

**Proposition 36:  
Allows Felony Charges and Increases Sentences for Certain  
Drug and Theft Crimes**

Initiative Statute

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## I. EXECUTIVE SUMMARY

Proposition 36, The Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative, modifies criminal sentencing for existing drug and theft crimes, and undoes many of the lowered penalties enacted by Proposition 47 (2014). Broadly, Proposition 36 makes three major changes to criminal sentencing. First, it allows stricter punishment for petty theft offenses when a defendant has two or more prior theft convictions. Second, it creates a mandatory treatment process for third drug petty drug possession offenses. Finally, it enacts a number of prison-mandated felony enhancements aimed at deterring the distribution of drugs.

A “YES” vote on this initiative would mean that people convicted of certain theft and drug crimes could receive increased penalties like stricter sentences, or mandated drug treatment. The initiative changes third drug or theft offenses from misdemeanors to felonies. Additionally, people convicted of some drug related conduct will face mandatory prison time. Examples of the crimes that will fall into this category include: drug and gun offenses; high-quantity drug distribution; and drug offenses with great bodily injury.

A “NO” vote would maintain the status quo regarding punishment and criminal procedures for drug and theft crimes.

## I. BACKGROUND

### A. Brown v. Plata

In May 2011, the United States Supreme Court, in *Brown v. Plata*, affirmed a federal three-judge panel’s decision requiring the state of California to reduce its overcrowded prisons.<sup>1</sup> The Court deemed prison conditions “toxic” and incapable of meeting inmates’ basic medical or mental health needs.<sup>2</sup> The Supreme Court maintained that California’s prison system’s overcrowding was sufficient to constitute cruel and unusual punishment within the meaning of the 8th Amendment to the U.S. Constitution and affirmed the panel’s order requiring a reduction of approximately 46,000 inmates.<sup>3</sup>

### B. 2011’s Public Safety Realignment

In April of 2011, while the state was still awaiting the results of the Supreme Court’s ruling in *Plata*, Governor Brown signed AB 109 and AB 117 into law, collectively known as “Public Safety Realignment.”<sup>4</sup> Ultimately, realignment was successful in its goal of reducing California’s prison population, but the decline from realignment alone was not enough to meet the goal of

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<sup>1</sup> *Brown v. Plata*, 536 U.S. 439, 522 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Brown, O’Malley, *2011 Realignment: Addressing Issues to Promote Its Long-Term Success*, LEGISLATIVE ANALYSTS’ OFFICE (Aug. 19, 2011).

reducing the California Department of Corrections and Rehabilitation (CDCR) by 46,000 inmates.<sup>5</sup> According to the Public Policy Institute of California (PPIC), a nonpartisan think tank: “[r]ealignment substantially reduced the prison population, but almost all of the decline took place during the first year and was not enough to meet the judicial target... by October 2014, three years into realignment, the prison population stood at 140.9 percent of capacity, still roughly 2,850 inmates above the mandated target.”<sup>6</sup> Furthermore, the PPIC noted that, despite initial fears by its opponents, the reduction in incarceration rates brought on by Public Safety Realignment occurred without any notable increase in violent crime, and a property crime increase driven entirely by a rise in auto thefts.<sup>7</sup>

### C. Proposition 47 (2014)

In 2014, California voters approved Proposition 47, a measure that continues to dictate much of California’s Policies on incarceration and public safety. Before Proposition 47’s passage, the California District Attorneys Association opposed the measure, and the organization’s President, Adam Christianson, co-wrote the opposition argument in the 2014 voter information guide, which called the measure “an invitation for disaster” that will “endanger Californians.”<sup>8</sup> Since the passage of Proposition 47, California’s District Attorney Association has remained skeptical of the measure, and has engaged in several efforts to revoke of it.<sup>9</sup> Proposition 36 is the latest measure attempting to do so.

#### 1. *Proposition 47 (2014)’s effects on incarceration*

According to the PPIC, Proposition 47 has led to substantial reductions in the state’s prison population and reduced California’s jail population since its passage.<sup>10</sup> The prison population has remained below the requirements mandated in *Brown v. Plata* and has fallen to rates not seen since the mid-1990s.<sup>11</sup> Following the reform, the overall jail population decreased by about 10,000; by

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<sup>5</sup> Lofstrom, Martin, *Public Safety Realignment: Impacts So Far*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.pplic.org/publication/public-safety-realignment-impacts-so-far>. (Sept. 2015).

<sup>6</sup> *Id.*

<sup>7</sup> Marissa Lagos, *State’s radical prison reform plan ready to start*, SF CHRONICLE, available at [https://www.courts.ca.gov/partners/documents/chronicle\\_prison\\_reform\\_article\\_10-2-2011.pdf](https://www.courts.ca.gov/partners/documents/chronicle_prison_reform_article_10-2-2011.pdf). (Oct. 2, 2011).

<sup>8</sup> CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 4, 2014, [“NOVEMBER 2014 VOTER GUIDE”] at 34, available at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> (last visited Oct. 16, 2024).

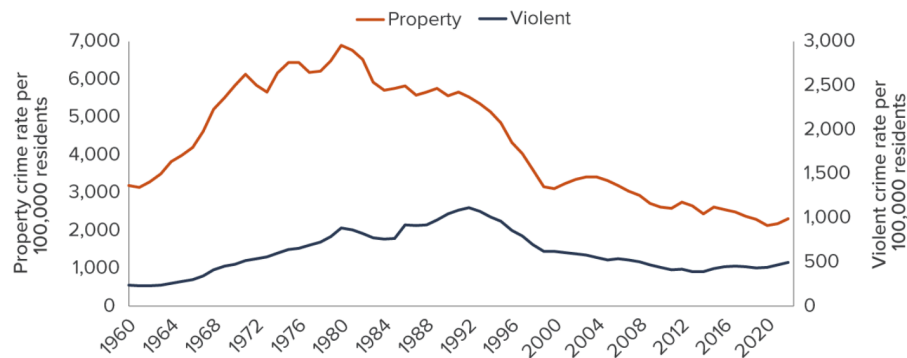
<sup>9</sup> *California Proposition 20, Criminal Sentencing, Parole, and DNA Collection Initiative (2020)*, BALLOTOPEDIA, available at <https://ballotpedia.org/California> (last visited Oct. 9, 2024); CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 4, 2014, [“NOVEMBER 4, 2014 VOTER GUIDE”] at 34, available at <https://vigarchive.sos.ca.gov/2014/general/> (last visited Oct. 16, 2024); CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 5, 2020, [“NOVEMBER 2020 VOTER GUIDE”] at 44, available at <https://vigarchive.sos.ca.gov/2020/general/> (last visited Oct. 16, 2024).

<sup>10</sup> Lofstrom, Martin, *Public Safety Realignment: Impacts So Far*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.pplic.org/publication/public-safety-realignment-impacts-so-far/> (Sept. 2015).

<sup>11</sup> *Id.*

late 2016, the population leveled out to a reduction of more than 6,250 prisoners.<sup>12</sup> Adjusting for this decreased prison population, in February 2023, Governor Newsom proposed a net reduction in funding for the California Department of Corrections and Rehabilitation (CDCR), and proposed plans to deactivate two entire prisons. The Legislative Analyst’s Office (LAO) also expects further CDCR reductions for the 2024-2025 budget.<sup>13</sup>

## 2. Proposition 47 (2014)’s effects on crime:



**SOURCES:** Authors’ calculation based on Federal Bureau of Investigation’s Uniform Crime Report 1960–2002 and the California Department of Justice’s Criminal Justice Statistics Center, California Crimes and Clearances Files, 2003–2022.

**NOTE:** Property crime includes burglary, motor vehicle theft, and larceny theft (including non-felonious larceny theft); violent crime includes homicide, rape, robbery, and aggravated assault.

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In a 2018 report titled “The Impact of Proposition 47 on Crime and Recidivism,” the Public Policy Institute stated that it had found no evidence that violent crime increased as a result of Proposition 47 (2014) and that both rearrest and re-conviction rates had decreased following the reform.<sup>15</sup> However, the report indicated that the proposition may have contributed to increased larceny offenses. It noted that despite recent upticks, California’s crime rates remain comparatively low despite dramatic reductions in incarceration levels.<sup>16</sup>

<sup>12</sup> Lofstrom, Martin, *Crime after Proposition 47 and the Pandemic*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.ppic.org/publication/crime-after-proposition-47-and-the-pandemic/> (Sept. 2024).

<sup>13</sup> Gabriel Peak, *The 2023-23 Budget: The California Department of Corrections and Rehabilitation*, LEGISLATIVE ANALYST’S OFFICE, available at <https://lao.ca.gov/reports/2023/4686/CDCR-Budget-021623.pdf> (Feb. 2023).

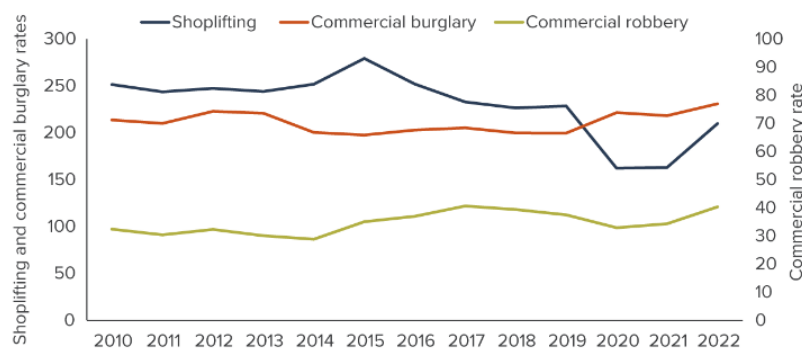
<sup>14</sup> Lofstrom, Martin, *2022-2023: Crime Trends in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.ppic.org/publication/crime-trends-in-california/> (Oct. 2023).

<sup>15</sup> Bird, et al, *The Impact of Proposition 47 on Crime and Recidivism*, PUBLIC POLICY INSTITUTE, available at <https://www.ppic.org/publication/the-impact-of-proposition-47-on-crime-and-recidivism/> (Jun. 2018).

<sup>16</sup> *Id.*

In 2018, researchers Charis Kubrin and Bradley Bartos from the University of California, Irvine conducted an advanced examination of statewide crime data.<sup>17</sup> The researchers compared control groups sentenced between the 1970s and those sentenced since the passage of Proposition 47 (2014) to approximate California's crime rates had Proposition 47 (2014) not been enacted. In this study, the researchers found little empirical support for the claim that Proposition 47 (2014) affected violent or property crime.<sup>18</sup>

### 3. Proposition 47 (2014)'s effect on retail crime



SOURCE: Author's calculation based on the California Department of Justice's Criminal Justice Statistics Center, California Crimes and Clearances Files.  
 NOTE: All rates are incidents per 100,000 residents.  
 FROM: PPIC Blog, January 2024.

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Proponents of Proposition 36 (2024) cite retail theft as an important catalyst for the initiative. When looking at shoplifting, particularly since the passage of Proposition 47 (2014), rates have dropped by a statistically significant 2.2% in the first two years following the initiative's passage.<sup>20</sup> However, this decrease is partially due to a change in definition.<sup>21</sup> Proposition 47 (2014) redefined shoplifting as a retail theft below \$950. Commercial burglary is defined as retail theft in which the value lost exceeds \$950. Even when both crimes are tracked concurrently, rates still appear to have declined since the passage of Proposition 47 (2014).<sup>22</sup> Only in 2023 were shoplifting and commercial burglary rates higher than before 2014.<sup>23</sup> PPIC indicates in their report that

<sup>17</sup> Charles Kubrin, Bradly Bartos, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety?*, CRIMINOLOGY AND PUBLIC POLICY, Vol 17, Iss. 3. (Aug. 2018).

<sup>18</sup> *Id.*

<sup>19</sup> Magnus Lofstrom, *Testimony: Crime Data on Retail Theft and Robberies in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.ppic.org/blog/testimony-crime-data-on-retail-theft-and-robberies-in-california/> (Jan. 4, 2024).

<sup>20</sup> Lofstrom, Martin, *Crime after Proposition 47 and the Pandemic*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.ppic.org/publication/crime-after-proposition-47-and-the-pandemic/> (Sept. 2024).

<sup>21</sup> *Id.*

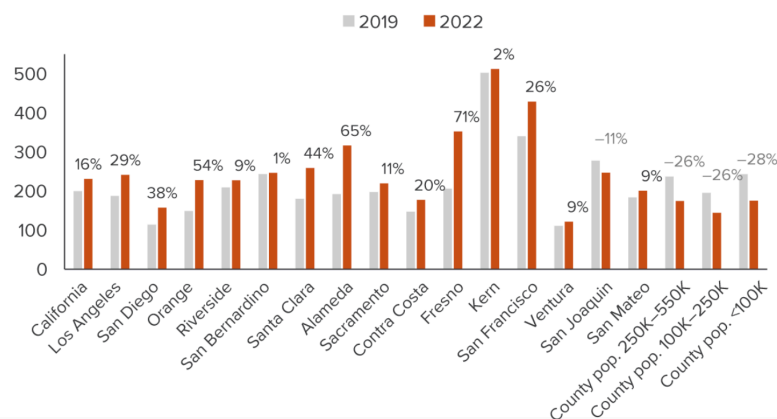
<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

socioeconomic impacts from the COVID-19 pandemic and a market crash significantly influenced this increase more than Proposition 47, which was already almost a decade removed.<sup>24</sup>

**Commercial burglary was up in 14 of California's 15 largest counties, but down in smaller counties**

Commercial burglary rate



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While shoplifting and commercial burglary rates appear to be down statewide, recent trends in retail theft, particularly shoplifting, show that these numbers vary widely across the state. Only three of the 15 most populous counties saw increases in shoplifting from 2014 to 2022, while smaller counties saw a net decrease.<sup>26</sup> Shoplifting has been particularly high in the Bay Area in recent years.<sup>27</sup> San Mateo's shoplifting rate nearly doubled (up by 95%), while Alameda and San Francisco saw increases of 9% and 40%, respectively.<sup>28</sup> If we add in rates of with the rates for shoplifting, the problem becomes more widespread. Commercial burglary rose in ten of the state's largest counties. Between 2014 and 2022, Orange saw an increase of 98%, Los Angeles 62%, and Santa Clara 61%, with the majority of increases coming in the last few years.<sup>29</sup> Fourteen of the largest counties saw increases from 2019-2022, with Fresno (71%), Alameda (65%), and Orange (54%) seeing the most increases<sup>30</sup>. Reports of excessive losses from California retailers had gained enough of a profile that in 2024, the California Legislature formed a joint Committee on Retail Theft and Public Safety. On February 9, 2024, this committee held a joint hearing with experts, and law enforcement.<sup>31</sup> State Assemblymember Rick Chavez Zbur acknowledged a "gap between some of the data and the ground experiences of many businesses, workers, residents, and law enforcement agents." While Assemblymember Zbur did not discredit existing data, he indicated

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Media on Demand, *Joint Hearing Select Committee on Retail Theft and Public Safety Committee*, CALIFORNIA STATE ASSEMBLY, available at <https://www.assembly.ca.gov/media/joint-hearing-selectcommittee-retail-theft-and-public-safety-committee-20240209> (Feb. 9, 2024), (timestamp 6:00-10:00),

that their committee had heard from several retailers who had experienced significant costs associated with shoplifting losses.<sup>32</sup>

#### D. Proposition 20 (2020)

In 2020, Proposition 20 attempted to undo several changes implemented by Proposition 47 (2014). The measure would have created new misdemeanor offenses for gang theft, lowered the legal definition of shoplifting to include attempts at the crime, and heightened parole board review standards to make it more difficult for offenders to obtain parole. Similar to Proposition 36, this measure was supported by statewide retailers.<sup>33</sup> It failed to pass, gaining only 38% of the vote.<sup>34</sup>

#### E. 2024 Governor Newsom Signs a Package of Anti-Retail Theft Bills

In August 2024, Governor Newsom signed ten bills relating to retail theft. These ten bills were the work of bipartisan cooperation and collaboration with law enforcement, the California District Attorneys Association, important retail groups like the California Retailers Association and California Grocers Association, individual large retailers like Home Depot, and others involved and impacted by the legislative issue.<sup>35</sup> They began the legislative process before the initiative was imagined and were initially supported by the District Attorney's Association and law enforcement.<sup>36</sup> The intent was to address brazen thefts and constituents' concerns about retail theft throughout the state.<sup>37</sup>

During the legislative process, soon began once Proposition 36 qualified for the ballot, with the support of many of the same groups that supported the Retail Theft Package. While initially a truly bipartisan effort, poison pill language was added to the bills that made it through the legislative process that would kill the legislation if Proposition 36 were to pass.<sup>38</sup> While these amendments were ultimately defeated and never implemented, they stalled the process.<sup>39</sup> At the same time, Governor Newsom and state legislators were attempting to get an alternative ballot

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<sup>32</sup> *Id.*

<sup>33</sup> Irene Meyers, Nicole Rossetta, Proposition 20: Reducing Crime and Keeping California Safe Act of 2018, CAL. INIT. REV. 91 available at <https://law.pacific.edu/sites/default/files/users/user242/2020-california-initiative-review.pdf> (Fall 2020).

<sup>34</sup> *California Proposition 20, Criminal Sentencing, Parole, and DNA Collection Initiative (2020)*, BALLOTOPEDIA, available at [https://ballotpedia.org/California\\_Proposition\\_20,\\_Criminal\\_Sentencing,\\_Parole,\\_and\\_DNA\\_Collection\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020)) (last visited on Oct. 16, 2024).

<sup>35</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>36</sup> *Id.*

<sup>37</sup> *PRESS RELEASE: Governor Newsom signs landmark legislative package cracking down on retail crime and property theft*, GOVERNOR GAVIN NEWSOM, available at <https://www.gov.ca.gov/2024/08/16/governor-newsom-signs-landmark-legislative-package-cracking-down-on-retail-crime-and-property-theft/> (Aug 16, 2024).

<sup>38</sup> Nigel Duara, *California Voters Will Decide an Anti-Crime Measure in November. Democrats Say This One is Better*, CALMATTERS, available at <https://calmatters.org/politics/elections/2024/06/proposition-47-california-democrats/> (Jun. 30, 2024).

<sup>39</sup> *Id.*

measure, SB 1381, placed for the 2024 election to compete with Proposition 36.<sup>40</sup> This attempt was unsuccessful, as many failed attempts occurred towards the end of the legislative session when the horse-trading of competing objectives met limited time resources.<sup>41</sup>

Proponents Proposition 36, like the California District Attorneys Association, feel that the legislative approach to the retail theft package was a minor fix to the state's major problems.<sup>42</sup> They characterize the retail theft issues in the state as an epidemic. Other proponents, such as the Retailer's Association and some large individual retailers, supported the alternative ballot measure.<sup>43</sup> The Legislative package that did pass is discussed in the next section.

## II. THE LAW

### A. Existing Law

#### 1. *Penal Code Section 1001 Drug Diversion, and Proposition 36 (2000) Treatment Courts*

In 1975, the California Legislature amended Penal Code Section 1000 (Drug Diversion) to *guarantee* pretrial diversion to criminal defendants charged with simple drug possession charges who met certain criteria.<sup>44</sup> In criminal cases, pretrial diversion occurs when a court requires certain conditions, usually treatment courses, as an alternative to criminal conviction and sentencing.<sup>45</sup> Upon successful completion of a pretrial diversion, a criminal defendant's criminal charges are dismissed, and the arrest upon which the defendant was charged will be deemed to have never occurred.<sup>46</sup> Drug Diversion guarantees pretrial dismissal and record sealing to criminal defendants charged with simple drug possession provided they meet four basic requirements: (1) they do not have a prior conviction for any controlled substance offense other than simple possession within the past five years, (2) the offense charged does not involve a crime of violence or threatened violence, (3) there is no evidence of another simultaneous drug offense, and (4) the defendant does not have a prior felony conviction within the past five years.<sup>47</sup> Upon being granted access to a drug diversion program, criminal defendants will have their charges dropped provided they complete a county-approved drug education course that constitutes, at a minimum, 20 hours of treatment.<sup>48</sup> Under current laws, failure to complete this diversion program, once granted, simply results in

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<sup>40</sup> Ashley Zavala, *What's The Difference Between California's Legislative Public Safety Package and Prop. reform Initiative?* KCRA, available at <https://www.kcra.com/article/california-legislative-public-safety-package-prop-47-reforminitiative/61063743> (Jun. 12, 2024).

<sup>41</sup> *Id.*

<sup>42</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>43</sup> Nigel Duara, *California Voters Will Decide an Anti-Crime Measure in November. Democrats Say This One is Better*, CALMATTERS, available at <https://signalscv.com/2024/07/california-voters-will-decide-an-anti-crime-measure-in-november-democrats-say-this-one-is-better/> (Jun. 30, 2024).

<sup>44</sup> Cal. Pen. Code, § 1000 (2023).

<sup>45</sup> *California Criminal Law Procedure and Practice* §27.26. CAL.CEB (May 2024).

<sup>46</sup> Cal. Pen. Code, § 1000 (2023).

<sup>47</sup> *Id.*

<sup>48</sup> Cal. Pen. Code, § 1211 (2023).



denying pretrial diversion and reinstating the original charges.<sup>49</sup> At this point, the criminal defendant would have to face trial and potential sentencing just as any other criminal defendant.

In 2000, California voters approved a different Proposition 36, which added section 1210 to the California Penal Code.<sup>50</sup> This provision mandates a period of probation and drug treatment (“Proposition 36 (200) treatment courts”) for convicted criminal defendants who generally meet five criteria. To be eligible, the following must be met: (1) in the active case, the defendant has only been convicted of a “nonviolent drug offense;” (2) they have not previously been convicted of a violent or serious felony; (3) they are not convicted in the same case with nondrug misdemeanors or any felony; (4) they have not committed drug offenses in combination with the use of a firearm; and (5) they do not refuse drug treatment as a condition of probation.<sup>51</sup> If a defendant successfully completes Proposition 36 (2000) treatment court programs, similar to drug diversion, they may petition the court to set aside their conviction and seal their arrest records.<sup>52</sup> Under Proposition 36 (2000), any defendant who violates the terms of their probation is subject to confinement no longer than their original sentence.<sup>53</sup>

In tandem, these two programs provide defendants charged with drug offenses, both before and following sentencing, the option to avoid incarceration and seek dismissal of their criminal charges upon the satisfactory completion of drug counseling courses.

## *2. Public Safety Realignment AB 109/AB 117*

In 2011, Governor Brown signed into law two bills, AB 109 and AB 117, collectively referred to as “Public Safety Realignment” or simply “realignment.” These bills were signed in an explicit attempt to reduce California’s prison overcrowding.<sup>54</sup> The bills added section 1170(h) to the California Penal Code’s sentencing provisions. This section shifted incarceration from state prisons to local jails for a substantial portion of offenders deemed relatively nondangerous.<sup>55</sup> Offenders eligible for county jail imprisonment are sometimes referred to as “3nons,” in that their target and prior offenses are “nonserious,” “nonviolent,” and “nonsexual.”<sup>56</sup> Because of the criteria, realignment applied to many drug and theft offenders.

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<sup>49</sup> Cal Pen. Code §1001.5 (2023).

<sup>50</sup> Cal. Pen. Code § 1210.1 (2023).

<sup>51</sup> *California Criminal Law Procedure and Practice* §27.26 CAL. CEB (May 2024).

<sup>52</sup> Cal. Pen. Code. § 1001.9 (2023).

<sup>53</sup> *California Criminal Law Procedure and Practice* §27.26 CAL. CEB (May 2024).

<sup>54</sup> Brown, O’Malley, *2011 Realignment: Addressing Issues to Promote Its Long-Term Success*, LEGISLATIVE ANALYSTS OFFICE available at [https://www.lao.ca.gov/reports/2011/stadm/realignment/realignment\\_081911.aspx](https://www.lao.ca.gov/reports/2011/stadm/realignment/realignment_081911.aspx) (Aug. 19, 2011).

<sup>55</sup> *California Criminal Law Procedure and Practice* §37.1A CAL. CEB (May 2024).

<sup>56</sup> *Id.*

### 3. Proposition 47 (2014)

In 2014, California voters approved Proposition 47, which made several modifications to the California Penal Code regarding drug possession and petty theft charges.<sup>57</sup> Proposition 47 modified Penal Code sections 490.2, 459.5, 496, and 476(a) and required four low-level property offenses to be charged as misdemeanors when the dollar amount cannot be shown to be more than \$950.<sup>58</sup> The offenses include: (1) petty theft, (2) shoplifting, (3) receipt of stolen property, and (4) writing bad checks.<sup>59</sup> Proposition 47 also modified Penal Code sections 1170 and 11357, mandating that simple drug possession offenses be charged as misdemeanors rather than felonies.<sup>60</sup>

### 4. August 2024 Shoplifting Bill Package

In August 2024, Governor Newsom signed a series of bills increasing penalties for vehicle theft, and organized retail theft.<sup>61</sup> Some of these bills adopted provisions directly from the proposed Proposition 36, while others are entirely distinct.

#### a. Instituted “Aggregation” of Dollar Amounts for Vehicle Theft and Shoplifting.

Among the bills Governor Newsom signed in August, AB 2943 and SB 905 allow for the “aggregation” of dollar amounts across different offenses. The legislation allows prosecutors to combine the value of items gained in thefts committed in the past two years, whether from separate counties or victims, to meet the \$950 required to substantiate a felony conviction.<sup>62</sup> AB 2943 allows aggregation across different shoplifting offenses to substantiate a felony shoplifting conviction, whereas SB 905 allows aggregation across different vehicle thefts to substantiate a felony vehicle theft conviction.<sup>63</sup>

#### b. Created an Organized Retail Theft Misdemeanor.

AB 1802 amended section 490.4 of the Penal Code and created a misdemeanor offense punishable by one year in county jail for individuals engaged in organized retail theft.<sup>64</sup> Organized

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<sup>57</sup> Selena Farnesi, Emily Reynolds, *Proposition 47: The Safe Neighborhoods and Schools Act*, CAL. INIT. REV. 76 (Fall 2014), available at <https://scholarlycommons.pacific.edu/california-initiative>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *PRESS RELEASE: Governor Newsom signs landmark legislative package cracking down on retail crime and property theft*, GOVERNOR GAVIN NEWSOM available at <https://www.gov.ca.gov/2024/08/16/governor-newsom-signs-landmark-legislative-package-cracking-down-on-retail-crime-and-property-theft/> (August 16, 2024).

<sup>62</sup> AB 2943, 2024 Leg., 2023-2024 Reg. Sess. (Cal. 2024); SB 905, 2024 Leg., 2023-2024 Reg. Sess. (Cal. 2024)

<sup>63</sup> *Id.*

<sup>64</sup> AB 1802, 2024 Leg., 2023-2024 Reg. Sess. (Cal 2024).

retail theft occurs when a person knowingly acts in concert with one or more persons to steal, sell, or return merchandise for value.<sup>65</sup>

c. Created New Sentencing Enhancement for Specific Dollar Amounts.

In response to the pending initiative, AB 1960 and SB 1416 adopted a portion of Proposition 36, adding Penal Code sections 12022.6 and 12022.10.<sup>66</sup> Penal Code section 12022.6 contains an automatic sentencing enhancement for those who cause loss or damage over specific dollar amounts to a victim's property.<sup>67</sup> Penal Code section 12022.10 imposes these identical dollar amounts whenever individuals possess, exchange, or return for value stolen merchandise. The dollar amounts listed are one year for fifty thousand dollars (\$50,000), two years for two-hundred-thousand dollars (\$200,000), three years for one million dollars (\$1,000,000), four years for three million dollars (\$3,000,000), and an additional three years for each additional three million dollars.<sup>68</sup>

d. Expanded Criminal Jurisdictions for Organized Retail Theft.

To increase the likelihood of prosecutions for retail theft, AB 1779 expanded criminal jurisdiction to include counties where merchandise was recovered or received or in any county where any instigating, promoting, or aiding of theft occurred.<sup>69</sup>

e. Created Retail Restraining Orders.

Additionally, AB 3209 added section 6380 to the California Family Code, authorizing a court to issue a criminal protective order ("restraining order") when sentencing someone for (1) theft from a retail establishment, (2) vandalism of a retail establishment, or (3) battery against a retail employee.<sup>70</sup> A defendant issued such an order can be charged with a misdemeanor violation for entering the retail establishment, its parking lot, and other franchises or chain locations.<sup>71</sup>

f. Created Regional Property Crime Task Forces.

Finally, AB 1972 Directs the California Highway Patrol ("CHP") and the California Department of Justice ("CDOJ") to convene a regional property crimes task forces to assist local law enforcement with the enforcement of property crime offenses.<sup>72</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> AB 1960, 2024 Leg., 2023-2024 Reg. Sess. (Cal 2024);  
SB 1416, 2024 Leg., 2023-2024 Reg. Sess. (Cal 2024).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> AB 1779, 2024 Leg., 2023-2024 Reg. Sess. (2024).

<sup>70</sup> AB 3209, 2024 Leg., 2023-2024 Reg. Sess. (2024).

<sup>71</sup> *Id.*

<sup>72</sup> AB 1972, 2024 Leg., 2023-2024 Reg. Sess. (2024).

## B. Proposed Law

Proposition 36 would make several critical changes to current laws and criminal processes regarding drug and theft offenses. Proposition 36 would add a number of new felony enhancements for both drug and theft offenses. Several enhancements require state prison terms rather than county jail incarceration pursuant to Public Safety Realignment. Proposition 36 would also allow prosecutors to charge defendants with a third theft offense with a felony, undoing some of the ameliorative changes of Proposition 47 (2014).<sup>73</sup> Additionally, Proposition 36 would allow prosecutors to charge a third drug offense as a new class of crimes labeled a “Treatment Mandated Felony,” modifying, at least in part, the provisions of both Proposition 47 (2014) and Proposition 36 (2000).<sup>74</sup>

### 1. *Changes to Drug Offenses Generally*

For drug offenses, Proposition 36 would create a new class of crimes labeled “Treatment Mandated Felonies.” Proposition 36 would also add a number of felony enhancements that make offenders ineligible for county jail time under 1170(h) Public Safety Realignment (“mandatory prison enhancements”).<sup>75</sup> These mandatory prison enhancements would mandate a period of state prison time in three specific instances: (1) drug and gun offenses, (2) cases where controlled substances are found in high quantities, and (3) when another individual faces significant or substantial physical injury as a result of drug distribution.<sup>76</sup> Additionally, Proposition 36 would enact section 11369 into the Penal Code, known as “Alexandria’s Law,” this section would require judges to inform defendants charged with drug dealing or distribution that they could face homicide charges if they continue their conduct.<sup>77</sup>

#### a. “Treatment-Mandated Felonies”

Proposition 36 would add section 11395 to the Penal Code and allow prosecutors to file a third simple possession offense as a “Treatment-Mandated Felony.”<sup>78</sup> A defendant convicted of a treatment-mandated felony may have the judgment on their offense deferred, meaning it will not become final if they choose to consult with a drug addiction specialist and engage in a treatment program created by a designated “drug addiction expert.”<sup>79</sup> and subsequently deemed by the court to be “effective and appropriate.”<sup>80</sup> Upon successful completion of the program, similar to drug diversion or Proposition 36 (2000) treatment court, a criminal defendant may have charges dropped and their arrest record sealed pursuant to Penal Code section 1001.9.<sup>81</sup>

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<sup>73</sup> Cal. Proposition 36 (2024).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Cal. Proposition 36 (2024), Section 7 “Treatment Mandated Felonies.”

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Cal. Proposition 36 (2024); Cal. PC. §1001.9.

While similarities exist between the current proposed legislation and existing law, Proposition 36 (2020), would change existing laws in a number of ways. Significantly, it would create a Treatment-Mandated Felony that prosecutors could use to impose either treatment, or felony time on for a third simple possession offense.<sup>82</sup> This means two things. First, defendants engaged in this program would have far more severe and potentially life-altering consequences if they are unsuccessful in treatment. Second, those charged under the new felony statute would be ineligible for both Penal Code section 1001 drug diversion and Proposition 36 (2000) drug treatment court.<sup>83</sup> This means that the treatment outlined in the new statute is the only option for defendants seeking to avoid incarceration or long-term felony probation.

Importantly, whereas current drug diversion laws allow a defendant to engage in any form of county-approved drug treatment, the new law would require a drug addiction specialist to generate an individualized plan and would require a court to decide whether the plan is “effective and appropriate.”<sup>84</sup> This alone would make grants of diversion for Treatment-Mandated Felonies under Proposition 36 (2020) more difficult than under the current diversion schemes. Additionally, compared to Proposition 36 (2000)’s drug treatment courts— which rely heavily on judicial discretion to determine the goals and modes of drug treatment— the requirement that a drug addiction expert generate the individual’s plan significantly reduces a court’s discretion and may pose additional barriers to entry.<sup>85</sup>

Finally, the proposal would change existing law by granting courts more discretion to halt treatment and impose a defendant’s sentence at any time, either on its motion or in response to a motion by the prosecutor, probation officer, or drug addiction specialist.<sup>86</sup> Under the existing drug diversion program, a judge may deny diversion if a defendant has performed unsatisfactorily in treatment.<sup>87</sup> Under the proposed law, a court could impose the underlying felony conviction if it determined that the defendant did not satisfactorily engage with treatment. But the court could also impose judgment if it determined the defendant was not benefitting from the treatment, was not amenable to treatment, or had at any time refused treatment.<sup>88</sup> The new statute would not only allow but also require a court to impose a sentence if the defendant was convicted of any new criminal activity.<sup>89</sup> This departs from the existing drug diversion program, which mandates denial of diversion only when a defendant commits a felony or a misdemeanor that demonstrates a propensity for violence.<sup>90</sup>

#### b. “Alexandria’s Law” Warnings

Proposition 36 would add section 11369(a) to the Penal Code, requiring a court to warn defendants convicted of knowingly distributing “hard drugs” that if their conduct results in the

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<sup>82</sup> Cal. Proposition 36 (2024), Section Seven “Treatment Mandated Felonies.”

<sup>83</sup> CAL. CEB *California Criminal Law Procedure and Practice* §27.26 (May 2024).

<sup>84</sup> Cal. Proposition 36 (2000); Cal. Proposition 36 (2024), Section 7 “Treatment Mandated Felonies.”

<sup>85</sup> Cal. Proposition 36 (2024); Cal. Proposition 36 (2000); Cal. Pen. Code. §1000.

<sup>86</sup> Cal. Proposition 36 (2024), Section 7 “Treatment Mandated Felonies.”

<sup>87</sup> CAL. PENAL CODE § 1001.3 (2023).

<sup>88</sup> Cal. Proposition 36 (2024), Section 7 “Treatment Mandated Felonies.”

<sup>89</sup> *Id.*

<sup>90</sup> Cal. Proposition 36 (2024), Section 4.

death of another human being, they could face a conviction for murder or manslaughter.<sup>91</sup> These drugs are defined in Section § 11054 of the California Health and Safety Code; they include dozens of prescription and nonprescription stimulants and depressants, but exclude marijuana and a variety of hallucinogenic substances.<sup>92</sup>

#### c. Quantity Enhancements

Proposition 36 would modify Penal Code section 11370.4 (“Quantity Enhancements”) to add illegally obtained fentanyl to a list of substances that require felony enhancements when a defendant possesses the drugs in substantial quantities.<sup>93</sup> These enhancement terms range from three to twenty-five years. Additionally, Proposition 36 (2024) denies the possibility of county jail sentences under Public Safety Realignment for these quantity enhancements. Under current law, those who are charge with these quantity enhancements may serve the sentence in county jail, under Proposition 36 (2024), these sentences would have to be served in state prison.<sup>94</sup>

#### d. Gun and Drug Enhancements

Proposition 36 would modify Penal Code section 11370.1 (“Gun and Drug Enhancements”) and add fentanyl to the list of substances that require a state prison felony enhancement of between two, three, and four years when the substance possessed at the same time as a loaded firearm.<sup>95</sup>

#### e. Great Bodily Injury (GBI) Enhancements

Proposition 36 would modify Penal Code section 12022.7 (“GBI enhancements”) to include drug sale offenses to those crimes for which one could face criminal penalties when their offense is causally related to a significant physical injury.<sup>96</sup> This change would make it possible for prosecutors to charge a defendant with a three-year state prison enhancement under Penal Code section 12022.7(a) upon showing an individual suffered “*significant or substantial physical injury*” from the drugs a defendant supplied.<sup>97</sup> In addition to being a three-year state prison-mandated enhancement, GBI enhancements constitute a “serious and violent felony” under California’s three strikes law.<sup>98</sup> This has several effects. Primarily, it means that defendants with two prior convictions or strikes can now face an indeterminant, 25-to-life sentence for a drug sale offense under an earlier Proposition 36 (2012) (The Three-Strikes Reform Act).<sup>99</sup> Secondly, the imposition of a strike enhancement creates the potential that defendants face higher penalties on

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<sup>91</sup> *Id.*

<sup>92</sup> Cal. Proposition 36 (2024), Section 4.; Cal. Health and Safety Code § 11054 (2023).

<sup>93</sup> Cal. Proposition 36 (2024), Section 6.

<sup>94</sup> *Id.*

<sup>95</sup> Cal. Proposition 36 (2024), Section 5.

<sup>96</sup> Cal. Proposition 36 (2024), Section 13.

<sup>97</sup> Cal. Proposition 36 (2024), Section 13; Cal. Pen. Code §12022.7 (2023).

<sup>98</sup> Cal. Pen Code. §667 (2023).

<sup>99</sup> Hon. J. Richard Couzens, Hon. Tricia A. Bigelow, *The Amending of the Three Strikes Sentencing Law*, Courts.Ca.Gov., available at <https://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf> (May 2017); Cal Proposition 36 (2012).

subsequent felony convictions, either doubling the base charge of the new offense, imposing an indeterminate, or ‘life sentence’ as it is commonly called.<sup>100</sup>

## *2. Changes to Theft Offenses.*

Proposition 36 would add Section 666.1 to the California Penal Code. This section would allow prosecutors to bring felony charges for a third theft offense even if the dollar amount would otherwise support a misdemeanor conviction.<sup>101</sup>

The initiative would also add section 490.3 to the California Penal Code. This would allow prosecutors to add unrelated thefts to meet the \$950 felony threshold for shoplifting (aggregation). The current set of bills Governor Newsom signed only aggregates for grand theft charges, so this provision is significantly broader.<sup>102</sup>

### *a. Sentencing Enhancements.*

Proposition 36 would add Section 12022.65 to the Penal Code, a three-year felony enhancement for gang shoplifting. This adds to the existing law adopted as part of Governor Newsom’s retail theft package, which created an offense penalizing gang shoplifting as a one-year misdemeanor.<sup>103</sup>

Additionally, Proposition 36 would lock in the enhancements for theft offenses above specific dollar amounts. These exact enhancements were adopted earlier this year under section 12022.6.<sup>104</sup>

### *b. Possibility of Future Modifications.*

Except to expand the various sections’ lists of prior offenses and add to the Penal Code’s definition of “hard drugs,” Proposition 36 may only be modified by two-thirds majorities in both houses of the Legislature.<sup>105</sup> This means that if, for example, a new street drug is used, the proposition could be modified by a simple majority of legislators to add it to the list of offenses that would require the above prison enhancements. If, however, the legislature wanted to add provisions that may make these offenses eligible for county jail confinement, the legislature would need two-thirds super majorities. Practically, this measure locks in the major sentencing changes Proposition 36 changes absent a subsequent ballot initiative.

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<sup>100</sup> *Id.*

<sup>101</sup> Cal. Proposition 36 (2024), Section 9.

<sup>102</sup> *PRESS RELEASE: Governor Newsom signs landmark legislative package cracking down on retail crime and property theft*, GOVERNOR GAVIN NEWSOM, available at <https://www.gov.ca.gov/2024/08/16/governor-newsom-signs-landmark-legislative-package-cracking-down-on-retail-crime-and-property-theft/> (August 16, 2024).

<sup>103</sup> AB 2943, 2024 Leg., 2023-2024 Reg. Sess. (Cal. 2024); SB 905, 2024 Leg., 2023-2024 Reg. Sess. (Cal. 2024); Cal. Proposition 36 (2024), Section 8.

<sup>104</sup> *Id.*

<sup>105</sup> Cal. Proposition 36 (2024), Section 15 “Amendments.”

### III. DRAFTING AND CONSTITUTIONAL ISSUES

#### A. Double Jeopardy Provisions

It has previously been argued that combining dollar amounts from unrelated cases violates the double jeopardy clause of the U.S. Constitution. When a court aggregates dollar amounts from multiple offenses, it may require a defendant to prove dollar amount in two separate incidents as an element of one offense. In *United States v. Lagrone*, the federal Fifth Circuit Court of Appeals confronted this same issue in the context of federal larceny law.<sup>106</sup> There, the Court held that aggregation is little more than a sentencing provision when utilized in a single trial.<sup>107</sup> Because of this, the Court held that legislatures have wide scope in determining sentencing provisions for criminal offenses but indicated that the provision could be challenged if its application overstepped the maximums intended by the legislature. Here, since the legislature expressly desires that these aggregation clauses be used to impose felony penalties more easily, the provision is unlikely to be judicially reviewed by way of current precedent.

#### B. The Eight Amendment's Prohibition Against Cruel and Unusual Punishment.

California's prison population has been lower than it has been since the mid-1990s.<sup>108</sup> This development, however, is a direct result of the changes to criminal sentencing adopted in Proposition 47 (2014) and Public Safety Realignment (2011).<sup>109</sup> It stands to reason that the reversal of many of these policies is likely to increase California's incarceration rate. While it is difficult to project to what degree the changes proposed here will increase California's prison population, there exists a risk that a notable increase in California's prison population may someday lead California to violate the Eight Amendment again and may result in a constitutional crisis similar to that experienced in the early 2000s and litigated in *Brown v. Plata*. Additionally, if such a scenario were to present itself, the California Legislature would find it difficult to summon the two-thirds majority required to modify the law.

#### C. The Single Subject Rule

Article II, Section 8(d) of the California Constitution states, "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."<sup>110</sup> The courts have interpreted this rather broadly, indicating that the initiative is allowable if the provisions are reasonably germane.<sup>111</sup> In *Raven v. Deukmejian*, the California Supreme Court adopted a fairly broad definition of reasonably germane, indicating that as long as the provisions

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<sup>106</sup> *United States v. Lagrone*, 773 F.3d 673 (5th Cir. 2014).

<sup>107</sup> *Id.*

<sup>108</sup> Lofstrom, Martin, *Public Safety Realignment: Impacts So Far*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, available at <https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/> (Sept. 2015).

<sup>109</sup> *Id.*

<sup>110</sup> Cal. Const. Art.II, Sect 8(d).

<sup>111</sup> *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990).



of the proposition are animated by the same policy goals, interests, or concerns, an initiative would be allowed to proceed under single-subject<sup>112</sup>. While the policies animating the single-subject rule, such as a fear of voter confusion or deceit on the part of bill drafters, is by fair inference, more likely in broader propositions, the Court has indicated faith in voters' ability to comprehend the implications of these initiatives.

The California Supreme Court has previously spoken on the issue of broad criminal justice initiatives in particular; in *Manduley v. Superior Court*, the Court held if the title and summary reasonably encompass the initiative's provisions, the bill should proceed under a single subject.<sup>113</sup> Proposition 36's title indicates that it imposes higher sentences for drug and theft offenses. Furthermore, the summary provided within the voter packet specifically indicates harsher penalties for third theft and drug offenses, and the proponent's arguments indicate that the provisions would require some defendants to choose between treatment and incarceration.<sup>114</sup> While the summary and title indicate, in a broad sense, that there would be higher penalties imposed for drug offenses, it does not indicate that there would be a number of mandatory prison enhancements. Instead, the summaries focus on third drug offenses. Under *Manduley*, therefore, future litigants could bring a valid claim that voters did not reasonably contemplate these enhancements. However, given the Court's prior reluctance to utilize the single-subject rule against initiatives, such litigants may face an uphill battle.

Proposition 36 does serve several far-reaching policy concerns. Broadly, the dozens of modifications aim to deter drug use, increase mandatory drug treatment, deter drug distribution, prevent petty theft, and prevent organized thefts. Solely within the attempt to address the single issue of criminal drug use, Proposition 36's drafters utilize two instruments: increased sentencing and mandated treatments. This approach broadens the bill's focus beyond merely sentencing to include policies that affect county probation, county drug treatment programs. Additionally, since these provisions will often apply to indigent defendants, mandating treatment will likely increase the responsibilities of Medi-Cal and private health insurers.<sup>115</sup>

While these provisions are fairly broad, Proponents can point to one common theme or complaint animating the initiative. Broadly, the measure seeks to deter nonviolent crime through increasing criminal penalties. The California Supreme Court has previously held that comprehensive criminal reforms can proceed under the single-subject rule. While widespread in reach, the measures appear to be a comprehensive response to a single complaint shared by its proponents.

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<sup>112</sup> *Id.*

<sup>113</sup> *Manduley v. Superior Court*, 27 Cal. 4th 537 (2002).

<sup>114</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 6, 2024, at 9, available at <https://vig.cdn.sos.ca.gov/2024/general/pdf/complete-vig.pdf> (2024).

<sup>115</sup> Cal. Proposition 36 (2024).

#### D. Conflicts Between Retail Theft Package and the Passage of Proposition 36

The Retail Theft Package does not seem to contain any provisions that would directly conflict with the initiative's language. The passage of Proposition 36 should not impact the measures contained within the Retail Theft Package. It is most likely that the two sets of policies will exist concurrently. In the unlikely case that a conflict was found, the initiative would be operative first. It would effectively negate the other bill because initiative measures take effect earlier in the year. However, even in this instance, a court would most likely try to harmonize the two measures to preserve both rather than remove one.

### IV. PUBLIC POLICY ISSUES

#### A. Fiscal Impacts

Proposition 36 (2024) likely has significant fiscal implications because substantial cost savings were experienced at the state, county, and local government levels from Proposition 47 (2014), resulting in fewer prosecutions and fewer people being imprisoned.<sup>116</sup> In 2023, the savings to the state from Proposition 47 (2014) were estimated at \$95 million.<sup>117</sup> Many of these savings resulted from decreased prison populations due to Proposition 47's (2014) sentencing reforms.<sup>118</sup> Smart Justice California and the organization California's for Safety and Justice ("CSJ") estimate that the cost to California taxpayers of imprisoning one person in CDCR is approximately \$132,000 per year.<sup>119</sup> Due largely to these costs, the Legislative Analyst's Office ("LAO") estimates that Proposition 36 would cost the state several tens of millions to the low hundreds of millions annually.<sup>120</sup> Much of the LAO's estimates depend on the number of people who will be incarcerated as a result of the new, harsher penalties, which is speculative by nature.

Californians for Safety and Justice (CSJ), a statewide public safety advocacy group, estimates that 32,000 additional people will be sentenced to state prison within seven years. With this projection, the combined state and local costs would be closer to \$4.5 billion annually.<sup>121</sup> Smart Justice California, a respected criminal justice reform advocacy organization, has a lower estimate of 5,000 agreed with the LAO.<sup>122</sup> This would constitute a shift of approximately .5% of the state's general fund, which is typically used to fund education, healthcare, prisons, and transportation. The LAO estimates that county governments will also need tens of millions in additional funding,

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<sup>116</sup> Gabriel Peak, "The 2023-23 Budget: The California Department of Corrections and Rehabilitation," *Legislative Analyst's Office*, available at <https://lao.ca.gov/reports/2023/4686/CDCR-Budget-021623.pdf> (Feb. 2023).

<sup>117</sup> *Id.*

<sup>118</sup> Hwang, Kristen, Duara, Nigel, *As California closes prisons, the cost of locking someone up hits new record at \$132,860* CAL MATTERS, available at <https://calmatters.org/justice/2024/01/california-prison-cost-per-inmate/> (Jan. 23, 2024).

<sup>119</sup> *Id.*

<sup>120</sup> Initiative Fiscal Analysis Pre-Ballot, *Proposition 36 Allows Felony Charges and Increases Sentences for Certain Drug and Theft Crimes. Initiative Statute*, LEGISLATIVE ANALYSTS OFFICE, available at <https://lao.ca.gov/BallotAnalysis/Proposition?number=36&year=2024> (2024).

<sup>121</sup> Monica Davalos, Scott Graves, report, *Understanding Proposition 36*, CALIFORNIA BUDGET AND POLICY CENTER, available at <https://calbudgetcenter.org/resources/understanding-proposition-36/> (Aug. 2024).

<sup>122</sup> Interview, with Natasha Minker, SMART JUSTICE CA (notes on file with the *California Initiative Review*).

likely in grants from that state.<sup>123</sup> This is because, while the initiative imposes numerous enhancements that require mandatory state prison time, the changes in felony theft provisions and treatment-mandated felonies still allow for county jail sentences under Public Safety Realignment. As a result, many people sentenced under the new provisions would serve increased time in county jail or under community supervision. Additionally, proponents argue that the initiative's increase in resource-heavy felony litigation will significantly increase the workload for local prosecutors and public defenders.<sup>124</sup>

If prison populations remain aligned with the LAO or Smart Justice California's estimates, the state will not need to build new prisons.<sup>125</sup> Recently, two prisons and the wings of other prisons were shuttered as California was moving away from a high incarceration model.<sup>126</sup> However, maintenance and upkeep will be needed if these prisons are to house inmates soon and continuously.

According to the California State Controller's Office, in the 2021-22 fiscal year, cities spent \$14.82 billion on police expenditures, making police expenditures the highest category of spending at 14.8% of state funding commitments.<sup>127</sup> Over the past five years, at the height of the 2020 Black Lives Matter protests, localities spent, on average, 25% more on police than in the previous year.<sup>128</sup> Because spending increases occur during projected budget deficits at a state level, decisions must be made regarding the general fund.<sup>129</sup> Opponents look to the past as an indication of how the Legislature might act when faced with funding dilemmas in the future. They claim that given the budget constraints and the difficulty of cutting necessary and vital spending like roads, healthcare, K-12 education, and others, typically, the cuts have come from the more swing education funding: early and higher education.<sup>130</sup>

Proponents of the initiative point out that many crime-related costs exist outside of the budget and are more difficult to account for in the community. In 2022, California small businesses and stores claimed nearly \$9 billion in costs associated with retail theft, including lost merchandise and deterrent efforts.<sup>131</sup> This does not include costs associated with large retailers, who have seen the brunt of organized retail theft groups that target everyday consumer goods that are easy to steal,

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Expenditures, Broken Down by Subitem 2*, CALIFORNIA STATE CONTROLLER'S OFFICE EXPENDITURES, available at [https://counties.bythenumbers.sco.ca.gov/#!/year/2022/operating/0/subcategory\\_2](https://counties.bythenumbers.sco.ca.gov/#!/year/2022/operating/0/subcategory_2) (last visited on Oct. 14, 2024).

<sup>128</sup> *Id.*

<sup>129</sup> Scott Graves, *Guide to the California State Budget Process*, CALIFORNIA BUDGET AND POLICY CENTER, available at <https://calbudgetcenter.org/resources/a-guide-to-the-california-state-budget-process/> (May 14, 2024).

<sup>130</sup> Interview, with Natasha Minker, SMART JUSTICE CA (notes on file with the *California Initiative Review*).

<sup>131</sup> *DEBUNKING THE MYTHS ABOUT PROPOSITION 36, YES ON PROP 36*, CALIFORNIANS FOR SAFER COMMUNITIES, available at <https://voteyesprop36.com/myths-vs-facts/> (last visited Oct. 14, 2024); Bruce Crumley, Lead, *Theft Prevention Steps by Chains May Drive Clients to Smaller Retailers*, INC, available at <https://www.inc.com/bruce-crumley/theft-prevention-steps-by-chains-may-drive-clients-to-smaller-retailers.html> (Jan. 29, 2024).

resell well, and have good monetary value.<sup>132</sup> The impact of theft can be felt in the price of goods, as preventative measures to thwart shoplifting are built into the price. Proponents argue creates a decreased quality of enjoyment while shopping and more resistance to frequent certain stores. Proponents of the initiative hope that this measure can change some of these costs and bring a positive balance sheet to the psyche of the community.

Proposition 36 makes significant sentencing changes that will affect incarceration. Through prior reforms, California has saved billions in prison spending, closed prisons, and ended private prison contracts.<sup>133</sup> The present budget has freed up an additional 3% of the total general fund from 2013 to 2014 for other critical state services.<sup>134</sup> Proposition 36 would reverse this trend. However, due to difficulties predicting future crime rates, sentencing decisions, and charging decisions, the initiative's impact on the budget will be difficult to estimate.

Prop 47 savings did not allow the savings to revert to the General Fund; instead, an average of \$90 million went to the Safe Neighborhoods and Schools Fund, which focused on reducing crime, supporting vulnerable youth, and assisting crime victims.<sup>135</sup> Most of the money was awarded through competitive grants for behavioral health services, including mental health services, substance abuse treatment, and diversion programs for those arrested, charged, or convicted of crimes.<sup>136</sup> Those championing these programs highlight that they have encouraged a 2-3 times lower recidivism rate than those serving prison sentences.<sup>137</sup> These programs also promote housing stability, with 60% of participants facing a reduction in homelessness at the end of the program.<sup>138</sup> Another fourth of the money is in the form of grants for programs that assist at-risk youth in preventing issues from becoming problematic, like truancy programs.<sup>139</sup> The final amount of money was intended for trauma recovery services for crime victims to assist them through their suffering.<sup>140</sup> With the passage of Prop 36, the savings from Prop 47 will, at least, be dramatically decreased, as will the associated money that funds these programs. This is why opponents of Prop 36 say that the money spent on mental health will decrease.

## B. Proponents' Arguments

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<sup>132</sup> *Id.*

<sup>133</sup> Monica Davalos, Scott Graves *Understanding Proposition 36*, CALIFORNIA BUDGET AND POLICY CENTER, available at, <https://calbudgetcenter.org/resources/understanding-proposition-36/> (Aug. 2024).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

Proponents of Proposition 36 (2024) argue that Californians increasingly feel unsafe due to softened penalties for minor offenses under Proposition 47 (2014).<sup>141</sup> Proponents say that this is because, in recent years, illegal drug use and theft have become commonplace across California. They argue that criminals no longer see or feel the consequences of their actions and, therefore, are more emboldened to commit petty offenses.<sup>142</sup> They stress that a lack of accountability does not serve as a successful deterrent.<sup>143</sup> While they acknowledge there are a myriad of reasons why people commit crime, low sentences imposed by Proposition 47 (2014) have failed to deter crime adequately and are a central cause of increased criminality.<sup>144</sup>

Proponents suggest that illegal drug use, in particular, is a significant driver of many social harms that Californians are worrying about. They argue that drug use is a significant contributor to suicide, homelessness, and violent crime.<sup>145</sup> Proponents also argue that the court-mandated treatment or the felony conviction will result in more people getting treatment.<sup>146</sup> It is difficult to drive down the roads and highways of California and see the numerous unhoused individuals who live on the street and not think of the hardships and difficulties they endure.<sup>147</sup> For many of these individuals, illegal drug use and theft are realities that are commonplace in their lives.<sup>148</sup> Whether as a gateway or as a way to survive, addiction often plays an integral role in suicide, homelessness, crime, and death. Proponents feel that people often do not want to enter treatment, so this is a more humane method to end these cycles and ensure that people get the treatment they need.<sup>149</sup> Some have classified this as a movement for mass treatment.<sup>150</sup> Proponents feel that people often do not want to enter treatment and that mandatory treatment provisions provide a humane way to mitigate these problems.<sup>151</sup> Some have classified this as a movement for mass treatment.<sup>152</sup>

### C. Opponents' Arguments

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<sup>141</sup> Thoms, Deja, Blog Post, *Californians Fear Being a Victim of Crime, and Some Have Been Victims of Racial Profiling*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (March 14, 2024).

<sup>142</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>150</sup> *Time for Common Sense on Safety YES ON PROP 36*, available at <https://yeson36treatmentnow.com> (last visited Oct. 9, 2024).

<sup>151</sup> Interview with Kim Stone, CALIFORNIA DISTRICT ATTORNEY ASSOCIATION (Sept. 28, 2024, notes on file with the *California Initiative Review*).

<sup>152</sup> *Time for Common Sense on Safety YES ON PROP 36*, available at <https://yeson36treatmentnow.com> (last visited Oct. 9, 2024).

Opponents, such as the Vera Institute for Law and Justice, maintain a broad consensus that increased sentences do not meaningfully deter crime.<sup>153</sup> At a joint hearing on shoplifting and public safety, California Assembly Member Rick Chavez Zbur stated that the committee had heard from many experts that “the best deterrence is not necessarily increasing imprisonment, but instead assuring that there is enforcement and a certainty of consequences for breaking the law.”<sup>154</sup> At that same hearing, Luz Castro, associate director of policy for Inclusive Action for the City, went a degree further, indicating that legislators should also look for alternatives to longer sentences and increased policing.<sup>155</sup> Luz stated, “Rather than advocating for increased policing and extended prison sentences, we strongly urge you to address retail theft by focusing on the following things: first, strengthening California’s social safety net. Second, addressing the root causes to understand better why people commit crimes in the first place and how limited economic opportunities lead to need-driven theft.”<sup>156</sup>

Opponents of mandatory treatment programs have countered that the measure exacerbates the lack of finite resources. They point out that mental health diversion courts and existing drug treatment courts are already heavily utilized and express that the initiative’s proposed increases would put an even greater strain on these systems.<sup>157</sup> Furthermore, opponents question the efficacy of coerced treatment programs on those who, in many instances, may not be ready for recovery.<sup>158</sup> Opponents argue that these programs often lead to more overdose deaths than voluntary programs.<sup>159</sup> Smart Justice California explained that legal and institutional obstacles currently prevent the widespread use of some of the most effective treatment programs, particularly in cases of opioid addiction.<sup>160 161</sup>

Opponents argue that in the long term, Prop 36 will lead to more recidivism. They stress that the initiative will erode the progress made to reduce mass incarceration and promote rehabilitation.<sup>162</sup> They further believe that the stricter sentencing law traditionally impacts people of color and those with low incomes and, therefore, exacerbates existing racial and socioeconomic disparities in the criminal justice system.<sup>163</sup> They point out that the rollbacks of Prop. 47 take money away from programs that have shown evidence of a reduction in recidivism and support for reintegration into society.<sup>164</sup> Civil Justice groups like the Los Angeles Poverty Department

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<sup>153</sup> Explainers, *No on Prop 36: Keep California’s Communities Safe and Stable*, VERA INSTITUTE (June 21, 2024); Mears, D. P., & Cochran, J. C., *Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Sanctions*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY, Vol. 55 Iss. 2 (2018).

<sup>154</sup> Media on Demand, *Joint Hearing Select Committee on Retail Theft and Public Safety Committee*, CALIFORNIA STATE ASSEMBLY (February 9, 2024), (00:6:00-00:10:00).

<sup>155</sup> *Id.* at (03:40:00-03:42:00).

<sup>156</sup> *Id.*

<sup>157</sup> Interview, with Natasha Minker, SMART JUSTICE CA (notes on file with the *California Initiative Review*).

<sup>158</sup> Interview, with ACLU (notes on file with the *California Initiative Review*).

<sup>159</sup> Ryan Parmet, Beletsky, Blog Post, *Involuntary treatment for substance use disorder: A misguided response to the opioid crisis*, HARVARD HEALTH (January 28, 2018).

<sup>160</sup> Interview, with Natasha Minker, SMART JUSTICE CA (notes on file with the *California Initiative Review*).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Recommendation on Prop 36 (2024)* LEAGUE OF WOMEN VOTERS, available at <https://lwvc.org/ballot-measure/2024-prop-36/recommendation> (last visited Oct. 14, 2024).

<sup>164</sup> *Id.*

stress that to truly eradicate crime, the root causes, such as healthcare access, multiple housing crises, and poverty, particularly in marginalized populations, should be addressed rather than what is proposed in Proposition 36.<sup>165</sup> Many who oppose the measure explained that it intends to combat the ills of homelessness. Still, it will likely increase incarceration rates, making it more difficult for individuals to obtain employment, housing, and other supports necessary to establish the stability necessary to combat homelessness post-conviction.<sup>166</sup> Furthermore, it defunds programs that aim to fill these gaps and help provide this support.<sup>167</sup>

## V. FUNDING COALITIONS SUPPORTING AND COMBATTING PROPOSITION 36

Significant sums have been raised both in support and against Proposition 36. The measure's primary supporter, Yes on Prop 36, Californians for Safer Communities (Yes on 36), have raised over \$11.6 million and have spent \$11.2 million.<sup>168</sup> Most of the organization's large donations have come from big-box retailers. Walmart, Target, and The Home Depot have raised over \$6 million together; more than two-thirds of that money was generated by Walmart alone.<sup>169</sup> Other major donors are the Political Action Committee supporting the California Business Roundtable, primarily composed of chief executives of California's leading small and medium companies. The organization has raised about \$400,000 to support the measure.<sup>170</sup><sup>171</sup> The last large donor is the California Correctional Peace Officers Association, which has raised approximately \$300,000.<sup>172</sup>

About \$1.7 million has been raised in opposition to the measure, and the Committee to Protect Public Safety, No on Prop 36, has spent over \$450,000. Interestingly, some of the top donors to this campaign are individuals. Patty Quillin, Producer and wife of Netflix chairman and CEO Reed Hastings, was the largest individual donor with \$500,000.<sup>173</sup> Stacy Schesterman, known

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<sup>165</sup> Bradelyn Clark, *California's Prop. 36, Which Would Again toughen Criminal Penalties, Sparks Debate*, CRONKITE NEWS, available at <https://cronkitenews.azpbs.org/2024/09/30/californias-prop-36-sparks-debate-criminal-justice-reform/> (Sept. 30, 2024).

<sup>166</sup> LA Times Editorial Board, *Endorsement: No on Proposition 36. California Shouldn't Revive the Disastrous War on Drugs*, LA TIMES, available at <https://www.latimes.com/opinion/story/2024-09-22/editorial-proposition36-no-fills-prison-war-on-drugs> (Sept. 22, 2024).

<sup>167</sup> *Id.*

<sup>168</sup> *California Proposition 36, Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative (2024)* BALLOTPEDIA, available at [https://ballotpedia.org/California\\_Proposition\\_36,\\_Drug\\_and\\_Theft\\_Crime\\_Penalties\\_and\\_Treatment-Mandated\\_Felonies\\_Initiative\(2024\)](https://ballotpedia.org/California_Proposition_36,_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative(2024)) (last visited Oct. 9, 2024).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Leadership for Jobs and a Diverse Economy* CALIFORNIA BUSINESS ROUNDTABLE, available at <https://www.cbrt.org> (last visited on Oct. 9, 2024).

<sup>172</sup> *California Proposition 36, Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative (2024)* BALLOTPEDIA, available at [https://ballotpedia.org/California\\_Proposition\\_36,\\_Drug\\_and\\_Theft\\_Crime\\_Penalties\\_and\\_Treatment-Mandated\\_Felonies\\_Initiative](https://ballotpedia.org/California_Proposition_36,_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative) (last visited Oct. 14, 2024).

<sup>173</sup> Peter Keifer, *Netflix Chief Reed Hastings' Wife, Patricia Quillin, Was a Quiet Force in the 2020 Election in California*, THE HOLLYWOOD REPORTER, available at <https://www.hollywoodreporter.com/news/politics-news/netflix-chief-reed-hastings-wife-patriciaquillin-was-a-quiet-force-in-the-2020-election-in-california-4093672/>



as an American heiress, billionaire businesswoman, and philanthropist who orients her family's philanthropic priorities based on a mission to pursue a more just and inclusive society,<sup>174</sup> is the second largest donor with \$325,000.<sup>175</sup> In fourth place among the top donors is Quinn Delaney, founder of Akonadi Foundation, which focuses on left-of-center causes and democratic political campaigns,<sup>176</sup> donated \$225,000.<sup>177</sup> The other top donors are the Service Employer's International Union (SEIU) and the American Civil Liberties Union (ACLU), with \$250,000 and \$100,000 respectively.<sup>178</sup> SEIU and ACLU have been involved in many efforts to confront similar issues legislatively and through the initiative process.<sup>179</sup>

## VI. CONCLUSION

Since 2011, California has engaged in a series of ameliorative sentencing reforms aimed at reducing the incarcerated population. Proposition 36 would reverse these trends. Data points indicate that California's crime rate was at a 50-year low when Proposition 47 (2014) passed, and that this crime rate has not seen a substantial increase since its passage. In recent years, retailers in some urban areas have experienced an acute rise in thefts and related crime. Proponents of the initiative suggest that the proposition's harsher sentences and mandated drug treatment programs will help remedy the problems experienced by these retailers. Opponents argue that the measures will not meaningfully reduce crime and that other solutions should be contemplated. Voters will decide which track California will embark on in the next few years. Regardless of the outcome, legal developments will continue, as many of these coalitions will likely submit additional ballot initiatives in the coming decades.

A **YES** vote on this initiative would mean that people convicted of certain theft and drug crimes could receive increased penalties like stricter sentences, or mandated drug treatment. It changes misdemeanors into felonies for third drug or theft offense. Additionally, forms of drug related conduct such as; drug and gun offenses, high-quantity drug distribution, and drug offenses with great bodily injury, will face mandatory prison time.

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(Nov. 25, 2020); *California Proposition 36, Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative* (2024) BALLOTPEdia., available at

[https://ballotpedia.org/California\\_Proposition\\_36,\\_Drug\\_and\\_Theft\\_Crime\\_Penalties\\_and\\_Treatment-Mandated\\_Felonies\\_Initiative](https://ballotpedia.org/California_Proposition_36,_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative)

(last visited Oct. 9, 2024).

<sup>174</sup> *Stacy Schusterman* SCHUSTERMAN FAMILY PHILANTHROPIES, available at

<https://www.schusterman.org/who-we-are/our-team/stacy-schusterman> (last visited on Oct. 14, 2024).

<sup>175</sup> *California Proposition 36, Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative* (2024) BALLOTPEdia., available at

[https://ballotpedia.org/California\\_Proposition\\_36,\\_Drug\\_and\\_Theft\\_Crime\\_Penalties\\_and\\_Treatment-Mandated\\_Felonies\\_Initiative](https://ballotpedia.org/California_Proposition_36,_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative) (last visited Oct. 9, 2024).

<sup>176</sup> *Person: Quinn Delaney* INFLUENCEWATCH, available at <https://www.influencewatch.org/person/quinn-delaney/> (last visited on Oct. 14, 2024).

<sup>177</sup> *California Proposition 36, Drug and Theft Crime Penalties and Treatment-Mandated Felonies Initiative* (2024) BALLOTPEdia., available at

[https://ballotpedia.org/California\\_Proposition\\_36,\\_Drug\\_and\\_Theft\\_Crime\\_Penalties\\_and\\_Treatment-Mandated\\_Felonies\\_Initiative](https://ballotpedia.org/California_Proposition_36,_Drug_and_Theft_Crime_Penalties_and_Treatment-Mandated_Felonies_Initiative) (last visited on Oct. 9, 2024).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*



A **NO** vote would maintain the status quo regarding punishment and criminal procedures for drug and theft crimes.