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## Police Reform in California: Preventing “Bad Apples” from “Spoiling the Whole Bunch”

Joshua P. Jendian

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Police Reform in California: Preventing “Bad Apples” from “Spoiling the Whole Bunch”

Joshua P. Jendian\*

Code Sections Affected  
Penal Code § 13510.8 (amended)  
SB 2 (Bradford); 2021 STAT. CH. 409

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2024; B.A. Political Science, California State University, Sacramento, 2020. Thank you to Professor Nadia Banteka for introducing me to this topic and to the editorial staff for their guidance. I would like to extend my gratitude to my wonderfully supportive family for their continued faith and support of my academic pursuits. I would like to thank my girlfriend, Alyssa, for her unwavering encouragement and devotion. I also thank the amazing friends I have made at McGeorge for their genuine camaraderie. I close by offering my everlasting appreciation for the wisdom, strength, and good health to complete this article.

## I. INTRODUCTION

April 11, 2018, started like any ordinary Wednesday in Gardena, California—a city in Los Angeles County’s South Bay.<sup>1</sup> Around 2:30 p.m., Gardena Police received a call describing twenty shots fired outside local businesses.<sup>2</sup> Officer Emily Colon identified Kenneth Ross, Jr. as the suspected shooter and followed him into a parking lot.<sup>3</sup> Officer Michael Medeiros arrived, joined Colon in pursuit of Ross, and commanded Ross to stop.<sup>4</sup> A third officer, Michael Robbins—who transferred to Gardena in 2016 from Orange, California—arrived on the scene armed with his department-issued AR-15.<sup>5</sup> Robbins believed Ross to be an active shooter and feared for the safety of those at the nearby elementary school.<sup>6</sup> Officers Colon, Medeiros, and Robbins believed Ross still had the gun from the reported shooting.<sup>7</sup> Within minutes of the 9-1-1 call, Robbins shot Ross after believing Ross was turning to fire a weapon.<sup>8</sup> Ross later succumbed to his injuries.<sup>9</sup>

The District Attorney’s investigation of the incident described a handgun recovered from Ross’s pocket.<sup>10</sup> However, Ross’s family disputes this finding based on bodycam footage—recovered from officers on the scene—which is unclear as to whether a gun was in his pocket.<sup>11</sup> To the disappointment of Ross’s family, the Los Angeles District Attorney determined Officer Robbins acted in self-defense and declined to pursue any charges against Robbins.<sup>12</sup> According to Robbins’ testimony, this was his fourth officer-involved shooting since becoming a certified law enforcement officer more than thirty years ago.<sup>13</sup> Subsequently,

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1. Robert Lewis, *Bill Aims to Decertify Police in CA for Serious Misconduct*, MERCURY NEWS (July 26, 2021), <https://www.mercurynews.com/2021/07/26/bill-aims-to-decertify-police-in-ca-for-serious-misconduct/> (on file with the *University of the Pacific Law Review*).

2. Memorandum about Officer-Involved Shooting of Kenneth Ross from D.A. Jackie Lacy to Captain Kent Wegner, at 1 (May 28, 2019) [hereinafter Memorandum], <https://da.lacounty.gov/sites/default/files/pdf/JSID-OIS-05-2019-Ross.pdf> (on file with the *University of the Pacific Law Review*).

3. *Id.* at 6.

4. *Id.* at 6.

5. *Id.* at 14–15; Jonathan Vankin, *California’s New, Sweeping Police Reform Legislation: What It Means and Why It Happened*, CAL. LOCAL (Oct. 6, 2021), <https://californialocal.com/localnews/statewide/ca/article/show/648-california-police-reform-laws-newsom-explained/> (on file with the *University of the Pacific Law Review*).

6. Memorandum, *supra* note 2, at 15.

7. *Id.* at 6, 9, 15.

8. *Id.* at 15, 17 (detailing Ross sustained two gunshot wounds: one to the chest and one to the right arm).

9. *Id.* at 17.

10. *Id.*

11. *Family, Activists Demand Criminal Charges Against Officer Who Fatally Shot Man in Gardena*, ABC 7 L.A. (Jan. 22, 2020), <https://abc7.com/306anhatt-ross-jr-gardena-police-shooting-ois-michael-robbins/5872326/> (on file with the *University of the Pacific Law Review*) (detailing an interview with Ross’s family attorney Haytham Faraj who, upon watching the bodycam videos, commented, “They said he had a gun. We have the video of when he fell . . . They then handcuff him to search him. They do search him. They find nothing.”).

12. *Id.* (reporting the Ross family filed a civil rights lawsuit against Robbins).

13. Lewis, *supra* note 1.

Officer Robbins returned to patrol before retiring in 2020.<sup>14</sup> Further investigations into Robbins' prior shootings may have led to disciplinary measures, like decertification for serious misconduct, and prevented Ross's death.<sup>15</sup>

Teachers at Purche Avenue Elementary School—the public school near the shooting—can have their teaching credentials revoked for any violent or serious felony conviction, drug offense, or sex offense.<sup>16</sup> The physicians practicing at Gardena's Memorial Hospital, the city's largest employer, can have their medical licenses revoked for felony (and some misdemeanor) convictions, malpractice, negligence, and drug use.<sup>17</sup> However, California police officers like Robbins, even when convicted of a crime or found engaging in misconduct, are not subject to such decertification procedures.<sup>18</sup>

Since 2019, and with renewed ambition since 2020, California legislators have been determined to pass legislation to address this accountability issue.<sup>19</sup> When Governor Newsom signed Chapter 409 into law in September 2021, California joined forty-six other states in having a decertification process for police officers.<sup>20</sup> Chapter 409 dismantles the one-and-done certification process California police officers have enjoyed for the last nineteen years.<sup>21</sup> Police associations agreed California needed a decertification process—with nearly 80,000 sworn officers in the state.<sup>22</sup> “Problem officers” hurt the reputation of police departments as a whole

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14. Lewis, *supra* note 1.

15. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 4 (Sept. 1, 2021) (illustrating how officers who commit misconduct and avoid serious consequences continue to commit additional acts of misconduct).

16. *California Commission on Teacher Credentialing*, <https://www.ctc.ca.gov/educator-discipline/faq> (last updated Jan. 28, 2021) (on file with the *University of the Pacific Law Review*); CAL. EDUC. CODE § 44424.

17. Adam Brown, *6 Ways to Have Your Medical License Revoked in California*, L. OFF. BROWN & BROWN (Nov. 20, 2020), <https://brownlicenselaw.com/6-ways-to-have-your-medical-license-revoked-in-california/> (on file with the *University of the Pacific Law Review*).

18. SB 2, *the Kenneth Ross Jr. Police Decertification Act of 2021, Approved by Legislature*, SENATE DIST. 30 (Sept. 8, 2021), <https://sd35.senate.ca.gov/news/2021-09-08-sb-2-kenneth-ross-jr-police-decertification-act-2021-approved-legislature> (on file with the *University of the Pacific Law Review*); see also *Law Enforcement Officer Certification*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement-certification.aspx> (last updated Jan. 12, 2021) (on file with the *University of the Pacific Law Review*) (describing how police “certificates” function as “licenses” due to their being issued by the state with state-mandated requirements); Robert Lewis & David DeBolt, *Many California Cops Have Kept Their Jobs After Being Convicted of a Crime*, VOICE SAN DIEGO (Nov. 10, 2019), <https://voiceofsandiego.org/2019/11/10/many-california-cops-have-kept-their-jobs-after-being-convicted-of-a-crime/> (on file with the *University of the Pacific Law Review*) (detailing how, while felony convictions are disqualifying as a matter of state law, many officers charged with felonies are often acquitted or plead down to misdemeanors; allowing them to keep their job).

19. SB 2, *the Kenneth Ross Jr. Police Decertification Act of 2021, Approved by Legislature*, *supra* note 18.

20. *Id.*; Stefanie Dazio, *Son of Black Man Killed by California Police Settles Lawsuit*, ASSOC. PRESS (Nov. 17, 2021), <https://apnews.com/article/police-lawsuits-california-los-angeles-carl-douglas-a46093394ccb6be4801c6cc9eb776543> (on file with the *University of the Pacific Law Review*).

21. Lewis, *supra* note 1.

22. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 6 (Sept. 1, 2021) (stating the California Peace Officer Research Association's argument began with the statement that “PORAC fully supports the license revocation of officers who demonstrate gross misconduct in law enforcement. We cannot allow this in our profession”).

and needlessly endanger public safety.<sup>23</sup> Chapter 409 is important because it creates a statewide framework for handling misconduct complaints and allows for officer decertification without a criminal conviction.<sup>24</sup> However, implementing an unclear and subjective decertification standard will not efficiently remove offending officers; instead, it will undeservedly burden law-abiding officers with trivial investigations.<sup>25</sup> California should institute an independent decertification system with targeted investigations and participation incentives for reducing misconduct.<sup>26</sup>

## II. LEGAL BACKGROUND

Assembly Member Dr. Akilah Weber described Chapter 409 as “an accountability bill . . . [w]ithout any accountability, we lose the integrity of the badge, and the bond with the community is broken.”<sup>27</sup> Recently, news organizations found that terminated California officers were rehired nearly twenty percent of the time.<sup>28</sup> The small percentage of misconduct complaints yielding discipline left legislators longing to improve police officer accountability.<sup>29</sup> Section A introduces the phenomenon of “wandering cops” that gave rise to this legislation and examines the prior California law on decertification.<sup>30</sup> Section B explores California’s Commission on Peace Officer Standards and Training, the agency handling police officer certification.<sup>31</sup> Section C details the concept of police officer decertification.<sup>32</sup>

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23. DOROTHY MOSES SCHULZ, MANHATTAN INST., *WANDERING COPS: HOW STATES CAN KEEP ROGUE OFFICERS FROM SLIPPING THROUGH THE CRACKS* 3 (2020), <https://www.manhattan-institute.org/schulz-wandering-cops> (on file with the *University of the Pacific Law Review*).

24. CAL. PENAL CODE § 13510.8 (enacted by Chapter 409).

25. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 6–7 (Sept. 1, 2021) (identifying the prohibited conduct as “vague, broad, and often subjective”); see also Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 193 (2019) (identifying four speculative harms resulting from police misconduct statutes).

26. See Robert Bloom & Nina Labovich, *The Challenge of Deterring Bad Police Behavior: Implementing Reforms that Hold Police Accountable*, 71 CASE W. RES. L. REV. 923, 975 (2021) (offering such reforms as part of an attempt to nationalize decertification of police); see also Richard Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 4–5 (2009) (describing the DOJ’s failures in reducing the net expected cost of reforms); Hilary Rau et al., *State Regulation of Policing: POST Commissions and Police Accountability*, 11 U.C. IRVINE L. REV. 1349, 1383 (2021) (describing how decertification, alone, does not lead to impacts elsewhere).

27. Don Thompson, *California Advances Bill to Strip Badges from Bad Officers*, ASSOC. PRESS (Sept. 3, 2021), <https://apnews.com/article/california-bills-police-reform-d372c1b5654099dc5ca3bcb0aae094b8> (on file with the *University of the Pacific Law Review*).

28. Lewis & DeBolt, *supra* note 18.

29. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 4 (Sept. 1, 2021); *California Police Scorecards*, Los Angeles Police Department, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*).

30. *Infra* Section II.A.

31. *Infra* Section II.B.

32. *Infra* Section II.C.

*A. “Wandering Cops” & Prior California Decertification Law*

Retired Police Captain turned Professor, Dorothy Schulz, studied “wandering cops” in various states.<sup>33</sup> Schulz defines a “wandering cop” as “a police officer who leaves one department after being terminated for misconduct or under a disciplinary cloud, and secures employment in another law enforcement agency.”<sup>34</sup> Officer Michael Robbins’ involvement in three shootings before Kenneth Ross, Jr. inspired the Legislature to seek solutions for police misconduct while prioritizing the prevention of future killings.<sup>35</sup>

In 2003, California repealed its police decertification law the Legislature initially enacted more than sixty years ago.<sup>36</sup> Since the repeal, police departments could fire and discipline California officers, but no authority existed to prevent their reinstatement or later hiring in a neighboring department.<sup>37</sup> This process allowed problematic officers who, through criminal convictions or findings of misconduct, have shown the public should not entrust them to remain certified.<sup>38</sup> Those terminated officers could get employed by departments elsewhere, subjecting a new community to heightened risks of police brutality.<sup>39</sup> To combat some of these risks, in 2015, Chapter 462 required law enforcement agencies to report certain incidents of police use-of-force to the California Department of Justice.<sup>40</sup>

*B. Commission on Police Officer Standards and Training*

In 1959, the Legislature established the Commission on Peace Officer Standards and Training (POST) and authorized it to create a certificate program for law enforcement officers.<sup>41</sup> This program comprises of training and education experiences.<sup>42</sup> The law permitted POST to revoke an officer’s certification only if it “was awarded in error or fraudulently obtained.”<sup>43</sup>

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33. Schulz, *supra* note 23, at 11.

34. *Id.* at 2.

35. SB 2, *the Kenneth Ross Jr. Police Decertification Act of 2021, Approved by Legislature*, *supra* note 18; Dazio, *supra* note 20.

36. William H. Freivogel & Paul Wagman, *Is Decertification of Bad Cops an Answer to U.S. Policing Flaws?*, ARIZ. STATE U. CRIME & JUST. NEWS (Oct. 4, 2021), <https://crimeandjusticenews.asu.edu/decertification-bad-cops-answer-us-policing-flaws> (on file with the *University of the Pacific Law Review*) (finding California was the first state to implement decertification for police misconduct, but the powerful police unions successfully lobbied for its repeal in 2003).

37. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 4–5 (Sept. 1, 2021).

38. *Id.*

39. *Id.*

40. CAL. GOV. CODE § 12525.2 (enacted by Chapter 462) (requiring agencies to report shootings by police, shootings of police, incidents of police use of force, and use of force against police).

41. CAL. PENAL CODE § 13500.

42. SENATE FLOOR, FLOOR ANALYSIS OF SB 2, at 5 (Sept. 1, 2021).

43. *Id.* (instructing POST that once an officer was properly certified, certification could not be revoked).

The POST membership appointees continue to set the minimum standards for hiring and training California law enforcement officers.<sup>44</sup> While department participation in POST is voluntary, nearly all law enforcement agencies participate due to the benefits POST provides participating agencies.<sup>45</sup> POST adopts regulations per enacted legislation, which participating agencies must follow to continue receiving membership incentives.<sup>46</sup> Once an officer completes the POST training and certification, the officer receives a certificate valid throughout California.<sup>47</sup>

### C. Police Decertification

Similar POST commissions in forty-six states have the power to decertify law enforcement officers (i.e., revoke the license to be a police officer), albeit with varying criteria.<sup>48</sup> For example, while all states can decertify for felony convictions, only about half of them can decertify for general misconduct and even fewer for misdemeanor convictions.<sup>49</sup> Generally, once a POST commission decertifies an officer, they can no longer serve in a law enforcement capacity in the state.<sup>50</sup> Uniquely, rather than assigning decertification responsibilities to its statewide POST agency, Oregon's decertification statute created an independent auditor with limited discretion for egregious misconduct.<sup>51</sup> Additionally, eleven states list their decertified officers on the National Decertification Index (NDI).<sup>52</sup>

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44. *About Post*, COMM'N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/About-Us> (last updated July 14, 2021) (on file with the *University of the Pacific Law Review*) (describing the appointees—which include law enforcement professionals, administrators, and educators—as having three-year terms with the Attorney General serving as an ex-officio member and being funded from the General Fund and State Penalty Fund).

45. *California Law Enforcement Agencies*, COMM'N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/le-agencies> (last updated Mar. 15, 2022) (on file with the *University of the Pacific Law Review*) (listing the agencies not enrolled as various university police, park police, and probation agencies); *About Post*, *supra* note 44 (showing nearly all departments are members for access to POST's general research, counseling services, leadership services, and reimbursement for hiring and training programs).

46. *Commission Regulations and Procedures*, COMM'N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/POST-Regulations> (last updated Jan. 6, 2022) (on file with the *University of the Pacific Law Review*); *About Post*, *supra* note 44.

47. Schulz, *supra* note 23, at 10 (finding California, Hawaii, New Jersey, and Rhode Island remained incapable of decertification as of 2020).

48. Rau, *supra* note 26, at 1347.

49. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1694 (2020).

50. Schulz, *supra* note 23, at 7 (exploring how there are instances of officers transferring states altogether, but most common relocation after firing has been within the same state).

51. Rau, *supra* note 26, at 1383; DEP'T OF PUB. SAFETY STANDARDS & TRAINING, ADDITIONAL RESOURCES NEEDED TO STRENGTHEN POLICE TRAINING AND ACCOUNTABILITY 8 (2021) (providing a list of mandatory violations).

52. Kallie Cox & William Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, ASSOC. PRESS (May 12, 2021), <https://apnews.com/Article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c> (on file with the *University of the Pacific Law Review*) (noting Arizona, Connecticut, Florida, Indiana, Kansas, Minnesota, Montana, Oregon, Utah, Vermont, and Washington as listing officers on NDI).

News organizations have compiled data from an additional forty-four states to estimate POST commissions nationwide have decertified more than 30,000 officers over the last half-century.<sup>53</sup>

### III. CHAPTER 409

Chapter 409 expands POST's statewide decertifying powers—beyond the rare instances of improper issuing—to those officers POST determines to have engaged in serious misconduct.<sup>54</sup> Chapter 409 requires law enforcement agencies to report to POST any termination, resignation, retirement, complaint, allegation, oversight finding, civil judgment, and any department investigation of misconduct.<sup>55</sup>

Upon notice of these events, the newly-created Peace Officer Standards Accountability Division (Division), within POST, reviews the department investigation and can conduct further investigations of their own.<sup>56</sup> Chapter 409 does not define “serious misconduct;” instead, it allows POST to create its definition so long as it minimally includes nine specified acts.<sup>57</sup> This list begins with (1) dishonesty in reporting, investigation, or prosecution of a crime and (2) abuse of power.<sup>58</sup> The list continues with (3) physical abuse, (4) sexual assault, (5) any demonstration of bias, and (6) any act that violates the law.<sup>59</sup> Lastly, (7) participation in a “law enforcement gang,” (8) failure to cooperate with a misconduct investigation, and (9) failure to intercede upon witnessing excessive force are also included.<sup>60</sup>

If the Division finds reasonable grounds for decertification, it must notify the officer, who has 30 days to file for a review.<sup>61</sup> This review will take place as a public hearing in front of the newly-created Peace Officer Standards

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53. John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY NEWS (June 11, 2020), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> (on file with the *University of the Pacific Law Review*).

54. CAL. PENAL CODE § 13510.8.

55. CAL. PENAL CODE § 13510.9 (added by Chapter 409) (prescribing these incidents should be reported to POST within 10 days of their receipt).

56. CAL. PENAL CODE § 13509.5 (enacted by Chapter 409).

57. CAL. PENAL CODE § 13510.8.

58. *Id.* (stating “dishonesty” minimally includes “false statements, intentionally filing false reports, tampering with, falsifying, destroying, or concealing evidence, perjury, and tampering with data recorded on a body-worn camera or other recording device for purposes of concealing misconduct,” while “abuse of power” minimally includes intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest”).

59. *Id.* (describing “physical abuse” to be “excessive or unreasonable use of force,” while “demonstrating bias” includes topics of “race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status”).

60. *Id.* (defining this “gang” to be “a group of peace officers within a law enforcement agency who may identify themselves by a name and may be associated with an identifying symbol . . . and who engage in a pattern of on-duty behavior that intentionally violates the law or fundamental principles of professional policing”).

61. CAL. PENAL CODE § 13510.85 (enacted by Chapter 409).



Accountability Advisory Board (Board) within POST.<sup>62</sup> After the public hearing, Chapter 409 instructs the Board to recommend an action to POST.<sup>63</sup> If the Board believes by majority vote the officer engaged in serious misconduct, then it will recommend POST begin decertification of the officer.<sup>64</sup> If POST agrees by a two-thirds majority vote, they will adopt the Board's recommendation.<sup>65</sup> The officer may then seek review in a formal adjudication hearing and further review in a Superior Court.<sup>66</sup>

Regarding hiring practices, Chapter 409 expands the criteria that exclude certain individuals from obtaining peace officer employment.<sup>67</sup> Chapter 409 also amends the Tom Bane Civil Rights Act.<sup>68</sup> These amendments eliminate three specific immunity provisions subjecting police officers to increased civil rights violation claims.<sup>69</sup> However, these provisions are minor in comparison to the new decertification process.<sup>70</sup>

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62. CAL. PENAL CODE § 13509.6 (enacted by Chapter 409) (detailing how the Governor appoints nine Board members. The first three seats will consist of two retired peace officers and one attorney with peace officer oversight experience. The remaining six seats are for [non-peace-officer] members of the public, two who “have substantial experience working at nonprofit or academic institutions on issues related to police accountability;” two who “have substantial experience working at community-based organizations on issues related to police accountability;” and two “with strong consideration given to” individuals or their surviving family members “who have been subject to wrongful use of force likely to cause death or serious bodily injury by a peace officer”).

63. PENAL § 13510.85.

64. PENAL § 13510.8.

65. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 5 (Sept. 1, 2021).

66. *Id.*

67. Lars T. Reed, *Governor Signs SB 2, Creating Police Decertification Process and Expanding Civil Liability Exposure*, LCW SPECIAL BULLETIN (Sept. 30, 2021), <https://www.lcwlegal.com/news/governor-signs-sb-2-creating-police-decertification-process-and-expanding-civil-liability-exposure/> (on file with the *University of the Pacific Law Review*) (explaining Government Code 1029 excludes officers with a revoked or surrendered POST certificate, conviction for a felony or dishonesty-related crime, or name listed on the National Decertification Index).

68. *Id.* (allowing claims against the police for constitutional rights violations).

69. Andrew Bethel, *Police Officers, Qualified Immunity & Asset Protection Estate Planning Under CA SB2*, BETHEL L. CORP. (Dec. 31, 2021), <https://www.bethellaw.com/blog/police-officers-qualified-immunity-and-asset-protection-estate-planning-under-ca-sb2> (on file with the *University of the Pacific Law Review*) (detailing the elimination of three California Government Code immunities: Section 821.6—immunity from injury caused by a peace officer during “any judicial or administrative proceeding”, even if malicious and lacking probable cause—Section 844.6—immunity from injuries caused “by any prisoner or injuries to any prisoner” while said the prisoner was under the officer’s custody—Section 845.6—immunity from injury “caused by the failure of a peace officer to furnish medical care for a prisoner in their custody”).

70. Brian Marvel, *PORAC Member Alert: SB 2 Passes Assembly, What it Means!*, PORAC (Sept. 8, 2021), <https://myemail.constantcontact.com/PORAC-Member-Alert-SB-2-Passes-Assembly-What-it-Means.html?soid=1104954099833&aid=bZaLRajDmlg> (on file with the *University of the Pacific Law Review*) (highlighting the importance of the decertification process).

#### IV. ANALYSIS

The State of California licenses or certifies more than 200 professions.<sup>71</sup> The unique powers entrusted to police officers to search, arrest, and use deadly force results in a serious duty to hold them accountable.<sup>72</sup> As California police associations suggest, “[w]e cannot allow [gross misconduct] in the [police] profession.”<sup>73</sup> The widespread support for decertification is due to the conflicts of interest facing local handling of police misconduct.<sup>74</sup> At the local level, departments unknowingly hire officers terminated for misconduct without notice to the public or other departments, triggering the “wandering cops” phenomena.<sup>75</sup> Unfortunately, the composition of the Board, the overinclusive nature of requested materials, and the lack of incentives to participate hurt Chapter 409’s potential to combat serious police misconduct.<sup>76</sup>

Section A explains how Chapter 409 importantly creates a statewide misconduct reporting system and a decertification framework that does not require a criminal conviction.<sup>77</sup> Section B details the challenges facing the implementation and enforcement of police officer reforms generally, as well as Chapter 409.<sup>78</sup> Section C highlights the biased decision-making bodies, lack of participation incentives, and lack of a clear link between increased decertification and reduced police officer killings of civilians.<sup>79</sup> Section D proposes a targeting procedure to induce proactive reform within departments and an independent body or auditor to manage decertifications.<sup>80</sup>

##### *A. Where Chapter 409 Succeeds*

The first important step taken by Chapter 409 is the reporting of department hirings, firings, civilian complaints, and findings of misconduct investigations.<sup>81</sup> This reporting allows POST to investigate when local inquiries—whether by the employing department or civilian review board—leave victims’ families and the public yearning for accountability.<sup>82</sup> This statewide reporting significantly opens

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71. CAL. PENAL CODE § 13510.8.

72. Roger Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 155 (2012).

73. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 6 (Sept. 1, 2021).

74. See Roger Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 545–46 (2001) (showing that allowing police to police themselves is ineffective at reducing misconduct or changing departmental attitudes).

75. *Id.*

76. *Infra* Section IV.

77. *Infra* Section IV.A.

78. *Infra* Section IV.B.

79. *Infra* Section IV.C.

80. *Infra* Section IV.D.

81. CAL. PENAL CODE § 13510.9; ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 4 (Sept. 1, 2021).

82. See Rau, *supra* note 26, at 1383–84 (finding local agency investigations often lack transparency with the public).

the disclosure of police misconduct in California—at least to POST—since before Chapter 409, POST limited disclosures to certain instances.<sup>83</sup> These broad disclosure requirements also present an opportunity to gather and store misconduct information in hopes of potentially using it to affect broader departmental reviews.<sup>84</sup>

Over the last decade, California’s eight largest police departments had significant variance in their handling of civilian complaints.<sup>85</sup> For instance, from 2016 to 2020, the Oakland Police Department saw about one civilian complaint for every eleven arrests made.<sup>86</sup> The lowest number of complaints—San Diego—saw one complaint for every 223 arrests.<sup>87</sup> The statistic most needing further examination is how departments handle civilian complaints.<sup>88</sup> Again, a large discrepancy existed from one jurisdiction to another.<sup>89</sup> While Long Beach Police resolved just 0.4% of complaints in favor of the civilian, that percentage rose to 20% in Fresno, a city with an independent police auditor.<sup>90</sup> Sending complaints to a statewide body allows the opportunity for neutrality and equal standards of accountability during misconduct investigations.<sup>91</sup> Another positive feature of

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83. See Cox & Freivogel, *supra* note 52 (listing events like shots fired, death, or serious injury to disclose).

84. See Michael D. White et al., *How Can We Achieve Accountability in Policing? The Not-So-Secret Ingredients to Effective Police Reform*, 25 LEWIS & CLARK L. REV. 405, 434 (2021) (describing how external oversight effectuates trust, credibility, and transparency for all parties involved).

85. *Top 10 Largest CA Police Departments*, CONNECT2AGENCIES (Mar. 24, 2021), <https://connect2agencies.com/top-10-largest-california-police-departments/> (on file with the *University of Pacific Law Review*) (listing—from first to eighth—Los Angeles, San Francisco, San Diego, San Jose, Long Beach, Fresno, Oakland, and Sacramento); *California Police Scorecards*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*).

86. See *California Police Scorecards, Oakland Police Department*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/oakland> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*) (reporting 6,470 civilian complaints and 74,417 arrests made).

87. *California Police Scorecards, San Francisco Police Department*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/san-francisco> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*); *California Police Scorecards, San Diego Police Department*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/san-diego> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*) (reporting 794 civilian complaints and 284,908 arrests made).

88. *California Police Scorecards, Los Angeles Police Department*, *supra* note 29.

89. Compare *id.* with *California Police Scorecards, San Diego Police Department*, *supra* note 87 (showing a large discrepancy with civilian complaints between these jurisdictions).

90. *California Police Scorecards, Long Beach Police Department*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/long-beach> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*) (showing 99.6% of the time an officer received a civilian complaint, the audit found they did no wrong); *California Police Scorecards, Fresno Police Department*, NATIONWIDE POLICE SCORECARDS, <https://policescorecard.org/ca/police-department/fresno> (last visited Sept. 3, 2022) (on file with the *University of the Pacific Law Review*).

91. See Bloom & Labovich, *supra* note 26, at 968–69 (asserting local departments and unions do not hold their own bad officers accountable).

Chapter 409 is that it does not require a criminal conviction for decertification.<sup>92</sup> Removing the barrier of attaining a criminal conviction allows POST to punish wrongful behavior that often goes formally unpunished.<sup>93</sup>

A 2020 study found that three percent of police officers in Florida—a state with a high decertification rate—were “wanderers.”<sup>94</sup> If a similar ratio existed in California, that equates to 2,400 “wandering” officers on the streets.<sup>95</sup> Implementing decertification should instill public trust that the officers failing to demonstrate the ability to serve as peace officers are being held accountable.<sup>96</sup> Similar to civil lawsuits, Chapter 409’s public decertification process will bring a sense of justice to victims of police misconduct while keeping attention on the issue.<sup>97</sup> Thus, decertification statutes can be an effective response to misconduct because of the personal implications facing the officer and as a public display of accountability.<sup>98</sup>

### *B. What Chapter 409 Must Overcome*

Deterring misconduct has been the focus of police officer reform in recent decades.<sup>99</sup> In 1979, Congress enacted Section 1983 allowing lawsuits against officers who violated civil rights.<sup>100</sup> Six years later, Congress enacted Section 14141 authorizing the Justice Department to sue entire departments for depriving individuals of their rights.<sup>101</sup> This section will briefly outline the issues facing these other remedial efforts in deterring police misconduct to understand the challenges facing decertification.<sup>102</sup>

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92. CAL. PENAL CODE § 13510.8.

93. *But see* Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. (forthcoming 2023) (manuscript at 4) (proposing a model statute that would criminalize serious police misconduct as a clearer way to hold police officers accountable).

94. Grunwald & Rappaport, *supra* note 49, at 1687–94.

95. *See* Magnus Lofstrom & Brandon Martin, *Law Enforcement Staffing in California*, PUB. POL’Y INST. OF CAL. (Feb. 2021), <https://www.pplic.org/publication/law-enforcement-staffing-in-california/> (on file with the *University of the Pacific Law Review*) (finding 79,550 sworn law enforcement officers in California).

96. PENAL § 13510.8.

97. *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 800–01 (1993) (expressing how cases involving police often generate news coverage that “galvanizes” public support).

98. *See id.* at 767–68 (noting how officers being investigated are often paid, given free legal counsel through their union, and any resulting damages paid for by the city, where decertification carries the personal significance of being career-altering).

99. *See id.* at 773–74 (seeing litigation costs, limited legislation, and unsympathetic juries as significant hurdles for those attempting police accountability reform).

100. 42 U.S.C. § 1983 (outlining how civilians can bring a civil action in federal court when a law enforcement officer violates their constitutional rights).

101. 34 U.S.C. § 12601.

102. *Infra* Section IV.B.

Record retirements and resignations amidst increased scrutiny and decreased morale have led departments across the country to fill openings with previously displaced officers.<sup>103</sup> Congress allocated fifteen percent of the approximately \$2 trillion American Rescue Plan to states to pay first responders, mitigate budget shortfalls, and hire more officers.<sup>104</sup> Small departments are especially vulnerable to hiring displaced officers due to the undesirability of fewer resources and lower compensation.<sup>105</sup> Unfortunately, it is these very communities that pay the price since misconduct complaints “cannot be divorced from the recurring tragedy of police officers with hidden histories of violence.”<sup>106</sup> A recent Florida study found when once-terminated officers rejoined a police agency, they were “significantly more likely” to receive complaints for “moral character violations” and face termination, again.<sup>107</sup> Derek Chauvin—the officer convicted of murdering George Floyd in 2020—had at least seventeen prior misconduct complaints.<sup>108</sup> Jason Van Dyke—the officer convicted of murdering Laquan McDonald in 2018—had at least eighteen prior misconduct complaints.<sup>109</sup> A 2015 report analyzed 3,458 officers arrested and later convicted or terminated between 2005 and 2011 across the United States.<sup>110</sup> By 2015, 332 of the officers—nearly ten percent—remained employed as police officers.<sup>111</sup>

Various systemic barriers arise for those seeking accountability for police officer behavior through a Section 1983 lawsuit.<sup>112</sup> First, the threat of personal financial impact on the individual officer does not exist.<sup>113</sup> This is because the city pays for both the defense and settlement or judgment against its officers.<sup>114</sup> Secondly, officers do not face any threat to their professional status.<sup>115</sup> Internal pressure from departments is often insufficient, and the outcomes of civil lawsuits

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103. Schulz, *supra* note 23, at 3 (describing how departments are only filling about 93% of their authorized positions and 63% of departments reported decreases in applications for open positions); *see also* Eric Westervelt, *Cops Say Low Morale and Department Scrutiny are Driving Them Away from the Job*, NPR (June 24, 2021), <https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job> (on file with the *University of the Pacific Law Review*) (describing a nonprofit study finding a 45% increase in police retirement and 20% increase in resignations).

104. Schulz, *supra* note 23, at 3.

105. *Id.* at 3–5 (highlighting how these communities also tend to have higher minority populations).

106. Moran, *supra* note 25, at 162.

107. Grunwald & Rappaport, *supra* note 49, at 1743, 1747 (defining “moral character violations” as complaints for violent, sexual, or integrity-related misconduct).

108. Derek Hawkins, *Officer Charged in George Floyd’s Death Used Fatal Force Before and Had a History of Complaints*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/> (on file with the *University of the Pacific Law Review*).

109. Moran, *supra* note 25, at 162.

110. Rau, *supra* note 26, at 1382.

111. *Id.* at 1382.

112. Patton, *supra* note 97, at 767–68.

113. *Id.* at 771.

114. *Id.* at 771–72.

115. *Id.* at 777.

do not lead to discipline, prevent promotions, or alter police officer practices.<sup>116</sup> With limited resources and political capital, the Justice Department has had mixed results affecting widespread reform, even in departments they are capable of investigating.<sup>117</sup> As Professor Stephen Rushin found in 2016, reform is ineffective when departments are unwilling and resistant to change.<sup>118</sup>

A significant barrier to adopting reforms is that the implementing department incurs the cost.<sup>119</sup> Simply put, when the cost of reforms is equal or greater than the cost of non-compliance, departments typically maintain the status quo.<sup>120</sup> Another hurdle to police reforms is their reactive nature, responding to past incidents of misconduct.<sup>121</sup> Even when lawsuits against departments succeed, the reforms are half-hearted and ineffective because of their coercive nature.<sup>122</sup>

In response to the Black Lives Matter protests, recent reform focused less on civil remedies and more on police officer practices.<sup>123</sup> As sensationalized topics dominated news cycles, police decertification received far less attention, even from reformers.<sup>124</sup> This may be because only three states lack the power to decertify an officer.<sup>125</sup> However, decertification has not resulted in equal enforcement due to varying criteria, funding, and emphasis among the states.<sup>126</sup> For instance, some states' POST agencies limit which types of officers can be decertified, while others limit the types of disqualifying misconduct.<sup>127</sup> A majority of the states allow decertification for findings of general offenses like "any criminal offense," act of

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116. *Id.* at 777–82.

117. Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113, 115 (2016).

118. *See generally id.* at 115, 137–38 (describing how the DOJ could not stimulate reform in the Sheriff's Department of Alamance County, North Carolina, due to the lack of organizational buy-in).

119. Harmon, *supra* note 26, at 4; Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 687–88 (2016).

120. Harmon, *supra* note 26, at 7, 61.

121. *Id.* at 33.

122. *Id.* at 47 (recognizing cities often pay for litigation, damages, or both in § 1983 lawsuits, thus not deterring local chiefs).

123. *See* Bloom & Labovich, *supra* note 26, at 930 (presenting chokehold bans and reallocation of police funds as targeting police practices rather than being remedial).

124. *See* #8CANTWAIT, CAMPAIGN ZERO, <https://8cantwait.org/> (last updated June 2021) (on file with the *University of the Pacific Law Review*) (listing eight popular reforms but neglecting to mention anything on police decertification).

125. *See* Sarah Childress, *How States Are Moving to Police Bad Cops*, FRONTLINE PBS (Apr. 8, 2016), <https://www.pbs.org/wgbh/frontline/article/how-states-are-moving-to-police-bad-cops/> (on file with the *University of the Pacific Law Review*) (listing six states without decertification powers, but since 2016, California (Chapter 409)—Massachusetts MASS. GEN. LAWS ch.253 (2020)—and New York N.Y. COMP. CODES R. & REGS. Tit. 9, § 6065.6 (2019)—have since enacted decertification, leaving New Jersey, Rhode Island, and Hawaii as the only states without any decertification process).

126. Grunwald & Rappaport, *supra* note 49, at 1694, 1697.

127. Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE QUARTERLY 420, 425 (2013); Grunwald & Rappaport, *supra* note 49, at 1694.

“moral turpitude,” or “conduct unbecoming an officer.”<sup>128</sup> Others use specific language allowing decertification for sexual misconduct, unjustified deadly force, or perjury.<sup>129</sup>

In drafting a model decertification statute, Professor Roger Goldman found a “hybrid approach, combining revocation for specific misconduct with more general language” to be ideal.<sup>130</sup> However, Goldman warned against the use of broad criteria.<sup>131</sup> For instance, states should elevate decertification standards above those for termination due to the career-long impact of such revocation.<sup>132</sup> While Chapter 409 does not create civil liability, decertification should address issues arising from these reforms to avoid alienating police officers from the public to be successful.<sup>133</sup>

### C. Where Chapter 409 Falls Short

Creating a swift and impartial decertification process would have resulted in near unanimous support for Chapter 409.<sup>134</sup> Unfortunately, the Board’s composition, the burdensome nature of requested materials, and the lack of participation incentives limit Chapter 409’s potential for combating serious police misconduct.<sup>135</sup> More than half of the POST Commission members—those with the final decision after a recommendation from the Board—have law enforcement backgrounds.<sup>136</sup> This composition is at odds with the newly-created Board having a majority of persons with a history of working on, teaching about, or suffering from police misconduct.<sup>137</sup> It is not hard to imagine these two bodies would judge a misconduct complaint differently.<sup>138</sup> POST will likely sympathize with the officer subject to the investigation, and the Board will favor the complainant based

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128. Goldman, *supra* note 72, at 151.

129. *Id.* at 152.

130. *Id.*

131. *Id.* at 152–53 (finding broad criteria to be hard to enforce and uninspiring to affect reform).

132. *Id.* (seeing decertification as more serious than termination).

133. See White, *supra* note 84, at 413–14 (describing the worsening of the “us versus them” divide between police and the public—especially minority populations—as a result of one-sided approaches to reform).

134. See generally Bloom & Labovich, *supra* note 26, at 967–68 (explaining how police are only deterred if they know their actions are being reviewed by an unbiased third party); see also ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 6 (Sept. 1, 2021) (quoting the Peace Officer Research Association of California as saying, “When an officer acts in a way that is grossly inconsistent with the missions and goals of our profession, it gives all law enforcement a bad name”).

135. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 3, 6–7 (Sept. 1, 2021) (listing PORAC’s argument describing the Board as “amateurish” and being “stacked against [police]”).

136. *The Post Commission*, COMM’N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/post-commission> (last updated June 1, 2022) (on file with the *University of the Pacific Law Review*).

137. CAL. PENAL CODE § 13509.6.

138. See generally Andre Douglas Pond Cummings, *Reforming Policing*, 10 DREXEL L. REV. 573, 593–94 (2018) (explaining how implicit biases and socio-historical contexts can impact a person’s point of view).

on similar relational biases.<sup>139</sup> Supporters worry the process is too difficult to decertify bad officers, while opponents worry good officers will face unnecessary investigations for minor complaints.<sup>140</sup> Unfortunately, both concerns are likely true as the vast amounts of departmental disclosures and investigative powers of the Board increase the inefficiency and burden for all parties.<sup>141</sup> The Board, eager to finally take advantage of a police decertification process, will be overwhelmed by the number of disclosures received and stunted by police officers “lawyering up.”<sup>142</sup> That is not to mention the hurdle of convincing a two-thirds majority of the POST Commission membership to agree with the Board’s findings.<sup>143</sup> This imbalance has invoked similar attitudes as the Justice Department’s attempt to reform unwilling departments.<sup>144</sup>

“[P]olice departments will not reduce misconduct without a legal incentive to do so.”<sup>145</sup> Incentives vary but rely on reducing the costs of adopting certain reforms and increasing the expected costs of not doing so.<sup>146</sup> Chapter 409 provides no penalty for a department failing to report the dozens of requested misconduct events within the specified ten-day period.<sup>147</sup> Aside from officers potentially facing decertification for dishonesty or failing to cooperate, there is otherwise no check on misconduct reporting.<sup>148</sup> While this may seem like a strong deterrent, it may be an over-deterrent, acting to strengthen the police officer code of silence.<sup>149</sup> Submitting a civilian complaint to POST may be the only way to identify a non-reporting officer, especially because the only witnesses are usually the complainant and police officers.<sup>150</sup> Officers are often under significant pressure to maintain the code of silence or face retaliatory threats of violence, discipline, and harassment.<sup>151</sup>

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139. See generally Patton, *supra* note 97, at 794 (“When someone is investigating his own people, there is potential for subconscious bias and fear . . .”).

140. Taiyler Simone Mitchell, *Gov. Newsom Signs Bill into Law Allowing for Sweeping Law Enforcement Reform in California*, BUS. INSIDER (Sept. 30, 2021), <https://www.businessinsider.com/california-bill-could-mean-the-end-of-qualified-immunity-2021-8> (on file with the *University of the Pacific Law Review*).

141. See generally CAL. PENAL CODE § 13510.9 (listing broad authority for the various POST bodies to request investigatory materials in addition to the nine areas of disqualifying behavior).

142. See Michael L. Rains, *Senate Bill 2—What It Does and How It Works*, RAINS LUCIA STERN ST. PHALLE & SILVER, PC (Nov. 1, 2021), <https://www.rlslawyers.com/senate-bill-2-what-it-does-and-how-it-works/> (on file with the *University of the Pacific Law Review*) (warning officers to obtain counsel preemptively due to the “real possibility” the investigation will be carried out fully with POST).

143. Lewis, *supra* note 1; ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 3 (Sept. 1, 2021).

144. See Rushin, *supra* note 121, at 115 (illustrating the difficulty the Justice Department had coercing reforms).

145. Harmon, *supra* note 26, at 8.

146. *Id.* at 23.

147. CAL. PENAL CODE § 13510.9.

148. CAL. PENAL CODE § 13510.8(8) (enacted by Chapter 409).

149. See Rosenthal, *supra* note 123, at 734; Patton, *supra* note 97, at 763–64 (explaining how every profession has a code of silence but especially police due to the life and death nature of the work).

150. Rosenthal, *supra* note 123, at 682–83.

151. Bloom & Labovich, *supra* note 26, at 935–36 (detailing how a police supervisor in New York was subsequently relocated thirty-eight times after breaking the code of silence); see also Owen Doherty, *A Reform*



While the culture of silence is not the same across departments, it is difficult to choose whether to speak-up and risk harassment—and isolation—or simply stay quiet.<sup>152</sup>

Underreporting of police misconduct is not a new phenomenon.<sup>153</sup> Because of the makeup of the decision-making bodies and the uncertainty of the statutory language, officers may not take the process seriously until they see POST begin revoking certificates.<sup>154</sup> Sensing this skepticism, police associations are already warning members to take the process seriously and prepare for numerous stages of investigations and litigation.<sup>155</sup> California’s notoriously strong police unions—and their legal teams—are prepared for POST investigations to begin—especially considering their influence on amending Chapter 409.<sup>156</sup>

Challenges aside, even if Chapter 409’s decertification were a smooth and effective process, the evidence is inconclusive that decertification alone decreases misconduct.<sup>157</sup> For example, Georgia has maintained the country’s highest decertification rate.<sup>158</sup> From 2015 to 2019, Georgia decertified 3,239 officers.<sup>159</sup> Meanwhile, across the same timeframe, Maryland—a state with one of the lowest decertification rates—decertified just one officer.<sup>160</sup> Despite the disparity, since 2015, Maryland has had a *lower* rate of killings by police officers (18 per million people) than Georgia (38 per million people).<sup>161</sup> A 2013 report found six states

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to *Police Department Hiring: Preventing the Tragedy of Police Misconduct*, 68 CASE W. RES. 1259, 1271–72 (2018) (describing violent threats, expulsion, and extortion as potential repercussions for breaking their silence).

152. See Bloom & Labovich, *supra* note 26, at 935–36 (detailing how officers face “extreme retaliation” for testifying against a fellow officer); Rosenthal, *supra* note 123, at 734.

153. Jeffrey Johnson, *Police Misconduct that Goes Unreported and Undocumented Undermines Our Criminal Justice System*, FREE ADVICE (Nov. 14, 2015), <https://www.freeadvice.com/legal/police-misconduct-that-goes-unreported-and-undocumented-undermines-our-criminal-justice-system/> (on file with the *University of the Pacific Law Review*); SUPER. CT. OF CAL., SANTA CLARA CNTY., 2006–2007 SANTA CLARA COUNTY CIVIL GRAND JURY REPORT, POLICE MISCONDUCT MAY BE UNDERREPORTED 1 (2007), [https://www.sccourt.org/court\\_divisions/civil/cgj/2007/PoliceMisconduct.pdf](https://www.sccourt.org/court_divisions/civil/cgj/2007/PoliceMisconduct.pdf) (on file with the *University of the Pacific Law Review*).

154. CAL. PENAL CODE § 13506.9(d) (enacted by Chapter 409) (outlining the makeup of the Board and Commission); see also Goldman, *supra* note 72, at 152 (identifying broad statutory language can be “problematic” for officers to heed).

155. Rains, *supra* note 146.

156. See Marvel, *supra* note 70 (describing Chapter 409 as a “far cry” from its origins due to PORAC’s efforts).

157. Nomaan Merchant, *U.S. Police Registry Would Fail Without Changes in States*, ASSOC. PRESS (June 26, 2020), <https://apnews.com/article/police-donald-trump-us-news-ap-top-news-technology-2015003554eade8968b74272d141ea80> (on file with the *University of the Pacific Law Review*).

158. Atherley & Hickman, *supra* note 131, at 429, 432 (finding Georgia decertified 7.03 officers per 1,000 in the state in 2011, more than 5.5 times the U.S. average of 1.24 per 1,000).

159. Merchant, *supra* note 161.

160. *Id.*

161. *Fatal Force: Police Shootings Database*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last updated January 13, 2022) (on file with the *University of the Pacific Law Review*) (listing, since 2015, 111 police killings in Maryland (population 6.1 million) and 420 killings in Georgia (population 11 million)).

with decertification statutes, did not record a single decertification in 2011.<sup>162</sup> However, similarly to Maryland, killings by police officers in those states have not deviated from the national average.<sup>163</sup> Some scholars attribute this variance to differing degrees of disqualifying conduct, statutory enforcement, willingness to decertify, and political forces.<sup>164</sup> Regardless of the reason, the mere existence of this wide discrepancy illustrates the nuance of decertification and the additional reforms and motivations needed to reduce killings by police officers.<sup>165</sup>

#### *D. Solutions Going Forward*

The challenges of Chapter 409 are akin to those of Section 1983 and Section 14141, because decertification is largely a reactive remedy, not prevention, for misconduct.<sup>166</sup> Section 14141 is specifically comparable because it involves an agency filtering exhaustive records to bring legal action against departments.<sup>167</sup> Because POST will face similarly exhaustive amounts of information about officers, it follows that efforts to make Section 14141 more efficient would translate to Chapter 409's decertification.<sup>168</sup> The Legislature should revise Chapter 409 to adopt criteria for targeting the worst-offending departments through an independent body or auditor, as seen in Fresno, California, or statewide in Oregon.<sup>169</sup>

By pursuing a "worst-first" policy, POST could concentrate its investigative resources on the largest—and most troublesome—departments to affect change where the resources are needed most.<sup>170</sup> As briefly exemplified earlier, even California's largest departments are not equal offenders.<sup>171</sup> Approaching the San Diego Police and Long Beach Police equally would take away resources away from the departments—and more importantly the communities—who need it most.<sup>172</sup> Spreading thin the limited resources of POST will likely prove insufficient

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162. Atherley & Hickman, *supra* note 131, at 431–32 (finding Alaska, Kentucky, Louisiana, North Carolina, Virginia, and Wisconsin had zero decertifications in 2011).

163. *Fatal Force: Police Shootings Database*, *supra* note 165.

164. Rau, *supra* note 26, at 1382.

165. Bloom & Labovich, *supra* note 26, at 972–75; Harmon, *supra* note 26, at 4–5.

166. Goldman & Puro, *supra* note 74, at 544 (describing decertification as a remedy like § 14141).

167. See Harmon, *supra* note 26, at 3–4 (describing the ability of federal agencies to sue under §14141, but the subsequent lack of suits brought because of "limited resources and inadequate political commitment").

168. See CAL. PENAL CODE § 13510.9 (asking departments for notices of every complaint received and every employment decision made by departments managing nearly 80,000 officers).

169. *Infra* Section IV.D.

170. See Harmon, *supra* note 26, at 4–5 (describing a "worst-first" policy as effectively raising the expected costs of departments that are the worst offenders and need the most incentive to change their culture).

171. *California Police Scorecards, San Diego Police Department*, *supra* note 87; *California Police Scorecards, Long Beach Police Department*, *supra* note 90.

172. Compare *California Police Scorecards, Long Beach Police Department*, *supra* note 90 (showing Long Beach with 0.4% of misconduct complaints being ruled in favor of the civilian and 1 police killing for every 3,900 arrests), with *California Police Scorecards, San Diego Police Department*, *supra* note 87 (showing San

to seriously deter misconduct.<sup>173</sup> But, assuming departments are rational actors, officers will change their behavior when faced with more concentrated investigative efforts from POST.<sup>174</sup> Using Chapter 409’s mandated reporting system, POST could establish basic criteria to prioritize departments most in need of oversight.<sup>175</sup> The Legislature should also consider penalties for noncompliance—like Oregon’s decertification statute—imposing a fine of up to \$1,500 on departments for each noncompliance.<sup>176</sup> Moreover, misconduct reporting and POST targeting should be public to promote transparency by providing notice about misconduct complaints and putting a spotlight on the targeted departments.<sup>177</sup> Not only would targeted departments face increased pressures to reform, but other departments would adopt reforms to avoid falling under such public scrutiny.<sup>178</sup>

Contrary to being on POST’s target list, departments that proactively implement reforms and reduce misconduct could receive a safe-haven status.<sup>179</sup> For this incentive to induce voluntary reform, POST must adopt a clear and strict process for decertifying officers.<sup>180</sup> For example, if a year-long focus on the state’s largest department (L.A.P.D.) yielded only a handful of decertifications, other departments would be unmotivated to avoid POST’s targeting.<sup>181</sup> If the Board administered decertifications, the process would be skewed against the police officers, resulting in investigation and decertification of undeserving officers.<sup>182</sup> Yet, if the POST Commission determined decertifications, the process would favor the police officers, resulting in limited investigations and too many bad officers keeping their badges.<sup>183</sup> While Chapter 409 asks both bodies to work together, this creates a political conflict.<sup>184</sup> Instead, California should look to depoliticize POST

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Diego with 17% of misconduct complaints being ruled in favor of the civilian and 1 police killing for every 7,700 arrests).

173. Harmon, *supra* note 26, at 26.

174. *See id.* at 22 (describing the applicability of deterrence theory: departments will change if they expect a positive outcome).

175. *See id.* at 26 (suggesting the increased pressure of targeting will induce reforms where most needed).

176. OR. REV. STAT. § 181A.655 (2015).

177. *See* Rau, *supra* note 26, at 1377 (highlighting how such a reporting system puts the public on notice so they can influence local department-level decisions without POST intervention).

178. *See* Harmon, *supra* note 26, at 35 (determining it is likely other departments will either adopt reforms or (more cynically) attempt to lobby the administrative agency not to target them).

179. *See id.* at 36–38 (advocating similar reforms for § 14141 lawsuits, such as creating a safe harbor mechanism that “eliminates the possibility that the department will be sued under” the statute).

180. *See id.* at 40 (stating the need for both the fear of potential spotlighting and a safe-harbor that monitors without significantly increasing the burden of implementing reforms).

181. *See id.* at 40–42 (warning that careless investigations and procedures will be ineffective to reform departments).

182. *See* Marvel, *supra* note 70 (describing POST’s role in the original proposal of Chapter 409 as, “more or less rubber stamp[ing] the recommendation of the Advisory Board”).

183. *See* Bloom & Labovich, *supra* note 26, at 933–34 (noting the strong solidarity between officers and the “sinister effect” it has on officer-involved investigations).

184. CAL. PENAL CODE § 13510.8; *supra* Section IV.B.

and move it toward an independent auditor-type agency.<sup>185</sup> In Oregon, rather than letting a panel decide on decertification, the state *must* decertify if an officer is terminated for certain conduct.<sup>186</sup> An auditor would be more objective and could adopt rules similar to Oregon's decertification statute to eliminate their discretion for egregious misconduct.<sup>187</sup> As it stands, Chapter 409 risks creating expensive and long-lasting litigation with police officers characterizing the Board as "biased against the officer" and reformers characterizing POST as "biased for police," resulting in stalled reform.<sup>188</sup>

## V. CONCLUSION

The prevalence of police officer brutality, misconduct, and killings has left many feeling disillusioned, despite reforms to redirect funding for police departments, ban the use of force, and rethink officer training.<sup>189</sup> In 2022, the number of killings by police officers—numbering 1,096—was the highest since comprehensive tracking began in 2015.<sup>190</sup> Confidence in police departments and the criminal justice system, while up from 2020, remains low across the country.<sup>191</sup> Unless reforms are approached with more objective enforcement, disillusionment among police will continue, confidence in police departments and public safety will deteriorate, and the credibility of institutions will suffer.<sup>192</sup>

Decertification is a powerful tool for the California POST because it can prevent violent officers from continuing to harm civilians.<sup>193</sup> Previously terminated police officers commit more acts of misconduct and increase the financial burden

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185. White, *supra* note 84, at 434–35.

186. Rau, *supra* note 26, at 1383–84.

187. *Id.*

188. See Marvel, *supra* note 70 (describing the Board as "inherently biased" against police); see also Lewis, *supra* note 1 ("We all want to see a fair and transparent decertification system put in place that permanently removes officers for serious misconduct, but even with recent amendments (the bill) fails to create a balanced and even process.").

189. William Roberts, *After 2020's BLM Protests, Real Police Reform Proves a Struggle*, ALJAZEERA MEDIA NETWORK (Apr. 13, 2021), <https://www.aljazeera.com/news/2021/4/13/after-2020s-blm-protests-police-reform-still-a-struggle-in-us> (on file with the *University of the Pacific Law Review*); Matt Agorist, *Nothing Has Changed Since George Floyd Died, U.S. Cops Still Kill Someone Every 8 Hours*, FREE THOUGHT PROJECT (Apr. 3, 2022), <https://thefreethoughtproject.com/nothing-has-changed-since-george-floyd-died-us-cops-still-kill-someone-every-8-hours/> (on file with the *University of the Pacific Law Review*); Sam Levin, *'No Progress' Since George Floyd: U.S. Police Killing Three People a Day*, GUARDIAN (Mar. 30, 2022), <https://www.theguardian.com/us-news/2022/mar/30/us-police-killing-people-high-rates> (on file with the *University of the Pacific Law Review*).

190. See *Fatal Force: Police Shootings Database*, *supra* note 165.

191. Jeffrey M. Jones, *In U.S., Black Confidence in Police Recovers From 2020 Low*, GALLUP, INC. (July 14, 2021), <https://news.gallup.com/poll/352304/black-confidence-police-recovers-2020-low.aspx> (on file with the *University of the Pacific Law Review*).

192. See Patton, *supra* note 97, at 803 (describing the impacts on under-privileged communities as creating a negative feedback loop, worsening the problem of police brutality).

193. Rau, *supra* note 26, at 1381.

on cities.<sup>194</sup> Chapter 409 is an important step in reducing misconduct and killings by police officers.<sup>195</sup> That said, Chapter 409 will be less effective due to its reliance on general criteria, lack of incentives regarding participation, and the political compositions of the Board and POST.<sup>196</sup> To have meaningful impact that engenders participation and additional reforms, the Legislature must establish a neutral enforcement body with robust targeting criteria, incentives, and penalties for non-compliance.<sup>197</sup>

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194. Grunwald & Rappaport, *supra* note 49, at 1747 (describing the financial strain of settling police lawsuits); *California Police Scorecards*, *supra* note 85.

195. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 4–5 (Sept. 1, 2021) (explaining that the power of officers to carry a gun and use force requires they be held to a high standard of accountability).

196. See Bloom & Labovich, *supra* note 26, at 975 (asserting that without such powers, decertification statutes will be ineffective in combatting departments covering-up misconduct); ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 2, at 6–7 (Sept. 1, 2021).

197. See Bloom & Labovich, *supra* note 26, at 975 (describing these elements as critical in building a “credible and accessible” system that results in greater accountability, transparency, and trust of police).

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