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April 22, 2020

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

RE: House Bill 465

Dear Governor Hogan:

We have reviewed and hereby approve House Bill 465, "Election Law - Campaign Material - Disclosure of the Use of Bots" for constitutionality and legal sufficiency. We write to discuss First Amendment issues raised by the bill.

House Bill 465 applies to any candidate, campaign finance entity, person required to register under Election Law Article ("EL"), § 13-306 ("a person [that] makes aggregate independent expenditures of $5,000 or more"), § 13-307 ("a person [that] makes aggregate disbursements of $5,000 or more . . . for electioneering communications"), or § 13-309.2 ("a participating organization [that] makes aggregate political disbursements of more than $6,000"), or an agent of any person previously listed. A person subject to the bill who uses a bot to publish, distribute, or disseminate campaign material online to another person in the State for the purpose of influencing an election must disclose "in a clear and conspicuous manner on the campaign material that the person is using a bot to publish, distribute, or disseminate the campaign material." Violation is punishable by criminal and civil penalties. If charged criminally, the penalty is a fine not exceeding $1,000 or imprisonment not exceeding one year, or both, and ineligibility to hold any public or party office for four years after the date of the offence. In addition, the State Board of Elections ("the Board") may impose a civil penalty of up to $500. EL § 13-604.1(d)(1). This civil penalty is in addition to any other sanction provided by law. EL § 13-604.1(c).

In addition to penalties, House Bill 465 provides that the Board "may seek to remove the bot." It does not, however, give the Board any express power to enforce removal. In fact, the bill expressly provides that the bot disclosure requirement "does not impose a duty on service providers of online platforms, including web hosting and internet service providers." It would

appear that what remains is that the Board can alert the third party platform to the existence of the bot and the third party platform can take, or not take, whatever action it deems desirable.

Because House Bill 465 targets only candidates and other entities engaged in campaign speech, its disclosure requirements are content-related. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015); *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019). Under standard First Amendment doctrine, content-related regulations are subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227. Beginning with *Buckley v. Valeo*, however, the Supreme Court has applied a lesser form of scrutiny termed "exacting scrutiny" to disclosure requirements in the electoral context, upholding them where there is a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest. 424 U.S. 1, 64, 66 (1976); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010). To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*.

The "exacting scrutiny" standard has been applied because disclosure requirements, unlike limitations on campaign contributions and expenditures, "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010). The disclosure requirement in House Bill 465 does not limit contributions or expenditures; it also does not limit speech. It places no limits on content or on methods of communications. A person is free to send any message they like and to use bots to do so if they wish. The sole requirement in House Bill 465 is that persons using bots reveal that they are doing so.

The danger presented by unidentified bots is occurring in fact. According to testimony in the Ways and Means Committee by the Honorable Alice Cain, co-sponsor of the bill, an estimated 15% of all Twitter users (or a total of an estimated 50 million users) are bots. Delegate Cain's testimony further reflected that bots were used to promote or attack general election candidates in both parties. In addition, testimony submitted by the other co-sponsor, the Honorable Samuel I. "Sandy" Rosenberg, showed that a study at the University of Southern California had found that the presence of social media bots can negatively affect democratic political discussions, alter public opinion, and endanger the integrity of our elections.[1] *See* written testimony on House Bill 465, submitted to the Ways and Means Committee, February 11, 2020. Delegate Cain further testified that "[u]sing artificial intelligence technology to appear like a human user, these bots were able to circulate inaccurate information on social media to unknowing followers. The result was the mass belief in these inaccuracies that were circulated by nefarious political actors, often from overseas." Tierra Bradford of Common Cause further testified that bots have legitimate uses, but have become a tool for deception in elections, and are problematic when used in order to confuse or mislead voters on a large scale. She concluded that "[w]hen voters are targeted and deceived it not only creates a distrust in our election system, it takes away the voters' right to make a

[1] The study cited by Delegate Rosenberg is Alessandro Bessi, Emilio Ferrara, University of Southern California, "Social bots distort the 2016 U.S. Presidential election online discussion," First Monday (November 2016).

knowledgeable and well-informed decisions. If candidates are able to mislead voters, it negatively impacts participation in our democracy." As explained in a letter from the Board:

> In its basic form, a bot is a delivery method of information. However, unlike other delivery methods of information, the recipient has no first-hand knowledge that a bot is being used. Furthermore, information disseminated by a bot is spread in a mass and viral way quickly. Bot usage has been linked with the spread of disinformation and false grassroots movements also known as digital astroturfing. A bot obscures the true disseminate point with fictional online identities.

See Informational testimony submitted by the Board to the Ways and Means Committee, February 11, 2020.

Other sources support the testimony submitted to the Ways and Means Committee. It has been said that bots "can create an appearance of false consensus, make a candidate or idea seem more popular than the reality, and even hijack attempts at genuine dialogue and community building." Madeline Lamo, *Regulating Bot Speech*, 66 UCLA Law Review 988, 990 (2019). This article also noted that there is evidence that bots created in Russia played a significant role in spreading disinformation during the 2016 presidential election. *Id*. The authors conclude that while "[t]he full effect of this type of bot use has not yet been quantified, it seems clear that political bots may be used to skew discourse, to make certain ideas and individuals appear more popular than they would be otherwise, and to stir up dissent and discord." *Id*. at 998

There can be no doubt that the protection of the integrity of elections is an important state interest. *The Washington Post, Inc. v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019). "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) (footnote omitted). Information concerning whether a communication is a bot rather than a human being, could "reinforce democratic decisionmaking by ensuring that voters have access to information about the speakers competing for their attention and attempting to win their support." *National Association for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1121 (9th Cir. 2019).

Nor can there be much doubt that requiring disclosure about the use of bots is closely related to that interest. As noted by the Board, bots are different than other sources of information because it is not clear that it is a bot rather than a human being. Yet, as the testimony on the bill as well as the news in recent years makes clear, the fact that a message is being delivered by a bot rather than a human being is relevant to a voter's decisions about the credence to give messages when making voting decisions.

House Bill 465 can be distinguished from the Online Electioneering Transparency and Accountability Act ("Accountability Act") found invalid in the *McManus* case. The primary

difference is that in House Bill 465 the disclosure requirement applies to the person making the communication and not to the third party platforms on which the communications appear. In addition, while the Board can "seek to remove the bot," it does not have the power to seek injunctive relief to remove the bot, while the Accountability Act gave the Attorney General the authority to seek an injunction to remove the ad. House Bill 465 also does not require recordkeeping or reporting to the Board itself. The notice need only appear in the message. By not focusing on third party platforms the bill avoids burdens on the press found problematic in *McManus*, 944 F.3d 516-520, and also avoids any possible violation of 47 U.S.C. § 230(c)(1), which prohibits treating a provider of interactive computer services as the publisher or speaker of information provided by another information content provider.

It is true that House Bill 465, like the Accountability Act, compels speech. That is the nature of a disclosure requirement. The Accountability Act, however, required third party online platforms to keep records of and disclose certain information about ad purchasers and to post that information on their web sites within 48 hours of the purchase of the ad and keep that information for disclosure to the Board. In contrast, House Bill 465 requires only the disclosure of a single truthful fact that will fit in a single sentence by the person engaged in campaign-related speech, and it does not dictate any specific wording or format for the disclosure.[2]

Not only is House Bill 465 addressed to a clearly important State interest, there is a substantial relationship between the requirement and the problem the bill seeks to address, which is the danger to the State's electoral system arising from bots when used maliciously to spread false and misleading information far faster and more widely than individuals could do. While the bill does not stop this use of bots, it alerts recipients of a message that its source is a bot, allowing them to use that information when weighing the value of the information it contains. This type of direct link was found lacking in *McManus* because it was aimed at paid advertising which was "rarely, if ever" used by the foreign nationals who were the target of the Accountability Act. *Id*. at 521. And to the extent that it did, it reached ads that did not support or oppose political candidates. *Id*.

[2]These facts differentiate this situation from that in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), where the law required that a certain notice be given in the exact language dictated by the law, and that it be in a larger print, or different font and color to make it stand out from the remainder of the communication. *Id*. at 2370. House Bill 465 can also be differentiated from the disclosure required in *Becerra* because the information required is not in conflict with the message in which it must be included. *See also* Madeline Lamo, *Regulating Bot Speech*, 66 UCLA Law Review 988, 1009 (2019) (noting that compelling disclosure of the use of bots may be constitutionally justified in the electoral context).

For the foregoing reasons, it is our view that if challenged House Bill 465 would most likely be upheld under the exacting scrutiny test.

It is also our view that House Bill 465 is not unconstitutionally vague. Generally, the federal and State constitutions require that a statute be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Galloway v. State*, 365 Md. 599, 616 (2001). This test involves two questions: whether the statute gives "fair notice" to "persons of ordinary intelligence and experience" of what is prohibited, so that they may govern their behavior accordingly," and whether the statute gives "legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws." *McFarlin v. State*, 409 Md. 391, 410-411 (2009). In the First Amendment context, a defendant can challenge a statute that may criminalize conduct that the First Amendment protects even if the statute is not vague when applied to the actions of that person. *McCree v. State*, 441 Md. 4, 19 n.4 (2014).

As commonly understood, a "bot" is:

> a software application that is programmed to do certain tasks. Bots are automated, which means they run according to their instructions without a human user needing to start them up. Bots often imitate or replace a human user's behavior. Typically they do repetitive tasks, and they can do them much faster than human users could.[3]

House Bill 465 defines the term "bot" as "an automated online account where all or substantially all of the actions or posts of that account are not the result of a person." This definition reflects the generally understood meaning of the term, but limits it to "accounts," reflecting an intention to limit its coverage to fake accounts on platforms such as Twitter and Facebook, where the bot is being presented as a human, as is shown both by the reference to an "automated online account," and the limitation to those with actions that are "not the result of a person." While ultimately everything that is on the Internet is the result of some action by a human, even if the human just programmed and launched the program, the legislative history reflects the more obvious meaning, which is to reach bots that are programed to act like a human in the context of an automated online account.

Discussions in the hearing before the Ways and Means Committee make clear that the bill is intended to reach accounts on Twitter and other social media platforms such as Instagram, Facebook, and Snapchat where the account is not operated by an actual human but by a program driven by artificial intelligence. Specifically, Delegate Cain explained that "[s]ocial media 'bot' technology lets users use artificial intelligence technology to program unmanned accounts to

[3] Cloudflare, *What Is a Bot?|Bot Definition*, https://www.cloudflare.com/learning/bots/what-is-a-bot/; *see also* Wikipedia, Internet Bot, https://en.wikipedia.org/wiki/Internet_bot.

interact with real ones in online conversation."[4] Thus, it is our view that the bill is not unconstitutionally vague, but applies in cases where the operation of the account once launched is substantially a result of its programming rather than continuing to be operated by a human being.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber

[4] *See* written testimony before the Ways and Means Committee. In addition, during the Senate floor debate, the floor leader gave as an example of a problem with a bot an event in Great Britain in which someone "absconded with or created a Tinder account and sent 30 or 40 thousand messages to voters . . . and made a difference in the outcome of the election, a very close election." During the exchange, the floor leader said, "[i]f it were trying to be representative. . . George Clooney is endorsing Senator Jones. . . and sending 20,000 emails, that would be a bot unless George Clooney were doing that." The response by the Senator from District 5 was, "[g]ot it; that would get my attention if George Clooney were." Then the floor leader responded, "[e]xactly, especially if it was for your opponent." *See* Senate Proceedings 52, March 17, 2020, starting at 1:25:55.