

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 2136 (Jones-Sawyer)  
Version: June 24, 2024  
Hearing Date: July 2, 2024  
Fiscal: Yes  
Urgency: No  
AM

**SUBJECT**

Controlled substances: analyzing and testing

**DIGEST**

The bill provides that it is not a violation of existing law for a controlled substance checking service to do specified acts solely for the purpose of providing controlled substance checking services, and would grant immunity from criminal and civil liability for doing those acts, except if the person is grossly negligent or acts in bad faith.

**EXECUTIVE SUMMARY**

Harm reduction is a public health policy that provides services to alleviate the negative consequences of recreational drug use, such as overdoses or the transmission of disease, without requiring abstinence in recognition that people who are unable or unwilling to stop using recreation drugs can still lessen the risk of adverse outcomes that can occur from using drugs. An example of this is California's existing syringe exchange projects. Another example of harm reduction services is providing testing of residual samples of drugs in order to provide the user with accurate information about what chemicals and substances are actually in the drugs they possess. This bill seeks to provide protections from both criminal and civil liability for persons providing controlled substance checking services in the state in order to close existing gaps in state law to encourage more jurisdictions to engage in offering these services in collaboration with community-based organizations and research institutions. The bill is sponsored by the Drug Policy Alliance and the California Women's Foundation. The bill is supported by numerous public health advocacy organizations and other advocacy groups. No timely opposition was received by the Committee.

## PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the California Uniform Controlled Substances Act, which regulates controlled substances. (Health & Saf. Code, § 11000 et seq.)
  - a) Classifies controlled substances into five schedules according to their danger and potential for abuse.
  - b) Provides that Schedule I controlled substances have the greatest restrictions and penalties, including prohibiting the prescribing of a Schedule I controlled substance. (Health & Saf. Code, §§ 11054-11058.)
- 2) Defines “drug paraphernalia” as all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. (Health & Saf. Code, §§ 11014.5(a) & 11364.5(a).)
- 3) Provides that drug paraphernalia includes testing equipment designed for use or marketed for use in identifying, or in analyzing the strength, effectiveness, or purity of controlled substances. (Health & Saf. Code, §§ 11014.5 (a)(4) & 11364.5(d)(4).)
  - a) Provides that “drug paraphernalia” does not include any testing equipment designed, marketed, intended to be used, or used, to test a substance for the presence of fentanyl, ketamine, gamma hydroxybutyric acid, or any analog of fentanyl. (Health & Saf. Code §§ 11014.5 (d) & 11364.5(g).)
- 4) Prohibits a person from maintaining or operating any place of business in which drug paraphernalia is kept, displayed or offered in any manner, sold, furnished, transferred or given away unless such drug paraphernalia is completely and wholly kept, displayed or offered within a separate room or enclosure to which persons under the age of 18 years not accompanied by a parent or legal guardian are excluded. (Health & Saf. Code § 11364.5(a).)
- 5) Defines “controlled substance analog” as either of the following:
  - a) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055 or a synthetic cannabinoid compound defined in Section 11357.5.
  - b) A substance that has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance

classified in Section 11054 or 11055 or a synthetic cannabinoid compound defined in Section 11357.5. (Health & Saf. Code § 11401(b).)

- 6) Authorizes a clean needle and syringe exchange project (SEP) in any city, county, or city and county upon the action of a county board of supervisors and the local health officer or health commission of that county, or upon the action of the city council, the mayor, and the local health officer of a city with a health department, or upon the action of the city council and the mayor of a city without a health department. (Health & Saf. Code §121349 (b).)

This bill:

- 1) Provides that drug paraphernalia does not include any testing equipment designed, marketed, intended to be used, or used, to test a substance for the presence of contaminants, toxic substances, hazardous compounds, or other adulterants, or controlled substances that include, without limitation, fentanyl, ketamine, gamma hydroxybutyric acid, or any analog of fentanyl.
- 2) Authorizes a controlled substance checking service provider to engage in specified conduct for the purpose of providing controlled substance checking services, including:
  - a) receiving voluntarily provided samples of substances potentially containing controlled substances or controlled substance analogs;
  - b) possessing, transporting, transferring, or storing a sample of a controlled substance or a controlled substance analog solely for the purpose of analyzing the substance to determine its chemical composition; and
  - c) using available technologies to analyze the contents of samples to obtain timely and accurate information regarding the composition of controlled substances or controlled substance analogs, among others.
- 3) Provides that a program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services and acting in accordance with established protocols is not subject to any of the following:
  - a) detention, arrest, or prosecution for a violation of California Uniform Controlled Substances Act;
  - b) forfeiture of property;
  - c) any civil or administrative penalty or liability of any kind; or
  - d) denial of a right or privilege for actions, conduct, or omissions relating to the operation of a controlled substance checking service in compliance with existing law.
- 4) Provides that the exemption in 3), above, does not apply to a party acting as a controlled substance checking service in a grossly negligent manner or in bad faith.

- 5) Defines “controlled substance checking service provider” to mean an entity that provides the service of controlled substance checking. The following entities are eligible entities:
  - a) an entity that provides syringe exchange services under existing law;
  - b) a research institution, college, or university; or
  - c) a community-based organization or nonprofit organization working in collaboration with public health departments, entities that provide syringe exchange services, or research institutions, colleges, and universities to reduce the potential harms associated with the use of controlled substances.
  
- 6) Defines “controlled substance checking” as the process of identifying, analyzing, or testing a substance, controlled or otherwise, or residue on drug paraphernalia or controlled substance packaging, to determine its chemical composition to assist in determining whether the substance contains contaminants, toxic substances, hazardous compounds, or other adulterants within a substance.
  
- 7) Defines “controlled substance checking equipment” as equipment, products, technologies, or materials used, designed for use, or intended for use to perform chemical analysis of controlled substances or controlled substance analogs, including materials and items used by the person operating the equipment or products to store, measure, or process samples for analysis. Includes, but is not limited to, fentanyl test strips, other controlled substance or controlled substance analog immunoassay strips, colorimetric reagents, spectrometers such as Fourier transform infrared and Raman spectrometers, and equipment that uses high-performance liquid chromatography, gas chromatography, mass spectrometry, or nuclear magnetic resonance techniques.

### COMMENTS

1. Stated need for the bill

The author writes:

As the state continues to address the unprecedented fentanyl crisis, our response must be guided by evidence, and AB 2136 clears the path for a proven strategy to help us reduce drug related mortality and other harmful consequences related to the adulterated drug supply. Drug checking will lead to long-term public health monitoring to continue informing our response to the ongoing overdose crisis that continues to claim the lives of members of our community at an alarming rate.

## 2. Background on harm reduction services

The number of deaths involving opioids, and in particular fentanyl, has increased significantly over the course of the last decade. Between 2019 and 2022, the number of opioid-related deaths in the state increased by 121 percent.<sup>1</sup> The Senate Public Safety Committee analysis notes that “[i]n 2022, the year for which the most recent data is available, there were 21,316 emergency room visits resulting from an opioid overdose, 7,385 opioid-related overdose deaths, and 6,473 overdose deaths from fentanyl.”<sup>2</sup> That Committee further noted:

Initially developed for adults with substance use disorders for whom abstinence was not feasible, harm reduction is a public health strategy in which the primary objective is to minimize the adverse consequences of the problematic behavior. Examples of harm reduction strategies employed by the state to address the ongoing opioid epidemic include the expansion of access to medication-assisted treatment services and the naloxone distribution program. The legalization of pharmacists to furnish hypodermic needles and syringes without a prescription or a permit to a person who is 18 or older as well as the legalization of a person who is 18 or older to obtain hypodermic needles and syringes from a physician or pharmacist without a prescription or license are additional examples of harm reduction strategies designed to minimize the spread of HIV, hepatitis B, and hepatitis C among people who inject drugs.

Fentanyl test strips (FTS), used to detect fentanyl in illicit or unregulated drugs, are another harm reduction strategy that can reduce the risk of overdose. FTS can be used to test injectable drugs, powders, and pills.

(<https://harmreduction.org/issues/fentanyl/>) Their use has become more common in recent years as drug overdose deaths, often attributable to fentanyl, have increased significantly. In 2021, the CDC and Substance Abuse and Mental Health Services Administration announced that federal funding could be used by grantees, including state, county, and city health departments, to purchase FTS.<sup>3</sup>

AB 1598 (Davies, Ch. 201, Stats. 2022) excluded from the definition of “drug paraphernalia” any testing equipment that is designed, marketed, used, or intended to be used, to test for the presence of fentanyl or any fentanyl analog, and also excluded testing equipment that is designed, marketed, used, or intended to be used, to test for the presence of ketamine and GHB which are often surreptitiously placed into a person’s drink.

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<sup>1</sup> Ibarra et al., *California’s opioid deaths increased 121% in 3 years. What’s driving the crisis?*, CalMatters.org (July 25, 2023), available at <https://calmatters.org/explainers/california-opioid-crisis/>.

<sup>2</sup> Sen. Pub. Safety Comm. analysis of Ab 2136 (2023-24 reg. sess.) as amended June 14, 2024 at p. 5.

<sup>3</sup> *Ibid.*

*a. SEPs*

SEPs have been operating in California since the late 1980s. They provide sterile syringes, collect used ones, and serve as a point of access to health education and provide assistance for people who inject drugs. California SEPs provide a wide range of services in addition to sterile syringes, including HIV testing, overdose prevention training, and referrals to drug treatment, housing, and mental health services. Additionally, many SEPs also provide first aid and basic supplies, such as clean socks and bottled water, to meet the needs of homeless clients. In California, SEPs operate in a variety of settings, including health clinics, mobile vans, storefronts, and churches. Some offer street-based services in multiple locations, with services being offered daily during standard business hours while others may provide home delivery services.

*b. SAMHSA's Harm Reduction Grant Program*

According to the federal Centers for Disease Control (CDC), the purpose of SAMHSA's Harm Reduction Grant Program (hereafter SAMSHA) is to support community-based overdose prevention programs, syringe services programs, and other harm reduction services. The CDC notes:

Funding will be used to enhance overdose and other types of prevention activities to help control the spread of infectious diseases and the consequences of such diseases for individuals with, or at risk of developing substance use disorders (SUD), support distribution of FDA-approved overdose reversal medication to individuals at risk of overdose, build connections for individuals at risk for, or with, a SUD to overdose education, counseling, and health education, refer individuals to treatment for infectious diseases such as HIV, sexually transmitted infections (STIs), and viral hepatitis, and encourage such individuals to take steps to reduce the negative personal and public health impacts of substance use or misuse. This will include supporting capacity development to strengthen harm reduction programs as part of the continuum of care. Recipients will also establish processes, protocols, and mechanisms for referral to appropriate treatment and recovery support services. Grantees will also provide overdose prevention education to their target populations regarding the consumption of substances including but not limited to opioids and their synthetic analogs. Funds may also be used to help address the stigma often associated with substance use and participation in harm reduction activities.<sup>4</sup>

Several universities in the state have received funding under SAMSHA and are currently providing controlled substance checking services in their communities with this funding.

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<sup>4</sup> SAMHSA's Harm Reduction Grant Program (SP-22-001), CDC, (Mar. 10, 2023), available at <https://harmreductionhelp.cdc.gov/s/article/SAMHSA-s>.

3. Bill seeks to address gaps in existing law to encourage more controlled substance checking services across the state

The bill seeks to address gaps in existing law to encourage more jurisdictions to engage in offering these services in collaboration with community-based organizations and research institutions. First, the bill provides that drug paraphernalia does not include any testing equipment designed, marketed, intended to be used, or used, to test a substance for the presence of contaminants, toxic substances, hazardous compounds, or other adulterants, or controlled substances that include, without limitation, fentanyl, ketamine, gamma hydroxybutyric acid, or any analog of fentanyl.

Second, the bill authorizes a controlled substance checking service provider to engage in specified conduct for the purpose of providing controlled substance checking services, including receiving voluntarily provided samples of substances potentially containing controlled substances or controlled substance analogs; possessing, transporting, transferring, or storing a sample of a controlled substance or a controlled substance analog solely for the purpose of analyzing the substance to determine its chemical composition; and using available technologies to analyze the contents of samples to obtain timely and accurate information regarding the composition of controlled substances or controlled substance analogs, among others. In essence, the bill provides immunity for a controlled substance checking service provider from prosecution for any drug offenses for the conduct specifically authorized in the bill if done for the sole purpose of providing drug checking services.

Additionally, the bill provides that a program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services and acting in accordance with established protocols is not subject to any of the following:

- detention, arrest, or prosecution for a violation of California Uniform Controlled Substances Act;
- forfeiture of property;
- any civil or administrative penalty or liability of any kind; or
- denial of a right or privilege for actions, conduct, or omissions relating to the operation of a controlled substance checking service in compliance existing law.

The bill provides that this exemption does not apply to a party acting as a controlled substance checking service in a grossly negligent manner or in bad faith.

Lastly, the bill provides that an individual possessing a controlled substance or a controlled substance analog who is engaged in obtaining controlled substances checking services from a controlled substance checking service provider is not subject to

any criminal or civil penalty or investigation based solely on the individual's utilization of a controlled substance checking service or actions authorized by this bill.

The bill was recently amended to specify that entities eligible to be controlled substance checking service providers for purposes of the bill are entities that provides the service of controlled substance checking and are:

- an entity that provides syringe exchange services under existing law;
- a research institution, college, or university; or
- a community-based organization or nonprofit organization working in collaboration with public health departments, entities that provide syringe exchange services, or research institutions, colleges, and universities to reduce the potential harms This was done to ensure that entities afforded the limitation on liability are ones that are legitimately providing controlled substance checking services associated with the use of controlled substances.

This was done to ensure that entities afforded the limitation on liability are ones that are legitimately providing controlled substance checking services.

#### 4. Immunity under the bill

Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the negligent or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty. As a general rule, California law provides that everyone is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by lack of ordinary care, caused their own injury. (Civ. Code § 1714(a).)

Blanket immunity provisions are generally disfavored as a matter of public policy because they, by their nature, prevent an injured party from seeking a particular type of recovery. However, the Legislature has in limited circumstances allowed for measured immunity from liability to promote other policy goals that could benefit the public. Immunity provisions are sometimes allowed when necessary to ensure the willingness of individuals to continue taking on certain roles that may involve some risk.

The bill currently provides that a program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services and acting in accordance with established protocols is not subject to criminal or civil liability. However, the bill provides that this exemption does not apply to a party acting as a controlled substance checking service in a grossly negligent manner or in bad faith. The author has agreed to amend the bill to instead apply a negligent standard instead of grossly negligent.



The specific amendment is as follows:

Amendment<sup>5</sup>

Section 11303 as added to the Health and Safety Code is amended to read:

- (a) A program, employee, contractor, volunteer, owner, or other person acting in the good faith provision of controlled substance checking services and acting in accordance with established protocols shall not be subject to any of the following:  
[...]
- (b) The exemption provided in this section shall not apply to a party acting as a controlled substance checking service in a ~~grossly~~ negligent manner or in bad faith.

SUPPORT

Drug Policy Alliance (sponsor)  
Women's Foundation of California (sponsor)  
ACLU California Action  
All of Us or None Los Angeles  
Balanced Imperfection  
Bienestar Human Services  
California Association of Alcohol and Drug Program Executives, Inc.  
California Consortium of Addiction Programs and Professionals  
Californians United for a Responsible Budget  
Community Health Project LA  
Community Health Project Los Angeles  
Drug User Health Advisory Committee of Santa Clara County  
Drug User Health Advisory Committee of South Alameda County  
Ella Baker Center for Human Rights  
Equality California  
Felony Murder Elimination Project  
Friends Committee on Legislation of California  
Glide  
Healthright 360  
Hotties of Harm Reduction  
Initiate Justice  
Initiate Justice Action  
Legal Services for Prisoners With Children  
Multidisciplinary Association for Psychedelic Studies

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<sup>5</sup> The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

San Francisco Public Defender  
Smart Justice California, a Project of Tides Advocacy  
Tenderloin Neighborhood Development Corporation  
The Gubbio Project  
Treatment on Demand Coalition

**OPPOSITION**

None received

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation: AB 1598 (Davies, Ch. 201, Stats. 2022) *see* Comment 2), above.

**PRIOR VOTES**

Senate Public Safety Committee (Ayes 4, Noes 1)  
Assembly Floor (Ayes 46, Noes 5)  
Assembly Appropriations Committee (Ayes 10, Noes 3)  
Assembly Public Safety Committee (Ayes 7, Noes 0)

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