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Senate Public Safety Committee
State Capitol Building,
Room 2031
Sacramento, CA 95814

RE: Senate Bill 448

Dear Public Safety Committee Members,

We are writing to enlist the CCLA's **OPPOSITION** to Senate Bill 448.

Our reasoning is as follows:

I. SB 448 seeks to amend Prop 35, neither of which are based on scientific facts or statistics, nor will increase public safety, and will only extend the continuum of punishment for men and women who have already paid their debt to society.

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. (hereinafter, "Tiering Paper".). SB 448 only piles on more registration and reporting requirements to a failing system that continuously penalizes citizens for past offenses. If no data exists to support such a policy, then what is the motivation for its implementation? Obviously, such a policy is more than just "a collateral consequence of conviction," but is instead designed to impose undue burdens and hardships on men and women who have already paid for their past offenses. What else could such a practice be called other than "punishment?"

II. SB 448 will force the vast majority of registrants to disclose online identifiers to help law enforcement solve the kinds of crimes they did not even commit.

SB 448 seeks to impose a burden on registrants to give up their privacy by disclosing "online identifiers" to law enforcement within five days. While the intent of this policy may be to aid

law enforcement in solving crimes involving human trafficking or online predators, CASOMB states 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.). In fact, the evidence reveals that most "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.). Since the vast majority of men and women listed on the registry for crimes against children were not strangers, and since 95% of sex crimes are committed by people who are NOT registered sex offenders, there exists very little, if any, justification for encroaching upon the First and Fourth Amendment rights of registered citizens in the name of enhancing public safety.

III. SB 448 will have a chilling effect despite the proposed amendments to Prop 35 because registrants will still be dissuaded from participating in protected online speech for fear of government intrusion and/or retaliation.

Men and women subject to California's sex offender registry requirements are still entitled to anonymous free speech, as protected by the First Amendment. Amending Prop 35 to delete the public disclosure requirement does nothing to avert the fear of government spying or intrusion. Having to give up online identifiers will have a chilling effect because, as stated by U.S. Supreme Court Justice Sotomayor, "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." (*U.S. v. Jones* (2012) 132 S. Ct. 945, Sotomayor, J., and Alito, J., concurring.). And expecting anyone to trust the government to use such information appropriately is a nonstarter because the First Amendment was designed to protect citizens from the government. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." (*United States v. Stevens* (2010) 559 U.S. 460, 480.). For instance, the federal Electronic Communications and Privacy Act of 1986 allows law enforcement officers to subpoena private emails of individuals that are 180 days or older. *U.S. v. Warshak* (2010) 631 F.3d 266 held that all email communications were protected by the Fourth Amendment and could only be obtained by the government under the authority of a warrant based on probable cause. But this decision is only binding on the Sixth Circuit. Additionally, much of the information linked to online identifiers is publicly searchable. Requiring a registrant to disclose online account information would allow local law enforcement agencies to monitor internet search histories, website visits, public posts, and comments. The same is true for comments left on social media sites, discussion boards, or newspaper articles. For instance, suppose a registrant wished to leave an anonymous comment on the website of a local newspaper which was critical of the local police force. The registered man or woman would then be required to notify that same police force of the new online identifier within five days. As articulated in Justice Sotomayor's observation, the knowledge that a law enforcement officer may log on to a computer and begin perusing such

public comments, which may otherwise be left anonymously, necessarily chills the speech of registrants who will be hesitant to leave comments that are open to government scrutiny.

IV. SB 448 substantially burdens protected speech due to reporting requirements and the threat of criminal sanctions.

The Ninth Circuit held in *Doe v. Harris* (2014) 772 F.3d 563, 573 that "condition[ing] internet speech with a new identifier on a registrant's affirmative act of sending written notice to the police" substantially burdens protected speech. The court went on to state that "if that was not enough of a burden, the Act's reporting requirement carries with it the threat of criminal sanctions." (*Harris, supra,* at 573). It is true that SB 448 amends the reporting requirement to allow a registrant five working days to comply, as opposed to just twenty-four hours. However, the mere requirement to register a new identifier every time a registrant chooses to post a comment online still burdens protected speech substantially in that the requirement is cumbersome and time-consuming. The threat of criminal prosecution for failing (or forgetting) to register a new identifier will undoubtedly dissuade registered men and women from posting anonymous, public comments altogether. Though technically content neutral, such a burden starts to resemble the unconstitutional practice of prior restraint. "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly." (*Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton* (2002) 536 U.S. 150, citing *Thomas v. Collins* (1945) 323 U.S. 516.). For instance, "[a] government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional." (*Sorell v. IMS Health Inc.* (2011) 131 S. Ct. 2653, 2664.).

V. SB 448 only adds to the pile of paperwork that law enforcement is required to process, sapping valuable resources better used serving the public, such as monitoring high-risk sex offenders and Sexually Violent Predators.

Law enforcement agencies have often groaned over legislation that requires them to spend valuable time and resources filing paperwork because it takes away time that they may spend interacting with and serving the public. For instance, regarding the reporting requirements mandated by AB 953 (Weber), the Peace Officers Research Association of California stated that "the additional information required will take much more of the officer's time and result in less service to the public." (Asm. Pub. Saf. Com., Analysis of Asm. Bill No. 953 (2015-2016 Reg. Sess.) as amended April 16, 2015, p. 6.). Concerning that same bill, the California Police Chiefs Association argued that "[t]he burden created by this mandate will result in significant officer time spent writing reports, thereby diminishing the time an officer is able to spend interacting with members of the community." The same line of reasoning is applicable to SB 448. More filing and reporting requirements will not only burden registrants, but will burden law

enforcement. According to CASOMB, "many local registering agencies are challenged just keeping up with registration paperwork. It takes an hour or more to process each registrant, the majority of whom are low risk offenders. As a result, law enforcement cannot monitor higher risk offenders more intensively in the community due to the sheer numbers now in the registry." (Cal. Sex Offender Management Board, The State of California Sex Offender Management Board Year End Report, (February 3, 2015), p.11.). Keeping tabs on the highest-risk sex offenders is becoming more difficult and challenging for law enforcement to keep up with because, as pointed out by UC Berkeley law professor, Frank Zimring, Ph.D., "[t]he more people you have in your caseload, the less of a good job you're going to do with your case load." (Vega, Police Face Challenge Of Tracking Offenders, ABC7 News (Oakland, Calif.), September 3, 2009.). Zimring went on to state that "[i]f you had 4,000 or 5,000 high-risk offenders you could do a much better job than if you have 50,000 or a 100,000 sex offenders and it's one size fits all." (Vega, supra.).

VI. SB 448's urgency clause is impracticable and will result in an overload of filings for law enforcement and/or arrests for failure to register if California's 110,000+ registrants are not notified of the immediate change.

Section 290.014, subd. (b) (1), beginning on line 24 of page 4, states that "[e]ach person to whom this paragraph applies at the time this paragraph becomes effective shall immediately provide the information required by this paragraph within five working days." Apparently, the bill's author expects over 110,000 registrants to inform the local registering agency of their online identifiers within five days of enrollment. What programming will be implemented to inform all of these registrants of the immediate requirement? Due to the ages-old maxim, *ignorantia juris non excusat*, thousands—perhaps tens of thousands—of registrants will be in violation of this new reporting requirement within five days of enrollment if they are not made aware of the change. Are local law enforcement agencies expected to arrest tens of thousands of people who may not register in time due to lack of knowledge? And even if all 110,000+ registered men and women could be notified of the new policy, are local registering agencies prepared to deal with the deluge of filings — i.e. most ordinary people, including registrants, have more than numerous online identifiers, which only translates into more paperwork to be filed.

VII. 448 is overinclusive and, if implemented at all, should be applicable only to Sexually Violent Predators ("SVP's") and/or parolees who were convicted of crimes involving online predatory behavior, child pornography, cyber stalking, or human trafficking.

A statute is overinclusive if it unnecessarily infringes protected areas of speech beyond that which is necessary to achieve its intended purpose. As previously mentioned, CASOMB reports that 93% of child victims know their perpetrator. (Tiering Paper, supra, p. 2.). The proportion of registrants convicted of online predatory behavior is currently not known, but would no doubt comprise part of the remaining 7%. Additionally, a 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.). In *Doe v. Harris, supra,* at 571, the Ninth Circuit reiterated its prior holding that internet monitoring of parolees convicted of downloading child pornography is currently acceptable. Relying on the Second Circuit opinion, *Birzon v. King* (1972) 469 F.2d 1241, 1243, the court held that "[a]lthough parolees 'should enjoy greater freedom in many respects than a prisoner, . . . the Government may . . . impose restrictions on the rights of the parolee that are reasonably and necessarily related to the [Government's] interests." Just because someone is required to register as a sex offender, this does not mean *ipso facto* that they are subject to the same restrictions as parolees. Again, the *Harris* court stated that, "although they remain subject to reporting requirements, sex offenders . . . are no longer on the "continuum" of state-imposed punishments." (*Doe v. Harris, supra,* at 572.). Neither empirical data, nor judicial reasoning support SB 448's indiscriminate application to all registrants, irrespective of risk level or severity of offense. SB 448 is therefore overinclusive and should be amended for particularized application to Sexually Violent Predators and/or parolees convicted of crimes involving online predatory behavior, child pornography, cyber stalking, or human trafficking, if at all.

For all of the foregoing reasons, the CCLA **OPPOSES** SB 448 ***in its current form***.

SB 448 is not based on empirical evidence and will chill First Amendment speech. The bill's reporting requirements and threat of criminal sanctions will also unnecessarily burden protected speech. Furthermore, SB 448 will only sap valuable law enforcement resources and distract officers from monitoring high-risk sex offenders and/or Sexually Violent Predators. SB 448's urgency clause is impracticable and unnecessarily places unwitting registrants in jeopardy absent programming that notifies registrants of the change. Finally, the language of SB 448 is overinclusive and should be amended to target only Sexually Violent Predators and/or parolees convicted of crimes involving the behaviors this policy seeks to detect.

Respectfully,

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cc: Senator Loni Hancock (Chair)
Senator Joel Anderson (Vice Chair)

Senator Mark Leno
Senator Carol Liu
Senator Mike McGuire
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