act occurs prior to an order to terminate the registrant from the registry after completion of a tier associated with the first conviction for a registerable offense, the applicable tier shall be the highest tier associated with the convictions.

(f) Nothing in this section shall be construed to require a ward of the juvenile court to register under the Act, except as provided in Section 290.008.

(g) This section shall become operative on January 1, 2021.

SEC. 3. Section 290.006 of the Penal Code, as amended by Section 3 of Chapter 541 of the Statutes of 2017, is amended to read:

290.006. (a) Any person ordered by any court to register pursuant to the act, who is not required to register pursuant to Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.

(b) This section shall remain in effect only until January 1, 2021, and as of that date is repealed.

SEC. 4. Section 290.006 of the Penal Code, as added by Section 4 of Chapter 541 of the Statutes of 2017, is amended to read:

290.006. (a) Any person ordered by any court to register pursuant to the act, who is not required to register pursuant to Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.

(b) The person shall register as a tier one offender in accordance with paragraph (1) of subdivision (d) of Section 290, unless the court finds the person should register as a tier two or tier three offender and states on the record the reasons for its finding.

(c) In determining whether to require the person to register as a tier two or tier three offender, the court shall consider all of the following:

(1) The nature of the registerable offense.

(2) The age and number of victims, and whether any victim was personally unknown to the person at the time of the offense. A victim is personally unknown to the person for purposes of this paragraph if the victim was known to the offender for less than 24 hours.

(3) The criminal and relevant noncriminal behavior of the person before and after conviction for the registerable offense.

(4) Whether the person has previously been arrested for, or convicted of, a sexually motivated offense.

(5) The person's current risk of sexual or violent reoffense, including the person's risk level on the SARATSO static risk assessment instrument, and, if available from past supervision for a sexual offense, the person's risk level on the SARATSO dynamic and violence risk assessment instruments.

(d) This section shall become operative on January 1, 2021.

~~SEC. 5. Section 3000.07 of the Penal Code is amended to read:~~

~~3000.07. (a) Every inmate who has been convicted for a felony violation of an offense described in paragraph (1) of subdivision (c) of Section 290, or for a felony violation of an offense described in paragraph (2) of subdivision (c) of Section 290, or any attempt to commit any of the offenses described in this subdivision and who is committed to prison and released on parole pursuant to Section 3000 or 3000.1 shall be monitored by a global positioning system for the term of the inmate's parole, or for the duration or any remaining part thereof, whichever period of time is less.~~

~~(b) Any inmate released on parole pursuant to this section shall be required to pay for the costs associated with the monitoring by a global positioning system. However, the Department of Corrections and Rehabilitation shall waive any or all of that payment upon a finding of an inability to pay. The department shall consider any remaining amounts the inmate has been ordered to pay in fines, assessments and restitution fines, fees, and orders, and shall give priority to the payment of those items before requiring that the inmate pay for the global positioning monitoring. An inmate shall not be denied parole on the basis of the inmate's inability to pay for those monitoring costs.~~

~~SEC. 6. Section 3003.5 of the Penal Code is amended to read:~~

~~3003.5. (a) Notwithstanding any other law, when a person is released on parole after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, or for a felony violation of an offense described in paragraph (2) of subdivision (c) of Section 290, that person may not, during the period of parole, reside in any single family dwelling with any person required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption. For purposes of this section, "single family dwelling" shall not include a residential facility which serves six or fewer persons.~~

~~(b) Notwithstanding any other law, it is unlawful for any person for whom registration is required pursuant to Section 290, or who has been convicted of a felony violation of an offense described in paragraph (2) of subdivision (c) of Section 290, to reside within 2,000 feet of any public or private school, or park where children regularly gather.~~

~~(c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290 or who has been convicted of a felony violation of an offense described in paragraph (2) of subdivision (c) of Section 290.~~

~~SEC. 7. Section 3004 of the Penal Code is amended to read:~~

~~3004. (a) Notwithstanding any other law, the Board of Parole Hearings, the court, or the supervising parole authority may require, as a condition of release on parole or reinstatement on parole, or as an intermediate sanction in lieu of return to custody, that an inmate or parolee agree~~

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~~in writing to the use of electronic monitoring or supervising devices for the purpose of helping to verify the inmate's or parolee's compliance with all other conditions of parole. The devices shall not be used to eavesdrop or record any conversation, except a conversation between the parolee and the agent supervising the parolee that is to be used solely for the purposes of voice identification.~~

~~(b) Every inmate who has been convicted for a felony violation of an offense described in paragraph (1) of subdivision (c) of Section 290, for a felony violation of an offense described in paragraph (2) of subdivision (c) of Section 290, or any attempt to commit any of the offenses described in this subdivision and who is committed to prison and released on parole pursuant to Section 3000 or 3000.1 shall be monitored by a global positioning system for life.~~

~~(c) Any inmate released on parole pursuant to this section shall be required to pay for the costs associated with the monitoring by a global positioning system. However, the Department of Corrections and Rehabilitation shall waive any or all of that payment upon a finding of an inability to pay. The department shall consider any remaining amounts the inmate has been ordered to pay in fines, assessments and restitution fines, fees, and orders, and shall give priority to the payment of those items before requiring that the inmate pay for the global positioning monitoring.~~

Date of Hearing: July 9, 2019
Consultant: Lorraine Black

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

SB 269 (Bradford) – As Amended July 1, 2019

As Proposed to be Amended in Committee

SUMMARY: Extends the statute of limitations for when a wrongfully convicted individual can file a claim with the California Victim Compensation Board (CVCB) from two years to ten years after exoneration or release. Specifically, **this bill:**

- 1) Extends the statute of limitations for individuals filing a wrongful conviction claim to the CVCB from within two years to within ten years of acquittal, pardon, dismissal of charges, or release from custody.
- 2) Requires that CVCB recommend an additional appropriation of \$70 per day that the individual suffered additional restrictions past the period of incarceration (i.e. parole, supervised release, or registration as a sex offender).

EXISTING LAW:

- 1) Establishes procedures for the filing and hearing of a petition for a writ of habeas corpus, which allows a person to challenge his or her incarceration or related restraint as unlawful. (Pen. Code, §§ 1474-1508.)
- 2) Requires that when a person is convicted of a charge, and the conviction is set aside based upon a determination that the person was factually innocent of the charge, the judge shall order that the records in the case be sealed, including any record of arrest or detention, upon written or oral motion of any party in the case or the court, and with notice to all parties to the case. (Pen. Code, § 851.86.)
- 3) Requires the court to inform wrongfully convicted individuals of the availability of indemnity for persons erroneously convicted and the time limitations for presenting those claims. (Pen. Code, § 851.86.)
- 4) Requires that CVCB recommend to the Legislature that an appropriation be made for a claimant that has secured a declaration of factual innocence. (Pen. Code § 851.865.)
- 5) Allows an individual no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment for any of the following reasons:
 - a) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence;

- b) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment; or,
 - c) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph. (Pen. Code, § 1473.6, subd. (a).)
- 6) Allows an individual who is no longer in criminal custody to file a motion to vacate a conviction or sentence if newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice. (Cal. Pen. Code, § 1473.7, subd. (a)(2).)
 - 7) States that, if the district attorney or Attorney General (AG) stipulates to or does not contest the factual allegations underlying one or more grounds for granting a writ of habeas corpus or a motion to vacate a judgement, the facts underlying the basis for the court's ruling shall be binding on the AG, the factfinder, and CVCB. (Pen. Code, § 1485.5, subd. (a).)
 - 8) States that, in a contested or uncontested proceeding, the express factual findings made by the court in considering a petition for habeas corpus, a motion to vacate judgment, or an application for a certificate of factual innocence, shall be binding on the AG, the factfinder, and CVCB. (Pen. Code, § 1485.5, subd. (c).)
 - 9) States that, in a contested proceeding, if the court has granted a writ of habeas corpus or vacated a judgement, and if the court has found that the person is factually innocent, that the finding shall be binding on CVCB for a claim presented to CVCB, and upon application by the person, CVCB shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid. (Pen. Code, § 1485.55, subd. (a).)
 - 10) States that, if the court has granted a writ of habeas corpus or vacated a judgement, and if the court finds that the individual has proven their factual innocence by a preponderance of the evidence, CVCB shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid. (Pen. Code, § 1485.55, subd. (d).)
 - 11) Provides that any person who, having been convicted of any crime against the state amounting to a felony and imprisoned in the state prison for that conviction, is granted a pardon by the Governor for the reason that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her, or who, being innocent of the crime with which he or she was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he or she was imprisoned, may, as specified, present a claim against the state to CVCB for the pecuniary injury sustained by him or her through the erroneous conviction and imprisonment. (Pen. Code, § 4900.)
 - 12) Allows erroneously convicted and pardoned individuals two years after acquittal, pardon or release of custody to file a claim against the state; an individual may not file a claim until 60 days have passed since the date of reversal of conviction or granting of the writ. (Pen. Code, § 4901.)

- 13) Requires that CVCB calculate compensation and recommend to the Legislature payment of the sum within 30 days of the presentation of a claim if the claimant has secured a declaration of factual innocence or if the court has granted a writ of habeas corpus or vacated a judgement and has found that the claimant is factually innocent. (Pen. Code, § 4902, subd. (a).)
- 14) Requires appropriation for wrongfully convicted claimants that is sum equivalent to \$140 per day of incarceration, which comprises any time spent in custody (including county jail), and specifies that this appropriation shall not be considered gross income for state tax purposes. (Pen. Code, § 4904.)
- 15) Defines “newly discovered evidence” as evidence that could not have been discovered with reasonable diligence prior to judgment. (Pen. Code, § 1473.6, subd. (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 269 would extend the deadline to seek compensation for individuals who were wrongfully convicted. Under current law, an individual must petition the California Victim Compensation Board within two years of their release to receive compensation. This claims process takes years to complete and involves lengthy litigation after they have already been found innocent by the courts. This bill extends the deadline an individual has to file a compensation claim to ten years."

“In addition, this bill provides an additional \$70 per day the individual wrongfully spent on parole, under state supervision, or on the sex offender registry. Many of these individuals had to spend years in prison despite never committing a crime, and many spend additional time dealing with the stigma associated with their wrongful conviction. Nothing can make up for the time and freedom these individuals have lost, but this bill takes a step toward providing justice for those who have been wrongfully convicted.”

- 2) **Post-Conviction Relief and Compensation for Exonorees:** Current law provides that a wrongfully convicted individual can file a claim with CVCB within two years of acquittal, pardon, or release from custody. This bill extends the statute of limitations for when a wrongfully convicted or incarcerated individual can file a claim with CVCB to within ten years of acquittal, pardon, dismissal of charges, or release from custody. It can take years for a wrongfully incarcerated individual to complete the compensation process. (National Registry of Exonerations, *Compensation for Exonorees: A Primer*, available at: <https://www.law.umich.edu/special/exoneration/Pages/Compensation.aspx>). An individual filing a claim must prove their innocence to CVCB, which may necessitate legal assistance or representation. A longer statute of limitations will allow more wrongfully incarcerated individuals to file claims for compensation with CVCB.

Current law also provides that, in the event CVCB finds an individual was wrongfully incarcerated, CVCB must recommend that the Legislature make an appropriation to pay the individual at the rate of \$140 for each day of incarceration. This bill will require that CVCB recommend an additional \$70 be paid for each day an individual spends under restrictions after incarceration. Current law does not provide compensation for time after release, where

wrongfully convicted individuals may endure additional restrictions like parole or registration as a sex offender. This additional compensation ensures wrongfully convicted individuals are recognized for any restrictions imposed upon them after release.

- 3) **Argument in Support:** According to the *California Innocence Coalition*, “SB 269 [will] provide wrongfully convicted inmates a more efficient and just process for obtaining compensation to help them successfully move forward in society upon their exoneration.

“Under current law, even after a judge has determined that the evidence in their habeas case was so powerful that the conviction would likely never have occurred had the evidence been available at trial, that wrongfully convicted person has a huge uphill battle to get compensated for their years of wrongful incarceration. In fact, they must litigate their case all over again before the court or Victim’s Compensation Board. This process takes on average 2 ½ years from the time someone is exonerated to the time the board makes a decision to compensate or not, and in some cases longer.

“Therefore, even after a court examines all of the evidence of innocence, reverses the conviction and then the State dismisses charges or our clients are acquitted on re-trial, an exoneree who has proven they were wrongfully convicted and is once again presumed innocent cannot get compensation without more litigation. This places our most vulnerable population, those already victimized by the system, in the position of risking further victimization as they go back through the system again, this time with even less protections and an unfair burden.

“SB 269 eliminates the 2 year statute of limitations for persons whose convictions have been reversed to apply for compensation. Also, SB 269 provides compensation to the wrongfully convicted for their years spent on parole, supervised release, or the sex offender registry as a result of their conviction. These men and women not only had to survive incarceration, but had to survive years under the worst stigmas in society all because of their wrongful conviction.

“With the changes reflected in the bill, individuals whose convictions likely would have never occurred—who are seeking to move forward and rebuild their lives—will not have to spend additional years litigating why they should receive compensation during the most critical time when they need it the most.”

- 4) **Related Legislation:** AB 702 (Weber) would require CVCB to reimburse exonerees for mental health counseling. AB 702 was held on the Assembly Appropriations Suspense File.

5) **Prior Legislation:**

- a) SB 1094 (Anderson), of the 2017-2018 Legislative Session, was a substantially similar bill. SB 1094 was held in the Assembly Appropriations Committee.
- b) SB 1232 (Bradford), Chapter 983, Statutes of 2018, extends the time limit for a minor victim to file a claim for compensation to CVCB to three years after the victim turns 21.

- c) AB 1987 (Lackey), Chapter 482, Statutes of 2018, expanded availability of post-conviction motions for discovery materials to cases where defendants were convicted of serious or violent felonies and sentenced to 15 years or more.
- d) AB 2867 (Gonzalez Fletcher), Chapter 825, Statutes of 2018, clarified timing and procedural requirements for motions for post-conviction relief based on newly discovered evidence of actual innocence.
- e) SB 321 (Monning), of the 2017–2018 Legislative Session, would have required the Governor to appoint a special master to oversee all claims for compensation presented to CVCB in wrongful conviction cases. SB 321 was held in Senate Appropriations Committee.
- f) SB 694 (Leno), of the 2015–2016 Legislative Session, was a substantially similar to this bill. SB 694 was held in the Assembly Appropriations Committee.
- g) AB 672 (Jones-Sawyer), Chapter 403, Statutes of 2015, required the Department of Corrections and Rehabilitation to assist an exonerated person with transitional services upon release.
- h) SB 635 (Nielsen), Chapter 422, Statutes of 2015, raised the compensation rate for wrongfully convicted persons from \$100 per day to \$140 per day.
- i) SB 618 (Leno), Chapter 800, Statutes of 2013, streamlined and provided clarity to the process for compensating exonerated persons.
- j) AB 316 (Solorio), Chapter 432, Statutes of 2009, extended the timeline for filing claims with CVCB from six months to two years, allowed a finding of factual innocence to be used as proof in a claim before CVCB, and extended the statute of limitations for legal malpractice in specified situations.

REGISTERED SUPPORT / OPPOSITION:

Support

California Innocence Coalition (Sponsor)
American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Catholic Conference
California Civil Liberties Advocacy
California Public Defenders Association
Drug Policy Alliance
Ella Baker Center for Human Rights
Exonerated Nation
San Francisco Public Defender's Office

Opposition

None

Analysis Prepared by: Lorraine Black / PUB. S. / (916) 319-3744

Amended Mock-up for 2019-2020 SB-269 (Bradford (S) , Glazer (S))

**Mock-up based on Version Number 97 - Amended Assembly 7/1/19
Submitted by: Lorraine Black, Assembly Public Safety Committee**

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

SECTION 1. Section 1485.55 of the Penal Code is amended to read:

1485.55. (a) In a contested proceeding, if the court has granted a writ of habeas corpus or when, pursuant to Section 1473.6, the court vacates a judgment, and if the court has found that the person is factually innocent, that finding shall be binding on the California Victim Compensation Board for a claim presented to the board, and upon application by the person, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

(b) In a contested or uncontested proceeding, if the court has granted a writ of habeas corpus or vacated a judgment pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, the person may move for a finding of factual innocence by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner.

(c) If the court makes a finding that the petitioner has proven their factual innocence by a preponderance of the evidence pursuant to subdivision (a) the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(d) A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to subdivision (a).

(e) If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

SEC. 2. Section 4901 of the Penal Code is amended to read:

4901. (a) A claim under Section 4900, accompanied by a statement of the facts constituting the claim, verified in the manner provided for the verification of complaints in civil actions, is required to be presented by the claimant to the California Victim Compensation Board **within a period of 10 years** after judgment of acquittal, dismissal of charges, pardon granted, or release from custody, whichever is later.

(b) For purposes of subdivision (a), “release from custody” means release from imprisonment from state prison or from incarceration in county jail when there is no subsequent parole jurisdiction exercised by the Department of Corrections and Rehabilitation or postrelease jurisdiction under a community corrections program, or when there is a parole period or postrelease period subject to jurisdiction of a community corrections program, when that period ends.

(c) A person may not file a claim under Section 4900 until 60 days have passed since the date of reversal of conviction or granting of the writ, or while the case is pending upon an initial refiling, or until a complaint or information has been dismissed a single time.

SEC. 3. Section 4903 of the Penal Code is amended to read:

4903. (a) Except as provided in Sections 851.865 and 1485.55, the board shall fix a time and place for the hearing of the claim. At the hearing the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto. The claimant shall prove the facts set forth in the statement constituting the claim, including the fact that the crime with which they were charged was either not committed at all, or, if committed, was not committed by the claimant, and the injury sustained by them through their erroneous conviction and incarceration.

(b) In a hearing before the board, the factual findings and credibility determinations establishing the court’s basis for granting a writ of habeas corpus, a motion for new trial pursuant to Section 1473.6, or an application for a certificate of factual innocence as described in Section 1485.5 shall be binding on the Attorney General, the factfinder, and the board.

(c) The board shall deny payment of any claim if the board finds by a preponderance of the evidence that a claimant pled guilty with the specific intent to protect another from prosecution for the underlying conviction for which the claimant is seeking compensation.

SEC. 4. Section 4904 of the Penal Code is amended to read:

4904. If Section 851.865 or 1485.55 applies to a claim, or if the evidence shows that the crime with which the claimant was charged was either not committed at all, or, if committed, was not committed by the claimant, and that the claimant has sustained injury through their erroneous conviction and incarceration, the California Victim Compensation Board shall report the facts of the case and its conclusions to the next Legislature, with a recommendation that the Legislature make an appropriation for the purpose of indemnifying the claimant for the injury. The amount of the appropriation recommended shall be a sum equivalent to one hundred forty dollars (\$140) per day of incarceration served, and shall include any time spent in custody, including in a county jail,

that is considered to be part of the term of incarceration. For a person who, after serving a sentence in a California prison for which the person is entitled to compensation pursuant to this section, was released either on parole pursuant to Section 3000 or 3000.1 or supervised release pursuant to Section 3074, or was required to register pursuant to Section 290, the additional amount of appropriation recommended shall be a sum equivalent to seventy dollars (\$70) per day during which the person suffered additional restrictions past the period of incarceration. All appropriation shall not be treated as gross income to the recipient under the Revenue and Taxation Code.

Date of Hearing: July 9, 2019
Counsel: Sandy Uribe

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

SB 273 (Rubio) – As Amended July 2, 2019

SUMMARY: Extends the statute of limitation for the crime of domestic violence for 10 years when specified conditions apply, and makes changes to domestic violence training requirements for peace officers. Specifically, **this bill:**

- 1) States that, notwithstanding any other law, a prosecution for a crime involving domestic violence, as specified, may be commenced within 10 years of the crime if one of the following criteria applies:
 - a) The state becomes aware of an audio or video recording, photographs, or written or electronic communication that provides sufficient evidence to charge the perpetrator; or
 - b) The perpetrator provides a confession.
- 2) States that this new statute of limitations shall only apply to crimes that were committed on or after January 1, 2020, or to crimes for which the statute of limitations that was in effect before January 1, 2020 has not expired as of that date.
- 3) States that the course of instruction for peace officers on domestic violence shall now include a brief current and historical context on communities of color impacted by incarceration and violence.
- 4) Delineates additional training requirements for peace officers with respect to domestic violence crimes, including:
 - a) Methods for ensuring victim interviews occur in a venue separate from the alleged perpetrator and with appropriate sound barriers to prevent the conversation from being overheard;
 - b) Asking the victim whether he or she would like a follow-up visit, information on obtaining a protective order or a gun violence restraining order, and/or a verbal review of specified resources available for victims.
 - c) A discussion of criminal conduct that may be related to domestic violence, including, but not limited to:
 - i) Coercion for purposes of committing or impeding the investigation or prosecution of domestic violence; as specified;

- ii) False imprisonment;
 - iii) Extortion and the use of fear;
 - iv) Identity theft; impersonation through an internet website or by other electronic means; false personation; mail theft; stalking; and,
 - v) Non-consensual pornography.
- 5) States that, if appropriate, presenters of the domestic violence training course may include both victims of domestic and violence perpetrators who have been rehabilitated.
- 6) Adds a criminal-justice-reform advocate and a racial-justice advocate to the individuals which should be consulted when developing standards and guidelines for domestic violence training.

EXISTING LAW:

- 1) Provides that a person who willfully inflicts corporal injury resulting in a traumatic condition upon a spouse, former spouse, cohabitant, former cohabitant, fiancé or fiancée, someone with whom the person has, or previously had, an engagement or dating relationship, or the mother or father of the offender's child, is guilty of domestic violence. (Pen. Code, § 273.5.)
- 2) Punishes domestic violence by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to \$ 6,000 or by both that fine and imprisonment. (Pen. Code, § 273.5, subd. (a).)
- 3) Provides that there is no statute of limitations for crimes punishable by death, or by imprisonment in the state prison for life, or by life without the possibility of parole. (Pen. Code, § 799, subd. (a).)
- 4) Provides that there is no statute of limitations for specified sex crimes if the crime was committed on or after January 1, 2017, or if the crime was committed before that date but the statute of limitations had not expired on January 1, 2017. (Pen. Code, § 799, subd. (b)(1).)
- 5) Provides that prosecution for crimes punishable by imprisonment for eight years or more must be commenced within six years after commission of the offense. (Pen. Code, § 800.)
- 6) Provides that prosecution for other felonies punishable by less than eight years must be commenced within three years after commission of the offense. (Pen. Code, § 801.)
- 7) Provides, generally, that the statute of limitations for most misdemeanors is one year. (Pen. Code, § 802, subd. (a).)
- 8) Provides that, notwithstanding any other time limitations, for specified sex crimes that are alleged to have been committed when the victim was under the age of 18, prosecution may be commenced any time prior to the victim's 40th birthday. (Pen. Code, § 801.1, subd. (a).)

- 9) Provides that notwithstanding any other time limitations, prosecution for a felony offense requiring sex offender registration shall be commenced within 10 years after commission of the offense. (Pen. Code, § 801.1, subd. (b).)
- 10) Provides that, notwithstanding any other limitation of time, a criminal complaint for specified sex crimes may be filed within one year of the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid (DNA) testing if specified conditions are met. (Pen. Code, § 803, subd. (g)(1).)
- 11) Provides that if more than one time period described in the statute of limitations scheme applies, the time for commencing an action is governed by that period that expires the latest in time. (Pen. Code, § 803.6, subd. (a).)
- 12) Requires peace officers to take a course of training in the handling of domestic violence complaints, as specified. (Pen. Code, § 13519.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "Current law allows the statute of limitations for domestic violence to be as short as one year, depending on the crime committed. However, studies show that there are multiple reasons why a victim may not come forward within the statute of limitations, including their age at the time of abuse, ongoing trauma, threats from the perpetrator, or lack of evidence.

"Law enforcement also plays a critical role when it comes to identifying and addressing domestic violence calls. Which is why we including additional training for law enforcement to include updated techniques when identifying a potential domestic violence victim."

- 2) **Statute of Limitations Generally:** The statute of limitations requires commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Pen. Code, § 804.)

The statute of limitations serves several important purposes in a criminal prosecution, including staleness, prompt investigation, and repose. The statute of limitations protects persons accused of crime from having to face charges based on evidence that may be unreliable, and from losing access to the evidentiary means to defend against the accusation. With the passage of time, memory fades, witnesses die or otherwise become unavailable, and physical evidence becomes unobtainable or contaminated.

The statute of limitations also imposes a priority among crimes for investigation and prosecution. The deadline serves to motivate the police and to ensure against bureaucratic delays in investigating crimes.

Additionally, the statute of limitations reflects society's lack of desire to prosecute for crimes committed in the distant past. The interest in repose represents a societal evaluation of the time after which it is neither profitable nor desirable to commence a prosecution.

These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of relative interests of the state and the defendant in administering and receiving justice.

More recently, in *Stogner v. California* (2003) 539 U.S. 607, the Court underscored the basis for statutes of limitations: "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (*Id.* at p. 615.)

The amount of time a prosecuting agency may charge an alleged defendant varies based on the crime. In general, the limitations period is related to the seriousness of the offense as reflected in the length of punishment established by the Legislature. (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1594-1595; see, e.g., Pen. Code, §§ 799-805.) After a comprehensive review of criminal statutes of limitation in 1984, the Law Revision Commission recommended that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. Law Revision Com. Rep. (1984) p. 313.) The Legislature overhauled the entire statutory scheme with this recommendation in mind. In *People v. Turner, supra*, 134 Cal.App.4th 1591, the court summarized the recommendations of the Law Revision Commission:

The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. It also served the procedural need to provid[e] predictability and promote uniformity of treatment for perpetrators and victims of all serious crimes. The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious. (*People v. Turner, supra*, 134 Cal.App.4th at pp. 1594-1595, citations omitted.)

The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The prosecution bears the burden of proving, by a preponderance of the evidence, that a charged offense was committed within the applicable period of limitations. (*People v. Lopez* (1997) 52 Cal.App.4th 233, 248.) The court is required to construe application of the statute

of limitations strictly in favor of the defendants. (*People v. Zamora* (1976) 18 Cal.3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

For most types of offenses, the statute of limitations begins to run on the day that the offense was actually committed. However, the statute of limitations period does not commence as to continuing offenses until the entire course of conduct is complete. (*People v. Zamora, supra*, 18 Cal.3d 538.) And in cases involving crimes such as fraud or embezzlement the statute of limitations may begin to run at the point that the offense is discovered. (See e.g. Pen. Code, § 803, subd. (c).)

In California, the statute of limitations to prosecute a criminal case of felony domestic violence is three years. (*People v. Sillas* (2002) 100 Cal.App.4th Supp. 1, 5.)

This bill would extend the statute of limitations in domestic violence cases to 10 years in cases where either (1) the perpetrator confesses, or (2) where there is photographic, audio or video-recorded evidence, or written or electronic communication that provides sufficient evidence to charge the perpetrator.

There are many reasons why a victim of domestic violence might not immediately report the crime to law enforcement, such as emotional manipulation, financial insecurity, or having no place to go. And yet, despite its traumatic nature, domestic abuse does not fall within the type of crimes that would normally warrant extension. The domestic abuse statute, Penal Code section 273.5, prohibits the willful infliction of corporal injury resulting in a traumatic condition upon a victim with which the offender has a *specified domestic relationship*. So, the identity of the perpetrator is not at issue. Moreover, domestic abuse is not the type of crime where the person does not discover until a later date that the crime has occurred. As a general matter, most people know that a battery is criminal conduct. In fact, if a victim of abuse is taking photographs of sustained injuries, the victim recognizes that criminal conduct has occurred.

The factors proposed by this bill to warrant extension of the statute of limitation – a confession by the perpetrator or images or writing documenting – are not the type of factor normally considered for extending a statute of limitations. Rather, this type of corroborating evidence affects the strength of the case or weight of the evidence. So for example, they might be factors a prosecutor would consider when deciding whether to file charges even when the statute of limitations has not expired.

Moreover, extension of the statute of limitations based on these factors will not necessarily get victims the justice they deserve. Even in cases where a proposed factor is present, a prosecutor may have to tell a victim that even though the case is not time barred, there is not enough evidence to bring the case to trial.

Most importantly however, as noted above, there is a strong public policy against extending the statute of limitations. Memories fade as time passes. Evidence that might have been gathered by the police is lost. Witnesses move or die. Fairness and due process demand prosecution be commenced in a reasonable time so the accused may be able to gather evidence to prove his or her innocence. It seems a rejection of firmly rooted public policy to significantly extend the statute of limitations in this type of case, even under these limited circumstances.

- 3) **Ex Post Facto:** In *Stogner v. California, supra*, 539 U.S. 607 the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.)

This bill states that the provisions eliminating the statute of limitations for the specified crimes will apply either only to crimes committed after its effective date, or to crimes for which a statute of limitations that was in effect before its effective date has not run as of that date. In other words, the bill extends current limitations periods, but does not try to revive time-barred cases. Therefore, there do not appear to be any ex post facto concerns raised by this bill.

- 4) **Law Enforcement Training on Domestic Violence:** Penal Code section 13519 requires peace officers to receive training on the handling of domestic violence complaints as part of basic training. Additionally, law enforcement officers below supervisory rank assigned to patrol are required to take refresher training every two years. (Pen. Code, § 13519, subd. (g).)

The course of training covers the following procedures and techniques:

- The provisions set forth in Title 5 (commencing with Section 13700) relating to response, enforcement of court orders, and data collection.
- The legal duties imposed on peace officers to make arrests and offer protection and assistance including guidelines for making felony and misdemeanor arrests.
- Techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and that promote the safety of the victim.
- The nature and extent of domestic violence.
- The signs of domestic violence.
- The assessment of lethality or signs of lethal violence in domestic violence situations.
- The legal rights of, and remedies available to, victims of domestic violence.
- The use of an arrest by a private person in a domestic violence situation.
- Documentation, report writing, and evidence collection.
- Domestic violence diversion
- Tenancy issues and domestic violence.
- The impact on children of law enforcement intervention in domestic violence.
- The services and facilities available to victims and batterers.
- The use and applications of the Penal Code in domestic violence situations.
- Verification and enforcement of temporary restraining orders when the suspect is present and when the suspect has fled.
- Verification and enforcement of stay-away orders.
- Cite and release policies.
- Emergency assistance to victims and how to assist victims in pursuing criminal justice options. (Pen. Code, § 13519, subd. (c).)

This bill would specify additional training requirements. In particular, this bill would require that the training include methods for ensuring victim interviews occur separate from the perpetrator and cannot be overheard. This bill would also require the training to include a

discussion of criminal conduct that may be related to domestic violence, such as extortion, coercion, and non-sensual pornography. Additionally, this bill would require that law enforcement learn about the importance of asking the victim whether he or she would like information on obtaining a protective order or a gun violence restraining order, a review of resources available for victims, and/or a follow up visit.

- 5) **Argument in Support:** According to artist and advocate *Evan Rachel Wood*, “I am a survivor of Domestic Violence. I was so traumatized and afraid of retaliation from my abuser it took me many years and a lot of therapy to reach the point of being able to come forward, only to be told by an attorney that despite my long list of video, audio and photographic evidence, nothing could be done.

“I felt that I was one of many victims who fall through the cracks if they were not able to recover from or identify their abuse in time. This moved me to assemble a team that could create a cushion for survivors of domestic violence to come back from their trauma, with certain exceptions to the statute of limitation.

“According to the American Psychological Association, more than one in three women and more than one in four men in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. Women with disabilities have a 40% greater risk of intimate partner violence. One in five female high school students reports being physically and/or sexually assaulted by a dating partner.

“California has the opportunity to significantly strengthen the law regarding domestic violence criminal prosecution, and law enforcement training. The steps in this bill will give victims the ability to pursue charges when they statute of limitations has passed when very specific, evidence-based criteria are met and give law enforcement the tools needed to identify and act appropriately to prevent further harm to a potential victim.”

- 6) **Argument in Opposition:** According to the *California Public Defenders Association*, “While we applaud the efforts to address the harms of domestic violence and the increase in training for law enforcement, we strongly oppose SB 273’s extension of the statute of limitations for domestic violence prosecutions. The extension of the statute of limitations will result in the conviction of innocent people, is bad public policy and wastes scarce resources that could be better spent on evidence based and effective strategies to end domestic violence.

“Criminal statutes of limitations in the United States date back to colonial times, with the first such statute appearing as early as 1652. The statutes’ fundamental purpose is to protect people accused of crimes from having to face charges based on evidence that may be unreliable, and from losing access to the means to defend themselves. The United States Supreme Court has stated that statutes of limitations are considered ‘the primary guarantee against bringing overly stale criminal charges’ and that they ‘protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time...’ Likewise, the California Supreme Court has noted that statutes of limitations ‘encourage the swift and effective enforcement of the law, hopefully producing a stronger deterrent effect.’

“With the passage of time, memories fade, witnesses die, records and biological evidence are

lost or destroyed. All of this makes it more likely that an innocent person will be wrongly convicted.

“Statutes of limitations also serve the purpose of encouraging swift investigations and prosecutions. Given the incidence of domestic violence in the United States and California, proponents of SB 273 rightly complain that relatively few domestic violence cases are actually investigated and prosecuted in California. The primary reason for this is not because of statutes of limitations. Rather, the failure to investigate and prosecute domestic violence results from choices made about allocation of resources and priorities and lingering ignorance about the generational harms of domestic violence. Extending the statute of limitations will do nothing to address those obstacles.

“Unfortunately, the extension of statute of limitations to 10 years for both misdemeanors and felonies will likely promote false accusations when spouses or dating partners separate or divorce and child custody and/or money are at issue. The provision that the discovery of ‘an audio or video recording, photographs, or written or electronic communication that provides evidence sufficient to charge the perpetrator’ intended to provide corroboration to test the reliability of the accusation provides scant protection in an era in which the average person can photo shop or alter recordings, photographs, or electronic communications without any particular training or skills. The instructions on how to do so are readily available on the internet with almost search engine.”

“SB 273 is bad public policy and proposes to wastes scarce resources imprisoning more individuals for domestic violence when there are evidence based programs that have been proven effective at reducing violence. Currently, researchers around the world are treating domestic violence which they term intimate partner violence as a public health issue. For example the Center for Disease Control has identified the risk factors for both perpetuating and being a victim of intimate partner violence (IPV). Not surprisingly, many, but not all, of the factors are the same. ‘For example, childhood physical or sexual victimization is a risk factor for future IPV perpetration and victimization. A combination of individual, relational, community, and societal factors contribute to the risk of becoming an IPV perpetrator or victim. Understanding these multilevel factors can help identify various opportunities for prevention.’”

7) **Related Legislation:**

- a) AB 1029 (E. Garcia), would extend the statute of limitation for the crime of domestic violence for 20 years when specified conditions apply. It was identical to this bill in its introduced form. AB 1029 was not heard in this committee and is now a two-year bill.
- b) SB 239 (Chang) provides that, notwithstanding any other statutes of limitations, for the crime of unauthorized access to computers, a criminal complaint may be filed within three years after the discovery of offense. SB 239 is pending in the Assembly Appropriations Committee.

8) Prior Legislation:

- a) SB 610 (Nguyen), Chapter 74, Statutes of 2017, extends the statute of limitations for the crime of concealing an accidental death to no more than four years after the concealment.
- b) SB 813 (Leyva), Chapter 777, Statutes of 2016, eliminated the statute of limitations for specified sex crimes.

REGISTERED SUPPORT / OPPOSITION:

Support

Evan Rachel Wood (Sponsor)
A Community for Peace
California Police Chiefs Association
Crime Victims United of California
Peace Officers Research Association of California
Riverside Sheriffs' Association
WEAVE

40 Private Individuals

Opposition

American Civil Liberties Union of California
California Public Defenders Association

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

Date of Hearing: July 9, 2019
Counsel: Nikki Moore

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

SB 338 (Hueso) – As Amended June 17, 2019

SUMMARY: Establishes the “Senior and Disability Justice Act” which requires a local law enforcement agency that adopts or amends its policy regarding senior and disability victimization after October 1, 2020 to include information and training on elder and dependent adult abuse as specified. Specifically, **this bill:**

- 1) Eliminates the duty imposed on long-term care ombudsman programs that revise their policy manuals regarding elder and dependent adult abuse to update the policy manuals to include specified information about elder and dependent abuse.
- 2) Authorizes, but does not require, a local law enforcement agency to adopt a policy regarding senior and disability victimization.
- 3) Requires a newly adopted or revised policy regarding elder and dependent adult abuse or senior and disability victimization on or after October 1, 2020, to include various definitions, terms, and references to laws including:
 - a) Information on the wide prevalence of elder and dependent adult abuse, sexual assault, other sex crimes, hate crimes, domestic violence, human trafficking, and homicide against adults and children with disabilities;
 - b) A statement of the agency’s commitment to providing equal protection;
 - c) The definitions and elements of lewd or lascivious acts by a caretaker, elder physical abuse, or false imprisonment of an elder or dependent adult;
 - d) The policy shall instruct officers to consider whether there is any indication that the perpetrator committed the criminal act because of bias, as defined;
 - e) An agency protocol and schedule for training officers, as specified by the bill;
 - f) A requirement that when an officer intends to interview a victim or witness to an alleged crime and the victim or witness reports or demonstrates deafness or hearing loss, the officer first secure the services of an interpreter;
 - g) An agency protocol for providing appropriate training for civilian personnel who interact with the public front desk personnel;

- h) The fact that the agency requires officers to investigate every report of senior and disability victimization, and does not dismiss any reports as merely civil matter or for any other reason without an investigation;
- i) An appendix to the policy describing the requirement for these investigations;
- j) A statement that it is the agency's policy to make arrests or to seek arrest warrants, and, in the case of domestic violence, as permitted by law. The policy shall also state the agency protocol for seeking those arrest warrants;
- k) The agency protocol for arrests for elder and dependent adult abuse and other related crimes other than domestic violence;
- l) The fact that elder and dependent adult abuse, dependent person sexual abuse by a caretaker, other sex crimes, and child abuse can also be domestic violence;
- m) The fact that many victims of sexual assault and other sex crimes may delay disclosing the crimes;
- n) An instruction to notify potential victims of sex crimes that they have a right to have a support person of their choice present at all times;
- o) The agency's cross-reporting requirements and an agency protocol for carrying out these cross-reporting requirements;
- p) Mandated reporting requirements;
- q) The fact that victims and witnesses with disabilities can be highly credible witnesses when interviewed appropriately by trained officers or other trained persons;
- r) A procedure for first-responding officers to follow when interviewing persons with cognitive and communication disabilities until officers'
- s) The unit or office, or multiple units or offices of the agency, or the title or titles of an officer or officers, tasked with specified responsibilities'
- t) An agency protocol for seeking emergency protective orders by phone from a court at any time of the day or night'
- u) A requirement that all officers treat an unexplained or suspicious death of an elder, dependent adult, or other adult or child with a disability as a potential homicide until a complete investigation, including an autopsy, is completed;
- v) A requirement that, whenever an officer verifies that a relevant protective order has been issued, the officer shall make reasonable efforts to determine if the order prohibits the possession of firearms or requires the relinquishment of firearms;

- w) Civil remedies and resources available to victims, including, but not limited to, the program administered by the California Victim Compensation Board;
- x) The content of any model policy on elder and dependent adult abuse and related crimes that the Commission on Peace Officer Standards and Training may develop, as well as the adoption of that policy;
- y) Use of the full term “elder and dependent adult abuse” in every reference to that crime, with no shorthand terms, including, but not limited to, “elder abuse” or “adult abuse;”
- z) A detailed checklist of first-responding officers’ responsibilities, as specified;
 - aa) The relevant content of any memoranda of understanding or similar agreements or procedures for cooperating with other responsible agencies;
 - bb) A statement of the agency chief executive’s responsibilities, as specified;
 - cc) An agency protocol for transmitting and periodically retransmitting the policy and any related orders to all officers, including a simple and immediate way for officers to access the policy in the field when needed;
 - dd) A requirement that all officers be familiar with the policy and carry out the policy at all times except in the case of unusual compelling circumstances as determined by the agency’s chief executive or by another supervisory or command-level officer designated by the chief executive;
 - ee) A responsible officer who makes a determination allowing a deviation from the policy shall produce a report stating the unusual compelling circumstances. The policy shall include an agency protocol for providing copies of those reports to the alleged victims and reporting parties; and,
 - ff) For each agency protocol, either a specific title-by-title list of officers’ responsibilities, or a specific office or unit in the law enforcement agency responsible for implementing the protocol.
- 4) Requires a law enforcement agency that adopts or revises a policy on elder and dependent adult abuse on or after July 1, 2020, to post a copy of that policy on its website.
- 5) Makes clarifying changes to related provisions with respect to the entities that have jurisdiction to investigate elder and dependent adult abuse.

EXISTING LAW:

- 1) Makes it a crime for a person, entrusted with the care of custody of any elder or dependent adult, to willfully cause the elder to be injured or permit them to be placed in a situation endangering their health. (Pen. Code, § 368, subd. (b)(1).)
- 2) States that adult protective services agencies and local long-term care ombudsman programs also have jurisdiction within their statutory authority to investigate elder and dependent adult

abuse and criminal neglect, and may assist local law enforcement agencies in criminal investigations at the law enforcement agencies' request, provided, however, that law enforcement agencies shall retain exclusive responsibility for criminal investigations, any provision of the law to the contrary notwithstanding. (Pen. Code § 368.5, subd. (b).)

- 3) Requires that every local law enforcement agency and long-term care ombudsman program shall, when the agency or program next undertakes the policy revision process, revise or include in the portion of its policy manual relating to elder and dependent adult abuse, if that policy manual exists, the following information: (Pen. Code § 368.5, subd. (c).)
 - a) The elements of specified elder abuse crimes;
 - b) The requirement that law enforcement agencies have the responsibility for criminal investigations of elder and dependent adult abuse and criminal neglect, however, adult protective services agencies and long-term care ombudsman programs have authority to investigate incidents of elder and dependent adult abuse and neglect and may, if requested, assist law enforcement agencies with criminal investigations; and,
 - c) As a guideline to investigators and first responders, the definition of elder and dependent adult abuse provided by the Department of Justice in its policy and procedures manual, dated March 2015, which defines elder and dependent adult abuse as physical "abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."
- 4) Exempts a long-term care ombudsman program that does not have a policy manual from requiring the program to create or adopt a policy manual. (Pen. Code § 368.5, subd. (c)(2).)
- 5) Requires every city police officer or deputy sheriff at a supervisory level and below who is assigned field or investigative duties to complete an elder and dependent adult abuse training course certified by the Commission on Peace Officer Standards and Training within 18 months of assignment to field duties. (Welf. & Inst. Code, § 13515, subd. (a).)
- 6) Includes in the training relevant laws, recognition of elder and dependent adult fraud, abuse and neglect, reporting requirements and procedures, the role of the local adult protective services and public guardian offices, the legal rights of, and remedies available to, victims of elder or dependent adult, including emergency protective orders and the option to request a simultaneous move-out order, and temporary restraining orders. (Welf. & Inst. Code, § 13515, subd. (a).)
- 7) States that when producing new or updated training materials pursuant to this section, the commission shall consult with the Bureau of Medi-Cal Fraud and Elder Abuse, local adult protective services offices, the Office of the State Long-Term Care Ombudsman, and other subject matter experts. (Welf. & Inst. Code, § 13515, subd. (b).)
- 8) Requires any new or updated training materials to address all of the following: the jurisdiction and responsibility of law enforcement agencies about crimes against elder and dependent adults; the fact that the protected classes of "dependent person" and "dependent adult" include many persons with disabilities, regardless of the fact that most of those

persons live independently; and other relevant information and laws. States that the commission may inform law enforcement agencies of other relevant training materials. (Welf. & Inst. Code, § 13515, subds. (c) & (d).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "In California, while a thousand people a day are turning 65, the state has fallen behind in allocating resources to properly prepare for this large-scale demographic transition. As an example, recent reports have indicated that elder abuse and crimes against seniors in California has increased in many counties.

"In the last five years, San Diego County saw a 37% increase in crimes against seniors. Fortunately, in response to this dramatic increase San Diego County District Attorney Summer Stephan launched a highly successful initiative, known as the 'blueprint', to address the rapid increase in elder abuse cases.

"Another of California's most vulnerable populations are California's living with disabilities. People with disabilities, including disabilities caused by advanced age, are victimized by violent crimes 3.4 times the rate of people without disabilities. For those with cognitive disabilities such as dementia, intellectual disparities, and mental illness, the rate is more than 5.5 times the rate of those with no disabilities. People with disabilities are victimized by rape and sexual assault at more than 3.5 times the rate of people without disabilities — 7 times more in the case of people with intellectual disabilities.

"Crimes rimes motivated by anti-disability bias – the invisible hate crimes - are also rampant and grossly under-reported amongst the disability community. The U.S. Department of Justice in 2017 estimated 40,000 anti-disability hate crimes per year nationally, often involving extraordinary sadism. However, the same year, the number reported by law enforcement agencies was only 116.

"SB 338 seeks to protect California's most vulnerable populations from harm and abuse. Specifically, SB 338 will create the California Senior and Disability Justice Act which will give local law enforcement agencies tools to better protect senior citizens and Californians living with disabilities from abuse, sexual assault, domestic violence, hate crimes, and murder. SB 338 will establish a comprehensive complete listing of laws protecting seniors and people with disabilities."

- 2) **Current Training Mandates and Materials on Elder Abuse:** In 2014, the Legislature passed AB 2623 requiring police officers and deputy sheriffs to be trained in the legal rights and remedies available to victims of elder or dependent adult abuse, such as protective orders, simultaneous move-out orders, and temporary restraining orders. (Pen. Code § 13515, subd. (a).) The legislation also requires Peace Officers Standards and Training Council (POST) to consult with local adult protective services offices and the Office of State Long-Term Care Ombudsman when producing new or updated training materials. (Pen. Code § 13515, subd. (b)(1)-(3).)

AB 2623 was sponsored by the Elder Law Clinic at the McGeorge School of Law, which at

the time stated that there was a need for peace officers to be informed on civil remedies available to a victim of elder or dependent adult abuse. The bill's author cited to the increasing elder population in California due as baby boomers reach the age of 65.

Also in 2014, the Santa Clara County Grand Jury issued a report on elder abuse training materials, noting that the county's elder abuse protocol was outdated and overly long. The Grand Jury recommended the Police Chiefs develop a card as a resource, containing information about elder and dependent abuse victims. The Grand Jury also recommended that local departments should conform their manuals on the subject to the county's protocol.

In 2018, the San Diego County District Attorney published a written set of goals and guidelines to enable the county to utilize best practices in collectively serving elders and dependent adults called the San Diego County Elder and Dependent Adult Abuse Blueprint. (Available at <https://www.sdcda.org/helping/elder-abuse-blueprint.pdf>.) The Blueprint addresses numerous issues specifying best practices for elder and dependent adult issues like mandated reporting, suspicious death and homicide review teams, removal of firearms, suspected sexual or other abuse, and restraining orders.

Last year, the Legislature approved SB 1191 which requires local law enforcement and long-term care ombudsman programs to revise their policy manuals to include references to existing elder and dependent adult abuse laws. In support of that measure, the Riverside Sheriffs' Association wrote that, "Most law enforcement jurisdictions have elder abuse policies that do not contain or reference California Penal Codes 368 and 368.5. As a result, police officers and other law enforcement officials usually lack training on how to handle cases of elder abuse and lack the ability to recognize when false imprisonment and forced isolation are taking place against elder dependent adults."

This bill would eliminate the duty imposed on long-term care ombudsman programs to revise or include in their policy manuals specified information regarding elder and dependent adult abuse, and instead would limit that mandate only to law enforcement agencies that update or adopt policies after October 1, 2020. This bill would also sets forth many of the elements included in the San Diego County and Dependent Adult Abuse Blueprint, which provides a model for an updated policy that comprehensively addresses issues of elder abuse.

- 3) **Argument in Support:** According to the *National Association of Social Workers, California Chapter*, "SB 338 will establish a comprehensive listing of laws protecting seniors and people with disabilities.

"Protecting California's most vulnerable populations is a duty of utmost importance but can be very difficult since many instances of abuse are not reported. California's senior population is growing faster than any other age group and California will soon be confronted with a demographic shift of epic proportions. Between now and 2026, the number of Californians 65 and older is expected to climb by 2.1 million, according to projections by the state Department of Finance. While a thousand people a day are turning 65, the state has fallen behind in allocating resources to properly prepare for this large-scale demographic transition. Recent reports have indicated that elder abuse and crimes against seniors in California has increased in many counties.

“This bill will require every city police department and county sheriff’s department that adopts or revises a policy manual to adopt a policy informing officers of these laws and guide them on how to respond to these crimes. This includes reaching out to the community to encourage prevention and reporting, investigating every report, and making arrests or seeking arrest warrants whenever officers find probable cause. All officers will be trained on their agencies’ policies and basic skills concerning handling these cases, and each law enforcement agency will designate a smaller number of officers for advanced training. In addition, each agency will develop its own specific accountability protocols.”

- 4) **Argument in Opposition:** According to *California Advocates for Nursing Home Reform*, “CAHNR is opposed to SB 338 (Hueso). As written, SB 338 is a disincentive for any police and sheriff’s department to adopt or revise a policy regarding elder or dependent adult victimization after October 1, 2010. As written, proposed Penal Code Section 368(6)(c) states that a law enforcement agency ‘may’ (if it chooses to) adopt a policy regarding senior and disability victimization. However, if they do so after October 1, 2020, then they shall (an absolute requirement) include at a minimum every single item as laid out under Penal Code Section 368(6)(c). Since many of the “requisites” of Penal Code Section 368(6)(c) mandate specific performances, procedures and allocation of resource, law enforcement agencies may simply decide that it would not be worth their time, effort and/or expenditure of resources to comply with the dictates. Simply put, it will be far easier not to do anything after October 1, [2020 than] attempt to comply.

“... While CANHR strongly supports the concepts enumerated in SB 338 we are opposed because we believe that as written, the real-world implications will be to discourage law enforcement from abiding by the very things the Author wishes to accomplish.”

5) **Related Legislation:**

- a) SCR 49 (Dodd), Chapter 89, Statutes of 2019, proclaims June 2019 as Elder and Dependent Abuse Awareness Month.
- b) SB 492 (Galgiani), would permit the adult protective services agency or the local long-term care ombudsman to proceed with an investigation against an alleged victim’s personal representative who is the alleged abuser as if the alleged victim provided consent. The hearing for SB 492 in the Senate Public Safety Committee was canceled at the request of the author.
- c) SB 314 (Dodd), Chapter 21, Statutes of 2019, adds abandonment to the list of wrongs for which a remedy exists in the Elder Abuse and Dependent Adult Civil Protection Act.

6) **Prior Legislation:**

- a) AB 329 (Cervantes), of the 2017-2018 Legislative Session, would have extended elder and dependent adult abuse laws applicable to a caretaker to a person who has a business relationship with an elder or dependent adult. The bill died in the Committee on Aging and Long-Term Care.
- b) SB 416 (Anderson), of the 2017-2018 Legislative Session, would have specified that crimes of elder and dependent adult abuse could be proved by showing mental suffering

caused by a pattern by isolation. The bill died in the Senate Committee on Public Safety.

- c) SB 1191 (Hueso), Chapter 513, Statutes of 2018, requires every local law enforcement agency, and long-term care ombudsman program to revise their policy manuals to include existing laws relating to elder and dependent adult abuse.
- d) AB 2623 (Pan), Chapter 823, Statutes of 2014, requires police officers and deputy sheriffs to be trained in the legal rights and remedies available to victims of elder or dependent adult abuse, such as protective orders, simultaneous move-out orders, and temporary restraining orders.

REGISTERED SUPPORT / OPPOSITION:

Support

The Arc California (Co-Sponsor)
 United Cerebral Palsy California Collaboration (Co-Sponsor)
 Association of Regional Center Agencies
 Cal-Tash
 California Alliance for Retired Americans
 California Association of Joint Powers Authorities
 California Commission on Aging
 California Long-Term Care Ombudsman Association
 California Senior Legislature
 Educate. Advocate.
 Empower Family California
 Exceptional Family Resource Center
 McGeorge School of Law Elder and Health Law Clinic
 National Adult Protective Services Association
 National Association of Social Workers, California Chapter
 Peace Officers Research Association of California
 Professional Fiduciary Association of California
 Riverside Sheriffs' Association
 San Diego County District Attorney's Office
 State Council on Developmental Disabilities
 The Arc of Ventura County
 The Neighborhood House Association
 UDW/AFSCME Local 3930

Oppose

California Advocates for Nursing Home Reform

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Date of Hearing: July 9, 2019
Counsel: Sandy Uribe

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

SB 360 (Hill) – As Amended July 2, 2019

SUMMARY: Narrows the existing exception for penitential communications within the Child Abuse and Neglect Reporting Act (CANRA) to exclude penitential communications between clergy members or those between a clergy member and a person employed at the same place. Specifically, **this bill:**

- 1) Defines “penitential communication,” for purposes of the CANRA, as an oral communication made privately to a clergy member which is intended by the communicant to be an act of contrition or a matter of conscience and is intended by both parties to be confidential at the time the communication is made, and which is made in the manner and context that places the clergy member specifically and strictly under a level of confidentiality that is considered inviolate by church doctrine.
- 2) States that penitential communication does not include any of the following activities unless they take place as part of the penitential communication:
 - a) Providing spiritual direction;
 - b) Religious counseling;
 - c) Individual or group therapy;
 - d) Activity related to human resources or personnel management
 - e) Clergy assignment work;
 - f) Communications between clergy, laity, or other members of the faith that occur outside of a penitential context; or,
 - g) Activity related to church administration or management.
- 3) Specifies that a written communication does not qualify as a penitential communication.
- 4) Requires a clergy member to report any information related to known or suspected abuse or neglect obtained outside of a penitential communication, even if they clergy member has also received information regarding the same person or incident during a penitential communication.
- 5) Excludes the following from the penitential communication exception:

- a) A penitential communication between a clergy member and another person that is employed at the same site or facility as the clergy member; and
- b) A penitential communication between a clergy member and another clergy member.

EXISTING STATE LAW:

- 1) Establishes the CANRA and states that the intent and purpose of the Act is to protect children from abuse and neglect. (Pen. Code, § 11164.)
- 2) Defines "child" under CANRA to mean person under the age of 18 years. (Pen. Code, § 11165.)
- 3) Defines "child abuse or neglect" under CANRA to include physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse as defined, neglect as defined, the willful harming or injuring of a child or the endangering of the person or health of a child as defined, and unlawful corporal punishment or injury as defined. (Pen. Code, § 11165.6.)
- 4) Enumerates 46 categories of mandatory child abuse reporters. Specific occupations that are mandated reporters, including but are not limited to, teachers, athletic coaches, social workers, peace officers, firefighters, physicians, psychologists, psychiatrists, emergency medical technicians, licensed family therapists, child visitation monitors, and clergy members. (Pen. Code, § 11165.7, subd. (a).)
- 5) Requires any mandated reporter who has knowledge of, or observes, a child in his or her professional capacity or within the scope of his or her employment whom he or she knows, or reasonably suspects, has been the victim of child abuse to report that incident immediately to a specified child protection agency by telephone, and further requires a written report be sent within 36 hours. (Pen. Code, § 11166, subd. (a).)
- 6) Makes it a misdemeanor for a mandated reporter to fail to report an incident of known or reasonably suspected child abuse or neglect as required by the CANRA. (Pen. Code, § 11166, subd. (c).)
- 7) Provides that a clergy member who acquires knowledge or a reasonable suspicion of child abuse or neglect during a penitential communication is exempt from the mandated reporter reporting requirements. (Pen. Code, § 11166, subd. (d)(1).)
- 8) Defines "clergy member" for purposes of the CANRA as "a priest, minister, rabbi, religious practitioner, or similar functionary of a church, temple, or recognized denomination or organization." (Pen. Code, § 11165.7, subd. (a)(32).)
- 9) Defines "penitential communication" for purposes of the CANRA, as "a communication, intended to be in confidence, including, but not limited to, a sacramental confession, made to a clergy member who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear those communications, and under the discipline, tenets, customs, or practices of his or her church, denomination, or organization, has a duty to keep those communications secret." (Pen. Code, § 11166, subd. (d)(1).)

- 10) Clarifies that a clergy member has a duty to report known or suspected child abuse or neglect when the clergy member acting in some other capacity that would otherwise make the clergy member a mandated reporter. (Pen. Code, § 11166, subd. (d)(2).)
- 11) Defines “member of the clergy” for purposes of the clergy-penitent evidentiary privilege as “a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.” (Evid. Code, § 1030.)
- 12) Defines “penitent” for purposes of the clergy-penitent evidentiary privilege as “a person who has made a penitential communication to a member of the clergy.” (Evid. Code, § 1031.)
- 13) Defines “penitential communication” for purposes of the clergy-penitent evidentiary privilege, as “a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member’s church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.” (Evid. Code, § 1032.)
- 14) Provides that a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege. (Evid. Code, § 1033.)
- 15) Provides that a clergy member, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege. (Evid. Code, § 1034.)
- 16) States that the right of any person to claim a privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evid. Code, § 912, subd.(a).)
- 17) Provides that “Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.” (Cal. Const., art. 1, § 4.)

EXISTING FEDERAL LAW:

- 1) States that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” (U.S. Const. Amend. I.)
- 2) Provides that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const. Amend. XIV.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, “As mandated child abuse and neglect reporters, doctors, psychiatrists, therapists, and others have to break client privilege and report suspected child abuse and neglect, without exception. But clergy have been exempt from full reporting, if they believe the conversation was intended to be confidential.

“SB 360 would begin to close that loophole by requiring clergy to report suspected child abuse or neglect, if they acquire the knowledge or suspicion during a penitential communication with an employee at their facility or with another clergy member. SB 360 also narrows the definition of penitential communication. To qualify, the communication must be verbal, made privately to a clergy member, intended to be an act of contrition or matter of conscience, and in a context of strict confidentiality that is considered inviolate by church doctrine.

“When a child is being abused or neglected, they often don’t understand what is happening to them. We rely on adults who hear something or see something to say something, which is why doctors and therapists must report child abuse or neglect, no matter what. Faith leaders have been the only exception to this rule among mandated reporters. Instead of protecting children, some have been shielding abusers.

“It is time for California to put children first.”

- 2) **Child Abuse and Neglect Reporting Act (CANRA):** Existing law requires persons who work in 46 occupations to report known or suspected child abuse or neglect, including sexual abuse. (Pen. Code, § 11166, subd. (a).) Failure to report an incident of known or reasonably suspected child abuse or neglect is a misdemeanor punishable by up to six months in jail, a fine, or both. (Pen. Code, § 11166, subd. (c).)

California law already requires a clergy member who learns of, or suspects, child abuse to report this conduct to law enforcement. This includes suspected child abuse committed by another clergy member or church employee. Clergy members are defined as “a priest, minister, rabbi, religious practitioner, or similar functionary of a church, temple, or recognized denomination or organization,” under the CANRA. (Pen. Code, § 11165.7, subd. (a)(32).)

Significantly, however, clergy members are provided an exemption from reporting under the CANRA if the knowledge or reasonable suspicion of child abuse or neglect is acquired during a “penitential communication,” which is defined as “a communication, intended to be in confidence, including, but not limited to, a sacramental confession, made to a clergy member who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear those communications, and under the discipline, tenets, customs, or practices of his or her church, denomination, or organization, has a duty to keep those communications secret.” (Pen. Code, § 11166, subd. (d)(1).)¹

¹ The penitential communication exception is tied to the clergy-penitent privilege, codified in Evidence Code sections 1030-1034, which precludes disclosure of evidence learned during a penitential communication during discovery proceedings or at a trial. Other types of privileged communications, including attorney-client privilege, doctor-patient privilege, and psychotherapist-patient privilege, are also codified. (Evid. Code, § 900 et seq.) Because

This bill would further clarify what is and is not a penitential communication. To qualify as a penitential communication, it must be: (1) an oral communication; (2) made privately to a clergy member; (3) intended by the communicant to be an act of contrition or a matter of conscience; (4) intended by both parties to be confidential at the time the communication is made; and, (5) made in the manner and context that places the clergy member specifically and strictly under a level of confidentiality that is considered inviolate by church doctrine. This bill would clarify that providing spiritual direction, religious counseling, or individual or group therapy is not a penitential communication. Nor is activity related to human resources or personnel management, clergy assignment work; communications between clergy, laity, or other members of the faith that occur outside of a penitential context; or, activity related to church administration or management. Finally, this bill expressly provides that a written communication does not qualify as a penitential communication.

Additionally, this bill would partially repeal the penitential-communication exemption under the CANRA to exclude the confessions of other clergy and those of persons employed at the same facility or location as the clergy member hearing the penitential communication.

- 3) **Confession in the Catholic Church and other Religions:** The Catholic sacrament of penance or reconciliation, also called confession, is a means for members of the church to seeks God's mercy and for restoring their relationship with God. Catholic church law, known as Canon Law, requires every Catholic to go to confession at least once a year. (Canon § 989.) Every Catholic parish has posted times set aside for confession. During this time, a priest will sit in a small booth, called a confessional, and hear the confessions of individuals, one at a time. There is a fixed screen between the confessor and the priest because Canon law requires that people have the opportunity to confess their sins anonymously.² (Canon 964 § 2.) Catholics are free to confess to any priest at any parish.

The Catholic Church absolutely prohibits priests from disclosing anything that is said in the

attorneys are not mandated reporters under California law, of the relationships/professions with recognized evidentiary privileges, only clergy members are granted an exemption under the mandated reporting statute.

The clergy-penitent privilege is a long established privilege rooted in religious doctrine and practice. (Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege* (1983) 23 Santa Clara L. Rev. 95, 95.) The clergy-penitent privilege "reflects a public policy that values the sanctity of conversations between members of a particular faith and their religious advisors." (Caroline Donze, *Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law* (2018) 78 La. L. Rev. 267, 275.) The clergy-penitent privilege is unique among the privileges because the person on the receiving end of the communication, the clergy member, may claim protection from compelled disclosure under the Free Exercise Clause of the First Amendment, a defense that is not available to a doctor, attorney, or psychotherapist. (*Id.* at 272.) Another aspect of the clergy-penitent privilege that distinguishes it from the other privileges is the fact that "a communicant's waiver of privilege may not be sufficient for clergy to justify revealing the details of a private confession." (*Ibid.*) As will be discussed below, most clergy members are also barred by religious laws from disclosing anything that is said during confession. It should be noted that this bill does not in any way affect the evidentiary privilege to refuse to disclose a penitential communication codified in Evidence Code sections 1033 and 1034.

² Catholics also have the option of making a "face to face" confession, where the priest and the penitent sit facing each other a few feet away.

confessional. (Canon 983 § 1.) This rule is known as the “seal of the confessional.” Under the Church’s canon law, a priest who breaks the seal of the confessional is excommunicated. (Canon 1388 § 1.) This penalty is automatic. (Canon 1314.) The seal of the confessional is such an important tenet, that priests throughout history have been tortured and killed because they refuse to break the seal of the confessional. In fact, days ago the Vatican published a “note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal,” which was approved by Pope Francis at the end of June. This document affirms “the absolute secrecy of everything said in confession and calling on priests to defend it at all costs, even at the cost of their lives.” (See Catholic News Service, July 1, 2019, *Secrecy of Confession Must Never Be Violated, Vatican Says*: <https://www.catholicsun.org/2019/07/01/secrecy-of-confession-must-never-be-violated-vatican-says/>.)

The Catholic Church is not the only religion to have a form of confidential confession and a confessional seal. Other religions include the Orthodox Church in America, the Lutheran Church, the Episcopal Church, and the Church of Jesus Christ of Latter-Day Saints. For example, as stated in the guidelines for clergy published by the Orthodox Church in America, “The secrecy of the Mystery of Penance is considered an unquestionable rule in the entire Orthodox Church... Betrayal of the secrecy of confession will lead to canonical punishment of the priest.” (Orthodox Church in America, *Guidelines for Clergy Compiled under the Guidance of the Holy Synod of the Orthodox Church in America* (1998) at p. 14: <http://oca.org/PDF/official/clergyguidelines.pdf>.) The Episcopal Church also recognizes the Reconciliation of a Penitent as a sacramental right of the church. The Episcopal Dictionary teaches, “Under no circumstances may be information give be revealed by the priest, unless the penitent gives permission.... In some states, the priest may be asked by a court of law to divulge information but must refuse even though this may lead to imprisonment.” (The Episcopal Church, *An Episcopal Dictionary of the Church: Seal of Confession*, <https://www.episcopalchurch.org/library/glossary/seal-confession>.) The Church of Jesus Christ of Latter Day Saints also mandates confession and church rules require that these confessional communications be kept confidential. (See e.g., discussion of confession in *Scott v. Hammock* (1994) 870 P.2d 947, 951.) Thus, while this bill might be seen a response to the Catholic Church’s attempts to cover up the sexual abuse of children by its priests, it implicates more than one religion.

- 4) **Other States:** All 50 states have a mandated reporter statute. A 2016 publication by the U.S. Department of Health and Human Services (HHS) on clergy members as mandated reporters reported that, as of August 2015, 28 states listed clergy members as mandated reporters. (Child Welfare Information Gateway (2016) *Clergy as Mandated Reporters of Child Abuse and Neglect*, US Department of Health and Human Services, Children’s Bureau, p. 1 <https://www.childwelfare.gov/pubPDFs/clergymandated.pdf>.) Another 18 states do not specifically list clergy members as mandated reporters, but instead require “any person” to report. (*Ibid.*) Of the 28 states that enumerated clergy members as mandated reporters, 24 of those states explicitly included an exemption for abuse discovered through penitential or pastoral communications. (*Id.* at p. 3.) Of the states with “any person” mandated reporter statutes, 7 explicitly provide a penitential communication exemption. (*Ibid.*) As of 2015, among states that list clergy as mandated reporters or enumerate “any person” as a mandated

reporter, only six states deny the clergy-penitent privilege in cases of child abuse or neglect.³ (*Ibid.*) Of note, Texas has explicitly abrogated all privileges, including not only the clergy-penitent privilege, but also the attorney-client privilege. (*Id.* at p. 15.)

This bill takes a very different approach from other states. As noted above, this bill would preserve the clergy-penitent privilege for most church members, and instead singles out the penitential communication of clergy and people working in the same church as the clergy member hearing the confession. No other state appears to make the privilege applicable based on the identity/profession of the person confessing.

- 5) **First Amendment Issues:** Requiring a clergy member to violate the confidentiality of the confessional raises constitutional issues. The first amendment provides, in pertinent part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.” (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 304.) In other words, while the freedom to believe is absolute, the freedom to act on those beliefs is not. The second clause is commonly referred to as the Free Exercise Clause. The Free Exercise Clause applies to the states through the due process clause of the Fourteenth Amendment. (*Id.* at pp. 303-304.)

This bill raises issues regarding the applicability of the Free Exercise Clause because it would require conduct that some religions prohibit, namely for clergy members to break the seal of the confessional.⁴

In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, the United States Supreme Court interpreted the Free Exercise Clause to mean that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes.)” (*Id.* at p. 879.) Thus the inquiry for a Free Exercise Clause claim begins with the consideration of whether the law is one that is neutral and of general applicability. Depending on the answer to the question, a different standard of review applies.

When a law is found to be neutral and of general applicability, then a rational basis standard

³ Additionally, in Tennessee the Clergy/Penitent communication is not privileged concerning reports of child sexual abuse. “The privileged quality of communication between husband and wife and between any professional person and the professional person's patient or client, and any other privileged communication, except that between attorney and client, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any situation involving known or suspected child sexual abuse and shall not constitute grounds for failure to report as required by this part, failure to cooperate with the department in its activities pursuant to this part, or failure to give evidence in any judicial proceeding relating to child sexual abuse.” T.C.A §37-1-614 If the abuse is not sexual in nature, the clergy/penitent privilege as described in T.C.A §24-1-206 would still apply. (

⁴ Some individuals might also invoke the Free Exercise Clause on the grounds that it burdens or makes more difficult their religious observances. For example, a priest might argue that he is essentially prohibited from seeking forgiveness through the sacrament of penance because that confession is not confidential in comparison to that of other penitents.

applies: the law need not be justified by a compelling government interest, even if it has the effect of burdening a religious practice. Under this test, regardless of how much a law burdens a religious practice, it will be found constitutional if it does not single out religious behavior for punishment and is not motivated by a desire to interfere with religion.

On the other hand, when the law is not general and neutral, then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. (*Church of Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520, 531-532.)

In *Smith, supra*, 494 U.S. 872, members of a Native American church challenged a law regarding collecting unemployment benefits after they were fired from a drug rehabilitation center for using peyote. The State of Oregon denied them unemployment benefits because the reason for their dismissal was considered work-related "misconduct." (*Id.* at p. 874.) The opinion noted, "The Court has never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that government is free to regulate." (*Id.* at pp. 878-879.) The Court held that "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." (*Id.* at p. 890.)

In contrast, in *Hialeah, supra*, 508 U.S. 520, the Court found city ordinances which prohibited the ritual slaughter of animals to violate the Free Exercise Clause. The City of Hialeah, Florida adopted the ordinances after the Santerias announced a plan to open a church, school, cultural center, and a museum. (*Id.* at p. 525-526.) The laws, among other things, punished a person who unnecessarily killed an animal in a ritual, and defined "sacrifice" as the unnecessary killing of an animal in a ritual not for the primary purpose of food consumption. The asserted need for the ordinances was to prevent animal cruelty. The Court determined the ordinances were not neutral because their objective was to prohibit the practice of the Santeria religion. (*Id.* at p. 534.) The court noted that there was a resolution passed which purported to prohibit acts or religion which were inconsistent with public morals, peace or safety. (*Id.* at pp. 534-535.) The Court found it significant that the ordinances "proscribed more religious conduct than necessary to achieve the stated end, and exempted other animal killing that undermined the government's interest. In fact, the definition of sacrifice excluded almost all animal killings except for religious sacrifice. It even went so far as to exempt kosher slaughter. (*Id.* at p. 536.)

Turning to the question of whether this proposed legislation is general and neutral one must consider what it requires. Under this bill, if a teacher, coach, or janitor confessed that he or she had abused a child, a priest has no duty to report the conduct to law enforcement. But if that teacher, coach or janitor happened to work at the Catholic parish where the priest also worked, the duty to report would be triggered. Additionally, the confession of any priest would always trigger the duty to report. This disparate treatment calls into question the neutrality of the proposed law. It also calls into question the proposed law's general applicability. Why should some abusers be protected and not others?

The Court stated in *Hialeah, supra*, 508 U.S. 520, that factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by

members of the decisionmaking body.” (*Id.* at p. 540.) The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion. (*Id.* at p. 534.)

Based on these factors, it can be argued that the proposed legislation is not neutral towards religion. The background sheet provided by the author to the committee states that the problem the bill seeks to remedy as follows:

Existing law gives clergy an exemption not given to the other 45 categories of mandatory child abuse and neglect reporters. That exemption has been distorted and manipulated to hide and enable child abusers within religious institutions.

Clergy, specifically clergy within the Catholic Church, promised to fix the cycle of secrets and abuse by instituting a “zero-tolerance” policy in 2002. Fifteen years later, the bombshell Pennsylvania Grand Jury Report and investigation of Cardinal McCarrick in Washington, DC showed in gruesome detail that those promises were not kept.

Institutions tend to make decisions based on self-preservation. This isn’t unique to faith institutions; it’s why we have governmental oversight of state institutions, local institutions, public and private institutions. And it is why we should no longer be complicit in a culture of secrecy by allowing, and entrusting, clergy to self-police themselves.

Additionally, several of the links to news articles provided in the committee background sheet pertain to child sexual abuse by religion institutions.⁵ These references are suggestive that the law is not neutral, but rather, hostile towards a religious practice.

If the proposed legislation is found not to be neutral and of general applicability, then the government must show both that it has a compelling state interest and that the law is narrowly tailored. Protecting children from physical and sexual abuse is undeniably a compelling government interest. And yet, as noted above, nearly half the states maintain a penitential-communication exception to their mandated-reporting laws. Not one of those states singles out religious profession or employment as an exception to the exception. Arguably, eliminating the exception altogether, as some states have done, raises less constitutional concerns.

- 6) **Practical Concerns:** In addition to constitutional concerns, this bill raises practical ones. As noted above, at least as pertains to the Catholic Church, the sacrament of confession can be received anonymously. In order to prosecute a priest for failure to report abuse learned of through a penitential communication, the prosecution would have to establish that the priest knew the penitent was another priest or a parish employee. In most situations, this would require an admission or revelation by the penitent that he or she confessed an instance of child abuse or neglect to the priest. That is not likely to happen because the person would be

⁵ See e.g., Los Angeles Times, *Los Angeles Archdiocese Priest Abuse Files* <<http://documents.latimes.com/los-angeles-archdiocese-priest-abuse-files/>> and Seattle Times, *Woman says Mormon Church Failed to Report Dad’s Sexual Abuse* <<https://www.seattletimes.com/nation-world/apxwoman-says-mormon-church-failed-to-report-dad-s-sexual-abuse/>>

implicating himself or herself in criminal conduct. And while there is the possibility that a priest learns of abuse through the confession of a victim, under the provisions of this bill, the priest is not required to report information learned in that scenario.

Additionally, the question remains whether this bill would incentivize a clergy member to violate a religious oath in order to avoid incarceration. The failure of a mandated reporter to report a known or suspected child abuse or neglect is a misdemeanor punishable by up to six months in a county jail, or by a fine of \$1,000, or both. (Pen. Code, § 11166, subd. (c).) In contrast, the penalty for a Catholic priest, for example, to break the seal of the confessional is excommunication. (Canon 1388 § 1.) It is difficult to imagine what priest would choose to be excommunicated rather than serve a maximum sentence of six months in a county jail.

For both of these reasons, this bill is unlikely to achieve its aims.

- 7) **Argument in Support:** According to the *California Civil Liberties Advocacy*, “The CCLA brought this concept before legislative offices as early as December 2018, including Senator Hill’s office. There has been confusion as to the CCLA’s stance and the rationale for supporting a bill that some perceive as attacking religious liberty. Our reasoning is based on the idea that the children of religious households should be afforded the equal protection of CANR, just as children whose abuse or neglect is not caused, facilitated, or kept secret by religious institutions. This is based on the “No Harm Principle,” discussed below....

“In *Employment Division v. Smith*, the late Justice Scalia, writing for the majority of the U.S. Supreme Court, held that an individual’s religious beliefs do not excuse them from compliance with an otherwise valid and neutral law prohibiting conduct that the state is free to regulate, and that, while the First Amendment protects the right of individuals to believe whatever they wish, it does not necessarily protect the right to act on those beliefs. The decision energized religious institutions and civil liberties groups alike to lobby Congress for what ultimately became the Religious Freedom Restoration Act of 1993 (RFRA). According to *Americans United for Separation of Church State*, the law was intended to protect the right of religious expression, ‘it was meant to be a shield, not a sword.’ Over the years, the RFRA has been broadly interpreted; for example, the U.S. Department of Justice released a memo on religious liberty guidance that effectively allows taxpayer-funded organizations, corporations, and individuals to use religion as a basis to discriminate against others. That particular issue is beyond the scope of SB 360, but it serves to illustrate our point that the reaction to the Supreme Court’s holding in *Smith* has been disproportionate. In 2018, Senator Kamala Harris introduced the Do No Harm Act, which would have made the RFRA inapplicable to laws or the implementation of laws that, among other things, ‘protect against child labor, abuse, or exploitation.’ The ‘No Harm Principle’ is based on the ideology that, while the government has no business interfering with individual beliefs, there must be a limit: when a religious actor’s conduct causes harm to another person. Thomas Jefferson once wrote that ‘[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.’ In sum, the CCLA takes the position that the government may not regulate belief or conscience, but that bad actors should not be afforded the opportunity to hide behind the façade of “religious liberty” in order to escape criminal and civil liability for reprehensible conduct; thus, the No Harm Principle.

“According to the U.S. Supreme Court, the purpose of the clergy-penitent privilege is to fulfill

'the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.' The privilege should be protected but not to an unlimited degree. It is therefore interesting to note that the privilege in the United States did not exist at common law but was rather the product of statute enacted by state legislatures that was intended to be narrowly construed. In a throwback to the sanctuary laws of old England, predating the common law, many organizations conduct similar disciplinary investigations of violations of their own rules and beliefs, including criminal conduct, in order to render church discipline and prepare for litigation. And documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent is often invoked. In other cases, priests have admonished victims to remain silent about abuse and "sweep it under the floor and get of rid it" because "too many people would be hurt" if the victim were to disclose the abuse to others. 'According to the Catholic Catechism, the act of confession is an intrinsically private communion between God and the sinner, with the priest as mediator.' But it is clear that religious entities have failed to uphold their own principle—a principle protected under California law.

"It is important to note that SB 360 does not amend the California Evidence Code or have any effect on evidentiary privileges. SB 360 merely clarifies what clergy-penitent privilege is, for purposes of CANR, and excludes clergy and religious employees from the exemption. By narrowing the definition, as discussed above, religious institutions will no longer be able to excuse skirting CANR by broadly applying the exception to any matter where a clergy member may be present. Further, since much abuse is perpetrated by clergy members and religious employees, excluding such ones from the privilege will ensure that abusers are detected and afforded due process. However, beyond the initial report, the privilege is still intact for evidentiary purposes as SB 360 amends no part of the Evidence Code.

"The CCLA also argues that the exclusion of clergy and church employees is constitutionally sound under the holding in *Roman Catholic Archbishop of Los Angeles v. Superior Court* (hereinafter "Roman Catholic"), that a law which is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. In deciding whether clergy-penitent privilege protected against disclosure of subpoenaed documents in a grand jury investigation, the plaintiff invoked both the ministerial exception doctrine and the ecclesiastical abstention doctrine.

"Under the First Amendment, the ministerial exception doctrine generally bars judicial inquiry into protected employment decisions and applies equally to ministers and a variety of nonordained employees with duties functionally equivalent to those of ministers. But the court in *Roman Catholic* held that ministerial exception did not apply to subpoenaed documents in a grand jury investigation involving priests who had sexually molested children because the case was criminal in nature and not related to employment matters. The ecclesiastical abstention doctrine is based on the determination that the Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs. Likewise, the *Roman Catholic* court held that the ecclesiastical abstention doctrine, as an exception to the general rule that the right of free exercise, does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability, did not apply to a religious institution that was required to disclose subpoenaed documents as part of grand jury investigation into allegations that

church priests had sexually molested children, because the case did not involve an internal church dispute, but rather, a criminal investigation. Furthermore, the courts have generally held that to withstand strictures of establishment clause, government action must not foster excessive government entanglement with religion. But the Roman Catholic court equally held that the disclosure of the subpoenaed documents, as part of the grand jury investigation, was not barred by the establishment clause of the federal Constitution because disclosure would not result in the government's excessive entanglement with questions of religious doctrine, because the core issue was whether children were molested by priests, which had no religious doctrine aspect.

“While those holdings primarily dealt with evidentiary privileges, it is reasonable to conclude that if clergy-penitent privilege cannot be invoked in responding to a criminal subpoena, then why should it be afforded greater protections in the context of mandatory reporting of child abuse and neglect, which itself is a matter with criminal implications.”

8) Arguments in Opposition:

- a) According to the *California Catholic Conference*, “The California Catholic Conference wholeheartedly agrees with the general principle that all youth should be protected from sexual abuse. To advance this principle, the Conference introduced amendments to clarify the Child Abuse and Neglect Reporting Act (CANRA) by making it explicit that Catholic priests are mandatory reporters in every setting except when people come to them seeking God’s forgiveness in the confessional, a context where the Catholic faith (like many other religions) gives everyone the right to confess sins anonymously and confidentially.

“SB 360 recognizes there is a strong public interest in protecting the privacy right of every person to seek spiritual healing and forgiveness in a religious setting with clergy who have an absolute duty to keep those communications confidential. But even while specifically recognizing the privileged status of penitential communications, the additional amendment adding subdivision (d)(5) to the bill nevertheless denies this privacy right to some, including tens of thousands of lay employees of the Catholic Church in California, based solely upon their particular religious and employment status. There is no justification for this distinction or the resulting inequality.

“Not only does SB 360 fail to honor this privacy right for thousands of Californians, it does so without any evidence that this invasion of privacy will help protect children. The Conference recognizes the existence of accounts that in the past the Catholic Church did not do everything it could to bring abusers to face justice, but there is no evidence that we are aware of to suggest that there has ever been an issue with clergy failing to make mandatory child abuse reports as a result of information received during the Sacrament of Confession. There is therefore no basis to conclude that allowing a person to freely and openly speak to God and seek spiritual healing and forgiveness through a religious communication with clergy will somehow hinder the reporting of crimes and wrongdoings to authorities.

“SB 360 also may well fail to achieve its stated goal because Catholic clergy are never likely to have sufficient information to actually make the mandated report, because those seeking confession do so completely anonymously. There is no sign-in, no submission of

identification, and so even if a priest received information from which to suspect abuse, he would have no actual names, locations, or other information to report. The Conference therefore offered amendments to SB 360 because it believes that a strong mandatory reporting law requires a bright line for implementation and enforcement. In its current form, SB 360 is therefore much more likely to chill the religious exercise of vulnerable people who would stop practicing their faith if they were uncertain whether they could trust their clergy, with no corresponding benefit to prevent abuse.

“Finally, but equally important, legislation like this has the potential to open the door for other governmental bodies to pass laws requiring the reporting of persons who seek assistance from the Church for violation of other laws, such as federal immigration laws. To be succinct, if the State of California can abrogate this well-established, constitutionally entrenched privilege, so can the Federal Government.

“Any law that does not keep this unique form of religious communications private and available to every person is impermissibly discriminatory and violates individuals’ rights to practice their religion freely. SB 360 is the extremely rare bill that on its face seeks to regulate religious rights of individuals based on their religious or employment status. Such laws are subject to strict scrutiny under the First Amendment, and are presumed unconstitutional unless the government can prove it cannot advance its interests in any other way. Given this infirmity, we believe that SB 360 would be enjoined before it ever takes effect, and that the law would eventually be struck down as unconstitutional. As such, passing SB 360 would not help protect children; it would only lead to expensive and protracted litigation.”

- b) According to the *California Missionary Baptist Convention, Churches in Action, and the Church of Jesus Christ of Latter-day Saints, Fifth Quorum of the Seventy, North America West Area*, “While gratefully acknowledging the good intentions animating SB 360, we oppose it for the following reasons.

“*SB 360 Will Harm Child Abuse Victims.* Past Legislatures have wisely understood that California’s existing clergy privilege helps protect child abuse victims. It does this in two ways. First, it provides perpetrators with a confidential space in which to disclose the abuse without fear that they will automatically be reported to law enforcement. While ideally all perpetrators would turn themselves into the police, that rarely happens as a first step. A strong clergy privilege helps induce perpetrators who would otherwise remain secret to disclose the abuse to clergy members. In our collective experience, once a perpetrator has made such a disclosure to a clergy member the perpetrator is nearly always open to measures that protect the victim from further abuse, such as by agreeing to move out of the home where the abuse is occurring or agreeing to disclose the abuse to a spouse or parent. Even without such permission, clergy members also take other measures that do not violate the clergy privilege but that protect the victim from further abuse and ensure that the perpetrator doesn’t commit additional abuse elsewhere (such as within the faith community). And once the perpetrator makes the initial disclosure of abuse, it is not uncommon for a clergy member to persuade the perpetrator to disclose the abuse to legal authorities as a condition of receiving forgiveness for the sin. In our long experience with these issues, the initial disclosure under conditions of legal confidentiality often opens the door spiritually, psychologically and emotionally for a report to law enforcement.

“Second, existing California law also protects child abuse victims by allowing the victims themselves to confidentially disclose abuse to clergy members. Child abuse victims—both those whose abuse has ended and those still being abused—are often terrified to speak of their abuse. They fear being interrogated by police. They fear what will happen to their families. They fear losing control—something the perpetrator has already taken from them. The current guarantee of confidentiality encourages safe, trusting communications with clergy members. Once that initial disclosure occurs, it is often easy to convince the victim to receive protection from further abuse (such as by being relocated to a safe home), to disclose the abuse to a safe parent or other trusted individual who can help, to receive professional counseling to begin the healing process, and even to report to law enforcement in a way that empowers the victim, rather than stripping the victim of control and making the person feel re-victimized. Child abuse is routinely reported under these circumstances.

“In its original form, SB 360 would have entirely revoked the clergy privilege for reporting purposes. That would have profoundly discouraged both perpetrators and victims from disclosing abuse. The net result would have been fewer victims getting the protection they desperately need and fewer perpetrators being reported to law enforcement.

“SB 360 as amended is an improvement but still has serious defects. It protects only ‘penitential communications’ by the perpetrator to the clergy member that resemble the sacrament of penance in a handful of Christian faiths, rather than all confidential communications to clergy members regardless of faith. Only oral communications intended ‘to be an act of contrition’ or ‘conscience’ are protected. That would exclude protection for victims who wish to confidentially disclose abuse to clergy members, since victims typically do not disclose abuse as part of confessing sins (although, tragically, some victims believe the abuse is their fault). In contrast with communications to lawyers, which remain privileged, neither victim nor perpetrator could communicate by confidential letter. SB 360 would deny a young female victim and her mother from confidentially communicating with their clergy member about abuse because under the bill no other person can be present. Yet having someone accompany and support such a victim under conditions of clergy confidentiality is often essential for a disclosure to be made. And clergy members could not confidentially seek advice from other clergy members about how to help a victim or persuade perpetrators to turn themselves in without triggering the reporting duty.

“In short, we strongly believe SB 360, even as amended, will have the unintended effect of harming far more victims of abuse than it will help. The confidentiality of clergy communications is essential. It will undermine the extensive efforts we and other faith communities have undertaken for many years to protect child abuse victims and prevent perpetrators from abusing again.

“*SB 360 (as Amended) Favors Some Religious Communities Over Others.* As amended, SB 360 favors certain religious communities over others by extending the clergy privilege only to practices analogous to the sacrament of penance. Not all faith communities have sacramental confession or practice formal confession to clergy members, although they may have a deep tradition of confidentially communicating with

clergy members about sin and personal trauma. Existing law properly recognizes the diversity of California faith communities and avoids constitutional problems (see, e.g., *Scott v. Hammock*, 870 P.2d 947 (Utah 1994) (narrow construction of clergy privilege to include only “penitential communications” would raise “serious” constitutional questions), by defining the clergy privilege to cover all confidential communications to clergy members.

“SB 360 Is Not Necessary to Punish Clergy Abuse Crimes. Lastly, sexual abuse of parishioners or anyone else by clergy members is a heinous crime. Aiding and abetting such acts is likewise criminal. These are serious felonies. Prosecutors already have plenty of tools under existing California law to severely punish clergy members who perpetrate child abuse or criminally conspire to facilitate it or cover it up. There is no evidence or reason to believe that the relatively minor (by comparison) misdemeanor penalties in the reporting statute will in fact provide further protections against criminal activity. Further, denying clergy members as a class the right to confess confidentially to their own clergy members (as SB 360 currently does) may itself raise grave constitutional problems. Existing California law wisely avoids this, and the other problems mentioned in this letter.”

9) **Prior Legislation:**

- a) AB 1435 (Dickinson), Chapter 520, Statutes of 2012, made athletic coaches, athletic administrators, and athletic directors at public or private K-12 schools mandated reporters.
- b) AB 1713 (Campos), Chapter 517, Statutes of 2012, expanded the list of persons identified as mandated reporters to include commercial-film and photographic-print or image processors.
- c) AB 1817 (Atkins), Chapter 521, Statutes of 2012, expanded the list of persons identified as mandated reporters to include commercial computer technicians.
- d) AB 1564 (Lara), of the 2011-12 Legislative Session, would have made volunteers of public and private organizations, including non-profits, mandated reporters under CANRA, and revokes a non-profit's tax exempt status if an employee or volunteer fails to report an instance of known or suspected child abuse. AB 1564 was not heard in the Committee at the request of the author.
- e) SB 1264 (Vargas), Chapter 518, Statutes of 2012, made athletic coaches at public or private postsecondary institutions mandated reporters.
- f) SB 646 (Watson), Chapter 1444, Statutes of 1987, established CANRA, which requires specified persons who have knowledge of or observe a child in their professional capacity or within the scope of their employment, who the person knows or reasonably suspects has been the victim of child abuse to report the known or suspected instance of child abuse to a child protective agency, as defined.

REGISTERED SUPPORT / OPPOSITION:

Support

California Civil Liberties Advocacy
California Family Resource Association
Child USA
Child-Friendly Faith Project
Consumer Attorneys of California
Crime Victims United of California
National Association of Social Workers, California Chapter
Restorative Justice International
Stop Child Abuse Advocates for Reform and Safety
The Child Abuse Prevention Center
Truth & Transparency Foundation

Opposition

California Catholic Conference
California Missionary Baptist Convention
Catholic League for Religious and Civil Rights
Church of Jesus Christ of Latter-day Saints,
Fifth Quorum of the Seventy, North America West Area
Churches in Action
Diocese of Stockton
James A. Sonne, Stanford Law Professor, Religious Liberty Clinic
Knights of Columbus
Pacific Justice Institute
Syriac Orthodox Church of Antioch

Over 125,000 individuals

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

Date of Hearing: July 9, 2019
Counsel: David Billingsley

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

SB 376 (Portantino) – As Amended June 11, 2019

SUMMARY: Changes the definition of “infrequent” for purposes of specified firearms transfers. Specifically, **this bill:**

- 1) Redefines “infrequent” to mean “less than six firearm transactions per calendar year, regardless of the type of firearm, and no more than 50 total firearms within those transactions.”
- 2) Exempts from the requirement that a person be a licensed dealer in order to transfer a firearm, specified transfers made by a formerly licensed dealer that is ceasing operations, transfers made to a specified government entity as part of a “gun-buyback” program, and transfers made by a person prohibited from possessing a firearm to a dealer for the purpose of storing that firearm.
- 3) Extends the exemption to the transfer of a firearm to a trust beneficiary, as specified.
- 4) Clarifies that specified exemptions to firearm laws which currently apply to certain charity auctions, also apply charity raffles.
- 5) Requires all firearms sold or otherwise transferred by charity auction or raffle to be delivered to a licensed dealer for delivery to the recipient and deletes language allowing for infrequent transfers without licensed dealer for those events.
- 6) Requires anybody manufacturing 50 or more firearms to be licensed as a manufacturer.
- 7) Repeals the exemption which allows a charitable auction to avoid the waiting period required by law before a person can take possession of a firearm.
- 8) Directs Department of Justice (DOJ) to maintain additional records regarding firearms.
- 9) Makes findings and declarations.

EXISTING LAW:

- 1) Defines "infrequent" for purposes of handgun transactions as “less than six per calendar year.” Defines "infrequent" for purposes of long gun sales as "occasional and without regularity." The term "infrequent" shall not be construed to prohibit different local chapters of the same nonprofit corporation from conducting auctions or similar events, provided the individual local chapter conducts the auctions or similar events infrequently. It is the intent of the Legislature that different local chapters, representing different localities, be entitled to invoke the exemption notwithstanding the frequency with which other chapters of the same

nonprofit corporation may conduct auctions or similar events. Specifies that "transaction" means a single sale, lease, or transfer of any number of handguns. (Pen. Code § 16730.)

- 2) Requires that firearms transfers go through a licensed firearms dealer. (Cal. Penal Code § 27545.)
- 3) Exempts from the requirement that transfers go through a licensed dealer requirement, the transfer of a firearm by bequest or intestate succession, or to a surviving spouse. (Cal. Pen. Code § 26500.) Provides certain exemptions to prohibitions on openly carrying a firearm, storage of firearms, dealer processing requirements, and off-premises transactions by a licensed dealer, for specified charity auctions and similar events. (Cal. Pen. Code §§ 26384 & 26500.)
- 4) Requires a person manufacturing 100 or more firearms each year in the state to be licensed as a manufacturer. (Cal. Pen. Code § 29010.)
- 5) States that where neither party to a firearm transaction holds a dealer's license issued as specified, the parties to the transaction shall complete the sale, loan, or transfer of that firearm through a licensed firearms dealer, as specified. (Pen. Code, § 27545.)
- 6) Specifies that the requirement that a firearm transaction go through a licensed firearms dealer, does not apply to the loan of a firearm to a parent, child, sibling, grandparent, or grandchild, if all of the following requirements are satisfied (Pen. Code, § 27880.):
 - a) The loan is infrequent, as specified;
 - b) The loan is for any lawful purpose;
 - c) The loan does not exceed 30 days in duration; and,
 - d) For any firearm, the individual being loaned the firearm shall have a valid firearm safety certificate, except that in the case of a handgun, an unexpired handgun safety certificate may be used.

FISCAL EFFECT:

COMMENTS:

- 1) **Author's Statement:** According to the author, "Consistent with the United States Supreme Court's *Heller-McDonald* decisions, which upheld ministerial licensing and registration, California has enacted a comprehensive system addressing the public safety concern's associated with making, acquisition, distribution, and possession of firearms and ammunition.

"Because 'through dealer processing' has been federal law since 1968 and private party transactions ["PPT's"] as a practical matter have had to be processed through a licensed dealer since at least 1953 – as noted in *People v. Bickston*, (1979) 91 Cal. App. 3d Supp. 29, the subsequent focus in the late 1980's had been on creating a clear regulatory structure that

facilitates and regulates PPT transactions.

“Prior to 1990, California had minimal regulation of rifles and shotguns as compared to longstanding regulations of handguns. The transfer of long guns was not generally regulated by state law. Regulation began in 1988 with AB 1540 and AB 3707 (Klehs). The following year, AB 1756 (1989, T Friedman) subsequently defined the main term “infrequent” as to handguns to mean 5 separate sales, leases (rentals) or other transfers of ownership to less than 5 a year to discrete individuals or in 5 separate discreet transactions to the same individual. However, multiple guns transferred to the same individual at the same time counted as one transaction.

“After 1990, state law began to clarify that in order to sell, loan, or transfer a handgun the transaction typically had to be by or processed through a state licensed firearms dealer. In 1990, AB 497 (Connelly) was enacted which extended the same processing rules that had long existed to handguns to rifles and shotguns. In 1991, Assembly Bill 242 modified the requirements imposed by AB 497 by doing all of the following:

- Exempting from dealer licensure the infrequent sale or other transfer by an individual of a firearm, other than a handgun, at auctions or similar events conducted by nonprofit mutual or public benefit corporations organized pursuant to the Corporations Code by adding a discrete exemption for nonprofits and redefining the term “infrequent” as to those transactions.
- Exempting from dealer processing the transfer of a firearm other than a handgun, if the firearm is donated for an auction or similar event and the firearm is delivered to the nonprofit corporation immediately preceding, or contemporaneous with, the auction or similar event.

“In late 1993, the Congress enacted the Brady Handgun Violence Prevention Act which contained both of the following components:

- Prior to the delivery of any firearm by a federal firearms licensee, a background check is required to be conducted by the National Instant Criminal Background Check System (NICS).
- The Federal Bureau of Investigation would conduct background checks, but a state could designate an agency to conduct electronic federal and state checks.

“In 1996, legislation was enacted to provide regulatory relief to federally licensed firearm collectors with Department of Justice certificates of eligibility. That legislation required all transactions to be processed through a state licensed firearms dealer but provided those individuals an exemption from the waiting period.

“In 1998, legislation was enacted to require state licensing of federal firearms manufacturers if they manufactured more than 100 firearms within this state.

“In 1998, to avoid the creation of duplicative reporting systems, legislation was enacted to require curio and relic rifles and shotguns to be processed through a state licensed firearms dealer unless certain “infrequent transfers” were made by private parties as to certain curio

and relic rifles. The auction waiting period exemption was made obsolete by the advent of NICS.

“At some point, the law that exempted from the licensure requirement, the infrequent sale or transfer of a firearm, other than a handgun, at charity auctions or similar events by adding a discrete exemption for nonprofits and redefining the term “infrequent” as to those transactions, was repealed.

“Moreover, as to auctions, prior to 2000, Section 19 of Article IV of the California Constitution barred raffles, which are a form of lottery. AB 497 was enacted during that time. In 2000, Senate Constitutional Amendment 4 was approved. It authorized the Legislature to allow private nonprofit organizations to conduct raffles as a funding mechanism to provide support for their own or others beneficial charitable works, as specified.

“In 2005, a reporting system was created to track the transfer of firearms between federal firearms licensees to ensure that state licensing requirements were followed. That legislation also exempted transactions involving certain curio and relic rifles and shotguns, creating an ambiguity as to which persons were to be included in, or could enroll in, the system.

“In 2009, legislation was enacted to clarify which persons were subject to licensing verification prior to the shipment of a firearm. That legislation did not resolve the ambiguity as to which persons were included in, or could enroll in, the reporting system. The Department of Justice decided that federally licensed collectors and federally licensed manufacturers and importers of ammunition who held no other federal firearms license were not part of the verification program.

“In 2011, Assembly Bill 809 was enacted to mandate the same reporting and record retention requirements for handguns and long guns. AB 809 required conforming changes to various statutory procedures relating to record retention. AB 809 did not make related conforming changes to sales of long guns at auctions. This was clearly an oversight.

“AB 809 also repealed the dealer processing exemption for curio and relic rifles and shotguns but continued the exemption for infrequent transactions by collectors involving curio and relic long guns if the transaction was reported to the Department of Justice. That exemption created its own ambiguities and also created cross-referencing issues.

“SB 376 puts in the same definition of “infrequent” for long guns as handguns and puts in a global cap of 50 guns a year. In addition, as to manufacturers it puts in a 50 gun threshold reduced from the 100 in code.

“Because the 50 gun cap could affect legitimate and other “1 shot” transactions and because the term “infrequent” is used in various code sections, SB 376 had to take a thorough review of where the term “infrequent” is used in code. Also, to accommodate the enactment of SCA modernize the auction language. This is really a continuation of prior efforts and has been done in close coordination with the G.O. Committee of both house.

“In doing so, SB 376 does the following in the way of conforming changes:

- Repeals the exemption from through dealer processing for the infrequent sale or transfer of a firearm other than a handgun, at charity auctions, raffles, or similar events, thus requiring that the transfer of a firearm to the purchaser be processed through a state licensed dealer. [Amendments to repeal Penal Code §§s' 16520(d)(1) and 16730((b) and repeals current Penal Code § 27900]
- Adds a loan exemption from through dealer processing for loans of firearm other than a handgun, at charity auctions, raffles, or similar events if the gun stays on premises. [Rewrite of Penal Code § 27900]
- Modernize the dealer licensing exemption for infrequent sale or transfer of a firearm, other than a handgun, at charity auctions, raffles, or similar events by exempting the actual delivery of those firearms to a dealer for processing so that as long as they are doing transactions through a state licensed dealer, they need not worry about their own dealer licensure. This is what non-profits are doing now. [Amendments adding Penal Code § 26581.]
- Retain and modernize the exemption from dealer processing for the transfer of a firearm, other than a handgun, if the firearm is donated for the auction, raffle, or similar event and the firearm is delivered to the nonprofit corporation immediately preceding, or contemporaneous with, the auctions or similar event. Penal Code § 27905
- Not touch the references to “infrequent” in Penal Code § 27875 [intra-familial non sale transfers of ownership – self reporting to DOJ with background check and FSC] or intra-familial loans as clarified in AB 1511 enacted in 2016. See: Penal Code § 27880. [Issues related to loans which is 1511 related as to storage is addressed by addressing loan exemptions in SB 172]
- Retain provisions and modernizes the same that that allow a dealer to accept delivery of firearms, other than handguns, outside the building designated in the license, provided the firearm is being donated for the purpose of sale or transfer at an auction, raffle, or similar event as well as other provisions to reflect SCA 3. See amendments to Penal Code §§ 26384, 26805 and 26890.
- Codify in statute certain existing Department of Justice practices regarding transactions involving curio or relic firearms, and firearm shipment verification procedures by eliminating a reference to “infrequent” in Penal Code § 27820 and rewriting the code section to reflect DOJ practices in settlement of a threatened lawsuit.
- Exempt from dealer licensure requirements certain other transactions by adding new exemptions to wit: (i) buybacks [new Penal Code § 26576]; (ii) relinquishments to dealers by prohibited persons [new Penal Code § 26577], adding new exemptions from dealer from dealer licensure relinquishments within a 60 day period by expanding the scope of *existing* Penal Code § 26515, and creating a ceasing operation exemption with reporting to DOJ by enacting Penal Code § 26556.
- On the Cease operation” exemption, SB 376 also makes via cross-references a PPT exemption, safe transport exemption, and AFS changes to reflect that as well as related

cross-referencing changes. See amendments to Penal Code §§' 11106, 25555, 26379, 26405, 27937, and 28230.

- Out of an abundance of caution apply the safe transport exemptions specifically to relinquishment of guns to a dealer per Penal Code § 29830 by amending Penal Code §§' 25555, 26379, and 26405 to reference Section 29830.
 - Exempt via amendments to Penal Code § 27966 from dealer processing requirements all receipts of curios and relic long guns by licensed collectors who have a COE provided they register the same with DOJ under current law, but retain the requirement that those persons who transfer curio and relic long guns directly to licensed collectors be licensed as a dealer unless some specific exemption applies. [Under *current law* (Penal Code § 26585) there is an exemption from dealer licensure if Collector A with a COE transfers a gun to collector B with a COE if it is brokered through a dealer. There is also a waiting period exemption for licensed collectors with COE's in *current law*. See: Penal Code §§' 26970 and 27670.]
 - Correct drafting errors that were made in AB 809 by making specific cross-referencing insertions of Penal Code § 27966 into Penal Code §§' 11106 and 26405 to reflect the enactment of Penal Code § 27966."
- 2) **Firearms Transfers Must Generally be Conducted Through a Licensed Dealer:** When both parties to a transaction are private parties, firearms transfers in California must be completed through a licensed California dealer. (Cal. Pen. Code § 27545.) To complete these transactions, the seller or transferor must provide the firearm to the dealer, who will deliver the firearm to the purchaser or transferee following a background check and expiration of the mandatory state waiting period, unless the transferee is prohibited from purchasing or possessing firearms, or the dealer is otherwise notified by the California Department of Justice (DOJ) that the sale or transfer may not proceed. (Cal. Pen. Code §§ 28050(a)-(c).) If the dealer cannot deliver the firearm to the purchaser or transferee, the dealer must determine whether the private seller or transferor is prohibited from possessing a firearm. If the seller or transferor does not fall into a prohibited class, the dealer must immediately return the firearm to that party. In the event the seller or transferor does fall into a prohibited class, the dealer cannot return the firearm to that party, and must deliver the firearm to the sheriff of the county or to the chief of police of any city in the county in which the dealer operates.

The following sales and transfers are exempt from the requirement that they be processed through a licensed dealer:

- a) Certain government-sponsored transfers, including gun buybacks;
- b) Certain transfers to nonprofit historical societies, museums, or institutional collections;
- c) Transfers to licensed firearms manufacturers and importers;
- d) Infrequent transfers between immediate family members;
- e) Certain loans involving firearms;

- f) Donations made to non-profit auctions;
- g) Transfers by operation of law; and,
- h) Certain transfers of curios or relics to licensed firearms collectors.

This bill would extend current exemptions regarding transfer and licensing requirements to additional circumstances which are consistent with existing law.

- 3) **Infrequent Firearms Transfers:** Current law exempts certain firearm transfers from the requirement that the transfer go through a licensed gun dealers when the transfer between people is "infrequent." The term "infrequent" is defined differently depending on whether the firearm is a handgun or a long gun. Existing law defines "infrequent" for purposes of handgun transactions as less than six per calendar year. Existing law defines "infrequent" for purposes of long gun sales as "occasional and without regularity." This bill would redefine "infrequent" to mean less than six firearm transactions per calendar year, regardless of the type of firearm, and no more than 50 total firearms within those transactions.
- 4) **Argument in Support:** According to *Brady United Against Gun Violence*, "Over the past thirty years, California has enacted and strengthened laws regulating handgun and assault weapon sales and possession. However, the regulation of long gun sales and possession has been either neglected or implemented far later. SB 376 brings the sell, lease, or transfer regulations of long guns in line with California's regulations exempting infrequent transfers of handguns from licensed dealer processing requirements. Specifically, the bill provides that 'infrequent' firearm transfers (less than six firearm transactions per calendar year) refer to every type of firearm, not just handguns, and allows no more than 50 total firearms transfers within a calendar year. Additionally, SB 376 updates existing law by exempting gun buy-backs, trust beneficiaries and others, as specified, from requirements of transferring firearms through a licensed dealer and resolves issues regarding charity raffles and auctions. Finally, the bill requires anybody manufacturing 50 or more firearms to be licensed as a manufacturer, instead of the current threshold of 100 firearms.

"SB 376 will help the California Department of Justice enhance their oversight of firearm transfers and assist dealers and the general public in better understanding of firearm sales and transfer regulations. The bill furthers our goal to have most transfers of firearms conducted by regulated and licensed firearms dealers. As such, Brady California is in support of SB 376."

- 5) **Argument in Opposition:** According to *California Sportsman's Lobby*, "The bill would unnecessarily limit to less than six the number of firearms sales transactions a sportsmen or other lawful individual could engage in per year.

"Currently, less than six transactions per year is the cap for handguns and, for rifles and shotguns, it is specified as 'infrequent' (occasional and without regularity).

"All private party transactions are processed through a properly licensed firearms dealer, and there is a ten-day waiting period before a sale or transfer can be completed during which time the Department of Justice conducts a criminal and mental history background check to determine if the prospective buyer/transferee is eligible to possess a firearm.

“Sportsmen and others occasionally (and without regularity) engage in private party firearms transactions through licensed firearms dealers in order to upgrade the quality of their firearms or to make other changes that would improve the enjoyment of their outdoor experience.

“There is no problem with the existing law that would justify changing the current restrictions as proposed.”

6) Related Legislation:

- a) AB 1009 (Gabriel), would allow the reports for various firearm transactions to be made via the California Firearms Application Reporting System (CFARS), and would, commencing January 1, 2025, require the report to be made via CFARS. AB 1009 is awaiting hearing in the Senate Appropriations Committee.
- b) AB 1292 (Bauer-Kahan), would specify circumstances following the death of a firearm owner which allow a firearm to be transferred from one person to another by operation of law without the need to go through a firearms dealer. AB 1292 is on the Governor’s desk.

7) Prior Legislation:

- a) SB 746 (Portantino), Chapter 780, Statutes of 2018, established procedures for return of ammunition that has been seized by law enforcement or has been transferred to a licensed firearms dealer because of a temporary prohibition on ammunition possession.
- b) AB 1511 (Santiago), Chapter 41, Statutes of 2016, specified that the infrequent loan of a firearm may only be made to family members.
- c) AB 1609 (Alejo), Chapter 878, Statutes of 2014, clarified the regulations for direct shipment requirements for transfer of ownership of firearms.
- d) AB 740 (Alejo), of the 2013-2014 Legislative Session, would have clarified the definition of infrequent transactions as they apply to all firearms transactions. AB 740 was vetoed by the Governor.
- e) SB 683 (Block), Chapter 761, Statutes of 2013, extended the safety certificate requirement for handguns to all firearms and requires the performance of a safe handling demonstration to receive a long gun.

REGISTERED SUPPORT / OPPOSITION:

Support

Department of Justice (Sponsor)
Bay Area Student Activists
Brady California United Against Gun Violence
Youth ALIVE!

Oppose

California Sportsman's Lobby, Inc.
Gun Owners of California, Inc.
Outdoor Sportsmen's Coalition of California
Safari Club International - California Chapters

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: July 9, 2019
Counsel: Nikki Moore

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

SB 439 (Umberg) – As Introduced February 21, 2019

As Proposed to be Amended in Committee

SUMMARY: Expands the ability for prosecuting agencies to use intercepted communications related to additional crimes captured during the lawful execution of a wiretap in court, as specified, and states that an agency that employs peace officers may use intercepted communications in an administrative or disciplinary hearing against a peace officer if the evidence relates to any crime involving a peace officer. Specifically, **this bill:**

- 1) Adds to the list of crimes for which intercepted wire or electronic communication may be used in a court proceeding:
 - a) Grand theft of a firearm; and,
 - b) Exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem.
- 2) Authorizes the use of an intercepted wire or electronic communication related to any crime involving the employment of a peace officer in an administrative or disciplinary hearing involving the employment of a peace officer.
- 3) Provides that evidence of any crimes involving the employment of a peace officer obtained while monitoring wire or electronic communications pursuant to a lawful order may be used in a court proceeding if the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted lawfully.
- 4) Prohibits the use of an intercepted wire or electronic communication as evidence in an administrative or disciplinary proceeding if the acts by a peace officer constitute only a violation of a departmental rule or guideline which is not a public offense under California law.
- 5) States that if an agency employing peace officers utilizes an intercepted wire or electronic communication relating to a crime involving a peace officer in an administrative or disciplinary hearing, the agency shall, on an annual basis, report both of the following to the Attorney General:
 - a) The number of administrative or disciplinary proceedings involving the employment of a peace officer in which the agency utilized evidence obtained from a wire interception or electronic communication; and,

- b) The specific offenses for which evidence obtained from a wire interception or electronic communication was used in those administrative or disciplinary proceedings.
- 6) States that the Attorney General may issue regulations prescribing the content and form of the reporting requirements imposed by this bill.
- 7) States that the Attorney General shall include information received as a result of this bill regarding the use of intercepted communications in an administrative and disciplinary hearing in its annual report to the Legislature and the public regarding the regulation of wiretaps, which are imposed by existing law.

EXISTING LAW:

- 1) 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.; Cal. Const., art. I, § 13.)
- 2) Provides that specified peace officer or custodial officer personnel records and records retained or owned by any state or local agency related to 1) a critical incident, as defined, 2) a sustained finding of sexual assault by a peace officer, and 3) a sustained finding of dishonesty, are not confidential and shall be made available for public inspection pursuant to the California Public Records Act. (Pen. Code, § 832.7, subd. (b).)
- 3) Defines "wire communication" as the transmission of communications by wire, cable, or other connection between the point of origin and point of reception. (Pen. Code, § 629.51, subd. (a)(1).)
- 4) Defines "electronic communication" as the transfer of data, images, sounds, writings, signals, and intelligence of any nature by a wire, radio, electromagnetic, photoelectric, or photo-optical system. (Pen. Code, § 629.51, subd. (a)(2).)
- 5) Specifies that the interception of wire or electronic communications does not apply to stored communications or stored content. (Pen. Code, § 629.51 subd. (b).)
- 6) Requires an investigative or law enforcement officer to apply to the presiding superior court judge for an order authorizing the interception of wire or electronic communications. (Pen. Code, § 629.50.)
- 7) Requires the application to be made in writing upon the personal oath or affirmation of the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or a district attorney or person designated to act as district attorney. (Pen. Code, § 629.50, subd. (a).)
- 8) Requires that the application include a statement of facts and circumstances, including the offense that is being, has been, or is about to be committed, the place where the communication is to be intercepted, that conventional investigative techniques are unlikely to succeed, the type of communication that is to be intercepted, the identity, if known, of the

person whose communications are to be intercepted, and a statement of the period of time for which the interception is required to be maintained. (Pen. Code, § 629.50, subd. (a)(4)-(5).)

- 9) Allows a presiding superior court judge, or judge designated by the presiding judge, upon application, to issue an order authorizing interception of wire or electronic communications when there is probable cause to believe that a specified offense is being, has been, or is about to be committed. Authorizes a wiretap when there is probable cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses: (Pen. Code, § 629.52.)
 - a) Importation, possession for sale, transportation or sale of controlled substances;
 - b) Murder or solicitation of murder or commission of a felony involving a destructive device;
 - c) A felony in violation of prohibitions on criminal street gangs;
 - d) Possession or use of a weapon of mass destruction;
 - e) A violation of human trafficking;
 - f) Kidnapping; and,
 - g) An attempt or conspiracy to commit any of the above.
- 10) Permits the judge to grant oral approval for an emergency interception without an order as specified. Approval for an oral interception shall be conditioned upon filing with the court, within 48 hours of the oral approval, a written application for an order. (Pen. Code, § 629.56.)
- 11) Provides that no order shall authorize the interception of a wire or electronic communication for a period longer than necessary to achieve the objective of the authorization, nor longer than 30 days. (Pen. Code, § 629.58.)
- 12) Mandates that the Attorney General submit an annual report to the Legislature, the Judicial Council, and the Director of the Administrative Office of the United States Courts, which shall be filed no later than April of each year. States that the report shall set forth the following data: (Pen. Code, § 629.62.)
 - a) The number of orders or extensions applied for;
 - b) The kinds of orders or extensions applied for;
 - c) The fact that the order or extension was granted as applied for, was modified, or was denied;
 - d) The number of wire or electronic communication devices that are the subject of each order granted;

- e) The period of interceptions authorized by the order, and the number and duration of any extensions of the order;
 - f) The offense specified in the order or application, or extension of an order;
 - g) The identity of the applying law enforcement officer and agency making the application and the person authorizing the application;
 - h) The nature of the facilities from which or the place where communications were to be intercepted;
 - i) A general description of the interceptions made under the order or extension, including (A) the number of persons whose communications were intercepted, (B) the number of communications intercepted, (C) the percentage of incriminating communications intercepted and the percentage of other communications intercepted, and (D) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;
 - j) The number of arrests resulting from interceptions made under the order or extension, and the offenses for which arrests were made;
 - k) The number of trials resulting from the interceptions;
 - l) The number of motions to suppress made with respect to the interceptions, and the number granted or denied;
 - m) The number of convictions resulting from the interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions;
 - n) Updated information required to be reported with respect to orders or extensions obtained in a preceding calendar year;
 - o) The date of the order for service of inventory, confirmation of compliance with the order, and the number of notices sent; and,
 - p) Other data that the Legislature, the Judicial Council, or the Director of the Administrative Office of the United States Courts shall require.
- 13) Requires that a defendant identified as the result of an interception shall be notified prior to the entry of a plea of guilty or nolo contendere, or at least 10 days prior to any trial, hearing, or proceedings in the case other than an arraignment or grand jury proceeding. Within 10 days prior to trial, hearing, or proceeding the prosecution shall provide the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying application and monitory logs. (Pen. Code, § 629.70.)
- 14) Specifies that a defendant in any trial, hearing, or proceeding, may move to suppress some or all of the contents of an intercepted wire or electronic communications, or evidence derived

from an intercepted communication, on the basis that the evidence was obtained in violation of the Fourth Amendment of the United States Constitution. (Pen. Code, § 629.72).

- 15) Permits a peace officer to use information obtained from an interception authorized by Section 629.52 if it relates to a violent felony, as defined. (Pen. Code, § 629.82, subd. (a).)
- 16) Prohibits the use of evidence obtained while engaged in intercepting wire or electronic communications relating to crimes other than those that authorize the issuance of a wiretap, or a violent felony, except to prevent the commission of a public offense. (Pen. Code, § 629.82, subd. (b).)
- 17) Provides that the provisions governing the interception of wire or electronic communications sunset on January 1, 2020. (Pen. Code, § 629.98.)
- 18) Enacts the California Electronic Communications Privacy Act (CalECPA), which generally prohibits a government entity from compelling the production of or access to electronic communication information or electronic device information without a search warrant, wiretap order, order for electronic reader records, or subpoena issued pursuant to specified conditions, except for emergency situations. (Pen. Code, §§ 1546-1546.4.)
- 19) Provides that a government entity may access electronic device information by means of a physical interaction or electronic communication device only: pursuant to a warrant; wiretap; with authorization of the possessor of the device; with consent of the owner of the device; in an emergency; if seized from an inmate. (Pen. Code, § 1546.1, subd. (b).)
- 20) Specifies the conditions under which a government entity may access electronic device information by means of physical interaction or electronic communication with the device, such as pursuant to a search warrant, wiretap order, or consent of the owner of the device. (Pen. Code, § 1546.1, subd. (c).)
- 21) Allows a person in a trial, hearing, or proceeding to move to suppress any electronic information obtained or retained in violation of the Fourth Amendment or the CalECPA. (Pen. Code, § 1546.4, subd. (a).)
- 22) Makes it a crime to intentionally and without the consent of all parties to a confidential communication eavesdrop or record that confidential communication. (Pen. Code, § 632, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The purpose of this bill is to: allow overheard communications to be disclosed if they involve a serious felony; and, to allow overheard communications involving any crime by a peace officer to be used in administrative or disciplinary hearings. SB 439 authorizes peace officers or federal law enforcement officers to disclose contents of intercepted wire and electronic communications obtained while investigating crimes. Eligible crimes can include violent felonies. Currently the following offenses, which are sometimes intercepted, are not allowed to be revealed:

assault with a deadly weapon on a peace officer, rape of an unconscious person, rape of a person with a mental disorder or disability, exploding a destructive device with the intent to injure, exploding a destructive device with the intent to murder, furnishing illicit drugs to a minor, grand theft of a firearm, attempted kidnapping, attempted carjacking, attempted rape, residential burglary (person not present), and law enforcement misconduct.”

- 2) **Wiretap Law and the Fourth Amendment:** “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” (U.S. Const., 4th Amend.) At the heart of the Fourth Amendment is the concern that the government can and will spy on its citizens.

“Wiretapping first became a tool of U.S. law enforcement in the 1890s, but the Supreme Court didn't establish its constitutionality until 1928, at the height of Prohibition... In 1963, U.S. Attorney General Robert Kennedy authorized the FBI to break into the home and office of the Rev. Martin Luther King Jr. The agency planted bugs, assuming they would unearth King's rumored links to communists, but removed them in 1966. Richard Nixon approved the illegal wiretapping of four reporters and 13 government officials in 1969 in a bid to unmask those leaking information to the press. And in 1972 a grand jury indicted two Nixon aides for the burglary and illegal wiretapping of the Democratic National Committee headquarters at the Watergate Hotel.”¹

From telegrams to telephones to cellphones, the ability for government to monitor people has increased since the constitution's inception. In the last few decades, the volume of text and talk communications, and the ease and affordability of communicating internationally and instantaneously, have also increased.

Granting government the authority to wiretap and spy on its citizens represents a significant intrusion on a person's civil liberties and right to privacy. As such, the laws have been narrowly drawn and are limited. California in particular has been very cautious in establishing laws to authorize wiretapping. For example, only an attempt to investigate a very narrow list of crimes will permit, after other methods of investigation are exhausted, law enforcement to contemporaneously monitor a person's communications. And every five years, the Legislature considers whether to reauthorize the law that permits wiretaps altogether. The perennial sunset ensures that the Legislature is regularly reviewing the propriety of permitting such governmental invasion in light of current norms and technological capacities.

The federal Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act are commonly referred together as the Electronic Communications Privacy Act (ECPA) of 1986. The ECPA updated the Federal Wiretap Act of 1968, to apply to the interception of computer and other digital and electronic communications. California modeled its wiretap statute in part on the federal law.

In interpreting a state wiretap scheme, the courts may look for guidance to cases under the federal wiretap act, which “provides a ‘comprehensive scheme for the regulation of

¹ William Lee Adams, *Brief History: Wiretapping*, Time Magazine (Oct. 11, 2010), available at <http://content.time.com/time/magazine/article/0,9171,2022653,00.html>.

wiretapping and electronic surveillance.” (*People v. Otto* (1992) 2 Cal.4th 1088, 1097.) The federal wiretap act sets minimum standards for the admissibility of evidence procured through electronic surveillance. “[S]tate law cannot be less protective of privacy than the federal [wiretap] [a]ct.” (*Otto*, at 1098.)

In general, California law is stricter than federal law, with a presumption that wiretapping is prohibited, as is recording a confidential communication without all parties consent. (*People v. Leon* (2007) 40 Cal.4th 376, 383; *see also* Cal. Const., art. I, § 1; Pen. Code, § 632.) “California’s wiretap law subjects the authorization of electronic surveillance to a much higher degree of scrutiny than a conventional search warrant.” (*People v. Roberts* (2010) 184 Cal. App. 4th 1149, 1166.) The purpose of wiretap laws is to protect the privacy of wire and oral communications and to delineate a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. (*Halpin v. Superior Court* (1972) 6 Cal.3d 885, 898.)

A designated judge may authorize a wiretap when the judge finds there is probable cause to believe that an individual is, was, or will be committing a specified crime, that particular communications about the offense will be intercepted, and that the device is used or leased by the person targeted by the wiretap. (Pen. Code, § 629.52.) The judge must also determine that normal investigative procedures have been tried and failed, or appear reasonably unlikely to succeed, or would be too dangerous if tried. (Pen. Code, § 629.52, subd. (d).) The intercept must be conducted to minimize the interception of communications not otherwise subject to interception. (Pen. Code, § 629.58.) Penal Code Section 629.51 defines the type of simultaneous surveillance that is authorized, including the monitoring of telephone and cellphone calls, along with other messaging, email, and social media applications.

Wiretaps are authorized as an investigatory technique when law enforcement is investigating a limited scope of crimes:

- (1) the importation, possession for sale, transportation, manufacture, or sale of controlled substances of heroin, cocaine, PCP, methamphetamine, fentanyl, or their precursors or analogs where the substance exceeds 10 gallons by liquid volume or three pounds of solid substance by weight; murder, solicitation to commit murder, or the commission of a felony involving a destructive device;
- (2) felony participation in a street gang;
- (3) a felony violation relating to weapons of mass destruction;
- (4) threats to use weapons of mass destruction, or relating to restricted biological agents;
- (5) human trafficking;
- (6) kidnapping;
- (7) and attempt or conspiracy to commit any of the before-mentioned crimes. (Pen. Code, § 629.52.)

According to data filed in the Attorney General’s annual report, “In 2018, there were 387 applications for wiretaps resulting in 465 arrests in California, mostly on gang and narcotics charges, according to the state attorney general’s office. The wiretaps resulted in 53 convictions, though some cases may be ongoing. In Los Angeles, there were 181 wiretap applications resulting in 49 arrests and two convictions that year. In one case cited by the attorney general, L.A. County investigators used wiretaps to seize more than 165 kilograms

of methamphetamine, 193 kilograms of cocaine, 33 kilograms of heroin and more than \$3.42 million.”²

During the calendar year of 2018, Los Angeles County reported that it spent \$6,294,371 in personnel and resources to operate wiretaps; Riverside County spent \$3,127,884; San Diego County spent \$856,910; Alameda County spent \$738,371; Orange County spent \$309,538; Sacramento County spent \$55,255; San Francisco County reported no expenditures for wiretaps.³

- 3) **Ancillary Evidence Collected from a Lawfully Obtained Wiretap:** Intercepting a person’s phone and electronic communications necessarily involves the collection of information between two or more parties. Often, a person communicating with the subject of a wiretap order is not themselves subject to any judicially authorized surveillance order. But if a law enforcement official obtains evidence of that third party person committing a violent crime or a crime that would authorize the issuance of a wiretap order, California law permits the use of the intercepted evidence against that person in court. Similarly, if the person who is the subject of a wiretap order discusses a crime not specified in the surveillance order, but which constitutes a violent felony or another crime that would authorize the issuance of a wiretap order, the evidence may be used in court. Conversely, any crime that does not authorize a wiretap or that is not a violent felony *cannot* be used in court.

The plain-view doctrine has justified the collection of intercepted communications for crimes not specified in an order, or those committed by a third party. But the Legislature has limited this expansion to only a narrow set of crimes—a violent felony, as defined,⁴ or a crime that permits authorization of a wiretap in the first instance. This limitation is intended to prevent “fishing expeditions” in which law enforcement seeks a wiretap for an enumerated offense when they actually suspect the target has committed a different offense. If a surveillance order produces evidence of any other crime, it may only use the intercepted information for

²Anita Chabria, *How an L.A. Police Misconduct Case Sparked Push to Loosen California Wiretapping Law*, Los Angeles Times (June 28, 2019), available at <https://www.latimes.com/politics/la-pol-ca-wiretapping-california-cops-20190626-story.html>.

³California Electronic Interceptions Report, Annual Report to the Legislature 2018 (April 1, 2019), available at <https://oag.ca.gov/publications#electronic>.

⁴See Pen. Code, § 667.5, et al. The reference to violent felonies contains numerous cross references. The crimes referenced include: murder or voluntary manslaughter; mayhem; rape; sodomy; oral copulation; a lewd or lascivious act; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on any person other than an accomplice; any felony in which the defendant uses a firearm; any robbery; arson; unlawful sexual penetration; attempted murder; exploding, igniting, or attempting to explode or ignite any destructive device or any explosive with intent to commit murder, which causes bodily injury, or which causes death; kidnapping; assault with the intent to commit a specified felony; continuous sexual abuse of a child; carjacking; rape, spousal rape, or sexual penetration, in concert; extortion which would constitute a felony; threats to victims or witnesses, as defined and which would constitute a felony; burglary of the first degree; holding a hostage by a prisoner; assault by a prisoner; assault by a life prisoner; assault with a firearm on a peace officer or firefighter; discharge of a firearm that proximately causes great bodily injury; commission of a felony using or discharging a firearm; participation in a street gang using a firearm; any person who uses or directly employs against another person a weapon of mass destruction in a form that may cause widespread, disabling illness or injury in human beings; any person who maliciously uses against animals, crops, or seed and seed stock, a weapon of mass destruction in a form that may cause widespread damage to or substantial diminution in the value of stock animals or crops; and any person who uses a weapon of mass destruction in a form that may cause widespread and significant damage to public natural resources, including coastal waterways and beaches, public parkland, surface waters, ground water, and wildlife.

the purpose of preventing the commission of a public offense, except where evidence was obtained through an independent source or inevitably would be discovered.

This bill would expand the use of ancillary evidence collected through intercepted communications for two additional crimes: 1) grand theft involving a firearm, and 2) exploding a destructive device or any explosion causing bodily injury, great bodily injury, or mayhem. According to the bill's sponsor, grand theft involving a firearm is the most commonly overheard crime through intercepted communications for which prosecuting agencies may be limited in using evidence in court under current law.

- 4) **Police Accountability:** According to the bill's sponsor, the impetus for the bill is the depublished decision issued by the Second District Court of Appeal in *County of Los Angeles v. Los Angeles County Civil Service Com.*, (2018) 22 Cal. App. 5th 473. In that case, the County of Los Angeles used evidence of a peace officer committing a crime⁵ which it had captured on a wiretap more than two years prior in a disciplinary proceeding to terminate the officer.

The officer, Carlos Arellano, "was identified on the wiretap by a voice comparison made by five Spanish-language linguists, according to court records, though Arellano's lawyer, Elizabeth Gibbons, said it was never proven to be Arellano on tape, and he has maintained his innocence."⁶ In 2011, Arellano was fired from the L.A. Sheriff's Department, chiefly based on evidence from the wiretap.

Arellano objected to the use of intercepted conversations in an administrative hearing and took his case to the Court of Appeal which ultimately agreed that the evidence was not admissible. The court specified two reasons: First, it said that the scope of the order was too narrow to permit the use of evidence a disciplinary hearing.⁷ Second, it found that the two-year-old evidence was not admissible because the County could not show that disclosure or use of the calls would prevent a crime from occurring or that any ongoing offenses could be prevented. Thus, while the bill is purportedly addressing the issues raised by this case, arguably, the deficiencies stem not from state law but the County's actions.

The County also argued that the court should interpret California law in line with federal rules on wiretapping, which would likely permit the use of the intercepted communication against a peace officer in Arellano's case. The Court of Appeal, though, recognized that the discord between California and federal law was intentional on the part of the Legislature, writing:

Although state law cannot be less protective of privacy than the federal wiretap act (citations omitted), this is precisely the result the County seeks here. At issue in *Roberts* was California's more restrictive provision with respect to the timing and content of

⁵The evidence was of the crime of cultivating marijuana, which is not a specified crime (i.e. a violent felony or a crime that permits issuance of a wiretap order) that will authorize the use of evidence obtained from a wiretap under existing law. This bill would permit the use of such evidence only against a peace officer in an administrative or disciplinary proceeding, and would not permit the use of such evidence in a criminal court proceeding.

⁶*Chabria*, supra, note 2.

⁷"[N]othing in Judge Fidler's order expressly authorized disclosure or use of the wiretap evidence in an administrative hearing against Arellano." (*City of L.A.*, 22 Cal. App. 5th at 484.)

reports submitted during a wiretap. At issue here is California's more restrictive provision with respect to the disclosure and use of the wiretap's intercepted calls. As in *Roberts*, the significant difference in the scope of the privacy protection created by the California statute "indicates that [the state Legislature] intended the statute not conform to federal law in this regard." (*Id.* at p. 1180.) Thus, relying upon the federal wiretap act does not aid the County's position here. Nor does citation to factually distinguishable federal decisions—bound not by California law but by the far broader scope of the federal wiretap act—assist the County's contentions. (See, e.g., *Forsyth v. Barr* (5th Cir. 1994) 19 F.3d 1527.)

Cty. of L.A., at 487-88, 231.

- 5) **Equal Protection Considerations:** This bill would establish the ability for law enforcement agencies to use information obtained on a wiretap, and intercepted electronic communications, against a peace officer in an administrative or disciplinary hearing. No other public or private employee in California would be subject to similar consequences.

A state law that treats one class of persons differently, based solely on their status as compared to other classes of persons, may raise equal protection implications. The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. Accordingly, the first prerequisite to a claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (*People v. Brown* (2012) 54 Cal.4th 314.)

Under the provisions of this bill, the allegation would be that a person who is subject to surveillance might be treated differently based on whether or not the perpetrator is a peace officer or not. No person other than a peace officer may be directly disciplined at work based on an intercepted communication collected regarding any crime.

The courts have used a three-tier system in order to determine whether a statute violates the equal protection clause: strict scrutiny, intermediate scrutiny, and minimal scrutiny. Where legislation does not burden a suspect class or a constitutionally protected right, then the legislative act faces minimal scrutiny. Equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) Under the minimal level of equal protection analysis, great deference is given to legislative determinations. (*Id.* at p. 887.) "A state may provide for differences as long as the result does not amount to invidious discrimination. Equal protection ... require[s] that a distinction made have some relevance to the purpose for which the classification is made." (*People v. Cruz* (2012) 207 Cal.App.4th 664, 675, citations omitted.)

A legitimate state interest is at the very least anything that advances a traditional police power: "Public safety, public health, morality, peace and quiet, law and order, these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not limit it." (*Berman v. Parker* (1954) 348 U.S. 26, 32.) "State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

inequality. Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” (*McGowan v. Maryland* (1961) 366 U.S. 420, 425-46.)

The policy aim of this bill is to ensure that law enforcement agents who are entrusted to follow and enforce the law do not remain employed with a police agency if there is evidence that the officer committed a crime. This would appear to be a legitimate state interest.

However, a peace officer who is subject to discipline because of the impacts of this bill might argue that allowing wiretap evidence of any crime by peace officers to be used in administrative hearings, even if there are no criminal proceedings or if that evidence cannot be used in court, violates an officer’s constitutional rights.⁸

Wiretapping implicates the constitutional right of privacy, which could trigger strict scrutiny of the law. In *Long Beach City Employees Ass’n v. City of Long Beach*, (1986) 41 Cal.3d 937, for example, the California Supreme Court reviewed a law that subjected some public employees to involuntary polygraph examinations and concluded that the law implicated privacy rights and violated equal protection principles by making a “legislative classification that is therefore dual in character” by creating a “subclassification” of public employees who are protected from the law, and those who are not. The court concluded there was no compelling reason for discriminating between public and private employees in the right to refuse a polygraph test, and the court enjoined the government from doing so.

There is precedent for distinguishing laws based on status as a peace officer—that a law enforcement officer’s special role in society will justify certain limits on their right of privacy. In finding that polygraph tests could be required of a peace officer, the Court of Appeal said, “Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them....” (*Frazer v. Civil Service Board* (1959) 170 Cal.App.2d 33, 335.)⁹

In *Ratray v. City of Nat’l City*, the district court refused to interpret California law to permit a police agency to secretly record a confidential communication, in violation of Penal Code Section 632, for the sole purpose of conducting an internal investigation into an officer employed by the department. The court reviewed Penal Code Section 633 which exempts from Section 632’s restraints on eavesdropping for police agencies conducting criminal investigations. The court concluded that it was facing a similar case as that in *Long Beach*, supra, and wrote, “Neither the California legislature nor [the agency] have articulated any reason, compelling or otherwise, for exempting only police employees from the privacy rights conferred by § 632, and we can perceive none.” (*Ratray v. City of Nat’l City*, 51 F.3d 793, 797-98 (9th Cir. 1994).)

This bill could raise the question of why certain public employees or officials are treated differently than others when they are caught committing any crime via an intercepted

⁸ *Chabria*, supra, note 2.

⁹ This case was decided prior to the passage of the Public Safety Officers Procedural Bill of Rights Act, and prior to the adoption of the state’s constitutional amendment establishing the right of privacy.

communications. For example, what if a teacher or an elected official was caught committing the same crime as a peace officer on an intercepted wire? In that case, the evidence remains secret because there is no forum in which the evidence may be introduced, whereas a peace officer may face consequences related to employment for the same conduct.

Notably, in a recent case the Court of Appeal permitted the use of recorded phone conversations collected pursuant to Penal Code Section 632 and 633 for a criminal investigation in a disciplinary proceeding against a peace officer. The evidence collected was used to support dismissal of the officer, who sought to exclude the evidence relying on *Rattray*. The Court of Appeal rejected this argument, distinguishing *Rattray* by finding that the information was collected for the purpose of a criminal investigation, not for the purpose of a workplace investigation. Similarly, this bill extends the right to use evidence in a disciplinary proceeding only when it is captured in the court of a *criminal* investigation. This bill does not authorize the issuance of a wiretap order for the purpose of investigation a peace officer in an internal investigation.

- 6) **Need for reporting:** This bill would require any agency that uses evidence obtained from a wiretap in an administrative or disciplinary hearing of a peace officer to report the number of proceedings in which the evidence was used in a calendar year, and the offense for which the evidence introduced in the proceeding was used.

Because police disciplinary proceedings are confidential, without a reporting element in this bill, the fact that information obtained on a wire is being used to discipline a peace officer would remain completely secret. By requiring basic reporting to the Attorney General, the public will know the number of proceedings that occur as a result of this legislation, and for what crimes. This minimal grant of oversight ensures that the public is alerted to any particularly troubling trends regarding police officer criminal conduct, and helps prevent abuse regarding the violation of a peace officer's privacy rights.

This bill raises the issue that police officers may be engaged in criminal conduct, and may, despite discovery of that conduct, evade discipline or termination from a police agency. Because police disciplinary proceedings are confidential, an officer may be terminated from their employing agency for engaging in criminal conduct, but that information may remain undisclosed to a potential future employer. There are numerous examples of police officers being fired by one department for misconduct, who are later hired by other law enforcement agencies. In the future, the Legislature may want to consider whether to address the disclosure of police disciplinary records when police officers commit crimes to fully address the concerns raised by this bill.

- 7) **Violation of Department Policy or Procedures Inadmissible:** This bill includes a restriction so that only evidence of criminal activity, not a violation of department policy or procedure, would be admissible against a peace officer in an administrative or disciplinary hearing. Technical amendments ensure that the limitation extends to both intercepted wire communication and electronic communications.
- 8) **Argument in Support:** According to the bill's sponsor, the *Los Angeles County District Attorney's Office*, "Existing law also limits the use of intercepted communications involving law enforcement misconduct. California law only allows the use of intercepted communications in limited circumstances in criminal proceedings and grand jury

proceedings. They may not be used in administrative hearings. Section 629.82(b)'s limitations were illustrated when Carlos Arrellano, a Los Angeles County narcotics detective, was intercepted discussing an illegal marijuana grow operation with the target of a narcotics wiretap investigation. The Los Angeles County Sheriff's Department Internal Criminal Investigations Bureau and the Drug Enforcement Administration conducted an investigation but charges could not be filed because marijuana is not listed in Penal Code section 629.52(a)(1) and use of the calls was therefore precluded by Penal Code section 629.82. Arrellano was discharged from his position as a deputy sheriff on August 29, 2011, but was reinstated because criminal charges could not be filed and the intercepted calls were not admissible at the administrative hearing. (Citations omitted).

"During a 2018 wiretap investigation, a call was intercepted between a Target Subject and the Target Subject's neighbor. The neighbor was an active law-enforcement officer from a local police agency. The Target Subject asked the officer to 'run' the license plate of the vehicle. The officer complied. Not only is this a violation of Penal Code section 13300 et seq., but undoubtedly a violation of the officer's departmental policy and procedure manual. The officer's agency may be able to initiate an internal affairs investigation into the officer's conduct, but the intercepted conversation cannot be used in any criminal or administrative proceedings.

"SB 439 would address these situations by permitting the use of a lawfully intercepted statement involving criminal offense is made by a peace officer in an administrative or disciplinary hearing involving the employment of a peace officer. SB 439 does not authorize the use of an electronic communication involving acts that only involve a violation of a departmental rule or guideline that is not a public offense under California law."

- 9) **Argument in Opposition:** According to the *California Attorneys for Criminal Justice*, "The attempt to significantly expand the number and nature of crimes embraced by PC 629.82(a) is a backdoor attempt to impinge on the rights of all Californians under the cover of prosecuting bad law enforcement officers as we will now discuss.

"The impetus for SB 439 comes from a court decision in 2018. Amending PC 629.82(a) to include serious felonies is not related to nor required to address the holding in that case.

"PC 629.82(b) already allows the use of wiretap evidence even if it is not evidence of a crime listed in either PC 629.52 (a) or PC 667.5(c) if it is to be used to prevent the commission of a public offense.

"This is why the Los Angeles County Sheriff's Department lost its case in *County of Los Angeles v. Los Angeles County Civil Service Commission (Carlos Arrellano)* (2018) 22 CA5th 473 (depublished) and this is the reason the current amendment to PC 629.82 is being proposed. The Sheriff's Department lost because they brought a disciplinary action against Detective Arellano some 3 years after his phone conversations re: selling marijuana were intercepted in a wiretap. Plainly, the evidence was not being used to prevent the commission of a public offense as required under PC 629.82(b).

"Thus, the alleged remedy proposed in SB 439 of adding serious felonies under PC 1192.7(c) to PC 629.82(a) at best goes far beyond the holding and reasoning in *Arrellano* and at worst is completely unmoored from the case upon which it is based. The reason for the Sheriff's

Department losing its case was that it waited too long to bring the disciplinary action; not because of the nature of the alleged crimes Arrellano committed.

“The legislative fix for the perceived problem with the Arrellano decision is found in the SB 439’s proposed amendment to PC 629.82 to add subdivision (d) which deals explicitly with using wiretap evidence of crimes committed by peace officers solely in administrative or disciplinary hearings.

“It is also clear from both the author’s statement regarding SB 439 and the references on pages 4 and 6 of the Senate Public Safety Committee analysis of the bill that the purpose of the bill is to overcome the so-called ‘limitations’s in PC 629.82(b); not PC 629.82(a).

“Invasions of the privacy of Californians is a matter taken most seriously by not only CACJ but our courts and legislature from the beginning of our State. Perhaps the greatest articulation of why we must always be on our guard regarding deeper intrusions into our individual privacy is found in Justice Brandeis’ famous dissent in *United States v. Olmstead* (277U.S. 438, 475-476, 48 S.Ct. 564) a wiretapping case from 1928. The great justice said as follows:

““The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him.

““Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.’ (See page 479)

“With regard to SB 439, this warning applies to persons who want to make it easier to weed out bad law enforcement officers but seek to ensnare average citizens in their zeal. Justice Brandeis closed with this observation and a warning that serves us all well to heed: ‘Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means- to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.’ (See page 485).”

10) Related Legislation:

- a) AB 304 (Jones-Sawyer), would extend the sunset date until January 1, 2025 on provisions of California law which authorize the Attorney General (AG), chief deputy attorney general, chief assistant attorney general, district attorney or the district attorney's designee to apply to the presiding judge of the superior court for an order authorizing the

interception of wire or electronic communications under specified circumstances. SB 304 is currently before the Senate Appropriations Committee.

- b) AB 904 (Chau) would prohibit a court from granting a search warrant to conduct real-time surveillance of a person through an electronic device possessed by that person, except in extraordinary circumstances. AB 904 is currently pending before this committee.
- c) AB 1638 (Olberholte) expands authorization for the issuance of a search warrant to obtain information from a motor vehicle's software that "tends to show the commission of a public offense involving a motor vehicle, resulting in death or serious bodily injury" except in the case of an infraction. AB 1638 is pending on the Senate Floor.

11) Prior Legislation:

- a) SB 178 (Leno) Chapter 651, Statutes of 2015, established CalECPA, which prohibited 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.
- b) AB 1924 (Low), Chapter 511, Statutes of 2016, requires an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device direct that the order be sealed until the order, including any extensions, expires, and would require that the order or extension direct that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person.
- c) 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.
- d) SB 741 (Hill) Chapter 741, Statutes of 2015, requires local agencies to publicly approve or disclose the acquisition of cellular communications interception technology (CCIT). SB 741 also requires local agencies to develop and release a usage and privacy policy for CCIT.
- e) SB 35 (Pavley), Chapter 745, Statutes of 2014, extended the sunset date on California's wiretapping law until January 1, 2020.
- f) SB 61 (Pavley), Chapter 663, Statutes of 2011, extended the sunset date on California's wiretapping law until January 1, 2015.
- g) AB 569 (Portantino), Chapter 391, Statutes of 2007, extended the sunset date on California wiretap law until January 1, 2012.
- h) AB 74 (Washington), Chapter 605, Statutes of 2002, extended the sunset date on California wiretap law until January 1, 2008.

- i) AB 2343 (Pacheco), of the 2001-2002 Legislative Session, would have deleted the sunset date of the current wiretap law, expanded the definition of "wire communication" to authorize the interception of information sent through e-mail media, and created the emergency authority to expand an existing interception order. AB 2343 died in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)

Oppose

California Attorneys for Criminal Justice
Electronic Frontier Foundation
Oakland Privacy
San Francisco Public Defender's Office

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Amended Mock-up for 2019-2020 SB-439 (Umberg (S))

**Mock-up based on Version Number 99 - Introduced 2/21/19
Submitted by: Nikki Moore, Assembly Committee on Public Safety**

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

SECTION 1. Section 629.78 of the Penal Code is amended to read:

629.78. Any person who has received, by any means authorized by this chapter, any information concerning a wire or electronic communication, or evidence derived therefrom, intercepted in accordance with the provisions of this chapter, may, pursuant to Section 629.82, disclose the contents of that communication or derivative evidence while giving testimony under oath or affirmation in any criminal court proceeding or in any grand jury proceeding, or in an administrative or disciplinary hearing involving the employment of a peace officer.

SEC. 2. Section 629.82 of the Penal Code is amended to read:

629.82. (a) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating to crimes other than those specified in the order of authorization, but that are enumerated in subdivision (a) of Section 629.52, or grand theft involving a firearm; or exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; or any serious felony as defined in subdivision (c) of Section 1192.7, or a violent felony as defined in subdivision (c) of Section 667.5, (1) the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in Sections 629.74 and 629.76 and (2) the contents and any evidence derived therefrom may be used under Section 629.78 when authorized by a judge if the judge finds, upon subsequent application, that the contents were otherwise intercepted in accordance with the provisions of this chapter. The application shall be made as soon as practicable.

(b) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating to crimes other than those specified in subdivision (a), the contents thereof, and evidence derived therefrom, may not be disclosed or used as provided in Sections 629.74 and 629.76, except to prevent the commission of a public offense. The contents and any evidence derived therefrom may not be used under Section 629.78, except where the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted in accordance with this chapter.

(c) The use of the contents of an intercepted wire or electronic communication relating to crimes other than those specified in the order of authorization to obtain a search or arrest warrant entitles the person named in the warrant to notice of the intercepted wire or electronic communication and a copy of the contents thereof that were used to obtain the warrant.

(d) (1) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating to crimes, other than those specified in subdivision (a), and involving the employment of a peace officer, the contents thereof, and evidence derived therefrom, may not be disclosed or used as provided in Sections 629.74 and 629.76, except to prevent the commission of a public offense or in an administrative or disciplinary hearing involving the employment of a peace officer. The contents and any evidence derived therefrom may not be used under Section 629.78, except if the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted in accordance with this chapter.

(2) This section does not authorize the use of an intercepted wire or electronic communication involving acts that only involve a violation of a departmental rule or guideline that is not a public offense under California law.

(3) If an agency employing peace officers utilizes evidence obtained pursuant to subdivision (d) in an administrative or disciplinary proceeding, the agency shall, on an annual basis, report both of the following to the Attorney General:

(A) The number of administrative or disciplinary proceedings involving the employment of a peace officer in which the agency utilized evidence obtained pursuant to subdivision (d).

(B) The specific offenses for which evidence obtained pursuant to subdivision (d) was used in those administrative or disciplinary proceedings.

(4)(A) The Attorney General may issue regulations prescribing the content and form of the reports required to be filed pursuant to this section by any employing agency utilizing intercepted wire or electronic communications for the purpose of an administrative or disciplinary proceeding against a peace officer.

(B) The Attorney General shall include information received pursuant to subsection (3) in its annual report made pursuant to section 629.62 of the Penal Code.

Date of Hearing: July 9, 2019
Chief Counsel: Gregory Pagan

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

SB 459 (Galgiani) – As Amended April 25, 2019

SUMMARY: Makes the five year enhancement for the infliction of great bodily injury (GBI) in the commission of specified sex offenses applicable to the crime of spousal rape where the victim was prevented from resisting by the use of any intoxicating or anesthetic substance or a controlled substance.

EXISTING LAW:

- 1) Provides that any person who personally inflicts GBI during the commission of a felony shall be punished by an additional and consecutive term of three years in state prison. (Pen. Code, § 12022.7, subd. (a).)
- 2) States that any person who personally inflicts GBI during the commission of a felony causing the victim to become comatose due to brain injury or permanently paralyzed shall be punished by an additional and consecutive term of five years in state prison, and defines “paralysis” to mean “a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.” (Pen. Code, § 12022.7, subd. (b).)
- 3) Provides that any person who personally inflicts GBI on a person who is 70 years of age or older during the commission of a felony shall be punished by an additional and consecutive term of five years in state prison. (Pen. Code, § 12022.7, subd. (c).)
- 4) States that any person who personally inflicts GBI on child under five years of age in the commission of a felony shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. (Pen. Code, § 12022.7, subd. (d).)
- 5) Provides that any person who personally inflicts GBI during the commission of a felony under circumstances involving domestic violence shall be punished by an additional and consecutive term of three, four, or five years in state prison. (Pen. Code, § 12022.7, subd. (e).)
- 6) Defines "GBI" as a significant or substantial physical injury. (Pen. Code, § 12022.7, subd. (f).)
- 7) States that any person that inflicts GBI in the commission of assault with intent to commit a specified sex offense, rape by force or violence, rape where a person is prevented from resisting by the use of any intoxicating substance or anesthetic substance, or by a controlled substance, rape that is accomplished against the victim’s will by threatening to retaliate in the future, spousal rape by means of force or violence, spousal rape that is accomplished against the victim’s will by threatening to retaliate in the future, rape in concert, lewd and lascivious

acts against a child under the age of 14 by force or violence, sexual penetration by force or violence, sodomy or oral copulation by force or violence shall receive a five year enhancement for each violation in addition to the sentence provided for the felony conviction. (Pen. Code, § 12022.8.)

- 8) Provides that any person who personally inflicts GBI during the commission of a felony upon a person he or she knows, or reasonably should know, is pregnant with the intent to inflict injury shall be punished by an additional and consecutive term of five years in state prison. (Pen. Code, § 12022.9.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 459 adds consistency to the Penal Code by applying the existing 5-year sentence enhancement for the infliction of great bodily injury during a rape to include all spousal rape.

"Under current law, a person is given a 5-year sentence enhancement when the survivor has suffered great bodily injury during the commission of rape by force or violence, rape where the victims is prevented from resisting by the use of any intoxicating or anesthetic substance, or by a controlled substance, and rape where the act is accomplished against the victim's will by threatening to retaliate in the future.

"However, there is no enhancement if the survivor suffered great bodily injury at the hands of a spouse while under intoxication or anesthetic, or by a controlled substances. SB 459 would fix this inconsistency."

- 2) **Argument in Support:** According to the *California State Law Enforcement Association*, "SB 459 enhances a person's sentence for the infliction of great bodily injury in the commission of spousal rape where the victim was prevented from resisting by the use of any intoxicating or anesthetic substance, or a controlled substance.

"Current law imposes an additional and consecutive term of 3 years imprisonment on a person who personally inflicts great bodily injury on a person. This measure is an important sentencing enhancement to ensure victims of spousal rape and domestic violence are protected to the fullest extent possible under the law. While we understand the Legislature's position to be mindful that sentence enhancements may lead to larger prison populations, sentence enhancements for spousal rape are particularly important because it allows the victims more time to move on from domestic violence situations. Unfortunately, law enforcement officers encounter domestic violence situations regularly that escalate from instances of physical abuse, to rape, to murder. Should SB 459 become law, it could prevent some of these tragic situations from becoming deadly."

- 3) **Argument in Opposition:** According to the *California Public Defenders Association*, "Under current law, when great bodily injury is inflicted in cases of rape in violation of Penal Code section 261, subdivision (a)(2), (a)(3), and d(a)(6), an enhancement of five years is imposed; while in cases of rape in violation of the other subdivisions of Penal Code section 261, namely subdivisions (a)(1), (a)(4), a(5), and a(7), the enhancement is three years.

Likewise, in cases of spousal rape in violation of Penal Code section 262, subdivisions (a)(1) and (a)(4), an enhancement of five years is imposed, while in cases of spousal rape in violation of the other subdivisions of Penal Code section 262, namely subdivisions (a)(2), (a)(3), and (a)(4) the enhancement is three years.

"Perhaps three is value to making the enhancement uniform for all subdivisions of Penal Code section 262, but, if so, the CPDA believes that value is best achieved by lowering the existing five year penalties of two subdivisions in section 262 to the existing three—year penalties in section 262."

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Statewide Law Enforcement Association

Oppose

American Civil Liberties Union of California
California Public Defenders Association

Analysis Prepared by: Gregory Pagan / PUB. S. / (916) 319-3744

Date of Hearing: July 9, 2019
Counsel: Matthew Fleming

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

SB 485 (Beall) – As Amended June 17, 2019

SUMMARY: Removes the ability of the court and the Department of Motor Vehicles (DMV) to delay, suspend, or revoke a person's driving privilege as a result of a conviction for various misdemeanor offenses. Specifically, **this bill:**

- 1) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of selling, furnishing, giving, or causing to be sold, furnished or given away, any alcoholic beverage to any person under 21 years of age.
- 2) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of being under the age of 21 years and purchasing or consuming any alcoholic beverage in any "on-sale" premises.
- 3) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of being an on-sale licensee who knowingly permits a person under 21 years of age to consume any alcoholic beverage in the on-sale premises.
- 4) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of being under the age of 21 years and possessing an alcoholic beverage in a public place.
- 5) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of being under the age of 21 years and in possession of alcohol in a vehicle without a parent, adult relative, or other designated adult.
- 6) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of being under the age of 21 years and presenting or offering a fraudulent identification or one that is not actually his or her own in an attempt to acquire alcohol.
- 7) Repeals the authority of the court to suspend or delay the driving privilege of a person who is convicted of the misdemeanor offense of possessing, manufacturing, selling, offering for sale, or transferring any document, not amounting to counterfeit, purporting to be a government-issued identification card or driver's license.
- 8) Repeals the authority of the court to suspend for up to 30 days, or restrict for up to 6 months, the driving privilege of a person convicted of the misdemeanor offense of soliciting or agreeing to engage in a lewd act or an act of prostitution, if that offense involves the use of a vehicle.

- 9) Repeals the authority of the court to suspend, or order the DMV to revoke, the driving privilege of a person convicted of numerous offenses related to controlled substances if a vehicle was involved in or incidental to the offense, as specified.
- 10) Repeals the authority of the court to suspend or delay the driving privilege of a minor convicted of a public offense involving a pistol, revolver, or other firearm capable of being concealed upon the person.
- 11) Repeals the requirement that the court to suspend or delay the driving privilege of a person who is convicted of an offense of vandalism or defacing a structure with butyric acid.
- 12) Makes findings of legislative intent stating that these provisions are not intended to affect any order or determination made by the court or the DMV before January 1, 2020, to suspend, delay, or otherwise restrict the driving privilege of a person. Instead, they are only intended to effect people who are convicted of the specified offenses after January 1, 2020, or persons who were convicted prior to January 1, 2020 but whose driving privilege was not suspended, delayed, or otherwise restricted.
- 13) Makes conforming changes.

EXISTING LAW:

- 1) Criminalizes various acts pertaining to underage drinking and authorizes the court to suspend or delay the driving privilege of a person convicted of such an offense. (Bus & Prof. §§ 25658, 25658.4, 25658.5, 25661, 25662; Pen. Code § 529.5.)
- 2) Criminalizes the acts of soliciting or agreeing to engage in a lewd act in a public place or an act of prostitution with the intent to receive compensation and authorizes the court to suspend or restrict the driving privilege of a person convicted of such an offense. (Pen. Code § 647, subs. (a), (b), and (k); Veh. Code § 13201.5.)
- 3) Criminalizes numerous acts pertaining to the use, possession, sales, transportation, etc., of controlled substances and authorizes the court to suspend or order the DMV to revoke the driving privilege of a person convicted of such an offense. (Health & Saf. Code, §§ 11000 *et seq.*; Veh. Code § 13202.)
- 4) Criminalizes acts of vandalism and defacing a structure with butyric acid and authorizes the court to suspend or delay the driving privilege of a person convicted of such an offense. (Pen. Code, §§ 594, 594.3, and 594.4; Veh. Code § 13202.6.)
- 5) Authorizes the court to suspend or delay the driving privilege of a minor who commits a public offense involving a pistol, revolver, or other firearm capable of being concealed upon the person for up to five years. (Veh. Code § 13202.4, subd. (a).)
- 6) Makes it a misdemeanor for a person to drive a motor vehicle at any time when that person's driving privilege is suspended or revoked and the person has knowledge of the suspension. (Veh. Code § 14601.1)

- 7) Provides that the DMV shall immediately revoke a person's driving privilege upon receipt of a duly certified abstract of the record of a court showing that the person has been convicted of specified offenses relating to the use of a motor vehicle. (Veh. Code § 13350, *et. seq.*)

EXISTING FEDERAL LAW

- 1) States that Secretary of Transportation shall withhold a specified percentage of a state's transportation funds if it has not enacted and enforced a law that requires at least a six-month suspension or revocation of driving privilege for a person convicted of a violation of the Federal Controlled Substances Acts, or any drug offense. (23 U.S.C. § 159(a)(3)(A).)
- 2) Allows a state to opt out of the above-reference law and receive the full percentage of transportation funds by submitting a written certification to the Secretary of Transportation from the Governor stating that the Governor is opposed to the law and a written certification that the legislature has adopted a resolution expressing its opposition to the law. (23 U.S.C. § 159(a)(3)(B).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "Suspending an individual's driver's license became a popular method of punishment in the 90s, whether or not the crime had anything to do with operating a vehicle. A driver's license is essential for people's everyday lives. Suspending licenses for non-vehicle related crimes does not increase public safety. Such suspensions deter a person's ability to care for their children, work, maintain employment and, importantly, pay restitution. It adds an unnecessary workload to the Department of Motor Vehicles (DMV), and financial burden on low-income families and people of color.

"In fact, financial burden may be the leading factor individuals drive with a suspended license. Because most people's livelihoods depend on having a valid driver's license, it increases the likelihood individuals will violate the law by driving with a suspended license. This leads to incarceration, fines and fees, and impounding vehicles, which all disproportionately affect low-income families and communities of color. 78% of Californians drive to work, and over five million jobs in California require a valid driver's license.³ Due to lack of jobs in low-income neighborhoods, a suspended license causes a decline in access to jobs in cities and suburbs where there are available jobs, which then creates significant financial burden.

"SB 485 prohibits suspending driver's licenses for non-vehicle related crimes. This bill eliminates an inefficient DMV process, while increasing the likelihood that those convicted will be able to maintain employment and pay restitution."

- 2) **AB 1618:** AB 1618 (Jones-Sawyer) was introduced this session and was similar to this bill. AB 1618 was eventually amended into an unrelated bill, but, in its prior version it would have eliminated the requirement that the court impose a license suspension or delay for a person convicted of a vandalism offense. According to the Assembly Committee on Transportation's analysis of that bill:

“Despite decades of legislative efforts of using license suspensions as a deterrent against graffiti, graffiti has persisted. In 2014, the City of Los Angeles spent \$7 million cleaning up 32.4 million square feet of graffiti.

“While the suspended licenses appear to have not had an effect on reducing graffiti, they have real world impacts on transportation. Suspending someone’s driver’s license does not stop someone from driving. In fact, there were 115,000 convictions for driving with a suspended license in 2018 (and that number does not include suspensions as a result of reckless driving or driving under the influence.) It does, however, stop someone from having a legal means of getting to work or school if there is no available public transportation.

“Further, suspending licenses also stops those who opt to drive anyway from having vehicle insurance. This could have detrimental effects for anyone involved in vehicle accident with someone driving with a suspended license. According to a 2000 study from AAA entitled *Unlicensed to Kill*, nearly 1 in 5 traffic fatalities in California are committed by someone with a suspended license, and hit and runs are more likely to occur when someone has a suspended license.

“By delaying a teenager’s ability to get a license until after the age of 18, you are also guaranteeing they will not get a provisional driver’s license, which includes behind the wheel training requirements.

“While the state grants courts the ability to suspend licenses for something completely unrelated to driving, two years ago it removed the authority for courts to suspend driver’s licenses for failing to pay traffic tickets out of recognition of the harm it may cause for low income families.” (Assem. Com. on Transportation, Analysis on Assem. Bill No. 1618 (2019 – 2020 Sess.) as amended April 11, 2019, p. 3.)

- 3) **The Need for this Bill:** Although AB 1618 pertained only to vandalism offenses, the analysis by the Assembly Transportation Committee concluded that “[t]he Legislature may want to consider whether it should continue to allow for the suspension of driver’s licenses for issues unrelated to traffic safety.” (*Ibid.*) This bill would eliminate a number of statutory provisions that either allow or require a court to suspend or delay a person’s driver’s license when they are convicted of offenses that are not directly related to any kind of driving activity. Suspensions and delays for reckless driving, vehicular manslaughter, and fleeing the scene of an accident would be undisturbed by the provisions of this bill, whereas suspensions and delay of driving privileges for offenses related to underage drinking, prostitution, vandalism, and controlled substances (other than driving while intoxicated) would be eliminated.

Most of the offenses contemplated by this bill constitute misdemeanor conduct, however some provisions, particularly those which pertain to controlled substances offenses, would encompass felony conduct. It’s important to note, however, that irrespective of the changes made by this bill, the court would retain its authority to order that a person’s license be suspended or revoked as a result of a conviction for a felony offense, provided that there is a nexus between the commission of the offense and the vehicle. (*See In re Gaspar* (1994) 22

Cal. App. 4th 166, 169 (citing *People v. Poindexter* (1980) 210 Cal. App. 3d 803, 808.) Therefore, if it appears to a court that suspending or delaying the driver's license could be useful in order to prevent recidivism, it will still be able to do so. *Paulsen* is illustrative of the court's authority in this regard. In that case, it was determined to be appropriate for a court to suspend the license of a person who had rented a U-Haul truck for the purposes of transporting stolen equipment that was taken as part of an "elaborate fraud scheme." (*People v. Paulsen* (1989) 217 Cal. App. 3d 1420, 1423.) The "strong nexus" between the crime and the vehicle made it appropriate for the court to order the license suspension. This bill would leave the court's discretionary authority to suspend licenses in felony cases intact, so long as there exists an appropriate nexus between the crime and a vehicle.

Existing federal law appears to require the states to revoke or suspend the driver's license of any person convicted of a controlled substance offense or risk losing some amount of the transportation funds to which the state is entitled. (23 U.S.C. § 159(a)(3)(A).) However, there is an opt-out clause which allows a state to retain their transportation funds if the Governor and the Legislature are in opposition to the law requiring driver's license suspension for drug convictions and they send written certification to the Secretary of Transportation. It appears that California is one of the many states that has chosen to opt out of the so called "smoke a joint, lose your licenses" federal legislation. (See Aiken, *Reinstating Common Sense: How Driver's License Suspensions for Drug Offenses Unrelated to Driving Are Falling Out of Favor*, Prison Policy Initiative, Dec. 12, 2016, available at: <https://www.prisonpolicy.org/driving/national.html>, [as of Jul. 2, 2019].)

- 4) **Argument in Support:** According to the *Pacific Juvenile Defender Center*: "Under current law, a young person involved in vandalism, disorderly conduct, drug possession, and a series of other offenses may lose their right to drive even though their offense had nothing to do with driving. This is unfair and impedes the very purpose of juvenile court intervention in young people's lives, which is to provide 'care treatment and guidance that is consistent with their best interest, holds them accountable for their behavior, and that is appropriate for their circumstances.' (Welf. & Inst. Code, §202.) S.B. 485 will eliminate such penalties for non-driving related offenses.

"The laws imposing driving restrictions on juveniles for non-driving offenses came about primarily in an era in which it was believed that more punishment would bring about rehabilitation. Since that time, juvenile experts have come to realize that loading youth down with long lists of probation conditions is unlikely to produce success. Best practices in probation now call for the imposition of many fewer conditions of probation, with an emphasis on imposing targeted conditions that will promote healthy development. (See, e.g., National Council of Family and Juvenile Court Judges, *Resolution Regarding Juvenile Probation and Adolescent Development* (2018).) Restrictions on driving privileges for non-driving offenses are not targeted and do not promote healthy development.

"In the short run, driving restrictions may interfere with young people's ability to travel to appointments and programs required by the terms of their probation. In addition, once driving privileges are restricted, it is much more likely that youth will intrude further into the system on technical probation violations. Most youth in the juvenile system come from poor or financially struggling families who may not be able to afford the costs of classes and administrative fees needed to reinstate the young person's driver's license. Because of this,

they are more likely to drive without a license and to suffer the consequences of additional fines or incarceration.

“In the long run, restricting driving privileges for youth involved in non-driving offenses interferes with one of the great rites of passage to adulthood. Our laws are carefully written to allow young people successive levels of responsibility in first taking driver’s education, getting a permit, having provisional license, driving with restrictions on who can be in the car, and finally being allowed to have full adult driving privileges. By restricting driving privileges for offenses unrelated to driving, we are interfering with the ability of young people to learn the skill of driving and to move through successive stages of increased responsibility.”

- 5) **Related Legislation:** AB 1618 (Jones-Sawyer) would have removed the ability of the court and the DMV to suspend or delay someone’s driver’s license for a conviction of the crime of vandalism. AB 1618 was amended into an unrelated subject matter and is pending hearing in the Senate Appropriations Committee.
- 6) **Prior Legislation:**
 - a) AB 2685 (Lackey), Chapter 717, Statutes of 2018, eliminated license suspensions for minors who are found to be habitually truant.
 - b) AB 534 (Linder), of the 2015–2016 Legislative Session would have required the court to suspend the driving privilege for six months of any person who pleads guilty or nolo contendere to hit and run with property damage if the charge is a substitute or in satisfaction of the charge of hit and run resulting in injury or death. AB 534 failed passage in the Assembly Public Safety Committee.
 - c) AB 2600 (Norby), of the 2011–2012 Legislative Session would have prohibited a person’s driving privilege from being suspended or revoked for a conviction of simple possession of marijuana. AB 2600 failed passage in the Assembly Transportation Committee.
 - d) AB 2923 (Calderon), Chapter 434, Statutes of 2006, extended the license suspension length for a vandalism conviction to up to two years.
 - e) AB 2331 (Goldsmith), Chapter 918, Statutes of 1996, required a one-year license suspension for a conviction of vandalism.
 - f) SB 1977 (Kopp), Chapter 712, Statutes of 1990, authorized the court to suspend or delay someone’s driving privilege if they were convicted of vandalism.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California
California Bus Association
California Public Defenders Association
Conference of California Bar Associations

Courage Campaign
Freedom 4 Youth
Initiate Justice
National Association of Social Workers, California Chapter
Pacific Juvenile Defender Center
Youth Justice Coalition

Opposition

None

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