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 writ of certiorari to the Appellate Court of Maryland
On appeal from the Circuit Court for Anne Arundel County
(Alison L. Asti, Judge)

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE MARYLAND CHAMBER OF COMMERCE, AND THE MARYLAND TECH COUNCIL IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENTS OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. It is a statewide coalition of more than 6,400 members and federated partners working to develop and promote strong public policy that ensures sustained economic health and growth for Maryland businesses, employees, and families. As such, the Maryland Chamber represents the interests of the state's business community before the General Assembly, Executive Branch, and the courts. In fulfilling that duty, the Maryland Chamber regularly files amicus briefs in cases that raise material concerns to Maryland's business community.

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[1] No person other than amici, their members, or their counsel made any monetary or other contribution to the preparation or submission of this brief. Amici have conferred with all parties to this appeal, who consent to the filing of this brief.

The Maryland Tech Council (MTC) is a collaborative community actively engaged in building strong technology and life science industries by supporting the efforts of over 700 members. MTC is the largest technology and life sciences trade association in the state of Maryland, providing value by giving members a forum to learn, share, and connect. MTC brings the region's community together into a single, united organization that empowers its members to achieve their business goals through advocacy, networking, and education. The vision for the Maryland Tech Council is to propel Maryland to become the number one innovation economy for life sciences and technology in the country. The Maryland Tech Council advocates for the interests of the state's technology and life sciences community before the general assembly, executive branch, and the courts, including in amicus briefs in cases that raise material concerns to its members.

INTRODUCTION[2]

Maryland's Digital Advertising Tax Act facially discriminates against digital commerce. It threatens to slow or reverse decades of growth in an increasingly significant industry. It is also a consumption tax, the true cost

[2] We refer to the assessment at issue here as a "tax" because that is how it is denominated by the statute itself, and because it is a tax for purposes of the ITFA. As we have explained in briefing in parallel litigation, the assessment is not actually a tax in the narrow context of the federal Tax Injunction Act, which is not implicated in this case. *See* Opening Br., *Chamber of Commerce of the United States of America v. Lierman*, No. 22-2275 (4th Cir. 2023).

of which will be felt by down-stream consumers rather than the large technology companies that the legislature intended to punish. And it puts Maryland businesses at a competitive disadvantage, threatening to weaken the state's economy and shift growth and innovation to surrounding states. These impacts are not hypothetical—the state has collected more than $100 million in estimated taxes, and Maryland businesses are feeling the crunch.

None of this would be surprising to the federal Congresses that enacted the Internet Tax Freedom Act in 1998 and made it permanent in 2015. Recognizing the detrimental economic effects of taxes that discriminate against digital commerce, they prohibited states and local governments from imposing them. ITFA was thus adopted to prevent the exact harms that the Act has caused and will continue to cause if—as the state urges—the Court declines to enforce the ITFA's clear preemption clause in this case. The Act falls within the heartland of ITFA's prohibition on discriminatory taxes. The Court should thus affirm.

ARGUMENT

I. DISCRIMINATORY FEES AND TAXES ARE DETRIMENTAL TO THE ECONOMY

Maryland's Digital Advertising Tax Act imposes a graduated surcharge on "digital advertising services" within the state. Md. Code Ann., Tax-Gen. § 7.5-101. Advertising, and especially digital advertising, is an enormous and growing part of the local, national, and global economies. Taxing digital

advertising services at (breathtakingly) greater rates than traditional advertising services puts digital advertising companies and their customers at a tremendous disadvantage, threatening to slow or reverse the enormous economic growth that they have generated over the last two decades. More, the Act is a regressive consumption tax whose burdens will ultimately be borne by small businesses that purchase digital advertising services, and those businesses' customers. The Act thus threatens Maryland small businesses.

A. The Act strongly discourages economic growth in Maryland

Congress has described the internet as "the primary driver of U.S. economic growth, innovation and productivity." H.R. Rep. No. 113-510, 5 (2014). Global digital ad spending ballooned from $68.4 billion in 2010 to $283.35 billion in 2018 and has since increased to $567.49 billion in 2022. Jasmine Enberg, *Global Digital Ad Spending 2019*, eMarketer (Mar. 28, 2019), perma.cc/EP9J-GBL7; Ethan Cramer-Flood, *Worldwide Digital Ad Spending 2023*, eMarketer (Jan. 9, 2023), perma.cc/JVQ9-DJMQ. United States companies dominate the international digital advertising market. U.S. Trade Rep., Report on France's Digital Services Tax 35-36 (Dec. 2, 2019), perma.cc/E7BG-6KJF (*USTR Report*)).

Legislation that disfavors digital commerce by subjecting it to comparatively or uniquely punitive taxation threatens economic growth. While

Maryland is the first U.S. state to adopt such a tax, there is a wealth of evidence to this effect from Europe's experience with digital services taxes, which critics have described as "inefficient and anti-growth." Daniel Bunn, *A Summary of Criticisms of the EU Digital Tax*, Tax Found. (Oct. 22, 2018), perma.cc/K34Z-U4Q2. "Digital advertising and social media are already taxed through corporate income and other taxes" like any other industry sector, "and there is little justification for exposing them to additional special taxes exclusively on their activities." Jared Walczak, *States Consider Digital Taxes Amidst Conflicting Rationales*, Tax Found. (May 2021), perma.cc/6X7W-MTH5. Imposing additional, discriminatory, and openly punitive taxes will make these companies less competitive and thus less successful—to the broader economy's significant detriment.

More generally, enacting a tax designed to punish especially large companies is certain to influence these companies' behavior. They operate across the country, and when they locate offices or infrastructure in a state, it creates hundreds of jobs and millions of dollars in tax revenue. By targeting these companies for special tax burdens, Maryland has created an expressly hostile policy climate that discourages technology companies and others from investing in the state even when those investments would unquestionably benefit the state and local communities and economies. For example, Maryland has sought to attract data centers to the state by

exempting them from sales and use taxes. *See Data Center Maryland Sales and Use Tax Exemption Incentive Program*, Md. Dep't of Commerce, perma.cc/UBW8-2LRV. Data centers can transform thousands of acres of industrial land into renovative and usable campuses, investing hundreds of millions of dollars and creating short-term and long-term jobs. But their success depends on their ability to attract business from the very companies that have been singled out by the Act for punitive tax treatment.

The Act signals that large technology companies are not welcome in Maryland, encouraging them to take their business, jobs, and development dollars elsewhere. As the only state to have adopted a digital advertising tax, for example, Maryland's approach stands in stark contrast to neighboring Virginia, which introduced a similar sales tax exemption for data centers in 2009 (extended in 2016). *See* Rich Miller, *Power and Taxes: The Business Environment in Northern Virginia*, Data Center Frontier (Aug. 2, 2022), perma.cc/V4JJ-DR3L. "These tax incentives, combined with Virginia's business-friendly environment, [have] attract[ed] data center investment that would otherwise go to the District of Columbia and Maryland," resulting in more than $1 billion in annual tax revenue for Virginia. *Id.* But there can be little doubt that Virginia's unprecedented success in attracting data center investments would have been stymied if the state had at the same time intentionally alienated the data centers' customers.

If the Act is upheld by this Court, another risk is the spread of similar laws throughout the country. Other states, including Connecticut, New York, West Virginia, Massachusetts, Nebraska, Montana, Texas, and Indiana are already considering social media and digital advertising taxes. *See* Jessi Vice & Sarah McGahan, *State Proposals to Tax Digital Ads are Popping up Everywhere*, Tax Adviser (June 1, 2021), perma.cc/P28F-WYGS; Charlie Kearns & Samantha Trencs, *More Digital Advertising and Data Tax Legislation Introduced*, SALT Shaker (Jan. 26, 2023), perma.cc/KW5D-CM5Y. These other states are waiting for this Court to determine the fate of the Maryland Act. One particularly troubling risk, should the Act be upheld, is that similar laws in other states will pass, and technology companies will take their facilities out of the United States altogether, moving critical internet infrastructure offshore. The upshot would be substantial harm not only to Maryland's and the Nation's economies, but to national security and the stability of domestic internet access. *See generally* Cybersecurity & Infrastructure Security Agency, *Information Technology Sector*, U.S. Department of Homeland Security, perma.cc/WG5V-WW3X.

B. The burdens of Maryland's Act harm Maryland companies, especially small businesses

Not only will the Act's levy discourage economic growth and innovation as a general matter, but its brunt will be felt most acutely by local

Maryland businesses. The costs of the Act are astounding—the state has acknowledged that taxpayers have remitted more than $100 million to the Comptroller under the Act to date, notwithstanding its facial unlawfulness and the circuit court's invalidation of it. The costs of gross-receipts assessments like this are certain to flow downhill to consumers—initially to small Maryland businesses and eventually to individual end-users.

1. Taxes on digital services that "are levied on the gross revenue of a firm," like the European model adopted by Maryland, are "a subcategory of 'consumption tax'" (Kim, *supra*, at 136)—taxes that target the purchase of goods or services. In well-established economic theory, "[c]onsumption taxes are usually assumed to be borne" by downstream market participants. Kim, *supra*, at 175. Here, the initial downstream market participants that will be hardest hit by the Act are small- and medium-sized Maryland businesses. These businesses depend on cost-effective advertising to bring customers to their storefronts, whether those storefronts are virtual or physical. And the digital advertising segment is one of the most cost-effective ways for those businesses to advertise.

The evidence is clear that digital advertising is an essential tool for such businesses to compete in an increasingly mobile marketplace. *See Letter from National Taxpayers Union, Maryland Chamber of Commerce, et al. concerning Md. H.B. 695* (Feb. 27, 2020); *Letter from David Bilger, Policy*

LLC, concerning Md. H.B. 695; Joe Pascaretta, *Why Digital Marketing Should be a Top Priority for Small Businesses in 2022*, Forbes (Jan. 18, 2022), perma.cc/SWV2-29WM. In total, Maryland's advertising industry helps generate more than $100 billion in economic activity, mostly local, creating thousands of jobs. *Letter from American Advertising Federation of Baltimore, concerning Md. H.B. 695* (Feb. 28, 2020). Increasing the cost of advertising for small businesses may "obliterate their already slim profit margins." *Id.* at 5. And as advertising costs go up, these businesses will advertise less, and the businesses will suffer further. The Act will thus fall most directly on Maryland businesses, not large tech companies.

2. To be sure, many Maryland businesses will likely attempt to pass their increased advertising costs on yet further to individual end-users. But it is not usually possible for businesses to recover the entire amount of a consumption tax like this. *See* IMF, *Estimating VAT Pass Through*, perma.cc/S29T-7H4P. And increased prices on end-user goods and services will also reduce demand and hamper growth. Either way, the costs of a consumption tax like the one here will not be borne by the large companies that Maryland sought to target, but instead by the small businesses and individual consumers who are collectively the engine of Maryland's economic growth. For this reason, the accepted view among economists is

that consumption taxes are regressive and ill-suited to promoting fairness or efficiency. Kim, *supra*, at 136.

Throughout this litigation, Maryland nonetheless has defended the Act by insisting that the large companies it targeted will be "'responsible for their own costs' rather than foist their tax burden 'onto small business consumers.'" State Br. 34 (quoting Sen. Ferguson testimony supporting S.B. 787). The mechanism it adopted to accomplish that end is a pass-through provision that prohibits a taxed entity from "pass[ing] on the cost of the tax imposed under this section to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line-item." Tax-Gen. § 7.5-102(c).

That mechanism does not help the state's case. First, as the Chamber of Commerce has explained to the Fourth Circuit in parallel litigation, it plainly violates First Amendment and is thus unenforceable. *See generally* Opening Br., *Chamber of Commerce of the United States of America v. Lierman*, No. 22-2275, at 23-46 (4th Cir. 2023). But aside from that, the provision is wholly ineffective at preventing consumers from shouldering the ultimate costs of the Act. Indeed, the state has stipulated that this provision "does *not* prohibit a person who derives gross revenues from digital advertising services in the State from indirectly passing on the cost of the tax." *Chamber v. Franchot*, No. 1:21-cv-410, Dkt. 68 at 1 (D. Md. Apr. 4,

2022) (emphasis added). The state has thus conceded that the provision bars companies only from talking about their price increases in certain ways, but virtually assured the costs will be borne by Maryland business and consumers.

* * *

"Sound tax policy should be simple, neutral, transparent, and stable." *Bunn*, *supra*, at 7. Like the European digital services taxes before it, Maryland's Act "fail[s] on nearly every count." *Id.* At the end of the day, "such taxes rarely accomplish what they are intended to do." Walczak, *supra*, at 5. A tax that singles out the business model that is the backbone of the internet will inhibit innovation and the free exchange of information on the internet, burdening the medium- and small-sized businesses that depend on digital advertising. *Id.* This result is both harmful and unnecessary.

II. MARYLAND'S DIGITAL ADVERTISING TAX ACT IS PREEMPTED BY THE FEDERAL INTERNET TAX FREEDOM ACT

A. ITFA was enacted to prevent the economic harms from discriminatory fees like Maryland's

Congress understood these harms and enacted ITFA to prevent them. As passed in 1998, ITFA imposed an initially temporary moratorium on "discriminatory taxes on electronic commerce." Pub. L. 105-277, 112 Stat. 2681-719 (1998). Congress "intended" from the outset "that this temporary ban [would] be made permanent in the future." H.R. Rep. No. 105-570, 30. It

extended ITFA's moratorium three times, finally making it permanent in 2015. *See* Pub. L. 114-125, § 922 (2015).

ITFA is an embodiment of Congress's power to promote and regulate interstate and foreign commerce. H.R. Rep. No. 105-570, pt. 1, at 8 (1998); *cf. Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1878) ("The powers thus granted [by the Commerce Clause] . . . keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."). By the end of the 20th Century, Congress had noted the "explosive growth of electronic commerce." H.R. Rep. No. 105-570, pt. 1, at 8. It enacted ITFA to "enhance" electronic commerce's "development" and "eliminate[] efforts that will impede its growth." *Id.* at 7. To that end, ITFA "establishes a national policy against State and local government interference with interstate commerce on the Internet." H.R. Rep. No. 105-825, 1545 (1998) (emphasis added).

ITFA defines "electronic commerce" as "any transaction conducted over the internet or through internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration." ITFA § 1105(3). It defines "tax," in turn, to mean "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes," carving out only simple

use-fees, or fees "for a specific privilege, service, or benefit conferred." ITFA § 1105(8)(A)(k).

A forbidden "discriminatory tax" is defined as a tax on electronic commerce that "is not generally imposed . . . on transactions involving similar property, goods, services, or information accomplished through other means." ITFA § 1105(2)(A)(i). ITFA's definition of "discriminatory tax" is meant to "capture instances where State or local tax policies seek to place electronic commerce at a disadvantage compared to similar commerce conducted through more traditional means." H.R. Rep. No. 105-570, pt. 1, at 33. But the definition also "mean[s] that property, goods, services, or information that are sold exclusively over the Internet—with no comparable off-line equivalent—would be protected from taxation." *Id.*

When the original ITFA was enacted, its goal was to "incubate a fledgling industry" in electronic commerce. H.R. Rep. No. 113-510, 5 (2014). "It has worked." *Id.* In making ITFA permanent, Congress recognized that the internet, nascent in 1998, had become "the primary driver of U.S. economic growth, innovation and productivity," bringing enormous benefits to individuals and businesses alike. H.R. Rep. No. 113-510 at 5. Indeed, testimony before Congress in 2007 suggested that "*more than 75%* of the remarkable productivity growth that has increased jobs and income since 1995 was due to telecommunications networks and the information technology

transported across them." *Id.* at 6 (emphasis added) (citing Internet Tax Freedom Act: Internet Tax Moratorium: Hearing Before Subcomm. On Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 30 (2007)).

Because internet commerce is "inherently susceptible to multiple and discriminatory taxation in a way that commerce conducted in more traditional ways is not" (H.R. Rep. No. 105-570, pt.1, at 29), Congress determined that making ITFA permanent was necessary to foster economic growth (H.R. Rep. No. 113-510 at 5). Making ITFA permanent also addressed Congress's concern that discriminatory or multiple internet taxes would have a disproportionate impact on low-income and minority households. H.R. Rep. No. 113-510 at 6-7.

B. ITFA preempts the Act

The Act is a prime example of the kind of discriminatory state regulation that Congress sought to address with ITFA. And Congress enacted ITFA against the backdrop of nearly a century of precedent allowing plaintiffs to seek injunctions of unconstitutional (and preempted) state regulations. The Court should thus affirm the district court's invalidation of the Act on this basis.

Although neither this Court nor the United States Supreme Court has yet to articulate a test for ITFA discrimination, the statutory text readily

supplies one. There must be:

(1) a state "tax"

(2) imposed on "electronic commerce"

(3) that is not imposed, or is imposed at a different rate, on "similar" services "accomplished" or "delivered" "through other means."

The Maryland Act easily satisfies each of these prongs.

1. As courts have recognized, there is no "universal definition of 'tax' applicable in every legal context." *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 929 (9th Cir. 1996). For its part, ITFA expressly defines the term: It specifies that a covered tax includes "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes," with the sole exception that it does not apply to "a fee imposed for a specific privilege, service, or benefit conferred." 47 U.S.C. § 151 note § 1105(8)(A). The assessment here plainly constitutes "any charge" that is not a fee imposed for a specific privilege, service, or benefit—it is therefore a "tax" for ITFA purposes. The state does not argue otherwise.

2. The charge is imposed on "electronic commerce." ITFA defines "electronic commerce" expansively as including "any transaction conducted over the Internet," including "the sale . . . or delivery of . . . services, or information." ITFA § 1105(3). The Act's charge here is assessed against digital advertising services, including "banner advertising, search engine advertising, interstitial advertising, and other comparable advertising ser-

vices." Tax. Gen. § 7-5.101(D). Such services are both sold and delivered over the internet.

The state's assertion (at 41) that it may dodge ITFA's prohibition by taxing gross revenues instead of individual transactions is not defensible. The Maryland Act imposes a graduated charge on "digital advertising services" (Md. Code Ann., Tax-Gen. § 7.5-101), assessed against "annual gross revenues derived from digital advertising services in the State" (*id.* § 7.5-102(b)(1)). Taxing gross revenues from a type of transaction is just a more burdensome, unusual, and punitive way to tax the transactions themselves. This is the type of punitive taxation at which ITFA was expressly aimed. *See* H.R. Rep. No. 105-570, at 24-25 (noting that the Act's definition of "discriminatory tax" would "prohibit a State or local government from taxing electronic commerce in a manner that resulted in a different tax rate being imposed on electronic commerce when compared to a transaction that occurred through other means").

3. The Act does not assess the same charge against advertising services "accomplished through other means." ITFA § 1105(2)(A)(i). As a starting point, and as the appellees persuasively demonstrate (Br. 40-43), there is no statutory requirement that digital and off-line advertising be "similar." Instead, Congress wrote its definition of "discriminatory tax" broadly enough to encompass attempts to disfavor electronic commerce by

taxing "Internet-unique services" (H.R. Rep. No. 113-510, at 17) "with no comparable offline equivalent" (H.R. Rep. No. 105-570, 33). That view is consistent with ITFA's purpose of preventing states from interfering with the growth of electronic commerce. It would make little sense to protect only products and services with offline equivalents while allowing States to impose taxes that would target commerce unique to the internet, like internet search engines. H.R. Rep. No. 105-570, 33; *see also* H.R. Rep. No. 105-570 pt. 2, at 2 (1998); H.R. Rep. No. 113-510, at 17.

The state thus misses the point by devoting a substantial portion of its opening brief (41-46) to highlighting the features and efficiencies of digital advertising that make it a supposedly distinguishable service. Even if credited, all that would show is that the Maryland Act singles out "Internet-unique services" that Congress meant just as well to shield from specially targeted taxation. H.R. Rep. No. 113-510, at 17.

Regardless, the state's position is wrong on its own terms. Traditional print, television, and radio advertising, which are the obvious nondigital analogues of digital advertising, are similar to digital advertising in every relevant sense. The state's contrary reasoning is, in effect, that digital advertising is dissimilar from print advertising *because it is digital*. But if that were enough to avoid ITFA, the law would never apply; the fact that services are sold and delivered more efficiently over the internet would, by itself,

render them not "similar" to services sold and delivered less efficiently by "other means" (ITFA § 1105(2)(A)(i)), thus permitting discrimination.

There is no ground for such a purpose-destroying interpretation of the statute. The word "similar" means "having characteristics in common" or being "alike in substance." *Similar*, Merriam Webster's Third New International Dictionary 2120 (2002). A banner ad on a website plainly has characteristics in common with the same banner ad appearing in a newspaper; a video commercial viewed over the internet plainly has characteristics in common with the same video commercial viewed over broadcast television; and a product plug heard over a digital music streaming service plainly has characteristics in common with the same plug heard over the radio waves.

Discrimination across these types of media is precisely what Congress had in mind when it enacted ITFA. *See Performance Marketing Association v. Hamer*, 998 N.E.2d 54, 59 (Ill. 2013) (holding, in an ITFA case, that online advertising "is not different in kind from advertising . . . in Illinois newspapers or Illinois radio broadcasts"). The state is wrong (Br. 42) that discrimination between digital and nondigital versions of a service like advertising is permissible so long as the state can distinguish between the two in any practical respect. ITFA does not instruct states to treat digital and nondigital services however it pleases—it *bans* disparate treatment of analogous industries. For that reason, the Act here is plainly preempted.

CONCLUSION

The Court should affirm the district court's grant of declaratory relief.

Dated: March 31, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,029 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirement stated in Rule 8-112.

Dated: March 31, 2023 /s/ *Michael B. Kimberly*