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May 20, 2021

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

RE: House Bill 156/Senate Bill 283, "Student and Military Voter Empowerment Act"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 156 and Senate Bill 283, identical bills entitled "Student and Military Voter Empowerment Act," which contain provisions designed to increase voting among military personnel and students at institutions of higher education. We note, however, it is possible that if challenged, a court could find certain applications of the provisions directed at voting by students violate the First Amendment. Nevertheless, it is our view that the bills are not facially unconstitutional.

The bills contain a number of provisions designed to provide information to assist students in voting in the state where they are residents, whether that is in Maryland or elsewhere. To this end, the bills require the State Board of Elections to maintain a page on its website that gives information on how to register to vote in Maryland and includes links with respect to voting by absentee ballot in other states. The bills also require public institutions of higher education to develop a student voting plan that includes wide dissemination of information about voter registration and voting opportunities to all students. Finally, the bills require public institutions of higher education and private nonprofit institutions of higher education that receive operating or capital funding from the State to provide a link to the online voting registration system on the home page of the online portal used by students to register for course work. This link must be prominently

placed on the home page, and if there are fewer than 15 clicks on the link in a calendar year the link must be moved to a more conspicuous location.

The public institutions of higher education are required to report annually to the Maryland Higher Education Commission (“MHEC”) on the number of clicks on the link and, if there were fewer than 15 clicks, what actions they have taken to encourage students to use the link. MHEC is required to compile and summarize this information and present it to certain legislative committees. The private institutions of higher education who are subject to the link requirement and who are members of the Maryland Independent College and University Association (“MICUA”) instead report information to MICUA, which is required to compile and summarize the information and submit it to the same legislative committees.

The requirements that private institutions of higher education put specified information on their website, report to MICUA about the results, and that MICUA process that information and provide it to the General Assembly raise issues about compelled speech under the First Amendment. It is well-established that the right to free speech under the First Amendment includes the right not to speak. *Wooley v. Maynard*, 430 U.S. 705, 714-16 (1977) (holding that state may not require display of state motto on license plates); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (stating school district may not require students to salute flag). To bring a compelled speech claim, however, a plaintiff must object to a message conveyed by the speech that they are required to utter. *Cressman v. Thompson*, 798 F.3d 938, 961 (10th Cir. 2015).

It is unlikely that any potential plaintiff will object to the requirements of the bills. MICUA submitted testimony in favor of the legislation, as did representatives of nonprofit institutions of higher education, including Johns Hopkins and Loyola. With the representative of all of the covered private institutions of higher education, as well as some of the individual institutions, in agreement with the requirements, the bills cannot be said to be facially invalid. Nor is it clear that they could be found to be invalid as applied in individual cases. The required speech is not in a commercial context and the law does not regulate professional conduct, with the result that application of the requirement would be subject to strict scrutiny. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2374 (2018). Strict scrutiny requires the government to prove that the action is “narrowly tailored” to serve a “compelling state interest.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The government has compelling interests in protecting voters from confusion or undue influence, preserving the integrity of the election process, and ensuring that an individual’s right to vote is not undermined. *Minnesota Voters Alliance v. City of Saint Paul*, 442 F. Supp. 3d 1109, 1118 (D. Minn. 2020)(citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992)). In *Minnesota Voters Alliance*, the court recognized these interests as

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sufficient to meet the first part of the strict scrutiny test for a law requiring landlords to provide their new tenants with voter registration information. The court found, however, that the provision was underinclusive, because it applied only to new tenants and not those who were already there, which “raise[d] doubt as to whether Defendants’ ordinances are appropriately tailored to advance the compelling interest of educating and increasing voter participation by all renters.” *Id.* 1119-1120. The court also stated that the government had not adequately supported its conclusion that notification by the landlord was “a singularly effective way of communicating voter registration information to renters,” and had not explored less burdensome methods such as “delivering brochures to apartment buildings or other locations, conducting voter-registration drives at community events, mailing voter-registration information directly to tenants, or enlisting willing messengers — including willing landlords — to voluntarily convey the information.”

The requirement in House Bill 156 and Senate Bill 283, on the other hand, reaches all students by placing the link to the information in the one single place where every student is likely to look. In addition, unlike the law challenged in *Minnesota Voters Alliance*, which imposed a fine for failure to provide the required information, the bills do not provide a penalty, and thus effectively make compliance discretionary. Therefore, it is our view that the bills could meet the standard of strict scrutiny even if challenged as applied to certain institutions of higher education. Thus, the bills are constitutional and legally sufficient.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is written in a cursive style and is contained within a thin black rectangular border.

Brian E. Frosh
Attorney General

BEF/KMR/kd

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