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April 21, 2025

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

RE: Senate Bill 360 — “Revenge Porn – Definition of Visual Representation and Civil Action”

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 360, entitled “Revenge Porn – Definition of Visual Representation and Civil Action.” Although it is our view that Senate Bill 360 is not clearly unconstitutional, we write to discuss a potential constitutional issue with the provision that authorizes a certain civil action.¹ The General Assembly may wish to consider clarifying the scope of that provision in a future legislative session.

If enacted, Senate Bill 360 would add a provision to § 3-809 of the Criminal Law Article (“CR”), providing “a person whose visual representation was distributed in violation of this section” with a civil cause of action for defamation per se or invasion of privacy “against *any* person who distributed the visual representation.” CR § 3-809(f)(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).

(emphasis added). By attaching potential civil liability to the distribution of visual representations, which can be expressive content, the bill implicates speech. The language of the civil action provision appears to authorize a civil action against “any” distributor of a visual representation — not just a person who violated the section or who was found criminally liable for such a distribution, and regardless of the distributor’s purpose or intent or whether consent was given. Furthermore, a defamation per se cause of action does not require proof of harm, yet certain distributions of visual representations might not involve any harm or intent to cause harm. Accordingly, it is our view that there is a minor risk that a court might find that the provision is overbroad and violates the free speech protections under the First Amendment of the United States Constitution and Article 40 of the Maryland Declaration of Rights.²

To determine whether a law is facially unconstitutional, a court would consider whether “a substantial number of [the law’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 615 (2021). Some distributions of “visual representations” could constitute protected speech, for example, distributing an image in connection with news reporting on a matter of public interest; however, it is not evident that such potentially unconstitutional applications of the civil action provision would substantially outnumber valid applications of the provision, such as criminal distributions of visual representations that violate CR § 3-809(c) or distributions that would be defamatory under the traditional definition. In addition, CR § 3-809(b) already contains carve-outs for certain actors and situations that have the potential to involve protected speech, thus narrowing the reach of the civil action provision. Regardless, if a court were to find the civil action provision facially unconstitutional, it is our view that it would be severable from the rest of the bill, such that a finding of unconstitutionality would not affect the bill’s other provisions.

² Though this does not render the provision facially unconstitutional, there is a more significant risk that the civil action provision would be found unconstitutional as applied to specific factual scenarios, especially where matters of core protected speech on matters of public interest are involved. For example, the United States Supreme Court has held that a public official may not recover under a defamation cause of action relating to his official conduct “unless he proves that the statement was made with ‘actual malice’” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Thus, depending on the context, there may be scenarios where the civil actions provided by Senate Bill 360 could not be brought under the First Amendment.

Thus, it is our view that Senate Bill 360 is not clearly unconstitutional. To the extent that the General Assembly intended that the civil action provided under the bill should apply only to certain distributors who commit a violation of the section, it should consider clarifying the language of the civil action provision in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "AGB Brown". The signature is fluid and cursive, with the first part being a stylized "AGB" and the last part being "Brown".

Anthony G. Brown

AGB/NRB/kd

cc: The Honorable Susan C. Lee
Jeremy Baker
Victoria L. Gruber