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California Civil Liberties Advocacy
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Thursday, September 10, 2015

The Honorable Jerry Brown
Governor of the State of California
Sacramento, CA 95814

Re: Senate Bill 741 — Request for Signature

Dear Governor Brown,

The California Civil Liberties Advocacy ("CCLA") respectfully urges you to sign Senate Bill 741.

As Senator Hill's own press release stated, "[cell phone intercept technology] can . . . capture the content of a conversation," and "can scoop up cell phone data from so many people at once, whether they are suspects or not." (Office of State Senator Jerry Hill, *Senator Jerry Hill Introduces Bill To Enhance Transparency for the Use of Cell Phone Intercept Technology* (Feb. 27, 2015) <http://sd13.senate.ca.gov/news/2015-02-27-senator-jerry-hill-introduces-bill-enhance-transparency-use-cell-phone-intercept-tec#sthash.OCppt0Ce.dpuf> [as of Sept. 10, 2015].)

Arguably, this practice is an invasion of privacy protected by both the United States and California State Constitutions. Of which Article 1, § 1 of the latter defines as an "inalienable right." When citizens engage in intrastate travel, they should be afforded a reasonable expectation that their private cell phone data and communications are protected. Coupled with the issue of automatic license plate reader technology addressed in SB 34 (Hill), it is nothing short of frightening that law enforcement may not only track our movements by storing license plate data, but now private cell phone communications may be linked to those same movements, resulting in a dragnet style search.

Law enforcement use of cell phone intercept technology absent a warrant or probable cause contingent an ongoing investigation is *ipso facto* unconstitutional. In *Riley v. California* (2014) 132 S. Ct. 945, the United States Supreme Court questioned the constitutionality of a warrantless search of an arrestee's cell phone. In that case, the Supreme 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.' " The Supreme Court recognized the serious breach of privacy that occurs when searching a modern cell phone, or "smart phone," and that "[a]n Internet search and browsing history . . . can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD," (*Riley, supra*, at pg. 2490) and that such devices provide comprehensive record[s] . . . that reflect[] a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." (See

United States v. Jones, supra, at 955, Sotomayor, J., concurring.) While the Supreme Court conceded that their holding in *Riley* "[would] have an impact on the ability of law enforcement to combat crime," the Court nonetheless held that "[prior] cases have historically recognized 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 2493, citing *Coolidge v. New Hampshire* (1971) 403 U. S. 443, 481.)

Unrestricted use of such technology grants government agencies and law enforcement personnel the omniscient and arbitrary ability to track the movement of private citizens and construct patterns of movement that should otherwise be protected. In *Knotts v. United States* (1983) 460 U.S. 276, 282, the U.S. Supreme Court ruled 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 . . . ." Likewise, the Court found that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." (*Knotts*, supra, at pg. 281) On the other hand, in *Kyllo v. United States* (2001) 533 U.S. 27, when a federal agent used a thermal imaging device to investigate the heat register of a resident's home who was suspected of growing marijuana, the Supreme Court found that this constituted a Fourth Amendment violation because the federal agent was engaged in more than mere "naked-eye surveillance" and "use[d**] a device that [was] not in general public use**." As noted by Supreme Court Justice Alito in a concurring opinion from *United States v. Jones* (2012) 181 L. Ed. 2d 911, 964, and joined by Justices Ginsberg, Breyer, and Kagan, "society's expectation has been that law enforcement agents and others would not--and . . . simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period."

As we recognized with SB 34, SB 741 also may not be as comprehensive as some civil liberties advocates would prefer. But its language does provide a framework that comports with the practical concerns of modern society, establishing basic policies that privacy proponents may build upon in the future.

Based on the aforementioned reasons, the CCLA respectfully urges you to sign Senate Bill 741.

Respectfully,

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