



February 24, 2021

Sen. Susan Deschambault, Chair
Rep. Charlotte Warren, Chair
Joint Standing Committee on Criminal Justice
and Public Safety
Maine State Legislature
100 State House Station
Augusta, ME 04333

Re: ***LD 369, An Act To Criminalize Recording an Incident in Progress but Failing To Report the Incident Immediately to the Appropriate Authority***

Dear Sen. Deschambault, Rep. Warren, and Members of the Criminal Justice and Public Safety Committee:

We write to express our **opposition** for LD 369 which would impose criminal penalties on individuals who do not quickly and expeditiously “turn over” to law enforcement authorities any recording they may have taken of an event where a crime occurs or where someone has been seriously injured or dies. We believe this bill, while well-intentioned, could have the effect of infringing on individual liberties and negatively impacting access to justice.

About us. The Maine State Bar Association (MSBA) is a statewide trade association chartered in 1891 by the Maine Legislature. The Association currently represents approximately 3000 attorneys in the State in both public service and private practice. The Association maintains 28 separate sections covering nearly every field of law practiced in Maine, from Administrative Law to Workers’ Compensation Law.

Our concerns with LD 369. A key component of MSBA’s mission is access to justice, and we are concerned that LD 369 undermines this goal by imposing criminal penalties on individuals who may have recorded an act that may be criminal or where an individual is seriously harmed or dies. Here are our key concerns:

1. **Now is not the time to expand what is considered criminal behavior.** Maine’s prisons and jails are already filled with individuals awaiting trial or who have been found guilty of a crime under our criminal justice system. Such incarceration costs money, disrupts lives, makes it difficult for individuals to find employment, and deprives individuals of their liberty during the period of incarceration. America currently incarcerates a higher percentage of its population than any other nation on earth. So, as policymakers consider whether more individual actions warrant the label of “criminal,” we strongly encourage that such decisions be made very carefully and conservatively. The label of criminal should only be attached to conduct that truly constitutes “criminal” behavior.
2. **Failing to turn over recordings is a difficult standard to enforce.** Individuals today are constantly recording the outside world – sometimes intentionally, sometimes not. Many homes now have doorbell cameras, and many businesses now have security cameras. These cameras may be recording 24 hours a day, 7 days a week. During any of these time periods, the cameras may witness an act for which this bill would require the recording be turned over to law

enforcement. But, what if the individual is not aware that the recording exists? Should such individuals now have to defend themselves from claims that they should have known the recording exists? This seems fraught with evidentiary problems and is fundamentally unfair.

3. **This bill may discourage the very activity it seeks to encourage.** On many occasions, recordings of criminal activities may become evidence in legal proceedings. These recordings may be intentionally taken by an individual on their cell phone, or taken by video recording systems protecting homes or businesses. However, if the State moves to attach criminal liability for taking such a recording and then not turning it over, we would be concerned that individuals or businesses would respond by avoiding such recordings at all in order to avoid the risk of being subject to criminal liability?
4. **Fifth Amendment concerns.** The Fifth Amendment of the US Constitution protects individuals from self-incrimination. However, this bill is so broadly written that individuals who inadvertently record a criminal act of themselves would now be compelled to incriminate themselves by turning over the recording to law enforcement authorities, or face criminal charges. This would violate the Fifth Amendment.

Conclusion. We hope the foregoing points in opposition to LD 369 are helpful to the Committee as it considers this bill. If you have additional questions or need more information, please let us know.

Sincerely,



Kelly McDonald
President, Board of Governors

cc: Angela Armstrong, Executive Director
Rachel Okun, Chair, MSBA Legislative Committee
James I. Cohen, Verrill Dana, LLP