California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, July 13, 2021
9 a.m. -- State Capitol, Room 4202

Part III

SB 262 (Hertzberg) – SB 357 (Wiener)

Date of Hearing: July 13, 2021
Counsel: David Billingsley

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

SB 262 (Hertzberg) – As Amended May 20, 2021

SUMMARY: Requires bail to be set at $0 for all offenses except, among others, serious or violent felonies, violations of specified protective orders, domestic violence , sex offenses, and driving under the influence. Requires the court to order a return of money or property paid to a bail bond company under specified circumstances, including when the individual makes all court appearances in a criminal case charged in connection with the arrest. Specifically, **this bill**:

1) Requires bail to be set at $0 (no bail money required to secure release) for all misdemeanor and felony offenses except the following:

   a) A serious felony, as defined, or a violent felony, as specified;

   b) A felony violation of resisting an officer;

   c) A violation of violating a domestic violence restraining order, as specified;

   d) A violation of dissuading a witness from testifying, when punishment is imposed based on specified additional allegations.

   e) A violation of spousal rape;

   f) A violation of domestic violence, as specified;

   g) A violation of specified protective orders if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;

   h) A violation of criminal threats where the offense is charged as a felony;

   i) Stalking;

   j) A violation of an offense requiring registration as a sex offender;

   k) Driving under the influence and driving under the influence causing injury;

   l) A felony violation of looting, as specified;

   m) Felon in possession of a firearm;

n) Criminal threats, as specified;

o) Human trafficking;

p) Child abuse or neglect, as specified;

q) Elder and dependent adult abuse; and,

r) Assault with force likely to produce great bodily injury.

2) Requires the Judicial Council to prepare, adopt, and annually revise a schedule of bail amounts, which shall apply statewide.

3) States that while released on bail for $0, bail for subsequent separate offenses shall be set pursuant to the statewide bail schedule established by the Judicial Council. This does not apply to those subsequent and separate offenses that occur after the original offense is resolved.

4) Specifies that prior to setting bail for one of the specified offenses, that is excepted from zero dollar bail, or for a subsequent separate offense while released on zero dollar bail, the court shall first consider whether nonfinancial conditions will reasonably protect the public and the victim and reasonably assure the arrestee's presence at trial.

5) States that if the court concludes that money bail is reasonably necessary to protect the public and the victim or reasonably assure the arrestee's presence at trial, the court shall consider the arrestee's ability to pay, and set bail at a level the arrestee can reasonably afford.

6) States that when setting the bail schedule for the offenses of this bill which are not eligible for $0 bail, the Judicial Council shall consider the seriousness of the offense charged.

7) Specifies that costs relating to conditions of release from custody shall not be imposed on a person released on bail or own recognizance.

8) Requires the court to order a return of money or property paid to a bail bond licensee by or on behalf of the arrestee to obtain bail under any of the following circumstances:

a) An action or proceeding against an arrestee who has been admitted to bail is dismissed;

b) No charges are filed against the arrestee within 60 days of arrest; or,

c) The arrestee has made all court appearances during the pendency of the action or proceeding against the arrestee.

9) States that the bail bonds person shall be entitled to retain a surcharge not to exceed 5 percent of the amount paid by the arrestee or on behalf of the arrestee.

10) Specifies that money or property shall be returned within 30 days and shall be to the entity or person who paid the money or property to the bail bond licensee to obtain bail.

11) States that a court shall order a return of money or property pursuant to this section only for a bail contract entered into on or after January 1, 2022.

12) Makes findings and declarations.

EXISTING LAW:

1) Prohibits excessive bail. (U.S. Const., 8th Amend. & Cal. Const., art. I, sec. 12.)

2) States that a person shall be granted release on bail except for the following crimes when the facts are evident or the presumption great:

   a) Capital crimes;

   b) Felonies involving violence or sexual assault if the court finds by clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; and,

   c) Felonies where the court finds by clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. (Cal. Const., art. I, sec. 12.)

3) States that in setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations. (Cal. Const., art. I, sec. 28, subd. (f)(3).)

4) Requires the court to consider the safety of the victim and the victim's family in setting bail and release conditions for a defendant. (Cal. Const., art. I, sec. 28, subd. (b)(3).)

5) Lists several factors that the court must consider in setting, reducing, or denying bail: the protection of the public; the seriousness of the charged offense; the defendant's prior criminal record; and, the probability of his or her appearing at trial or hearing of the case. Public safety is the primary consideration. (Pen. Code, § 1275, subd. (a).)

6) States that in considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (Pen. Code, § 1275, subd. (a).)

7) Requires the superior court judges in each county to prepare, adopt, and annually revise a uniform, countywide bail schedule. (Pen. Code, § 1269b, subd. (c).)

8) Provides that at the time of issuing an arrest warrant, the magistrate shall fix the amount of bail which, in the magistrate's judgment, will be reasonable and sufficient for the defendant to appear, if the offense is bailable. (Pen. Code, § 815a.)

9) Provides that an arrested person must be taken before the magistrate with 48 hours of arrest, excluding Sundays and holidays. (Pen. Code, 825, subd. (a).)

10) Authorizes the officer in charge of a jail, or the clerk of the superior court to approve and accept bail in the amount fixed by the arrest warrant, the bail schedule, or an order admitting to bail in case or surety bond, and to issue and sign an order for the release of the arrested person, and to set a time and place for the person's appearance in court. (Pen. Code, 1269b, subd. (a).)

11) States that if a defendant is arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, and a peace officer has reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, the officer shall file a declaration with the judge requesting an order setting a higher bail. (Pen. Code, 1269c.)

12) Allows a defendant to ask the judge for release on bail lower than that provided in the schedule of bail or on his or her own recognizance and states that the judge is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. (Pen. Code, § 1269c.)

13) States that after a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the Court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. (Pen. Code, § 1289.)

14) Prohibits the release of a defendant on his or her own recognizance (OR) for any violent felony until a hearing is held in open court and the prosecuting attorney is given notice and an opportunity to be heard on the matter. (Pen. Code, § 1319.)

15) Specifies conditions for a defendant's release on his or her OR. (Pen. Code, § 1318.)

16) Provides that a defendant released on bail for a felony who willfully fails to appear in court, as specified, is guilty of a crime. (Pen. Code, § 1320.5.)

17) Specifies that if an on-bail defendant fails to appear for any scheduled court appearance, the bail is forfeited unless the clerk of the court fails to give proper notice to the surety or depositor within 30 days, or the defendant is brought before the court within 180 days. (Pen. Code, § 1305, subds. (a) & (b).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In California's criminal justice system, most people who are arrested and cannot afford to post bail have two options: pay a non-refundable fee to a bail agent to post bail on their behalf, or languish in jail for an indefinite period before their trial. Under this system, thousands of Californians accused of crimes end up paying a fee to stay out of jail, before ever being found guilty by a judge or jury. Securing a bail bond through an agent is far from simple. People often have to borrow from friends and family, enter into exploitative financing schemes, or put up their property – even their homes – as collateral. Regardless of whether a case is dismissed, or charges are not ultimately filed after an arrest, the bail company keeps its premium. Despite this plain inequity, the only alternative is worse: being stuck in jail could mean losing a job, missing rent payments, losing custody of a child or ultimately pleading guilty when innocent just to get home and prevent these harms. Moreover, the current pretrial framework, including the process of bail, presents staggering costs not only for people accused and their families, but for local governments, which pay an average of $100 per day to hold someone in jail pending trial.

   "The reforms in SB 262 will end unnecessary pretrial incarceration and eliminate the bail industry's unjust profiteering by ensuring that one's liberty and constitutional right to the presumption of innocence are not dependent on their wealth."

2) **Background**: In California, bail is a constitutional right except when the defendant is charged with: (1) a capital crime; (2) a felony involving violence or sex and the court finds that the person's release would result in great bodily harm to another; or (3) when the defendant has threatened another and the court finds it likely that the defendant might carry out that threat. The constitution also allows for an arrestee to be released upon a written promise to appear, known as release on own recognizance. The constitution prohibits excessive bail. (Cal. Const. art. I, § 12.)

   Courts require many defendants to deposit monetary bail in order to be released from custody. Bail is intended to act as a financial guarantee to the court that the defendant will appear for all required court hearings. An arrestee may post bail with his or her own cash, or may post bail using a bail bond.

   Currently, each county sets a bail schedule based exclusively on the charged offense. The bail schedule is used by the arresting officer to allow an arrestee to post bail before his or her court appearance. Once a defendant is brought before the court, there must be an individualized determination of the appropriate amount of bail.

   Another function of the bail system is protection of the community. Arguably, the current bail system does not actually address community safety concerns because there is no assessment of risk, at least when bail is posted before the arrestee appears before the court.

3) **Challenges Presented by Money Bail System**: There are a number of challenges that the bail system faces. A growing number of people acknowledge that the bail system has a negative impact on communities of color and those who come from the lower end of the socio-economic spectrum. In short, those who have money have the ability to confront their criminal charges while free from confinement in county jail. Those who are too poor to post bail are forced to remain incarcerated, and are more likely to plead guilty in order to get out of custody. Prior to the initial court appearance, the determination as to who remains

detained while awaiting resolution of criminal charges is made based on money, and not whether the person is a present danger to the community or whether he or she will return to court.

The ability to be out of custody while facing criminal charges carries a number of inherent advantages. A defendant who is released on bail is able to carry on with his or her life while awaiting the disposition of the criminal case. For instance, criminal defendants who are out on bail are not only able to maintain employment but they are also encouraged to do so.

By broadly applying $0 bail, this bill would allow individuals to achieve pretrial release independent of their financial ability to make bail.

4) **SB 10 (Hertzberg) and Subsequent Referendum:** SB 10 (Hertzberg) was signed into law on August 28, 2018. SB 10 eliminated cash bail in California. In its place, SB 10 created a risk-based non-monetary prearraignment and pretrial release system for people arrested for criminal offenses including preventative detention procedures for person's determined to be too high a risk to assure public safety if released.

A veto referendum to overturn the law was filed on August 29. On January 16, 2019, the California Secretary of State reported that the estimated number of valid signatures exceeded 110 percent of the 365,880 required signatures, putting the targeted law, SB 10, on hold until the November 2020 election. The referendum was identified as Proposition 25 on the ballot. A "Yes" vote indicated a preference to uphold the statutory changes made by SB 10 and end the use of cash bail in California. Voters rejected SB 10 by a margin of 55% to 45%. The voters' veto of SB 10 maintained the existing structure of cash bail for criminal defendants in California.

In the case of *Assembly v. Deukmajian*, the California Supreme Court provided the following guidance to the Legislature when it seeks to enact new legislation in an area where the voters have rejected an earlier legislative effort by means of a referendum: "Unless the new measure is 'essentially different' from the rejected provision and is enacted 'not in bad faith, and not with intent to evade the effect of the referendum petition,' it is invalid.'"(*Assembly* v. *Deukmejian* (1982), 30 Cal.3d 638, 678 *(citing Reagan* v. *City of Sausalito* (1962), 210 Cal.App.2d 618, 629-631 and *Martin* v. *Smith* (1959), 176 Cal.App.2d 115, 118-119.)

5) **Judicial Council Emergency Bail During the Pandemic:** On April 6, 2020, the Judicial Council issued an emergency rule on the bail schedule. That rule contained provisions making most offenses eligible for a bail amount of $0. The $0 bail provisions were substantially similar to the $0 bail provisions of this bill with respect to arrests on new offenses and contained a similar list of crimes that were exempted from $0 bail.

The emergency rule also addressed bail for post-conviction violations (probation, parole, mandatory supervision). Under the statewide Emergency Bail Schedule, bail for all violations of misdemeanor probation, whether the arrest is with or without a bench warrant, were directed to be set at $0. Bail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision, were directed to be set in accord with the statewide Emergency Bail Schedule, or for the bail amount in the court's countywide schedule of bail for charges of conviction listed in exceptions including any enhancements.

The emergency order stated that, "Notwithstanding any other law, this rule establishes a statewide Emergency Bail Schedule, which is intended to promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic."

The emergency bail rule was rescinded, effective June 20, 2020. Many county court systems have voluntarily continued to implement the order.

This bill would incorporate aspects of the emergency bail order into the existing statutory structure on bail. This bill would require a $0 bail on arrests for most of the same offenses that were the subject of the emergency bail order when an individual is arrested and charged with a new offense. The emergency bail order also applied to the release/detention of individuals facing post-conviction proceeding for violation of their post-conviction supervision (probation, parole, post-release community supervision, and mandatory supervision). This bill would not apply to individuals facing arrest or court proceedings for violations on any post-conviction supervision. The provisions of this bill specify that if a defendant is arrested for a subsequent offense while released on $0 bail, bail for the subsequent offense would be set pursuant to the statewide bail schedule to be established by the Judicial Council.

6) **Mandatory Directives of This Bill and Their Interaction with the California Constitution and Existing Statutory Law:** The emergency bail order was put in place "notwithstanding any other law." This bill seeks to incorporate the language of the emergency order into the existing statutory scheme on bail. As such, it cannot be applied "notwithstanding any other law," but must be incorporated consistently with the other statutes with which it will interact. The provisions of this bill must also interact with the provisions of the California Constitution regarding bail.

This bill contains a directive that a judge *shall* set bail at the initial court appearance at $0, except for the specified offenses for which a bail will be set at amount established by the Statewide Bail Schedule, established by the bill.

This language suggests that it is mandatory for a judge set a $0 bail on any of the offenses specified for $0 bail under the provisions of this bill, regardless of the other statutory directives the judge is instructed to consider in setting an amount for bail.

The California Constitution, Article I, section 28, contains directive language that specifies in setting, reducing or denying bail, the judge *shall* consider the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. That same section goes on to direct that court that public safety and the safety of the victim *shall* be the primary considerations. Existing statutory law (Pen. Code, §1275) contains the same directive language regarding the criteria a court should use to set bail as Article I, section 28.

Current law also provides a mechanism for a peace officer to submit a declaration to the court prior to the defendant's initial appearance, in which the peace officer sets forth reasons why the bail amount in the schedule of bail is insufficient to insure the defendant's appearance or ensure the protection of a victim. (Pen. Code, §1269c.)

These statutory and constitutional directives set up a potential conflict with the language of this bill requires bail to be set a $0 regardless of the other circumstances that a court is required to consider. Given that the constitution and other existing statutes direct the court to consider specific elements in setting bail, a statutory directive that the bail for most criminal offenses be set at $0 at the initial appearance might be considered a baseline from which to start. If that is the case, the court would still exercise discretion to vary from the $0 baseline if the public safety, the defendant's likelihood to appear, the defendant's financial status, and consideration of possible release conditions indicated that a variance from $0 bail was in order.

7) **Arrest Warrants:** Judges can issue arrest warrants directing any peace officer to arrest a particular person and bring them before the court. When a judge issues an arrest warrant they must set bail and note the amount on the warrant. (Pen. Code, § 815a.) Admitting a defendant to bail on an arrest warrant is currently governed by Pen. Code 1269c, which states that the jail in which an arrested person is held in custody "may approve and accept bail in the amount fixed by the **warrant of arrest**, schedule of bail, or order admitting to bail in cash or surety bond . . ."

   This bill strikes out the language concerning the bail amount being fixed by the warrant of arrest and specifies that arrested person must have the bail set pursuant to $0 bail or pursuant to the statewide bail schedule if it is an offense excepted from $0 bail.

   It is not clear if the intent of this bill is to require jails to release individuals from custody if they are arrested on a warrant issued by the court for an offense that would be eligible for $0 bail under the provisions of this bill.

8) ***Humphrey* Case on Bail:** In January, 2018, the California First District Court of Appeal found that California's money bail system violated due process and equal protection sections of the California Constitution. (*People v. Humphrey* (2018), 19 Cal.App.5th 1006.) The First District Appellate Court held that trial court judges must consider defendants' financial capacities and non-monetary options for release when determining bail. The appellate court's decision was appealed to the California Supreme Court.

   On March 25, 2021, the California Supreme Court upheld the decision and reasoning of the First District Court of Appeal and concluded that the California Constitution prohibits pretrial detention to combat an arrestee's risk of flight unless the court first finds, based upon clear and convincing evidence, that no condition or conditions of release can reasonably assure the arrestee's appearance in court. (*In re Humphrey* (2021) 11 Cal.5th[t] 135.)

   The California Supreme Court made the following statements as part of its opinion:

   > "The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. Other conditions of release—such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment—can in many cases protect public and victim safety as well as assure the arrestee's appearance at trial. What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee "solely because" the arrestee

'lacked the resources' to post bail." (*Id.* at 143.)

> "In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements." (*Id.*)

The Supreme Court noted that a trial court, when making any bail determination, must undertake an individualized consideration of the relevant factors. The Supreme Court identified the protection of the public as well as the victim, the seriousness of the charged offense, the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings, among the relevant factors. The California Constitution requires courts to consider these factors in setting bail. (*Id.* at 152, Cal. Const., art. I, §§ 12, 28, subds. (b)(3), (f)(3).)

This bill would direct judges to consider whether nonfinancial conditions will reasonably protect the public and the victim and reasonably assure the arrestee's presence at trial before setting a money bail. Under the provisions of this bill, if the court concludes that money bail is reasonably necessary to protect the public and the victim or reasonably assure the arrestee's presence at trial, the court shall consider the arrestee's ability to pay, and set bail at a level the arrestee can reasonably afford.

9) **Money returned to arrestee:** Under the current system of cash bail, bail agents provide a service to individuals that are detained on a cash bail with is too large for them to post in its entirety. The bail agent will post the full amount of the bail in exchange for a premium (fee) which is generally 10% of the bail amount. The bail agent posts the full amount of the bail and accepts the risk that they might lose the bail money if the person for whom the bail has been posted fails to appear in court. Bail agents keep the fee regardless of the outcome of the case, as well as if the bail is posted at arrest and no charges are subsequently filed.

   This bill would require bail agents to return the fee to individuals that have paid the bail agent to post the full amount of the bond. This bill would allow bail agents to keep 5% of the premium as a "surcharge." It is not clear how money would be returned to the arrestee or other individual that paid the premium for the bail bond. This bill would require the person's fee to be returned to them if:

   a) If case against the person that posted bail is dismissed;

   b) If no charges are filed against the person within 60 days of arrest; or,

   c) If the person has made all court appearances during the pendency of the action or proceeding against the arrestee.

10) **Arguments in Support**: According to the *Insurance Commissioner, Ricardo Lara*, "A bail agent provides a means for an incarcerated person to be out of custody until his or her day in court, allowing the defendant to continue his or her day-to-day life until the legal matter has been resolved. However, California bail schedules are among the highest in the nation and many arrestees cannot afford to make bail. Discussing the need to reform this inequitable bail system has been advocated by reformers since the Bail Reform Act of 1966, yet cash bail continues to contribute to the unnecessary pretrial detention of many low-risk defendants simply because they are poor.

"As the regulator of the bail bond industry in California, I receive consumer complaints which suggest that not only is the bail industry in need of long-overdue reform, but the general population is also at risk of being victimized by unscrupulous bail agents. Subjects of such complaints include bribery, money laundering, kidnapping, and false imprisonment for purposes of extortion, illegal solicitation, using jail inmates and jail staff as recruiters for bail transactions, embezzlement of collateral or premium, and abuse of unmonitored attorney-client jail visiting rooms.

"In California, 97% of people who make bail use a bail agent and pay a non-refundable fee for their freedom. For most, this is not a simple transaction. People often have to borrow from friends and family, enter into exploitative financing schemes, or put up their property – even their homes – as collateral. Regardless of whether a case is dismissed, or charges are not ultimately filed after an arrest, the bail company keeps its premium. Despite this plain inequity, the only alternative is worse: being stuck in jail could mean losing a job, missing rent payments, losing custody of a child, or ultimately pleading guilty when innocent just to get home and prevent these harms.

"In March 2021, the California Supreme Court ruled that conditioning freedom solely on whether an arrestee can afford bail is unconstitutional and that, when setting bail, judges must consider an arrestee's ability to pay. This bill is in line with that ruling and represents a critical step forward in securing Californians' rights to the presumption of innocence and due process after being accused of an alleged crime. **SB 262** would also protect Californians against many of the nefarious and predatory practices carried out by the bail bond industry."

11) **Arguments in Opposition**: According to the *Golden State Bail Agents Association*, "We **OPPOSE** SB 262 because (1) the *Humphrey* decision has rendered this bill moot, (2) it is a bad faith attempt to thwart the will of the voters, who only a few months ago rejected Proposition 25 in a landslide of over 2 million votes, (3) Setting bail at zero is an unconstitutional violation of Separation of Powers and (4) the bill violates Proposition 103.

"On March 25, 2021, the California Supreme Court held that when setting money bail the trial court must consider an arrestees ability to pay bail and whether other, nonfinancial conditions can be used to release the arrestee. The arrestee can only be detained if the trial court finds by clear and convincing evidence that the arrestee is a threat to public safety, the victim or a flight risk. (*In re Humphrey*, No. S247278, 2021 WL 1134487, at *2 (Cal. Mar. 25, 2021).

"The rational for SB 262 is that arrestees are being held in jail because they cannot afford bail. *Humphrey* has rendered SB 262 moot because trial courts must now consider an

arrestees ability to pay when setting bail and whether other, nonfinancial conditions can be used to release the arrestee.

"The California Constitution requires bail amounts to be set by the courts, not the legislature:

"Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

"A person may be released on his or her own recognizance in the court's discretion." (Cal.Const. Art. I, §12, emphasis added).

"SB 262 is a legislative mandate setting bail at zero for most charges and requiring a statewide bail schedule. As shown above, the California Constitution vests the power to set bail amounts with the courts and not the legislature. Only the courts can make informed decisions about bail amounts because they have the evidence and arrestee's criminal history before them."

12) **Related Legislation**:

a) AB 329 (Bonta), is substantially similar to this bill. AB 329 was never heard in the Assembly Appropriations Committee.

b) AB 38 (Cooper), would have established a statewide bail schedule. AB 38 failed passage in Assembly Public Safety Committee.

13) **Prior Legislation**:

a) SB 10 (Hertzberg), Chapter 644, Statutes of 2018, revised the pretrial release system by limiting pretrial detention to specified persons, eliminating the use of bail schedules, and establishing pretrial services agencies tasked with conducting risk assessments on arrested person and preparing reports with recommendations for conditions of release. SB 10 was repealed by referendum November, 2020.

b) AB 42 (Bonta) was substantially similar to SB 10 (Hertzberg). AB 42 failed passage on the Assembly Floor.

c) AB 805 (Jones-Sawyer), Chapter 17, Statutes of 2013, provides that in setting bail, a judge or magistrate may consider factors such as the report prepared by investigative staff for the purpose of recommending whether a defendant should be released on his/her own recognizance.

d) AB 2388 (Hagman), of the 2013-2014 Legislative Session, would have required the Judicial Council to prepare, adopt, and annually revise an advisory statewide bail schedule for all bailable felony offenses and for all misdemeanor and infraction offenses, except Vehicle Code infractions, that counties could reference when setting a countywide bail schedule. AB 2388 was held on the Appropriations Suspense file.

e) SB 210 (Hancock), of the 2013-2014 Legislative Session, would have revised the criteria for determining eligibility for pretrial release from custody. SB 210 was ordered to the Assembly Inactive File.

f) SB 210 (Hancock), of the 2011-12 Legislative Session, would have required a court to determine, with public safety as the primary consideration, whether a defendant charged with a jail felony is eligible for release on his or her own recognizance (OR). SB 210 failed passage on the Assembly Floor.

g) SB 1180 (Hancock) of the 2011-12 Legislative Session, was substantially similar to SB 210. SB 1180 was ordered to the Senate Inactive File.

REGISTERED SUPPORT / OPPOSITION:

Support

Californians for Safety and Justice (Co-Sponsor)
American Academy of Pediatrics, California
Anti-recidivism Coalition
Asian Solidarity Collective
California Catholic Conference
California Department of Insurance
California Federation of Teachers Afl-cio
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent
California Labor Federation, Afl-cio
California Public Defenders Association
Change Begins With Me Indivisible Group
City and County of San Francisco
City of Alameda
Community Advocates for Just and Moral Governance
Conference of California Bar Associations
Del Cerro for Black Lives Matter
Democratic Club of Vista
Democratic Party of The San Fernando Valley
Democratic Woman's Club of San Diego County
Drug Policy Alliance
Ella Baker Center for Human Rights
Essie Justice Group
Friends Committee on Legislation of California
Hillcrest Indivisible
Initiate Justice
League of Women Voters of California
Los Angeles County Democratic Party
Los Angeles County District Attorney's Office
Mission Impact Philanthropy
Multi-faith Action Coalition
National Association of Social Workers, California Chapter

Nextgen California
Partnership for The Advancement of New Americans
Pillars of The Community
Racial Justice Coalition of San Diego
Reentry Council of The City and County of San Francisco
Riseup
Rubicon Programs
Sacramento Advocates INC.
San Diego Progressive Democratic Club
San Francisco Public Defender
Sd-qtpoc Colectivo
Seiu California
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice California
Social Workers for Equity & Leadership
Team Justice
Think Dignity
Uncommon Law
Uprise Theatre
We the People - San Diego
Western Center on Law & Poverty, INC.

Oppose

American Bail Coalition
American Property Casualty Insurance Association
Bail Hotline Bail Bonds, the
California Attorneys for Criminal Justice
California District Attorneys Association
California Judges Association
California Peace Officers Association
California Police Chiefs Association
California State Sheriffs' Association
City of Cypress
Crime Survivors Resource Center
Crime Victims Alliance
Crime Victims United of California
Golden State Bail Agents Association, INC.
Peace Officers Research Association of California (PORAC)

1 private individual

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

Date of Hearing: July 13, 2021
Counsel: Matthew Fleming

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

SB 98 (McGuire) – As Amended June 17, 2021

SUMMARY: Allows duly authorized members of the press to enter areas that have been closed by law enforcement due to a demonstration, march, protest, or rally and prohibits officers from citing members of the press for failure to disperse, a violation of a curfew, or a violation of resisting, delaying, or obstructing, as specified. Specifically, **this bill**:

1) Allows a duly authorized representative of any news service, online news service, newspaper, or radio or television station or network to enter areas that are closed as command post, police line, or rolling closure at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of the California Constitution.

2) States that a peace officer or other law enforcement officer shall not intentionally assault, interfere with, or obstruct the duly authorized representative of any news service, online news service, newspaper, or radio or television station or network who is gathering, receiving, or processing information for communication to the public.

3) Prohibits an officer from citing a duly-authorized representative of any news service, online news service, newspaper, or radio or television station or network that is authorized or permitted to be in a closed area for the failure to disperse, a curfew violation, or a violation of resisting, delaying, or obstructing, as specified.

4) Provides that if the duly authorized representative is detained by a peace officer or other law enforcement officer, that representative shall be permitted to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so.

5) Specifies that these provisions do not prevent a law enforcement officer from enforcing other applicable laws if the person is engaged in activity that is unlawful.

EXISTING LAW:

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

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

3) Authorizes specified law enforcement officers to close the area where a menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster. (Pen. Code, § 409.5, subd. (a).)

4) Authorizes specified law enforcement officers to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating any calamity or any riot or other civil disturbance to any and all unauthorized persons whether or not the field command post or other command post is located near to the actual calamity or riot or other civil disturbance. (Pen. Code, § 409.5, subd. (b).)

5) Makes it a misdemeanor for any person to willfully and knowingly enter an area closed as the result of such a disaster and willfully remain within the area after receiving notice to evacuate. (Pen. Code, § 409.5, subd. (c).)

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

7) Authorizes specified law enforcement officers to close the area where a menace to the public health or safety is created by an avalanche. (Pen. Code, § 409.6, subd. (a).)

8) Authorizes specified law enforcement officers to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating hazardous conditions created by an avalanche. (Pen. Code, § 409.6, subd. (b).)

9) Makes it a misdemeanor for any person to willfully and knowingly enter an area closed due to an avalanche and willfully remain within the area after receiving notice to evacuate; and further authorizes the use of reasonable force to remove any unauthorized person from such an area. (Pen. Code, § 409.5, subd. (c).)

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

11) Makes it a misdemeanor for a person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined, in the discharge or attempt to discharge any duty of their office or employment. (Pen. Code, § 148, subd. (a).)

12) Provides that the fact that a person takes a photograph or makes an audio or video recording of a public officer or peace officer, while the officer is in a public place or the person is in a place he or she has the right to be, does not constitute, in and of itself, a violation of resisting, delaying, or obstructing, nor does it constitute reasonable suspicion to detain the person or probable cause to arrest the person. (Pen. Code, § 148, subd. (g).)

13) Requires the Commission on Peace Officer Standards and Training (POST) to implement a course or courses of instruction for the training of law enforcement officers in the handling of acts of civil disobedience and adopt guidelines that may be followed by police agencies in responding to acts of civil disobedience. (Pen. Code, § 13514.5, subd. (a).)

14) Requires the POST training course to include adequate consideration of all of the following subjects:

a) Reasonable use of force;

b) Dispute resolution;

c) Nature and extent of civil disobedience, whether it be passive or active resistance;

d) Media relations;

e) Public and officer safety;

f) Documentation, report writing, and evidence collection; and,

g) Crowd control. (Pen. Code, § 13514.5, subd. (b).)

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

16) Specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. (Pen. Code, § 835a.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "When natural disasters such as earthquakes or wildfires occur, state law authorizes peace officers to close certain areas to the public during emergencies, but authorized members of the press are granted unique exemptions from these restrictions, as press provide information to the public on what is going on. Members of the press often need to put themselves in harm's way in order to evaluate the scene of an emergency and report.

"Currently, members of the press are not allowed to interfere with, hinder, or obstruct emergency operations. Restrictions on media access may be imposed for only so long and only to such extent as is necessary to prevent actual interference. While California law protects members of the press from being stopped when entering closed areas during emergencies and natural disasters to gather information, these protections don't extend to protest events such as demonstrations, marches, protests, or rallies where individuals largely engage their First Amendment right to speech.

"In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons, and fists. In many cases there are strong indications that the officers injuring journalists knew their targets were

members of the press. Members of the press risk their personal safety and wellbeing each time they attend protest events to get the public the information they need, but rubber bullets, teargas, and even arrest cannot be the norm for an essential pillar of our democracy. We must take steps to ensure that the right of the press and the First Amendment are protected here in the Golden State.

"SB 98 will ensure that journalists' ability to perform their critical role of documenting history and informing the public is protected as they attend demonstrations, marches, protests, and rallies. SB 98 will prohibit law enforcement officers from obstructing, detaining, assaulting or otherwise preventing the press from fulfilling their constitutional mandate in relaying information regarding these events."

2) **Law Enforcement and Crowd Control**: The basic course of training for law enforcement officers includes training in handling disputes and crowd control (POST website, https://post.ca.gov/regular-basic-course-training-specifications, [as of June 28, 2021].) The training topic is broken down into crowd management, crowd control, and riot control. In addition, under Penal Code Section 13514.5, POST is required to provide a supplemental course of training for officers in civil disobedience situations. This training includes instruction on the use of force as well as media relations in organized protest situations.

The POST training on crowd control situations, and other available law enforcement training materials on the same subject, were recently analyzed by an advisory group to the Governor. (Glaser, Review of Research on Policing Demonstrations, July 28, 2020, pp. 3 – 8, available at: https://www.gov.ca.gov/wp-content/uploads/2020/10/Policing-and-Protests-Recommendations.pdf, [as of July 1, 2021].) The advisory group concluded that the materials acknowledge many of the challenges of policing protests, introduce the idea that crowds are heterogeneous and not inherently prone to violence, and provide clear operational guidance. (*Id.* at 8.) The advisory group criticized the training materials for failing to reflect systematic research on crowd behavior in general and policing protests in particular. (*Ibid.*)

The rules for when and what type of force law enforcement can use in crowd control situations is defined by case law and local policy. In general, when courts are evaluating whether or not a specific use of force was lawful or not, they will attempt to balance the "nature and quality of the intrusion on the individual" against the "countervailing governmental interests at stake" and make a determination about whether the use of force was reasonable under the circumstances. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) The decision about whether or not the use of force is "reasonable," and therefore lawful, must take into account "the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving." (*Id.* at 396-97.)

For example, in *Deorle v. Rutherford* (9th Cir. 2000) 272 F.3d 1272, 1286, the court found that an officer shooting a beanbag round into the face of a mentally disturbed person without warning was unreasonable. The officer arrived on the scene and was able to observe the individual form a distance prior to firing the less-lethal beanbag round, which weighed against the notion that the officer had to make a split second decision to use less-lethal force. (*Ibid.*) By contrast, in *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, the court held the use of "pain compliance" techniques to be reasonable to disperse a group of protestors. Prior to applying the pain compliance techniques, the officers warned the

demonstrators that they would be subject to pain compliance measures if they did not move, that such measures would hurt, and that they could reduce the pain by standing up, eliminating the tension on their wrists and arms. (*Id.* at 806.)

3) **Police Confrontations with the Media**: The genesis of this bill is the use of force when it is applied to journalists who are attempting to provide news coverage of protests, marches, demonstrations, etc. Numerous Black Lives Matter Protests have occurred following the killing of George Floyd, and other African Americans by police officers. The United States Press Freedom tracker indicates that from May 2020 to May 2021, there were over 600 aggressive acts by officers against journalists. (U.S. Press Freedom Tracker website, available at: https://pressfreedomtracker.us/, [as of June 28, 2021].) The website contains links to various incidents in the state of California, including one protest in Los Angeles where police allegedly used force against at least four journalists in separate instances. (*Multiple journalists covering protests in Los Angeles assaulted*, U.S. Press Freedom Tracker, available at: https://pressfreedomtracker.us/all-incidents/multiple-journalists-covering-protests-los-angeles-assaulted/, [as of June 28, 2021].)

   This bill would add several protections for journalists into state law. First, it would clarify that "duly authorized members of the press" have access to areas that have been closed by the police due to a protest, march or other type of demonstration. It further instructs that journalists are not to be assaulted, interfered with, or obstructed during their coverage of such demonstrations. In addition, this bill would provide journalists with immunity from specified violations such as remaining after an order to disperse, curfew violations, and resisting arrest offenses.

4) **SB 629 of the 2019 – 2020 Legislative Session and the Governor's Veto Message**: SB 629 (McGuire) of the 2019 – 2020 Legislative Session was substantially similar to this bill. It had a somewhat broader definition of who constituted media for purposes of the bill, in that it defined a "duly authorized representative of a news service" to include anyone who appears to be gathering news and who produces a press credential as well as anyone carrying professional broadcasting or recording equipment. This gave rise to criticism that the bill was drafted too broadly, in that a person with an iPhone and an internet blog could possibly qualify as a duly authorized representative. This bill has removed that language and made some other minor changes.

   In his veto message, Governor Newsom stated the following in regards to SB 629:

   > "This bill would allow authorized representatives of any news service, online news service, newspaper, or radio or television station or network to enter areas that have been closed by law enforcement due to a demonstration, march, protest or rally, including the immediate area surrounding any emergency field command post or any other command post. This bill would, additionally, prohibit a peace officer from intentionally assaulting, interfering with or obstructing these duly authorized representatives who are gathering, receiving or processing information for communication to the public.
   >
   > "Media access to public gatherings - especially protests - is essential for a functioning democracy, and law enforcement should not be able to interfere with

those efforts. But I am concerned that this legislation too broadly defines a 'duly authorized representative of a news service, online news service, newspaper, or radio or television station or network.' As written, this bill would allow any person who appears to be engaged in gathering, receiving or processing information, who produces a business card, press badge, other similar credential, or who is carrying professional broadcasting or recording equipment, to have access to a restricted law enforcement area. This could include those individuals who may pose a security risk - such as white nationalists, extreme anarchists or other fringe groups with an online presence.

"Law enforcement agencies should be required to ensure journalists and legal observers have the ability to exercise their right to record and observe police activities during protests and demonstrations. But doing so shouldn't inadvertently provide unfettered access to a law enforcement command center. In fact, the police reform advisors that I appointed in the wake of the nationwide protests this summer to advise me on what more California can do to protect and facilitate the right to engage in peaceful protests and demonstrations made concrete recommendations on protecting journalists and legal observers exercising their right to record and observe police activities during protests and demonstrations. I plan to implement these recommendations at the state level and am encouraging every California law enforcement agency to do the same. I also plan to work with the Legislature on providing access to journalists in a way that addresses the security concerns and accomplishes the intent of this bill."

This bill is the second iteration of SB 629. This time around, the language expanding who would qualify as "a duly authorized representative of any news service, online news service, newspaper, or radio or television station or network" has been removed. This bill, unlike SB 629, is analogous to existing law in terms of who would qualify as media for purposes of its access and protection provisions. (*See e.g.* Pen. Code, § 409.5, subd. (d).) In that sense, this bill appears to respond to the Governor's veto message by using a definition that is narrower than the one advanced in SB 629.

This bill does not appear to address the other concerns stated by the Governor in his veto message. Specifically, there have been no changes to address the worry about the extent of access to sensitive law enforcement areas, and there does not appear to be any significant overlap between this bill and the Governor's Policing and Protests Recommendations. (*See* Glaser, *supra*.) In regards to access, the author submits that case law adequately addresses ant potential problems that may arise. (*See e.g. Leiserson v. City of San Diego* (1986) 184 Cal.App.3d 41, 51 (holding that existing law with language that is substantially similar to this bill means that "press representatives must be given unrestricted access to disaster sites *unless* police personnel at the scene reasonably determine that such unrestricted access will interfere with emergency operations." (*emphasis* added).) The author's staff has also stated that they are continuing to work with the Governor's office to address any lingering concerns about the bill.

5) **Argument in Support**: According to the *California News Publisher's Association, California Black Media, ImpreMedia, Ethnic Media Services, the California Broadcasters Association, ACLU California Action, and the First Amendment Coalition*: "In order to protect members of the media who are often responsible for the first draft of history, SB 98

would: ensure an authorized member of the media may enter areas closed off by first responders during a demonstration, march, protest or rally; prohibit an officer from assaulting a journalist or obstructing their ability to gather or process news; and create an accelerated process for a journalist to challenge being detained by an officer.

"Recent actions taken against journalists by law enforcement officers demonstrate that additional statutory protections are necessary to allow reporters and photographers to gather and process information and report on the significant events that are transforming and reshaping our world.

"In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons, and fists. In many cases there are strong indications that the officers injuring journalists knew their targets were members of the press.

...

"The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. News reporting on police conduct serves the crucial First Amendment interest in promoting the "free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). Further, the ability journalists to cover people exercising their First Amendment to petition the government and assemble is crucial to continuing a dialog on the difficult issues our society faces.

"In a turbulent and troubled time and with an abundance of misinformation flooding information channels, journalists need to be able to gather and report facts without having to fear that they will be shot at or arrested by law enforcement officers simply because they are trying to provide context and help us all understand the significance of these events.

"Police attacks on journalists are what we expect from third world countries. SB 98 would make clear that it is the policy of this state that assaults and obstructions designed to prevent the constitutionally protected free flow of information to Californians will not be tolerated."

6) **Argument in Opposition**: According to the *California Statewide Law Enforcement Association*: "While we certainly understand the need to protect the media during protests, SB 98 has unintended consequences that could put officers and the public in danger. By granting the media access to emergency command posts, they will have access to field tactics our command post officers are communicating to the officers on the ground. Should that information be leaked to the public, it could prevent our officers from diverting crowds to safe locations or even worse, provide suspects with pertinent information to aid in the commission of a crime. We appreciate the recent amendments that require permission from the commanding officer; however, we remain opposed until it is further clarified that a peace officer is allowed to remove the reporter for willful interference with a response."

7) **Related Legislation**: AB 48 (Gonzalez) would prohibit the use of kinetic energy projectiles or chemical agents, as defined, by any law enforcement agency to disperse any assembly, protest, or demonstration, except in compliance with specified standards. AB 48 is pending in the Senate Public Safety Committee.

8) **Prior Legislation**:

a) AB 629 (McGuire), of the 2019 – 2020 Legislative Session, was similar to this bill. SB 629 was vetoed by Governor Newsom.

b) AB 392 (Weber), Chapter 170, Statutes of 2019, revised the standards for use of deadly force by peace officers.

c) AB 230 (Caballero), Chapter 285, Statutes of 2019, required law enforcement agencies to maintain a policy that provides guidelines on the use of force, utilizing de-escalation techniques and other alternatives to use of force, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents.

d) SB 411 (Lara), Chapter 177, Statutes of 2015, provided that taking a photograph or recording a law enforcement officer while the officer is performing any official duty in a public place or in a place where the person has a right to be does not constitute the offense resisting, obstructing, or interfering.

e) SB 1844 (Thompson), Chapter 207, Statutes of 1998, required the Commission on Peace Officer Standards and Training (POST) to implement a course for training peace officers to deal with civil disobedience, including reasonable use of force, active and passive resistance, media relations, officer safety, evidence collection and crowd control.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU of California
Asian American Journalists Association, Los Angeles
Asian American Journalists Association, Sf Bay Area
California Black Media
California Broadcasters Association
California Federation of Teachers Afl-cio
California News Publishers Association
California Public Defenders Association
California Public Defenders Association (CPDA)
Californians Aware: the Center for Public Forum Rights
Ccnma: Latino Journalists of California
Communications Workers of America, District 9
Ethnic Media Services
First Amendment Coalition
IBEW Local 45
Journalism and Women Symposium, Southern California (jaws Socal)
LA Opinion
Los Angeles County
Los Angeles Press Club
Media Alliance

Media Guild of The West, Newsguild-cwa Local 39213
National Association of Black Journalists of Los Angeles
National Association of Hispanic Journalists
National Press Photographers Association
National Writers Union
Oakland Privacy
Online News Association Local Los Angeles
Orange County Press Club
Pacific Media Workers Guild (the Newsguild-communications Workers of America Local 39521)
Radio Television Digital News Association
Society of Professional Journalists, Greater Los Angeles Chapter
Society of Professional Journalists, Northern California Chapter
We Make Kcrw
Writers Guild of America West
Writers Guild of America, East

Oppose

California Association of Highway Patrolmen
California Civil Liberties Advocacy
California Narcotic Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
Los Angeles County Sheriff's Department
Los Angeles County Sheriff's Dept.
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
California Peace Officers Association

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Date of Hearing: July 13, 2021
Counsel: Matthew Fleming

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

SB 264 (Min) – As Amended June 15, 2021

SUMMARY: Prohibits the sale of any firearm, firearm precursor part, or ammunition on state property. Specifically, **this bill**:

1) Prohibits a state officer or employee, or operator, lessee, or licensee of any state property, shall not contract for, authorize, or allow the sale of any firearm, firearm precursor part, or ammunition on state property or in the buildings that sit on state property or property otherwise owned, leased, occupied, or operated by the state.

2) Provides that the prohibition does not apply to any of the following:

   a) A gun buyback event held by a law enforcement agency;

   b) The sale of a firearm by a public administrator, public conservator, or public guardian within the course of their duties;

   c) The sale of a firearm, firearm precursor part, or ammunition on state property that occurs pursuant to a contract that was entered into before January 1, 2022; and,

   d) The purchase of ammunition on state property by a law enforcement agency in the course of its regular duties.

3) Makes Legislative findings and declarations.

EXISTING LAW:

1) Prohibits the sale, lease, or transfer of firearms without a license, unless the sale, lease, or transfer is pursuant to operation of law or a court order, made by a person who obtains the firearm by intestate succession or bequest, or is an infrequent sale, transfer, or transfer, as defined. (Pen. Code, §§ 26500, 26505, & 26520.)

2) Excludes persons with a valid federal firearms license and a current certificate of eligibility issued by the Department of Justice (DOJ) from the prohibitions on the sale, lease, or transfer of used firearms, other than handguns, at gun shows or events. (Pen. Code, § 26525.)
3) Permits licensed dealers to sell firearms only from their licensed premises and at gun shows. (Pen. Code, § 26805.)

4) States that a dealer operating at a gun show must comply with all applicable laws, including California's waiting period law, laws governing the transfer of firearms by dealers, and all

local ordinances, regulations, and fees. (Pen. Code, § 26805.)

5) Specifies the requirements that gun show operators must comply with at gun shows, including entering into a written contract with each gun show vendor selling firearms at the show, ensuring that liability insurance is in effect for the duration of a gun show, posting visible signs pertaining to gun show laws at the entrances of the event, and submitting a list of all prospective vendors and designated firearms transfer agents who are licensed firearms dealers to the Department of Justice, as specified. (Pen. Code, §§ 27200, 27245.)

6) States that no person shall produce, promote, sponsor, operate, or otherwise organize a gun show, unless that person possesses a valid certificate of eligibility from the DOJ. (Pen. Code, § 27200.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "County fairgrounds are intended to be family friendly venues. Instead, they've become known for hosting gun shows. While the Second Amendment protects the rights of individuals to bear arms, it does not require our great State of California to use taxpayer-owned property to disseminate more deadly firearms into our communities. Given the clear linkage between the sale of guns and the likelihood of gun violence in a community, our state must stop being in the business of selling guns. Unfortunately, all too often this year, we've seen headline after headline of terrible tragedies throughout the nation and California — two shootings in my district and in San Jose in May. Enough is enough."

2) **Gun Shows**: A "gun show" is a trade show for firearms. At gun shows, individuals may buy, sell, and trade firearms and firearms-related accessories. These events typically attract several thousand people, and a single gun show can have sales of over 1,000 firearms over the course of one weekend. (Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Gun Shows: Brady Checks and Crime Gun Traces*, January 1999, available at: https://www.atf.gov/file/57506/download, [as of March 18, 2019].)

   According to the NRA's Institute for Legislative Action (NRA-ILA), less than one percent of persons incarcerated in state prisons for gun crimes acquired their firearms at a gun show. (NRA-ILA, https://www.nraila.org/get-the-facts/background-checks-nics.) However, according to a report published by UC Davis, gun shows have been identified as a source for illegally trafficked firearms. (https://www.ucdmc.ucdavis.edu/vprp/pdf/IGS/IGS1web.pdf, [as of March 20, 2019].) Though violent criminals do not appear to regularly purchase their guns directly from gun shows, gun shows have received criticism as being "the critical moment in the chain of custody for many guns, the point at which they move from the somewhat-regulated legal market to the shadowy, no-questions-asked illegal market." (Gerney, *The Gun Debate 1 Year After Newtown*, Center for American Progress, December 13, 2013, available at: http://www.americanprogress.org/issues/guns-crime/report/2013/12/13/80795/the-gun-debate-1-year-after-newtown/, [as of March 18, 2019].)

In 1999, California enacted the nation's broadest legislation to increase oversight at gun shows. AB 295 (Corbett), Chapter 247, Statutes of 1999, the Gun Show Enforcement and Security Act of 2000, added a plethora of requirements for gun shows. To obtain a certificate of eligibility from the DOJ, a promoter must certify that he or she is familiar with existing law regarding gun shows; obtain at least $1,000,000 of liability insurance; provide an annual list of gun shows the applicant plans to promote; pay an annual fee; make available to local law enforcement a complete list of all entities that have rented any space at the show; submit not later than 15 days before the start of the show an event and security plan; submit a list to DOJ of prospective vendors and designated firearms transfer agents who are licensed dealers; provide photo identification of each vendor and vendor's employee; prepare an annual event and security plan; and require all firearms carried onto the premises of a show to be checked, cleared of ammunition, secured in a way that they cannot be operated, and have an identification tag or sticker attached. AB 295 also provided for a number of penalties for a gun show producer's willful failure to comply with the specified requirements.

In California, gun transactions at gun shows are treated no differently than any other private party transaction. This means that such transfers must be completed through a licensed California dealer. Such a transfer requires a background check and is subject to the mandatory ten day waiting period prior to delivering the firearm to the purchaser. California's strict gun show regulations may help to prevent increases in firearm deaths and injuries following gun shows. (See Ellicott C. Matthay, et al., "In-State and Interstate Associations Between Gun Shows and Firearm Deaths and Injuries," Annals of Internal Medicine (2017) Vol. 1 Iss. 8.)

3) **Banning Gun Shows on State Agricultural Land**: There have been several legislative attempts to regulate gun shows in Agricultural District 1A in San Mateo and San Francisco Counties at a location commonly known as the "Cow Palace." SB 221 (Wiener) of 2018, SB 475 (Leno) of 2013, SB 585 (Leno) of 2009, and others, all attempted to either ban gun shows at the Cow Palace altogether, or require prior approval from the county Board Supervisors prior to entering into a contract for holding a gun show there. All three attempts were vetoed by then-Governors Schwarzenegger and Brown.

   Then, in 2019, AB 893 (Gloria) Chapter 731, Statutes of 2019, added a section to the Food and Agricultural Code that prohibits the sale of firearms and ammunition at the Del Mar Fairgrounds, effectively terminating the possibility for future gun shows at the Del Mar Fairgrounds. AB 893 was signed into law by Governor Newsom. This bill would expand the provisions of AB 893 by including all state property within the prohibition on the sale or transfer of firearms and ammunition.

4) **Constitutional Implications**: A federal judge recently ruled that California's ban on the AR-15 assault rifle is unconstitutional. (*See Miller v. Bonta,* (June 4, 2021) U.S. Dist. LEXIS 105640.) *Miller* becomes the third federal district court decision to find a California firearms regulation unconstitutional under the Second Amendment to the United States Constitution, joining *Rhode v. Becerra* (S.D. Cal., 2020) 445 F. Supp. 3d 902 (ammunition background checks), and *Duncan v. Becerra* (9th Cir., 2020) 970 F.3d 1133 (high-capacity magazines). All three of these decisions were made by the same federal judge. *Duncan* was upheld by the Ninth Circuit Court of Appeals, but is now pending a rehearing *en banc*. *Rhode* and *Miller* have been stayed pending further proceedings.

This bill is also likely to generate constitutional challenges. Opponents to the bill have cited to the Ninth Circuit Court of Appeals, which has held that "an offer to sell firearms or ammunition" is constitutionally protected commercial speech under the First Amendment to the United States Constitution. (*Nordyke v. Santa Clara County* (2009) 110 F.3d 707, 710.) This bill does not specifically prohibit "an offer" to sell guns or ammunition, but it does prohibit contracting for such a transaction. Opponents assert that such a prohibition constitutes impermissible viewpoint discrimination. They also state that this bill unduly burdens rights guaranteed by the Second Amendment.

5) **Argument in Support**: According to >

6) **Argument in Opposition**: According to >

7) **Related Legislation**: AB 311 (Ward) would prohibit a vendor at a gun show or event from possessing, displaying, offering to sell, selling, or transferring a firearm precursor part. AB 311 was held in the Assembly Appropriations Committee suspense file.

8) **Prior Legislation**:

   a) AB 893 (Gloria) Chapter 731, Statutes of 2019, prohibited the sale of firearms and ammunitions at the Del Mar Fairgrounds in the County of San Diego and the City of Del Mar.

   b) SB 221 (Wiener) of the 2017-18 Legislative Session, would have prohibited the sale of firearms and ammunitions at the Cow Palace located in San Mateo County and San Francisco County. SB 221 was vetoed by Governor Brown.

   c) SB 475 (Leno), of the 2013-14 Legislative Session, would have required gun shows at the Cow Palace to have prior approval of both the Board of Supervisors of the County of San Mateo and the City and County of San Francisco, as specified. SB 475 was vetoed by Governor Brown.

   d) SB 585 (Leno), of the 2009-10 Legislative Session, would have prohibited events at which any firearm or ammunition is sold at the Cow Palace, as specified. SB 585 was vetoed by Governor Schwarzenegger.

   e) AB 2948 (Leno), of the 2007-08 Legislative Session, would have prohibited the sale of firearms or ammunition at the Cow Palace. AB 2948 failed passage on the Senate Floor.

   f) SB 1733 (Speier), of the 2003-04 Legislative Session, would have required gun shows at the Cow Palace to have prior approval of both the Board of Supervisors of the County of San Mateo and the City and County of San Francisco, as specified. SB 1733 failed passage on the Assembly Floor.

   g) AB 295 (Corbett), Chapter 247, Statutes of 1999, established the Gun Show Enforcement and Security Act of 2000, which includes a number of requirements for producers that promote gun shows.

h) AB 1107 (Ortiz), of the 1997-98 Legislative Session, would have authorized any city, county or agricultural association to prohibit gun sales at gun shows or events. AB 1107 failed in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

American Academy of Pediatrics, California
Brady Orange County
Canyon Democrats
City of Solana Beach
Democrats of Greater Irvine
Hb Huddle
Laguna Beach Democratic Club
Laguna Woods Democratic Club
League of Women Voters of California
Neveragainca
Office of Chair Nathan Fletcher, San Diego County Board of Supervisors
Peace and Justice Commission From St Mark Presbyterian Church in Newport Beach
San Diegans for Gun Violence Prevention
San Diego; City of
Santa Barbara Women's Political Committee
The Violence Prevention Coalition of Orange County
Women for American Values and Ethics Action Fund
Women For: Orange County

Oppose

Black Brant Group, the
Cal-ore Wetlands and Waterfowl Council
California Bowmen Hunters/state Archery Association
California Deer Association
California Houndsmen for Conservation
California Rifle and Pistol Association, INC.
California Sportsman's Lobby, INC.
California Statewide Law Enforcement Association
California Waterfowl Association
Gun Owners of California, INC.
National Rifle Association - Institute for Legislative Action
National Shooting Sports Foundation, INC.
Nor-cal Guides and Sportsmen's Association
Outdoor Sportsmen's Coalition of California
Peace Officers Research Association of California (PORAC)
Rural County Representatives of California
Safari Club International - California Chapters
San Diego County Wildlife Federation
San Francisco Bay Area Chapter - Safari Club International

Tulare Basin Wetlands Association
Western Fairs Association

1 private individual

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

Date of Hearing: July 13, 2021
Counsel: Cheryl Anderson

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

SB 491 (Nielsen) – As Amended July 7, 2021

SUMMARY: Requires a court to order the suspension, for up to one year, of the business license of a person who has knowingly violated laws related to the distribution of nitrous oxide and who has a prior conviction for such an offense, except as specified. Specifically, **this bill**:

1) Expands the list of exceptions from the general requirement that the California Department of Tax and Fee Administration (CDTFA) issue a license to a cigarette or tobacco retailer to include a retailer that has been convicted of one of the following offenses:

    a) Selling, furnishing, administering, distributing, or giving away nitrous oxide to a minor;

    b) Dispensing or distributing nitrous oxide to a person if the retailer knew or should have known that the person was going to inhale or ingest it for the purpose of intoxication, and that person proximately caused great bodily injury or death to themselves or another person; or,

    c) Violating record keeping requirements involving the dispensing and distribution of nitrous oxide.

2) Adds the above-listed offenses to the definition of "violation" for purposes of violations that can result in the suspension or revocation of a license by the CDTFA.

3) Requires the CDTFA to provide a licensee with at least 10 days' written notice of a pending suspension or revocation and an opportunity to appeal the decision only if the appeal is to correct a mistake or clerical error and not for the purposes of establishing whether the licensee committed one of the above-listed offenses.

4) Authorizes the CDTFA to modify its action on its own to correct a mistake or clerical error.

5) Requires the court to suspend the business license, for up to one year, of a person who knowingly commits a second violation of the following offenses absent evidence that the owner or their employees have made a good faith effort to prevent violations:

    a) Dispensing or distributing nitrous oxide to a person if the licensee knew or should have known that it would be ingested or inhaled by the person for the purpose of intoxication, and that person proximately caused great bodily injury or death to themselves or another person; and

b) Failing to comply with specified record-keeping requirements for persons dispensing or distributing nitrous oxide.

6) Allows the prosecuting agency to notify the CDTFA of any conviction for violation of dispensing or distributing nitrous oxide to a person resulting in death or great bodily injury.

EXISTING LAW:

1) Provides that possession of nitrous oxide with the intent to breathe, inhale, or ingest it for the purpose of intoxication is a misdemeanor. (Pen. Code, § 381b.)

2) Makes it a misdemeanor to sell, furnish, administer, distribute, give away, or offer to sell, furnish, administer, distribute, or give away a device, canister, tank, or receptacle either exclusively containing nitrous oxide or exclusively containing a chemical compound mixed with nitrous oxide, to a person under 18. Requires the court to order the suspension of the business license, for a period of up to one year, if the person has previously been convicted of this offense, unless the owner of the business license can demonstrate a good faith attempt to prevent illegal sales or deliveries by the owner's employees. (Pen. Code, § 381c.)

3) Makes it a misdemeanor to dispense or distribute nitrous oxide to a person if the dispenser or distributor of the nitrous oxide knows or should know that the person is going to use the nitrous oxide for the purpose of intoxication, and that person proximately causes great bodily injury or death to themselves or another person. (Pen. Code, § 381d.)

4) Requires that a person who dispenses or distributes nitrous oxide record each transaction in a written or electronic document and makes a violation of this requirement a misdemeanor. (Pen. Code, § 381e.)

5) Establishes the Cigarette and Tobacco Products Licensing Act (Act), which requires the CDTFA to issues licenses to retailers of cigarette or tobacco products upon receipt of an application and a license fee, with certain exceptions (commencing with Business and Professions Code (B&PC) Section 22970).

6) Provides that licenses issued pursuant to the Act are subject to suspension or revocation for violations of the Act or the Revenue and Taxation Code, as provided. Delineates the process for suspending or revoking a license. Specifies that a "violation" means a violation of the Revenue and Tax Code relating to cigarettes and tobacco products. (Bus. & Prof. Code, § 22980.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In October of 2016, a constituent contacted my office upon learning that his 20-year-old son had been using nitrous oxide, also known as 'whippits,' which he legally purchased through a smoke shop. The substance abuse degraded his health to the point that he was unable to walk without assistance and was confined to a wheelchair. Although this case is the catalyst for SB 491, it is far from an isolated incident. In addition to the numerous people for whom nitrous oxide use has been fatal or caused long-

lasting health problems, it has also been the cause of multiple recent drugged driving fatalities, claiming the innocent lives of Camille Rand, Christopher and Robert Ohlander, and others.

"Most Californians will encounter nitrous oxide at the dentist in the form of 'laughing gas,' or as the aerosol spray propellant in pre-made whipped cream (e.g., Reddi-Wip). The small pressurized cartridges are also sold with the intended use of aerating homemade whipped cream. Strikingly, nitrous oxide cartridges are also sold in smoke shops or tobacco shops – stores that specialize in selling inhalants—for underground purposes of recreational intoxication. Well known as a party drug, nitrous oxide is dispensed from the canisters into a balloon from which it is inhaled yielding a short burst of euphoria. Unlike the 'laughing gas' administered by dentists, who carefully control and monitor its use to ensure that there is a safe amount of oxygen mixed in with the gas, nitrous oxide abuse is dangerous. According to the National Institute on Drug Abuse, recreational use of nitrous oxide can lead to 'death from lack of oxygen to the brain, altered perception and motor coordination, loss of sensation, limb spasms, blackouts caused by blood pressure changes, [and] depression of heart muscle functioning.'

"SB 491 protects Californians by prohibiting retailers of tobacco or tobacco-related products from selling nitrous oxide, a product intended for use in making whipped cream but often illegally inhaled as a dangerous recreational drug."

2) **Nitrous Oxide**: Nitrous oxide is an inorganic gas that may be colorless and odorless to sweet-smelling. It has several uses, including managing pain and anxiety in dentistry, use in food preparation, and as an oxidizer in model rockets and motor vehicle racing. According to the American Dental Association, inhaled nitrous oxide-oxygen is the most used gaseous anesthetic in the world and a 2007 survey by the ADA estimated that 70% of dental practices using any form of sedation employed nitrous oxide-oxygen sedation. (< https://www.ada.org/en/member-center/oral-health-topics/nitrous-oxide > [as of June 24, 2021].)

   Nitrous oxide has also become a popular recreational drug. It can be taken via "Whippit" cannisters used in whip cream dispensers. However, this can have serious health consequences. <https://www.drugabuse.gov/publications/research-reports/inhalants/letter-director> [as of June 24, 2021].)

   The National Institute for Drug Abuse notes that "although the high that inhalants produce usually lasts just a few minutes, people often try to make it last by continuing to inhale again and again over several hours." (<https://www.drugabuse.gov/publications/drugfacts/inhalants > [as of June 24, 2021].) Short-term effects of inhalant use include slurred or distorted speech, lack of coordination, euphoria, dizziness, light-headedness, hallucinations, delusions, vomiting, headaches, and drowsiness. Long-term effects of inhalant use include liver and kidney damage, hearing loss, bone marrow damage, loss of coordination and limb spasms from nerve damage, delayed behavioral development, and brain damage from a lack of oxygen. Inhalant abuse can also cause seizures, coma, and death. (*Ibid.*)

   The National Survey on Drug Use and Health provides data on substance use, including inhalant use. The 2018 survey found that approximately two million people aged 12 or older had used inhalants in the past year. This corresponds to 0.7 percent of the population. Use

among adolescents aged 12 to 17 was more common; in 2018, approximately 662,000 had used inhalants in the past year. This corresponds to 2.7 percent of adolescents. The survey also found the following data regarding past year users in other age groups: 1.5 percent of young adults ages 18 to 25, and 0.4 percent of adults ages 26 or older. (<https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> [as of June 24, 2021] at p. 18.)

3) **Effect of this Bill**: In California, possession of nitrous oxide with the intent to ingest it for the purposes of intoxication is a misdemeanor, as is intentionally being under the influence of nitrous oxide, except pursuant to legitimate medical or dental use. (Pen. Code, § 381b.) In 2009, the Legislature made the sale or furnishing of nitrous oxide to a minor a misdemeanor. (AB 1015 (Torlakson), Chapter 266, Statutes of 2009; Pen. Code, § 381c, subd. (b).) AB 1015 also provided for the suspension of the business license, for up to one year, of a person who has been convicted of this crime for a second time, unless the business license owner demonstrates good faith efforts to prevent sales of nitrous oxide to minors by the business owner or their employees. (Pen. Code, § 381c, subd. (e).) AB 1015 did not apply to California licensed medical or dental practitioners administering nitrous oxide for medical or dental care, or as a propellant in a food product. (Pen. Code, § 381c, subds. (f) & (g).)

   In 2014, the Legislature expanded these provisions to make it a misdemeanor for any person to dispense or distribute nitrous oxide to a person, if it is known or should have been known that it will be ingested or inhaled by the person for the purposes of causing intoxication, and that person proximately causes great bodily injury or death to themselves, or any other person. (AB 1735 (Hall), Chapter 458, Statutes of 2014; Pen. Code, § 381d.) AB 1735 also required persons distributing or selling nitrous oxide to record each transaction involving the dispensing or distribution of it in a written or electronic document, among other record-keeping requirements. A violation of this requirement is a misdemeanor. (Pen. Code, § 381e)

   Despite current laws in place, sales of nitrous oxide for use as a recreational drug persists. This bill would require license suspension for up to one year in the case of a second violation of dispensing or distributing nitrous oxide to a person who the retailer knew or should have known would use it for the purpose of intoxication, and that person proximately caused great bodily injury or death to themselves or another person (Pen. Code, § 381d). The suspension would not apply if the owner of the business provides evidence that they or their employees have made a good faith effort to prevent violations of this offense. The bill would provide the same penalty in cases in which a person dispensed or distributed nitrous oxide and violated the record keeping statute (Pen. Code, § 381e). This is consistent with the penalty and exception codified in Penal Code section 381c for selling or furnishing nitrous oxide to a minor.

   This bill would also provide for CDTFA to deny an application for a license for those who have been convicted of violating one of these laws regarding the sale or distribution of nitrous oxide (Pen. Code, §§ 381c, 381d, 381e.) And it would also add violations of these offenses to the violations for which CDTFA may suspend or revoke current licenses.

4) **Argument in Support**: According to *West Shield Adolescent Services*, "West Shield Adolescent Services currently contracts with over 112 Ca. school districts, multiple county mental health facilities, juvenile justice and the department of social services as well as

parents.

"In recent years we have seen an increase in our being requested to therapeutically transport young people to specialized schools, psychiatric facilities and programs due to brain damage from the abuse of nitrous oxide that the kids refer to as 'poppers' and 'whippets'.

"During our flights or extensive drives with these young people they become very candid with us. We have been told dozens of times by minors how easy it is for them to buy the nitrous oxide. Many of them said they were able to buy hundreds of 'poppers' or 'whippets' at a time allowing them to stay high for long periods of time or to be able to sell them to their friends.

"I have read the new senate bill 491 and believe that it's [sic] passage will motivate many of the retailers of these products to not put their business license in jeopardy by violating the law by selling to minors.

"I further believe that by reducing the use of these products by minors will save lives, brain damage and taxpayer funds used to house these young people as well as the (in some cases) lifelong medical costs attributed to these young people.

"As someone who also interacts with the families of these young people who have suffered brain damage from these products, I can add that reducing the use of these products by minors will also save a huge amount of heartache that the families go through."

5) **Prior Legislation**:

a) SB 193 (Nielsen), of the 2019-2020 Legislative Session, would have made it a misdemeanor for any retailer of tobacco or tobacco-related products to sell or offer to sell nitrous oxide, and would have provided for the suspension of their business license for up to one year upon a second conviction. SB 193 was held in the Assembly Appropriations Committee.

b) SB 631 (Nielsen), of the 2017-2018 Legislative Session, would have prohibited a retailer of tobacco or tobacco related products from selling, offering, or exposing for sale nitrous oxide, and would have authorized a civil penalty for violations of this prohibition. SB 631 was pulled from hearing in the Assembly Judiciary Committee at the request of the author.

c) AB 1735 (Hall), Chapter 458, Statutes of 2014, made it a misdemeanor for any person to dispense or distribute nitrous oxide to a person, if it is known or should have been known that it would be ingested or inhaled by the person for the purposes of causing intoxication, and that person proximately cause great bodily injury or death to themselves, or any other person. Required also specified record-keeping for persons dispensing or distributing nitrous oxide and made violation of the requirement a misdemeanor.

d) AB 1015 (Torlakson), Chapter 266, Statutes of 2009, made it a misdemeanor to sell or furnish to a person under 18 years of age a canister or device containing nitrous oxide, or a chemical compound mixed with nitrous oxide, and provided for suspension of their

business license for up to one year upon a second conviction.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County Sheriff's Department (Sponsor)
Milestones Ranch Malibu
West Shield Adolescent Services

1 private individual

Opposition

None

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

Date of Hearing: July 13, 2021
Counsel: Matthew Fleming

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

SB 715 (Portantino) – As Amended June 21, 2021

SUMMARY: Makes numerous changes to firearm transfer laws, requires verification of the validity of a hunting license for the purchase of specified firearms, and clarifies what qualifies as an "unarmed" civilian to trigger investigations of officer-involved shootings by the Attorney General's Office. Specifically, **this bill**:

1) Provides that the prohibition on firearm transfer to minors does not apply if the following conditions are met:

   a) The transfer is infrequent, as defined;

   b) The transfer is by a parent or legal guardian of the minor;

   c) The minor is 16-years of age or older;

   d) The firearm is not a handgun or a semiautomatic centerfire rifle;

   e) The minor has been issued a valid hunting license that is unexpired;

   f) The minor is not a prohibited person as specified; and

   g) Within 48-hours of delivering the firearm to the minor the parent or guardian of the minor submits a report to the Department of Justice (DOJ) in a manner and format prescribed by the DOJ.

2) Requires the DOJ, commencing July 1, 2025, for sales of firearms to persons under 21 years of age who are eligible to purchase a firearm based upon their possession of a valid hunting license, to confirm the validity of the hunting license as part of the background check.

3) Defines a valid and unexpired hunting license as one that has been issued but has not yet expired.

4) Exempts any licensed common carrier involved in the delivery of firearms, as specified; and a licensed manufacturer of ammunition, as specified, from the requirement to return a firearm if a third party sale, transfer, or loan of a firearm was unable to be processed.

5) Provides, until July 1, 2024, that when a dealer is unable to process a transfer of a firearm, and the dealer cannot legally return the firearm to the transferor or seller or the person loaning the firearm, then the dealer must deliver the firearm to the sheriff of the county or the chief of police or other head of a municipal police department of any city or city and county,

who shall then dispose of the firearm in a specified manner.

6) Provides for the following procedure commencing July 1, 2024 when a dealer cannot legally return the firearm to the transferor or seller or the person loaning the firearm:

   a) The seller, transferor, or person loaning the firearm may request, and the dealer shall grant, that the dealer retain possession of the firearm for a period of up to 45 days so that the transferor or seller or the person loaning the firearm may designate a person to take possession of that firearm. This 45-day period shall be in addition to any time necessary to process a transaction;

   b) If, before the end of the 45-day period, the seller, transferor, or person loaning the firearm designates a person to receive the firearm and that person completes an application to purchase, the dealer shall process the transaction as specified; and,

   c) If the seller, transferor, or person loaning the firearm, does not request that the firearm be held by the dealer, or the firearm cannot be delivered to the designated person, the dealer, shall forthwith deliver the firearm to the sheriff of the county or the chief of police or other head of a municipal police department of any city or city and county.

7) Requires that a dealer who retains possession of a firearm or delivers possession a firearm to a law enforcement agency because they cannot legally return it to the transferor or seller or the person loaning the firearm, then the dealer shall within 72 hours after retaining possession of the firearm, notify the DOJ in a manner and format prescribed by the department.

8) Authorizes a dealer who cannot legally return the firearm to the transferor or seller or the person loaning the firearm to charge a fee of up to $10 for any firearm stored by the dealer.

9) Authorizes a person operating a licensed common carrier to deliver a firearm without possessing a valid firearm safety certificate when acting in the course and scope of duties incident to delivery of a firearm.

10) Deletes obsolete provisions relating to the DOJ's authority to impose fees for nonelectronic transfers of firearm purchaser information to the department.

11) Clarifies that a state prosecutor must investigate and gather facts in an incident involving a shooting by a peace officer that results in the death of a civilian if the civilian was unarmed, or if there is a reasonable dispute as to whether the civilian was armed.

12) Makes conforming changes.

EXISTING LAW:

1) Prohibits the sale of firearms to any person who is under the age of 21-years. (Pen. Code, § 27510, subd. (a).)

2) Exempts persons aged 18-20 years from the prohibition on sale of firearms to persons under the age of 21-years when the person is purchasing a semiautomatic centerfire rifle if they

possess a valid, unexpired hunting license issued by the Department of Fish and Wildlife. (Pen. Code, § 27510, subd. (b).)

3) Requires that persons who purchase a firearm in California must wait 10-days from the date of the purchase to undergo a background check and for the DOJ to process the purchase of the firearm. (Pen. Code, §§ 26815 & 27540.)

4) Requires that the sale, transfer, or loan of a firearm is processed through a licensed firearms dealer requires a dealer who is unable to process a third party sale, transfer, or loan of a firearm, to return the firearm to the person making the sale, firearm, or loan. (Pen. Code, § 26500.)

5) Requires, subject to specified exceptions, any person who purchases or receives a firearm to possess a valid firearm safety certificate. (Pen. Code, §§ 31615 & 31700.)

6) Permits the DOJ to charge a fee to reimburse for specified costs related to the sale or transfer of firearms, the filing of required reports, and the submission of the Dealers' Record of Sale (DROS). Also requires that firearm purchaser information be provided to the DOJ exclusively by electronic means. (Pen. Code § 28230.)

7) Requires a state prosecutor, meaning the Attorney General unless otherwise specified, to investigate incidents involving shootings of unarmed civilians that result in death. (Gov. Code, § 12525.3.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 715 will address the outstanding circumstances uncovered in the Poway shooting, ensuring that background checks are done comprehensively so the same mistakes do not happen again. Additionally, the bill expands on AB 1506 McCarty from last year to clarify that the Attorney General can investigate officer involved shootings that result in the death of an unarmed civilian or if there is a reasonable dispute that the civilian was unarmed."

2) **Valid Hunting License Clarification**: This bill seeks to define a valid hunting license as being valid only during the period in which the hunter may lawfully hunt the bird or mammal for which the license has been granted. Hunting licenses may be used for persons aged 16-20 years to purchase specified firearms despite the ban on the purchase of these firearms by persons under the age of 21-years.

   Under existing law, persons who purchase firearms in California must wait 10-days to undergo a background check and to allow the DOJ to process the purchase of the firearm. This bill would require, starting July 1, 2025, the DOJ to verify the validity of the minor purchaser's hunting license with the Department of Fish and Wildlife.

   This provision is similar to SB 914 (Portantino) from the 2019 – 2020 Legislative Session. That bill was enrolled and presented to the Governor and he issued a veto. In his message, Governor Newsom stated the following:

This bill would, beginning July 1, 2021, require the Department of Justice (DOJ) to verify the validity of a hunting license with the Department of Fish and Wildlife for a sale or transfer of a firearm to a person under 21 years of age.

DOJ does not currently have the technology to verify the validity of hunting licenses. In order to meet the requirements of this bill, it would take DOJ 30 months to complete the information technology project. During this time, they would have to redirect existing application development resources, which could affect the work currently scheduled for seven previously enacted bills impacting the firearms information technology systems.

I am concerned that adding an information technology project will impede DOJ's ability to perform the work it has already been tasked.

The Governor had concerns with SB 914 and the workload it would have created with DOJ. However, unlike SB 914, this bill has delayed implementation date for the provisions requiring DOJ to verify hunting licenses, meaning they would not take effect until January 1, 2025. According to the author, the delayed implementation date was requested by DOJ and it may make it easier for DOJ to transition into hunting license verification.

3) **Clarification of the Attorney General/State Prosecutor Investigation of Police Shootings**: Last year, this Legislature passed, and the Governor signed AB 1506 (McCarty) Chapter 326, Statutes of 2020. In that bill, the Legislature gave the authority to a state prosecutor (or the Attorney General) to investigate shootings by peace officers of unarmed civilians that result in death. This bill would expand that role by also granting the AG the authority to investigate instances where the there is a reasonable dispute as to whether the civilian was armed or unarmed.

4) **Argument in Support**: None submitted.

5) **Argument in Opposition**: According to the *California Rifle and Pistol Association*: "SB 715 started out last session as SB 914, a bill to 'clarify' what a valid hunting license is as it relates to the purchase of a firearm. After multiple amendments the bill was morphed to include numerous 'fixes' that unnecessary restrict the purchase, access and transfer of firearms and firearm parts by law abiding citizens. SB 715 is such a convoluted mess even the author, nor his staff are able to explain what this bill does! Our opposition is therefore based on three main points.

"First, do we really need legislation to define what a valid hunting license is? Doesn't the date printed on the license do that? Second, after amendments and removal of subdivision (4) allowing loans with the express permission of the minor's parents SB 715 will effectively kill any youth shooting sports program where the minor's parents are not present. This will eliminate the use of waivers. Firearms could only be loaned by the parents directly to the minor. Therefore if the minor is to engage in any sort of shooting program, for example, youth camps or state Hunter Education Program classes their parent or legal guardian MUST be present.

"Third, SB 715 raises the cost of eligibility checks on certain ammunition purchases and

precursor firearms parts. For years the Department of Justice (DOJ) has been allowed to overcharge 'fees' for Dealer Record of Sales (DROS) transactions. These DROS fees acuminated into large surpluses that the DOJ then unlawfully used on activities not related to DROS."

6) **Prior Legislation**:

a) AB 1506 (McCarty), Chapter 326, Statutes of 2020, allowed law enforcement agencies and district attorneys to request a new division of the Attorney General's office to investigate, report on, and potentially prosecute a criminal case when there is an officer involved shooting that results in a death of a member of the public.

b) SB 914 (Portantino), of the 2019 – 2020 Legislative Session would have implemented a procedure to confirm that a hunting license is valid when a person under the age of 21 years of age is using the license to purchase a firearm and would have deleted an outdated code section pertaining to fees associated with firearm purchaser information. SB 914 was vetoed by Governor Newsom.

c) 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.

d) SB 1100 (Portantino), Chapter 894, Statutes of 2018, increased the age for which a person can purchase a long-gun from a licensed dealer from 18 to 21 years of age, except as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Oppose

California Rifle and Pistol Association, INC.
California Sportsman's Lobby, INC.
Gun Owners of California, INC.
Outdoor Sportsmen's Coalition of California
Safari Club International - California Chapters

1 private individual

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

Date of Hearing: July 13, 2021
Counsel: Nikki Moore

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

SB 420 (Umberg) – As Amended July 6, 2021

SUMMARY: Establishes the Unemployment Insurance Integrity Enforcement Program to promote coordination with county district attorneys, and federal authorities, to pursue civil and criminal actions to recover funds misappropriated from the Employment Development Department ("EDD" or "the department"), to be administered through a task force with grant money, upon appropriation of funds by the Legislature. Specifically, **this bill**:

1) Establishes within the Department of Justice the Unemployment Insurance Integrity Enforcement Program, to be administered by the Attorney General.

2) Requires the Attorney General to establish a task force consisting of the Director of Employment Development and five members appointed by the Attorney General.

3) Provides that the task force will, prior to pursuing any civil or criminal action pursuant to this part, prepare a cost-benefit analysis considering the likelihood of prevailing on the merits of the case, the likelihood of collecting any of the misappropriated funds subject to the case, and the costs of investigating and litigating the case.

4) Provides that, beginning Jan. 1, 2023, and upon appropriation by the Legislature, the Attorney General shall fund a grant program targeted at the successful prosecution and elimination of fraudulent unemployment insurance claims.

5) Requires the task force to coordinate closely with county district attorneys to pursue available methods, including both civil and criminal actions, to recover funds misappropriated from the EDD.

6) When available and necessary due to jurisdictional limitations, the task force shall coordinate with the United States Attorney's Office and federal law enforcement agencies to pursue available methods, including both civil and criminal actions, to recover improper benefit payments made from the EDD.

7) States that to enable all members of the Unemployment Insurance Integrity Enforcement Program Task Force to access relevant claimant information in order to conduct investigations of potential unemployment insurance fraud. The information provided pursuant to this subdivision shall be provided to the extent permitted by federal law and regulations. Conduct related to information provided pursuant to this subdivision shall not be subject to the criminal sanctions set forth in subdivision (f) of Section 1094.

8) Specifies that in determining whether to award a district attorney a grant pursuant to this subdivision, the Attorney General shall consider factors indicating fraudulent unemployment

insurance claims in the district attorney's county, including, but not limited to, the county's level of general criminal activity, population density, claim frequency, number of suspected fraudulent claims, and prior and current evidence of fraudulent activity. States that funding priority shall be given to those grant applications with the greatest potential to reduce unemployment fraud activity and lessen the economic losses from that fraud.

9) Requires the Attorney General to prioritize funding under this section for multicounty efforts to investigate and prosecute unemployment insurance fraud activity.

10) States that each grantee shall provide the Attorney General with information resulting from the investigations, and clarifies that this section does not prohibit the referral of any cases developed by grantees or the Attorney General to any appropriate prosecutorial entity.

11) Provides that a grant under this section shall be awarded on the basis of a single application for a period of three years, and that continued funding of a grant shall be contingent upon a grantee's successful performance, as determined by an annual review by the Attorney General. Provides that the redirection of grant funds under this section be made only for good cause.

12) Permits two or more district attorneys to submit a joint application for a grant award under this section.

13) Provides that the entirety of the recovered funds shall be returned to the EDD to be appropriated back to the original funding source as required by law.

14) Makes legislative findings and declarations related to fraudulent unemployment claims.

EXISTING LAW:

1) Establishes the EDD which is responsible for administering the state's unemployment insurance (UI) program, including the payment of unemployment compensation benefits to eligible persons. (Unemp. Ins. Code, §§ 301 et seq.)

2) Makes it a violation to willfully make a false statement or representation, to knowingly fail to disclose a material fact, or to use a false name, false social security number, or other false identification to obtain, increase, reduce, or defeat any benefit or payment, whether for the maker or for any other person. (Unemp Ins. Code, § 2101.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 420 empowers local prosecutors' efforts to fight unemployment benefits fraud by expanding the resources available to investigate and prosecute fraud cases in California. It also creates a task force to serve as a critical focal point for these efforts, which cut across jurisdictional lines. The bill would require the task force to coordinate with local district attorneys and with the United States Attorney's Office to pursue available methods to recover improper benefit payments made from the department and provides it access to the information it needs to investigate and prosecute fraud. Lastly, the

bill requires that the task force consider the cost of any action prior to undertaking it."

2) **Fraudulent UI Claims Involving Incarcerated Individuals**: The EDD is responsible for administering the state's unemployment insurance program which provides partial wage replacement to eligible unemployed Californians.

The COVID-19 pandemic resulted in a surge in the filing of unemployment claims in March 2020 following the issuance of a statewide stay-at-home order. This substantially increased EDD's workload. At the same time, Congress expanded federal UI benefits and relaxed the eligibility criteria for receiving those benefits through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). More specifically, the CARES Act extended pandemic unemployment assistance (PUA) to individuals who were not eligible for regular unemployment benefits, including those who had been self-employed, and added $600 per week to the amount of benefits claimants would have otherwise received under state law.

In dispensing these funds, "the state paid more than 35,000 claims under state prisoners' names, with one inmate collecting nearly $49,000… California also paid more than $421,000 to 133 Death Row inmates." (Emily Hoven, *Latest Unemployment Scandal: State Paid Inmates $1B in Fraudulent Claims*, CalMatters, Nov. 25, 2020, available at https://calmatters.org/newsletters/whatmatters/2020/11/california-edd-fraud-claims-inmates/.) This discovery put EDD under a national spotlight, and resulted in numerous investigations on various local, state and federal levels.

In Jan. 2021, the State Auditor issued a report about the fraud, noting that EDD was particularly vulnerable to fraud associated with incarcerated individuals because "it lacked a system to crossmatch all incoming claims against incarceration data." (State Auditor, *Employment Development Department: Significant Weaknesses in EDD's Approach to Fraud Prevention Have Led to Billions of Dollars in Improper Benefit Payments*, Report 2020-628.2, p. 27, available at https://www.auditor.ca.gov/reports/2020-628.2/index.html.)

This occurred because there was no data sharing agreement in place between California Department of Corrections and Rehabilitation (CDCR) and EDD until December 2020 when the Attorney General authorized CDCR to share inmate information with EDD. (*Id.* at p. 29.) The fraudulent claims primarily involved PUA claims. It was reported that in most cases the payments were sent via prepaid debit cards to addresses used on claims applications (i.e., addresses outside of a correctional facility) with the funds later deposited to inmate accounts in jails and prisons. (Shawn Hubler, *Unemployment Scam Using Inmates' Names Costs California Hundreds of Millions*, New York Times, Nov. 24, 2020, available at https://www.nytimes.com/2020/11/24/us/california-unemployment-fraud-inmates.html.) However, some benefits were sent directly to correctional facilities. (*Id.*)

The extent of the fraud was uncovered after the U.S. Department of Labor crosschecked federal UI claims data against a list of state prison inmates that it had subpoenaed from the state and identified approximately 35,000 claims involving individuals incarcerated in the state's prisons. (Hubler, *Id.*) Notably, the crosscheck completed by the federal government did not include any of the state's county jails, state hospitals, or other institutions where people have been civilly committed. (Hubler, *Id.*.) EDD estimated that it paid roughly $810 million in benefits between January 2020 and November 2020 to 45,000 claimants with information that matched incarcerated individuals. (State Auditor, *Employment Development*

Department: Significant Weaknesses in EDD's Approach to Fraud Prevention Have Led to Billions of Dollars in Improper Benefit Payments, Report 2020-628.2, p. 27.) Those figures include individuals incarcerated in county jails who were identified after EDD contracted with a private vendor that provided cross-reference inmate data "from prisons and jails in multiple states," including access to "real-time incarceration and arrest records." (*Id.* at pp. 29-30.)

3) **Summary of Auditor's Recommendations**: The State Auditor's report made the following recommendations.

To the Legislature

- To protect against fraudulent UI claims, the Legislature should amend state law to require EDD to regularly cross-match its claims against data from state and local correctional facilities.
- To ensure that EDD effectively protects the integrity of the UI program, the Legislature should amend state law to require EDD to, by January 2022, and biannually thereafter, assess the effectiveness of its fraud prevention and detection tools, eliminate those that are not effective, and reduce duplication in its efforts.

To the EDD

- To ensure that it does not suspend critical safeguards, EDD should plan in advance which UI fraud prevention and detection mechanisms it can adjust during recessions to effectively balance timely payment with fraud prevention.

- To provide timely access to benefits for legitimate UI claimants with frozen accounts, EDD should immediately obtain and review a comprehensive listing of benefit accounts that are frozen and, by March 2021, begin the process of unfreezing legitimate accounts.

- To ensure that it can approach UI fraud prevention in a comprehensive and coordinated manner, EDD should do the following:

- By March 2021, establish a central unit responsible for coordinating all fraud prevention and detection efforts.

- By May 2021, develop a plan for how it will assess the effectiveness of its fraud prevention and detection tools.

4) **Investigative Task Force into EDD Fraud**: This bill would establish a task force to further investigate EDD fraud, to be administered by the Attorney General, and to be funded by grant money upon appropriation of the Legislature. The author of this bill plans to seek funds for this task force in 2022, with the bill taking effect in 2023.

Currently, there is a statewide task force established by the Governor, comprised of nine district attorneys and a federal prosecutor that has been working since December to investigate fraudulent unemployment claims involving incarcerated people. As of April 2021, there were 68 arrests, with 1,641 inquiries open. (Patrick McGreevy, *California has opened hundreds of investigations into unemployment fraud involving prisoners*, Los Angeles Times,

April 26, 2021, available at https://www.latimes.com/california/story/2021-04-26/california-task-force-investigations-unemployment-fraud-prison.) The Governor's Office of Emergency Services (Cal OES) in partnership with State's Districts Attorney's and the US Attorney's Office were working to investigate and remediate fraud within state and federal unemployment insurance programs.(See *Local, State and Federal Law Enforcement Collaborate to Protect Californians from Unemployment Insurance Fraud*, available at https://news.caloes.ca.gov/local-state-and-federal-law-enforcement-collaborate-to-protect-californians-from-unemployment-insurance-fraud/.) The State level coordination taskforce was created at the Direction of Governor Gavin Newsom, who directed California Governor's Office of Emergency Services (Cal OES) to facilitate the joint efforts, with District Attorneys and the US Attorney's Office of multiple local, state and federal law enforcement entities to hold those responsible for PUA/UI accountable to fullest extent possible under the law. (Id.) The full list of organizations participating in this effort includes: Cal OES, California Highway Patrol (CHP), California Attorney General's Office, the California District Attorneys Association, United States Department of Labor-Office of the Inspector General, Federal Bureau of Investigation (FBI), United States Secret Service (USSS), US Attorney's Office, United States Marshalls Service, Federal Bureau of Prisons, CDCR, and the EDD. (Id.) In light of this, is another task force necessary?

5) **Argument in Support**: According to the *California Chamber of Commerce*, SB 420 "will add accountability for UI fraud by creating a task force under the Attorney General to pursue and recover improper benefits payments.

"In the wake of this unprecedented emergency and economic shutdown, we have seen fraudsters steal those benefits from Californians who deserve and need them. According to CalChamber's estimates, this fraud could have totaled as much as $30 billion, with more than a billion coming from California's UI Fund. As the funders of California's UI Fund, California's employers see this fraud as doubly troubling because we will face increased taxes in the coming decades to repay the present insolvency.

"As the Auditor's reports and legislative hearings have shown, the Employment Development Department must now turn to reviewing the benefits it distributed last year and identifying where fraud occurred. According to all accounts, it will be difficult work – but we see SB 420 as a critical step in the right direction by creating a task force (including the State Auditor) who will pursue cost-effective recovery strategies and incorporating local district attorneys."

6) **Related Legislation**:

a) SB 39 (Grove), would require CDCR, at least every 90 days, to provide the names and social security numbers (SSNs) of current inmates to EDD for the purpose of preventing fraudulent unemployment claims. SB 39 is currently pending before the Assembly Appropriations Committee.

b) AB 12 (Seyarto), would require state agencies to stop sending full SSNs on outgoing mail as soon as feasible. AB 12 is currently pending before the Senate Appropriations Committee.

c) AB 110 (Petrie-Norris), would require EDD to cross-match claimant information with information provided by CDCR prior to making any payment of unemployment benefits to ensure that the claimant is not an inmate at a state prison. This bill is currently pending before the Senate Labor, Public Employment and Retirement Committee.

d) AB 56 (Salas), would, among other things, set dates by which state agencies that cannot comply with the prohibition on including SSNs on outgoing mail must submit an annual corrective action plan to the Legislature. AB 56 is currently pending before the Senate Appropriations Committee.

e) SB 232 (Nielsen), would codify recommendations from the State Auditor's Report related to UI fraud. SB 232 is currently pending before the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Chamber of Commerce
California District Attorneys Association

Opposition

None

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

Date of Hearing: July 13, 2021
Counsel: Nikki Moore

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

SB 35 (Umberg) – As Amended June 17, 2021

As Proposed to be Amended in Committee

SUMMARY: Add several new crimes to the Elections Code including specifically prohibiting the obstruction of a vote by mail (VBM) ballot drop box, and prohibiting blocking parking and the ingress and egress to a vote site. Specifically, **this bill**:

1) Modifies the distance from which electioneering and other specified political activities near a polling location are prohibited from the 100-foot radius of protected voting space from "the room or rooms in which voters are signing the roster and casting ballots" to include 100 feet from the entrance to a building that contains a polling place, as well as the curbside voting area where a voter may drop off a ballot.

2) Makes it unlawful to obstruct access to a VBM ballot drop box.

3) Makes it unlawful to obstruct ingress, egress, or parking with the intent of dissuading another person from voting, within 100 feet of a protected voting space.

4) Provides that a person shall not, on election day, or at any time that a voter may be casting a ballot, do any of the following within the "immediate vicinity" of a voter "in line to cast a ballot or drop off a ballot": solicit a vote, speak to a voter about marking the voter's ballot, or disseminate visible or audible electioneering information.

5) States that a person shall not, with the intent of dissuading another person from voting, do any of the following within the "immediate vicinity" of a voter "in line to cast a ballot or drop off a ballot": solicit a vote, speak to a voter about marking the voter's ballot, or disseminate visible or audible electioneering information.

6) Makes it unlawful to display, with the intent to deceive a voter to cast a ballot in an unofficial ballot box, a container for the purpose of collecting ballots. Establishes that evidence of an intent to deceive may include using the word "official" on the container, or otherwise fashioning the container in such a way that is likely to deceive a voter into believing that the container is an official collection box that has been approved by an elections official.

7) Makes it unlawful to direct or solicit a voter to place a ballot in an unofficial container which appears to be and is likely to deceive a voter into believing is an official collection box that has been approved by an elections official.

8) Requires notice of the prohibitions on electioneering be provided to the public, and requires the Secretary of State ("SOS") to promulgate regulations specifying the manner in which

such notice shall be provided.

9) Requires notice regarding the prohibitions on activity related to corruption of the voting process set forth in this chapter be provided to the public, and requires the SOS to promulgate regulations specifying the manner in which such notice shall be provided.

EXISTING LAW:

1) Defines a "polling place" to mean a location where a voter casts a ballot and includes the following terms, as applicable: poll, polling location, and vote center. (Elec. Code, § 338.5.)

2) Defines "electioneering" to mean the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot within 100 feet of a polling place, a vote center, an elections official's office, or a satellite location, as specified. (Elec. Code, § 319.5.)

3) Provides that prohibited electioneering information includes, but is not limited to, any of the following:

   a) A display of a candidate's name, likeness, or logo.

   b) A display of a ballot measure's number, title, subject, or logo.

   c) Buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information.

   d) Dissemination of audible electioneering information.

   e) At VBM ballot drop boxes, loitering near or disseminating visible or audible electioneering information. (Elec. Code, §319.5.)

4) Prohibits a person, on election day, or at any time that a voter may be casting a ballot, within 100 feet of a polling place, a satellite location, or an elections official's office, from doing any of the following:

   a) Circulating an initiative, referendum, recall, nomination petition, or any other petition.

   b) Soliciting a vote or speaking to a voter on the subject of marking the voter's ballot.

   c) Placing a sign relating to voters' qualifications or speaking to a voter on the subject of voter's qualifications, except as provided in current law.

   d) Doing any electioneering as defined under current law. (Elec. Code, § 18370.)

5) Specifies that for the purposes of this prohibition, within 100 feet of a polling place, a satellite location, or an elections official's office means a distance of 100 feet from the room or rooms in which voters are signing the roster and casting ballots. (Elec. Code, § 18370.)

6) Provides that it is a misdemeanor for a person, with the intent of dissuading another person from voting, within 100 feet of a polling place, to do any of the following:

   a) Solicit a vote or speak to a voter on the subject of marking their ballot.

   b) Place a sign relating to voters' qualifications or speak to a voter on the subject of voter's qualifications, except as provided in current law.

   c) Photograph, video record, or otherwise record a voter entering or exiting a polling place. (Elec. Code, § 18541.)

7) Defines "100 feet," for these purposes, to mean a distance of 100 feet from the room or rooms in which voters are signing the roster and casting ballots. (Elec. Code, § 18370.)

8) Provides that every person is punishable by a fine not exceeding $1,000, or by imprisonment for 16 months or two or three years, or by both that fine and imprisonment, as specified, who does any of the following:

   a) Aids in changing or destroying any poll list or official ballot;

   b) Aids in wrongfully placing any ballots in the ballot container or in taking any therefrom;

   c) Adds or attempts to add any ballots to those legally polled at any election by fraudulently putting them into the ballot container, either before or after the ballots therein have been counted;

   d) Adds to or mixes with, or attempts to add to or mix with, the ballots polled, any other ballots, while they are being counted or canvassed or at any other time, with the intent to change the result of the election, or allows another to do so, when in the person's power to prevent it;

   e) Carries away or destroys, attempts to carry away or destroy, or knowingly allows another to carry away or destroy, any poll list, ballot container, or ballots lawfully polled or who willfully detains, mutilates, or destroys any election returns; and,

   f) Removes any unvoted ballots from the polling place before the completion of the ballot count. (Elec. Code, § 18568.)

9) Defines "vote by mail ballot drop box" to mean a secure receptacle established by a county or city and county elections official whereby a voted VBM ballot may be returned to the elections official from whom it was obtained. (Elec. Code, § 3025.)

10) Requires the SOS to promulgate regulations establishing guidelines based on best practices for security measures and procedures, including, but not limited to, chain of custody, pick-up times, proper labeling, and security of VBM ballot drop boxes, that a county elections official may use if the county elections official establishes one or more VBM ballot drop-off locations. (Elec. Code, § 3025.)

11) Permits counties, pursuant to the California Voter's Choice Act (CVCA), to conduct elections in which every voter is mailed a ballot and vote centers and ballot drop-off locations are available prior to and on election day, in lieu of operating polling places for the election, subject to certain conditions. (Elec. Code, § 3017.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Californians have embraced an expanding array of options for casting their ballots. But state law intended to protect voters from intimidation and partisan harassment has not kept pace. Buffer zones that may have provided adequate protection to voters in the past are becoming less effective forms of protection for voters who may now wait in lines that stretch far outside of early and day-of polling places due to social distancing restrictions, increasing voter engagement, and work and family obligations that limit the times of day that many Californians are available to vote. Further, the law does not clearly provide enough protections to a growing number of early voters who cast their ballots in official vote-by-mail ballot drop boxes.

   "SB 35 would modernize the laws that protect voters from intimidation and harassment at the polls by extending protections against electioneering to every voter, regardless of their physical distance from the door. SB 35 would require that notice regarding these prohibitions be provided to the public. Separately, this bill would clarify that the word "official" may not appear on unofficial ballot boxes.

   "California's voters deserve to cast their ballots free of partisan harassment and intimidation. Unfortunately, during the November 2020 election, voters seeking to exercise their franchise in California were forced to wade through crowds of partisan rallygoers to vote, while voters in other states were confronted by persons engaged in other electioneering activities:

   - Nevada City: According to an article in The Washington Post, residents reported that they did not feel comfortable and could not access one of the most popular ballot boxes in the county during an October 11, 2020 rally for then-President Donald J. Trump at the drop box site attended by about 300 people.
   - Temecula: According to the Los Angeles Times, on November 1, 2020, police received complaints that electioneering activities conducted by an estimate 4,000 Trump supporters parked at Ronald Reagan Sports Park may be violating state elections law because the crowd was blocking access to a voting center inside the park.
   - Hendersonville, Tenn.: According to the Post, a Trump supporter repeatedly drove past a polling place in a church in a large truck-and-trailer rig with Trump flags and music blaring from speakers.
   - Albuquerque, NM: A convoy of vehicles, some with Trump flags, honked and yelled near a voting site on the first day of early voting.
   - Craven County, N.C.: An election worker reported that a Trump supporter was "loudly exclaiming political statements" and played a Trump rally loudly on her phone within earshot of others lining up to vote.

"Separately, the Orange County Register reported that during the November 2020 election, a political party distributed more than 100 ballot collection boxes to churches, shops, local political party headquarters, and campaign offices, initially labeling at least some of them as "official" ballot drop boxes.

"The United States Supreme Court has upheld a prohibition on electioneering within 100 feet of a polling place as permissible, finding a state's interest in protecting voters from undue influence and preserving the integrity of the election process sufficient to survive strict of a limitation on speech. (*Burson v. Freeman* (1992) 504 U.S. 191.) Some 14 states have electioneering buffer zones at or around polling places that are greater than 100 feet, and at least one state, Georgia, has a flexible buffer that extends past the last person in a voting line.

"According to the California Secretary of State, 65 percent of California voters who cast ballots in the November 2018 election voted by mail, and nearly 87 percent of voters registered for the November 2020 election were vote-by-mail voters. In nine counties, 100 percent of voters are registered to vote by mail. Given the high proportion of California voters who are casting their ballots by mail, it is imperative that voters have safe access to ballot boxes."

2) **Crimes in the Elections Code:** While history of the Elections Code is difficult to track prior to 1994 when the code was reorganized by SB 1547 (Chapter 920, Statutes of 1994), the crimes established by code have rarely been updated since; only once, to define "electioneering" in 2006. This bill would add several new crimes to the Elections Code including specifically prohibiting the obstruction of a VBM box, and prohibiting blocking parking and the ingress and egress to a vote site.

The proposals follow reporting by the *Los Angeles Times*, which wrote on Nov. 1, 2020, that "A massive caravan of supporters of President Trump paraded for 60 miles through Riverside County on Sunday afternoon before converging on a large Temecula sports park, blocking access to the site, which included a vote center, snarling traffic and upsetting some voters, officials there said." (Matt Stiles, *Huge Trump Car Caravan Disrupted Some Voters in Temecula, Authorities Say,* Los Angeles Times, Nov. 1, 2020, available at https://www.latimes.com/california/story/2020-11-01/trump-supporters-rally-outside-voting-center-in-temecula.) "The Sheriff's Department responded and cleared access to the parking lot and voter assistance center." This bill would clarify that such obstructions are unlawful.

Regulating political speech necessarily creates tension with the First Amendment. Competing with free speech rights is the right to vote unimpeded, which has been long established. "There is a substantial and long-lived consensus among the 50 States that some restricted zone around polling places is necessary to serve the interest in protecting the right to vote freely and effectively. The real question then is how large a restricted zone is permissible or sufficiently tailored." (*Burson v. Freeman* (1992) 504 U.S. 191, 208.)

This bill seeks to adjust the points of measurement in determining what is protected voting space where electioneering and other political activity may be curbed. Existing law defines the point of measurement to be "the room or rooms in which voters are signing the roster and casting ballots." This bill would delete that definition and state that the entrance of the

building, and also a curbside where voting is taken place, are the terminal points to determine the area of protected voting space.

The bill would also add criminal penalties for engaging in electioneering activity in the "immediate vicinity" of a voter in line to vote. The term "immediate vicinity" is not defined by this bill. Merriam-Webster defines "immediate" to mean "existing without intervening space or substance," "brought into immediate contact," and "being near at hand." Merriam-Webster defines "vicinity" to mean "a surrounding area or district" and "neighborhood." The plain language of this statute may raise ambiguities. This standard would be interpreted and enforced across the state based on local interpretations which could lead to varied and incongruent enforcement. Arguably, this undefined term could justify imposing a 100-foot buffer zone at the end of a line of voters—in a space that extends far beyond the existing 100-foot buffer zone Arguably, "immediate vicinity" means something much narrower. Additionally, this standard adopts a dynamic point of measurement, meaning it will change as the line of voters shrinks and expands. Should the Legislature consider defining "immediate vicinity" to clarify the area of protected voting space established by this bill?

3) **Unofficial Ballot Box Collections in 2020**: This bill also prohibits the collection of ballots in non-official drop boxes that purport to be "official" drop boxes following activity in the 2020 election. Various groups were collecting ballots in drop boxes that purported to be "official" government drop boxes. The New York Times reported that the California Republican Party placed more than 50 drop boxes for mail-in ballots in Los Angeles, Fresno, and Orange Counties with labels like "Official Ballot Drop Off Box" which are "virtually indistinguishable" from drop of sites operated by county elections officials pursuant to established regulations. (Glenn Thrush, Jennifer Medina, *California Republican Party Admits It Placed Misleading Ballot Boxes Around State*, New York Times, Oct. 12, 2020, available at https://www.nytimes.com/2020/10/12/us/politics/california-gop-drop-boxes.html.)

   The Attorney General and SOS sent a cease-and-desist letter to stop the deceptive practice. This bill would clarify that displaying a ballot drop box that is fashioned to look like an official government drop box is unlawful, as is asking or directing a person to deposit their vote in a container that appears to be an official government drop box.

   This bill would also prohibit a person from displaying or otherwise directing a person to vote using a VBM ballot drop box that is not authorized by county elections officials, but which appears to be and which a voter is deceived into thinking is authorized by elections officials. Thus, this makes it clear that activity like that cited above is unlawful. However, displaying an unofficial ballot collection box that clearly indicates that it is *not* an official ballot box and is *not* connected to official county election operations would still be lawful if the voter is not deceived in believing the container is an official VBM ballot drop box.

4) **Argument in Support**: According to the *California Teachers Association*, "During the 2020 election cycle, there were reports of attempts to demonstrate for specific candidates within close proximity of polling places as well as attempts to create unofficial ballot boxes. This proposal addresses attempts to 'corrupt' the voting process by ensuring voters are not subjected to false electioneering while at a designated polling place and guarantees their ballots are counted.

   "CTA believes one of our most important freedoms is the right to vote and to be a full

participant in the electoral process of our nation. CTA further believes our voting system must be free of procedures dissuading voters from voting in person. Electioneering in and around a polling location can have a 'chilling effect' and should not be visible when a voter approaches a polling location. We believe SB 35 is a necessary change to further the opportunity for eligible voters to participate in the democratic process."

5) **Argument in Opposition**: According to the *Election Integrity Project California*, "EIPCa has steadfastly held its position that third-party ballot collecting by individuals who are not close relatives or members of the household/trusted associates of the voter must not be tolerated by any system that values integrity.

"Given the prevalence and convenience of private and public mail boxes as well as community drop boxes, there is no California voter who under any circumstance would be hampered or even inconvenienced by being expected to post a ballot unaided by a third party outside the categories listed above.

"Unrestricted ballot collecting as condoned by AB 1921 (Stats. 2016, Ch. 820, Elections Code 3017(e)) opens the door to voter harassment and intimidation, vote buying and selling and many other forms of election corruption. Voters and observers have provided documentation to EIPCa signed under penalty of perjury that all of the above situations were manifested as a result of AB 1921. Los Angeles prosecuted cases of so-called ballot harvesters paying individuals for their signatures.

"In addition, unrestricted ballot collecting completely removes chain of custody, so that ballots can no longer be ensured to be legitimate. The damage done not only to election integrity but to voter trust and confidence as a result is fatal to a free society.

"SB 35 assumes that certain types of third-party ballot collection are legitimate and that others are not. EIPCa reiterates that no form of unrestricted ballot collecting is legitimate or conducive to a healthy democratic process.

"If the legislature is sincere in its desire to encourage every eligible Californian to register and vote, then it needs to provide them with a system that is secure and trustworthy, one that engenders trust and confidence that all votes will be legitimate and that their vote will be equal to all other votes and receive due and legal process.

"EIPCa urges the legislature to re-examine the issue of third-party ballot collection, and return to the pre-AB 1921 standards for the protection of voters and the integrity of their voice in government."

6) **Related Legislation**:

a) SB 742 (Pan) would make it a crime to "harass," as defined, within 30 feet of a person who is within 100 feet of a medical facility offering vaccines. SB 742 is currently pending before the Assembly Appropriations Committee.

b) AB 1356 (Bauer-Kahan) would make it a crime to film or record a person entering a reproductive health facility within 100 feet of the facility. AB 1356 is currently pending

before the Senate Judiciary Committee.

7) **Prior Legislation**:

a) AB 1921 (Gonzalez), Chapter 820, Statutes of 2016, permitted a VBM voter to who is unable to return his or her ballot to designate any person to return the ballot, as specified, and prohibited the designated person from receiving any form of compensation based on the number of ballots they return.

b) AB 1337 (Evans), Chapter 146, Statutes of 2009, defined "electioneering."

c) AB 603 (Garcia), of the 2003-2004 Legislative Session, would have defined "electioneering." This bill failed passage on the Assembly Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Professional Firefighters
California Teachers Association
Disability Rights California
Orange County Employees Association

Opposition

Election Integrity Project California

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

Amended Mock-up for 2021-2022 SB-35 (Umberg (S))

Mock-up based on Version Number 95 - Amended Assembly 6/17/21
Submitted by: Nikki Moore, Public Safety

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

SECTION 1. Section 319.5 of the Elections Code is amended to read:

319.5. (a) "Electioneering" means the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot within the ~~200~~ 100 foot limit specified in subdivision (b). Prohibited electioneering information includes, but is not limited to, any of the following:

(1) A display of a candidate's name, likeness, or logo.

(2) A display of a ballot measure's number, title, subject, or logo.

(3) Buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information.

(4) Dissemination of audible electioneering information.

(5) At vote by mail ballot drop boxes, obstructing access to, loitering near or disseminating visible or audible electioneering information.

(b) The activities described in subdivision (a) are prohibited within ~~200~~ 100 feet of any of the following:

(1) The entrance to a building that contains a polling place as defined by Section 338.5, an elections official's office, or a satellite location specified in Section 3018.

(2) An outdoor site, including a curbside voting area, at which a voter may cast or drop off a ballot.

~~(3) A vote by mail ballot drop box for the collection of ballots as defined by Section 3025.~~

SEC. 2. Section 18370 of the Elections Code is amended to read:

18370. (a) A person shall not, on election day, or at any time that a voter may be casting a ballot, within the ~~200~~ 100 foot limit specified in subdivision (b), do any of the following:

(1) Circulate an initiative, referendum, recall, or nomination petition or any other petition.

(2) Solicit a vote or speak to a voter on the subject of marking the voter's ballot.

(3) Place a sign relating to voters' qualifications or speak to a voter on the subject of the voter's qualifications except as provided in Section 14240.

(4) Do any electioneering as defined by Section 319.5.

(b) The activities described in subdivision (a) are prohibited within ~~200~~ 100 feet of any of the following:

(1) The entrance to a building that contains a polling place as defined by Section 338.5, an elections official's office, or a satellite location specified in Section 3018.

(2) An outdoor site, including a curbside voting area, at which a voter may cast or drop off a ballot.

~~(3) A vote by mail ballot drop box for the collection of ballots as defined by Section 3025.~~

(c) A person shall not, on election day, or at any time that a voter may be casting a ballot, do any of the following within the immediate vicinity of a voter in line to cast a ballot or drop off a ballot:

(1) Solicit a vote.

(2) Speak to a voter about marking the voter's ballot.

(3) Disseminate visible or audible electioneering information.

(d) Any person who violates any of the provisions of this section is guilty of a misdemeanor.

SEC. 3. Section 18372 is added to the Elections Code, to read:

18372. Notice regarding the prohibitions on electioneering set forth in this article shall be provided to the public. The Secretary of State shall promulgate regulations specifying the manner in which such notice shall be provided.

SEC. 4. Section 18504 is added to the Elections Code, to read:

18504. Notice regarding the prohibitions on activity related to corruption of the voting process set forth in this chapter shall be provided to the public. The Secretary of State shall promulgate regulations specifying the manner in which such notice shall be provided.

SEC. 5. Section 18541 of the Elections Code is amended to read:

18541. (a) A person shall not, with the intent of dissuading another person from voting, within the ~~200~~ 100 foot limit specified in subdivision (b), do any of the following:

(1) Solicit a vote or speak to a voter on the subject of marking the voter's ballot.

(2) Place a sign relating to voters' qualifications or speak to a voter on the subject of the voter's qualifications except as provided in Section 14240.

(3) Photograph, video record, or otherwise record a voter entering or exiting a polling place.

(4) Obstruct ingress, egress, or parking.

(b) The activities described in subdivision (a) are prohibited within ~~200~~ 100 feet of any of the following:

(1) The entrance to a building that contains a polling place as defined by Section 338.5, an elections official's office, or a satellite location specified in Section 3018.

(2) An outdoor site, including a curbside voting area, at which a voter may cast or drop off a ballot.

~~(3) A vote by mail ballot drop box for the collection of ballots as defined by Section 3025.~~

(c) A person shall not, with the intent of dissuading another person from voting, do any of the following within the immediate vicinity of a voter in line to cast a ballot or drop off a ballot:

(1) Solicit a vote.

(2) Speak to a voter about marking the voter's ballot.

(3) Disseminate visible or audible electioneering information.

(d) A violation of this section is punishable by imprisonment in a county jail for not more than 12 months, or in state prison. Any person who conspires to violate this section is guilty of a felony.

SEC. 6. Section 18568 of the Elections Code is amended to read:

18568. Every person is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months or two or three years, or by both that fine and imprisonment, who:

(a) Aids in changing or destroying any poll list or official ballot.

(b) Aids in wrongfully placing any ballots in the ballot container or in taking any therefrom.

(c) Adds or attempts to add any ballots to those legally polled at any election by fraudulently putting them into the ballot container, either before or after the ballots therein have been counted.

(d) Adds to or mixes with, or attempts to add to or mix with, the ballots polled, any other ballots, while they are being counted or canvassed or at any other time, with intent to change the result of the election, or allows another to do so, when in the person's power to prevent it.

(e) Carries away or destroys, attempts to carry away or destroy, or knowingly allows another to carry away or destroy, any poll list, ballot container, or ballots lawfully polled or who willfully detains, mutilates, or destroys any election returns.

(f) Removes any unvoted ballots from the polling place before the completion of the ballot count.

(g) ~~Provides, or aids or abets in the provision of~~, Displays, with the intent to deceive a voter to cast a ballot in an unofficial ballot box, ~~an unofficial vote by mail ballot drop box~~ a container for the purpose of collecting ~~for the collection of~~ ballots. Evidence of an intent to deceive may include using the word ~~and marks, places, or uses the word~~ "official" on the ~~vote by mail ballot drop box~~ container, or otherwise ~~provides, or aids or abets in the provision of, an unofficial vote by mail ballot drop box~~ fashioning the container in such a way that is likely to deceive a voter into believing ~~the voter is placing a ballot into a secure~~ that the container is an official collection box that has been approved by an elections official.

(h) ~~Encourages~~ Directs or solicits a voter to place a ballot in a ~~receptacle~~ container prohibited by subdivision (g).

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Date of Hearing: July 13, 2021
Counsel: Matthew Fleming

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

SB 357 (Wiener) – As Amended April 5, 2021

SUMMARY: Decriminalizes the act of loitering with the intent to commit prostitution. Specifically, **this bill**:

1) Repeals provisions of law that make it a crime to loiter with intent to commit prostitution and attendant provisions that provide definitions and circumstances constituting evidence of intent to commit prostitution.

2) Provides that a person who is currently serving a sentence for loitering with intent to commit prostitution may petition the court for a recall or dismissal of sentence.

3) Provides that person who has completed their sentence for a conviction of loitering with intent to commit prostitution may file an application with the court to have the conviction dismissed and sealed.

4) Requires the court, upon receiving a petition to recall, dismiss, or seal a sentence or conviction for loitering with intent to commit prostitution, to presume the petitioner satisfies the criteria for recall, dismissal, or sealing.

5) Requires the court to grant the appropriate remedy, unless the party opposing the petition or application proves by clear and convincing evidence that the petitioner is not entitled to relief.

6) Specifies that unless requested by the applicant, no hearing is necessary to grant or deny an application to dismiss and seal a conviction for loitering with the intent to commit prostitution.

7) Specifies that if the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

8) Specifies that these provisions are not intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

9) Requires the Judicial Council to promulgate and make available all necessary forms to enable the filing of the petitions and applications.

10) Makes conforming changes.

EXISTING LAW:

1) Makes it a misdemeanor to solicit anyone to engage in, or engage in, lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. (Pen. Code, § 647, subd. (a).)

2) Makes it a misdemeanor to solicit, agree to engage in, or engage in any act of prostitution with the intent to receive compensation, money, or anything of value from another person. (Pen. Code, § 647, subd. (b)(1).)

3) Makes it a misdemeanor to solicit, agree to engage in, or engage in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. (Pen. Code § 647, subd. (b)(2).)

4) Makes it a misdemeanor to loiter in a public place with the intent to commit prostitution. (Pen. Code §§ 653.22 and 653.26.)

5) States that among the circumstances that may be considered in determining whether a person loiters with intent to commit prostitution are that the person:

   a) Repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with passersby, indicative of soliciting for prostitution;

   b) Repeatedly stops or attempts to stop motor vehicles by hailing the drivers, waving arms, or making any other bodily gestures, or engages or attempts to engage the drivers or passengers of the motor vehicles in conversation, indicative of soliciting for prostitution;

   c) Has been convicted of violating this section, or other offenses related or involving prostitution, within five years of the arrest under this section;

   d) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists, indicative of soliciting for prostitution;

   e) Has engaged, within six months prior to the arrest under this section, in any behavior described in this subdivision or any other behavior indicative of prostitution activity. (Pen. Code, § 653.22, subd. (b).)

6) States that the circumstances set forth above are not exclusive. These circumstances should be considered particularly salient if they occur in an area that is known for prostitution activity. (Pen. Code, § 653.22, subd. (c).)

7) Defines the following terms:

   a) "Commit prostitution" means to engage in sexual conduct for money or other consideration, except as specified;

b) "Public place" means an area open to the public, or an alley, plaza, park, driveway, or parking lot, or an automobile, whether moving or not, or a building open to the general public, including one which serves food or drink, or provides entertainment, or the doorways and entrances to a building or dwelling, or the grounds enclosing a building or dwelling.

c) "Loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered. (Pen. Code, § 653.20.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Senate Bill 357 repeals provisions of the law that criminalize loitering for the intent to engage in sex work. This misdemeanor crime has failed to protect public safety, in addition to contributing to the discrimination on the basis of gender, race, class and perceived sex worker status – in particular, targeting Black women and members of the transgender community. This bill does not decriminalize soliciting or engaging in sex work. SB 357 simply eliminates an anti-loitering offense that results in the legal harassment of LGTBQ+, Black, and Brown communities for simply existing and looking like a 'sex worker' to law enforcement. Due to the broad subjective nature of the language that criminalizes loitering for the intent to engage in sex work, this offense permits law enforcement to stop and arrest people for discriminatory reasons, such as wearing revealing clothing while walking in an area where sex work has occurred before. The creation and enactment of this offense began to cause more harm than help, because of the power it gave law enforcement to profile, target, harass, and criminalize without accountability, and the consequences of criminalization on the livelihood and safety of specifically targeted communities. Furthermore, anyone that is arrested and cited for this offense may have difficult securing employment and safe housing due to having an arrest record relating to sex work."

2) **Legislative History of Penal Code Section 653.22**: The crime of loitering with the intent to commit prostitution was enacted in 1995 by AB 1035 (Katz) Chapter 981, Statutes of 1995. At the time, soliciting or agreeing to engage in prostitution was already a crime. According to the Senate Committee's analysis of AB 1035, the author and proponents of the bill expressed that the bill was needed because existing laws were ineffective at producing arrests of persons who were believed to be sex workers, and the presence of such individuals added to crime and blight to neighborhoods. According to the author's statement provided in the analysis:

> Prostitutes and drug dealers blatantly work on the streets in defiance of law enforcement. Prostitution and drug dealing adversely affect the safety, welfare, and health of our neighborhoods while hurting small businesses and decreasing property values. While it is usually quite obvious that prostitutes and drug dealers are conducting business, existing law has been ineffective in securing their arrest.
>
> In order to be arrested, prostitutes must either solicit, accept, or engage in a sexual act for money. Drug dealers must be caught exchanging controlled substances for

> money. These criminals have become skilled in their operations -- they are familiar with undercover officers and know exactly what they can and cannot say to avoid arrest. They blatantly work the streets in defiance of law enforcement -- and add to the rampant crime and blight in some of our neighborhoods.

(Sen. Comm. on Crim. Procedure, Analysis of Assem. Bill No. 1035 (1995-1996 Reg. Sess.) as amended Apr. 6, 1995, p. d.)

The committee analysis cited concerns by opponents of the bill that enacting the proposed crime of loitering with the intent to commit prostitution may allow police officers to make arrests with substantially less than probable cause that a crime has been or will be committed. The bill provided broad discretion on what circumstances could satisfy the intent to commit prostitution, potentially leading to subjective and arbitrary arrests. (*Id.* at pp. i-j.)

This bill would repeal existing provisions of law related to loitering with the intent to commit prostitution. According to the author, the "creation and enactment of this offense began to cause more harm than help, because of the power it gave law enforcement to profile, target, harass, and criminalize without accountability."

3) **Policing of Sex Workers**: A study conducted in 2019 through the Los Angeles County Public Defender's office compiled data from all of the charges of violations of Penal Code section 653.22 reported from the Compton Branch of the Public Defender's office. During a one-week period of time, a total of 48 cases were reported. (Demeri, Policing of People in the Sex Trades in Compton: Analysis of Section 653.22 Clients, Law Offices of the Los Angeles County Public Defender (2019).)

The study found that the majority of arrests were made up of young Black women. 42.6 percent of arrests were for people aged 21-24 with the next highest rate being 23.4 percent for people aged 18-20. (Id. at p. 2.) As for race, 72.3 percent were Black with the next highest rate being 17 percent for Hispanic. (*Id.* at p. 4.)

The study shows that probable cause was most commonly established by the arrestee's presence in an area known for sex work, their clothing, and motioning in a flirtatious manner to vehicles. (*Id.* at p. 14.) Other stated reasons for establishing probable cause for the arrest include possession of a cellphone, possession of cash, reacting to presence of police, giving conflicting information about activities, among many other stated reasons. (*Ibid.*)

The study also discussed why criminalization of sex work contributes to societal harms:

> Evidence has shown that laws criminalizing sex work only contribute to human trafficking and violence, not stopping it. A recent study found that sex workers are three times more likely to experience violence when the sex trades are criminalized. Another study found that the erotic service's section of Craigslist reduced the national homicide rate of women by 17%. Criminalization creates significant barrier to exiting the sex trade, makes sex workers more reliant on exploitive third-parties, and justifies irrational societal hatred towards sex workers. In several instances, serial killers have cited sex workers lack of societal protection as reason to prey on their vulnerable status. Ultimately, the best way to

> combat human trafficking is not through increasing criminalization, but increasing social welfare nets, addressing issues of poverty, and reforming immigration.
>
> Decriminalization also maximizes public health outcomes. In a ground breaking report, the Lancet discovered that decriminalizing sex work would reduce the spread of HIV by 33% to 46% over a decade. When Rhode Island temporarily decriminalized indoor sex work, there was a sharp reduction in incidents of rape and gonorrhea. (*Id.* at p. 19, citations omitted.)

This bill would repeal existing provisions of law related to loitering with the intent to commit prostitution. It also makes conforming changes to Penal Code sections that reference the offense of loitering with intent to commit prostitution. This bill would not repeal or change other laws related to prostitution such as engaging in or soliciting sex work.

4) **Post-Conviction Relief**: Under existing law, loitering with the intent to commit prostitution is punishable as a misdemeanor. This bill seeks to repeal that offense and provides post-conviction relief for anyone who was previously convicted of a violation of the repealed statute. Specifically, people who are currently serving a sentence for loitering with intent to commit prostitution will be able to petition to have their sentence recalled and/or dismissed, as appropriate. People who have completed their sentence will also be able to apply for dismissal of the conviction and sealing. This bill states that a person who files such a petition or application shall be presumed to satisfy the criteria for having their conviction dismissed unless it is shown by clear and convincing evidence that the person does not satisfy the criteria.

   Based on the current version of the bill, it appears that people who have completed a sentence for loitering with intent to commit prostitution will be entitled to recall and dismissal of the sentence, but not seal their record. By contrast, people who have completed their sentence will be entitled to have their record sealed. It may be worth considering an amendment to address the disparity in the availability of sealing as a remedy for people who have completed their sentence vs. people who have had their sentence recalled and dismissed.

5) **Argument in Support**: According to the bill's co-sponsor, *ACLU California Action*: "The broad subjective nature of the anti-loitering law has created opportunities for law enforcement to engage in discriminatory policing that targets Black and Brown women and members of the transgender community. For instance, Black adults accounted for 56.1% of the Penal Code § 653.22 charges in Los Angeles between 2017-2019,1 despite only making up 8.9% of the city's population.2 Moreover, women accounted for 67.1% of all §653.22 charges, a figure that is likely an underrepresentation given that the data set may count many trans women as males.3

   "By repealing § 653.22, this measure eliminates a law that allows police to rely on bias rather than evidence to criminalize otherwise legal activities like walking, dressing or standing in public, and results in the harassment of LGTBQ+, Black, and Brown communities for simply looking like a "sex worker" in the subjective opinion of a police officer. Arresting sex workers or persons perceived to be sex workers increases safety risks for persons trading sex. When sex workers are under constant threat of arrest for loitering, they are more vulnerable

to exploitation and violence, and face greater barriers to accessing safe housing and legal employment.

"California must stop criminalizing people based on their gender or the color of their skin. We all deserve to exist in public peacefully without fear of arrest based on discriminatory stereotypes."

6) **Argument in Opposition**: According to the *Peace Officer's Research Association of California*: "Current law prohibits soliciting or engaging in an act of prostitution. It also prohibits loitering in a public place with the intent to commit prostitution, or directing, supervising, recruiting, or aiding a person who is loitering with the intent to commit prostitution. This bill would repeal the above provisions related to loitering with the intent to commit prostitution.

"Everyday more people fall victim to human trafficking. This bill would further hinder law enforcement efforts to not only identify and prosecute those who commit crimes related to prostitution and human trafficking, but also hinder the ability of identifying those being victimized."

7) **Prior Legislation**:

a) SB 233 (Wiener) Chapter 141, Statutes of 2019, made condoms inadmissible as evidence in specified crimes relating to prostitution and prohibited the arrest of a person for misdemeanor drug possession or prostitution-related offenses when the person is reporting certain, more serious crimes

b) AB 2243 (Friedman) Chapter 27, Statutes of 2018, prohibited the use of evidence that victims of, or witnesses to a violent felony as specified, extortion, or stalking, were engaged in an act of prostitution at or around the time they were the witness or victim to the crime.

c) AB 336 (Ammiano) Chapter 403, Statutes of 2014, established an evidentiary procedure for admitting condoms into evidence.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action (Co-Sponsor)
Equality California (Co-Sponsor)
Adult Industry Laborers and Artists Association
Anti-defamation League
Apla Health
Asian Pacific Islander Legal Outreach
Bayswan (bay Area Sex Worker Advocacy Network)
Best Practices Policy Project
California Attorneys for Criminal Justice
California Latinas for Reproductive Justice

California Public Defenders Association
California Public Defenders Association (CPDA)
California United for A Responsible Budget (CURB)
California Women's Law Center
Californians for Safety and Justice
Californians United for A Responsible Budget
Call Off Your Old Tired Ethics (coyote Ri)
Center for Lgbtq Economic Advancement & Research (CLEAR)
City of West Hollywood
Coalition on Homelessness, San Francisco
Coalition to Abolish Slavery & Trafficking (CAST)
Coalition to Abolish Slavery and Trafficking
Decriminalize Sex Work
Desert Aids Project
Dignity and Power Now
Drug Policy Alliance
Ella Baker Center for Human Rights
Erotic Service Providers Legal, Education, and Research Project
Fem Dems of Sacramento
Free Speech Coalition
Fresno Barrios Unidos
Green Party of California
Harm Reduction Coalition
If/when/how: Lawyering for Reproductive Justice
Initiate Justice
Justice At Last
Legal Aid At Work
Legal Services for Prisoners With Children
Los Angeles Community Health Project
Los Angeles County District Attorney's Office
Los Angeles Lgbt Center
Lyric
Mpact Global Action for Gay Men's Health and Human Rights
National Center for Lesbian Rights
National Council of Jewish Women Los Angeles
Oasis Legal Services
Positive Women's Network - USA
Prosecutors Alliance California
Reframe Health and Justice
Religious Coalition for Reproductive Choice California
San Francisco District Attorney's Office
San Francisco Public Defender
San Francisco Sex-positive Democratic Club
Santa Barbara Women's Political Committee
Scientists for Sex Worker Rights
Sero Project
Sex Worker's Outreach Project Los Angeles
Sex Workers Outreach Project Behind Bars
Sex Worker's Out Reach Project Los Angeles

St. James Infirmary
Strippers United INC
The Sex Workers Project of The Urban Justice Center
The Sharmus Outlaw Advocacy and Rights (SOAR) Institute
Transgender, Gendervariant, Intersex Justice Project
Transitions Clinic Network
Translatin@ Coalition
U.s. People Living With Hiv Caucus
Ucsf Alliance Health Project
US Prostitutes Collective
We the People - San Diego
Women's Foundation California
Young Women's Freedom Center

1 private individual

Oppose

Beacon4victims
California Family Council
Capitol Resource Institute
Los Angeles County Sheriff's Department
Magdalene Hope INC.
National Center on Sexual Exploitation (NCOSE)
Peace Officers Research Association of California (PORAC)
Restoration Ranch Women's Shelter
Stepping Into His Image

10 private individuals

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