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TESTIMONY OF MICHAEL KEBEDE, ESQ.

LD 2159 – Ought to Pass

An Act to Protect the Confidentiality of Attorney-Client E-mail Communications for Residents of Jails and Correctional Facilities

Joint Standing Committee on Judiciary

January 24, 2024

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary, greetings. My name is Michael Kebede, and I am Policy Counsel for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we urge you to support LD 2159.

Access to effective counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment obligations to states under due process clause of Fourteenth Amendment). Access to effective counsel includes the right to have confidential communications with one's attorney without the government eavesdropping on what is said. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.") For too many people in Maine, access to private communications with their defense attorney is treated as a privilege for the few instead of a constitutional right guaranteed for all by the Sixth Amendment: a report by the Maine Monitor in 2020 found that Maine's jails recorded at least 837 confidential calls from 161 different incarcerated people to their attorneys at the Aroostook, Androscoggin, Franklin and Somerset County jails alone.[1]

[1] *See* Samantha Hogan, *Recording of 837 attorney-client phone calls 'borders on the ridiculous,'* July 9, 2020, *available at* https://www.themainemonitor.org/recording-of-837-attorney-client-phone-calls-borders-on-the-ridiculous/.

Last year, Maine passed a law to curb government eavesdropping on privileged attorney-client phone conversations in jails.[2] This bill would extend the protections of that law to email communications. If this bill becomes law, then the contents and existence of intercepted email communications, when the government has constructive notice that they are between a defendant and their lawyer, become inadmissible in criminal trials. Additionally, state officials who viewed, listened to, or read the communication and did not immediately discontinue doing so as soon as they had sufficient information to determine that the communication was protected by attorney-client privilege, are disqualified from participating in an investigation of the incarcerated person and from appearing as a witness in a criminal proceeding in which the incarcerated person is a defendant. Finally, state officials who view, listen to, or read the intercepted communication are disqualified from participating in an investigation of the resident or appearing as a witness against the incarcerated person.

This change in the law is important for several reasons. First, it is clear that, notwithstanding the United States Constitution and decades of Supreme Court jurisprudence interpreting defendants' right to private communication with counsel, jails in Maine have demonstrated an impulse to eavesdrop. A clarification in statute is appropriate in this situation.

Second, for the attorney-client privilege to protect client-attorney communications, clients must have a reasonable expectation of privacy in their communications with their lawyer. Where clients do not have a reasonable expectation that their conversations are private, they can be found to have waived their attorney-client privilege. *See, e.g., United States v. Mejia*, 655 F.3d 126 (2d Cir. 2011) (defendant waived attorney-client privilege where he was aware calls could be recorded). This law will clearly establish the expectation that emails with attorneys from jails and prisons are private and not being monitored by the government.

Third, the law creates clear rules for removing people who have received confidential information from investigating or prosecuting a criminal case. Rather than leaving it up to the District Attorney or Attorney General to decide whether a prosecutor should be removed from a case, the law creates an easy-to-follow rule: if a person receives information the constitution (and now state law) say they

[2] Samantha Hogan, *Maine passes bill to curb recording of attorney-client phone calls in jails*, Maine Monitor, July 2, 2023, *available at* https://themainemonitor.org/maine-passes-bill-to-curb-recording-of-attorney-client-phone-calls-in-jails/.

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ought not have, they cannot participate in the defendant's prosecution. This rule would improve the perception and actual fairness of our judicial system.

We urge you to vote *ought to pass*.