LFC Requester:	

AGENCY BILL ANALYSIS
2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction ____ **Substitute** ____

Date Feb. 4, 2025
Bill No: SB 228-280

Sponsor: Sen. Muñoz
Short Title: Felony For Certain Thefts

Agency Name and Code Number: LOPD - 280
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	**FY25**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	**FY25**	**FY26**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SB 228 is identical to 2024's SB 195, except the short titles differ.

SB 228 would amend the burglary statute to add a fourth-degree felony crime for entering a retail establishment with the intent to commit a felony or theft therein, after having previously received notice that the person is not authorized to enter.

FISCAL IMPLICATIONS

The conduct described by SB 228 is already misdemeanor trespassing, a crime that qualifies for public defender representation. Because felony convictions carry more significant collateral consequences, increasing the penalty to a felony is likely to result in more trials, as more defendants will prefer to risk a trial than take a plea to felony. If more trials result from enactment, LOPD may need to hire more trial attorneys to ensure compliance with constitutional mandates of effective assistance of counsel. (Additionally, courts, DAs, AGs, and NMCD could anticipate increased costs.) Assessment would be necessary after the implementation of the proposed higher-penalty scheme.

The other fiscal implication of elevating that crime to a felony is that it shifts the representation to attorneys practicing in district court (rather than magistrate or metropolitan courts) and/or who have more experience. So, while the proscribed conduct is already subject to public defender representation, this bill would move the representation into the workload of higher paid attorneys, which, if combined with increased prosecutions, could necessitate additional mid-level attorney FTEs. Compared to an entry-level Assistant Trial Attorney's mid-point salary including benefits ($121,723.30 in Albuquerque/Santa Fe and $130,212.59 in the outlying areas), a mid-level felony capable Associate Trial Attorney's mid-point salary including benefits is $136,321.97 in Albuquerque/Santa Fe and $144,811.26 in the outlying areas.

SIGNIFICANT ISSUES

The conduct addressed by SB 228 is currently punishable by 364 days' incarceration as Trespass; **and** if any theft or other felony is actually committed after entry, that crime is separately punishable under corresponding statutes. The mere entry into a retail store, during business hours, when the store is open to the public, should not be punished as burglary, as New

Mexico courts have already declared that it is inconsistent with the foundational criminal law principles that distinguish burglary from trespass. Trespass is the appropriate crime for entering a place otherwise open to the public after being expressly told you are not permitted to be there. Adopting SB 228 would undo over a decade of burglary jurisprudence and undermine clarity that the appellate courts have created by precedent since 2012. Both of New Mexico's appellate courts have unambiguously reject application of burglary to the conduct addressed in SB 228.

In 2012, the New Mexico Supreme Court decided a case that reaffirmed the scope of the crime of "burglary" as being limited to entries into protected spaces that enjoy particular security and privacy interests; the interests that "burglary" has protected since common law, before there was ever a burglary statute at all. *See State v. Muqqddin*, 2012-NMSC-029, ¶¶ 43, 61, 285 P.3d 622; *see* ¶¶ 14-18 (historical review of burglary since Saxon times).

The Supreme Court noted that "In the past, the typical burglary scenario involved a home invasion, and the crime was intended to protect occupants against the terror and violence that can occur as a result of such an entry." *Id.* ¶ 3. *Muqqddin* held that burglary charges should be limited to only entries that *themselves* violate the security and privacy interests burglary protects, and that the law should avoid converting less-intrusive entries into felonies. The Supreme Court cautioned that courts must "be cognizant of the disparity in potential penalties that can stem from a burglary charge due to its unique place in our jurisprudence." *Id.* ¶ 62. The Court observed:

> First and foremost, what is being punished as a felony under Section 30–16–3 is a harmful entry. Again, the entry is the harm sought to be prevented, as the crime is complete upon entry with the requisite intent. As a felony, burglary is a serious offense with serious consequences. *See* Section 30-16-3 (defining burglary as either a third or fourth degree felony). A burglary charge is no petty crime. *See* NMSA 1978, § 31-18-15(A)(9) to (10) (2007) (defining the basic sentence for a third and fourth degree felony as three years imprisonment and eighteen months imprisonment respectively).
> …
> Prosecutors and courts must be cognizant of the disparity in potential penalties that can stem from a burglary charge due to its unique place in our jurisprudence. As noted above, even though the completed crime of burglary is but a step taken toward another crime, it never merges with that completed crime. As a result, a burglar can be convicted and sentenced for the burglary, a felony, as well as the subsequently completed or attempted crime. This can easily lead to a punishment that may not fit the actions of the accused.

Id. ¶¶ 60, 62.

Pertinent to SB 195, before *Muqqddin* was decided, *State v. Tower*, 2002-NMCA-109, ¶ 9, 133 N.M. 32, held that entry into a commercial business establishment contrary to a no trespass order constitutes an "unauthorized entry" for burglary purposes. This is the state of the law SB 195 seeks to reinstate. However, in 2014, the New Mexico Court of Appeals applied *Muqqddin* to overturn *Tower* and reject burglary charges for entering retail establishments that were open for business even though they were not *personally* permitted on the premises. *See State v. Archuleta*, 2015-NMCA-037, 346 P.3d 390 (decided Oct. 27, 2014); *State v. Baca*, 2014-NMCA-087, ¶ 3, 331 P.3d 971 (decided May 14, 2014), *cert quashed after consolidated oral argument in* S-1-SC-35005; S-1-SC-34769, respectively.

In *Baca*, a defendant deceptively gained entry into Costco, a "members-only" retail store, with the intent to shoplift. In barring prosecution for burglary, the *Baca* Court emphasized that

> the burglary statute is not just designed to "deter trespass and theft, as those are prohibited by other laws." [*Muqqddin*, 2012-NMSC-029,] ¶ 40. It is instead an offense against the security of a building or habitation. *Id.* ¶¶ 34, 42. Defendant's entry into Costco during business hours, albeit deceptive, granted him access to an otherwise open shopping area, as opposed to an area "where things are stored and personal items can be kept private." *Id.* ¶ 61. Thus, as far as the privacy and security interests of the store itself are concerned, we see no heightened or unique security or privacy interest that distinguishes Costco from other retail stores that we generally consider open to the public.

Baca, 2014-NMCA-087, ¶ 9. *Baca* "question[ed] the continuing validity of general statements in *Tower* indicating that a retail store's notice revoking a person's permission to be on the premises is sufficient by itself to make his or her presence unauthorized under our burglary statute." *Id.* ¶ 11.

Then, a few months later, the Court of Appeals decided *Archuleta* and expressly overruled *Tower*. Applying *Muqqddin* and taking *Baca* into account, the Court of Appeals observed: "We have difficulty envisioning how a defendant's entry into an open public shopping area, even where the person entering the shopping area has received a notice of no trespass, can constitute the kind of harmful entry prohibited by the burglary statute." *Archuleta*, 2015-NMCA-037, ¶ 14. Accordingly, *Archuleta* rejected burglary under the circumstances and stated that, "to hold otherwise allows the State to use the burglary statute to enhance the misdemeanor act of trespassing to a felony—an enhancement that *Muqqddin* does not permit." *Id.* ¶ 19.

In sum, burglary security interests are those that have to do with feeling safe in a private space and ensuring that – when you leave your secure space – no one will come inside while you are gone. Retail stores undoubtedly have such interests: private "employees only" areas of the store are protected and when the manager closes and locks the store for the night, she has an interest in returning the next day to open the store and find that no one came inside in the meantime. The security interest for a store that is addressed by SB 228 is neither of these. An open store is not a "private" space. Shoppers – members of the public – are invited inside. Thus, the security interest at issue in this case not an interest in excluding shoplifters from entering the store; it is *preventing them from exiting the store without paying for the goods being sold*. The entry itself is not the store's true concern and it should not be punished as a felony.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

Analyst notes that the short title for an identical bill in 2024 read "Felony Entering Retail Establishments," which accurately describes the proposal. However, this bill's short title reads "Felony for Certain Thefts," which is a misleading title, since the crime it creates does not involve any resulting theft at all; it punishes only *entering* the store; no theft is required.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Unauthorized entries would still be punishable by 364 days in jail as misdemeanor trespass, and any other crime committed inside the store would be separately punishable according to the applicable criminal statute(s), including felony-level shoplifting charges.

AMENDMENTS