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TESTIMONY OF MEAGAN SWAY, ESQ.

LD 1056 – Ought to Pass

An Act Restricting State Assistance in Federal Collection of Personal Electronic Data and Metadata

Joint Standing Committee on Judiciary

March 28, 2023

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am the policy director at the ACLU of Maine, a statewide organization committed to advancing and preserving civil rights and civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we support LD 1056 in concept.

Nearly a century ago, Supreme Court Justice Louis Brandeis characterized “the right to be left alone” as “the most comprehensive of rights and the right most valued by civilized [people].” *Olmstead v. United States*, 277 U.S. 438, 478 (1928). That right is guaranteed by the Fourth Amendment to the United States Constitution, which protects “persons, houses, papers, and effects” from “unreasonable search and seizure,” and requires that search warrants be supported by “probable cause.” The Maine Constitution also protects against “unreasonable searches and seizures” and requires search warrants based on probable cause. Me. Const. Art. I, Sec. 5.

Though our constitutions continue to be vital sources of protection for individual liberty and human dignity, the interpretation of these documents often lags behind the needs of society. Courts do the best that they can to keep up with technological developments, but it can take many years for court cases to be decided, especially when they are appealed. The United States Supreme Court’s decision in *Carpenter v. United States* is one example. Although the Court updated Fourth Amendment law to apply to cellphones, it did so more than a decade after cellphones had become ubiquitous. *See* 585 U.S. ___, 138 S. Ct. 2206 (2017) (holding that government must have warrant to obtain citizen’s cell phone location history).

This is why there is an important role for legislative bodies, particularly state legislatures, to play in ensuring that the protection of the right to privacy keeps pace with technological developments. This is a role that the Maine legislature has seized and exercised with admirable vigor, by passing legislation restricting the collection of cellphone content, location information, and metadata by law

enforcement. See 16 M.R.S.A. § 641 *et seq.* (Portable Electronic Device Content); 16 M.R.S.A. § 647 *et seq.* (Electronic Device Location Information). Maine was one of the first states in the country to adopt protections of this kind, and these laws have become a model for other state legislators and privacy advocates. Maine's actions also protected the privacy of its residents more than 4 years before the Supreme Court acted in *Carpenter*.

We support the concept of LD 1056, to put strong guardrails around the Fourth Amendment. However, the bill's language may need to be amended to ensure that the information covered by the bill is electronic data protected by the Fourth Amendment, and does not inadvertently include information that would prohibit the administrative functions of government unrelated to criminal or national security investigations.

If amended properly, LD 1056 would help close a gap left by those privacy laws by ensuring that our law enforcement officials are not able to directly or *indirectly* violate our right to telecommunications privacy. The federal government has yet to adopt meaningful protections against unreasonable intrusions into our telecommunications privacy, but until they do, Maine law-enforcement officials need to know that Maine taxpayers pay their paychecks and the Maine legislature and courts set the rules for how and when they are allowed to intrude upon people's privacy.

Because this protection is necessary, and because Maine should continue to lead the nation in protecting individual privacy in the digital age, we support the intent of LD 1056, to ensure that Maine resources are not used to violate the Constitution.