California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

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

REGULAR ORDER OF BUSINESS

HEARD IN SIGN-IN ORDER

1.	SB 14	Grove	Serious felonies: human trafficking.
2.	SB 19	Seyarto	Anti-Fentanyl Abuse Task Force.
3.	SB 50	Bradford	Vehicles: enforcement.
4.	SB 88	Skinner	Pupil transportation: driver qualifications.
5.	SB 89	Ochoa Bogh	Crimes: stalking.
6.	SB 99	Umberg	Courts: remote proceedings for criminal cases.
7.	SB 345	Skinner	Health care services: legally protected health care activities.
8.	SB 441	Bradford	Criminal procedure: discovery.
9.	SB 442	Limón	Sexual battery.
10.	SB 449	Bradford	Peace officers: Peace Officer Standards Accountability Advisory Board.
11.	SB 485	Becker	Elections: election worker protections.
12.	SB 514	Archuleta	Wiretapping: authorization.
13.	SB 519	Atkins	Corrections.
14.	SB 596	Portantino	School employees: protection.
15.	SB 601	McGuire	Professions and vocations: contractors: home improvement contracts: prohibited business practices: limitation of actions.
16.	SB 690	Rubio	Domestic violence.
17.	SB 749	Smallwood-Cuevas	Criminal procedure: sentencing.(Urgency)
18.	SB 796	Alvarado-Gil	Threats: schools and places of worship.
19.	SB 883	Public Safety	Public Safety Omnibus.

COVID FOOTER

SUBJECT:

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

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

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

SB 14 (Grove) – As Amended April 27, 2023

SUMMARY: Adds human trafficking of a minor for purposes of a commercial sex act to the list of "serious' felonies subject to enhanced penalties, including under California's Three-Strikes Law.

EXISTING LAW:

1) Specifies that a person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to commit specified crimes including pimping, pandering, or child pornography, is guilty of human trafficking. A violation is punishable by imprisonment in the state prison as follows:

   a) Five, 8, or 12 years and a fine of not more than $500,000; or

   b) Fifteen years to life and a fine of not more than $500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c).)

2) Defines the following offenses as "serious" felonies:

   a) Murder or voluntary manslaughter;

   b) Mayhem;

   c) Rape;

   d) Sodomy by force, violence, duress, menace, or threat or fear of bodily injury;

   e) Oral copulation by force, violence, duress, menace or threat or fear of bodily injury;

   f) Lewd act with child under fourteen years of age;

   g) Any felony punishable by death or life imprisonment;

   h) Any felony in which defendant personally inflicts great bodily injury on any person other than an accomplice or personally uses a firearm;

   i) Attempted murder;

j) Assault with intent to commit rape or robbery;

k) Assault with a deadly weapon or instrument on a peace officer;

l) Assault by a life prisoner on a non-inmate;

m) Assault with a deadly weapon by an inmate;

n) Arson;

o) Exploding a destructive device or any explosive with intent to injure;

p) Exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem;

q) Exploding a destructive device or any explosive with intent to murder;

r) Burglary of an inhabited dwelling;

s) Robbery or bank robbery;

t) Kidnapping;

u) Holding a hostage by an inmate;

v) Attempt to commit a crime punishable by life imprisonment or death;

w) Any felony where defendant personally used a dangerous or deadly weapon;

x) Sale or furnishing heroin, cocaine, PCP, or methamphetamine to a minor;

y) Forcible penetration with a foreign object;

z) Grand theft involving a firearm;

aa) Any gang-related felony;

bb) Assault with the intent to commit mayhem or specified sex offenses;

cc) Maliciously throwing acid or flammable substances;

dd) Witness intimidation;

ee) Assault with a deadly weapon or firearm or assault on a peace officer or firefighter;

ff) Assault with a deadly weapon on a public transit employee;

gg) Criminal threats;

hh) Discharge of a firearm at an inhabited dwelling, vehicle, or aircraft;

ii) Commission of rape or sexual penetration in concert;

jj) Continuous sexual abuse of a child;

kk) Shooting from a vehicle;

ll) Any attempt to commit a "serious" felony other than assault;

mm) Any violation of the 10 years, 20 years, 25 years to life gun law;

nn) Possession or use of any weapon of mass destruction; and,

oo) Any conspiracy to commit a "serious" felony. (Pen. Code, § 1192.7, subd. (c).)

3) Prohibits plea bargaining in any case in which the indictment or information charges a "serious" felony unless there is insufficient evidence to prove the charge, the testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence. (Pen. Code, § 1192.7, subd. (a)(2).)

4) Provides that any person convicted of a "serious" felony who has previously been convicted of a "serious" felony receives, in addition to the sentence imposed by the court, an additional and consecutive five-year enhancement for each such prior conviction. (Pen. Code, § 667, subd. (a)(1).)

5) States that a conviction of a violent or serious felony counts as a prior conviction for sentencing under the Three Strikes Law. (Pen. Code, § 667.)

6) Specifies all references to existing statutes in specified portions of the Three Strikes Law, are to statutes as they existed on November 7, 2012. (Pen. Code, § 667, subd. (h).)

7) Provides that if a defendant is convicted of a felony offense and it is pled and proved that the defendant has been convicted of one prior serious or violent offense as defined, the term of imprisonment is twice the term otherwise imposed for the current offense. (Pen. Code, § 667.)

8) Provides that a defendant, who is convicted of a serious or violent felony offense or a specified sex offense, and it is pled and proved that the defendant has been convicted of two or more prior violent or serious offenses, the term is life in prison with a minimum term of 25 years. (Pen. Code, §§ 667, subds. (a) & (d)(2)(i); 1170.12, subd. (c)(2)(A).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "The fastest growing criminal industry in the world is the buying and selling of human beings and California is one of the largest hubs for human trafficking. SB 14 will include sex trafficking of minors in the lists of crimes that are

defined as serious under California law, making the crime a strike under the Three Strikes law. It will also help strengthen protections for the millions of victims of sex trafficking and serve as a deterrent for those that wish to perpetuate this horrendous crime."

2) **Current Penalties**: The offense addressed by this bill already carries very steep sentences. These punishments can often be further enhanced by any number of existing sentence enhancements.

Human trafficking of a minor for purposes of commercial sex is punishable by up to 12 years in prison. If the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, the penalty is 15-years-to-life. The court may also impose up to a $1.5 million fine on a person convicted of human trafficking. (Pen. Code §§ 236.1 and 236.4.) If great bodily injury is inflicted on the victim to commit the human trafficking crime, an enhancement of up to 10 more years in state prison can be added. (Pen. Code, § 236.4, subd. (b).) A person convicted of human trafficking for sexual conduct is also required to register as a sex offender. (Pen. Code, § 290, subd. (c).) Any property or money used to facilitate human trafficking is subject to seizure. (Pen. Code, § 236.8.)

This bill would add human trafficking of a minor for purposes of commercial sex to the list of "serious" felonies and make it a strike under California's Three Strikes law. While this crime is not listed as a "serious," if great bodily injury is inflicted it is already both a "violent" and a "serious" felony. (Pen. Code, §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8).) Moreover, the act of human trafficking could include crimes that are already designated as a "violent" or "serious" felony such as kidnapping, threatening a victim or witness, personal use of a dangerous or deadly weapon, among others. Additionally, any felony punishable by life in prison is already a "serious" felony (see Pen. Code, § 1192.7 subd. (c)(7)) which applies to human trafficking of minor victims for commercial sex acts when the crime involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c)(2).) Any number of sexual offenses involving minors are also already on the "serious" or "violent" felony list. (See generally, Pen. Code §§ 667.5, subd. (c), 1192.7, subd. (c).)

A person who has a conviction for a strike ("serious" or "violent" felony) faces increased prison time for any future felony conviction. Any future felony conviction when a person has a prior conviction for a single strike results in a doubling of the prison sentence. A person, with two prior convictions for strikes faces a minimum sentence of 25 years-to life for a felony conviction, if certain criteria are met. (Pen. Code § 667, subds. (a) and (d)(2)(i); Pen. Code § 1170.12, subd. (c)(2)(A).)

3) **Three Strikes Implications**: In general, serious felonies as specified in Penal Code section 1192.7, subdivision (c) are considered "strikes" for purposes of California's Three Strikes law. However, Proposition 36, which was passed by California voters on November 6, 2012, specifies that only the crimes that were included in the "serious felonies" list as of November 7, 2012, shall be treated as strikes for purposes of the Three Strikes law.

> Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to

(g), inclusive, of Section 667 (Three Strikes Law), are to those statutes as they existed on November 7, 2012.

(Pen. Code, § 667.1; see also Pen. Code, § 1170.125 ["Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012].)

This bill would make human trafficking of a minor for purposes of commercial sex, generally, a strike under California law because this bill would amend the date which defines the list of strikes to include the provisions of this bill. However, as discussed *ante*, by virtue of its 15-to-life penalty, where the human trafficking of the minor for purposes of commercial sex involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, it is already a strike. (Pen. Code, §§ 236.1, subd. (c)(2), 1192.7, subd. (c)(8).)

4) **Increased Penalties and Lack of Deterrent Effect:** The National Institute of Justice (NIJ) has looked into the concept of improving public safety through increased penalties. (https://nij.ojp.gov/about-nij.) As early as 2016, the NIJ has been publishing its findings that increasing punishment for given offenses does little to deter criminals from engaging in that behavior. ("Five Things About Deterrence," NIJ, May 2016, available at: https://www.ojp.gov/pdffiles1/nij/247350.pdf].) The NIJ has found that increasing penalties are generally ineffective and may exacerbate recidivism and actually reduce public safety. (*Ibid.*) These findings are consistent with other research from national institutions of renown. (See Travis, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council of the National Academies of Sciences, Engineering, and Medicine, April 2014, at pp. 130 -150 available at: https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1026&context=jj_pubs, [as of Feb. 25, 2022].) Rather than penalty increases, the NIJ, advocates for polices that "increase the perception that criminals will be caught and punished" because such perception is a vastly more powerful deterrent than increasing the punishment. ("Five Things About Deterrence," *supra*.)

5) **Argument in Support**: According to *3Strands Global Foundation*, the sponsor of this bill, "California consistently ranks number one in the nation in the number of human trafficking cases reported to the National Human Trafficking Hotline. The California Attorney General notes that California is one of the largest sites for human trafficking in the United States, recognizes the serious nature of this crime, and has defined it as "modern day slavery." Human trafficking is among the world's fastest growing criminal enterprises and is estimated to be a $150 billion-a-year global industry. It is a form of modern slavery that profits from the exploitation of our most vulnerable populations.

"SB 14 will give a voice to the millions of victims that have suffered from this horrific abuse. This bill will fight to protect victims, strengthen prevention and increase the prosecution of those who buy and sell human beings. It is about time that California starts to prosecute these horrendous acts as a serious crime."

6) **Argument in Opposition**: According to the *Ella Baker Center for Human Rights*, "The Three Strikes model of sentencing enhancements is fundamentally flawed and should be

repealed, not built upon. Three Strikes is ineffective in preventing crime or protecting our communities. It does not make victims whole or provide them with the healing that they need and deserve. Three Strikes has been proven to be applied in a manner that punishes Black, Latinx, and Indigenous people more severely than white people who commit similar acts. [¶]…[¶]

"For each additional year of incarceration, the California Legislature takes an additional $150,000 from the state General Fund. Multiplied by approximately 97,000 incarcerated people in state prisons serving very long sentences, the 2023-2024 fiscal year will spend 14.1 billion dollars from the state General Fund on prisons.. [sic] The state locks far too many billions of dollars into punishment schemes that could be better spent on mental health services in the community, the type of services that prevent crime and treat survivors of trauma.

"When reading what leaders in trauma treatment write, it is notable that punishment is not typically considered an essential element of recovery from sexual assault. In March 2017, UC-San Francisco Trauma Recovery Center (TRC) published its 'Integrated, Evidence-Based Approach for Survivors of Violent Crime.' In their Goals and Objective section, they wrote:

"'The overarching goal of TRC is to support the healing of the client's emotional and physical wounds along with restoration of their disrupted life circumstances. At the close of treatment, the client's health, broadly defined, will be stabilized and improving. Goals include working toward having safe housing; having an income sufficient to meet their needs; safety from further violence; the emotional health to cope with daily life, including a sense of hope for the future; access to needed physical or behavioral health treatments; incorporating healthy self-care strategies; employment or school, as appropriate; and being meaningfully engaged with others, such as family, church, and community.'

"In their 228-page manual, nowhere do they advocate for greater punishment as a means of healing a survivor's trauma. The word 'punish' does not appear. The only references to jail or prison was to acknowledge that decreased spending on mass incarceration due to Prop 47 would result in greater investment in mental health and drug diversion programs, as well as other services.

"The Ella Baker Center respectfully asserts that we have adequate means to punish sex trafficking of a minor. What we lack is adequate investment in schools, jobs, mental health and other services that can prevent acts of violence, and inadequate investment in trauma services. This bill will further exacerbate these fiscal inequities."

7) **Related Legislation**: AB 229 (Joe Patterson), would have expanded the crimes that are within the definition of a violent felony subject to additional penalties, including for purposes of California's Three Strikes Law, to include additional forms of sexual crimes, human trafficking, and felony domestic violence. AB 229 failed passage in this committee.

8) **Prior Legislation**:

   a) AB 1655 (Seyarto), of the 2021-2022 Legislative Session, would have prohibited plea bargaining in cases charging human trafficking of a minor, except in specified

circumstances. AB 1665 was held in the Assembly Appropriations Committee.

b) SB 1042 (Grove), of the 2021-2022 Legislative Session, would have added human trafficking to the list of "violent" felonies as well as to the list of "serious" felonies for all purposes, including for purposes of the Three Strikes Law. SB 1042 failed passage in the Senate Public Safety Committee.

c) SB 1072 (Dahle), of the 2021-2022 Legislative Session, would have added human sex trafficking to the list of "violent" felonies. SB 1072 was not heard in the Senate Public Safety Committee at the author's request.

d) AB 537 (Acosta), of the 2017-2018 Legislative Session, would have added crimes, including human trafficking involving sexual exploitation, to the list of "serious" felonies. AB 537 failed passage in this committee.

e) AB 1321 (Stone), of the 2013-2014 Legislative Session, would have added crimes, including human trafficking, to the list of "serious" felonies. AB 1321 was held in this committee.

f) AB 1188 (Pan), of the 2011-2012 Legislative Session, would have added four new offenses relating to child abuse to the list of "violent" felonies, and added five new offenses related to human trafficking and the abuse of a child to the "serious" felony list. AB 1188 failed passage in this committee.

g) AB 16 (Swanson), of the 2009-2010 Legislative Session, would have added human trafficking to the list of "serious" and "violent" felonies. AB 16 failed passage in the Assembly Appropriations Committee.

h) SB 440 (Denham), of the 2009-2010 Legislative Session, would have added the crimes of child abuse likely to produce great bodily injury or death, physical child abuse, killing, mutilating, or torturing a domestic animal, elder abuse for which the defendant was incarcerated in state prison, and escape or attempted escape by force or violence to the lists of "serious" felonies as well as to the list of "violent" felonies, as specified; and added the crimes of human trafficking, stalking, solicitation to commit murder, fleeing or attempting to elude a pursuing peace officer, willful flight or attempting to elude a pursuing peace officer, and felon in possession of a firearm, to the list of "serious felonies," as specified. SB 440 failed passage in the Senate Public Safety Committee.

i) AB 426 (Galgiani), of the 2007-2008 Legislative Session, would have added human trafficking to the list of "serious" and "violent" felonies. AB 426 failed passage in the Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

3strands Global Foundation (Sponsor)
Bakersfield Crisis Pregnancy Center, INC.

Bakersfield Mayor Karen Goh
Bakersfield Police Department
Bakersfield Republican Women Federated
Bear Valley Police Department
Bridge Network
California Association of Highway Patrolmen
California Capitol Connection
California Catholic Conference
California District Attorneys Association
California Faculty Association
California Family Council
California Massage Therapy Council
California Medical Association
California Police Chiefs Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
Chief Probation Officers' of California (CPOC)
Church without Walls
City of Bakersfield
City of Clovis
City of Fresno
City of Needles
City of Roseville Police Department
City of San Juan Capistrano
City of Santa Clarita
City of Taft
City of Tehachapi
City of Visalia
City of Yuba City
Clovis Police Department
Concerned Women for America
Connect 2 Change
Cornerstone Synergy
County of Fresno
County of Kern
Crime Victims United of California
Empowerment (dess Perkins Foundation)
Exeter Police Department
Flood Bakersfield Ministries, INC.
Fresno County District Attorneys Office
Fresno Police Department
Harvest International Ministry
Helping US
Hoffman Hospice
Homestead Valley Community Council
Hope for Justice
Kern County Board of Supervisors
Kern County Department of Human Services
Kern County District Attorney's Office

Kern County Probation Department
Kern County Sheriff's Office
Lake Isabella & Bodfish Property Owner's Association
Love Never Fails
Lucerne Valley Economic Development Association (LVEDA)
Merced County District Attorney's Office
Mom Army
Monterey County District Attorney's Office - ODA - Salinas, CA
National Center for Missing & Exploited Children
National Center on Sexual Exploitation (NCOSE)
Orange County Sheriff's Department
Peace Officers Research Association of California (PORAC)
Project 14:14 INC.
Project Rescue
Real Impact.
Sacramento County District Attorney
San Bernardino County Sheriff's Department
San Diego County District Attorney's Office
San Diego County Supervisor Joel Anderson's Office
Santa Clara County District Attorney's Office
Saving Innocence
Soroptimist International of North San Diego
Table Mountain Rancheria
The Light House Recovery Program, INC.
Treasures
Tulare County Child Abuse Prevention Council
Tulare County District Attorney's Offiice
Tulare County Supervisor Dennis Townsend
Tulare County Supervisor Larry Micari
Tule River Indian Tribe of California
UPS
Ventura County District Attorney
Veterans for Child Rescue
Visalia Police Department
Woman Ii Woman INC
Women's Center-high Desert, INC.
Yolo County District Attorney
Zoe International

13 Private Individuals

Opposition

California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Public Defenders Association
Ella Baker Center for Human Rights
Initiate Justice
San Francisco Public Defender

Sister Warriors Freedom Coalition

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

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

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

SB 19 (Seyarto) – As Amended June 22, 2023

SUMMARY: Creates the Anti-Fentanyl Abuse Task Force to evaluate the nature and extent fentanyl abuse in California and to develop policy recommendations for addressing it. Specifically, **this bill**:

1) Establishes the Anti-Fentanyl Abuse Task Force, upon appropriation by the Legislature, to:

   a) Collect and organize data on the nature and extent of fentanyl abuse in California;

   b) Examine collaborative models between government and nongovernmental organizations for protecting persons who misuse fentanyl or other illicit substances that may contain fentanyl.

   c) Develop policy recommendations for the implementation of evidence-based practices to reduce fentanyl overdoses, including, without limitation, overdose prevention centers, fentanyl testing strip distribution, and access to overdose reversal treatments.

   d) Measure and evaluate the progress of the state in preventing fentanyl abuse and fatal fentanyl overdoses, protecting and providing assistance to persons who misuse fentanyl or other illicit substances that may contain fentanyl, and prosecuting persons engaged in the illegal manufacture, sale, and trafficking of fentanyl;

   e) Evaluate approaches to increase public awareness of fentanyl abuse;

   f) Analyze existing statutes for their adequacy in addressing fentanyl abuse and, if the analysis determines that those statutes are inadequate, recommend revisions to those statutes or the enactment of new statutes that specifically define and address fentanyl abuse; and,

   g) Consult with governmental and nongovernmental organizations in developing recommendations to strengthen state and local efforts to prevent fentanyl abuse and fatal fentanyl overdoses, protect and assist persons who misuse fentanyl or other illicit substances that may contain fentanyl, and prosecute individuals engaged in the illegal manufacture, sale, and trafficking of fentanyl.

2) Requires the Attorney General or their designee to chair the task force, and requires the Department of Justice (DOJ) to provide staff and support for the task force, to the extent that resources are available.

3) Provides that members of the task force serve at the pleasure of the respective appointing authority, and that reimbursement of necessary expenses may be provided at the discretion of the respective appointing authority or agency participating in the task force.

4) Provides that the task force shall be comprised of the following representatives or their designees:

   a) The Attorney General;

   b) The Chairperson of the Judicial Council of California;

   c) The Director of the State Department of Public Health;

   d) The Director of the State Department of Health Care Services;

   e) One member of the Senate, appointed by the Senate Rules Committee;

   f) One member of the Assembly, appointed by the Speaker of the Assembly;

   g) One representative from the California District Attorneys Association;

   h) One representative from the California Public Defenders Association;

   i) One representative from the California Hospital Association;

   j) One representative from the California Society of Addiction of Medicine;

   k) One representative from the County Health Executives Association of California;

   l) Three representatives of local law enforcement, one selected by the California State Sheriff's Association and one selected by the California Police Chiefs' Association, one selected by the California Highway Patrol;

   m) One representative from a community organizations representing persons with opioid use disorder, appointed by the Governor;

   n) One university researcher and one mental health professional, appointed by the Governor;

   o) A representative of a local educational agency, appointed by the Superintendent of Public Instruction;

   p) The Speaker of the Assembly shall appoint one representative from an organization that provides services to homeless individuals and one representative from an organization that services persons who misuse fentanyl or other illicit substances that may contain fentanyl in southern California;

   q) The Senate Rules Committee shall appoint one representative from an organization that provides services to homeless individuals and one representative from an organization that serves persons who misuse fentanyl or other illicit substances that may contain

fentanyl in northern California; and

r) The Governor shall appoint one person in recovery from fentanyl or opioid abuse, and one person who has lost a family member to a fatal fentanyl overdose.

5) Requires members of the task force, whenever possible, to have experience providing services to persons who misuse fentanyl or other illicit substances that may contain fentanyl, or to have knowledge of fentanyl abuse issues.

6) Provides that the task force must meet once every two months.

7) Provides that subcommittees may be formed and meet as necessary.

8) Requires all meetings to be open to the public.

9) Provides that the first meeting of the task force shall be held no later than March 1, 2024.

10) Requires the task force, on or before July 1, 2025, to report its findings and recommendations to the Governor, the Attorney General, and the Legislature.

11) Provides that, at the request of any member, the report may include minority findings and recommendations.

12) Defines "fentanyl abuse" as "the use of fentanyl or produces containing fentanyl in a manner or with a frequency that negatively impacts one or more areas of physical, mental, or emotional health."

13) Provides a sunset date of January 1, 2026.

EXISTING LAW:

1) Lists controlled substances in five "schedules" - intended to list drugs in decreasing order of harm and increasing medical utility or safety - and provides penalties for possession of and commerce in controlled substances. Schedule I includes the most serious and heavily controlled substances, with Schedule V being the least serious and most lightly controlled substances. (Health & Saf. Code, §§ 11054-11058.)

2) Lists fentanyl on Schedule II. (Health & Saf. Code, § 11055.)

3) Provides that a person who possesses any controlled substance, as specified, unless upon a valid prescription, shall be punished by imprisonment in a county jail for not more than one year, unless that person has had one or more prior convictions, as specified. (Health & Saf. Code, § 11350.)

4) States that in addition to the term of imprisonment provided by law for persons convicted of violating specified drug offenses, including possession, the trial court may impose a fine not exceeding $20,000 for each offense. (Health & Saf. Code, § 11372, subd. (a).)

5) Commits the state to reinvesting criminal justice resources to support community corrections programs and evidence-based practices that will achieve improved public safety returns on the state's substantial investment in its criminal justice system. (Pen. Code, § 3450, subd. (b)(4).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "The potency and availability of illicit fentanyl is a threat to all Californians. Local agencies need the tools to keep our communities safe and to hold those responsible for poisoning our communities accountable for this catastrophe. This taskforce will identify the resources necessary to respond to and bring the scourge of fentanyl under control. Fentanyl is a new threat and unlike anything the state has seen before, our communities deserve a coordinated policy response with proven strategies which this taskforce will recommend."

2) **The Use of Fentanyl**: The Drug Enforcement Agency classifies Fentanyl as a Schedule II drug. Schedule II drugs are considered highly addictive and therefore highly regulated. Drugs on this list are for medical use and require a medical prescription.

   According to the Centers for Disease Control (CDC), "Pharmaceutical fentanyl is a synthetic opioid, approved for treating severe pain, typically advanced cancer pain. It is 50 to 100 times more potent than morphine. It is prescribed in the form of transdermal patches or lozenges and can be diverted for misuse and abuse in the United States.

   "However, most recent cases of fentanyl-related harm, overdose, and death in the U.S. are linked to illegally made fentanyl.[2] It is sold through illegal drug markets for its heroin-like effect. It is often mixed with heroin and/or cocaine as a combination product—with or without the user's knowledge—to increase its euphoric effects." (https://www.cdc.gov/opioids/basics/fentanyl.html)

   In California, the number of overdoses relating to fentanyl are growing at an unprecedented rate. The California Department of Public Health (CDPH) states that, "The opiod epidemic is dynamic, complex, and rapidly changing. Between 2012 and 2018, fentanyl overdose deaths increased by more than 800%—from 82 to 786." (CDPH, Overdose Prevention Initiative <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/SACB/Pages/PrescriptionDrugOverdoseProgram.aspx?msclkid=99f1af92b9e411ec97e3e1fe58cde884> [last visited Jun. 29, 2023].) In 2021, there were 5,961 deaths related to fentanyl overdoses. (CDPH, California Overdose Surveillance Dashboard <https://skylab.cdph.ca.gov/ODdash/?tab=Home> [last visited Jun. 29, 2023]).

   CDPH is at the forefront of the fentanyl crisis in California. According to their website, "CDPH works closely with local health departments, opioid safety coalitions, and other local level partners to support local prevention and intervention efforts. Working closely with local health departments, opioid safety coalitions, and other local level partners allows CDPH to support local prevention and intervention efforts that address the specific and unique trends and needs of California's communities." (https://www.cdph.ca.gov/Programs/CCDPHP/sapb/Pages/Fentanyl.aspx?utm_source=dc_gs

&utm_medium=paidsearch&utm_campaign=dc_ope__mc_en&utm_term=na_na&utm_content=na&gclid=Cj0KCQjw1_SkBhDwARIsANbGpFs7N_SNtVe0W987Ci8tTS1QeDJgCOO3yCHv9_OSYWO_WvE1DzXcYxcaAsoKEALw_wcB) [last visited Jun. 29, 2023]).

3) **Current Law Enforcement Efforts**: Due to the severity and rapid prevalence of the fentanyl crisis, the Drug Enforcement Administration (DEA) announced on February 7, 2022 a new initiative aimed -- Operation Overdrive --at combatting the rising rates of drug-related violent crime and overdose deaths plaguing American communities. (<https://www.dea.gov/press-releases/2022/02/07/dea-washington-division-launches-operation-overdrive> [July 5, 2023]). In January, the DEA Washington Division announced *their new data-driven approach* to combatting violent crime and overdose deaths across the area, in order to devote its law enforcement resources to where they will have the most impact: the communities where criminal drug networks are causing the most harm. *(Id.)*

Operation Overdrive, launching in 34 cities and 23 states across the U.S., is launching in 3 cities in our area – Baltimore, Maryland; Washington, D.C.; and Richmond, Virginia. Operation Overdrive aims to use a data-driven, intelligence-led approach to identifying and dismantling criminal drug networks operating in areas with the highest rates of violence and overdoses. *(Id.)*

Speaker Emerita Pelosi requested to have San Francisco included as part of Operation Overdrive. The U.S. Department of Justice responded to the inquiry with the following, "The Deputy Attorney General and the DEA Administrator are committed to including San Francisco in the upcoming phase of Operation Overdrive. DEA is now assessing the results of their enforcement operations in 57 Operation Overdrive locations across the country, while also reviewing the most recent violent crime and drug poisoning data, to select the remaining Operation Overdrive locations. DEA expects to launch this next phase of Operation Overdrive in the coming months."

In addition to efforts at the federal level, the Governor has also made a commitment to combat the fentanyl crisis. In a recent press release, the governor's office announced, "As part of the joint public safety partnership with the City of San Francisco, today Governor Gavin Newsom announced he is directing the California Highway Patrol (CHP) to expand its operational footprint — doubling the number of officers deployed — and authorizing the CHP to conduct targeted surges with law enforcement partners to fight crime and further crackdown on the fentanyl crisis gripping San Francisco. Personnel assigned to the expanded operation are expected to include some of the more than 100 new CHP officers slated to graduate from the CHP Academy this week, as well as active officers within the CHP's Golden Gate Division." (<https://www.gov.ca.gov/2023/06/page/6/> [Jul. 5, 2023])

This bill would create a task force to address the fentanyl crisis and would consist of 20 individuals from various backgrounds including, but not limited to: the Attorney General; the Chairperson of the Judicial Council of California; law enforcement representatives; public health officials; and individuals with substance use disorders. This bill would require that the task force meet at least once every two months and that the first meeting of the task force be held by March 1, 2024. The task force must report its findings and recommendations to the Governor, the Attorney General, and the Legislature by July 1, 2025. The provisions of this

bill would sunset on January 1, 2026.

4) **Duplication of Efforts – The State Opioid Task Force**: The state's 2022-23 budget included $7.9 million in 2022-23 and $6.7 million ongoing to fund the Fentanyl Task Force within DOJ to help tackle the fentanyl crisis. (*Governor's Budget Summary – 2023-24* at p. 117 <https://ebudget.ca.gov/2022-23/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf> [Jun. 29, 2023].) The task force includes 25 new positions within DOJ to support those efforts. (*Ibid.*) This bill would require the DOJ to provide staff and support for a separate task force, which could result in some duplication of effort.

   Building on the 2022-23 Budget, the State's 2023-24 allocates additional funding to combat fentanyl abuse. The budget allocates $93 million over the next four years, including $79 million for Naloxone distribution projects; $10 million for grants for education, testing, recovery, and support services; $4 million to make test strips more available; and, $3.5 million for overdose medication for all middle and high schools. (*Governor's Budget Summary – 2023-24* at p. 69 <https://ebudget.ca.gov/FullBudgetSummary.pdf> [Jun. 29, 2023].)

   The Governor's Master Plan for Tackling the Fentanyl and Opioid Crisis also includes $30 million to expand California National Guard's work to prevent drug-trafficking transnational criminal organizations and $15 million over two years to establish and operate the Fentanyl Enforcement Program within the Department of Justice to combat manufacturing, distribution, and trafficking. To the extent this bill requires the task force to conduct a public awareness campaign, the Governor has allocated $40.8 million education and awareness campaign to establish partnerships an create messaging and education tools for parents and educators and $23 million substance use disorder workforce grants to develop substance use disorder training for non-behavioral health professionals working with children and youth. (*Governor Newsom's Master Plan for Tackling the Fentanyl and Opioid Crisis* <https://www.gov.ca.gov/wp-content/uploads/2023/03/Fentanyl-Opioids-Glossy-Plan_3.20.23.pdf?emrc=86c07e> [Jun. 29, 2023].)

5) **Argument in Support**: According to *The California Hospital Association,* "While the Statewide Overdose Safety Workgroup (established in 2014 by the California Department of Public Health) works to address opioid use, misuse, addiction, and related overdoses, the proposed task force would have additional responsibilities that are not supported by the workgroup, such as analyzing whether existing law adequately addresses fentanyl abuse. In addition, the task force would focus on fentanyl while the workgroup is tasked with addressing opioids more broadly. Having a specific focus would allow the task force to enhance the state's current work by examining and providing recommendations to state leadership on fentanyl-related issues from a coordinated, collaborative, and multisector approach.

   "As hospitals are on the front lines of this growing problem and treat fentanyl patients daily, we greatly appreciate that SB 19 includes a representative of CHA on the task force. Having a hospital voice at the table is critical to understanding the best response to this crisis from all perspectives, including health care providers tasked with caring for people in crisis."

6) **Argument in Opposition**: According to *Drug Policy Alliance (DPA),* "DPA understands the need to evaluate statewide efforts to help inform strategies to reduce the harms associated

with fentanyl use, however, we strongly believe that any attempt to examine and measure the impact of fentanyl must be led by public health experts, with the specialty in harm reduction and substance use disorder treatment as well as drug policy experts. The approach taken in SB 19 structures this task force as being more prosecutorial focused rather than recognizing substance use as being a health crisis. In a year when the state is facing billions of dollars in deficit, it's counterproductive to pour more funds into a law enforcement approach to analyze the state's work on mitigating the harms of fentanyl. Creating another enforcement styled body will not help solve the opioid overdose crisis in our state, rather it runs the risk of operating counter to existing health centered task forces and working groups. Additionally, the structure of this bill strays away from the evidence-based healthcare treatment approaches that have been proven to work.

"To best accomplish the bills stated goal to "*mobilize state and local resources to evaluate the best practices for combating fentanyl*," we believe it is necessary to have majority representation by directly-involved academics and experts including California health providers, harm reduction organizations and treatment professionals. It's concerning that out of the twenty-one members of the task force only two members will be people with lived experience.

"The state would be better served by further investing in a work group that is overseen by experts prioritizing and centering health approaches to addressing the root causes of the overdose crisis. We'd also recommend to revisit the reimbursement provision in the bill as it doesn't seem fair to have "reimbursement of necessary expenses" at the discretion of the person/entity appointing the member.

"Until this task force is restructured, we ask the legislature to support the work that the California Department of Public Health is already doing and ensuring that the state makes investments in harm reduction, increasing access to treatment on demand, and building out the substance use assessment system so that referrals and information can be provided directly and in real time to those individuals and communities in need."

7) **Related Legislation**: AB 33 (Bains), would establish the Fentanyl Addiction and Overdose Prevention Task Force. AB 33 is substantially similar to this bill and is pending hearing in the Senate Committee on Appropriations.

8) **Prior Legislation**:

   a) AB 1673 (Seyarto), was substantially similar to this bill. AB 1673 was held in the Assembly Committee on Appropriations.

   b) AB 2365 (Patterson), Chapter 783, Statutes of 2022, requires the California Health and Human Services Agency to, upon appropriation, establish a grant program to reduce fentanyl overdoses and use throughout the state by giving six one-time grants to increase local efforts in education, testing, recovery, and support services, as specified.

   c) SB 1395 (Bates) of the 2019 – 2020 Legislative, would have required the AG to establish and chair the Southern California Fentanyl Task Force (SCFTF), which would have developed information, made recommendations, and reported findings to the DOJ and to the Legislature regarding matters relating to the fentanyl crisis in southern California

communities. SB 1395 was held in the Senate Public Safety Committee.

d) AB 186 (Eggman), of the 2017 – 2018 Legislative Session, would have authorized the City and County of San Francisco to approve entities to operate an overdose prevention program for adults supervised by healthcare professionals or other trained staff where people can safely use drugs and get access to referrals to addiction treatment. AB 186 was vetoed by Governor Brown.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Academy of Family Physicians
California Coalition of School Safety Professionals
California District Attorneys Association
California Hospital Association
California Society of Health System Pharmacists
California State Sheriffs' Association
City of Alameda
City of Carlsbad
City of Laguna Niguel
City of Murrieta
City of Norwalk
City of Placentia
City of Riverside
Claremont Police Officers Association
Corona Police Officers Association
County Health Executives Association of California (CHEAC)
Culver City Police Officers' Association
Fullerton Police Officers' Association
Inglewood Police Officers Association
League of California Cities
Los Angeles School Police Officers Association
Newport Beach Police Association
Orange County District Attorney
Orange; County of
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Assocation
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Upland Police Officers Association

Oppose

Drug Policy Alliance

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

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

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

SB 50 (Bradford) – As Amended June 29, 2023

SUMMARY: Prohibits peace officers from initiating a traffic stop for specified low-level infractions unless a separate, independent basis for a stop exists, and to authorize local authorities to enforce traffic violations through the use of non-sworn government employees. Specifically, **this bill**:

1) Prohibits a peace officer from stopping or detaining the operator of a motor vehicle or a bicycle for a low-level infraction unless there is a separate independent basis to initiate the stop, or unless more than one low-level infraction is observed.

2) Defines "low-level infraction" as a Vehicle Code violation related to any of the following:

   a) Registration of a vehicle or vehicle equipment;

   b) Positioning or number of license plates when at least one plate is clearly displayed;

   c) Vehicle lighting equipment not illuminating, if the violation is limited to a single brake light, headlight, rear license plate, or running light, or a single bulb in a larger light of the same;

   d) Vehicle bumper equipment; or,

   e) Bicycle equipment or operation.

3) Provides that "low-level infraction" does not include violations relating to commercial vehicles.

4) Authorizes an officer's agency, if an office does not have grounds to stop or detain the operator of a motor vehicle or bicycle and the officer can identify the owner of the vehicle, to mail a citation to the owner or send a warning letter identifying the violation and instructing the owner to correct the defect or otherwise remedy the violation.

5) Provides that a county, city, municipality, or any other local authority is not precluded from enforcing a violation provided in Vehicle Code through government employees who are not peace officers.

6) Clarifies that local authorities may adopt rules and regulations by ordinance or resolution regulating traffic by means of government employees, as well as traffic officers.

EXISTING LAW:

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

2) Requires each state and local agency that employs peace officers to annually report to the Attorney General data on all stops conducted by that agency's peace officers for the preceding calendar year. (Gov. Code, § 12525.5, subd. (a)(1).)

3) Requires reports on stops submitted to the Attorney General to include, at a minimum, the following information:

   a) The time, date, and location of the stop;

   b) The reason for the stop;

   c) The result of the stop, such as: no action, warning, citation, arrest, etc.;

   d) If a warning or citation was issued, the warning provided or the violation cited;

   e) If an arrest was made, the offense charged;

   f) The perceived race or ethnicity, gender, and approximate age of the person stopped. For motor vehicle stops, this paragraph only applies to the driver unless the officer took actions with regard to the passenger; and,

   g) Actions taken by the peace officer, as specified. (Gov. Code, § 12525.5, subd. (b)(1)-(7).)

4) Provides that law enforcement agencies shall not report personal identifying information of the individuals stopped to the Attorney General, and that all other information in the reports, except for unique identifying information of the officer involved, shall be available to the public. (Gov. Code, § 12525.5, subd. (d).)

5) Defines "stop," for the purposes of reports sent by law enforcement agencies to the Attorney General, as any detention by a peace officer of a person, or any peace officer interaction with a person in which the peace officer conducts a search, including a consensual search, of the person's body or property in the person's possession or control. (Gov. Code, § 12525.5, subd. (g)(2).)

6) Finds and declares that pedestrians, users of public transportation, and vehicular occupants who have been stopped, searched, interrogated, and subjected to a property seizure by a peace officer for no reason other than the color of their skin, national origin, religion, gender identity or expression, housing status, sexual orientation, or mental or physical disability are the victims of discriminatory practices. (Pen. Code, § 13519.4, subd. (d)(4).)

7) Creates the Racial and Identity Profiling Advisory Board (RIPA), which, among other duties, is required to conduct and consult available, evidence-based research on intentional and

implicit biases, and law enforcement stop, search, and seizure tactics. (Pen. Code, § 13519.4, subd. (j)(3)(D).)

8) Prohibits a peace officer from engaging in racial or identity profiling, as defined. (Pen. Code, § 13519.4, subds. (e) & (f).)

9) Provides that the provisions of the Vehicle Code are applicable and uniform throughout the state and in all counties and municipalities therein, and a local authority shall not enact or enforce any ordinance or resolution on matters covered by the Vehicle Code, as specified, unless expressly authorized by that code. (Veh. Code, § 21, subd. (a).)

10) Provides that a person shall not drive, move, or leave standing upon a highway, or in an off-street public parking facility, any motor vehicle unless it is registered with the DMV and the appropriate fees have been paid, with exceptions. (Veh. Code, § 4000).

11) Requires motorists to have their valid driver's license in their immediate possession when driving a motor vehicle, and to present their license for examination upon demand of a peace officer. (Veh. Code, § 12951, subds. (a) & (b).)

12) Establishes various requirements regarding the equipment specifications and operation of bicycles, as well as related safety devices. (Veh. Code, §§ 21201 & 21212).

13) Establishes various requirements regarding the display of license plates and registration tabs and stickers. (Veh. Code, §§ 5200-5206).

14) Establishes various requirements regarding the functionality of vehicle lighting equipment. (Veh. Code, § 24250 et. seq.).

15) Requires every passenger vehicle registered in this state to be equipped with a front bumper and rear bumper. (Veh. Code, § 28701.)

16) Requires the California Department of Motor Vehicles (DMV) to include in the California Driver's Handbook information regarding a person's civil rights during a traffic stop. (Veh. Code, § 1653.6, subd. (a)(4).)

17) Makes it unlawful to willfully fail or refuse to comply with a lawful order, signal or direction of a uniformed peace officer or to refuse to submit to a lawful inspection pursuant to the Vehicle Code. (Veh. Code, § 2800, sudb. (a).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 50 will limit law enforcement's ability to stop people for minor, non-safety-related traffic infractions, unless there is an independent, safety-related basis to initiate the stop. It will also provide technical clarification to ensure that localities can explore non-law enforcement approaches to traffic safety. In doing so, SB 50 will help protect Californians of color from unnecessary harms and help ensure that public

dollars dedicated to community safety are used more effectively."

2) **Pretext Stops:** The Fourth Amendment of the United States Constitution provides in part that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The United States Supreme Court has held that temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of persons within the meaning of this provision. (See *Delaware* v. *Prouse* (1979) 440 U.S. 648, 653; *United States* v. *Martinez Fuerte* (1976) 428 U.S. 543, 556; *United States* v. *Brignoni Ponce* (1975) 422 U.S. 873, 878.) In *Whren v. United States* (1996) 517 U.S. 806, the Court further held that "the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective." (*Id.* at pp. , 809-819.) The Court's decision in *Whren* has given rise to what have been dubbed "pretext stops," a practice in which a law enforcement officer uses a minor traffic violation as a pretext to stop a vehicle in order to investigate other possible crimes.

   Officers stop drivers for low-level offenses such as tinted windows, broken taillights, license plates improperly affixed to vehicles, obstructed windshields or objects hanging from a rearview mirror. (See, e.g., Pen. Code § 26708(a)(2); *People v. Colbert* (2007) Cal.App.4th 1068, 1073 [a stop under § 26708(a)(2) is reasonable when the police officer "explicitly testifie[s] that the air freshener was 'large enough to obstruct [the driver's] view through the front windshield"]; *People v. Guerra* (2002) 2002 WL 31717061 [stopping a driver to see whether a neck chain hanging from a rearview mirror violated the Vehicle Code]; Baker & Bogel-Burroughs, *How a Common Air Freshener Can Result in a High-Stakes Traffic Stop*, N.Y. Times (Apr. 17, 2021) <https://www.nytimes.com/2021/04/17/us/police-air-fresheners.html?referringSource=articleShare> ["prohibitions against objects hanging from rearview mirrors can extend to fuzzy dice, graduation tassels, and rosaries"].)

3) **Racial Disparity in Traffic Stops:** As mentioned above, much of the criticism of pretext stops has centered around their disparate impact on communities of color. In 2020, the Stanford Open Policing Project published an analysis of almost 100 million police traffic stops conducted between 2011 and 2017 by 21 state patrol agencies (including the California Highway Patrol) and 29 municipal police departments nationwide. One of the study's central findings was that "police stopped and searched black and Hispanic drivers on the basis of less evidence used in stopping white drivers, who are searched less but are more likely to be found with illegal items." (Pierson et. al, *A large-scale analysis of racial disparities in police stops across the United States*, Nature Human Behavior (July 2020) p. 743 <https://5harad.com/papers/100M-stops.pdf> [as of July 3, 2023].) Moreover, these stops based on routine traffic violations often turn violent. A 2021 New York Times investigation found that in the preceding 5 years, police officers had killed at least 400 unarmed drivers and passengers who were not under pursuit for a violent crime, while about 60 officers had died at the hands of motorists who had been pulled over. (Kirkpatrick et. al, *Pulled Over: Why Many Police Traffic Stops Turn Deadly*, The New York Times (Oct. 31, 2021) <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> [as of July 3, 2023].)

   The Racial and Identity Profiling Act (RIPA) of 2015, expressly prohibits racial and identity

profiling by law enforcement and requires law enforcement agencies to report vehicle stop data to the DOJ. A 2022 analysis conducted by the Public Policy Institute of California of RIPA stop data collected in 2019 California found the following:

> [Our] research finds that Black Californians are more than twice as likely to be searched as white Californians, but searches of Black Californians are somewhat less likely to yield contraband or evidence. [...] Black Californians are markedly overrepresented in traffic stops [...] and white drivers are somewhat underrepresented. [...]
>
> The likelihood of being searched during a traffic stop varies across race and ethnicity as well as across agency type. Black drivers stopped by local police and sheriff departments are searched in 20 percent of traffic stops, while the search rates for Latino and white drivers are 13 percent and 6 percent, respectively. [...] While roughly one in ten white drivers stopped by local law enforcement in the late evening are searched for contraband or evidence, about one in four Black drivers and one in five Latino drivers are searched. [...] The higher search rates of Latino and Black drivers in traffic stops made by local law enforcement are not associated with higher rates of discovery of contraband or evidence.

(Lofstrom et. al, *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California (Oct. 2022) <https://www.ppic.org/publication/racial-disparities-in-traffic-stops/"> [as of June 26, 2023].)

In January, 2023, the RIPA Board released its sixth annual stop data report of data collected in the 2021 calendar year, which showed that the most commonly reported reason for a stop (86.8%) across all racial/ethnic groups was a traffic violation, and that individuals perceived as Black or Hispanic comprised nearly 58% of the stops reported (against a total population share of 42%), while just under 31% of the stops involved individuals perceived as white (against a total population share of 35%). Additionally, the report found that officers used force against people perceived as Black at 2.2 times the rate of individuals perceived as white. (See RIPA Board, Annual Report 2022 <https://oag.ca.gov/system/files/media/ripa-board-report-2022.pdf> [as of July 3, 2023]; Press Release, *California Racial and Identity Profiling Advisory Board Releases Report on 2021 Police Stop Data*, DOJ (Jan. 3, 2023) <https://oag.ca.gov/news/press-releases/california-racial-and-identity-profiling-advisory-board-releases-report-2021> [as of July 3, 2023].)

4) **Recent Reforms and Policy Recommendations:** In recent years, several local jurisdictions have advanced reforms related to traffic stops. For instance, in 2018, the Oakland Police Department, long criticized for using traffic violations to stop and search people of color, instituted a policy of declining to initiate traffic stops for low-level infractions. Although the racial breakdown of traffic stops in the first year of the policy resembled that from the year prior, the number of traffic stops involving Black individuals decreased by over eight thousand, representing a 43% drop. (Swan, *To curb racial bias, Oakland police are pulling fewer people over. Will it work?*, S.F. Chronicle (Nov. 15, 2019) <https://www.sfchronicle.com/bayarea/article/To-curb-racial-bias-Oakland-police-are-pulling-14839567.php> [as of July 3, 2023].) In nearby Berkeley, the city council in 2020 proposed the creation of a new Berkeley Department of Transportation, which would assume responsibility for the city's traffic enforcement from the police department. (Raguso, *Plans*

firm up to remove police from traffic stops, but it's a long road ahead, Berkeleyside, (May 25, 2021) <https://www.berkeleyside.org/2021/05/25/berkeley-department-of-transportation-civilian-traffic-enforcement> [as of June 26, 2023].)

In early March 2022, the Los Angeles Police Department enacted a policy to limit the use, duration and scope of pretext stops conducted by its officers. The policy allows officers to make stops for minor equipment violations or other infractions *only* when the officer believes that such a violation significantly interferes with public safety, and requires officers to state the public safety reason for such stops on their body-worn cameras. The policy also prohibits pretext stops *unless* officers are acting upon articulable information in addition to the traffic violation, which may or may not amount to reasonable suspicion, regarding other specified crimes, such as a serious or violent crime, reckless driving, burglary, and others. (Special Order #3, March 9, 2022, LAPD, <https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/03/3_9_22_SO_No._3_Policy_Limitation_on_Use_of_Pretextual_Stops_Established.pdf> [as of June 26, 26, 2023].)

In addition to publishing compiled stop data, the RIPA board suggests best practices and provides recommendations to law enforcement agencies and policymakers. Regarding pretextual stops, the RIPA board, in its most recent report, recommended that the Legislature and local law enforcement should examine approaches to:

- Eliminating all pretextual stops and subsequent searches and ensure that a stop or search is based on reasonable suspicion or probable cause;

- Identifying and taking action to limit enforcement of traffic laws and minor offenses that pose a low public safety risk and show significant disparities in the rate of enforcement; and,

- Limiting armed responses to traffic enforcement by allowing for stops only if there is a concern for public safety, and consider amending the Vehicle Code to more broadly move traffic enforcement out of law enforcement's purview (i.e. to a civilian traffic unit).

(RIPA Board, Annual Report 2022 (Jan. 3, 2023) <https://oag.ca.gov/system/files/media/2023-ripa-report-best-practices.pdf)> [as of July 3, 2023].)

In December 2022, the Committee on the Revision of the Penal Code (CRPC) released its annual report, issuing a series of recommendations spanning various topics in criminal law. One recommendation urged the Legislature to "prohibit police officers from stopping people for technical, non-safety-related traffic offenses, including at a minimum offenses related to vehicle or equipment registration, position or number of license plates, lighting equipment, window tints or obstructions, and bicycle equipment and operation." (Committee on the Revision of the Penal Code, 2022 Annual Report and Recommendations (Dec. 2022) p. 27 <http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf> [as of July 3, 2023].)

This bill would implement recommendations from both the CRPC and the RIPA board described above.

5) **Effect of This Bill:** The California Vehicle Code establishes roughly 1,000 infractions related to a wide array of conduct and vehicle types. (Published by Contra Costa County Superior Court, Traffic Infraction Fixed Penalty Schedule <https://www.cc-courts.org/fees/docs/2015BailSchedules_Traffic.pdf> [as of July 3, 2023].) This bill would prohibit officers from initiating a vehicle stop for a "low-level infraction," unless there is a separate, independent basis for the stop, or unless there is more than one low level infraction. This bill would define "low-level infraction" as any violation related to vehicle registration or vehicle equipment, the position or number of license plates, vehicle lighting not illuminating if it is a single light or single bulb, bumper equipment and bicycle equipment or operation. Thus, while the bill does limit the permissible bases for a traffic stop to some degree, there are still hundreds of traffic violations for which an officer could initiate a stop, even as a pretext to investigate other potential crimes. For violations where an officer does not have grounds to stop or detain a motorist or bicyclist, and the officer can identify the owner of the vehicle, this bill would allow the officer to send a citation or fix-it ticket to the motorists home address.

   In addition to the traffic-stop-related provisions described above, this bill clarifies that a city, county or other local authority may enforce Vehicle Code violations through the use of government employees who are not sworn peace officers. This change provides firmer legal footing to Berkeley and other local jurisdictions seeking to transfer traffic enforcement responsibility from armed police to unarmed civilians. That is, where such jurisdictions may currently perceive a high risk that such local reforms would be preempted by existing state law, this bill expressly states that such local reforms are not prohibited by the relevant provisions of the Vehicle Code.

6) **Argument in Support**: According to the *Prosecutors Alliance of California*, one of the bill's sponsors, "Law enforcement use minor vehicle equipment and administrative issues—such as a broken taillight, driving without valid registration, or incorrectly displaying a license plate—to conduct an otherwise illegitimate stop and investigation, commonly referred to as a "pretext stop." The Racial and Identify Profiling Board reports that Black, Latinx, Native Hawaiian, and Pacific Islander Californians are **more** likely to be subject to pretextual stops than their white counterparts, even though stops of people of color are **less** likely to result in the discovery of evidence or criminal prosecution then stops of white people. Pretextual stops inflict devastating harm on Californians of color—including dehumanization, economic extraction through fees and fines, physical violence through uses of force, and devaluation of life.

   "These practices have also failed to meaningfully improve safety. A 2022 study found that Sheriff's deputies in Los Angeles and Riverside counties spent nearly 9 out of every 10 hours on stops initiated by officers rather than responding to calls for help. Amongst those officer-initiated stops, approximately 80 percent were for traffic violations.

   "SB 50 will implement the recommendations of the Committee on Revision of the Penal Code and the Racial and Identity Profiling Board, limiting police power to stop people for minor, technical violations of the Vehicle Code. SB 50 will also ensure that communities that wish to move forward with alternative enforcement strategies for traffic laws have the legal authority to do so. SB 50 is a long over due reform to address the harms of racial profiling and promote equal treatment under law."

7) **Argument in Opposition**: According to the *California District Attorneys Association*, "This bill prohibits peace officers from detaining the operator of a motor vehicle or bicycle for a low-level infraction unless a separate independent basis for the stop exists. Doing so jeopardizes public safety, undermines the rule of law, and reduces accountability for low level infractions.

"Most importantly, this bill's prohibition on detaining drivers for low level infractions deprives peace officers of a very effective investigative tool that is often used by law enforcement to gather information needed in an ongoing criminal investigation, apprehend a suspect who is wanted for having committed an unrelated criminal violation, or to investigate an unrelated offense.

"Consider the political terrorist who paid individuals to shoot up the homes his political opponents. The plot was only uncovered after a vehicle stop for an expired registration revealed the driver had an active felony warrant. A search of the vehicle revealed 800 fentanyl tablets which lead to a phone with texts detailing the location of the victims and a gun that was ballistically linked to the shootings. [citation omitted]

"Pretextual stops are also employed by peace officers to investigate the transportation for sale of fentanyl. Information alerting law enforcement to controlled substances in vehicles oftentimes come from confidential sources who law enforcement need to protect. The source of information will be 'walled' off from peace officers who will only be told that if a vehicle violates a traffic infraction, pull the vehicle over and investigate for drugs and guns. The traffic infraction is a 'pretext' to investigate another crime without jeopardizing the confidential informant's safety. This technique is used routinely and effectively. Recently in San Diego, for example, a broken taillight on a boat trailer yielded 20,000 fentanyl pills and 1000 pounds of methamphetamine. That stop and others like it would not be permitted if SB 50 became law.

"Research has found that increased traffic enforcement is associated with decreases in traffic crashes and injuries from accidents. Jordan B. Woods, Traffic Without the Police, 73 Stanford Law Review 1471, 1536 (2021). The low-level infractions defined by SB 50 are, in fact, designed to enhance public safety and notify drivers that their vehicles are out of compliance with traffic safety laws. Pursuant to SB 50, a low-level infraction includes violations related to: 1) vehicle registration requirements; 2) the positioning or number of license plates; 3) vehicle lighting equipment; 4) vehicle bumper requirements; and 5) bicycle equipment or operation. Simply put, a broken headlight, brake light, or windshield obstruction is a driving hazard and can be the cause of an accident. A missing bumper could be the reason that a non-lethal accident becomes fatal.

"Prohibiting a peace officer from detaining and notifying a driver of a hazardous condition ensures that the unsafe vehicle will be driving on the road for a longer time before it is brought into compliance. Mailing the owner of the vehicle a notice of violation, as SB 50 contemplates, does not address the violation with the urgency that is warranted when public safety is at issue.

"Moreover, mailing the owner of the vehicle a notice of the violation creates an additional burden for law enforcement that will likely result in decreased enforcement. This anticipated lack of enforcement will create ambiguity for drivers regarding what the rules of the road

actually are, and blur the line between what is lawful and unlawful. Without fear of enforcement, drivers will be less likely to bring their vehicles into compliance with registration requirements and traffic safety laws which, in turn, will make those regulations ineffectual and the roads less safe.

"Not only will SB 50 result in decreased enforcement, if law enforcement does choose to enforce via a mailed notice of violation, it will make it more difficult to hold offenders accountable. Claims that a citation was never received, and the number of warrants being issued for failing to appear, would be significant. Additionally, prohibiting detention would make it more difficult to gather evidence to substantiate the offense. Pursuant to Vehicle Code § 40001, it is unlawful for the owner to cause or permit the operation of an offending vehicle to be driven on the highway. Without being able to identify the driver (to see if they are the owner), or to speak with the driver (to verify the owner authorized the use), the owner can simply deny that they permitted the operation of the vehicle. This, in turn, would make low level infractions more difficult to prove."

8) **Related Legislation**: AB 93 (Bryan), would prohibit peace officers from conducting searches of a vehicle, person or their effects based solely on a person's consent, and specifies that consent to conduct a search is not a lawful justification for a search. AB 93 failed passage on the Assembly Floor.

9) **Prior Legislation**:

   a) SB 1389 (Bradford), of the 2021-2022 Legislative Session, was substantially similar to this bill. SB 1389 (Bradford, 2022), died on the Senate floor inactive file.

   b) AB 2537 (Gipson), Chapter 332, Statutes of 2022, requires driver education courses to include a video on proper conduct by peace officers and individuals during a traffic stop.

   c) AB 2773 (Holden), Chapter 805, Statutes of 2022, requires a peace officer making a traffic or pedestrian stop to state the reason for the stop before asking any questions.

   d) AB 2918 (Holden), Chapter 723, Statutes of 2018, requires the DMV to include within its Handbook a section on a person's civil rights during a traffic stop.

   e) AB 2133 (Torrico), of the 2005-2006 Legislative Session, would have prohibited consent searches in connection with traffic stops. AB 2133 was not heard in this Committee at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

California Faculty Association (Co-Sponsor)
Aapi Equity Alliance
ACLU California Action
Asian Americans Advancing Justice - Asian Law Caucus
Berkeley; City of

California Alliance for Youth and Community Justice
California Association of Local Conservation Corps
California Attorneys for Criminal Justice
California Federation of Teachers Afl-cio
California for Safety and Justice
California Immigrant Policy Center
California Native Vote Project
California Public Defenders Association
California Public Defenders Association (CPDA)
California-hawaii State Conference of The NAACP
Californians for Safety and Justice
Californians United for A Responsible Budget
Center for Policing Equity
Center on Juvenile and Criminal Justice
Charles Houston Bar Association
Children's Defense Fund - CA
Church State Council
City of Berkeley
Coalition for Humane Immigrant Rights (CHIRLA)
Communities United for Restorative Youth Justice (CURYJ)
Consumers for Auto Reliability & Safety
County of Los Angeles Board of Supervisors
County of Sonoma
Democrats of Rossmoor
Disability Rights California
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC) Fiscally Sponsored by Community Partners
Equality California
Fair Chance Project
Fresh Lifelines for Youth
Fresno Barrios Unidos
Friends Committee on Legislation of California
Indivisible CA Statestrong
Indivisible Yolo
Initiate Justice (UNREG)
Initiate Justice Action
LA Defensa
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
League of Women Voters of California
Legal Services for Prisoners With Children
Los Angeles County
National Association of Social Workers, California Chapter
Norcal Resist
Oakland Privacy
Pacific Juvenile Defender Center
Peace and Freedom Party of California
People for The American Way
Policylink (UNREG)

Prosecutors Alliance California
San Francisco Bay Area Planning and Urban Research Association (SPUR)
San Francisco Public Defender
Secure Justice
Seiu California
Showing Up for Racial Justice North County San Diego
Sister Warriors Freedom Coalition
Smart Justice California
State of California Racial and Identity Profiling Advisory Board
Streets are For Everyone (SAFE)
Team Justice
Techequity Collaborative
University of San Francisco School of Law | Racial Justice Clinic
Voices for Progress
Voices for Progress Education Fund
Walk Bike Berkeley

Opposition

Arcadia Police Officers' Association
Association for Los Angeles Deputy Sheriffs (ALADS)
Burbank Police Officers' Association
California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California Contract Cities Association
California District Attorneys Association
California Peace Officers Association
California Police Chiefs Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Los Angeles School Police Officers Association
Monterey County District Attorney's Office - ODA - Salinas, CA
Murrieta Police Officers' Association
Newport Beach Police Association
Orange County Sheriff's Department
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Assocation
Pomona Police Officers' Association
Riverside County Sheriff's Office
Riverside Police Officers Association
Riverside Sheriffs' Association
San Bernardino County Sheriff's Department

San Diegans Against Crime
San Diego Deputy District Attorneys Association
Santa Ana Police Officers Association
Upland Police Officers Association
Visalia; City of

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

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

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

SB 88 (Skinner) – As Amended June 19, 2023

SUMMARY: Outlines new requirements that drivers who are compensated to transport students must adhere to, including, among other things, drug-testing, background checks, and becoming a mandated reporter of known or suspected child abuse or neglect. Specifically, **this bill**:

1) Specifies that the following provisions apply to all drivers who transport pupils for compensation except:

   a) Drivers of municipally-owned transit systems;

   b) Parents or guardians transporting their own children; and,

   c) School employees providing transportation to a field trip, school activity, or athletic program, as specified.

2) States that all drivers transporting pupils in a vehicle with a maximum capacity of 10 or fewer persons must, among other things:

   a) Have a valid California driver's license;

   b) Be 18 years of age or older;

   c) Pass a criminal background check, that includes a fingerprint clearance, as specified;

   d) Have a satisfactory driving record, as specified;

   e) Participate in the Department of Motor Vehicles' (DMV) pull-notice system;

   f) Comply with drug and alcohol testing, as specified;

   g) Be a mandated reporter;

   h) Complete a specified medical examination prior to driving, as well as biennially;

   i) Submit to a tuberculosis risk assessment, as specified;

   j) Not drive more than 10 hours within a work period, or as otherwise specified;

   k) Complete a specified annual training course;

l) Maintain a daily log sheet and complete a daily pre-trip inspection of the vehicle, as specified; and,

m) Complete specified first aid training.

3) States that vehicles with a maximum capacity of 8 or fewer passengers can only be street-legal coupes, sedans, or light-duty vehicles, as specified.

4) Requires a driver of a vehicle with a maximum capacity of 10 or more persons to also hold a valid California commercial driver's license, as specified, in addition to complying with the aforementioned requirements.

5) Provides that a local educational agency (LEA) contracting with a private entity for student transportation purposes must obtain a written attestation from the entity of the following:

a) It does not have outstanding applicable law violations;

b) It will maintain compliance with applicable laws for the duration of the contract;

c) It will retain direct control over the manner and means for performance of any driver;

d) Only drivers who meet the requirements of these provisions will drive the pupils; and,

e) That it has on file all necessary reports and documents, as specified.

6) States that any vehicle transporting pupils under these provisions must be inspected every year or 50,000 miles, as specified, and contain a first aid kit and fire extinguisher.

7) Makes drivers providing pupils transportation mandated reporters of child abuse and neglect.

EXISTING LAW:

1) Authorizes a LEA, upon reasonable grounds existing, to provide for the transportation of pupils to and from school, and states that:

a) An LEA may purchase or rent vehicles for transportation purposes, as well as contract with a common carrier, municipally-owned transit system, or a responsible private party, including the parent or guardian of the pupil; and

b) An LEA may transport preschool or nursery school pupils in school buses owned or operated by the district. (Ed. Code, § 39800, subd. (a).)

2) Provides that a schoolbus is a motor vehicle designed, maintained, or used for transporting pupils to and from school, or school activities, except for the following:

a) Any vehicle carrying only members of the owner's household;

b) A motortruck transporting pupils seated only in the passenger compartment or a passenger vehicle not carrying more than 10 persons, except any vehicle transporting two

or more pupils who use wheelchairs;

c) A vehicle operated by a common carrier, or by a publicly owned or operated transit system, as specified, only if the vehicle is designed to carry no more than 16 people, the vehicle is available to members of the general public, and the school does not otherwise provide the requested transportation service;

d) A school pupil activity bus (SPAB) which is any vehicle operated by a common carrier, transit system, or passenger charter-party carrier, as specified;

e) A vehicle operated by a carrier licensed to transport pupils on school activities to, and from, another state or country; or,

f) A state-owned vehicle operated by a state employee upon grounds owned by a state hospital where the speed limit is no more than 20 mph or specified adjacent areas with a speed limit of no more than 25 mph. (Ed. Code, § 39830, subds. (a)-(f).)

3) Provides that the State Board of Education (SBE) must adopt regulations relating to the use of schoolbuses that do not touch upon the schoolbus safety requirements governed by the California Highway Patrols (CHP). (Ed. Code, § 39831, subd. (a).)

4) States that CHP must adopt regulations, as specified, relating to the safe operation of schoolbuses. (Ed. Code, § 39831, subd. (b).)

5) Requires, on or before July 1, 2035, all schoolbuses in California be equipped with a passenger restraint system and requires the SBE to adopt regulations to that effect. (Ed. Code, § 27316, subd. (e); Ed. Code, § 39831.1.)

6) Requires the SBE to adopt regulations requiring certain SPABs to be equipped with passenger restraint systems, as specified. (Ed. Code, § 39831.2.)

7) Requires schools to prepare a transportation safety plan to ensure the safe transport of pupils that includes boarding and unloading procedures, adult chaperone procedures on SPABs, and procedures to ensuring no pupil is left unattended on a bus. (Ed. Code, § 39831.3, subd. (a)(1)-(5).)

8) States that pupils in prekindergarten through grade 12 who use a bus, must receive safety instructions that include the following:

a) Upon registration, parents of prekindergarten through grade 6 pupils must, among other things, receive information regarding red light crossing instructions, schoolbus danger zones, and walking to and from schoolbus stops;

b) For prekindergarten through grade 8 pupils receiving home-to-school transportation, annual information relating to proper loading and unloading procedures, safe street crossing, seatbelt use, emergency equipment locations, and live evacuation simulations. Requires the date of instruction, number of pupils participating, busdriver's name, and other specified information be documented and maintained for CHP inspection for one

year; and,

c) On school activity trips, safety instructions that include emergency exit locations, use of emergency equipment and passenger responsibilities, as specified. (Ed. Code, § 39831.5, subd. (a)(1)-(4).)

9) Requires an LEA employing drivers to drive vehicles, other than buses, that primarily transport pupils to participate in a drug-testing program consistent with the U.S. Secretary of Transportation program for schoolbus drivers, as specified. (Veh. Code, § 34520.3.)

10) Provides that any entity contracting with an LEA must ensure that any employee who interacts with pupils, outside of guardian or school employee supervision, must undergo a specified background check through the Department of Justice (DOJ) that includes fingerprinting. (Ed. Code, §§ 45125, 45125.1.)

11) Mandates certain individuals to report child abuse or neglect if they know or reasonably should know that a child has been the victim of abuse or neglect. (Pen. Code, § 11166.)

12) Specifies that, among other individuals, teachers, instructional aides, classified public school employees, and employees of a public or private organization whose duties require direct contact and supervision of children, are mandated reporters of child abuse and neglect. (Pen. Code, § 11165.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Last year, California allocated a record $680 million for home-to-school transportation so that more kids have a guaranteed ride to and from school each day and to ensure that California is no longer dead last in the nation when it comes to per pupil funding for public school transportation. SB 88, Safe Rides to School, will build on last year's historic funding increase by ensuring that the transportation we provide to public school students is as safe as possible. Currently, bus drivers employed by school districts are mandated to meet high safety standards, but unfortunately, some school districts in recent years have turned to rideshare companies that contract with drivers who aren't required to meet those same high standards. SB 88 will level the playing field and ensure that all people who drive our kids to school meet the same rigorous safety standards that our school district employees are already mandated to meet."

2) **School Transportation Shift from School Buses**: In California, it is not compulsory for districts to provide transportation services to students. Rather, the governing board of each district has discretion to provide transportation services if they deem it advisable and if good reasons exist. (Ed. Code, § 39800.) However, federal law mandates that districts must provide transportation to students with disabilities if it is required by their Individualized Education Plan (IEP), as well as to homeless students. (Legislative Analyst's Office. *The 2022-23 Budget: Green School Bus Grants*. (hereafter *LAO Bur Report*) (Feb. 2022) <https://lao.ca.gov/reports/2022/4525/green-school-bus-021022.pdf> [as of Jul. 7, 2023] at p. 2.) Many districts in California provide home-to-school transportation for students if they have a disability, are homeless, or are otherwise low-income. (*ibid.*) Schools can provide

school transportation in a variety of ways, some have their own transportation departments, others contract with other LEAs, some use private companies, and other can use a mix of these options. (*Ibid.*)

According to data from 2017, California students use various modes of transportation to travel to and from school, with 67% relying on automobiles, 20% walking or biking, 9% using a school bus, and 4% using other types of transportation such as public transit. (*LAO Bus Report* at 2.)

As has been noted by both the bill's proponents and opposition, home-to-school transportation has traditionally been performed by school bus drivers, who are heavily regulated. However, there has been a growing trend for schools to contract with other drivers that work for Transportation Network Companies (TNCs). Contracting with such drivers allows schools to more readily provide transport for students who live farther away, as can be the case with foster youth, homeless youth, and youths with disabilities.

This bill would require drivers who contract with a LEA to provide pupil transportation for compensation, to fulfill certain requirements already required of those employed by an LEA. For purposes of the jurisdiction of this Committee, these requirements include: drug testing, criminal background checks, and mandated reporting of child abuse and neglect under the Child Abuse and Neglect Reporting Act. (See Pen. Code, § 11164 *et seq*,)

Should this bill be approved by this Committee it would be referred to the Committee on Education which will evaluate the school transportation and safety provisions, as this analysis will largely focus on the criminal law/public safety aspects of the measure.

In addition, this analysis will include some input provided by the Assembly Communications and Conveyance Committee addressing the regulation of TNCs.

3) **Public Safety Related Requirements for School Bus Drivers**: There are several statutory requirements that an individual must meet to be a bus driver, including, as relevant to this committee, undergoing a background check, being subjected to drug testing, and being a mandated reporter. (Ed. Code, §§ 45125, 45125.1; Veh. Code, § 34520.3; Pen. Code, § 11165.7.) However, when it comes to other drivers that LEAs contract with to transport youth, there may be some rules regulating certain drivers, but there is no clear set of rules specifically governing the transportation of students to and from school.

    a) **Drug Testing:** Currently, school bus drivers, as drivers of commercial vehicles, are subjected to certain federal drug testing requirements, including a blanket prohibition on the use of cannabis. (Veh. Code, § 15278, subd. (a)(3); 49 C.F.R. §§ 382.103, subd. (a)(1); 382.109; 383.3, subd. (a); 392.4.) With respect to drug testing, it should be noted that in 2016, Californians passed Proposition 64, which allows adults 21 or older to possess and use marijuana for recreational purposes. Since then California has also passed AB 2188 (Quirk) Chapter 392, Statutes of 2022, prohibiting employers from taking adverse actions against applicants or employees based exclusively on the results of a drug test that detects nothing more than the presence of past cannabis use; importantly, it did not prohibit employers from taking adverse action against employees who were found to be under the influence *during* work hours. These provisions become effective January 1, 2024. (See Gov. Code, §

12954.)

The author has committed to amending the drug testing requirement such that off-duty cannabis use will not result in a driver losing their employment or the ability to otherwise transport students. As committed to be amended by the author, this bill would allow only off-duty cannabis use unless state or federal law otherwise prohibited it, or if it affects federal funding. This amendment would align with the requirements of Government Code, section 12954.

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

The Act identifies over 40 separate categories of mandated reporters. (Pen. Code, § 11165.7, subd. (a)(1)-(49).) A mandated reporter must report known or reasonably suspected child abuse or neglect to a designated agency under section 11165.9, specifically "any police or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive such reports, or county welfare department." (Pen. Code, § 11166, subd. (a).) Failure to make the required report is a misdemeanor. (Pen. Code, § 11166, subd. (c).)

Schoolbus drivers employed by an LEA are mandated reporters. (See Pen. Code, § 11165.7, subd. (a)(4) [classified employees of a public school].) This bill would require drivers who transport youth to schools for compensation to be subject to the same mandated reporting rules as school bus drivers. As these drivers presumably will have the same regular contact with children putting them in a good position to observe suspected abuse or neglect, it seems sensible to require that they be subjected to similar obligations as bus drivers.

c) **Background Checks**:

Under existing law, schoolbus drivers employed by an LEA are required to undergo a fingerprint based background check. (Ed. Code, §§ 45125, 45125.1.) Additionally, existing law provides that people seeking a license, employment or volunteer position with supervisory or disciplinary power over a minor may have a criminal background check through the DOJ. (Pen. Code, § 11105.3.)

As these drivers presumably will, in some cases, be the only adult in the vehicle aside from a child, it seems sensible to require that they be subjected to similar obligations as bus drivers.

4) **Current Regulations Applicable to Drivers Transporting Students**: Some proponents of the bill have argued that there are minimal rules governing drivers who schools contract with to transport students. On the other hand, some opponents say they are otherwise governed by existing regulatory agencies. According to the Assembly Communications and Conveyance

Committee:

"***The California Public Utilities Commissions (CPUC) indeed regulates all transportation network companies, and other passenger carriers covered by this bill.*** Existing law establishes the Passenger Charter-Party Carriers Act to, in part, promote carrier and public safety through enforcement of safety regulations[1]. The Charter-Party Carriers Act applies broadly to persons and corporations engaged in the transportation of persons by motor vehicle for compensation[2]. Within the Charter-Party Carries Act, Article 7 establishes a definition of a transportation network company (TNCs) and TNC specific requirements[3]. While TNCs and charter-party carriers have different definitions, the California Public Utilities Commission, through its regulatory decisions, has found that TNCs are charter-party carriers subject to the jurisdiction and control of the commission[4]. In summary, the CPUC has clear and broad regulatory authority over both transportation network companies, including those that carry pupils, and of charter-party carriers broadly. While the author purports that this bill is intended to cover passenger carriers beyond TCPs and TNCs, such as taxis or other categories of private pupil transportation, the findings of this bill do not accurately reflect the reality of the Public Utilities Code or the CPUC's regulatory decisions. Further, the findings and declarations singularly highlight a supposed gap of regulation for TNCs that transport pupils, while not directly naming or addressing other categories of passenger carriers.

"To be clear, the Charter-Party Carriers Act lists various exemptions to its broad application, including specifically for transportation of school pupils conducted by or under contract with the governing board of any school district entered into pursuant to the Education Code[5]. However, the CPUC has interpreted the Education Code exception narrowly to apply to school buses. The CPUC's interpretation of the Education Code exception was most recently reaffirmed in a 1997 decision, where the CPUC recognized it has the authority to adopt rules regarding the transport of minors by TCPs, with the understanding that if such transport included school buses, that would also be subject to the applicable sections in the Education Code[6]. In other words, the transportation of children by TCPs may include pupils and school activities, but also includes a variety of other activities that fall within the scope of the Commission's statutory jurisdiction. For example, the transportation of children on a TNC or TCP between parent's homes or non-school related activities and locations.

"***The CPUC has existing rules for TCPs and TNCs that carry minors, including pupils.*** Notwithstanding the narrow exceptions to the CPUC's jurisdiction to regulate TCPs and TNCs, the agency has adopted rules for those carriers transporting minors, including pupils. In CPUC Decision D.97-07-063, the CPUC adopted the first rules for a new market niche form of passenger carriers that specialized in the carriage of infants and children, and their caregivers. The rules reflects the public's interest in assuring the safety of unaccompanied

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[1] Public Utilities Code § 5352(a)
[2] Public Utilities Code § 5360
[3] Public Utilities Code § 5430 et. seq.
[4] CPUC Decision D. 13-09-045 at p.71
[5] Public Utilities Code § 5353
[6] CPUC Decision D. 97-07-063.

minor passengers by having the carriers conduct criminal background checks of drivers and other employees transporting children passengers, by utilizing the Department of Justice's Trustline program. In a more recent decision applicable to TNCs, the CPUC required TNCs that primarily transport minors to also comply with existing Trustline background check requirements adopted in D. 97-07-063[7].

"Additionally, the CPUC has requirements for TNC drivers and vehicles generally, which were established in other decisions and listed in Commission General Order 157-E[8]. Requirements that apply to TNCs generally include vehicle inspections at least every 12 - months or 50,000 miles; minimum insurance levels of $1,000,000 per incident; background checks with prohibitions on drivers convicted within the past seven years, of driving under the influence of drugs or alcohol, fraud, sexual offenses, use of a motor vehicle to commit a felony, a crime involving property damage, and/or theft, acts of violence, or acts of terror; zero-tolerance policies for intoxicating substances; disqualification of drivers with convictions for reckless driving, driving under the influence, hit and run, or driving with a suspended or revoked license; a requirement that TNC drivers must possess a valid California driver's license, be at least 21 years of age, and must provide at least one year of driving history before providing TNC services; TNCs may only use street-legal coupes, sedans, or light-duty vehicles including vans, minivans, sport utility vehicles (SUVs) and pickup trucks; TNC drivers are prohibited from transporting more than 7 passengers on any given ride; TNC vehicles shall not be significantly modified from factory specifications; and TNCs are required to participate in the DMV's pull-notice system.

"While the additional requirements this bill seeks to impose on all drivers providing pupil transportation are more expansive than the existing safety requirements for TNCs and TCPs, there is overlap and similarities among the requirements. Examples of similarities between this bill and regulatory requirements are: the requirement to hold a valid driver's license, the minimum age of the driver, a criminal background check, having a satisfactory driving record, and participation in the DMV's pull-notice system. A few notable examples of where this bill exceeds existing TNC requirements includes the requirement for drug and alcohol testing, requiring drivers to be mandated reporters pursuant to the Penal Code, a driver medical examination, submission of a clear tuberculosis risk assessment, completing a minimum number of hours of training, limiting drivers to 10 hours of driving per work period, and first aid training.

"It certainly is the proper role of the Legislature to consider additional safety requirements for TNCs, TCPs, and any form of transportation concerning a pupil. Ideally, additional requirements would be imposed in light-of existing requirements, and not without regard to those requirements. Assuming there are indeed gaps in the safety requirements placed on drivers transporting pupils, as this bill asserts, it would behoove the author to first consider which additional requirements are reasonable or necessary; and secondly whether utilizing the existing regulatory framework overseen by the CPUC would be an effective means of realizing the stated intent of establishing "parity in law that applies equally to all drivers, regardless of employer and employment status, who are compensated to transport pupils."

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[7] CPUC Decision D. 16-04-041 at p. 26.

[8] CPUC General Order 157-E: Operations of charter-party carriers of passengers, including Transportation Network Companies (TNCs). http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M322/K150/322150628.pdf

For example, one approach to marrying the requirements of this bill with the existing regulatory structure applicable to TNCs and TCPs would be to require those carriers contracting with an LEA to register with the CPUC while also directing the CPUC to impose new requirements on all carriers transporting minors. On the other hand, if the existing CPUC regulations are sufficient, it might also be reasonable to completely exempt TNCs and TCPs from the scope of this bill."

5) **Argument in Support**: According to the bill's sponsor, the *California School Employees Association*, "Home-to-school transportation has traditionally been performed by schoolbus drivers, who are heavily regulated by the California Department of Education, the California Department of Motor Vehicles, and the California Highway Patrol. There is a growing trend where Transportation Network Companies (TNCs), commonly known as app-based companies, are contracting with school districts to provide home-to-school transportation and related pupil transportation.

"TNCs are normally regulated by the California Public Utilities Commission (CPUC) and Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code. However, Public Utilities Code Section 5353(b) exempts "Transportation of school pupils conducted by or under contract with the governing board of any school district entered into pursuant to the Education Code" from being regulated under its normal TNCs statutes. Thus while all TNCs are regulated by the CPUC, when TNCs perform home-to-school transportation, the CPUC does not regulate that home-to-school transportation service. SB 88 fills this unregulated space. We should not continue to allow this loophole to exist and wait until something tragic occurs before we apply these existing health and safety standards to all drivers.

"Under SB 88, all pupil drivers would be required to have satisfactory driving records, comply with drug and alcohol testing, be mandated child abuse and neglect reporters, complete medical examinations, and clear tuberculosis assessments, among other provisions that ensure safety and fitness of duty for the job. The bill requires minimum hours of training on various safety components such as pre-trip inspection, proper loading and unloading of passengers, defensive driving, and operations of a vehicle in inclement weather or under impaired visibility conditions. It also requires the vehicles used to transport pupils to be in safe, working condition with annual inspections by state-licensed facilities and to be equipped with first-aid kits and fire extinguishers in case of emergencies.

"While there may be some minimal costs associated with complying with these requirements, many drivers will likely have already satisfied many of them. These requirements will not drive TNCs out of business. The safety benefits of these requirements outweigh any minimal costs. It is a small price to pay to ensure our students are being transported by safe drivers."

6) **Argument in Opposition**: According to *HopSkipDrive*, "With regard to HopSkipDrive specifically, we have arranged over two million rides since 2014 with no critical safety incidents. As written, SB 88 would impose conflicting regulations on entities like HopSkipDrive. SB 88 would make operations in California unfeasible and require us to cease services, putting thousands of students and families at risk. Consequently, dozens of school districts, counties, and child welfare organizations are also opposing the bill.

"HopSkipDrive currently partners with over 350 local education agencies in California,

arranging transportation for thousands of students in the child welfare system, on individualized education plans, or experiencing homelessness. Often, these vulnerable students cannot utilize traditional bus routes or public transportation. They may travel across school district boundaries or even cities to reach their school of origin or school tailored to their special needs.

"This problem is only growing. According to updated data released recently by the California Department of Education, the number of students enrolled in public schools experiencing homelessness increased by 9% this year, or about 16,000, to a total of approximately 187,000 kids. To put a finer point on it: more homeless students than ever need to get to school. With bus driver shortages increasing, these kids are at risk of being left behind.

"HopSkipDrive is providing an essential - and safe - service to thousands of vulnerable students. SB 88 threatens to take away this lifeline for kids who need it the most, leaving districts with fewer options and fewer tools to address these huge inequities.

"This bill would eliminate an option that families, schools, and county child welfare agencies across the state rely on for daily, small-vehicle services to get kids to and from school safely. These rides are essential for our communities' most vulnerable students – students experiencing homelessness, students in foster care, and students with special education needs…

"HopSkipDrive and the California Legislature are completely aligned in the priority of ensuring safe transportation for California students. I founded HopSkipDrive with two other working mothers in Los Angeles in 2014. Our safety policies and procedures are all designed with this question in mind: "What would it take for me to use HopSkipDrive for my child?" We took time to research safety measures, look at the data, and incorporate the standards that have a proven impact on safety. These include: requiring drivers to have at least five years of caregiving experience; conducting extensive fingerprint-based background checks through the Trustline system as well as continuous criminal and driving record monitoring; leveraging GPS and mobile telematics to detect any problematic driving behavior; a live safety support team that uses advanced technology to monitor each ride in real-time and provide alerts of any ride anomalies; and annual reporting of our safety data."

REGISTERED SUPPORT / OPPOSITION:

Support

California School Employees Association (Sponsor)
American Federation of State, County and Municipal Employees (AFSCME), Afl-cio California (Co-Sponsor)
California Labor Federation, Afl-cio (Co-Sponsor)
California State Legislative Board, Sheet Metal, Air, Rail and Transportation Workers - Transportation Division (Co-Sponsor)
California Association of School Transportation Officials
California Conference Board of The Amalgamated Transit Union
California Federation of Teachers
California Federation of Teachers Aft, Afl-cio
California Nurses Association

California Nurses Association/ National Nurses United
California State Legislative Board, Sheet Metal, Air, Rail and Transportation Workers - Transportation Division (SMART-TD)
California Teamsters Public Affairs Council
Contra Costa Central Labor Council
John Burton Advocates for Youth
State Superintendent of Public Instruction Tony Thurmond

Opposition

Alameda County Board of Education
Alameda County Office of Education
All Saints Church Foster Care Project
Anderson Valley Unified School District
Association of California School Administrators
Association of California Suburban School Districts
Big Valley Joint Unified School District
Butte County Selpa
California Advancing Pathways for Students
California Alliance of Caregivers
California Alliance of Child and Family Services
California Association of School Business Officials (CASBO)
California Association of Suburban School Districts
California Charter Schools Association (CCSA)
California County Superintendents
California High School Coalition
California School Boards Association
California Youth Connection (CYC)
Calistoga Joint Unified School District
Campbell Union School District
Casa of Los Angeles
Castro Valley Unified School District
Central Valley Education Coalition
Children's Law Center of California
Children's Legal Services of San Diego
Coalition for Adequate Funding for Special Education
Colton-redlands-yucaipa Regional Occupational Program
Contra Costa County Office of Education
Court Appointed Special Advocates Los Angeles
Court Appointed Special Advocates of Ventura
Dependency Advocacy Center
Dependency Legal Services
Dinuba Unified School District
East Bay Children's Law Offices
Eden Area Regional Occupational Program
Enterprise Elementary School District
Farmworker Institute of Education & Leadership Development
Foothill Selpa
Hopskipdrive INC.

Human Trafficking Legal Network
Kern County Superintendent of Schools
Kern County Superintendent of Schools Office
Lakeside Union School District
Los Angeles County Superintendent of Schools
Manhattan Beach Unified School District
Merced County Office of Education
Metropolitan Education District
Milpitas Unified School District
Modesto City Schools District
North Orange County Regional Occupational Program
Office of The Riverside County Superintendent of Schools
Orange County Department of Education
Orcutt Union School District
Pierce Joint Unified School District
Pioneer Union Elementary School District
Pomona Unified School District
Princeton Joint Unified School District
Redondo Beach Unified School District
Riverside County Office of Education
Ross Valley School District
Round Valley Unified School District
San Diego County Office of Education
San Lorenzo Unified School District
San Lorenzo Unified School District (alameda County)
Simply Friends
Small School Districts' Association
Stanford Sierra Youth and Families
Sulphur Springs Union School District
Taft City School District
Tri-valley Selpa
Torrance Unified School District
Tulare Joint Union High School District
Ventura County Office of Education
Wheatland School District
Woodlake Unified School District
Youth Law Center
Yuba County Selpa

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

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

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

SB 89 (Ochoa Bogh) – As Amended April 13, 2023

SUMMARY: Expands the crime of stalking to include making a credible threat with the intent to place a person in reasonable fear for the safety of their pet, service animal, emotional support animal, or horse.

EXISTING LAW:

1) States that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of their immediate family is guilty of stalking. (Pen. Code, § 646.9, subd. (a).)

2) Punishes stalking by imprisonment in county jail for not more than one year, or by imprisonment in the state prison. (Pen. Code, § 646.9, subd. (a.).)

3) Provides that a person who commits stalking while there is a temporary restraining order, injunction, or any other court order in effect prohibiting stalking behavior against the same party shall be punished by imprisonment in the state prison for 2, 3, or 4 years. (Pen. Code, § 646.9, subd. (b).)

4) Provides that a person who commits stalking after having been convicted of domestic violence, violation of a protective order, or of criminal threats shall be punished by imprisonment in the state prison for 2, 3 or 5 years. (Pen. Code, § 646.9, subd. (c)(1).)

5) Provides that a person who commits stalking after previously having been convicted of felony stalking shall be punished by imprisonment in the state prison for 2, 3, or 5 years. (Pen. Code, § 646.9, subd. (c)(2).)

6) Authorizes the sentencing court to order a person convicted of felony stalking to register as a sex offender. (Pen. Code, § 646.9, subd. (d).)

7) Requires the sentencing court to consider issuing a restraining order valid for up to 10 years when a defendant is convicted of stalking, regardless of whether the defendant is placed on probation or sentenced to state prison or county jail. (Pen. Code, § 646.9, subd. (k).)

8) Defines the following terms as it relates to the elements of the crime of stalking:

   a) "Harass" means "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that

serves no legitimate purpose." (Pen. Code, § 646.9, subd. (e).)

b) "Course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." Constitutionally protected activity is not included within the meaning of "course of conduct." (Pen. Code, § 646.9, subd. (f).)

c) "Credible threat" means "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section." Constitutionally protected activity is not included within the meaning of "credible threat." (Pen. Code, § 646.9, subd. (g).)

d) "Immediate family" means "any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household." (Pen. Code, § 646.9, subd. (l).)

9) Provides that a person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of animal cruelty. (Pen. Code, § 597, subd. (a).)

10) Punishes a violation of animal cruelty as a felony with imprisonment in the county jail under realignment, or by a fine of not more than $20,000, or by both; or alternatively, as a misdemeanor with imprisonment in a county jail for not more than one year, or by a fine of not more than $20,000, or by both. (Pen. Code, § 597, subd. (d).)

FISCAL EFFECT:

COMMENTS:

1) **Author's Statement**: According to the author, "According to the Bureau of Justice Statistics Special Report: Stalking Victimization in the US, perpetrators of stalking tend to damage their victim's property, even going as far as to target the victim's loved ones, including pets. One National Crime Victimization Survey estimated that four in 10 stalkers threaten a "victim or the victim's family, friends, co-workers, or family pet," with 87,020 threats to harm a pet being reported.

"Humans and animals form strong bonds that induce strong feelings of affection and connection, which can make a pet an easy target for threats and physical harm. California's law ignores how powerful a threat or injury to a beloved pet can be. Not updating state statute to conform to federal anti-stalking law leaves victims and their pets vulnerable to threats and attacks by a stalker. It is critical that California's anti-stalking law is updated in

order to better protect victims and their pets."

2) **Elements Required for Stalking Prosecutions**: Stalking is generally understood as repeated threatening behavior that is intended to place the subject of the stalking in reasonable fear for their safety or the safety of their family. In order to convict a person under the current stalking statute, Penal Code section 646.9, the prosecutor must prove the following:

   a) The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person; and,

   b) The defendant made a credible threat with the intent to place the other person in reasonable fear for their safety, or for the safety of their immediate family. (See CALCRIM No. 1301; see also *People v. Falck* (1997) 52 Cal.App.4th 287, 297-298.)

   Stalking requires either repeated following or harassment which necessarily includes multiple acts. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293; *People v. Heilman* (1994) 25 Cal.App.4th 391, 400) "Repeated . . . simply means the perpetrator must follow the victim more than one time. The word adds to the restraint police officers must exercise, since it is not until a perpetrator follows a victim more than once that the conduct rises to a criminal level." (*People v. Heilman, supra*, 25 Cal.App.4th at 400.)

   This bill would expand the offense stalking to include situations where the person threatens the safety of another's pet, service animal, emotional support animal, or horse. The background provided by the author notes that the federal stalking statute protects the pet, service animal, emotional support animal, or horse of that person. (18 USCS § 2261A.)

   There are many instances where California law is not coextensive with federal law. Moreover, existing state law does provide protections to animals under animal cruelty laws. Expanding the stalking statute to pets and other animals creates a slippery slope for significant expansion of other crimes such as criminal threats and domestic violence.

   Finally, as noted above, the crime of stalking is based on a continuous course of conduct involving multiple acts, not a single incident. (See also *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293.) A prosecutor can already argue that any person would reasonably fear for their *own safety* (as opposed to that just of their pet) if the perpetrator was threating a person's pet in addition to committing other harassing or threatening behavior against that person. As such, this bill is unnecessary.

3) **Recent Relevant Supreme Court Case Law**: On June 27, 2023, the United States Supreme Court decided *Counterman v. Colorado* (2023) 600 U.S. __ [2023 U.S. LEXIS 2788], a case deciding what constitutes a "true threat" and what test should be applied to determine if a statement or conduct rises to the level of a true threat. The issue arose in the context of a conviction for the crime of stalking. The Colorado statute makes it unlawful to, in pertinent part, to directly, or indirectly through another person, knowingly either: make a credible threat to another person and, in connection with the threat, repeatedly follow, approach, contact or place under surveillance that person … or, make a credible threat to another person and, in connection with the threat, repeatedly make any form of communication with that person … regardless of whether a conversation ensues. (CRS 18-3-602, subd. (1).)

In *Counterman, supra*, the defendant's stalking conviction was based on hundreds of messages sent to the victim over Facebook. Counterman never met the victim and she never responded to any of his messages. While some of the messages were benign, others suggested Counterman might be surveilling the victim, and others expressed anger and threats of harm. The conviction was based solely on the repeated Facebook communications. (2023 U.S. LEXIS 2788, *6-7.) Counterman argued that the conviction should be overturned because the statements were not true threats and so were protected under the First Amendment. (*Id.* at *8.)

The Supreme Court noted that the Colorado courts had used an objective, reasonable person standard to determine if Counterman had made a threat. (2023 U.S. LEXIS 2788, *8.) The question before the Court was "whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." (*Id.* at *5.) The Court answered the question in the affirmative. (*Id.* at *9.) The Court reasoned that reliance on an objective standard would sometimes result in self-censorship because people would be worried about how their statements would be perceived. (*Id.* at *12-15.) To prove this subjective understanding, the Court further held that a mental state of recklessness is sufficient. In the threats context, recklessness means "that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" (*Id.* at *18.)

While the Supreme Court overturned Counterman's conviction, it did not overturn the Colorado stalking statute. Rather, what is affected going forward is the evidence prosecutors must prove to establish a conviction under the statute. Under the new U.S. Supreme Court precedent, going forward prosecutors will have to show that the defendant knew that others could perceive a statement made threatened violence and yet the defendant uttered it anyway.

As in Colorado, California courts have applied an objective reasonable-person standard to determine if statements constitute a credible threat. The California stalking statute itself notes that the person that is the target of the threat must have reasonable fear for their safety. (Pen. Code, § 646.9, subd. (g).) However, under California law, prosecutors also have had to prove subjective mens rea for stalking based on threats, namely that "the defendant made a credible threat *with the intent* to place the other person in reasonable fear for their safety, or for the safety of their immediate family." (See CALCRIM No. 1301; see also *People v. McCray* (1997) 58 Cal.App.4th 159, 172 ["The crimes with which appellant was charged required proof of his intent to place Michelle in fear for her safety or that of her family.... (§ 646.9, subd. (a))."].)

4) **Argument in Support**: According to *Crime Victims United of California*, "Stalking is a crime of power and control. Victims of stalking live in fear. The victim endures unspeakable harassment, threats, and is literally terrorized. Perpetrators of this crime often threaten their loved ones, including their pets. This leaves the victim to live in fear, not only for their safety but the safety of loved ones and precious pets.

"Unfortunately, California law does not recognize terrorizing a victim about their pet as a crime or form of stalking. Federal law does and brings the ability of victims who are threatened with harm to their animals to be able to hold their preparators accountable.

"It is critical to the safety and security of stalking victims that penal code section 646.9 be amended to include victims' pets. SB 89 would do that providing much need protection to the victims of stalking. It is widely known that animal cruelty is "the link" to more violent behavior. By adding this critical section and conforming state law to Federal law, broader protection for crime victims can be provided."

5) **Argument in Opposition**: According to the *American Civil Liberties Union California Action*, "[W]e must respectfully oppose SB 89, which would greatly expand the definition of "stalking," a crime that carries with it a punishment of between one and five years incarceration in prison, as well as potential immigration consequences.

"SB 89 is an emotional expression of the outrage society feels when a person acts to intimidate and harass another, but it takes the wrong policy approach. Existing law already provides protections to animals under animal cruelty laws at the State and Federal level. In 2016, AB 494 amended Code of Civil Procedure 527.6 (civil harassment), Welfare and Institutions Code sections 213.5 (juvenile), and 15657.03 (elder and dependent adult abuse) to permit a court to issue a protective order for animals to keep a person away from them, and restrain from conduct including making threats. California also allows domestic violence protective orders to include pets. In addition, Federal law includes the crime of stalking and actions that make the victim fear that the stalker will hurt the victim's pet, service or emotional support animal, or horse (18 U.S.C. § 2261A (2019)).

"For these reasons, we must respectfully oppose SB 89."

6) **Related Legislation**:

   a) AB 56 (Lackey) would expand eligibility for victim compensation to include emotional injuries from specified felony crimes including stalking. AB 56 is pending hearing in the Senate Appropriations Committee.

   b) AB 829 (Waldron) would require a court to consider ordering a defendant who has been granted probation after conviction of specified animal abuse crimes to undergo a mental health evaluation, and requires the defendant to complete mandatory counseling as directed by the court, if the evaluator deems it necessary. AB 829 is pending in the Senate Appropriations Committee.

7) **Prior Legislation**:

   a) AB 1982 (Ting), of the 2013-2014 Legislative Session, would have modified the crime of stalking from one requiring specific intent on the part of the perpetrator to one of general intent and would have included a domesticated pet within the definition of immediate family for purposes of the crime of stalking. AB 1982 was held in the Assembly Appropriations Committee.

   b) SB 1320 (Kuehl), Chapter 832, Statutes of 2002, revised California's stalking statute to, among other things, specify that constitutionally protected activities are not included with the meaning of "credible threat."

c) SB 2184 (Royce), Chapter 1527, Statutes of 1990, enacted California's stalking statute.

REGISTERED SUPPORT / OPPOSITION:

Support

American Association of University Women - California
American Association of University Women - San Jose
American Kennel Club, INC.
American Society for the Prevention of Cruelty to Animals
California District Attorneys Association
California Police Chiefs Association
Crime Victims Alliance
Crime Victims United
Los Angeles County District Attorney's Office
Peace Officers Research Association of California
Riverside County District Attorney
Social Compassion in Legislation

Opposition

ACLU California Action
California Attorneys for Criminal Justice
San Francisco Public Defender

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

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

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

SB 99 (Umberg) – As Amended April 10, 2023

PULLED BY AUTHOR

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

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

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

SB 345 (Skinner) – As Amended July 6, 2023

SUMMARY: Enacts various safeguards against the enforcement of out-of-state anti-abortion and anti-transgender laws to protect individuals seeking and providing gender-affirming health care in California. Specifically, **this bill**:

1) States that California law governs in any action, whether civil, administrative, or criminal, against any person who provides, receives, aids or abets in providing or receiving, or attempts to provide or receive, by any means, including telehealth, reproductive health care services and gender-affirming health care services, including gender-affirming mental health care services, if the care was legal in the state in which it was provided at the time of the challenged conduct.

2) Declares that access to reproductive health care services and gender-affirming health care services is a right secured by the Constitution and laws of California and that interference with this right, whether or not under the color of law, is against the public policy of California.

3) Defines "legally protected health care activity" to mean the following:

   a) The exercise and enjoyment, or attempted exercise and enjoyment, by a person of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California by a health care service plan contract or a policy, or a certificate of health insurance, that provides for such services;

   b) An act or omission undertaken to aid or encourage, or attempt to aid or encourage, a person in the exercise and enjoyment or attempted exercise and enjoyment of rights to reproductive health care services, gender-affirming health care services, or gender-affirming mental health care services secured by the Constitution or laws of California; or,

   c) The provision of the health care services by a person duly licensed under the laws of California and the coverage of, and reimbursement for, such services by a health care service plan or a health insurer, if the service is lawful under the laws of California, regardless of the patient's location.

4) Specifies that "legally protected health care activity" does not include any activity that would be deemed unprofessional conduct or that would violate antidiscrimination laws of California.

5) Defines "reproductive health care services" as all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventative, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system provided in accordance with the constitution and laws of this state, whether provided in person or by means of telehealth services which includes, but is not limited to, all services, care, and products relating to pregnancy, the termination of a pregnancy, assisted reproduction, or contraception.

6) Clarifies that the abortion exemption to murder includes an act or omission by a person pregnant with the fetus.

7) Prohibits a magistrate from issuing a warrant for the arrest of an individual whose alleged offense or conviction is for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of an abortion, contraception, reproductive care, or gender-affirming care if the abortion, contraception, reproductive care, or gender-affirming care is lawful under the laws of this state, regardless of the recipient's location.

8) Provides that a bondsman or person authorized to apprehend, detain, or arrest a fugitive admitted to bail in another state who takes into custody a fugitive admitted to bail in another state whose alleged offense or conviction is for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of sexual or reproductive health care if it is lawful under the laws of this state, regardless of the recipient's location, without a magistrate's order, is ineligible for a license issued as specified, and shall forfeit any license already obtained as specified.

9) Prohibits a bail fugitive recovery agent from apprehending, detaining, or arresting a bail fugitive admitted to bail in another state whose alleged offense or conviction was for the violation of the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of sexual or reproductive health care if it is lawful under the laws of this state, regardless of the recipient's location.

10) Provides that bail fugitive recovery agent who violates the above prohibition is guilty of a misdemeanor punishable by a fine of $5,000 or by imprisonment in a county jail not to exceed one year, or by both that imprisonment and fine, is ineligible for a license, as specified, and shall forfeit any license already obtained pursuant to those laws.

11) Authorizes a person who is taken into custody by a bail agent in violation of the above prohibition to institute and prosecute a civil action for injunctive, monetary, or other appropriate relief against the bail fugitive recovery agent within three years after the cause of action accrues.

12) Prohibits a judge from issuing an order directing a witness to appear if the criminal prosecution is based on the laws of another state that authorize a criminal penalty to an individual performing, receiving, supporting, or aiding in the performance or receipt of sexual or reproductive health care, including, but not limited to, an abortion, contraception, or gender-affirming care if the care is lawful under the laws of this state.

13) Prohibits a state or local government employee, person, or entity contracted by a state or local government, or person or entity acting on behalf of a local or state government from cooperating with or providing information to any individual to apprehend, detain, or arrest a fugitive admitted to bail in another state, or out-of-state agency or department regarding any legally protected health care activity or otherwise expend or use time, moneys, facilities, property, equipment, personnel, or other resources in furtherance of any investigation or proceeding that seeks to impose civil or criminal liability or professional sanctions upon a person or entity for any legally protected health care activity that occurred in this state or that would be legal if it occurred in this state.

14) Specifies that the above prohibition does not prohibit compliance with a valid, court-issued subpoena or warrant which does not relate to a law seeking to impose civil or criminal liability or professional sanctions for a legally protected health care activity, or in response to the written request of a person who is the subject of such an investigation or proceeding, to the extent necessary, in each case, to fulfill such request.

15) Requires any out-of-state subpoena or warrant to include an affidavit or declaration under penalty of perjury that the discovery is not in connection with an out-of-state proceeding relating to any legally protected health care activity unless the out-of-state proceeding meets all of the following requirements:

    a) Is based in tort, contract, or on statute;

    b) Is actionable, in an equivalent or similar manner, under the laws of this state; or,

    c) Was brought by the patient who received a legally protected health care activity or the patient's legal representative.

16) States that, notwithstanding any other law and except as required by federal law, a demand for the extradition of a person charged with any legally protected health care activity shall not be recognized by the Governor, except as specified.

17) Provides that it is abusive litigation to litigate or take other legal action to deter, prevent, sanction, or punish a person engaging in legally protected health care activity by either of the following:

    a) Filing or prosecuting an action in a state other than California where liability, in whole or part, directly or indirectly, is based on a legally protected health care activity that was legal in the state in which it occurred, including an action in which liability is based on a theory of vicarious, joint, or several liability; or

    b) Attempting to enforce an order or judgment issued in connection with an action described in the paragraph above by a party to the action or a person acting on behalf of a party to the action. A lawsuit shall be considered to be based on conduct that was legal in the state in which it occurred if a part of an act or omission involved in the course of conduct that forms the basis for liability in the lawsuit occurs or is initiated in a state in which the health care was legal, whether or not the act or omission is alleged or included in a pleading or other filing in the lawsuit.

18) States that a public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against, or otherwise interferes with a person, provider, or other entity in California that seeks, receives, causes, aids in access to, aids, abets, provides, or attempts or intends to seek, receive, cause, aid in access to, aid, abet, or provide, reproductive health care services or gender-affirming health care services shall be an interference with the exercise and enjoyment of the rights secured by the Constitution and laws of California and shall be a violation of the public policy of California.

19) States that if a person, whether or not acting under color of law, engages or attempts to engage in abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, then an aggrieved person, provider, carrier, or other entity, including a defendant in the abusive litigation, may institute and prosecute a civil action for injunctive, monetary, or other appropriate relief within three years after the cause of action accrues.

20) Authorizes an aggrieved person, provider, or other entity, including a defendant in abusive litigation, to move to modify or quash a subpoena issued in connection with abusive litigation on the grounds that the subpoena is unreasonable, oppressive, or inconsistent with the public policy of California.

21) Provides that if the court finds for the petitioner in a civil action for abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity, recovery shall be in the amount of three times the amount of actual damages, which shall include damages for the amount of a judgment issued in connection with an abusive litigation, and any other expenses, costs, or reasonable attorney's fees incurred in connection with the abusive litigation.

22) Authorizes a court to exercise jurisdiction over a person in a civil action for abusive litigation that infringes on or interferes with, or attempts to infringe on or interfere with, a legally protected health care activity if any of the following apply:

    a) Personal jurisdiction is found;

    b) The person has commenced an action in a court in California and, during the pendency of that action or an appeal therefrom, a summons and complaint is served on the person or the attorney appearing on the person's behalf in that action or as otherwise permitted by law; or,

    c) The exercise of jurisdiction is permitted under the Constitution of the United States.

23) Specifies that the above provision does not apply to a lawsuit or judgment entered in another state that is based on conduct for which a cause of action exists under the laws of California, including a contract, tort, common law, or statutory claims.

24) States that the laws of California shall govern in a case or controversy heard in California related to reproductive health care services or gender-affirming health care services, except as may be required by federal law, and specifies that related provisions shall not be construed to provide jurisdiction over a California resident in an out-of-state forum when the California

resident has not availed themselves of that forum.

25) Requires a court to grant a stay of enforcement when a money judgment or lien on real property was obtained against a person or entity for exercising a right guaranteed under the United States Constitution or a right guaranteed under the California Constitution, or against a person or entity for aiding and abetting the exercise of said rights.

26) Prohibits a person or business from collecting, using, disclosing, or retaining the personal information of a person who is physically located at, or within a precise geolocation of, a family planning center, except only as necessary to perform the services or provide the goods requested by the person. A person or business shall not sell or share this personal information.

27) Defines "precise geolocation" as a geographic area that is equal to or less than the area of a circle with a radius of 1,850 feet as derived from a device that is used or intended to be used to locate a person.

28) Defines "family planning center" as a business categorized as a family planning center by the North American Industry Classification System adopted by the United States Census Bureau, including, but not limited to, an abortion clinic, birth control clinic, pregnancy counseling center, or reproductive health services center.

29) Authorizes an aggrieved person or entity, including a family planning center, to institute and prosecute a civil action against any person or business who violates the prohibition on selling or sharing personal information for injunctive and monetary relief and attorney's fees within three years of discovery of the violation.

30) Prohibits a board from suspending or revoking the license of a person solely because that person provided a legally protected health care activity, as defined.

31) Prohibits a board from denying an application for licensure or from suspending, revoking, or otherwise imposing discipline upon a person licensed, as specified, because the person was disciplined for, or convicted of, an offense in another state in which they were licensed if the suspension, revocation, or other discipline was for providing legally protected health care activity, as specified.

32) Provides that performance, recommendation, or provision of a legally protected health care activity by a health care practitioner acting within their scope of practice for a patient who resides in a state in which the performance, recommendation, or provision of that legally protected health care activity is illegal, does not, by itself, constitute professional misconduct, upon which discipline or other penalty may be taken.

33) Replaces the term "unborn children" and "unborn person" to "fetus" in various provisions including, among others, defining low-risk pregnancy conditions for determining the scope of authorization of a certificate to practice nurse-midwifery, defining active labor for health facility licensing provisions, and defining spouse for California State Teachers' Retirement System benefits.

34) Replaces the term "unborn person" to "unborn beneficiary" in various sections of the Probate Code.

35) Contains a severability clause.

36) Repeals section 123450 of the Health and Safety Code requiring an unemancipated minor to first obtain the written consent of one of their parents or legal guardians before receiving an abortion, a requirement that was held unconstitutional in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.

EXISTING LAW:

1) Establishes the Reproductive Privacy Act which provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. Accordingly, it is the public policy of the State of California that:

   a) Every individual has the fundamental right to choose or refuse birth control;

   b) Every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions; and,

   c) The state shall not deny or interfere with a person's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted. (Health & Saf. Code, § 123462.)

2) Provides that the state may not deny or interfere with a person's right to choose or obtain an abortion prior to viability of the fetus or when the abortion is necessary to protect the life or health of the person. (Health & Saf. Code § 123466, subd. (a).)

3) Requires a court to grant a stay of enforcement of a judgment based on a sister state judgment by filing an application with a superior court and requires the court clerk to enter a judgment based on the application under specified circumstances. (Code Civ. Proc., § 1710.50.)

4) States that a person shall not be compelled in a state, county, city, or other local criminal, administrative, legislative, or other proceeding to identify or provide information that would identify or that is related to an individual who has sought or obtained an abortion if the information is being requested based on either another state's laws that interfere with a person's rights or a foreign penal civil action. (Health & Saf. Code, §123466, subd. (b).)

5) Prohibits, under the Confidentiality of Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient's written authorization, subject to certain exceptions. (Civ. Code, § 56 et seq.)

6) Defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

7) Exempts from the definition of murder a person who commits an act that results in the death of a fetus if any of the following apply:

   a) The act complied with the Therapeutic Abortion Act;

   b) The act was committed by a holder of a physician's and surgeon's certificate in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

   c) If the act is solicited, aided, abetted, or consented to by the mother of the fetus. (Pen. Code, § 187, subd. (b).)

8) States that it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this State. (Pen. Code, § 1548.1.)

9) States that no demand for the extradition of a person charged with a crime in another state shall be recognized by the Governor unless it meets specified requirements including that the demand is in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter the person fled from that state. (Pen. Code, § 1548.2.)

10) Provides that the Governor may also surrender, on demand of the executive authority of another state any person in this state with committing an act in this state, or in a third state, that results in a crime in the demanding state though the accused was not in the demanding state at the time of the commission of the crime, and has not fled therefrom. (Pen. Code, § 1549.1.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In the wake of Roe being overturned last year, California strengthened and expanded access to reproductive health care and abortion services and provided many legal protections to patients and providers. California also affirmed the right to gender-affirming care. But as the assault on essential healthcare accelerates, new challenges are emerging to patients and health care providers who have extended a lifeline to patients who may be in a location where medically safe and effective abortions or gender affirming care are now illegal. SB 345 is necessary to ensure that California healthcare practitioners are legally protected when they provide essential reproductive and gender affirming care to any of their patients, regardless of their patient's location. As the CA Medical Board's letter in support notes, SB 345 'protects healthcare providers licensed in California … for performing healthcare activities within the standard of care permitted in California.' Additionally SB 345 makes it unlawful for bounty hunters or others to take enforcement actions against or apprehend people in California related to

violations of another state's anti-abortion or anti-gender affirming care law."

2) **Reproductive Rights in California:** *Roe v. Wade* (1973) 410 U.S. 113 (overruled by *Dobbs v. Jackson Women's Health* (2022) 142 S. Ct. 2228) was the landmark U.S. Supreme Court decision that held that the implied constitutional right to privacy extends to a person's decision whether to terminate a pregnancy. Specifically, the Court found for the first time that the constitutional right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* had been one of the most debated Supreme Court decisions, and its application and validity continued to be challenged time and again. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, the Court reaffirmed the basic holding of *Roe,* yet also permitted states to impose restrictions on abortion as long as those restrictions do not create an undue burden on a person's right to choose to terminate a pregnancy.

   Last year, in *Dobbs v. Jackson Women's Health, supra*, the U.S. Supreme Court overturned *Roe v. Wade* holding that, contrary to 50 years of precedent, there is no fundamental constitutional right to have an abortion. (*Dobbs*, 142 S. Ct. at 2242.) The majority opinion further provided that states should be allowed to decide how to regulate abortion and that a strong presumption of validity should be afforded to those state laws. (*Id.* at 2283-2284.)

   In California, before *Roe v. Wade* was decided by the U.S. Supreme Court, the California Supreme Court held in 1969 that the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.*)* Existing California statutory law provides, under the Reproductive Privacy Act, that the Legislature finds and declares every individual possesses a fundamental right of privacy with respect to personal reproductive decisions; therefore, it is the public policy of the State of California that every individual has the fundamental right to choose or refuse birth control and the right to choose to bear a child or to choose to obtain an abortion. (Health & Saf. Code, § 123462, subds. (a)-(b).) The Act further provides that it is the public policy of the state that the state shall not deny or interfere with a person's fundamental right to choose or obtain an abortion prior to viability of the fetus or when the abortion is necessary to protect the life or health of the pregnant person. (Health & Saf. Code, § 123466.)

   In the 2022 general election, California voters approved Proposition 1 to amend the state constitution to guarantee the right to abortion and contraception. This ballot measure was approved by 66.9% of voters. (Secretary of State, November 8, 2022 General Election State Ballot Measures by County <https://elections.cdn.sos.ca.gov/sov/2022-general/sov/props.pdf> [as of Apr. 11, 2023].)

   Last year, several bills were enacted to further protect reproductive rights in California. AB 1242 (Bauer-Kahan), Chapter 627, Statutes of 2022, protects reproductive digital information handled by companies incorporated or headquartered in California and prevents the arrest of individuals or the disclosure by law enforcement of information in an investigation related to any abortion that is legal in California. AB 1666 (Bauer-Kahan), Chapter 42, Statutes of 2022, declares that a law of another state that authorizes a person to bring a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions, is contrary to the public policy of this state. AB 2091 (Bonta), Chapter 628, Statutes of 2022, prohibits a provider of health care, health care service plan, or contractor from releasing medical

information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on either another state's laws that interfere with a person's rights set forth in the Reproductive Privacy Act and prohibits the issuance of a subpoena, from the superior court or an attorney licensed in California, based on a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state. AB 2223 (Wicks), Chapter 629, Statutes of 2022 prohibits a person from being criminally or civilly liable for miscarriage, stillbirth, abortion, or perinatal death due to causes that occurred in utero.

This bill makes additional changes to civil and criminal laws to protect patients and health care providers who provide patients with a legally protected health care activity. According to the background information provided by the author of this bill, "approximately 53% of abortions are done through medication rather than surgery, and 64% of abortions before the 10th week of gestation are done through medication rather than surgery. Medication abortion ends a pregnancy in its early stages. The medications are generally administered up to 10 weeks into a pregnancy, using a safe and effective two-drug protocol, mifepristone and misoprostol. The first drug, mifepristone, also known as 'Mifeprex' or 'RU-486,' blocks the action of the natural hormone progesterone on the uterus. This causes the lining of the uterus to shed, as it does during a period, and stops the growth of the pregnancy. This medication can be administered in the clinic, mailed to a patient's location, or sent home with a patient. The second drug, misoprostol, causes the uterus to contract and initiates bleeding and cramping, Misoprostol is taken by the patient 6 to 72 hours after taking the first medication, mifepristone. Misoprostol completes the abortion."

Because medication abortion necessarily involves a time lapse between when the patient interacts with the medical professional to receive the pills and two phases of medication, it is possible for people who travel to California to receive such services that they may be in another state over the course of the treatment, potentially opening them up for criminal prosecution or civil liability in that state.

This bill would address the issue raised by medication abortion by specifically allowing medical providers to provide abortion medication that is legal in California to a patient regardless of where the patient is located. This bill would also prohibit the sharing of information that is sought through subpoenas or a warrant for an out-of-state prosecution or law suit when the information is related to the legally protected health care in California. This bill would also prohibit the suspension or revocation of a person solely because the person provided legally protected health care activity.

This bill would also allow medical providers and individuals to bring suit in California against anyone who interferes with the healthcare provider's right to provide care that is legal in California or with a patient's right to receive such care.

Finally, this bill repeals Section 123450 of the Health and Safety Code requiring an unemancipated minor to first obtain the written consent of one of their parents or legal guardians before receiving an abortion, a requirement that was held unconstitutional in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307.

3) **Gender-Affirming Health Care Protections in California:** Last year, in response to a series of laws and executive orders adopted in other states that impose civil and/or criminal

liability on transgender youth, their parents and medical providers who assist them in obtaining gender-affirming care, California enacted protections for such individuals obtaining care in this state. The new law, among other things, prohibits the sharing of medical records regarding the receipt of gender-affirming care; the enforcement of out-of-state subpoenas seeking information regarding the receipt of gender-affirming medical care in California; and the enforcement of laws of another state that authorize the removal of a child from their parent or guardian and enforcement of out-of-state criminal laws related to gender-affirming health care. (SB 107 (Wiener), Chapter 810, Statutes of 2022.)

Similar to the issue raised by medication abortion, gender-affirming health care can entail a regimen of hormones and treatment that is legal in California, however patients who take these hormones out of state may subject themselves or their medical provider to another state's laws banning such care. This bill would allow medical providers to provide gender-affirming health care to a patient regardless of where the patient is located. This bill would also prohibit the sharing of information that is sought through subpoenas or a warrant for an out-of-state prosecution or law suit when the information is related to the legally protected health care in California.

This bill also allows medical providers and individuals to bring suit in California against anyone who interferes with the healthcare provider's right to provide care that is legal in California or with a patient's right to receive such care.

4) **Full Faith and Credit Clause:** Generally, the laws of the state regulate conduct that occurs within that state. However, situations may arise where more than one state's laws may apply such as collection of previously-owed income taxes or child support obligations from another state. Or one state has jurisdiction to criminally prosecute an offense because someone has fled the state or committed part of the crime in the prosecuting state. Under the United States Constitution, states are required to provide full faith and credit to "to the public acts, records, and judicial proceedings of every other state. (U.S. Const. art. IV, sec. 1.)"

   The Full Faith and Credit Clause may be implicated when there is a conflict between the laws of the different states. At least one court has held that any effort by a state to apply its criminal laws beyond its state borders to criminalize activity that is otherwise lawful in the other state. (*Bigelow v. Virginia* (1975) 421 U.S. 809.) However, the Supreme Court has also held that even when criminal conduct takes place outside of the state, extraterritorial jurisdiction may be proper when the conduct was intended to produce or did produce harmful effects within the state. (*Strassheim v. Daily* (1911) 221 U.S. 280.)

   The Supreme Court has also made a distinction between the strength of the Full Faith and Credit Clause's applications to judgments versus state law. "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.'" (*Baker v. General Motors Co.*, *supra*, 522 U.S. at 232-233.) This concept is often referred to as the "public policy exception" meaning statutes in other states is given effect only if they do not contravene the public policy of the other state.

By refusing to recognize the laws of another state, this bill appears to implicate the Full Faith and Credit Clause. California has declared that such laws that criminalize abortion, contraceptives and gender-affirming health care are against the public policy of this state and shall not be enforced in a court in this state. This bill further declares that access to reproductive health care services and gender-affirming health care services is a right secured by the Constitution and laws of California and that interference with this right, whether or not under the color of law, is against the public policy of California. Thus, a challenge based on a violation of the Full Faith and Credit Clause would likely be met with a response that the public policy exception applies. Whether such exception applies is ultimately up to the courts.

5) **Extradition Process:** Extradition refers to the legal process of returning fugitives from justice back to the state in which they allegedly committed a crime or violated the terms of their bail, probation, or parole.

Extradition between states is guaranteed by the Extradition Clause of the United States Constitution, which provides, "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." (U.S. Const. art. IV, § 2, cl. 2.) The Extradition Clause has been implemented by 18 USC § 3182. The Extradition Clause in the Constitution is limited, as it refers only to persons "who shall flee from justice" and requires surrender to the state from which they "fled." So, it covers only persons who committed a crime in one state and then flee from there. (*In re Morgan* (1948) 86 Cal.App.2d 217, 223.)

"The federal constitutional and statutory provisions are not exclusive and the state are free to cooperate with one another by extending interstate rendition beyond that required by federal law." (*In re Cooper* (1960) 53 Cal.2d 772, 775.) Besides the Extradition Clause of the United States Constitution, most states, including California, are also bound by the Uniform Criminal Extradition Act (UCEA), which goes beyond the Constitution and its implementing statute. The UCEA is enforceable within any state that adopts it, whether or not the demanding state has a similar statute. (*In re Morgan*, *supra*, 86 Cal.App.2d at p. 224.)

Under the UCEA, the Governor of the state has the duty to have arrested and delivered to the executive authority of any other state a person charged in that state with a crime, who has fled from justice and is found in this State. (Pen. Code, § 1548.1.) Any person, who while present in the demanding state, commits a crime there and is subsequently found in another state, is a "fugitive from justice" and subject to extradition. (Pen. Code, § 1548.1.)

The UCEA provides the manner in which an extradition request must be made: "No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The

indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand." (Pen. Code, § 1548.2.) However, under the UCEA, the Governor also has discretion to extradite a person who commits an act in California (or another state besides the demanding state) that intentionally results in a crime in the demanding state even if the accused was not in the demanding state at the time of the commission of the crime, and has not fled therefrom. (Pen. Code, § 1549.1.)

This bill states that notwithstanding Penal Code section 1549.1 or any other law, except as required by federal law, a demand for the extradition of a person charged with legally protected health care activity shall not be recognized by the Governor unless it is alleged in writing that the accused was present in the demanding state at the time of the commission of the offense and that the accused thereafter fled from that state. The intent of this provision is to protect against extradition requests from another state criminalizing an act committed by a health care provider or an individual receiving care in California that results in a crime in that state.

6) **Abortion Exemption in Murder Definition:** Under existing law, murder is the unlawful killing of a human being, or a fetus, with malice aforethought but specifically provides that it does not apply "to any person who commits an act that results in the death of a fetus if…the act is solicited, aided, abetted, or consented to by the mother of the fetus." (Pen. Code § 187(a) & (b)(3).)

This bill expands the abortion exemption within the definition of murder to include when the person pregnant with the fetus commits the act that results in the death of the fetus. This change would clarify that self-managed abortion is not murder.

7) **Argument in Support**: According to *California Public Defenders Association*, "SB 345 would protect California health care providers and pharmacies from out-of-state criminal and civil actions merely for providing their patients with health care in the form of reproductive and gender-affirming care. Specifically, it would allow healthcare providers to prescribe and dispense contraception, abortion, and gender-affirming care regardless of where the patient is located without fear of prosecution or extradition due to other states' overreaching laws infringing on Californian physicians' right to practice medical care at a professionally mandated standard of care.

"Due to ongoing assaults on the medical profession, SB 345 would ensure that California is prohibited from co-operating with out-of-state extra-territorial law and interfering with a health care provider's right to provide legal care. In addition to defining "gender affirming health care," "legally protected health activity," "reproductive health services" as being protected from disclosure by other states/persons seeking to impose civil or criminal sanctions for acts occurring within California. SB 345 also amends Penal Code section 187 so that an unlawful killing of a fetus if it was "committed" by the mother is not homicide. This amendment would ensure there is no threat of being charged with homicide for receiving health care services provided within the State.

"Currently, California is a state where hate and bigotry do not interfere with a health care provider's ability to provide appropriate patient care. SB 345 will reaffirm that California is a

safe and inclusive state providing the right of access to reproductive and gender-affirming health care. "

8) **Argument in Opposition**: According to *California Catholic Conference*, "With this bill, the Legislature is overstepping and engaging in ideological colonization against states and citizens that do not want abortion. SB 345 circumvents Article IV, section 1 of the US Constitution, stating 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.' Denying the legitimate interest of other states to protect unborn children and public health is a dangerous precedent. By explicitly contravening the U.S. Constitution, this bill could prompt other states to selectively decide to ignore laws duly enacted by the California Legislature.

"This bill would also remove the terms 'unborn child' and 'unborn person' from the code, replacing with 'fetus' and 'unborn beneficiary.' From the moment of fertilization, a new, unique, unrepeatable human being's life begins, as is affirmed throughout embryology textbooks and the consensus of 95% of biologists. Each of us began at the zygote stage, and modern science shows us the embryo's beating heart at just four weeks post-fertilization. By 8 weeks, all major organs are present, and babies even show a preference for their right or left hand. By 12 weeks, they can smile, yawn, and suck their thumb, all shown on incredible 4D ultrasound. Doctors routinely perform surgery and treat unborn babies right in the womb – and the babies are treated as patients in their own right and given anesthesia for their pain.

"As members of the human family, unborn children possess basic human rights. Removing the terms 'child' and 'person', this bill dehumanizes and erases preborn children, even as their factual biological existence and legal rights remain evident in their rights to guardians ad litem in probate court, benefits, and their needs for medical care."

9) **Related Legislation**:

a) AB 1194 (Carrillo), would provide states that a consumer accessing, procuring or searching for reproductive health services does not constitute a natural person being at risk or danger of death or serious physical injury and therefore does not count as an exemption to the California Consumer Privacy Act. AB 1194 is pending hearing in the Senate Appropriations Committee.

b) AB 1707 (Pacheco), would protect California-licensed health care professionals from adverse licensing actions or losing staff privileges in this state as a result of an adverse action taken in another jurisdiction as a result of a medical provider giving proper care that is otherwise legal in California. AB 1707 is pending hearing in the Senate Judiciary Committee.

c) SB 36 (Skinner), would have, among other things, prohibited a magistrate from issuing a warrant for the arrest of a bail fugitive whose alleged offense or conviction is for the violation of another state's laws that criminalize abortion, contraception, reproductive care, or gender-affirming care that is otherwise lawful under the laws of this state, regardless of the individual's location. SB 36 was held in the Senate Appropriations Committee in the Suspense File.

d) SB 487 (Atkins), would establish protections for health care providers who contract with health plans and insurers, or are enrolled as Medi-Cal providers, from adverse outcomes such as contract termination, discrimination, or suspension of enrollment, when such adverse action is based on adverse legal action or professional discipline in other states for conduct that is not prohibited in California (such as provision of abortion or gender-affirming care). SB 487 is pending hearing in the Assembly Judiciary Committee.

10) **Prior Legislation**:

a) AB 1242 (Bauer-Kahan), Chapter 627, Statutes of 2022, prohibited a peace officer from arresting a person for performing or aiding in the performance of a lawful abortion or for obtaining an abortion and to prohibit law enforcement agencies from cooperating with or providing information to an individual or agency from another state regarding a lawful abortion, except as provided.

b) AB 1666 (Bauer-Kahan), Chapter 42, Statutes of 2022, declared that a law of another state that authorizes a person to bring a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions, is contrary to the public policy of this state.

c) AB 2091 (Bonta), Chapter 628, Statutes of 2022, prohibited the sharing of specified information in response to subpoenas related to out-of-state anti-abortion statutes or foreign penal civil actions.

d) AB 2223 (Wicks), Chapter 629, Statutes of 2022, prohibited a person from being subject to civil or criminal liability based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome or based solely on their actions to aid or assist a pregnant person who is exercising their reproductive rights.

e) SB 107 (Wiener), Chapter 810, Statutes of 2022, enacted various safeguards against the enforcement of out-of-state anti-transgender laws to protect individuals seeking and providing gender-affirming health care in California.

f) AB 4 (Ammiano), Chapter 570, Statutes of 2013, enacted the TRUST Act which prohibits a law enforcement official, as defined, from detaining an individual on the basis of a United States Immigration and Customs Enforcement hold after that individual becomes eligible for release from custody, unless, at the time that the individual becomes eligible for release from custody, certain conditions are met, including, among other things, that the individual has been convicted of specified crimes.

g) SB 54 (De León), Chapter 495, Statutes of 2017, enacted the California Values Act, which further limits the involvement of state and local law enforcement agencies in federal immigration enforcement.

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REGISTERED SUPPORT / OPPOSITION:

Support

Abortion Coalition for Telemedicine Access
Access Reproductive Justice
American Association of University Women (AAUW) San Jose
American Association of University Women - California
American Medical Women's Association
Apla Health
Aria Medical
Black Women for Wellness Action Project
Black Women Lawyers Association of Los Angeles, INC.
Board of Registered Nursing
California Association of Black Lawyers
California Latinas for Reproductive Justice
California Legislative Women's Caucus
California Nurse Midwives Association
California Nurse Midwives Association (CNMA)
California Public Defenders Association (CPDA)
California School-based Health Alliance
California State Board of Pharmacy
California Transcends
California Women's Law Center
Choix INC
Citizens for Choice
City and County of San Francisco
City and County of San Francisco Department on The Status of Women
Conference of California Bar Associations
Dolores Huerta Foundation
Equality California
Essential Access Health
Gender Spectrum
Health Care Workers
Honeybee Health, INC.
John Burton Advocates for Youth
John M. Langston Bar Association
Los Angeles County District Attorney's Office
Los Angeles Lgbt Center
Medical Board of California
Mya Network
Naral Pro-choice California
National Association of Social Workers, California Chapter
Ncjwofkc
Nextgen California
Oakland Privacy
Osteopathic Medical Board of California
Physician Assistant Board
Physicians for Reproductive Health

Plan C
Planned Parenthood Affiliates of California
Positive Images Lgbtqia+ Center
Possible Health, Inc.; Possible Health Medical, P.c.; Possible Health Ca, P.c.
Prosecutors Alliance California
Public Health Institute/access Bridge
Queen's Bench Bar Association of The San Francisco Bay Area
Queerdoc
Radiant Health Centers
Reproductive Health Access Project (RHAP)
San Diego Pride
San Francisco City Attorney's Office
Santa Barbara Women's Political Committee
State Innovation Exchange
The Source Lgbt+ Center
The Women's Building
Tia, INC.
Training in Early Abortion for Comprehensive Health Care
Training in Early Abortion for Comprehensive Healthcare
Urge: Unite for Reproductive & Gender Equity
Valorcalifornia / Valorus
Viet Rainbow of Orange County
Women's Foundation California
Women's Health Specialists

5 Private Individuals

Opposition

California Catholic Conference
Frederick Douglass Foundation of California
Right to Life League

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

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

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

SB 441 (Bradford) – As Amended June 29, 2023

SUMMARY: Shortens the time limits in which a prosecutor must disclose specified discovery to the defense in felony cases prior to the preliminary hearing. Specifically, **this bill**:

1) States that, in felony cases where the defendant has not waived the right to a preliminary hearing within 10 days, a prosecutor must disclose to the defense the following discovery within three days after the defense makes a request:

   a) Names and addresses of all witnesses or persons whose statements the prosecutor intends to introduce into evidence at the preliminary hearing;

   b) Statements of all defendants;

   c) All relevant real evidence obtained as part of the investigation;

   d) The existence of felony convictions of any material witnesses or persons whose statements the prosecutor intends to introduce at the preliminary hearing;

   e) Any exculpatory evidence; and,

   f) Relevant written or recorded statements of witnesses or persons that the prosecutor intends to call at the preliminary hearing, including any scientific tests, experiments or other examinations made.

2) Provides that these provisions do not reduce the obligation to produce discovery under any other statutory or constitutional mandate, and specifies that a prosecutor may otherwise charge a reasonable discovery fee.

3) Exempts felony cases where the defendant has not waived the 10-day preliminary hearing rule, from the general rule requiring the prosecution to turn over discovery to the defense within 15 days after receiving a defense request.

4) Specifies that, in felony cases where the defendant has not waived the 10-day preliminary hearing rule, if the prosecutor fails to provide the discovery requested within three days, the defense may seek a court order.

5) Provides that, in felony cases where the defendant has waived the 10-court-day preliminary exam rule, a court may make an order compelling discovery from the prosecution, law enforcement, or related agencies, if the affected agency has received notice of a discovery

motion at least 10 court days prior to the date in which discovery motion will be heard.

6) States that, in felony cases where the defendant has not waived the 10-court-day preliminary exam rule, a court may issue an order compelling discovery from the prosecution, after notice of a discovery motion that has been made at any time, including during the preliminary hearing. Provides that a court may not proceed with the preliminary hearing before hearing and deciding any outstanding discovery motions.

7) Provides that, in any case in which an order compelling discovery has been ordered by the court, upon motion by the defendant, the court must continue the preliminary hearing until all of the court-ordered discovery has been produced to the defense. Specifies that the defendant can make the motion at any time and that, making such a continuance motion does not vitiate any other available remedy for a failure to produce court-ordered discovery. Further specifies that any delay pursuant to a continuance under this provision does not toll the running of statutory or constitutional rights to a speedy preliminary hearing or trial.

8) Specifies that if a continuance for the preliminary hearing is requested by the prosecutor in order to comply with the discovery requirements, and the continuance results in the preliminary hearing not occurring within 10 court days, then the court may continue the preliminary hearing once for an additional five calendar days, upon good cause.

9) Specifies that if a continuance for the preliminary hearing is requested by the prosecutor in order to comply with the discovery requirements, and the continuance results in the preliminary hearing not occurring within 60 days, the preliminary hearing may be extended once by 10 calendar days.

10) Provides that if a preliminary hearing is continued pursuant to these provisions, the existing law that, among other things, requires the case be dismissed or the defendant be released, does not apply until the time allotted in the continuance runs out.

11) States that a failure to comply with a discovery order pursuant to these subdivisions does not, in and of itself, constitute good cause to continue a preliminary hearing.

12) Specifies that in felony cases where the defendant has waived the 10-court-day rule, discovery must be turned over no later than 10 days before the preliminary hearing is scheduled to occur.

13) States that in felony cases where the defendant has not waived the 10-court-day rule, discovery must be turned over no later than 72 hours before the preliminary hearing is scheduled to occur.

EXISTING LAW:

1) States that a defendant has the right to a speedy public trial, to compel witness attendance on the defendant's behalf, have assistance of counsel, to be personally present with counsel, and to confront witnesses. (Cal. Const. Art. I, § 15.)

2) Provides that felonies shall be prosecuted either by indictment or, after being held to answer in a preliminary hearing, by information. (Cal. Const. Art. I § 14.)

3) Specifies that the purpose of a preliminary examination is to establish whether probable cause exists to believe that the defendant committed a felony and that a preliminary hearing shall not be used for purposes of discovery. (Pen. Code, § 866, subd. (b).)

4) States that at the time the defendant appears for arraignment on a felony to which the defendant has not pleaded guilty, the magistrate shall immediately set a time for the preliminary hearing. (Pen. Code, § 859b.)

5) Provides that both the prosecution and defense have a right to a speedy preliminary hearing, and that the preliminary hearing must be held within 10 court days of arraignment or plea, unless waived by the defense or otherwise continued for good cause. (Pen. Code, § 859b.)

6) States that a court must dismiss a complaint if the preliminary hearing occurs more than 60 days from the arraignment or plea, unless the defendant personally waives such right. (Pen. Code, § 859b.)

7) Provides that, in felony cases where an in-custody defendant has not waived the 10-court-day preliminary hearing rule, and the hearing is not held within 10 court days, a court must dismiss the complaint and release the defendant unless the following circumstances apply:

   a) The defendant personally waives their right to a preliminary hearing within 10 court days; or

   b) The prosecution establishes good cause for a continuance beyond the 10-court-day period. (Pen. Code, § 859b, subd. (b).)

8) Provides that, in felony cases where an in-custody defendant has not waived the 10-court-day preliminary hearing rule and the examination has been set or continued beyond the 10-court-day period, a defendant must be released from custody unless the following circumstances apply:

   a) The defendant requests a continuance;

   b) The defendant is charged with a capital offense where the proof is evident and the presumption great;

   c) A witness needed for the preliminary examination is unavailable due to the actions of the defendant;

   d) Illness of counsel;

   e) Unexpected engagement of counsel in jury trial; or,

   f) Unforeseen conflicts of interests requiring appointment of new counsel. (Pen. Code, § 859b, subd. (b)(1)-(6).)

9) Provides that, in order to continue any hearing, a written notice shall be filed and served on all parties at least two court days before the hearing sought to be continued, and that the notice shall detail specific facts demonstrating good cause as to why a continuance is necessary. (Pen. Code, § 1050.)

10) Specifies that good cause is not needed to continue a preliminary hearing if the hearing is reset on a date less than 10 court days from the date of the defendant's arraignment on the complaint. (Pen. Code, § 1050, subd. (k).)

11) States that a preliminary examination must be completed within one session or be dismissed unless good cause substantiated by affidavit is found. Specifies that a postponement shall not be more than 10 court days unless defendant makes a waiver or the prosecution establishes good cause for postponement beyond the 10 court days. Provides that in such situations, a defendant must be released, as specified. States that a preliminary examination must not be postponed beyond 60 days from the date the postponement motion is granted, unless consented to by the defendant. (Pen. Code, § 861.)

12) States that a dismissal of a felony case due to, among other things, the failure to hold a timely preliminary hearing is a bar to any other prosecution for the same offense if the case had previously been dismissed, as specified, and except under the following circumstances:

    a) Substantially new evidence is discovered that otherwise would not have been known through the prosecution's exercise of due diligence;

    b) The dismissal was the result of direct intimidation of a material witness, as specified;

    c) The dismissal was the result of a failure to appear by a subpoenaed victim of domestic violence or sexual assault offenses; or,

    d) The dismissal was due to a domestic violence or sexual assault victim being held in contempt of court for refusing to testify on the stand. (Pen. Code, § 1387, subd. (a).)

13) Authorizes the prosecution to refile a felony case, notwithstanding two prior dismissals, if the offense was a violent felony and the prior dismissals were due solely to excusable neglect. (Pen. Code, § 1387.1.)

14) Requires a court to dismiss a case, unless good cause is shown or the defendant waives time, under the following circumstances, among other things:

    a) When a person has been held to answer after a preliminary examination and has not been arraigned on the subsequent information within 15 days; or

    b) In felony cases, if a defendant is not brought to trial within 60 days after arraignment (Pen. Code, § 1382.)

15) Requires the prosecution to disclose the following evidence, if it is possessed by the prosecution or the prosecutor knows it is possessed by the investigating agencies:

a) Names and addresses of persons the prosecutor intends to call as witnesses at trial;

b) Statements made by all defendants;

c) All relevant real evidence obtained as part of the investigation of the charged offenses;

d) The existence of felony convictions of material witnesses whose credibility is likely to be critical to the outcome of the trial;

e) Any exculpatory evidence; and,

f) Relevant written or recorded statements. (Pen. Code, § 1054.1.)

16) States that before a party may seek court enforcement of any of the required disclosures, the party shall make an informal request of opposing counsel for desired materials and information. (Pen. Code, § 1054.5, subd. (b).)

17) States that if within 15 days of the informal request, opposing counsel fails to provide the materials and information requested, the party may seek a court order and upon a showing that the moving party complied with informal discovery, a court may make any order necessary to enforce compliance, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (Pen. Code, § 1054.5, subd. (b).)

18) Provides that disclosure of the required materials and information shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure shall be denied, restricted or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (Pen. Code, § 1054.7.)

19) Requires a judge to report a prosecutor to the State Bar if it finds by clear and convincing evidence that the prosecutor, intentionally and in bad faith, withheld relevant or material exculpatory evidence which limited a defendant's ability to present a defense, contributed to a guilty verdict, or contributed to a plea. (Pen. Code, § 1424.5; Bus. & Prof. Code, § 6086.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 441 will require prosecutors in felony cases to disclose specified information to the defendant or their attorney within 72 hours of a preliminary hearing. This shall include critical information such as statements made by the defendant, witnesses, and physical evidence already collected by the prosecution or law enforcement. By promoting the full disclosure of this key information by prosecutors and law enforcement, SB 441 will ensure our criminal justice process is more efficient and effective by giving the accused access to this information early in the legal process, eliminating long and costly legal motions over the disclosure of evidence, and reducing the risk of wrongful

arrests and convictions."

2) **Overview of Preliminary Hearings**: In criminal prosecutions for felony offenses, a defendant is entitled to a preliminary hearing before a magistrate. (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150-51.)

A defendant is entitled to have their preliminary hearing occur within 10 court days or 60 actual days. (Pen. Code, § 859b.) Generally speaking, a defendant may waive both the 10-court-day and the 60-day time limits in order to better prepare for the preliminary hearing. (Pen. Code, § 859b.) As this bill deals primarily with defendants who do not waive their right to have a preliminary hearing within 10 court days, it is important to note that court days exclude weekends and statewide holidays. (*People v. Pickens* (1981) 124 Cal.App.3d 800, 805; Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2023) (hereafter *CEB*) § 8.16, p. 194.) So if a defendant was arraigned on a Monday, then the 10th court day would be the Friday after next, taking into account the intervening weekend and assuming there were no state holidays during that time.

At the preliminary hearing, the prosecution must present sufficient evidence to convince the judge that sufficient cause exists to believe that a crime has been committed and that the defendant committed it. (Pen. Code, § 872.) If the prosecutor fails to do so, the charges and even the entire case can be dismissed. During the hearing, the prosecution can present live witnesses, hearsay from law enforcement witnesses, or a combination of both. (Pen. Code, § 872, subd. (b).) The defense may call witnesses and cross-examine the prosecution's witnesses. (Pen. Code, §§ 865, 866.) As such, a preliminary hearing provides a brief glimpse into what the trial may look like and allow both sides to judge the strength of their case, however:

> "Because the vast majority of felony cases settle before trial, the preliminary hearing may be the sole proceeding in the case at which evidence is taken. The preliminary hearing gives the defense a key opportunity to show the prosecutor why a particular settlement is justified, and to show the magistrate why the case should be discharged or reduced. Ideally, both prosecutors and defense attorneys should be as prepared for the preliminary hearing as they would be for trial. In reality, if the hearing proceeds on a 'no-time waiver' basis (*i.e.*, 10 court days after arraignment), neither side will be fully prepared."
>
> (*CEB* at p. 185.)

Under existing law, in order to alleviate some of those time constraints, a defendant may agree to a limited time waiver (meaning the defendant can agree to continue a preliminary hearing for a few days without generally waiving their right to have the preliminary hearing occur in 10 court days or 60 days). (*Favor v. Superior Court* (2021) 59 Cal.App.5th 984, 991-992; *Garcia v. Superior Court* (2020) 47 Cal.App.5th 631, 651.) For example, if there was some evidence that the defense needed more time to review, they could enter into a limited time waiver in order to review the evidence without allowing the preliminary hearing to be rescheduled on a date too far ahead out in the future.

On the opposite end, the prosecution generally must seek a continuance of a preliminary

hearing if the defendant does not waive time. (Pen. Code, § 859b.) For cases where the defendant is in custody, if the prosecutor seeks to continue a preliminary hearing beyond 10 court days, they must demonstrate good cause as to why a continuance is needed, and even then, the preliminary hearing could only be continued for up to three days. (*Ibid.*) If they do not show good cause, a case must be dismissed. If they do show good cause the defendant still must be released unless certain exemptions apply. (*Ibid.*) However, regardless of whether a defendant is in custody or not, the prosecution can only continue a preliminary hearing until they reach the 60 day limit, anything beyond that will result in an automatic dismissal of the case unless the defendant waives time. (*Ibid.*)

This bill, among other things, would allow the prosecutor to continue a preliminary hearing beyond 10 court days if they demonstrate good cause in attempting to retrieve remaining discovery. This bill would only allow one such continuance and states that the continuance can be no more than 5 calendar days. It amends existing law in that it extends the time in which a preliminary hearing for an in-custody defendant who has not waived the 10-court-day rule can be continued, from three days to five days. This bill would also prevent the defendant from being released within those five days, whereas existing law requires an in-custody defendant to be released if a preliminary hearing gets continued beyond 10-court-days.

3) **Overview of Discovery Requirements**: In the criminal justice system, the term "discovery" typically refers to the evidence obtained by law enforcement that relates to a particular case. Such evidence is comprised of, "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 250.) Of course, the evidence has to be relevant, meaning, it has to prove or disprove a fact that is of consequence in the case. (Evid. Code, § 210.) In a criminal case, this typically means that "discovery" refers to evidence tending to point to a defendant's culpability or innocence regarding the charged offenses. Discovery could take the form of police reports, photos, video recordings, DNA evidence, reports from experts regarding a case, and whatever else would constitute "relevant" evidence in a given case.

In California, there are two wholly independent frameworks that govern the rules of discovery in criminal cases; one framework is by federal constitutional mandate, and the other is through state law. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.)

In 1963, the U.S. Supreme Court held that the constitutional principle of due process requires prosecutors to ensure the defense receives all evidence that is both favorable to the accused and material to their guilt or punishment. (*Brady v. Maryland* (hereafter *Brady*) (1963) 373 U.S. 831 87-88; *U.S. v. Bagley* (hereafter *Bagley*) (1985) 473 U.S. 667, 674-675.) For evidence to be considered favorable, it must help the defendant or hurt the prosecution, such as by impeachment of the prosecutor's witness. (*In re Miranda* (2008) 43 Cal.4th 541, 575.) For evidence to be material, there must be a reasonable probability that disclosure of the evidence would have led to a different outcome in a proceeding. (*Turner v. U.S.* (2007) 137 S. Ct. 1885, 1893.) This duty imposed upon the prosecutor applies whether or not a defendant requests the evidence, and whether or not the prosecutor intentionally or inadvertently did not disclose the evidence. (*Brady, supra*, 373 U.S. at 87-88.) Such evidence is generally referred to as *Brady* evidence and failure to turn it over will result in a verdict being overturned. (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1482-83.)

In 1990, California voters approved Proposition 115 (hereafter Prop 115), which, among other things, established a statutory framework of reciprocal discovery whereby both the prosecution and defense are required to turn over specified information and materials such as the names and addresses of witnesses that will be called to testify at trial, any real evidence, and any exculpatory evidence. (Pen. Code, § 1054 *et seq.*) Generally, discovery must be given to opposing counsel as soon as possible but no later than 15 calendar days after they are requested. (Pen. Code, § 1054.5, sub. (b).) Additionally, regardless of a request, the law requires discovery to be given to opposing counsel at least 30 calendar days before trial, unless good cause is shown why disclosure should be denied, restricted or deferred. (Pen. Code, § 1054.7.) Failure to disclose evidence under Prop 115's statutory framework can lead to court sanctions such as contempt proceedings, limiting the testimony of a witness, continuing a matter, and informing the jury of any failure or refusal to timely disclose. (Pen. Code, § 1054.5, subd. (b).) However, a court may only prohibit the testimony of a witness when all other sanctions have been exhausted, and a court can never dismiss a charge unless it is required to do so by the Constitution of the U.S. (Pen. Code, § 1054.5, subd. (c).)

Under the 14th Amendment's due process clause, a prosecutor has a duty to disclose *Brady* evidence at preliminary hearings. (*People v. Gutierrez* (hereafter *Gutierrez*) (2013) 214 Cal.App.4th 343, 346; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 270.) Breaching a *Brady* obligation at a preliminary hearing can result in a judge dismissing the entire case. (*Gutierrez, supra*, 214 Cal.App.4th at 348-49.) What this means is that, under existing law, a prosecutor must turn over discovery to the defense so long as it is favorable and material under *Brady*, however, the prosecution is not required to turn over essentially all the other relevant evidence under Prop 115. The standard of materiality in a preliminary hearing is, "whether there is a reasonable probability that disclosure of exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation." (*Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1087.) What evidence the prosecution is therefore required to turn over under existing law depends on whether it would have changed the magistrate's decision to hold the defendant to answer during the preliminary hearing. For example, in a preliminary hearing with DUI charges, a prosecutor may not be required to turn over the calibration logs of a breathalyzer (logs indicating when a breathalyzer was tested and how accurate it was in detecting blood alcohol levels) during the preliminary hearing, unless the calibration logs indicated the breathalyzer was displaying incorrect blood alcohol readings far above what the blood alcohol levels in the defendant's system actually were. The incorrect breathalyzer readings would need to be so high such that there would be a "reasonable probability" it would have changed the mind of the magistrate in holding the defendant to answer on the DUI charges. If they were, then the case could potentially be dismissed. (*Gutierrez, supra,* 214 Cal.App.4th at 348-49.)

This bill would, among other things, require that the prosecution turn over relevant real evidence, any exculpatory evidence, and witness statements including scientific tests or experiments, within 72 hours before a preliminary hearing if the defendant did not waive the 10-court-day rule. Going back to the DUI example, under this bill, the prosecution would be, after a motion to compel, required to turn over the calibration logs of the breathalyzer to the defense even if the breathalyzer was off by an inconsequential amount. However, in part, this bill would allow the prosecution to argue for a one-time 5 day continuance in order obtain the calibration logs from the investigating agency, Department of Justice, or from wherever the logs may otherwise be. If the prosecution was unable to obtain the logs within that time, then

the case would automatically be dismissed.

The question then presented by this bill, is whether it properly balances giving a defendant a proper chance of defending themselves during a preliminary hearing, with the amount and nature of evidence it requires to be turned over within a shortened timeline.

4) **New York Discovery Statute**: In 2019, New York passed a law that among other things, shortened its discovery deadlines. (N.Y. Times. *Why 3 Liberal New York D.A.s Want to Change a Law Backed by Progressives*. (Apr. 25, 2023) <https://www.nytimes.com/2023/04/25/nyregion/discovery-laws-ny.html> [as of Jun. 29, 2023].) However, New York's governor at the time refused to provide additional funding to prosecutors in order to comply with the shortened deadlines. (*Ibid.*) As a result, the Manhattan district attorney, Alvin Bragg; the Bronx district attorney, Darcel Clark; and the Brooklyn district attorney, Eric Gonzalez, pushed for a change to the law. (*Ibid.*) A spokesperson for Mr. Bragg stated that, while they were support the intent of the changes, "the current version of the law has resulted in thousands of cases being needlessly dismissed. We can address this issue through common sense amendments that protect the rights of defendants." (*Ibid.*) Recently however, the prosecutors reversed their push for a change to the law, and asked instead for more funding, with rumors pointing towards a concession in the state's budget process. (N.Y. Times. *New York City Prosecutors Suddenly Flip on Change to Evidence Law*. (Apr. 27, 2023) <https://www.nytimes.com/2023/04/27/nyregion/discovery-prosecutors-evidence-ny.html> [as of Jul. 6, 2023].)

   Although the discovery deadlines the New York bill differ substantially from the discovery deadlines in this bill, it may be important to ensure that the new requirements imposed by this bill can be adequately fulfilled.

5) **Amending an Initiative Statute**: The Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. According to the text of Proposition 115, "The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568-569.)

   Because this bill amends the discovery statutes that were enacted by Proposition 115, this bill is keyed as requiring a 2/3 vote by the Legislature. Although two cases have discussed how Proposition 115 affects discovery, neither have squarely discussed how Proposition 115 affects discovery as it relates to a preliminary hearing. (*Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444 [stating, "the issue before us in this case is not the broad issue of whether magistrates have an expansive power to order discovery of any kind in advance of the preliminary examination, but only the narrow issue of whether a magistrate has the power to order discovery in support of a suppression motion to be heard in conjunction with the preliminary examination."]; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564 [stating that Proposition 115 only deals with pretrial discovery, not post-trial discovery].)

6) **Argument in Support**: According to the bill's sponsors, the *California Attorneys for Criminal Justice*, "SB 441 addresses a key issue in the criminal justice court process: when

should the prosecutor and law enforcement turn over critical evidence that could prove innocence. In felony cases, the first opportunity for individuals to present evidence before a judge is at the preliminary hearing. At this proceeding the prosecution is required to simply prove.

"This ensures that the case is not without some merit, and there is at least minimal evidence that charged individual may have committed the offense. However, too often these preliminary hearings occur WITHOUT the accused gaining access to evidence that is already in the prosecution or law enforcement's possession - evidence that could exonerate the person. SB 441 lists specific information that must be turned over prior to the preliminary hearing to ensure a judge can review and determine whether the wrong person was arrested.

"For example, under current law, established by ballot initiative in 1990 during the height of the 'tough-on-crime' era, prosecutors can move forward with a preliminary hearing by only providing the official police report. An accused is not entitled to any other information. As a result, false identifications, conflicting witnesses accounts and other evidence that could prove innocence are not always turned over to the accused, even if the information is already in the possession of the prosecutor or law enforcement. The shortcoming of current law often results in the wrong person being charged with a crime or being charged with an inappropriate charge. If this information is not shared at the preliminary hearing, the next usual opportunity to present evidence to a judge is during the trial which could be weeks, months of years later. Prosecutors are not required to turn over all evidence until 30 days before trial. This delayed disclosure is at the root of many problems, and SB 441 seeks to create a more balanced approach to criminal prosecutions…

"Without SB 441, an accused would have to undertake a long and challenging legal process to potentially get access to these items well before trial; or simply wait until 30 days before trial for the current legal mandate to trigger disclosure.

"One of the primary goals of SB 441 is to get critical information to the accused and before a judge early in the legal process. This will assist in identifying someone who is wrongfully accused of a crime, is charged with an incorrect offense, or to help settle a case in weeks if not months before it would under current law. The bill will also eliminate long and costly legal motions over the disclosure of evidence."

7) **Argument in Opposition**: According to the *California District Attorneys Association*, "It is important to note that current rules provide for discovery to be provided promptly to defense attorneys in criminal cases well in advance of a preliminary hearing. In fact, when it comes to criminal discovery, California has long been well ahead of other states. It is commonplace, for example, for defense counsel to obtain copies of police reports that form the basis of the charging decision on the very day they are appointed by the court to represent a defendant. Additionally, current rules already ensure that exculpatory information is provided to the defense in advance of a preliminary hearing (See, i.e.: People v. Gutierrez (2013) 214 Cal.App.4th 343 [Affirming dismissal of criminal case in which exculpatory information not disclosed prior to preliminary hearing]).

"The criminal discovery statutes currently require that a prosecutor provide requested evidence within 15 days of the request, at risk of sanctions including fines, contempt, or exclusion of evidence. Additionally, currently laws require prosecutors to ensure that all

exculpatory evidence is disclosed to the defense in advance of a preliminary hearing, at risk of dismissal of the case and additional sanctions upon the prosecutor.

"Defendants who wish to have more complete discovery in advance of a preliminary hearing may do so simply by asking for it at the arraignment, which is common. In rare occasions when a defendant wants more evidence than is already provided, he may file motions to compel, which allows a court to intervene and order discovery not already provided.

"Let there be no mistake, the proposed changes to criminal discovery as proposed in SB 441 are drastic and would undoubtedly result in cases being dismissed against persons guilty of all variety of crimes. The statute does not differentiate a low level offender from a murderer, nor provide for additional time for discovery on complex cases. What the bill would do is permit the defense to drip-request items they believe to exist (which may or may not), request them, sometimes piecemeal, and when they are not provided within three days of being asked for, the defendant would be entitled to a continuance of a preliminary hearing or trial even if such a continuance would extend beyond the speedy trial statutes, which would subsequently mandate dismissal of the case. Such a proposal is strongly skewed in favor of defendants and incentivizes gamesmanship in an adversarial process that must be focused on securing justice.

"Senate Bill 441 may be intended to provide more information, earlier, to more defendants. In practice, however, it would immediately prove to be disastrous, drastically destabilize the criminal justice system, and cause prosecutors to be constantly at the beck and call of defense attorneys for any requested evidence. If a defense attorney requests something like 'every body camera video, surveillance video, booking video, patrol camera video, and photograph taken' on a multiple-homicide case involving several different investigating agencies and crime scenes, a prosecutor would be forced – within 3 days – to come up with everything, all at once, at risk of sanctions including, under SB 441, continuance past the statutory last day, thereby requiring dismissal. What if the request comes on Friday afternoon on a three-day weekend? Some complex cases take more than three days just to read all the reports and have a basic understanding of what occurred in an investigation."

8) **Prior Legislation**: Proposition 115 of the 1990 primary election, among other things, outlined the framework for discovery in criminal cases.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Sponsor)
California Public Defenders Association (CPDA)
Exonerated Nation
Initiate Justice

Opposition

California District Attorneys Association
Monterey County District Attorney's Office - ODA - Salinas, CA

San Diegans Against Crime
San Diego Deputy District Attorneys Association

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