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Senate of
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Senate District 24

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Testimony of Senator Roger Katz
Before
The Joint Standing Committee on Judiciary
LD 415 “An Act to Require a Warrant to Obtain the Location Information of a Cell Phone or Other Electronic Device”

Senator Valentino, Rep. Priest and distinguished members of the Joint Standing Committee on Judiciary. My name is Roger Katz and I am the State Senator from District 24. I am here today to present my bill, LD 415, “An Act to Require a Warrant To Obtain the Location Information of a Cell Phone or Other Electronic Device”.

Where were you in 1986, 27 years ago? Let’s take a moment to remember that year. The song “Walk Like an Egyptian” by the Bangles was number 1 on the *Billboard* charts. Ronald Reagan was President. Larry Bird was playing for the Celtics and Oil Can Boyd pitching for the Red Sox. And if you will remember, we were still using black rotary phones and The World Wide Web was still five years away. 1986 is also the year that Congress passed the Electronic Communications Privacy Act, codified at 18 U.S.C. §§ 2510–2522.

The stated goal of the Electronic Communications Privacy Act (ECPA) was to preserve “a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement.” ECPA includes the Wiretap Act, the Stored Communications Act, and the Pen-Register Act. It was a forward thinking law that created warrant requirements, a private right of action for persons who are unlawfully wiretapped, and an exclusionary rule, which requires the suppression of evidence gathered through illegal wiretaps.

But authors of ECPA did not and could not have envisioned the technology that we enjoy today. As we all struggled with paper maps and atlases, we did not even dream of today’s GPS technology, which guides us precisely to our destination. How times have changed! Today, whether we realize it or not, most of us are walking around with a GPS device in our pockets, the smart phone, and whether we like it or not, a record is being created that shows exactly where we are every moment of the day or night if we have a GPS feature. That’s a wonderful scientific advance, but in the hands of the wrong people, it can lead to a stunning invasion of our personal privacy.

This bill says we CAN have the best of both worlds: provide law enforcement with the leeway to chase and catch the bad guys while at the same time protecting the rest of us from yet another intrusion into our personal lives.

That's why LD 415 is so important. The ECPA has not been updated since 1986. So while we are protected from warrantless surveillance if we are using our landlines at home or in the office, I would suggest that neither federal law nor state law grants us those same privacy protections as we go about our daily lives with our cell phone in our pocket.

In sponsoring this bill, it was important to me to discuss the bill language with both the cell phone providers and law enforcement. What I heard from cell phone providers was that they are prepared to follow the law, but they could use some clarity in understanding what is and is not allowed under the law. The Attorney General's office informed me that they believe that ECPA sufficiently covers geo-locational tracking. That was comforting in a sense. It is good to know that the Attorney General instructs law enforcement to follow the procedures outlined in ECPA in carrying out any geo-locational tracking. They are going above and beyond what the law requires. Every law enforcement agency in Maine should follow the good example of the Attorney General's office in obtaining warrants for geo-locational tracking, but that will only happen if that is the law. We can only ensure statewide adherence to these important privacy and due process principles if LD 415 becomes law.

I am further comforted by the Attorney General's adherence to ECPA because some provisions of LD 415 are modeled on ECPA. It is not my intention to create any unfamiliar or unnecessary burden on law enforcement. The delayed notice provision of LD 415, which requires law enforcement to go back to the court for reauthorization to delay notice after 90 days, is modeled after the delayed notice provision in ECPA. The exceptions provision that allows the Attorney General to designate a law enforcement officer to obtain geo-locational information prior to obtaining a warrant is based on ECPA. The exclusionary rule established in LD 415 is based on ECPA, which provides for the suppression of oral communication evidence gathered in violation of the Wiretap Act. The warrant requirements established in LD 415 are congruent with similar requirements in ECPA. These are neither new nor novel procedures for law enforcement. Only the technology has changed, and new technology should be subject to the same privacy protections envisioned for old technology.

Indeed, the authors of the Bill of Rights, once recovered from the shock of seeing drones and iPhones, might be confused that we are having a debate about this bill at all. The Fourth Amendment is clear:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Last year, the United States Supreme Court ruled in the case of *United States v. Jones* that the Fourth Amendment applies to GPS tracking devices attached to your car by law enforcement. The standard should be no different when the tracking device used by law enforcement is the cell phone in your pocket. A warrant and probable cause should be required, just as the Fourth Amendment says.

The concept of warrant requirements for law enforcement to conduct surveillance on the citizenry is older than the Constitution itself. Will this bill make it harder for law enforcement to conduct surveillance? Yes. Is that an important safeguard in a democracy? Yes I have spoken at length about this bill with my friend Bill Stokes, who followed me as Mayor of Augusta and also is the respected Chief of the Attorney General's Criminal Division. He has some problems with this bill and I understand that. I will tell you that I look forward to working with Bill and the Committee as you go into work sessions to improve the bill to perhaps better take into account law enforcement's legitimate needs. If there are specific parts of the bill as drafted that will make it harder for them to do their job, let's work with them to fix it. But make no mistake. The technology has gotten ahead of the law here. Maine people can't wait for the federal government to solve the problem; they seem incapable of almost anything these days. I have absolute and total confidence in the integrity of the Attorney General and her professional staff, but this is more than that. I would argue that today, Augusta's police chief could call up Rep. Priest's cell phone provider and ask for the records of his location over the last week just because he was a little suspicious of who the good representative was hanging around with, and there is arguably no law in place to protect him if the provider decides to comply. We need the law to protect him, to protect all of us, from that kind of snooping absent probable cause or some emergency. It is not enough to rely on some federal law from 1986 that arguably does not even apply to the new technology we now have. There is no harm in being crystal clear in statute, BEFORE it becomes a problem as it has elsewhere.

I thank you.