CANDACE MCLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel

ANTHONY G. BROWN
Attorney General

SANDRA BENSON BRANTLEY
Counsel to the General Assembly

DAVID W. STAMPER
Deputy Counsel

JEREMY M. MCCOY
Assistant Attorney General

SHAUNEE L. HARRISON
Assistant Attorney General

NATALIE R. BILBROUGH
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 6, 2024

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 603 and Senate Bill 571, "Consumer Protection – Online Products and Services – Data of Children (Maryland Kids Code)"

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 603 and Senate Bill 571, which are identical bills entitled "Consumer Protection – Online Products and Services – Data of Children (Maryland Kids Code)," and which create the Maryland Age–Appropriate Design Code Act ("the Maryland Act"). Although we conclude that the bills are not clearly unconstitutional, we write to discuss potential constitutional issues with the Maryland Act.[1]

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

The Maryland Act creates certain privacy-related protections for children engaging with online products. In doing so, the General Assembly intends that "all covered entities that operate in the State" process children's data "in a manner consistent with the best interests of children." Proposed Commercial Law Article ("CL"), § 14-4603(3). Accordingly, the Maryland Act imposes certain requirements and prohibitions on the designs and data management practices of a covered entity's[2] online products that are "reasonably likely to be accessed by children." CL §§ 14-4604 – 14-4606. Violations of the Act constitute unfair, abusive, or deceptive trade practices under the State's Consumer Protection Act and are subject to civil enforcement by the State, as well as civil penalties. CL § 14-4608.

Based on our review, there is some risk that if the legislation is challenged, a reviewing court will construe some of the Maryland Act's provisions, described below, to regulate speech or other expressive conduct, and as such, subject them to heightened scrutiny under the First Amendment and find those provisions unconstitutional. While "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell v. IMS Health Inc*., 564 U.S. 552, 567 (2011), courts examine whether an economic regulation has a "significant expressive element," and apply heightened First Amendment scrutiny "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Indeed, the United States District Court for the Northern District of California recently enjoined California from enforcing a similar, though not identical law, the California Age-Appropriate Design Code Act ("the California Act"), on the basis that the plaintiff would likely prevail in its First Amendment claim that the law regulated protected speech and failed to pass intermediate, commercial speech scrutiny. *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551, at *4 (N.D. Cal. Sept. 18, 2023).[3] Notably, however, as discussed further below, there are material differences in the Maryland Act and the California Act, and any court examining the Maryland Act would analyze the record for House Bill 603/Senate Bill 571, not the

[2] A "covered entity" is limited by definition to for-profit entities that do business in the State, have "annual gross revenues in excess of $25,000,000," "[a]nnually buy[], receive[], sell[], or share[] the personal data of 50,000 or more consumers, households, or devices … for the covered entity's commercial purposes," or "[d]erive[] at least 50% of [their] annual revenues from the sale of consumers' personal data." CL § 14-4601(h).

[3] The plaintiff in the *Bonta* case raised additional claims that were not reached by the court, namely First Amendment vagueness and overbreadth, Commerce Clause, and federal preemption based on Section 230 of the Communications Decency Act and the federal Children's Online Privacy Protection Act of 1998 ("COPPA"). Although it is possible that similar issues could be raised in as applied challenges depending on how the Maryland Act is applied in certain instances, based on the current state of the law, we do not think that the Maryland Act is clearly unconstitutional or clearly preempted under any of those additional grounds.

California Act. Yet, there is a risk that a court could adopt the same reasoning of the California federal court and enjoin some or all of the Maryland Act.

The Maryland Act requires covered entities to prepare a "data protection impact assessment" ("DPIA") for any online product "reasonably likely to be accessed by children." CL § 14-4604(a). A DPIA must identify an online product's purpose and how it uses children's data, as well as "determine whether the online product is designed in a manner consistent with the best interests of children reasonably likely to access the online product." CL § 14-4604(b)(3). In doing this assessment, the Maryland Act directs the covered entity to consider, in part, whether the "data management or processing practices of the online product could lead to children experiencing or being targeted by contacts" or "participat[ing] in or be[ing] subject to conduct" that "would result in" reasonably foreseeable physical, financial, psychological, or emotional harm, prohibited discrimination, or a "highly offensive intrusion on children's reasonable expectation of privacy." CL § 14-4604(b)(3). A DPIA must also describe "steps that the covered entity has taken and will take to comply with the duty to act in a manner consistent with the best interests of children." CL § 14-4604(b)(4). On request, an entity must provide a completed DPIA to the Division of Consumer Protection of the Office of the Attorney General. CL § 14-607(b).

The Maryland Act also prohibits covered entities offering online products reasonably likely to be accessed by children from "process[ing]" — which is defined in CL § 14-4601(p) to include "collecting, using, storing, disclosing, analyzing, deleting, or modifying" — children's personal data "in a way that is inconsistent with" children's best interests or is unnecessary to provide the product with which the child is knowingly engaged, or for "any reason other than the reasons for which the data was collected." CL § 14-4606(a)(1), (3), (4). Covered entities are also prohibited from "process[ing] any precise geolocation data of a child by default" or "process[ing] any personal data for the purpose of estimating the age of a child" unless it is "necessary … to provide the online product." CL § 14-4606(a)(5), (8).

There is a reasonable argument these restrictions regulate conduct rather than speech. For example, the Maryland Act's DPIA mandate arguably requires only an assessment of potential harms to children because of a covered entity's product design and data management. Nonetheless, it is possible that a court may consider the DPIA provisions to regulate, chill, or even compel speech, and thus fall subject to heightened scrutiny under the First Amendment. In *NetChoice, LLC v. Bonta*, the court concluded that because the California Act's similar DPIA requirement "facially requires a business to express its ideas and analysis about likely harm," the plaintiff was "likely to succeed in its argument that the DPIA provisions … regulate the distribution of speech and therefore trigger First Amendment scrutiny." *NetChoice, LLC v. Bonta*, 2023 WL 6135551, at *8.

Similarly, we cannot dismiss the possibility that to the extent the Maryland Act's prohibitions impact a covered entity's collection, use, creation, or disclosure of information or burden only certain types of information or speech, for example, speech that may be considered harmful to children, a court may consider the provisions to regulate protected speech. *See Sorrell*, 564 U.S. at 570 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."). Again, in *NetChoice LLC v. Bonta*, the court rejected California's argument that the California Act "merely regulates business practices regarding the collection and use of children's data, so that its restrictions are only of nonexpressive conduct that is not entitled to First Amendment protection." 2023 WL 6135551, at *6. Instead, the court found that because the California Act "restricts the 'availability and use' of information by some speakers but not others, and for some purposes but not others," it was a "regulation of protected expression." *Id*. at *7 (quoting *Sorrell*, 564 U.S. at 570-71).

Even assuming a court would conclude the Maryland Act regulates protected speech, it is not clear what level of scrutiny a court would apply. In general, content- and speaker-based speech restrictions are subject to strict scrutiny and must advance a compelling state interest by narrowly tailored means, whereas content-neutral or commercial speech, is subject to a lesser intermediate level of scrutiny. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *Eanes v. State*, 318 Md. 436, 447 (1990). For regulations of non-misleading or lawful commercial speech, the State must show that "the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572.

In *Bonta*, the court determined that, although the plaintiff had not met its burden to demonstrate that strict scrutiny must be applied, it need not decide the issue since the California Act's DPIA mandate and data processing prohibitions likely would not pass even intermediate scrutiny. 2023 WL 6135551, at *10. The court explained that "the compelling and laudable goal of protecting children does not permit the government to shield children from harmful content by enacting greatly overinclusive or underinclusive legislation," and found that California "provide[d] no evidence of a harm to children's well-being from the use of personal information for multiple purposes." *Id*. at *16-*17. Despite seeking to prevent children from exposure to "harmful unsolicited content," the court concluded that the California Act would also "restrict neutral or beneficial content, rendering the restriction [on collecting, selling, sharing, and retaining children's data] poorly tailored to the State's goal of protecting children's well-being." *Id*. at *16. "Because the State has not established a real harm that the provision [prohibiting unauthorized use of children's personal information] materially alleviates, [the plaintiff] will likely succeed in showing that the provision fails commercial speech scrutiny." *Id*. at *17.

Based on our review of applicable case law and the so-far successful constitutional challenge to similar provisions in the California Act, we cannot rule out that a reviewing court would find the Maryland Act's DPIA requirement and prohibitions on data processing for certain purposes or in certain ways violate the First Amendment. Of course, the possibility of a successful First Amendment challenge necessarily depends on the type of challenge and the factual record, including evidence of Maryland's asserted interests and the linkage showing how those interests are served by the means adopted in the Act (which differ in part from California's). And it is possible a court reviewing the Maryland Act would not make the same findings as the California federal court, especially since Maryland's Act does not contain some of the provisions of the California Act that the court found to restrict speech, such as a provision requiring covered entities to enforce privacy policies or a provision requiring an entity to assess whether an online product's design would expose children to "harmful or potentially harmful, content."

In addition, efforts by states to protect children from harmful online products and applications is an emerging area and judicial review of the regulatory landscape is still developing. Thus, the legal validity of the Maryland Act no doubt will be impacted by forthcoming legal decisions. California has appealed the District Court's decision in *NetChoice, LLC v. Bonta* to the United States Court of Appeals for the Ninth Circuit. We expect the Ninth Circuit's forthcoming decision in that case, as well as decisions in other cases pending before the United States Supreme Court involving First Amendment challenges to other states' laws regulating online companies,[4] to provide additional guidance in this evolving area of law, including the extent of First Amendment protection, if any, due to the design and data management practices of companies providing online products, and in what circumstances certain personal consumer data is considered protected speech. Moreover, if a court were to find any of the Maryland Act's provisions facially unconstitutional, that provision(s) could be severable from the rest of the bill.[5]

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[4] *E.g.*, *Moody v. NetChoice, LLC*, No. 22-277; *NetChoice, LLC v. Paxton*, No. 22-555. In those cases, the Supreme Court is expected to address, among other things, the extent to which states can require social media platforms to disclose information about their content moderation activities consistent with the First Amendment. It is possible that the Court will determine that states can require these platforms to disclose purely factual and uncontroversial information about their products. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Nat'l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.").

[5] *See* General Provisions Article, § 1-210 (a finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining provisions of a statute unless those remaining provisions are incomplete and incapable of being executed consistent with legislative intent).

Accordingly, in the absence of binding case law to the contrary, we conclude that House Bill 603 and Senate Bill 571 are not clearly unconstitutional.

Sincerely,

Anthony G. Brown

AGB/NRB/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber