CaliforniaCivilLiberties.org

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Monday, December 14, 2015

Assemblymember William Brough
P.O. Box 942849
Room 2174
Sacramento, CA 94249-0073

RE: Assembly Bill 201

Dear Assemblymember Brough,

We are writing to enlist the CCLA's **OPPOSITION** for Assembly Bill 201 based on the following reasoning:

**I. The United States Supreme Court has ruled that it is a violation of the Eighth Amendment to criminalize a person based on their status; only criminal acts may be regulated.**

In *Robinson v. California (1962) 370 U.S. 660*, the U.S. Supreme Court ruled that it is a violation of the Eighth Amendment to criminalize a person based on status. In *Robinson*, the Court ruled that the state may not criminalize a person for being addicted to narcotics. The state may only "regulate the administration, sale, prescription and use of dangerous and habit-forming drugs," whereas "a statute which makes the 'status' of narcotic addiction a criminal offense" is prohibited. (*Robinson, supra,* at 666, 667.) Six years later, the Court clarified its position in holding that laws intended to criminalize behavior (i.e. public intoxication) are distinguishable from laws that criminalize status (i.e. being an alcoholic) and thus do not violate the Eighth Amendment. (*Powell v. Texas* (1968) 392 U.S. 514.) Criminalizing a person's presence in one locality or another simply for being required by the state to register as a sex offender is criminalizing a person based on their legal status, since no criminal act has been committed. In *Powell*, Justice Black stated in his concurrence that "[p]unishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes." (*Powell, supra,* at 543.) Furthermore, penalizing a person for being in compliance with state-mandated reporting and registration requirements itself is arguably violative of the Eighth Amendment.

**II. The regulation of registered sex offenders is an area of law that has been fully occupied by the California State Legislature for over 60 years and AB 201 is wholly inconsistent with the California State Constitution and established court precedents, allowing local municipalities to impose unreasonable burdens on 290 registrants and their families.**

In *People v. Nguyen*, (2014) 222 Cal. App. 4th 1168 [See also *People v. Godinez*, Case No. G047657 (Cal. Court of Appeals, January 10, 2014) (unpublished)], the 4th District Court of Appeals held that "the state statutory scheme imposing restrictions on a sex offender's daily life fully occupies the field and therefore preempts the city's efforts to restrict sex offenders from visiting . . . parks and recreational facilities." (Id.)

The California Supreme Court has ruled that "[c]hartered cities and counties have full power to legislate in regard to municipal affairs unless . . . the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." (*In re Hubbard* (1964) 62 Cal.2d 119, upheld in *Riverside v. Inland Empire Patients Health and Wellness Center, Inc*. (2013) 56 Cal.4th 729.) AB 201 will impose a burden on citizens who are subject to 290 registration, as well as accompanying family members who engage in intrastate travel throughout California. Citizens should not be expected to guess what the law is from one municipal jurisdiction to another. Imposing such a burden on transient citizens would stagger dangerously close to the edge of the constitutional limits first set forth in *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453, that "all citizens of a free state must be informed as to what the state commands or forbids and that no one should be required, at peril of life, liberty or property, to speculate as to the meaning of the state's penal statutes." (*Findley v. Justice Court* (1976) 62 Cal. App. 3d 566.) Furthermore, assuming that such local ordinances are even effective at improving public safety, AB 201 will equally impose a burden, not only upon 290 registrants, but on ordinary citizens who would not have any reasonable expectation of consistency in the laws from one jurisdiction to the next. Apart from hiring an attorney or going to a law library to conduct the research themselves (most ordinary citizens—including registrants—are unfamiliar with the process), citizens would be unable to engage in intrastate travel and maintain an expectation of consistency between local ordinances in their hometown and other jurisdictions, which may not have enacted similar ordinances. If exclusion zone ordinances are to be permitted at all, then the California State Legislature should seriously consider adopting statewide policies in order to ensure unity and consistency.

**III. The types of ordinances permitted by AB 201 routinely disregard individual risk assessment, severity of the offense, or how many years have passed since successfully completing probation/parole and sex offender rehabilitation programs.**

In their 2014 report, the California Sex Offender Management Board stated that "[e]ffective policy must be based on . . . scientific evidence. Research on sex offender risk and recidivism now has created a body of evidence which offers little justification for continuing the

current registration system since it does not effectively serve public safety interests." (Cal. Sex Offender Management Board (CASOMB), A Better Path to Community Safety – Sex Offender Registration in California, Tiering Background Paper, (2014), p. 4. (hereafter Tiering Paper.) That same report also stated that "[a]bout 95% of solved sex crimes are committed by individuals never previously identified as sex offenders and so not registered." (Tiering Paper, supra, p. 2.) Not all persons required to register pursuant to Penal Code section 290 are high-risk. In fact, the overwhelming majority of "crimes against children (about 93%) are committed not by a stranger but by a person known to the child and his or her family, usually an acquaintance or family member." (Tiering Paper, supra, p. 2.) Thus a substantial portion of California's exponentially-growing, 110,000-strong sex offender registry will be forced to bear the burdens permitted by AB 201, purportedly to protect children from the types of offenses which the majority of 290 registrants did not commit. As an aside, registrants who were released from community supervision were concurrently required to successfully complete a sex offender counseling and rehabilitation program. (Tiering Paper, supra, p. 4.) Those who failed to complete such a program necessarily failed to complete parole/probation. Many who do successfully complete such programs go on to become productive members of society with spouses and children of their own. The types of "exclusion zone" ordinances permitted by AB 201 ignore the fact that these burdens are unduly being imposed on citizens who are already in compliance with the law and NOT on potential predators who have yet to be detected and so are not registerd.

**IV. The types of ordinances permitted by AB 201 are typically overbroad, devoid of sound logic, and wanting of empirical evidence.**

Cases involving the abduction or kidnapping of child victims, or human trafficking, are rare and would be considered outliers in a typical case study. It appears that the local ordinances permitted by AB 201 would particularly seek to impose burdens on 290 registrants convicted of those types of offenses. But according to a report published by Fox News in 2012, only about 0.19% of cases are " 'stereotypical' kidnappings carried out by strangers . . . [a]nd 16[%] of those were taken from home." (Associated Press, *Experts: Child abductions at home relatively rare* (April 23, 2012), Web, FoxNews.com.) In other words, about 1 out of every 1,200 (0.083%) registrants committed the type of offense which these ordinances purport to protect children from. According to a report by the California State Auditor, less than 1% of defendants are deemed sexually violent predators, or "SVP's." (California State Auditor, Sex Offender Commitment Program – Streamlining the Process for Identifying Potential Sexually Violent Predators Would Reduce Unnecessary or Duplicative Work, (July, 2011), p. 13.) A more recent report by the State Auditor reveals that only 97 sexually violent predators were released from the Department of State Hospitals between 2009 and 2014, which constitutes only about 0.082% of the state's estimated 110,000 plus registered sex offenders. (California State Auditor, California Department of State Hospitals – It Could Increase the Consistency of Its Evaluations of Sex Offenders by Improving Its Assessment Protocol and Training, Report 2014-125, (2014), pp. 13-14.) Horrific and heart-rending as such cases may be, AB 201 and the local ordinances addressed by its language ignore the fact such cases are extremely rare – the severity and

sensationalism which often surround high-profile cases simply do not translate into frequency or prevalence.

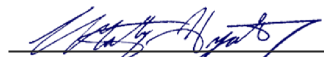
**V. AB 201 is counterintuitive to public safety because it will adversely affect 290 registrants' ability to maintain gainful employment and find adequate housing, factors which have been associated with elevated risk.**

Restricting where 290 registrants may be physically present will have adverse effects on housing and employment, further promoting indigence, homelessness, and the concentration of such registrants in low-income communities. All of these are factors which have been associated with higher levels of risk. CASOMB stated in their year-end report to the legislature that "[h]aving an alarmingly large number of transient sex offenders in California does not make communities safer," and that "the promulgation of conditions which actually create homelessness and transience among registered sex offenders while producing no discernible benefit to community safety is counterproductive and continues to be the single most problematic aspect of sex offender management policy in California." (Cal. Sex Offender Management Board, The State of California Sex Offender Management Board Year End Report, (February 3, 2015), p.11. (hereafter Year End Report.) In that same report, CASOMB addressed the kind of local ordinances which AB 201 seeks to codify, stating that "no research shows that exclusion zones are helpful in preventing re-offense," and that "[t]here is no evidence that broader restrictions will be effective." (Year End Report, supra, p. 17.) CASOMB strongly admonishes the legislature against codifying such local ordinances: "[A]ny law precluding sex offenders from being in particular places ("exclusion zones") must be tailored to the individual, including a consideration of the risk level of the offender in order to be effective and need to have reasonable distances and protected places along with consistency in implementation statewide." (Year End Report, supra, p. 18.)

AB 201 is overbroad, inconsistent with established case law, imposes undue burdens on registered citizens who are in compliance with the law, and will diminish public safety. AB 201 is a "solution" in search of a problem.

For the aforementioned reasons, the CCLA strongly **OPPOSES** Assembly Bill 201.

Respectfully,



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cc: Assembly Public Safety Committee