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INTERNATIONAL OFFICE
CENTRAL AND EASTERN EUROPE
Budapest, Hungary

March 7, 2013

The Honorable Bob McDonnell
Office of the Governor
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, Virginia 23219

Re: *H.B. 1907 – Texting While Driving*

Dear Governor McDonnell:

The Rutherford Institute¹ has grave concerns about H.B. 1907. While the objective of this legislation is ostensibly to penalize drivers who text while driving or even read emails and text messages while driving, unfortunately, it is vague and overly broad and has been drafted in such a way as to give police officers leeway to carry out fishing expeditions on drivers' cell phones, thereby opening the floodgates to a broad range of civil liberties violations.

Assuredly, any marginal safety benefits gained by passage of this law will be wholly eclipsed by the threats it poses to critical Fourth Amendment rights. It is our hope that you will not sign this legislation but instead send a strong message to the General Assembly that if they wish to discourage dangerous driving habits, they must do so in a manner that does not run afoul of the Constitution.

Paramount among our concerns about this legislation are that it expands police powers to search individuals' private property without a warrant, does away with the need for probable cause, and fails to provide police with adequate standards for determining whether there is sufficient cause to believe a driver is texting as opposed to numerous other activities that are not a basis for a stop of the vehicle, among other things.

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened or infringed.

Specifically, H.B. 1907 contains insufficient enforcement standards to ensure that officers are not empowered to stop drivers who are not, in fact, using handheld devices while driving. Second, the legislation will presumably justify an officer's intrusive search of a citizen's private cell phone if the officer alleges that he or she witnessed the citizen texting while driving. And finally, the bill contains an unjustifiable, blanket exemption for law enforcement officers, which undermines the legislation's putative purpose of protecting the public. I will address each of these concerns in turn.

The bill fails to establish standards for probable cause to stop and arrest.

H.B. 1907 makes texting or reading an email while driving a crime that can be the basis for a vehicle stop and arrest of a driver. But there are numerous innocent activities which police could misconstrue as these prohibited activities, leading to the real possibility that an officer will claim he or she has probable cause to arrest the driver on the basis of wholly ambiguous behavior. A driver may look down to clean a spill on his lap or to select a CD to put in the car's player, yet each of these activities and many others could be deemed probable cause for an arrest by a police officer. Commentators have noted the significant danger that persons will be stopped and arrested for texting while driving even though the conduct police observed was not a violation of the law.²

The bill is riddled with enforcement problems.

It is undeniable that texting or reading text messages and emails while driving is unsafe. However, H.B. 1907 provides no standards to limit law enforcement officers in making traffic stops based on this alleged offense. This means that the bill leaves innocent citizens at the mercy of law enforcement and at risk of being stopped for the briefest glance downward or the slightest hand motion that may resemble texting.

While some may discount these concerns as pessimistic or alarmist, these are, in fact, the kind of legal "loopholes" that provide opportunities for the encroachment of a growing police state into the lives of ordinary, law-abiding citizens. Inch by inch, laws such as this one that sacrifice liberty for the sake of apparent security erode that which Supreme Court Justice Louis Brandeis described as the most valued right of a free people: the right to be left alone.³

The bill will justify unwarranted government intrusion into citizens' private communications.

Under the proposed legislation, government agents will be authorized to search citizens' cell phones—including viewing the substance of private communications, websites visited, etc.—upon merely articulating a suspicion that the driver was using the

² Article, *Near Impossible to Enforce at Best, Unconstitutional At Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 RICH. J.L. & TECH. 1, 33-39 (2010).

³ *Olmstead v. United States*, 277 U.S. 438 (1928).

device while driving. Even if we could assume (which we cannot) that law enforcement officers would never abuse this power by disingenuously alleging probable cause, it is the mere *vesting* of this type of power in law enforcement that does serious damage to fundamental civil liberties by producing a chilling effect on free speech and association.

Naturally, citizens will curb their association with politically or socially disfavored organizations, as well as their communication of unpopular ideas, if they know that “Big Brother” may become privy to such personal matters upon the slightest suspicious hand or eye movement on the highway. This is an intolerable “unintended consequence” of a law designed to enhance public safety.

While we do not dispute that some solution to the problem of texting while driving should be found, we must insist that our Commonwealth refuse to settle for a law that opens the door to systematic intrusions upon citizens’ privacy and freedom of movement; intrusions that are predicated upon nothing more than wayward glances, or, more accurately, police officers’ *allegations* of wayward glances. Until the General Assembly is able to identify and articulate clear standards to guide police in enforcing a no-texting-while-driving law and to limit their ability to read citizens’ private communications in an effort to obtain “evidence” of the alleged offense, it is incumbent upon you to refuse to sanction an approach that places fundamental civil rights at the mercy of government officials.

The law’s blanket exemption for law enforcement undermines its premise.

If, as all seem to concede, it is unsafe to text while driving a motor vehicle, then it is unsafe to do so even for one who is driving a police motor vehicle and wearing a uniform. Law enforcement officers should not be *exempted* from operating their vehicles safely; they should *exemplify* the safe operation of a vehicle. In short, the blanket exemption for drivers of law enforcement vehicles makes no sense. If anything, these drivers should be held to a higher standard of safety in light of the fact that they frequently operate their vehicles at higher speeds than are permitted for ordinary citizen-drivers.

In fact, a situation here in Charlottesville several years ago is a case in point on this issue. On November 5, 2007, an Albemarle County police cruiser struck a wheelchair-bound pedestrian in a crosswalk in broad daylight.⁴ While the incident was shocking in and of itself, it became even more so when evidence that surfaced during the ensuing civil lawsuit revealed that the police officer had been engaged in “excessive” cell phone use on the day of the accident. This offered a possible explanation for what had before seemed inexplicable.

⁴ The information about the incident is taken from an article that appeared in an online article from *The Hook* on August 29, 2011. The article is available at <http://www.readthehook.com/100416/crosswalk-bombshell-officer-was-texting-wheelchair-incident>.

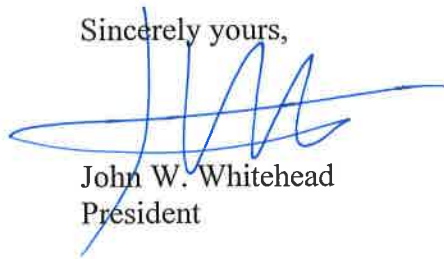
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Providing a blanket exemption that allows law enforcement officers to text or search the Internet while driving undermines the very justification for passing this type of law in the first instance. In this matter, police—who frequently operate their vehicles at high speeds in responding to emergency situations—must be subject to the same safety regulations as the rest of us.

In an age in which police officers have shown themselves to be increasingly aggressive and willing to discard Fourth Amendment prohibitions on unreasonable searches and seizures, even going so far as to perform invasive roadside cavity searches on female travelers without any probable cause of wrongdoing, this legislation renders the Fourth Amendment null and void and leaves Virginia drivers with no virtually civil liberties protection. Based on the aforementioned concerns, we request that you refuse to sign this poorly drafted measure into law.

If I can be of assistance to you in this matter, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'JWA', with a long horizontal flourish extending to the right.

John W. Whitehead
President