



## MEMORANDUM

**TO:** The Pennsylvania Senate

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** December 13, 2023

**RE: OPPOSITION TO SB 596 P.N. 1284 (ARGALL)**

**Bill summary:** [SB 596](#) (PN 1284) would amend the organized retail theft statute, [18 Pa.C.S. § 3929.3](#), to drastically lower the thresholds for the retail value of stolen goods for the purposes of criminal grading:

- **F3:** To charge a third-degree felony, the current value of stolen goods must be at least \$5,000, but not more than \$19,999. **SB 596 would lower the range to at least \$2,500, but not more than \$9,999.** Third-degree felony convictions carry a maximum of 7 years in prison and a \$15,000 fine.
- **F2:** To charge a second-degree felony, the current value of stolen goods must be at least \$20,000. **SB 596 would lower the range to at least \$10,000, but not more than \$49,999.** Second-degree felony convictions carry a maximum of 10 years in prison and a \$25,000 fine.
- **F1:** SB 596 would **create a new, first-degree felony offense** if the value of stolen goods is **at least \$50,000**, punishable by up to 20 years in prison and a \$25,000 fine.

To prosecute cases of organized retail theft, SB 596 would create the Office of Deputy Attorney General for Organized Retail Crime Theft, staffed by five prosecuting attorneys, each staffed by up to two special agents. It would also give county district attorneys the authority to investigate and prosecute violations.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 596.**

### **SB 596 will disproportionately punish already marginalized people.**

By lowering the felony threshold for organized retail theft, SB 596 will exacerbate the disparate impact this kind of grossly punitive response will have on marginalized communities: from Black Americans subjected to [systemic](#) over-policing, arrests, charging, and incarceration, including for [retail theft crimes](#),<sup>1</sup> to juveniles, to those impacted by poverty, unemployment, [substance use disorder](#), or some combination of those factors.

### **SB 596 would decimate any meaningful distinction between types of retail theft.**

SB 596 would lower the felony threshold for organized retail theft to a level that blurs the lines between other types of retail theft and would subject an untold number of people to felony charges. In other words, if enacted, all it would take is two people coordinating to steal, for example, an iPad, to be charged with a third-degree felony and imprisoned for up to seven years.

Currently, to be charged with organized retail theft in Pennsylvania does not require being a member of a gang, “organized crime,” or a vast criminal conspiracy to steal merchandise. Instead, it requires a person to organize, coordinate, control, supervise, finance or manage... a corporation, partnership or any other type of association, *whether or not legally formed*, operated for the purpose of [receiving stolen property](#) or committing [retail theft](#).<sup>2</sup> Of course, this definition could certainly include an organized crime ring, but it could

<sup>1</sup> Braun, Michael and Rosenthal, Jeremy and Therrian, Kyle, [Police Discretion and Racial Disparity in Organized Retail Theft Arrests: Evidence from Texas](#) (July 17, 2018). SMU Cox School of Business Research Paper No. 18-3.

<sup>2</sup> 18 Pa.C.S. [§ 3925](#) and [§ 3929](#).

also apply to two kids coordinating to shoplift. But given the current offense's high threshold for the value of stolen goods, which requires a minimum of \$5,000 for a F3 charge and \$20,000 for a F2 charge, one could reasonably conclude that the *original intent of this statute* was to apply to much more coordinated and organized activity to steal higher value goods, and not to target lower-level instances of shoplifting.

### **SB 596 would do little, if anything, to deter retail theft. Instead, it relies on the same, overly-punitive legislative responses to drug trafficking, which didn't, and haven't ever, worked.**

*"When all you have is a hammer, everything looks like a nail. It doesn't really matter [if it] doesn't actually solve the problem. They get to say, 'look, we solved it, I did something, aren't we great?' And move on and the problem persists."* — Molly Gill, vice president of policy at FAMM.<sup>3</sup>

We know, from [decades](#) of [crime-deterrence research](#), that harsher penalties do little to prevent crime.<sup>4</sup> Instead, deterrence is most successful when there's a greater likelihood of [getting caught and swiftly punished](#).<sup>5</sup> Even more compelling are the data from at least [39 states](#) that have raised their felony theft thresholds—the value of stolen money or goods above which prosecutors may charge theft offenses as felonies, rather than misdemeanors.<sup>6</sup> Pew has studied the effects of increasing felony theft thresholds (the **opposite of what SB 596 proposes**) on crime rates and found that:

- Raising the felony theft threshold has no impact on overall property crime or larceny rates.
- States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws.
- The amount of a state's felony theft threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.<sup>7</sup>

So, not only does more punishment fail to deter crime, but we now know that *increasing* the felony thresholds for retail theft—making it *less* punitive—has **no effect** on crime rates.

### **SB 596 is an overreaction to exaggerated industry claims of an organized retail theft "crisis."**

No one disputes that retail theft is a concern. But the panic over the scale and impact of this type of crime has been difficult, if not impossible, to prove or even meaningfully quantify:<sup>8 9</sup>

*"Trying to quantify 'organized retail theft' means wading through a morass of slippery terms, questionably reliable estimates, and statistical sleights of hand. When you make it to the other side, you find a significant discrepancy between the enormity of organized retail crime as described by the retail industry and the actual dollar losses it attributes to the problem."*<sup>10</sup>

*"Retail theft is real and causes major issues for businesses, but companies are not required to report data on how it is affecting them and it is nearly impossible to verify their claims. Any number of issues, from employee theft to lost or damaged goods, could be causing retailers to lose inventory."*<sup>11</sup>

<sup>3</sup> Gabrielle Fonrouge, [Retailers are shaping a wave of laws to crack down on organized theft — here's how they do it](#), CNBC, August 11, 2023.

<sup>4</sup> Petrich, Damon M., Travis C. Pratt, Cheryl Lero Jonson, and Francis T. Cullen. "[Custodial Sanctions and Reoffending: A Meta-Analytic Review](#)." Crime and Justice, 2021; and Sentencing Project, [Long-Term Sentences: Time to Reconsider the Scale of Punishment: Unduly long prison terms are counterproductive for public safety and contribute to the dynamic of diminishing returns as the prison system has expanded](#), November 5, 2018.

<sup>5</sup> Pew, [Weighing Imprisonment and Crime](#), February 10, 2015.

<sup>6</sup> Pew Issue Brief, [States Can Safely Raise Their Felony Theft Thresholds. Research Shows: Outdated statutes lead to serious charges for lower-level offenses](#), May 22, 2018.

<sup>7</sup> Pew Issue Brief, [The Effects of Changing Felony Theft Thresholds: More evidence that higher values have not led to increased property crime or larceny rates](#), April 12, 2017.

<sup>8</sup> Sam Dean, [Retailers say thefts are at crisis level. The numbers say otherwise](#), Los Angeles Times, December 15, 2021.

<sup>9</sup> Jerry Iannelli, [Big Retail Chains are Manufacturing a Shoplifting 'Crisis'](#), The Appeal, November 9, 2021.

<sup>10</sup> Amanda Mull, [The Great Shoplifting Freak-Out](#), The Atlantic, December 21, 2021.

<sup>11</sup> Gabrielle Fonrouge, [Companies say organized retail crime is on the rise, but there's no data to prove it](#), CNBC, August 9, 2023.

The case for rising crime due to “organized retail theft” has relied primarily on an annual survey from the [National Retail Federation](#), one of the largest retail trade associations in the country.<sup>12</sup> The Federation estimates that stolen merchandise [cost retailers \\$94 billion](#) in 2021, while another lobbying group, the [Retail Industry Leaders Association](#), estimated the [cost at \\$69 billion](#) annually. But the National Retail Federation’s survey shows that the amount of merchandise disappearing from shelves remained stable between 2016 and 2021, and external theft only represented a portion of overall losses. In fact, Walgreens, after having cited “organized” shoplifting as a reason to close five stores in San Francisco in October 2021, admitted the company might have overstated the effect of theft on its business. James Kehoe, Walgreens chief financial officer, told investors “maybe we cried too much last year,” and that the company might have mischaracterized how much theft took place in its stores.<sup>13</sup>

Theft is only one of numerous factors that contribute to “shrink”—the industry term for inventory or money lost to theft, fraud, or error:

- According to the National Retail Federation’s own survey, the amount of merchandise disappearing from shelves remained stable between 2016 and 2021. “External theft only represented a portion of overall losses. And the largest share, roughly two-thirds of missing merchandise, is a result of **employee theft, process failures and unknown sources.**”<sup>14</sup>
- “Retailers who have blamed organized theft for lower profits could be overstating the crime’s impact to cover up internal flaws such as **steep discounting and bloated inventories.** Companies are quick to blame organized theft for shrink losses, but behind closed doors the parallel issues of **employee theft and self checkout** are their primary focus areas, experts say.”<sup>15</sup>
- “**Paperwork errors and self-checkout machines**<sup>16</sup> are both far graver threats to inventory management” than theft of goods from sales floors. “**Returns fraud, gift-card schemes, and cargo theft** are all also significant factors, but they’re rarely discussed in news reports about criminal threats to businesses.”<sup>17</sup>
- **Steep inflation** has upped the price of goods<sup>18</sup> and shrinkage can also be attributed to **product damage and loss of goods, theft by employees and vendor fraud.**<sup>19</sup>

On average then, *even by the estimates of industry organizations* and groups lobbying legislators to “do something” about this problem, organized retail theft crimes account for only a small percentage of their overall losses.

SB 596 is a bill that relies on demonstrably failed policies in response to an exaggerated “crisis.” If enacted, it would exacerbate existing racial and economic disparities in our criminal legal system, putting more people behind bars for longer. Longer prison terms offer a poor return on public safety investments. And by creating additional bureaucracy to prosecute these cases, SB 596 would only compound the loss to public safety from such an investment.

**For these reasons, we urge you to oppose Senate Bill 596.**

<sup>12</sup> Center for Just Journalism, [Data on Retail Theft: Where to Find It, What to Look for, and Questions to Consider](#), 2022.

<sup>13</sup> Amanda Holpuch, [Walgreens Executive Says Shoplifting Threat Was Overstated](#), New York Times, January 18, 2023.

<sup>14</sup> Nicole Lewis, [What the Panic Over Shoplifting Reveals About American Crime Policy: Lawmakers consider bills to crack down on people ripping off retailers, even as some stores walk back claims about a growing theft problem](#), Marshall Project, February 27, 2023.

<sup>15</sup> Gabrielle Fonrouge, [Retailers say organized theft is biting into profits, but internal issues may really be to blame](#), CNBC, August 10, 2023.

<sup>16</sup> Adrian Beck, [Self-Checkout In Retail: Measuring The Impact On Loss](#), ECR Retail Loss, 2018.

<sup>17</sup> Amanda Mull, [The Great Shoplifting Freak-Out](#), The Atlantic, December 21, 2021.

<sup>18</sup> Nicole Lewis, [What the Panic Over Shoplifting Reveals About American Crime Policy: Lawmakers consider bills to crack down on people ripping off retailers, even as some stores walk back claims about a growing theft problem](#), Marshall Project, February 27, 2023.

<sup>19</sup> Amanda Holpuch, [Walgreens Executive Says Shoplifting Threat Was Overstated](#), New York Times, January 18, 2023.