

May 21, 2023

To: Senator Carney, Representative Moonen, and Honorable members of the Judiciary Committee

From: Charles Volkwein, J.D., CIPP/US

Re: Testimony in Support of LD 1576, "An Act to Update the Laws Governing Electronic Device Information as Evidence"

My name is Charles Volkwein, a recent graduate of the University of Maine School of Law with a Certification in Information Privacy Law and resident of South Portland. I am writing to you today as a concerned citizen to urge you to vote "ought to pass" on LD 1576, "An Act to Update the Laws Governing Electronic Device Information."

The Third-Party Doctrine is anachronistic and it is essential that the legislature addresses the current gap in constitutional protections to privacy afforded under the Fourth Amendment. **LD 1576 ensures that the personal information of Mainers is protected and eliminates a critical loophole to the Fourth Amendment's protection against unauthorized search and seizure by the government.** Constitutional protections and rights should not be circumvented by use of the internet and third-party providers.

LD 1576 would ensure that the government and law enforcement entities consult an independent judge to obtain a warrant to search and obtain Mainers' personal information from third parties. As the internet continues to become an integral part of our everyday lives, our Constitutional protections and rights must translate to an online context, lest the Constitution become almost wholly ineffective.

In *Carpenter v. United States*, Chief Justice Roberts's majority opinion expressed concern about the limited applicability of the third-party doctrine in light of modern information sharing practices.¹ Indeed, the Third-Party Doctrine's rigid approach to information transfers does not take into consideration the reasonable expectations of privacy held by the public regarding their online activity and fails to acknowledge the reality that the voluntariness of this sharing is not a meaningful assumption of risk, especially "given how omnipresent and necessary technological disclosures are." The mere fact that much of daily life is conducted digitally has not necessarily changed the public's attitude toward the privacy of their intimate digital information. Studies show that "a majority of people do not knowingly convey their locations information to cell phone providers and expect law enforcement to obtain a warrant before gathering information."²

The amount of granular information that is collected by third parties about an individual because of that individual's participation in modern society is immense. **It is unreasonable to expect an individual to waive their expectation of privacy consciously, knowingly, intentionally, and voluntarily in every instance of digital interaction during which their information is collected.** To the contrary, because of the information economy, individuals are pushed, prodded, incentivized, encouraged, and cajoled into sharing even more information in exchange for

¹ See *Carpenter v. United States* 138 S. Ct. 2206 (2018) at 2219.

² Harvey Gee, Last Call for the Third-Party Doctrine In the Age After *Carpenter*?, 26 B.U. J. SCI & TECH. L. 286, 299 (2020), <https://www.bu.edu/jostl/files/2020/08/2-Gee.pdf>

participation in the most basics of online activities. This information then becomes the source of warrantless searches by law enforcement who, outside of the digital context, would be obliged to acquire a warrant to access such information. This loophole will continue to be exploited unless the Maine Legislature acts. While *Carpenter* might have narrowly limited the third-party doctrine, Justice Roberts acknowledged "Legislation is much preferable." Maine must heed this advice.

In sum, LD 1576 addresses the current gap in Mainer's Fourth Amendment protections by:

- Updating the language of the current statute, modernizing the statute and bringing the law into harmony with modern day information sharing practices;
- Providing clarification for situations in which a warrant would be required for the obtainment of electronic communications and information, reducing ambiguity for law enforcement while ensuring protections for Mainer's; and
- Ensuring that the government and law enforcement entities consult an independent judge to obtain a warrant to search and obtain Mainer's personal information from third parties, creating a fair oversight and review in the search for evidence of a crime or otherwise.

For the above reasons, I urge this Committee to vote "Ought to Pass" on LD1576.

Respectfully Submitted,

Charles E. Volkwein, J.D., CIPP/US