Yeshiva University, Cardozo School of Law
LARC @ Cardozo Law

Amicus Briefs | Faculty

3-31-2023

Brief of Amici Curiae Tax Law Professors

Young Ran (Christine) Kim

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-briefs

 Part of the Taxation-State and Local Commons, and the Tax Law Commons

E-FILED
Gregory Hilton, Clerk,
Supreme Court of Maryland
3/31/2023 1:42 PM

IN THE SUPREME COURT OF MARYLAND

No. 32
September Term, 2022

COMPTROLLER OF MARYLAND

Appellant,

v.

COMCAST OF CALIFORNIA, MARYLAND, PENNSYLVANIA, VIRGINIA, WEST VIRGINIA, LLC, *et al.*,

Appellees.

On Appeal from the Circuit Court for Anne Arundel County, Maryland
Case No. 02-CV-21-000509
(The Honorable Alison L. Asti, Circuit Judge)

BRIEF OF AMICI CURIAE TAX LAW PROFESSORS

Samara M. Spence*
Aman George*
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
sspence@democracyforward.org
ageorge@democracyforward.org

**Pro hac vice to be applied for*

Patrick A. Thronson
Janet, Janet & Suggs, LLC
Executive Centre at Hooks Lane
4 Reservoir Circle, Ste 200
Baltimore, MD 21208
(410) 653-3200
(410) 653-9030 (fax)
pthronson@jjsjustice.com

Counsel for Tax Law Professors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Bologna, Michael. J. & Serrano-Román, *States Float New Taxes on Digital Ads, Social Media, Data Mining*, Bloomberg Tax (Jan. 25, 2023), https://news.bloombergtax.com/daily-tax-report-state/states-float-new-taxes-on-digital-ads-social-media-data-mining 1

Bruell, Alexandra, *Amazon Surpasses 10% of U.S. Digital Ad Market Share*, Wall St. J. (Apr. 6, 2021), https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200 2

Cline, Robert, et al., *Sales Taxation of Business Inputs: Existing Tax Distortions and the Consequences of Extending the Sales Tax to Business Services*, Council on State Tax'n (2005), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/sales-taxation-of-services-and-business-inputs.pdf 16

Comptroller of Md., *List of Tangible Personal Property and Services Subject to Sales and Use Tax* (Jan. 1, 2023), https://www.marylandtaxes.gov/forms/Tax_Publications/Sales_and_Use_Tax-List_of_TPP_and_Services.pdf 15

Duhigg, Charles, *How Companies Learn Your Secrets*, N.Y. Times (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html 11

Fed. Trade Comm'n, A look at What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf 8, 9, 11

Hellerstein, Jerome R. et al., *State Taxation* (3d. ed. 2022) 21, 22

H.R. Rep. 110-372 (2007) 17

H.R. Rep. No. 105-808, pt. 1 (1998) 16

H.R. Rep. No. 107-240 (2001) 16

H.R. Rep. No. 108-234 (2003) 17

How Google Uses Cookies, Google Priv. & Terms, https://policies.google.com/technologies/cookies (last visited Mar. 29, 2023) 12

How to be Successful with Google Ads, Google, https://support.google.com/google-ads/answer/6080949?hl=en&ref_topic=6146239 (last visited Mar. 29, 2023) 10

Keen, Michael & Slemrod, Joel, *Rebellion, Rascals and Revenue* (2021) 21

Kim, Young Ran (Christine), *Digital Services Tax: A Cross-border Variation of the Consumption Tax Debate*, 72 Ala. L. Rev. 131 (2020) 4, 5, 16

Kim, Young Ran (Christine) & Shanske, Darien, State Digital Services Taxes: A Good and Permissible Idea (Despite What You Might Have Heard), 98 Notre Dame L. Rev. 741 (2022*)* 4

Major brands aren't happy they're still appearing next to online hate videos as Google's crisis spreads, Fin. Post (Mar. 24, 2017) 13

Measure Results – About return on investment (ROI), Google Ads Help, https://support.google.com/google-ads/answer/1722066?hl=en&ref_topic=3121936 (last visited Mar. 29, 2023) 12

Members, Internet Ass'n, https://internetassociation.org/our-members/ (last visited Mar. 29, 2023).....2

Members List, Comput. & Commc'ns Indus. Ass'n, https://www.ccianet.org/about/members/ (last visited Mar. 29, 2023).....2

Nystrom, Anna-Greta & Mickelsson, Jacob, *Digital Advertising as Service: Introducing Contextually Embedded Selling*, J. of Servs. Mktg. (June 2019), https://www.researchgate.net/publication/333738138_Digital_advertising_as_service_introducing_contextually_embedded_selling.....11

Perrin, Nicole, *US Digital Ad Spending 2021*, eMarketer (Apr. 14, 2021), https://www.emarketer.com/content/us-digital-ad-spending-2021.....1

Reach a larger or new audience with Google Display Network targeting, Google Ads, https://ads.google.com/intl/en_id/home/resources/reach-larger-new-audiences/ (last visited Mar. 29, 2023) 10

Reike, Aaron & Bogen, Miranda, *Leveling the Platform: Real Transparency for Paid Messages on Facebook*, Upturn (May 9, 2018), https://www.upturn.org/reports/2018/facebook-ads/ 11

Ring, Raymond J., *Consumers' Share and Producers' Share of the General Sales Tax*, 52 Nat'l Tax J. 79 (1999).....16

Robert G. Reeve (@RobertGReeve), Twitter (May 24, 2021, 11:32 PM), https://twitter.com/RobertGReeve/status/1397032784703655938.....10

Shapiro, Carl, & Varian, Hal R., *Information Rules: A Strategic Guide to the Network Economy* (1999) 21

Singh, Spandana, *Special Delivery: How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads*, Open Tech. Inst., https://www.newamerica.org/oti/reports/special-delivery/ (Feb. 18, 2020).....10, 12 13

STATEMENT OF THE CASE

Maryland, like most states, currently taxes "retail sales": the sale of tangible items, some services, and even digital products. Md. Code Ann., Tax-Gen. § 11-101(h)(1) (West 2022). A tax on the sale of goods or services to consumers is known in our field as a "consumption tax." If a brick-and-mortar store in Maryland sells a book or a Marylander buys an e-book, those sales will be taxed. If a company purchases a subscription list or direct mail service, those transactions will also be taxed.

But many digital transactions and portions of transactions currently evade sales taxation in Maryland, even though the closest non-digital analogues are subject to tax. Specifically, digital advertising platforms like Respondents obtain vast quantities of individualized data from and on Marylanders in currently untaxed transactions. The scope and value of these transactions is vast and growing, as they allow advertising platforms the lucrative opportunity to sell advertisers precisely targeted, individualized, and verifiable digital access to Maryland residents.[1]

Maryland is the furthest along of at least ten states that have in recent years sought to address the substantial problem that much of the modern digital economy is untaxed as compared to traditional commerce,[2] through taxing a proxy for the gap in consumption and building on

---

[1] In 2021, the digital advertising market in the United States was over $191 billion. Nicole Perrin, *US Digital Ad Spending 2021,* eMarketer (Apr. 14, 2021), https://www.emarketer.com/content/us-digital-ad-spending-2021.

[2] *See* Michael J. Bologna & Angélica Serrano-Román, *States Float New Taxes on Digital Ads, Social Media, Data Mining*, Bloomberg Tax (Jan. 25, 2023), https://news.bloombergtax.com/daily-tax-report-state/states-float-new-taxes-on-digital-ads-social-media-data-mining (noting ongoing debates in Connecticut, Indiana, Massachusetts, and New York, and additional recent debates in Arkansas, Montana, Texas, Washington, and West Virginia). These states are considering joining a number of tax jurisdictions around the world that have begun to tax digital services, including advertising. *See Action 1 Tax Challenges*

work by economists seeking to reconcile our tax systems with digital advancements.[3] Maryland's new tax applies to digital advertising platforms with over $1 million in annual revenues from digital advertising in Maryland and over $100 million in total global revenues. Md. Code Ann., Tax-Gen. §§ 7.5-102, -103, -201 (West 2021). This includes companies like Respondents—utility-scale internet providers able to collect data transmitted to and from users on their networks, sell that data to other digital advertising platforms, and use that data to sell advertisers access to their users.[4] It also applies to three gargantuan advertising platforms that control over 64% of the U.S. digital advertising market: Google, Facebook, and Amazon.[5]

Amici agree with Petitioners that the lower court's decision should be vacated for procedural errors. Amici here address Respondents' substantive claims under the Internet Tax

---

Arising from Digitalisation, OECD, https://www.oecd.org/tax/beps/beps-actions/action1/ (last visited Mar. 29, 2023).

[3] *See, e.g.*, David R. Agrawal & William F. Fox, *Taxing Goods and Services in a Digital Era*, 71 Nat'l Tax. J. 257, 294 (2021) (noting four "arguments for taxing [digital] advertising and consumer sales," including that "advertising revenues could operate as a surrogate for the implicit value of consumer services," with advertising serving as "a proxy for the marginal social media user's value," that a tax "reduces firm incentives to engage in tax avoidance in their pricing decisions," that a tax "ensures that firms not monetizing the entire service to consumers are subject to some sales tax.").

[4] The digital advertising portion of Respondents' business is distinct from, though enabled by, the fee-for-internet portion of their business, which is not subject to Maryland's digital advertising tax.

[5] Alexandra Bruell, *Amazon Surpasses 10% of U.S. Digital Ad Market Share*, Wall St. J. (Apr. 6, 2021), https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200 (reporting that, in 2020, Amazon's digital ad revenues accounted for 10.3% of the market, Google's accounted for 28.9%, and Facebook's accounted for 25.2%). Notably, at least three of the named plaintiffs in this case boast two or more of these behemoth companies in their limited membership rosters. *See Members List*, Comput. & Commc'ns Indus. Ass'n, https://www.ccianet.org/about/members/ (last visited Mar. 29, 2023) (Amazon, Google, Facebook); *About Us*, NetChoice, https://netchoice.org/about/ (last visited Mar. 29, 2023) (Amazon, Google, Facebook); *Members*, Internet Ass'n, https://internetassociation.org/our-members/ (last visited Mar. 29, 2023) (Amazon, Google, Facebook).

Freedom Act (ITFA) and the dormant Commerce Clause. The Circuit Court of Anne Arundel County's decision from the bench was cursory, but its essence was that Maryland's tax discriminates against electronic commerce in violation of the ITFA and against out-of-state businesses in violation of the dormant Commerce Clause. Both holdings were mistaken.

As for alleged discrimination against electronic commerce, digital advertising has no meaningful parallel in the non-digital world. It is used differently, has a significantly different impact, and relies on a business model and fee structure that is deeply and fundamentally different from traditional advertising, the most comparable non-digital industry. It is thus not "similar" to any non-digital service for purposes of discrimination under the ITFA. Further, rather than seek to confer an advantage upon non-digital advertising at the expense of a digital counterpart, the state's policy simply seeks to impose a consumption tax on currently untaxed transactions, unlike those transactions that take place in non-digital markets.

As for the dormant Commerce Clause, Maryland's tax passes muster because it applies only to revenue derived from digital advertising in Maryland. While the tax *rate* varies depending on a platform's worldwide gross receipts, that is a reasonable tax practice comparable to progressive income taxes that similarly consider out-of-state income and have been held to be constitutional.

QUESTIONS PRESENTED

1. Does the federal ITFA prevent Maryland from taxing digital advertising platforms on receipts derived from selling precisely targeted, individualized, and verifiable access to Maryland residents, using data obtained in transactions with Maryland residents, and using technologies and business models that are meaningfully distinct from traditional advertising?

2. Does the Commerce Clause restrict Maryland from determining a digital advertising platform's appropriate tax rate by considering the platform's global receipts where the rate determination method is comparable to that used in progressive income tax thresholds otherwise held to be constitutional?

Additional questions presented are located in Maryland's brief.

STATEMENT OF FACTS

Amici adopt the Statement of Facts in Maryland's principal brief.

STANDARD OF REVIEW

Amici adopt the Standard of Review in Maryland's principal brief.

ARGUMENT

Amici are tax law professors who collectively have significant experience in state and local taxation, business taxation, and digital taxation.[6] We have studied the emerging digital advertising platforms and the local, federal, and international efforts to adapt their traditional taxation models to reach these new forms of commerce. We have written extensively on these efforts.[7] Of particular relevance here, we have explained at length why Maryland's digital advertising tax ("DAT"), and others like it, should be evaluated as a traditional consumption tax, similar to a tax on retail sales or services.[8] We have also analyzed various objections to such

---

[6] Amici's interests are set out more fully in our motion for leave to file.

[7] *E.g.*, Young Ran (Christine) Kim, *Digital Services Tax: A Cross-border Variation of the Consumption Tax Debate*, 72 Ala. L. Rev. 131 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578348; Young Ran (Christine) Kim & Darien Shanske, *State Digital Services Taxes: A Good and Permissible Idea (Despite What You Might Have Heard)*, 98 Notre Dame L. Rev. 741 (2022*), available at* https://ssrn.com/abstract=4205398; Reuven Avi-Yonah, Young Ran (Christine) Kim, & Karen Sam, *A New Framework for Digital Taxation*, 63 Harv. Int'l L. J. 279 (2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068928.

[8] *See id*.

schemes, including allegations that they violate the ITFA or Commerce Clause, concluding that neither claim is supported.

The ITFA was intended to protect the emerging internet from taxation seeking to protect traditional, local sales of "similar" products, such as a higher tax on a purchase of a book on Amazon versus at a local bookstore. These concerns do not apply to digital advertising platforms, a wholly new industry, much less the use of the receipts derived from digital advertising as a proxy for taxing consumption occurring in Maryland. And Maryland's calculation of taxpayers' rates is a reasonable approximation of the value extracted from Marylanders and is comparable to income tax schemes held to be constitutional.

I. Maryland's DAT Is Not Preempted by the ITFA.

a. "Similarity" for purposes of ITFA preemption requires a substantive analysis.

The ITFA prohibits state taxation in only two respects: taxes on internet access itself, 47 U.S.C. § 151 note, § 1101(a)(1), and "multiple or *discriminatory* taxes on electronic commerce." *Id.* § 1101(a)(2) (emphasis added). A discriminatory tax is defined as "any tax imposed . . . on electronic commerce that is not generally imposed . . . on transactions involving *similar* property, goods, services, or information accomplished through other means." *Id.* § 1105(2)(A)(i) (emphasis added).

In assessing whether a "similar" non-digital comparator exists for purposes of ITFA discrimination claims, courts have gone beyond labels to assess the substance of the industry and activity taxed as compared to its closest analogue. Courts have refused to find that products are sufficiently "similar" where the taxed product or service relies on a different business model and fee structure, is used differently, or has a different impact than the most analogous non-digital product or service. For example, in *Labell v. City of Chicago*, an Illinois Appellate Court

declined to find that the ITFA preempted a tax on streaming entertainment services—platforms such as Netflix or Spotify that "electronically deliver" television shows, movies, videos, music, and games to customers. 147 N.E.3d 732, 736 (Ill. App. Ct. 2019). The court concluded that there were substantive differences in the usage of streaming services that made them not "similar" to purported non-digital analogs like video machines, jukeboxes, and live performances. *Id.* at 743, 747-48. "Streaming services are primarily used privately in the home or on devices owned and maintained by the patron. In contrast, automatic amusement devices are used publicly, outside the home and are owned and maintained by businesses." *Id.* at 746. Those distinctions defeated a finding of discrimination. *Id.* at. 747-48.

Similarly, because online travel platforms (like Priceline) use different business models and fee structures from traditional travel agents, these industries have been treated as not similar under the ITFA, and state laws that account for those differences and result in disparate tax rates have been held not discriminatory. *E.g.*, *Vill. Of Rosemont, Ill. v. Priceline.com, Inc.*, No. 09 C 4438, 2011 WL 4913262, at *9 (N.D. Ill. Oct. 14, 2011); *Mayor & City Council of Balt. v. Priceline.com, Inc.*, No. MJG-08-3319, 2012 WL 3043062, at *7-8 (D. Md. July 24, 2012).

In another example, the ITFA did not bar a state tax on internet research database sales because the research databases did not merely electronically transmit research that was previously transmitted physically; they also used software applications that provided services that physical research databases could not provide, such as "trending" areas of interest, embedded links to related research, research portals customized to individual users, and automated recommendations. *See Gartner, Inc. v. Dep't of Revenue*, 455 P.3d 1179, 1188-89, 1192-93 (Wash. Ct. App. 2020). The ITFA was also found not to bar a change in taxation of a company whose business model shifted from providing live human resource and payroll services

to licensing payroll software. *ADP, LLC v. Ariz. Dep't of Revenue*, 524 P.3d 278, 286-87 (Ariz. Ct. App. 2023). By "almost entirely automat[ing] tasks that were previously done by human employees," the company had "chang[ed] the nature of the transaction" that was being taxed rather than simply creating a similar digital product. *Id.* at 286. And because this change was "entirely attributable to [the] automation of its work, not because of [the product's] internet use," the ITFA's nondiscrimination provisions didn't apply. *Id.* at 287.

While the Supreme Court has not yet interpreted the nondiscrimination provisions of the ITFA, the mode of analysis in the cases above aligns with the significant body of the Court's closely related Commerce Clause jurisprudence analyzing allegedly "discriminatory" state taxation. The Supreme Court has explained that, under the Commerce Clause, "discrimination . . . assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 279, 299 (1997). "[W]hen the allegedly competing entities provide *different* products," courts must consider "whether the companies are indeed similarly situated." *Id*. (emphasis added). Products that are merely superficially comparable are not "similar" for purposes of a discriminatory taxation analysis. *See id.* (state-regulated natural gas utilities were not "similar" to natural gas producers and independent marketers and, therefore, Ohio law giving favorable tax treatment to the former did not violate the dormant Commerce Clause). Only a tax levied on one but not both of two *similar* businesses can cause a *competitive harm*. *Id*.

Consistent with cases applying the ITFA and the Supreme Court's established understanding of discrimination more generally, evaluation of Maryland's tax under the ITFA's nondiscrimination provision must be more nuanced than the Circuit Court's analysis.

b. Digital advertising is used differently, has a significantly different impact, and relies on a business model that is deeply and fundamentally different from non-digital advertising and is thus not "similar" under the ITFA.

Ruling from the bench, the Circuit Court held that digital advertising is similar to traditional advertising and that Maryland's DAT is therefore discriminatory under the ITFA.[9] This conclusion failed to grapple with the deep, substantive differences in how digital advertising platforms operate compared to traditional advertising.

Individual user targeting. A traditional non-digital advertiser can know some high-level things about the target audience. For example, buyers of radio station ads can research the demographics of a station's listeners as a whole. Or an advertiser may learn through a focus group that readers of the print edition of the *Baltimore Sun* are interested in a certain local service. But a non-digital advertiser cannot precisely target *individuals*.

On the other hand, digital advertising platforms like Google or Facebook can precisely target *individuals*. Companies like Respondents—often called "ISPs" or "internet service providers"—operate the same way with respect to digital advertising. ISPs provide the gateways through which Marylanders access the internet, and, in doing so, they collect data on Marylanders through every interaction with the internet, using unblockable software to track users in ways that even companies like Google cannot achieve.[10] Respondents may collect and store every URL a user visits; users' physical location and movements; titles of shows and movies watched, durations watched, and start and stop times; information on automated home

---

[9] Oct. 17, 2022, Hearing Tr. at 76 (Record Extract at E. 1081).

[10] *See* Fed. Trade Comm'n, A Look at What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers 1, 13-14 (Oct. 21, 2021) (FTC ISP Report), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

security activity and events, home lighting types, energy usages, or temperature readings.[11] Companies like Respondents may offer multiple products to users (such as TV, broadband, cellular service, or home automation or security); in addition to the obvious transaction—the sale of the service—they can monetize Marylanders' *use* of these services by collecting and combining data gathered across their products.[12] ISPs readily admit that they "collect additional data from their customers that is not necessary to provide ISP services," such as app usage, and that they keep customer data, such as web browsing information, "for longer than is strictly necessary [to provide ISP services] for advertising purposes."[13] Information held by ISPs may be sold to third-party data brokers to build out extensive individualized advertising profiles for each Marylander to help digital advertisers precisely target users.[14] Marylanders may be identified by such hyperspecific descriptions as "Asian Achievers" "Gospel and Grits," or "tough times," allowing advertisers to target consumers based on race, ethnicity, sexual orientation, religious beliefs, historic marginalization, or sensitive internet habits.[15]

Digital advertising platforms can target individual Marylanders with sophistication and specificity.[16] Information on everything from a user's demographics and friend network to her web history and geolocation relative to other users[17] is collected and fed into an algorithm that

---

[11] *Id.* at 15-17.

[12] *Id.* at 17-18.

[13] *Id.* at 18.

[14] *Id.* at 18-19, 22.

[15] *Id.* at 22.

[16] *See, e.g., How to Be Successful with Google Ads*, Google, https://support.google.com/google-ads/answer/6080949?hl=en&ref_topic=6146239.

[17] Facebook, for example, collects users' location, demographics, interests and hobbies, behavior such as purchases and device usage, and "connections." *Audience ad targeting*, Meta Ads, https://www.facebook.com/business/ads/ad-targeting (last visited Mar. 29, 2023). Google has

allows the platforms to command higher bids from advertisers for more carefully targeted access.[18] A user who searches for a grill may receive ads for grills for months.[19] After visiting family, a user may start receiving ads for a relative's toothpaste.[20] A user who buys unscented soap may suddenly start receiving pregnancy-related ads because platforms infer that "when someone suddenly starts buying lots of scent-free soap and extra-big bags of cotton balls," they may be "getting close to their delivery date."[21] And each piece of data collected about a user can be bought, sold, or aggregated into an individualized profile drawing on *all* of a user's online services and physical devices, amounting to an extraordinarily detailed summary of each user that is used to sell targets to advertisers.[22]

Digital advertisers are not buying access to a billboard or to a corner of a magazine page like traditional advertisers; they are, quite literally, buying access to *you*, from companies who have harvested data from their other business lines to build a precise profile of who *you* are.

---

information on, at least, its users' age, gender, parental status, search history, interests, and affinities. *Reach a larger or new audience with Google Display Network targeting*, Google Ads, https://ads.google.com/intl/en_id/home/resources/reach-larger-new-audiences/ (last visited Mar. 29, 2023).

[18] For an in-depth analysis of how this works, *see* Spandana Singh, *Special Delivery: How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads, Part 3: The Role of Data in the Targeted Advertising Industry*, Open Tech. Inst., https://www.newamerica.org/oti/reports/special-delivery/ (Feb. 18, 2020); *see also*, *e.g.*, *How to be successful with Google Ads*, *supra* note 16 ("Through Google Ads, you can create online ads to reach people *exactly when they're interested in the products and services that you offer*." (emphasis added)).

[19] *See Reach a larger or new audience with Google Display Network targeting*, *supra* note 17.

[20] Robert G. Reeve (@RobertGReeve), Twitter (May 24, 2021, 11:32 PM), https://twitter.com/RobertGReeve/status/1397032784703655938.

[21] Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. Times (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

[22] *See* FTC ISP Report, *supra* note 10, at 18-19.

Individually verifiable advertising. A traditional non-digital advertiser generally cannot know whether an individual saw an ad. People flip past ads in magazines, enter the subway without looking up, or get a snack during television commercials. A person inspired to take action by a traditional ad generally leaves no proof that she walked into the store because of the ad on the radio. Traditional non-digital advertisers generally pay for the mere privilege of ad placement and use proxies to make assumptions about whether ads worked.[23]

By contrast, digital advertising platforms can *individually verify* whether an ad was successful. Platforms place ads where users cannot avoid seeing them, like at the top of a webpage or in line with a user's Facebook feed.[24] And the *very act of displaying an ad* is often both (1) an ad impression for which the advertiser pays and (2) a data collection tool for the advertising platforms, allowing them to verify the basis for payment and further refine future ad placement.[25] They collect detailed information about users—in real time, as the ad is shown—and provide advertisers with verifiable reports about their ad's performance.[26] Platforms take

---

[23] Traditional, non-digital advertising presents consumers as "passive recipients" of advertising messages, where consumers are expected to make a purchase at a later time and a later place. Anna-Greta Nystrom & Jacob Mickelsson, *Digital Advertising as Service: Introducing Contextually Embedded Selling*, J. of Servs. Mktg., 3 (June 2019), https://www.researchgate.net/publication/333738138_Digital_advertising_as_service_introducing_contextually_embedded_selling.

[24] Aaron Rieke & Miranda Bogen, *Leveling the Platform: Real Transparency for Paid Messages on Facebook*, Upturn (May 9, 2018), https://www.upturn.org/reports/2018/facebook-ads/ ("[T]he boundary between ads and other types of posts can be porous. Ads are designed to exist seamlessly among other kinds of posts that users see in their news feeds. . . . And in many cases, it can be infeasible for users to determine when a post was initially propelled by money before going viral.")

[25] *See, e.g.*, *How Google Uses Cookies*, Google Priv. & Terms, https://policies.google.com/technologies/cookies (last visited Mar. 29, 2023) (noting that "Google uses cookies for advertising, including serving and rendering ads, personalizing ads . . . and measuring the effectiveness of ads.")

[26] *See, e.g.*, *Measure Results - About return on investment (ROI)*, Google Ads Help, https://support.google.com/google-ads/answer/1722066?hl=en&ref_topic=3121936 (last visited

note of which user the ad is shown to and how that user interacts with the ad. Platforms can record the fact that a user paused for a fraction of a second at the ad while scrolling through their social media feed.[27] And the ads provide a direct gateway to the product or service being advertised, allowing verification of click-throughs and sales.[28] This allows novel fee structures in which advertisers may pay only for (or pay more for) an ad placement that leads directly to a sales event.[29] These capabilities are not feasible in the non-digital world.

Advertising platform control of ad placement. In traditional, non-digital advertising, the advertiser typically has control over where its ad is placed and the entity displaying or playing the ad typically selects, approves, or places the ads in front of its audience. The print edition of the *New York Times*, for example, can choose to show readers an ad for a local business or can decline to show its readers a misleading or offensive ad.

In the delivery of digital ads, on the other hand, the advertising platform can, and often does, have complete control of which ads to display in front of whom on third-party websites. The *New York Times'*s website, unlike the print edition, can simply choose to "lease" web space to a digital advertising platform, allowing the platform to place any ad in the designated location without review by the *New York Times*, and advertisers themselves may be unaware of where

---

Mar. 29, 2023) (in Google Ads, an advertiser can track "how many clicks lead to conversions" and "how your customers interact with your website").

[27] *Id*.; *see also Bid on viewable impressions using viewable CPM*, Google Ads Help, https://support.google.com/google-ads/answer/3499086 (last visited Mar., 29, 2023).

[28] *See, e.g.*, *Measure Results - About return on investment (ROI)*, *supra* note 26.

[29] *See* Singh, *supra* note 18, Part 4: The Role of Automated Tools in Digital Advertising (advertisers bid on ad placement and can choose to pay on a per-impression or per-click basis).

their ads are placed.[30] For example, a typical third-party website that signs up to allow Google to place ads on its site often hands control over *which* ads to place to Google.[31] The platforms typically choose whether to place an ad based on factors like which advertiser is willing to pay the most for access to a particular user and the likelihood that a user will click on the ad, allowing the platform to get paid a higher rate.[32] The platforms make the choice that is most profitable to themselves. And an assessment that it is profitable to place an ad in front of a particular Maryland user is made possible by data extracted from Marylanders.

In sum, these differences make digital advertising platforms at least as dissimilar from traditional advertising as in other cases where courts found no similarity for purposes of ITFA claims. The difference in how digital advertising platforms are used by advertisers and users is at least as significant as the difference in how online streaming services and physical video devices are used. *See Labell*, 147 N.E.3d at 743, 746-48. The different business models and fee structures are likewise at least as significant as the difference between online travel services and traditional travel agents. *See Rosemont*, 2011 WL 4913262, at *9. And the degree of automation in digital advertising varies from traditional advertising at least as much as online research services differ from the physical transmittal of research. *See Gartner*, 455 P.3d at 1188-89, 1192-93. As with

---

[30] Indeed, this has led to embarrassment when advertisers discovered that their ads were being displayed alongside offensive content. *See Major brands aren't happy they're still appearing next to online hate videos as Google's crisis spreads*, Fin. Post (Mar. 24, 2017), https://financialpost.com/technology/major-brands-arent-happy-theyre-still-appearing-next-to-online-hate-videos-as-googles-crisis-spreads.

[31] *Solutions, Auto Ads*, Google AdSense, https://www.google.com/adsense/start/solutions/auto-ads/ (last visited Mar. 19, 2023) ("Auto ads helps you make money with an easy-to-use, automated platform that makes smart decisions on your behalf.").

[32] *See* Singh, *supra* note 18, Part 4: The Role of Automated Tools in Digital Advertising (advertisers bid on ad placement and can choose to pay on a per-impression or per-click basis).

each of those examples, state taxation of digital advertising is not "similar" to traditional advertising under the ITFA.

c. Discrimination presupposes treating one similar transaction worse than another, but Maryland's DAT merely taxes aspects of commerce that are currently untaxed in ways applicable to non-digital goods and services.

Moreover, the Circuit Court's holding overlooks an essential part of ITFA preemption: it is not enough to find that the tax applies to a digital service or product that is similar to a non-digital comparison. It has to tax the digital product or service *in a discriminatory manner*. 47 U.S.C. § 151 note, § 1101(a)(2). In other words, the ITFA applies only if Maryland's law gives a "preferential advantage" over a similar Maryland industry. *Gen. Motor*, 519 U.S. at 299 (explaining discriminatory taxation in Commerce Clause context).

The Supreme Court addressed a similar issue when considering whether a state tax that applied to railroads "discriminate[d] against a rail carrier" in violation of the Railroad Revitalization and Regulation Reform Act. *Ala. Dep't of Revenue v. CSX Transp*., 575 U.S. 21 (2015). The Court found that, while the taxed entity was similar to an entity not subject to the tax, it did not follow that the tax was discriminatory. *Id*. at 1143-44. The tax "does not discriminate unless it treats railroads differently from other *similarly situated* taxpayers *without sufficient justification*." *Id*. Disparate tax treatment is not discriminatory when the competitor must pay another comparable tax. *Id*.

Most consumption of tangible or digital goods is subject to Maryland's retail sales tax. Md. Code Ann., Tax-Gen. § 11-101(h)(1) (West 2022). Books are subject to the tax and so are e-

books, magazines (including digital magazines), digital video streaming services, sales of subscription lists, and direct mail advertising distributed in-State. [33]

In digital advertising, ad platforms like Respondents exchange digital products or services for user information or simply collect information from Maryland users and then monetize that information. Each side of these transactions could theoretically be subject to a sales tax, but Maryland's retail sales tax does not currently reach these exchanges. That is because, as the Organization for Economic Co-operation and Development (OECD) has explained, currently existing taxes were not designed with this sort of transaction in mind.[34] Maryland's DAT merely modernizes its pre-existing taxation scheme. Taxing revenue from ads targeting Maryland users is a proxy for the value of the transactions occurring in Maryland, like the exchange of Google Maps for consumer data. Accordingly, Maryland's tax does no more than level the playing field by extending a consumption tax to the portion of the transaction that was previously untaxed but could have been taxed.[35]

---

[33] *See* Md. Code, Tax-Gen. § 11-109 (West 2019) (Comptroller delegated power to maintain list of products subject to tax); Comptroller of Md., *List of Tangible Personal Property and Services Subject to Sales and Use Tax* 12 (Jan. 1, 2023), https://www.marylandtaxes.gov/forms/Tax_Publications/Sales_and_Use_Tax-List_of_TPP_and_Services.pdf (subscription lists included as taxable property).

[34] OECD, *supra* note 2.

[35] *See* Young Ran (Christine) Kim, *supra* note 7, at-145, 179-84. Indeed, the size of the tax is quite similar to the effective tax rate for Maryland consumers. While Maryland's formal sales tax is 6%, this tax also applies to up to 40% of "business inputs," resulting in an effective tax rate on final consumption of 10%. See, e.g., Raymond J. Ring, Jr., *Consumers' Share and Producers' Share of the General Sales Tax*, 52 Nat'l Tax J. 79 (1999) (finding 40% of sales tax base consists of business inputs, including in Maryland); *see also* Robert Cline et al., *Sales Taxation of Business Inputs: Existing Tax Distortions and the Consequences of Extending the Sales Tax to Business Services*, Council on State Tax'n, 14 (2005), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/sales-taxation-of-services-and-business-inputs.pdf ("[T]he total tax effective rate,

Allowing state taxes to fill such holes is consistent with the purpose of the ITFA: to ensure that internet retailers compete on equal footing with brick-and-mortar retailers selling similar products. The ITFA was passed in 1998, at a time when the internet was in its infancy. The House Committee on the Judiciary was concerned that states fearing lost tax revenues "as the situs of sales drifts inexorably into cyberspace" might tax sales over the internet less favorably. H.R. Rep. No. 105-808, pt. 1, at 9 (1998). To take a classic example of what the ITFA sought to prevent, one can well imagine how it would have been tempting for states to tax internet purchases of books and shoes more heavily in order to protect their brick-and-mortar sellers. As the Committee noted when extending the ITFA in 2001, "during the first quarter of 2000, online retail sales represented less than 1 percent of overall retail sales." H.R. Rep. No. 107-240, at 2 (2001). In-person retail sales still dwarfed e-commerce in 2003, when the Committee again took up the issue: "despite early warnings that online businesses would drive their 'bricks and mortar' counterparts to extinction, 'nothing approaching these degrees of transformation ha[d] yet occurred.'" H.R. Rep. No. 108-234, at 3 (2003).

As Congress began to consider making the ITFA permanent, the focus remained on ensuring equal footing among online and physical retailers. For example, in 2007, legislators advocating for a permanent extension explained that it would never "be a good idea to allow states to tax a purchase of a book on Amazon.com at a higher rate than they tax the purchase of the same book on Main Street." H.R. Rep. 110-372, at 21 (2007). Even legislators who opposed a permanent extension of the ITFA were focused on retail sales. For example, in 2016, Senator Mike Enzi lamented the challenge to states of "offset[ting] the growing loss of sales tax revenue"

---

including the sales tax on business purchases . . . is 1.72 times the average nominal sales tax rate. This occurs because 43 percent of the sales tax falls on business purchases.").

as "in-store sales were about the same as the year before, but Internet sales grew by about 40 percent." 162 Cong. Rec. S836-02 (Feb. 11, 2016), 2016 WL 544351, at *S842.

Those concerns simply do not apply to a tax derived from digital advertising that complements the traditional retail sales tax. Congress feared discriminatory treatment driven by states' protectionism—a desire to protect in-state brick and mortar companies from online competition. But, as explained above, the digital advertising industry is doing far more than providing online sales of a product (like a billboard) that one might also purchase from a brick-and-mortar establishment. Even Respondents would likely concede that Maryland's purpose in enacting its DAT was *not* to protect any Maryland industry or company from online competition.

In one of their briefs below, Respondents pointed to a 1998 quote from an early sponsor of the ITFA that "any taxation of property, goods, services, or information that is inherently unique to the Internet would be discriminatory, because there is no non-Internet property, goods, services, or information that is similar and that the State generally taxes."[36] Respondents claimed that this means that a tax on any industry unique to the internet would be a violation of the ITFA. However, as the overwhelming weight of legislative history shows, the ITFA was focused on ensuring that internet retailers could compete on an equal footing with traditional retailers. Even more importantly, the statutory language suggests that Congress did not adopt the quoted argument. The text passed by Congress bars only "discriminatory" taxes, defined as taxes imposed on electronic commerce that is not generally imposed on "similar" goods or services. 47

[36] *See* Response in Opposition to Defendant's Motion to Dismiss at 40-41, *Comcast of Cal. Md. Pa. Va. W. Va. v. Comptroller of the Treasury of Md.*, No. C-02-cv-21-000509 (Md. Cir. Ct. Mar. 14, 2022) [hereinafter Pl.'s Mot. To Dismiss Opp'n] (citing 144 Cong. Rec. 15339 (1998) (statement of Rep. Christopher Cox)).

U.S.C. § 151 note, § 1101(a)(2). The ITFA imposes no bar on taxes that apply to electronic commerce when no similar non-electronic good or service exists.

Further, the Supreme Court has consistently held that state tax authority should not be superseded unless that is the statute's clear intent. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275, 281-82 (1972) (Upholding state regulations that had the effect of subjecting businesses to state taxation, noting, "[s]uch regulation is an important function of local governments in our federal scheme . . . unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.") (citation and quotation marks omitted).

Respondents argued below that the presumption against preemption is not applicable here because the ITFA explicitly preempts state taxing power.[37] Such a reading is at odds with federalism norms underlying the presumption. Unsurprisingly, courts have not followed Respondents' interpretation. *See Heublein*, 409 U.S. at 275 (applying presumption in interpreting scope of tax preemption); *see also Disney Enters., Inc. v. Tax Appeals Tribunal of State*, 888 N.E.2d 1029, 1036 (N.Y. 2008) ("[W]e will not, 'absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.'" (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992)); *Gartner*,455 P.3d at 1192 (applying presumption against preemption in ITFA case). Thus, even if similarity were a close call, which it is not, this court should choose the interpretation that displaces less state revenue authority.

---

[37] *Id.* at 35.

II. Maryland's Use of Worldwide Revenue to Determine a Taxpayer's Rate Is a Reasonable Measure for Assessing the Value of the Consumption in Maryland and Is a Common Approach for Progressive Income Taxes.

The Circuit Court also held that Maryland's DAT violates the Commerce Clause because the tax rate is calculated based on worldwide income.

The Commerce Clause requires that state taxes, among other things, be fairly apportioned and not "discriminate against interstate commerce." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Maryland's DAT taxes the gross receipts arising from advertising in Maryland.[38] To determine the tax *rate*, the law considers the overall size of the company. For example, digital advertising platforms with global revenues between $100 million and $1 billion are taxed at 2.5%.[39] Platforms with over $15 billion in global revenues are taxed at 10%.

Respondents argued that by taking into account worldwide revenue, the state violated the dormant commerce clause by taxing extraterritorial values[40] and by discriminating against out-of-state businesses.[41] Both contentions are incorrect. First, on its face, the law taxes only the receipts derived from advertising in Maryland.[42] This is reasonable and satisfies the fair apportionment requirement. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 181-82 (1983) (apportionment will be upheld unless "the income apportioned to [a state] is 'out of all

---

[38] Md. Code Ann., Tax-Gen. § 7.5-102(b)(2) (West 2021). Under the Comptroller's implementing regulations, digital advertising revenues are derived in Maryland "when any portion of those services are accessed through a device located within the State." Md. Code Regs. 03.12.01.02(A) (2021).

[39] Md. Code Ann., Tax-Gen. § 7.5-103 (West 2021).

[40] Pl.'s Mot. To Dismiss Opp'n, *supra* note 36, at 43-44.

[41] Oct. 17, 2022, Hearing Tr. at 76-77 (Record Extract at E 1081-82).

[42] Md. Code Ann., Tax-Gen. § 7.5-102 (West 2021).

appropriate proportion to the business transacted in that State.'" (quoting *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931)).

Nevertheless, Respondents argued, and the court below suggested it agreed, that increasing the tax rate for larger businesses discriminates against out-of-state businesses, which tend to be larger. And they argued that because out-of-state sales may trigger a higher tax, those extraterritorial sales are being taxed. These contentions are incorrect upon closer analysis.

There is a strong non-discriminatory reason for Maryland's scheme. Using global revenues as a basis for determining the tax rate is a reasonable proxy for the value of the data extracted from, and the access to, Marylanders. Greater global revenue is likely indicative of larger "network benefits," meaning that the value of a product or service provided by a platform increases according to the number of others using it.[43] As the Supreme Court has explained, the discrimination analysis under the Commerce Clause considers whether the rate (whether the same or different for in-state and out-of-state entities) is a "relevant proxy for the benefit conferred upon the parties to a sales transaction."[44] Indeed, taxing proxies is so endemic to taxation that one of the recognized pillars of tax wisdom is that "[t]axation is about finding good proxies."[45]

The use of revenues or receipts earned outside the state to determine a taxpayer's rate is common in the area of income taxation. For example, suppose an out-of-state taxpayer earns $10,000 in a state with a progressive income tax, like California. That $10,000 could be part of a

---

[43] *See* Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 13 (1999).

[44] *Okla. Tax Comm'n v. Jefferson Lines Inc.*, 514 U.S. 175, 199 (1995).

[45] Michael Keen & Joel Slemrod, *Rebellion, Rascals and Revenue* 380 (2021).

total income of $20,000 or $20,000,000. In order to apply the correct marginal tax rate to the California income, California needs to first ascertain the taxpayer's total global income.[46] As a leading tax treatise notes, "we cannot fairly and rationally implement the concept that those who earn more should pay taxes at an increasingly higher rate unless we determine how much the individual earns without regard to the particular political entities in which the earnings were accumulated."[47] This practice in the income tax context has been upheld as consistent with the Commerce Clause.[48] Maryland, like California in this example, is using global receipts to determine tax rates not to tax those receipts but to assess the *value* of the receipts in Maryland.

CONCLUSION

Amici respectfully request that the Court reverse the ruling of the Circuit Court for Anne Arundel County and direct the court to dismiss the case.

---

[46] *See* Cal. Rev. & Tax. Code § 17041(b) (Westlaw 2022); see also N.Y. Tax Law § 601(e) (Westlaw 2022).

[47] *See* Jerome R. Hellerstein et al., *State Taxation* ¶ 20.05[1][b] (3d. ed. 2022).

[48] *Id.* ¶ 20.05[3][b][ii] (citing *Container Corp.*, 463 U.S. at 169-171).

Dated: March 31, 2023

Respectfully submitted,

/s/ *Patrick A. Thronson*
Patrick A. Thronson (MD Bar 18906)
Janet, Janet & Suggs, LLC
Executive Centre at Hooks Lane
4 Reservoir Circle, Ste 200
Baltimore, MD 21208
(410) 653-3200
(410) 653-9030 (fax)
pthronson@jjsjustice.com

Samara M. Spence (TN Bar 031484)*
Aman T. George (DC Bar 1028446)*
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 448-9090
sspence@democracyforward.org
ageorge@democracyforward.org

**Pro hac vice to be applied for*

Counsel for Amici Tax Law Professors

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,466 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

/s/ Patrick Thronson
Patrick A. Thronson

RULE 1-322.1 CERTIFICATE

I certify that I have complied with Rule 1-322.1 regarding the exclusion of personal identifier information in court filings.

/s/ Patrick Thronson
Patrick A. Thronson