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Monday, July 6, 2015

Senator Mark Leno
State Capitol
Room 5100
Sacramento, CA 95814-4900

RE: Senate Bill 178 — Support

Dear Senator Leno,

We are writing to enlist the CCLA's **SUPPORT** for Senate Bill 178.

"**Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.**" (*U.S. v. Lopez* (1963) 373 U.S. 427, 466, Brennan, J., Douglas, J., and Goldberg, J., concurring.)

The rapid growth of technology—for both civilian and law enforcement usage—has been outpacing the antiquated Electronic Privacy Act (ECPA) for nearly 30 years. The ECPA became obsolete almost as soon it was enacted by Congress in 1986 — before email or the internet were in widespread use; before cellphone text messaging became a staple of everyday communications; before the introduction of tablet devices; before the advent of social networking, and etc. Additionally, the ECPA predated many modern spying tools that are now routinely utilized by law enforcement personnel, such as cellphone intercept technology (commonly known as "Stringray"). Besides the obvious due process violations incurred when attempting to bring criminal defendants to justice, the usage of such technologies in a dragnet-like manner facilitate gross government intrusion into the private lives of its citizens. This sort of overreach affords much potential for abuse and the chilling of free speech that hearken back to the McCarthy era and smacks of Orwell's "Big Brother."

Once thought of as a forerunner in protecting citizens' rights, California has become a disgrace in falling behind other states that have sought to modernize their privacy laws — states such as Utah and Texas.

SB 178 will provide greater protections for electronic privacy. One of the problems is that the U.S. Supreme Court ruled long ago that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology [has] afforded them . . . ." (*Knotts v. United States* (1983) 460 U.S. 276, 282.) This ruling, which predated the ECPA by several years is often cited in support of modern technologies employed by law enforcement. However, this jurisprudence is also greatly antiquated as it could not and did not foresee the scope and the breadth of the electronic privacy issues before us today. In 2001, the Supreme Court ruled that police could not just "use a device that is not in general public use" to incriminate suspects (*Kyllo v. United States* (2001) 533 U.S. 27.), and as recent as last year, the Court held that "when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee,' " as applied to the issue of warrantless cellphone searches even after a suspect was already in police custody. (*Riley v. California* (2014) 134 S. Ct. 2473.)

While law enforcement agencies may be well-intentioned in combatting crime, their claims that SB 178 will hinder police efficiency cannot be cited as justification to trump the rights of the citizens they allegedly serve. It is true that the Supreme Court conceded that their ruling in *Riley* "[would] have an impact on the ability of law enforcement to combat crime." Nonetheless, the majority held that "**the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.' "** (*Riley, supra,* at p. 2493, citing *Coolidge v. New Hampshire* (1971) 403 U. S. 443, 481.)

For all of the foregoing reasons, the CCLA strongly **SUPPORTS** SB 178.

SB 178 effectively brings California's privacy laws into the 21st century by codifying the *Riley* holding and extending the warrant requirement to all forms of electronic communication.

Respectfully,

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cc: Assembly Public Safety Committee