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April 23, 2008

The Honorable Martin J. O'Malley  
Governor of Maryland  
State House  
Annapolis, Maryland 21401-1991

*RE: Senate Bill 3 and House Bill 64*

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 3 and House Bill 64, identical bills entitled "Fallen Soldier Privacy Act of 2008." We write to discuss the First Amendment issues raised by the bills.

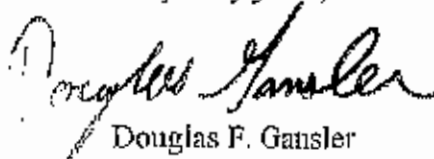
Senate Bill 3 and House Bill 64 provide that a person may not knowingly use the name, portrait, picture or image of a soldier killed in the line of duty within the previous 50 years in advertising for the sale of a product, good, ware, merchandise, or service, purpose of gaining a commercial advantage without obtaining prior consent for use from the soldier or the surviving spouse, the personal representative, or the majority of the heirs of the deceased soldier. Violation is a misdemeanor and carries a penalty of a fine of up to \$2,500 or imprisonment not exceeding one year or both. The bills specify that they do not apply to the use of a soldier's name, portrait, picture, or image in an attempt to portray, describe, or impersonate that soldier in a live performance, single and original work of fine art, play, book, article, film musical work, radio or television programming, or other audio or audiovisual work if the work does not constitute a commercial advertisement for any product, good, ware or merchandise. It also does not apply to the use of a soldier's name, portrait, picture or image for noncommercial purposes, including any news public affairs, or sports broadcast or account, the use of a soldier's name in truthfully identifying the soldier as the author of a particular work or program or as the performer in a particular performance, or any promotional materials, advertisements, or commercial announcements for any of the uses mentioned above. Further exemptions permit display of a photograph of a soldier in a professional photographer's studio, the use of a picture, portrait or image where the soldier is not facially identifiable, and a photograph of a monument or a memorial that is placed on any product, good, ware or merchandise.

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In an earlier letter on this bill, this office advised that, to the extent that the bill was limited to commercial speech, it was facially constitutional. Letter to the Honorable Bryan W. Simonaire dated January 17, 2008. (Attached hereto). Specifically, we found that the bill was reasonably calculated to serve the substantial public interest of protecting the families of fallen soldiers from additional suffering linked to unwanted commercial exploitation of their loved ones and that there was a reasonable fit between the proposed legislation and the aims to be achieved. Since that letter was written, the bill has been amended to further clarify the limitation to commercial speech, and language has been added expressly stating a wide variety of First Amendment protected activities that do not violate the provisions of the bill. These changes strengthen the facial constitutionality of the bill and on that basis we approve it for your signature.

As noted in our earlier letter, however, there are instances where First Amendment rights will be found to outweigh the State's interests and the bill would not be able to be given effect. For example, in *Frazier v. Boomsma*, 2007 WL 2808559 (D. Ariz. 2007), it was held that a law similar to Senate Bill 3 and House Bill 64 could not be applied to advertisements of anti-war t-shirts containing the names of fallen soldiers because the advertising, which also contained statements of the seller's position on the war was "inextricably intertwined with political speech and therefore receives the highest level of constitutional protection," rather than the lower level of protection accorded commercial speech.

Very truly yours,



Douglas F. Gansler  
Attorney General

DFG/KMR/lck

cc: The Honorable Bryan W. Simonaire  
The Honorable Nicholas R. Kipke  
The Honorable Dennis C. Schnepfe  
Joseph Bryce  
Karl Aro