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April 15, 2019

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

RE: House Bill 181 and Senate Bill 103, "Criminal Law - Electronic Harassment and Bullying (Grace's Law 2.0)"

Dear Governor Hogan:

We have reviewed House Bill 181 and Senate Bill 103, "Criminal Law - Electronic Harassment and Bullying (Grace's Law 2.0)" for constitutionality and legal sufficiency. While we approve the bills, we write to discuss two severable portions that we believe raise issues under the First Amendment of the United States Constitution.

The first of these problems arises from the change in the definition of "electronic communication" found at page 2, lines 11-17 of the House Bill and page 2, lines 18-24 of the Senate Bill. While the current definition is limited to communications that are sent to and received by the person at whom the communication is aimed, the new definition includes communications that involve e-mail, instant messaging, Internet websites, social media applications, network calls, facsimile machines and other Internet-based communication tools. Thus, it reaches communications that are not necessarily sent to the person involved, and may not ever be seen by them.

The expanded definition is not problematic with respect to the new offenses that require either a course of conduct or malice, as well as intent to intimidate or harass the minor and cause physical injury or serious emotional distress to the minor, and the effect of intimidating or harassing the minor and causing physical or serious emotional distress to the minor. It is our view that given the State interest in preventing actual harm to minors, the elements of these new offenses are such that they have no legitimate purpose other than to harass and intimidate, which are types of conduct that can be prohibited by law. *See United States v. Gonzalez*, 905 F.3d 165, 193 (3d Cir. 2018) (citing *Giboney v. Empire*

Storage and Ice, 336 U.S. 490, 501 (1949)). The new definition does not apply to existing Criminal Law Article ("CR"), § 3-805(b)(2), which already applies to any "interactive computer service." Even if it did, the new definition does not raise a constitutional problem because that section only applies to true threats, which are not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003)

While CR, § 3-805(b)(1) requires malice and a course of conduct, it nevertheless lacks other elements necessary to avoid application to protected speech. A person can violate the provision by taking actions to annoy another person, and although the provision requires that the action continue after a reasonable warning or request to stop, there are many instances in which continuing to speak after a person asks the speaker not to do so are fully protected by the First Amendment. These problems are mitigated in current law because the provision is limited by the requirement of direct communication with the person who is the subject of the speech, and who is under the terms of the statute an unwilling listener. But with the broader definition, the prohibition can reach a communication on a website or social media platform that is not sent to the subject of the speech. In that context, intending to annoy a person with speech and continuing to say things that the person does not like, is protected by the First Amendment. Thus, application of the expanded definition raises substantial First Amendment issues.

It is also my view that, to the extent that language in the bills can reach a "single significant act," page 6, 11-29 of House Bill 181 and page 6, line 17 to page 7, line 7 of Senate Bill 103, that language raises substantial First Amendment issues. New § 3-805(b)(4) would provide:

> A PERSON MAY NOT MALICIOUSLY ENGAGE IN A SINGLE SIGNIFICANT ACT OR COURSE OF CONDUCT USING AN ELECTRONIC COMMUNICATION IF:
>
> (I) THE PERSON'S CONDUCT, WHEN CONSIDERED IN ITS ENTIRETY, HAS THE EFFECT OF:
>
> 1. INTIMIDATING OR HARASSING A MINOR; AND
>
> 2. CAUSING PHYSICAL INJURY OR SERIOUS EMOTIONAL DISTRESS TO A MINOR;
>
> (II) THE PERSON INTENDS TO:

1. INTIMIDATE OR HARASS THE MINOR; AND

2. CAUSE PHYSICAL INJURY OR SERIOUS EMOTIONAL DISTRESS TO THE MINOR; AND

(III) IN THE CASE OF A SINGLE SIGNIFICANT ACT, THE COMMUNICATION:

1. IS MADE AFTER RECEIVING A REASONABLE WARNING OR REQUEST TO STOP;

2. IS SENT WITH A REASONABLE EXPECTATION THAT THE RECIPIENT WOULD SHARE THE COMMUNICATION WITH A THIRD PARTY;

3. SHOCKS THE CONSCIENCE.

To the extent the foregoing provision relates to a course of conduct, it is the same as CR § 3-805(b)(3), except that it would permit consideration of non-communicative acts as part of the course of conduct.

This section also applies, however, to a "single significant act" with no course of conduct. A single significant act of electronic communication can be a violation of this provision under one of three possible scenarios. The first possibility is that the one significant act occurs after the person receives a reasonable warning or request to stop. Because this provision specifically deals with a single act, however, an advance request or warning seems unlikely. Nor is it clear that a warning can take a single communicative act out of the protection of the First Amendment.

The second possibility is that the single communicative act is sent with a reasonable expectation that the recipient would share the communication with a third party. Under the new expanded definition of electronic communication, "the recipient" could be thousands of people. Moreover, arguably it is not possible to send an email to a single person without a reasonable expectation that the recipient would share it with a third party. Thus, this requirement for a "single significant act" would be met in virtually any case.

Finally, a single significant act would be found if it "shocks the conscience." Speech that "shocks the conscience" is not currently recognized as outside the protection of the First Amendment. We have found no case addressing the use of "shocks the conscience"

as a First Amendment standard, but it is well-established that the First Amendment protects speech that is "outrageous." *United States v. Stevens*, 559 U.S. 460, 470 (2010) (depictions of animal torture); *Boos v. Barry*, 485 U.S. 312, 322, (1988) (signs critical of foreign governments); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (caricature of respondent and his mother having sex in an outhouse). In the *Falwell* case, the Court said:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. A reviewing court may make the same objection with respect to determining whether speech may be criminally punished based on whether it is found to "shock the conscience."

Most importantly, the purpose served by including the "course of conduct" requirement in the federal law is to tether all "proscribed acts ... to the underlying criminal conduct and not to speech." *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (assessing 18 U.S.C. § 2261A); *United States v. Ho Ka Yung*, 2018 WL 619585 (D. Del. January 30, 2018) (unreported). In the absence of a course of conduct requirement, the statute simply targets speech, in which case, a court could find that it reaches only speech that is not protected by the First Amendment such as true threats, which are not protected because they "inflict great harm and have little if any social value." *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (citing *Virginia v. Black*, 538 U.S. 343, 359-60 (2004)). True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). New § 3-805(b)(4) reaches a single significant act that is both intended to and does cause physical harm to the minor, but does not specifically reach threats to commit violence. Thus, it cannot be said to address true threats.

The Supreme Court has held that speech "integral to criminal conduct" is unprotected by the First Amendment. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Some challenges to the application of harassment statutes have been successfully defended under this exception. In *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014), the court held that any expressive aspects of the defendant's speech, which consisted of designing a false Facebook page and sending emails to the victim's coworkers with nude pictures of the victim, were integral to the criminal conduct of intentionally harassing,

intimidating or causing substantial emotional distress to the victim. *Id.* at 947. In *United States v. Sayer*, 748 F.3d 425, 433-434 (1st Cir. 2014), where the defendant posted an online ad on Craigslist, created fake Facebook and MySpace accounts, and posted explicit photographs of the victim on pornography websites, the court found that to the extent his course of conduct involved speech, it served only to implement his criminal purpose of harassing her. In *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012), which involved the posting of sexually explicit photographs and text messages with the victim on the Internet, the court found that the communications were integral to criminal conduct because they constituted the means of carrying out his extortionate threats. And in *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), which involved a large number of calls and emails that continued after requests to stop, the court found all communications were an integral part of the defendant's common scheme to harass and threaten the victim. None of these cases, however, have involved a single communication.

While the portion of new Criminal Law Article, § 3-805(b)(4) that reaches single significant acts and the application of the new definition of electronic communication raises problems if it is applied to existing Criminal Law Article, § 3-805(b)(1), it is our view that the problematic applications are severable from the remainder of the bill. Section 2 of the two bills expressly provide that the provisions of the bills are severable. As a result, we do not recommend veto of the bills.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber