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May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

***RE: House Bill 744, "Commercial Law – Consumer Protection – "Mug Shot" Web Sites"***

Dear Governor Hogan:

We have reviewed House Bill 744 for legal sufficiency and constitutionality. The bill raises issues regarding whether it would survive a challenge to its constitutionality under the First Amendment and the Commerce Clause. Nevertheless, because there is no binding precedent directly on point, we cannot say that the bill is clearly unconstitutional on its face.

House Bill 744 allows individuals to request that "an operator of a web site remove the individual's photograph or digital image from the operator's web site" under certain circumstances. The individual may request removal if the image is a mug shot, i.e., "taken during arrest or detention of the individual for a criminal or traffic charge or suspected violation of a criminal or traffic law," and the court or police record has been expunged under Maryland law, the public record containing the image has been shielded or removed by court order, or a court has vacated "the judgment that resulted from the arrest or detention." The web site operator must remove the image within 30 days after receiving a request for removal. The web site operator is prohibited from charging a fee for doing so. A violation of the provisions of House Bill 744 constitutes an unfair or deceptive trade practice under Title 13 of the Commercial Law Article and is subject to all enforcement and penalty provisions therein.

The legislative history shows that the intent of the bill is to reach web sites that use automated methods to download or "screen scape" hundreds of mug shots from detention

centers and other facilities, and publish them online. After posting the mug shots online, these companies then typically charge a high fee—around $400—to remove a mug shot. The sponsor and other proponents of the bill testified that the continuing presence and easy availability of these mug shots online, including for arrests that occurred years ago and resulted in no convictions, creates a stigma for those individuals and imposes a job barrier. The legislative history also shows that to address the concerns of media organizations the bill was amended to limit the scope to an "operator of a web site that charges a fee to remove an arrest or detention photograph or digital image."

The First Amendment prohibits the government from enacting laws "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment of the United States Constitution applies to the state through the Fourteenth Amendment. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). In addition, the Maryland Court of Appeals has instructed that Article 40 of the Maryland Declaration of Rights is "substantially similar" to the First Amendment and has been treated "as in *pari materia* with the First Amendment." *Freedman v. State*, 233 Md. 498, 501 (1965). Accordingly, the Supreme Court's interpretation of the First Amendment is relevant for determining whether House Bill 744 comports with the Maryland constitution as well.

Mug shots are public records under Maryland law. 92 Op. Att'y Gen. 26 (2007) (concluding that a mug shot in the custody of a police department is an investigatory record and should be disclosed in response to a Public Information Act request unless the department determines that disclosure would be contrary to the public interest). House Bill 744 does not change the status of mug shots as public records. As a result, legislation that punishes the continuing publication of information originally publicly available raises a First Amendment concern.[1] *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (determining that First Amendment prohibited a lawsuit against television station for publishing rape victim's name obtained from court records); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (holding that court could not bar publication of juvenile offender's name when the court proceeding was open to the public); *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010) (finding unconstitutional a Virginia law that

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[1] The First Amendment also gives protection to a person who publishes non-public government information. *See New York Times v. United States*, 403 U.S. 713 (1971) (announcing that the government failed to meet "the heavy burden" of justifying an injunction to prevent publication of classified government papers). In this situation, any justification for banning publication is likely to be particularly difficult given that the State itself considers mug shots to be public records subject to disclosure.

prohibited publication of publicly available land records, including Social Security numbers).

The level of scrutiny a court would apply to a law banning speech initially depends on whether the speech in question is considered to be commercial speech or not. *Central Hudson*, 447 U.S. at 561-62. Commercial speech is "expressly related solely to the economic interests of the speaker and its audience" and is "speech proposing a commercial transaction." *Id.* Arguably, the principal purpose of the web site operators targeted by House Bill 744 is to make money from posting mug shots, either by proposing a commercial transaction to remove the mug shot or through paid advertisements. At the same time, the fact that a fee may be charged in connection with speech does not necessarily render that speech commercial. *See Nefedro v. Montgomery County*, 414 Md. 585 (2010) (holding that fortune telling is not commercial speech despite that the individual telling the fortune charges a fee). In the absence of any case law addressing whether mug shot web sites involve commercial or noncommercial speech, we will analyze the statute's constitutionality under both standards.[2]

If a court determines the subject of House Bill 744 is noncommercial speech, it will assess the bill for constitutionality under the First Amendment standard applicable to laws regulating speech based on its content. That standard requires a showing that the legislation is "'narrowly tailored to promote a compelling Government interest.'" *Nefedro*, 414 at 605 (quoting *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000)). The Supreme Court recently observed that "'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise." *Williams-Yulee v. The Florida Bar*, 2015 WL 1913912 (S. Ct. April 29, 2015) at *8 (citations omitted).

The State's interest in requiring the removal of certain mug shots is arguably compelling in several ways. First, requiring removal of those mug shots protects the privacy of individuals who are damaged by the availability of mug shots online, especially when the underlying records have been expunged, removed or shielded by a court.

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[2] It is also possible that a court would find the posting of mug shots to demand payment for removal is not speech at all. "[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (upholding tort claim against book publisher who published a guide to commit murder, which a murderer then followed).

> [A] booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.

*Karantsalis v. U.S. Dept. of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) (determining that Marshall Service could deny Freedom of Information Act ("FOIA") request for mug shots). *Accord Times Picayune Publishing Corp. v. Dept. of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) ("a mug shot is more than just a photograph"); *World Publishing Co. v. Dept. of Justice*, 672 F.3d 825 (10th Cir. 2012) (privacy interest in booking photo supported exemption from FOIA request). *But see Detroit Free Press, Inc. v. Dept. of Justice*, 73 F.3d 93 (6th Cir. 1996) (mug shot must be produced in response to FOIA request).[3]

In addition, requiring removal of certain mug shots from the web sites in question supports the State's other civil justice efforts to give individuals an opportunity to clear their criminal records. Marylanders with criminal records face significant barriers to employment. Recognizing this reality, State laws have been enacted over the last several years to allow individuals to expunge some criminal records[4] and to prohibit employers from asking job applicants whether they have criminal convictions.[5] Additionally, the General Assembly recently passed the Maryland Second Chance Act, which will allow individuals to shield certain nonviolent, misdemeanor convictions from public view.[6]

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[3] Of course, it could be argued "that '[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served.'" *Ostergren*, 615 F.3d at 273 (quoting *Cox Broadcasting*, at 420 U.S. at 495). *See also* 92 Op. Att'y Gen. at 50 (advising that "[g]iven the increasing use of digital photography and the potential for including digital photographs in criminal history databases, the Legislature may wish to address explicitly the status of mug shots" under Maryland law.

[4] Chapter 63 and Chapter 388, Laws of Maryland 2007, Chapter 616, Laws of Maryland 2008, and Chapter 362, Laws of Maryland 2010.

[5] Chapter 160, Laws of Maryland 2013.

[6] Maryland Second Chance Act, Senate Bill 526 and House Bill 244 of 2015.

The statute is arguably narrowly tailored because it targets only those web sites that appear to post the mug shots for the express purpose of inducing the subjects of the mug shots to pay for removal—a practice some have likened to extortion.[7] Additionally, the only mug shots that must be removed when a request is made are those involving records that have been expunged, removed or shielded by a court or where a court has vacated the judgment that resulted from the arrest or detention. It is these mug shots that the legislature determined unfairly violate an individual's privacy interest and undermine the State's other criminal justice efforts to remove job barriers. In comparison, in *Cox Broadcasting* the statute in question criminalized the publication of "the name or identity or any female who may have been raped or upon whom an assault with intent to commit rape may have been made." 420 U.S. at 471 n.1.

Some mug shots may be found on media web sites, which are not within the scope of the bill, thus there is an argument that the bill is fatally underinclusive. The Supreme Court, has recognized

> that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." ... Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy.

*Williams-Yulee*, 2015 WL 1913912 at *11 (citations omitted). The Court in *Williams-Yulee*, however, also recognized that "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." Consequently, it is possible that a reviewing court would find that House Bill 744 is narrowly tailored to support a compelling State interest.

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[7] David Segal, *Mugged by a Mug Shot Online*, N.Y. Times, Oct. 5, 2013, available at http://nyti.ms/1a84Mic.

If a court were to view the posting of mug shots online as commercial speech, it would apply a 4-part test to determine whether the government restriction meets the First Amendment. *Central Hudson Gas*, 447 U.S. at 566. First, does the speech concern a lawful activity and is it misleading? Second, is the government's interest substantial? If the answer is yes to both those questions, the next questions are "whether the restriction directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to service that interest." *Id.* Although there is an argument that a mug shot provides a misleading impression of an individual, the mug shots in question are typically accurate public records. Thus, the remaining relevant inquiry is whether the State has a substantial interest that is directly advanced by House Bill 744 and whether the bill is no more restrictive than it needs to be.

In our view, if a court determines that the mug shots in question are commercial speech, a court would uphold House Bill 744 as facially constitutional under the First Amendment. The bill is limited to only those web sites that post mug shots and require payment for their removal. Additionally, as discussed previously, the State's substantial interest in protecting the privacy of individuals and removing job barriers is advanced by the bill. Although it is possible that a particular person's mug shot may be found on a media web site, press organizations do not routinely post every mug shot publicly available. Thus, limiting the reach of the bill to sites that publish a massive amount of mug shots and charge for their removal advances privacy interests. Moreover, limiting the right of removal to individuals whose criminal records have been expunged, removed, or shielded or where no criminal conviction resulted from the arrest is consistent with and helps advance the State's efforts in removing job barriers.

The bill, however, has another possible constitutional defect. It may violate the Commerce Clause because it applies to any web site, including those situated outside of Maryland. The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, grants to Congress the power to regulate commerce among the states. The Supreme Court has long interpreted this clause as a barrier to states from regulating interstate commerce even in the absence of federal law. *Gibbons v. Ogden*, 22 U.S. 1 (1824). "When a State proceeds to regulate commerce … among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Id.* at 10.

> The constitutional grant of authority to Congress to regulate interstate commerce "has long been understood, as well, to

> provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" This "negative command, known as the dormant Commerce Clause," prohibits States from legislating in ways that impede the flow of interstate commerce. The dormant Commerce Clause's limitation on State power, however, "is by no means absolute. In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

*Star Scientific, Inc. v. Beales*, 278 F.3d 339, 354-55 (4th Cir. 2002)(citations omitted).

The Supreme Court developed a two-tiered test for determining whether a state statute violates the Commerce Clause. "'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,' the statute is generally struck down 'without further inquiry.'" *Id.* at 355. The first tier "asks whether a 'statute clearly discriminates against interstate commerce,' or has the 'practical effect of regulating extraterritorially.'" *Volvo Trademark Holding Aktieboaget v. AIS Construction Equipment Corp.*, 416 F. Supp. 2d 404 (W.D.N.C. 2006).

In *Star Scientific*, the Fourth Circuit made clear that

> a State may not regulate commerce occurring wholly outside of its borders. Nor may a State pass laws that have "the 'practical effect' of regulating commerce occurring wholly outside the State's borders." This proposition is based on the common sense conclusion that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority," regardless of the State's legislative intent.

*Id.* at 355 (citations omitted).

Under the second tier, applicable in the situation where a state statute indirectly affects interstate commerce, a court will apply the test developed by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* at 142 (citation omitted).

House Bill 744 on its face does not discriminate between in-state and out-of-state web site operators. At the same time, it may reach a web site operator whose only "contact" with the State is that it published a mug shot associated with the commission of a Maryland crime. Thus, a reviewing court will examine "'the overall effect of the statute on both local and interstate activity.'" *MaryCLE, LLC v. First Choice Internet, Inc.* 166 Md. App. 481, 516 (2006). In that case, the court found that Maryland's anti-spam act, which did not discriminate against out-of-state senders of email on its face, passed the *Pike* test because its benefits outweigh the burden placed on email advertisers. *Id.* at 522.

In addition, the court found that the anti-spam act did not regulate extraterritorially because "its focus is not on 'when or where recipients may open the proscribed ... messages. Rather, the Act addresses the conduct of spammers in targeting [Maryland] consumers.'" *Id.* at 523 (*quoting Washington v. Heckel*, 24 P.3d 404, 412 (Wash. 2001)). The court also noted that the anti-spam law did not prevent senders of email from soliciting residents in other states; it only regulated those sent to Marylanders. The act required a showing that the email advertiser used equipment in the State or sent prohibited email to a person the sender knew or should have known was a Maryland resident. Thus, it is possible that a court would find that by pulling mug shots from Maryland-based agencies, the web site operator has sufficient contacts with Maryland.

On the other hand, some courts have found that effective regulation of the internet requires federal legislation. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Nevertheless, because House Bill 744 does not discriminate against interstate commerce on its face,

whether the bill violates the Commerce Clause will likely be made on a case-by-case basis and depend on the conduct of the specific web site operator being sued. Hence, we do not believe that House Bill 744 clearly violates the Commerce Clause.

In closing, although a prohibition on republishing online material that is a public record and not false gives us pause due to the First Amendment, we also note that according to the National Conference of State Legislatures at least nine other states[8] have enacted similar legislation in the past two years and none has been struck as unconstitutional.[9] For the reasons set forth above, it is our view that House Bill 744 is not clearly unconstitutional.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[8] California, Colorado, Georgia, Illinois, Missouri, Oregon, Utah, Wyoming. In addition, the governor of Virginia signed a bill into law on March 23, 2015 that makes it a misdemeanor for the owner of a web site to both post an arrest photo and solicit, request, or accept money for removing the photograph. *See* Richmond Sunshine web page for Senate Bill 720, available at https://www.richmondsunlight.com/bill/2015/sb720/.

[9] There have been at least a couple suits brought against mug shot web sites. "In Ohio, a federal lawsuit against two mug shot websites, bustedmugshots.com and mugshotsonline.com, settled in December 2013. The sites agreed to pay $7,500 and not charge people for removing their photos. Both sites are run by Citizens Information Associates LLC, based in Austin, Texas. *Lashaway v. D'Antonio*, U.S.D.C. (N.D. Ohio), Case No. 3:13-cv-01733-JZ." *Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, Prison Legal News, August 14, 2014, available at: https://www.prisonlegalnews.org/news/2014/aug/12/jails-stop-posting-mug-shots-end-extortion-profiteering-websites/. A class action suit was filed in Florida against mug shot web sites but class certification was denied. *Bilotta v. Citizens Information Associates LLC*, U.S.D.C. (M.D. Fla.), Case No. 8:13-cv-02811-CEH-TGW.