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Senator Anne Carney, Chair
Representative Matt Moonen, Chair
Committee on Judiciary
5 State House Station, Room 438
Augusta, ME 04333

RE: LD 1056 and LD 1576

Dear Senator Carney, Representative Moonen, and Members of the Judiciary Committee:

MACDL regrets it cannot have a representative present for the upcoming work sessions on LD 1056 and 1576. Legislative Analyst Janet Stocco requested MACDL provide written comments in response to the Committee's two questions. Thank you for providing us with the opportunity to do so. Please feel free to follow up with any additional questions.

1. **What issues/problems, if any, do you see involving Maine law enforcement's ability to access and to use electronic communication data and metadata under current law?**

LD 1056 and 1576 seek to catch Maine's privacy laws up with the ever-evolving technology we all rely upon. Cellphones and related electronic devices allow us to keep track of our children's school days remotely or know where our car is parked at any time. These technologies are wonderfully convenient but rely upon gathering massive amounts of information about our day-to-day lives and often do so without us ever seeing the transmission of this background information to third parties. This information is no longer stored on just our physical devices but is instead transmitted to third parties who increasingly rely upon and even sell this information. The importance of this information to large technology companies means that what was once only a name and address for subscriber information now may contain intimate details about our location, purchases, travels, etc.

In *Carpenter v. United States* and *Riley v. California*, the Supreme Court made clear that these kind of intimate details about individuals must be obtained by warrant when law enforcement seeks to recover them from actual cellphones. In *Riley* the Court noted that

> In 1926, Learned Hand observed (in an opinion later quoted in Chimel) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Riley v. California, 573 U.S. 373, 396 (2014)

The Supreme Court required a warrant for searching a phone because doing so was no different than searching a person's home given the amount of information we keep on our phones. Now that cloud and other server-based technologies allow for the flow of information from device to third-party companies so easily, the reality is that our subscriber information and other device information held by third-party companies is sometimes no different than the contents of our electronic devices. Our privacy laws need to adapt so that law enforcement is not able to circumvent important privacy protections without first showing probable cause that a crime has been committed and obtaining court approval through a warrant.

2. **Do you have any response to law enforcement testimony regarding the challenges presented by the proposals in LD 1056 and LD 1576?**

The criminal investigative process is not always transparent. MACDL and its members are not privy to much of what happens in initial investigations even if it is later summarized in affidavits or reports. As a result, it is difficult to respond to specific concerns raised in law enforcement testimony against LD 1056 and 1576.

At a high level, MACDL agrees that increasing privacy protections for the people of Maine will require additional work on the part of law enforcement when prosecuting crimes based on personal electronic data. This was certainly the case when the Supreme Court held in *Carpenter* and *Riley* that law enforcement could no longer seize a person's phone at the time of his or her arrest and simply search through whatever they wished without a warrant. Law enforcement has adapted since those decisions and seeks warrants to hold devices and then specific warrants to search for the actual electronic evidence on the devices it believes will show a crime has been committed.

The State's interest in prosecuting crimes as easily as possible must be balanced against an individual's right to privacy. LD 1056 and 1576 strike the right balance in light of the changing nature of technology. Law enforcement can and must be required to adapt with these changing technologies and how they affect important privacy rights.

Thank you for considering our input.

Sincerely,

Matthew D. Morgan

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MACDL Vice President