

IN THE MARYLAND TAX COURT — 23-DA-OO-0456
APPLE INC. v. COMPTROLLER OF MARYLAND

MEMORANDUM AND ORDER

This matter comes before the Court on Cross-Motions for Summary Judgment on the applicability, scope, statutory legality, and constitutionality of the Maryland Digital Advertising Gross Revenues Tax (“Tax”), which was enacted by the Maryland General Assembly in 2021. MD. CODE ANN., TAX-GEN. (“CODE”) §§ 7.5-101–7.5-301 (2021). The Petitioner seeks a refund of the Tax it paid for tax year 2022 and the Respondent seeks affirmation of its denial of said refund. The Petitioner has exhausted administrative remedies pursuant to Maryland law and its appeal was timely filed. CODE §§ 13-510(a)(2), 13-514.¹

Accordingly, on this 14th day of August 2026, for the reasons discussed below, the Maryland Tax Court hereby GRANTS the Petitioner’s motion on all counts, DENIES the Respondent’s motion on all counts, and the Court REVERSES the Respondent’s decision. The refund must be paid with interest, as applicable under Maryland law.^{2, 3}

BACKGROUND

The Tax has three main prongs of applicability. First, it only applies to businesses operating in Maryland that have at least \$100 million in global annual gross revenues. CODE § 7.5-103. The tax rate starts at 2.5% and can grow to 10% once \$15 billion in gross revenues are exceeded. *Id.* Second, it only

¹ On November 17, 2023, the Court denied Respondent’s Motion to Dismiss. The Respondent sought to dismiss the Petitioner’s refund claim under section 13-902 of the Code.

² This decision is one of three decisions published on this date regarding the Tax. The other two involve Peacock TV, LLC and Google LLC. While some arguments and facts differ among these three decisions, the Court’s legal conclusions and ultimate outcomes are similar.

³ The Court takes official notice that there is past and ongoing litigation in other jurisdictions involving similar taxation matters that merely provide persuasive authority.

applies to businesses that have at least \$1 million in annual gross revenues derived from digital advertising services in Maryland. CODE § 7.5-201. Third, it only applies to digital advertising services in Maryland that are not specifically exempted. Exemptions include digital advertising services on digital interfaces “owned or operated by or operated on behalf of a broadcast entity or news media entity.” CODE § 7.5-101(e)(2). A “broadcast entity” is defined as “an entity that is primarily engaged in the business of operating a broadcast television or radio station.” CODE § 7.5-101(d). A “news media entity” is defined as “an entity engaged primarily in the business of newsgathering, reporting, or publishing articles or commentary about news, current events, culture, or other matters of public interest,” but does not include an entity that is “primarily an aggregator or republisher of third-party content.” CODE §§ 7.5-101(g)(1)–(2). There is no statewide Maryland tax on advertising services that are not digital, such as those involving billboards, magazines, newspapers, direct mail, and other printed media, and even broadcast radio and broadcast television.⁴

In this appeal, the Petitioner relies on three independent grounds for its motion, to wit:

First, the Tax violates section 1105(2)(A)(i) of the federal Internet Tax Freedom Act (“ITFA”), because the plain language of the Tax (“advertisement services on a digital interface,” CODE §7.5-101(e)(1)) makes it a “discriminatory tax . . . imposed by a State or political subdivision thereof on electronic commerce that . . . is not generally imposed . . . on transactions involving *similar* property, goods, services, or information accomplished through other means.” Internet Tax Freedom Act, 47 U.S.C. § 151 note (1998) (emphasis added). “[T]he gross receipts are only subject to the Tax if those

⁴ The Court takes official notice that Baltimore City levies a billboard tax on both “electronic” and “any other” outdoor advertising displays. BALT. CITY CODE art. 28 §§ 29-3(a)(1)–(2) (2021); *see also Clear Channel Outdoor, LLC v. Dir., Dep’t of Fin. of Balt.*, MTC. 23-MI-BA-0076 (Jan. 31, 2025). While not generally imposed across the state, the Maryland General Assembly must grant the city the power to tax. CHARTER OF BALT. CITY art. II § 40 (2021).

services are provided digitally.” Petitioner’s Memorandum (3/5/24) at 3–4, 18–21; Petitioner’s Opposition (4/11/24) at 2–3, 12–13.⁵

Second, the Tax violates the dormant Commerce Clause of the U.S. Constitution because only “Congress shall have the power . . . [t]o regulate Commerce . . . among the several states.”⁶ Specifically, the Petitioner argues, the Tax a) is—and was meant to be—discriminating against out-of-state interests, b) is not fairly apportioned because it is externally inconsistent, and c) is not fairly related to a taxpayer’s presence or activities in Maryland. Petitioner’s Memorandum (3/5/24) at 7–8 (citing prongs 3, 2, and 4, respectively, of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277–79 (1977)); Petitioner’s Memorandum (3/5/24) at 21–25, 25–27, 28–31; Petitioner’s Opposition (4/11/24) at 15–21.

Finally, the Tax violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution,⁷ as well as Article 24 of the Maryland Declaration of Rights,⁸ because it taxes extraterritorial values. Petitioner’s Memorandum (3/5/24) at 8–9 (citing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 303 (1994)); Petitioner’s Memorandum (3/5/24) at 27–28; Petitioner’s Opposition (4/11/24) at 21.⁹

In its response and cross-motion, the Respondent makes the following five arguments in defense of its motion and in opposition to the Petitioner’s motion, to wit:

⁵ At the outset, the Court notes that the subject of the ITFA is “electronic commerce,” including “services” and the subject of the Tax is “digital advertising services.” The Court wishes to make it clear that in the context of the relationship between ITFA and the Tax, it sees no difference between a discussion of “advertising” and a discussion of “advertising services” and further notes that the terms were often used interchangeably by the parties.

⁶ U.S. CONST. art. I, § 8, cl. 3.

⁷ U.S. CONST. amend. XIV, § 1.

⁸ MD. CONST. DECL. OF RIGHTS art. 24.

⁹ As the Petitioner notes, the Maryland Supreme Court has held that Article 24 has the same meaning as the Due Process Clause. Petitioner’s Memorandum at 27–28 (citing *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 77 (2001)). Thus, Article 24 does not constitute a separate ground for the motion and will not be discussed further.

First, the ITFA violates the anti-commandeering proscription inherent in the Tenth Amendment to the U.S. Constitution because the ITFA mandates an action by the States that is not one of the “certain enumerated powers” of Congress in the U.S. Constitution.¹⁰ Respondent’s Memorandum (3/14/24) at 13–15.

Second, the ITFA does not confer a private right of action to enforce it. Respondent’s Memorandum (3/5/24) at 15–24.

Third, the ITFA does not pre-empt the Tax under the Supremacy Clause of the U.S. Constitution because digital advertising services are not “similar” to other forms of advertising as required for the ITFA to apply.¹¹ Respondent’s Memorandum (3/5/24) at 24–30; Respondent’s Response (4/11/24) at 2–10.

Fourth, the Tax does not violate the dormant Commerce Clause or the Due Process Clause because a) it applies to activities with a substantial nexus to Maryland, b) it is fairly apportioned, c) it does not discriminate between similarly situated companies in Maryland and other states, and d) it is fairly related to the services provided by the State. Respondent’s Memorandum (3/5/24) at 30–45; Respondent’s Response (4/11/24) at 10–23.

Finally, the Tax does not violate the Due Process Clause because it does not discriminate between Maryland companies and similarly situated companies in other states. Respondent’s Memorandum (3/5/24) at 43–45; Respondent’s Response (4/11/24) at 19–20.

¹⁰ U.S. CONST. amend. X.

¹¹ U.S. CONST. art. VI, cl. 2.

LEGAL STANDARD

The Maryland Tax Court is an adjudicatory administrative agency, established by the Maryland General Assembly, not the Maryland Constitution. CODE § 3-102. While appeals to the Court are *de novo*, the burden of proof is on the Petitioner to overcome the *prima facie* correct decision of the Respondent with “affirmative evidence.” *Id.* §§ 13-523; 13-528(b). Thus, the Respondent’s refund denial is presumed to be correct, but there are neither factual findings for the Court to review on administrative appeal, nor deference to be paid for any longstanding statutory authority or regulatory promulgations.¹² As such, it is the role of the Court to establish a record and to review legal conclusions with fresh eyes. CODE § 13-514.¹³ There is no deference with respect to constitutionality.¹⁴ There may be some deference as to whether the Respondent correctly interpreted applicable statutes and regulations.¹⁵

Due to the Court’s unique position as an administrative appellate quasi-judicial agency, the Maryland Rules do not control it. MD. CODE ANN., CTS. & JUD. PROC. § 1-101(c); STATE GOV’T § 10-203(a)(3)(vi); Md. Rule 1-101(b). Nevertheless, the rules are often instructive and followed.¹⁶ In Maryland constitutional courts, summary judgment may only be granted if two conditions are met. First, the moving party must establish that there is no genuine dispute as to any material fact, and second, the moving party must establish that it is entitled to judgment as a matter of law. Md. Rule 2-501(f). *See Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017).

¹² *See Comptroller of Md. v. FC-Gen Operations Invs., LLC*, 482 Md. 343, 358–64 (2022).

¹³ *FC-Gen*, 482 Md. at 360.

¹⁴ *Id.* at 360 (stating “we do not apply any agency deference when undertaking a review of [constitutionality].”)

¹⁵ *Id.* at 360 (stating “we occasionally apply agency deference when reviewing errors of law related to [whether the agency correctly interpreted an applicable statute or regulation].” Importantly, unlike other tax types, no Comptroller-level appeal mechanism is available for the Tax. *See* CODE § 13-508(a).

¹⁶ *Comptroller of Md. v. Myers*, 251 Md. App. 213, 242–43 (2021).

The Petitioner has brought an appeal of a denial of a refund claim. CODE §§ 13-510(a)(2); 13-508(a)(2). The Court “has jurisdiction to hear appeals from the final decision . . . including . . . the determination of a claim for refund.” *Id.* §§ 3-103(a)(3); 13-528. This is the same method of review and ability to dispose of such tax matters as any other matter before it.

Any ambiguity in a taxing statute must be resolved in favor of the taxpayer. *Scoville Service, Inc. v. Comptroller of the Treasury*, 269 Md. 390 (1973) (a case that also dealt with a refund claim). Also, in performing an analysis of statutory language, it is axiomatic that if the plain language of the statute is clear and unambiguous, a Court does not need to review the comments of legislators to determine the intent of the statute. *See Bellard v. State*, 452 Md. 467, 481 (2017) (“When the statutory language is clear, we need not look beyond the statutory language to determine the General Assembly’s intent.”); *see also FC-Gen*, 482 Md.¹⁷ In the case at bar, the Court has found no ambiguity in the Tax that requires an inquiry into the Maryland legislature’s intent.

The Court, however, did find some ambiguity with respect to the word “similar” in § 1105(2)(A) of the ITFA. It is not defined and there are no examples in the law. During the pendency of the litigation, the Court held two days of hearings on the meaning and applicability of the word “similar” to provide both parties an opportunity to present arguments and evidence related to their position on this narrow issue.¹⁸

The Court also takes official notice of the August 15, 2025, decision of the U.S. Court of Appeals for the 4th Circuit in *Chamber of Commerce of the U.S., et al. v. Lierman*, 151 F.4th 530 (4th Cir. 2025), in which that court invalidated section 7.5-102(c) of the Tax on constitutional grounds, finding that the legislature’s attempt to prevent companies from revealing to customers the amount of

¹⁷ *But see Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984).

¹⁸ On July 28–29, 2025, the Court heard from the parties in this appeal in a combined hearing with Google LLC. On July 30–31, the Court heard from the parties in the Peacock TV, LLC appeal.

the Tax “by means of a separate fee, surcharge, or line-item”¹⁹ violated the First Amendment to the U.S. Constitution. The Court held an informal hearing and received briefs from the parties in this appeal on the import of the 4th Circuit’s ruling. The Tax Court agrees with both parties that the ruling does not affect this appeal.²⁰

ANALYSIS

The Court will address each argument of the Petitioner and Respondent *seriatim*.

I. The ITFA – Applicability, Scope, Pre-emption, and Anticommandeering

For the Court, the key word in the ITFA is “similar.” 47 U.S.C. § 151 note § 1105(2)(A)(i). Is a tax on digital advertising services a tax on “similar property, goods, services, or information” that is not taxed? *Id.* Are digital advertising services similar to wallpaper billboards, print newspaper ads, bus posters, flyers plastered on street poles, and commercials on broadcast radio or broadcast television? The Petitioner argues “yes” and implies that digital advertising services are simply the use of the Internet instead of ink or voice to carry a message designed to get the public to do something. Petitioner’s Reply (5/2/24) at 6. The Respondent argues “no” and cites four ITFA cases that it believes illustrate its argument that digital advertising services is a “new industry” or “distinct business model” (Respondent’s terms) and therefore is not “similar” to analog (i.e., non-digital) advertising services. Respondent’s Response (4/11/24) at 3–9. The Court begins its analysis by turning to those four cases, which are less than persuasive at best.

¹⁹ CODE § 7.5-102(c).

²⁰ After the Circuit Court’s decision, the United State District Court for the District of Maryland issued an injunction against enforcement of section 7.5-102(c). The issue of severability was not raised. Unless the invalidated provision is held in some future related case as not severable from the remainder of the Tax, it remains irrelevant to this appeal.

A. Applicability

1. Discussion of Respondent's Four Cited Cases

In *Rosemont v. Priceline.com, Inc.*, No. 09 C 4438, 2011 WL 4913262 (N.D. Ill. Oct. 14, 2011),²¹ the defendants operated a travel booking website on the Internet, charging and collecting a fee from overnight travelers for the total of the room rate, the room rate tax, and their booking services. Travelers who used travel agents, on the other hand, paid only the room rate plus the tax on the room rate—the hotel paid the travel agent part of that room rate for its booking services. The ITFA question before the court was whether the village of Rosemont could charge a tax on the full price paid by the traveler to the defendant rather than just tax the room rate. That court found that taxing the full amount charged by the booking service did not violate the ITFA because it was not discriminatory to tax the amount a traveler paid for a room, whether the amount paid was simply the room rate paid to a travel agent (who then received part of that amount from the hotel as a booking fee) or the room rate plus the booking service fee that was paid to the defendant. The case had little to do with similarity of business models and everything to do with paying the tax on the traveler's required cost of receiving the room key.

In *Labell v. Chicago*, 147 N.E.3d 732 (Ill. App. Ct.) (2019), the city imposed a tax on amusements but had given exemptions to users of automatic amusement devices (e.g., juke boxes and pinball machines) and to live performances. The city then expanded the tax to streaming services, and the plaintiffs objected, citing the ITFA. That court found that streaming services were similar to other amusements, and not similar to the exempted amusements and thus there was no violation of the ITFA. Indeed, the court's finding in that case of a similarity between non-exempted traditional amusements

²¹ This decision is not reported.

and streaming service amusements supports a finding that digital advertising services are similar to non-digital advertising services.

In *Gartner, Inc. v. Dep't of Revenue*, 455 P.3d 1179 (Wash. Ct. App.) (2020), the plaintiff offered customers its searchable research content online for a fee and also offered research via human interaction for a separate fee. The ITFA question before that court was whether the two products were similar. The court gave the question short shrift:

Gartner argues that [the Department of Revenue] has applied a higher tax rate only because its services are “ ‘electronically transferred,’ ” which is prohibited by the ITFA. [Citation omitted.] However, simply sending its clients Research Content by e-mail is not the equivalent of Gartner selling access to its Research Library. As discussed above, access to Gartner's Research Library is a digital automated service that is transferred electronically and uses one or more software applications. [Citation omitted.]

Therefore, we hold that application of the retail sales tax on Gartner's automated digital service does not violate the ITFA.

Id. at ¶¶ 65–66. That court appeared to base its decision on a finding that the research library was a product while its research using humans was a labor service not subject to the tax.

Finally, in *ADP, LLC v. Arizona Dep't of Revenue*, 524 P.3d 278 (Ariz. Ct. App. 2023), the court was faced with a tax on payroll software that ADP sold over the Internet whereas its previously provided manual payroll services were not taxed. The court said:

ADP rents software that almost entirely automates tasks that were previously done by human employees, changing the nature of the transaction. For example, paying someone to wash clothing might be properly characterized as a service when done by hand, but paying to use technology that performs that same function by automation subjects the transaction to [the tax]. [Citation omitted.] Similarly, before using eTime, ADP manually processed its customers' payroll; now, ADP licenses eTime to its customers, and eTime automates the labor that ADP previously provided. The change in taxation status is entirely attributable to ADP's automation of its work, not because of its internet use. The charging of fees to use eTime software that automates its HR work fundamentally altered ADP's business, thereby warranting a change in taxation that is not discriminatory.

Id. at ¶ 28. Somewhat akin to *Gartner*, this Arizona court reasoned that taxing tangible software was not similar to taxing an intangible labor service. On that basis, both cases are easily distinguishable from the case at bar.

Unlike the four cases cited by the Respondent, none of which concerned advertising services, this Court is persuaded in part by an Illinois ITFA case cited by the Petitioner that did involve advertising services. In *Performance Marketing Ass’n, Inc. v. Hamer*, 998 N.E.2d 54 (Ill. 2013), that court found that online advertising in Illinois that contained codes allowing the tracing of sales (the main attribute of “performance marketing”) required the retailer responsible for the advertising to pay a use tax to Illinois, regardless of whether or where sales took place. No tax was imposed on print or broadcast advertising that contained similar codes. The Illinois Supreme Court found a clear violation of the ITFA. The Respondent attempts to distinguish that case from the case at bar by noting that in the Illinois case, the parties had reached certain stipulations (Respondent’s Response (4/11/24) at 7), but those stipulations merely concerned how the tax worked, not whether it violated the ITFA. In the case at bar, there is no need for stipulations on how the Tax works. Similar to *Performance Marketing*, Maryland also imposes a tax on online advertising services that are not imposed on print or broadcast advertising services.

2. Hearing Set

In addition to arguing the holdings in the above-cited cases, and having previously filed its own motion for summary judgment implying that there were no material facts in dispute, the Respondent in its brief argued that the analysis “requires” a factual inquiry into whether digital advertising services are similar to non-digital advertising services, that is, an inquiry into whether those entities taxed are similar to those non-taxed. Respondent’s Response (4/11/24) at 2, 6. As noted above, the Court acceded to the Respondent’s request and held a hearing on the matter.

In the same month as the hearing, the Respondent published Technical Bulletin 59 (“TB59”) on the subject of the Tax, offering guidance on definitions and the applicability of the Tax. For the first time, “programmatic” and “visual” were introduced as necessary and key factors in the Respondent’s interpretation of the Tax.²² Thus, the Court focused on two questions at the hearing:

- i. Are digital advertising services similar to non-digital advertising services for purposes of the ITFA?
- ii. Does TB59 affect the determination of whether the Tax violates the ITFA?

Before describing and assessing the testimony and other evidence introduced at the hearing, it is helpful to recite and place in context the various definitions extant in both laws as well as in TB59.

3. Series of Helpful Definitions

ITFA Definitions (47 U.S.C. § 151 note §§ 1101(a) and 1105(2)(A)(i))

- Discriminatory tax is “any tax imposed by a State or political subdivision thereof on electronic commerce that is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means.”
- Electronic commerce “means 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, and includes the provision of Internet access.”
- Internet “means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.”

Terms mentioned but not defined:

- Similar
- Generally imposed

Terms neither mentioned nor defined:

- Advertising services

²² The Respondent has incorporated the main elements of TB59 into regulations in COMAR 03.12.01.B as of March 2, 2026. Of course, TB59 and the regulation change postdate the filing of the refund claim and are thereby technically irrelevant to this case, but since they are considered guidance for state auditors applying the Tax (*see infra*-Testimony of Respondent’s Representative Deborah Gorman,), it is useful to consider them in the discussion and analysis.

- Digital advertising services
- Comparable
- Programmatic
- Visual

The Tax Definitions (CODE § 7.5-101, *et seq.*)

- Digital advertising services “includes advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services.”
- Digital interface “means any type of software, including a website, part of a website, or application, that a user is able to access.”

Terms mentioned but not defined:

- Advertising
- Advertising services
- Banner advertising
- Search engine advertising
- Interstitial advertising
- Digital
- Other comparable advertising services

Terms neither mentioned nor defined:

- Programmatic
- Visual

TB59 Definitions

- Advertising is “the action of calling something to the attention of the public especially by paid announcements. Similarly, ‘advertise’ means ‘to present (something or oneself) to the public in a way that is intended to attract customers.’ The terms are commonly used within the marketing industry to describe a publisher’s conveyance of an advertiser’s promotional message to a potential recipient or audience.” [Footnotes omitted.]
- Advertising services “are services provided by a person (i.e., a publisher) to convey an advertiser’s promotional message. Advertising services enable or co-occur with advertisements, and processes that generate advertisements. ‘Advertising services’ includes services that match advertisers with publishers’ advertising opportunities, target audiences and recipients, and generate and customize promotional messages to specific advertising opportunities, among other related functions.”
- Banner advertising “is a form of graphical advertising embedded into a webpage, typically including a combination of static and animated images, text, and/or video designed to convey a marketing message and/or cause the user to take an action.”
- Digital “means of, relating to, or utilizing devices constructed or working by the methods or principles of electronics. ‘Digital’ also means composed of data in the form of especially binary digits.” [Footnote omitted.]

- Digital advertising services “includes advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services. ‘Digital advertising services’ does not include advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast entity or news media entity.”
- Digital interface “means any type of software, including a website, part of a website, application, that a user is able to access.”
- Interstitial advertising “is advertising that occurs before, in between, or after a primary content experience.”

Although not listed under the “Definitions” section, the following terms are elsewhere defined:

- Other comparable advertising services. “Other advertising services are comparable to banner advertising, search engine advertising, and interstitial advertising when the advertising services are both programmatic and visually conveyed.”
- Programmatic. “The programmatic attribute of digital advertising refers to the capacity to automate advertising services. Digital advertising is automated, in that it is performed by employing technology that uses computer- or software-driven workflow or machine learning algorithms to deliver advertisements to audiences based on advertiser-defined parameters. These parameters may include precise targeting data, such as potential audience’s geographic locations; the types of devices the audience members use; and audience members’ recent online search behaviors and browsing history, shopping and purchase history, and/or biographical and other information compiled in databases. The programmatic attribute enables digital advertising opportunities to be sold in real time - often within milliseconds of when an advertising opportunity becomes available or likely. The programmatic aspect of digital advertising allows advertisers and publishers of digital advertising to optimize spending, in part by allowing them to more accurately measure individual recipient conversions, such as consumer clicks, product purchases, or other evidence that an advertisement reached its intended audience or achieved its intended purpose (e.g., that it resulted in a sale). Digital advertising enables automated experiments and historical analysis to identify conversion-maximizing combinations of advertisement messages, contexts, and recipients. These automated processes can be directed to act on statistical learning within pre-specified constraints with human oversight but with infrequent human intervention. To be subject to the DAGR [Digital Advertising Gross Receipts] tax, digital advertising must be both programmatic and visual. Advertising services that are not automated are considered non-programmatic. Revenue derived from non-programmatic advertising services is not subject to the DAGR tax.”
- Visual. “Banner advertising, search engine advertising, and interstitial advertising share a second common attribute: they convey messages visually. Although such advertisements can often have an audio element, an audio element is not a necessary component. To be subject to the DAGR tax, digital advertising must be both programmatic and visual. Revenue derived from advertisements that are conveyed in a purely audio format is not subject to the DAGR tax.”

4. The Hearing

On the questions of “similar” and related definitional terms, each party introduced the testimony of two witnesses. The Petitioner called two expert witnesses, and the Respondent called one expert and

one fact witness. The Court found each of the four witnesses to be honest, sincere, experienced, and extremely knowledgeable. Moreover, the Court finds that all testimony not specifically determined to be inadmissible during the hearing was helpful and appreciated. None of the testimony overstepped the rules of evidence.

Testimony of Petitioner's Expert Witness Bruce Biegel

Mr. Biegel, a management consultant with the Winterberry Group and a 22-year veteran of over 800 engagements in marketing and advertising, testified on behalf of the Petitioner. He was certified as an expert in digital and non-digital advertising services. Tr. July 28, 2025, 96. He defined advertising as the use of communication to inform an audience of services. He testified that digital advertising is similar to non-digital advertising in many respects, including objectives, audience, message, media, outcomes, awareness, considerations, engagement, planning, activation, measurement, and feedback. He testified that both digital and non-digital advertising involve a buyer and a seller. To Mr. Biegel, programmatic advertising is the automation of the advertising services process and has similar characteristics and components to traditional advertising.

Testimony of Petitioner's Expert Witness Richard Pomp

Professor Richard Pomp also took the stand for the Petitioner. He was certified as an expert “in his field of study,” which included state and local taxation, corporate income tax, federal income tax, taxation of American Indians, state corporate income tax, state sales tax, and gross receipt taxes. Tr. July 28, 2025, 167–168. He has occupied an endowed chair in tax and tax policy at the University of Connecticut since 1976 and also teaches corporate and sales tax courses at New York University. He has written extensively in opposition to digital advertising taxes in light of the ITFA. He recounted the history of the ITFA from 1998 to the present and noted that each of the several enacted amendments over the years expanded the protections against taxation of the Internet. He testified that Congress

intended broad protection, not granular or specific protections. He said the use of the words “generally imposed” and “similar” were meant to provide “guardrails” for a high level of generality in the statute’s application. His definition of “similar” is “alike in substance.”

Through cross-examination, Professor Pomp stated that he does not consider himself a marketing expert and does not purport to opine on how the ITFA or the Tax should be interpreted. He testified, however, that delivery of advertising can be in different forms, but that does not affect their similarities.

Testimony of Respondent’s Expert Witness Kenneth Wilbur

Professor Kenneth Wilbur took the stand for the Respondent. He was certified as an expert in advertising, digital advertising, and non-digital advertising. Tr. July 28, 2025, 273. He has over 25 years of experience in his field and is currently a professor of marketing and analytics at the University of California, San Diego. He has published over 30 peer-reviewed papers.

In his testimony, he defined advertising as the publication of a marketer’s message to others by a publisher, which he defined as an organization that generates advertising opportunities for sale to advertisers. Thus, he does not consider a direct mail campaign between a business and the public or a business’s website postings (what he called “owned media”) as advertising unless those processes are handled by an intermediary, a publisher.

Rather than defining “similar” (“It seemed like a really important legal consideration and it just felt reckless to me to provide opinions based on my understanding of a legally questionable concept.” Tr. July 28, 2025, 303), Professor Wilbur opined that “comparable” (a term in the Tax that he did not mind addressing) means “sharing key attributes” or “sharing in really important characteristics.” *Id.* at 302, 303. At the same time, he also recognized that the second definition listed in Webster’s dictionary of “comparable” is “similar.” *Id.* at 302. Further, his definition of “digital” had nothing to do with the Internet; to him it means data encoded and transmitted via 1s and 0s (i.e., binary code), and digital

advertising means a publisher's digital conveyance of an advertiser's message to a recipient. In addition, he testified that while everything on the Internet is digital, not everything digital is necessarily on the Internet; that perception is "slang."

Professor Wilbur's definition of digital advertising includes three key features: digitalization, programmatic practices (e.g., automation, electronic feedback, optimization), and visualization. Thus, digital radio, cable, satellite, and fiber optic transmissions cannot be digital advertising (because they are not programmatic); neither can interstitial ads in a radio version of an online podcast, no matter how the podcast is delivered (because there is no visual aspect). In addition, a digital billboard advertisement cannot be digital advertising because there needs to be user interaction or user control to have the necessary digital interface. Moreover, he said that digital advertising has a different business model than non-digital advertising.

During cross-examination, Professor Wilbur testified that he was hired by the Respondent to clarify the term "digital advertising services" because the definition in the Tax was not clear. When asked if digital advertisements are similar to non-digital ones, he said that most of the attributes must be on a close level—in terms of effectiveness and performance for purposes of the user—to be similar. Thus, in response to a question by the Court, he was not willing to agree that a horse was similar to a race car or that a human-driven taxi was similar to a driverless one because not all users have in mind just travelling from point A to B. Some users have a primary purpose of safety or a reasonable fare. Professor Wilbur did agree, however, that all digital advertising is part of electronic commerce, a critical term in the ITFA.²³

²³ Consistent with note 5, *supra*, the Court observed that neither Professor Wilbur nor any of the other witnesses made any distinction between "advertisements," "advertising," "advertising services," and "advertisement services." Further, the Tax does not make any distinction either: "Digital *advertising services* includes *advertisement services* on a digital interface, including *advertisements* in the form of banner *advertising*, search engine *advertising*, interstitial *advertising*, and other comparable *advertising*

Testimony of Respondent's Representative Deborah Gorman

Ms. Gorman served as a fact witness as she was not proffered as an expert witness, but she serves a highly technical and legal administrative role for the Respondent. Ms. Gorman's experience in interpreting Maryland tax law and Respondent processes was well regarded by the Court. Ms. Gorman, director of the legal division of the Respondent's Office of Law and Oversight since 2022, testified for the Respondent that TB59 was meant to inform state auditors and taxpayers what the state will consider taxable digital advertising services, and that TB59 was a direct result of the report of Professor Wilbur who was hired in January 2025 to help clarify the Tax. She said it was coincidental that TB59 was issued two weeks before the hearing and more than three years after the Tax was signed into law. No part of the development or publication process was expedited in anticipation of the hearing. She admitted that TB59 has no binding effect on the courts, as it is not law. The Court appreciated Ms. Gorman's testimony for its candor, honesty, and forthrightness.

5. Discussion of the Testimony

For the Court, the question of "similar" comes down to whether to be broad (Petitioner's view) or granular (Respondent's view), that is, whether to recognize from the Petitioner's perspective the overwhelming litany of attributes and characteristics that are found to be nearly, if not actually, identical between digital advertising services and non-digital advertising services based on the testimony of the witnesses (i.e., purposes, objectives, planning, participants, strategies, goals, content, targeting, analytics, format, function, audience, effectiveness, conversions, processes, timing, outcomes, performance tools, attention, intrusiveness, richness, context, message, media, awareness,

services." CODE § 7.5-101(e)(1) (emphasis added). Again, throughout the course of the case, the parties generally used these terms interchangeably. The Court nevertheless has attempted to confine its discussion to the "advertising services" that are taxed by the Tax and to the "services" that are covered by ITFA.

considerations, engagement, activation, effectiveness, measurement, feedback, and cost) or to herald from the Respondent's viewpoint, differences in business models and technical operations between the two methods of delivery.

It is important to note that the ITFA forbids discriminatory taxes on "electronic commerce" which is defined not just on deliveries conducted over the Internet, but on "any transaction conducted over the Internet or through Internet access, comprising the *sale, lease, license, offer, or delivery* of property, goods, services, or information." 47 U.S.C. § 151 note § 1105(3) (emphasis added).

Based on the testimony and other evidence introduced on this issue, the Court finds that it may be a close question in the abstract, but in the context of the ITFA, the Tax, advertising services, and digital advertising services, the Court reasons that Congress could not have been any clearer that it did not want internet services of any kind taxed unless other similar services in the broader sense were taxed. Using a common-sense approach to define and distinguish digital advertising services from non-digital, the Court finds that currently, in the advertising industry, in academia, and in Maryland households, the provision of digital advertising services is indistinguishable from the provision of non-digital advertising services; they are even more aligned than "similar." This perception may change over time as new technologies, capabilities, and public education develop and prosper, but that is the current state of affairs.

The Court finds, based upon the testimony presented in the hearing, that advertising services are rendered in an attempt to have the public do something—whether those services are digital or not. The medium through which the message to do something is transmitted to a consumer, be it digitally or through a non-digital means does not, as a matter of fact, overcome the inherent similarity between the two. Whether something is similar to something else is determined by a plurality of characteristics that are not necessarily the same by comparison, but that are not so different as to be non-comparable.

Advertising services through digital commerce and advertising services through non-digital commerce need not be the same. The ITFA also uses the term “generally imposed,” meaning that the similarity can be varied by some items that do not fit precisely within the characteristics being compared.

To the Court, purpose is the paramount consideration. The purpose of digital advertising services is the same as the purpose of non-digital advertising services, i.e., to make an impression on receivers of the advertising that leads to a sale of goods or other action. In this respect, all advertising services are similar to all other advertising services. Other considerations pale. Attempts to characterize digital advertising as much more detailed or granular in practice, or as a completely new business model or industry, do not change the main purpose. Both industry and current academic thinking support the idea that digital advertising services are merely a newer form of advertising services and not a new business category. Other attributes raised in defining advertising services or digital advertising services are mere distractions. For example, in the Court’s view, advertising services do not need a separately paid publisher to be advertising. Advertising services, including digital advertising services, include all attempts to get a consumer off the proverbial couch and into the proverbial store, which of course may now be found inside a phone as an IP address instead of a building with a street address.

The ITFA concerns transactions of electronic commerce, not structures or business models or technical operations behind those transactions. Thus, the question is “Are the transactions similar” not “Are the business models similar?” The Court finds that the following test suggested by the Respondent is unpersuasive: “If the services differ operationally, even by one or two characteristics, they are dissimilar and the tax does not discriminate under the ITFA.” Respondent’s Post-Hearing Brief (11/25/25) at 41. When the proper comparison is made, digital advertising services are similar to non-digital advertising services in all circumstances. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Further, TB59 adds very little to the determination of “similar.” TB59 is merely a reworking of Professor Wilbur’s report, which was thoroughly analyzed in testimony and argument. Although neither “programmatic” nor “visual” are words in either the ITFA or the Tax, the Respondent made them the key points in an analysis of whether or not an advertising service should be taxed in Maryland. The Court rejects the notion that including these two words helps bring the Tax within the proscriptions of the ITFA. While the Respondent may wish to adopt TB59’s interpretations, such a course of action will not cause to make digital advertising services any more different than non-digital advertising services. The Tax will still violate the “similar” requirement of the federal law even though TB59 has been elevated from guidance to regulation (and even if it is further elevated to statute), because this Court finds that the digital advertising services covered by the Tax are similar to advertising services not covered by the Tax and that the Tax therefore violates the ITFA. While the Respondent is presumed correct and given deference in interpreting its statutes and regulations, the Respondent is asked to interpret a state statute in light of federal law. The Court did not hear any testimony from the Respondent as to how the state statute fits within the federal ITFA. Similarly, the Respondent has no longstanding interpretation of the Tax. It was only enacted in 2021 with 2022 as the first time the tax was collected. Therefore, deference will not cover non-binding guidance, and the Court gives little deference to the Respondent. The Petitioner prevails on this point.²⁴

²⁴ Another potential way of viewing the ITFA’s applicability that does not turn on the word “similar,” is to view this matter as a *de facto* sales tax controversy cloaked as a gross receipts tax. Indeed, the ultimate result of the Tax is to charge applicable corporations a tax on the revenue/sales of digital advertising services which it may then build into the price it charges for such services. Under a sales tax analysis, the “true object” of the Tax is to impose a graduated tax on the delivery of a digital service. It is very clear from the ITFA that Congress did not want digital/internet services to be taxed, whether they were similar or not with other services that were taxed.

B. Private Right of Action – Scope

What is the scope of the ITFA? The Respondent argues that the ITFA does not provide for a private remedy and does not create a cause of action in any person or company to enforce it. That argument, while probably true in fact, misses the mark. According to the legal definition, a “right of action” means, “The right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon.” *Right of Action*, BLACK’S LAW DICTIONARY (4th ed. 1957). That is irrelevant to the case at bar.

The Petitioner is not attempting to enforce the ITFA by filing a stand-alone action for a violation of the federal law. Likely, only the Federal government could bring that type of action against a state. The Petitioner has standing because it is seeking a refund of tax paid to the Respondent. Whether the ITFA lacks a private right of action is irrelevant. The Petitioner is merely using the ITFA as justification for a refund claim that the Court finds was properly filed. The procedure or vehicle for the appeal is the Respondent’s denial of the refund claim. As such, Petitioner is able and correct to argue that the ITFA precludes the Tax from being imposed. The Petitioner prevails on this point.

C. Supremacy Clause – Pre-emption

Does the Supremacy Clause apply to pre-empt Maryland law? It normally does if there is a conflict between the two. The Respondent quotes from *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), in saying that a pre-emption analysis must start with a presumption against pre-emption: “the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *See also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) and *Dep’t of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). The Court could not agree more, but finds that the language of the ITFA is indeed a “clear and manifest” expression of what Congress wanted: no state discrimination against internet services.

A recently decided Supreme Court of Maryland case is also instructive. *Mayor & City Council of Balt. v. B.P. P.L.C., et al.*, 493 Md. 427 (2026). Three local jurisdictions sought common law tort verdicts against 26 oil companies for damages caused by global greenhouse gas pollution. That court found that the actions were preempted by federal legislation, in particular the Clean Air Act. Relying heavily on the U.S. Supreme Court decision in *Int’l Paper Co. v. Oullette*, 479 U.S. 481 (1987), the Supreme Court of Maryland cited three attributes for preemption:

(1) “that it is not necessary to a federal statute to provide explicitly that particular state laws are pre-empted;” (2) preemption “may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation”; and (3) “in addition to express or implied pre-emption, a state law also is invalid to the extent that it actually conflicts with a federal statute” and that “such a conflict will be found when the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.” *Id.* at 491–92 (citation modified).

493 Md. at 469.

All of those attributes are present in the case at bar. Moreover, in the Maryland Supreme Court decision, a “saving clause” in the federal statute specifically preserved some states rights within the environmental arena; the ITFA has no such clause. The Petitioner prevails on this point.

D. Constitutionality – Anti-commandeering

With respect to the constitutionality of the ITFA, the Respondent argues that the ITFA is an example of Congress exceeding its enumerated powers in the Constitution by ordering the states to do something over which the Constitution did not give Congress sole authority. Imposing a tax on a particular activity, here, electronic commerce is not Congress’ authority alone. The Respondent further argues that taxing is an essential function of both federal and state governments and Congress may not interfere with a state’s right to tax. The Respondent points to *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453 (2018) for its “anti-commandeering” argument. *Murphy* struck down a Congressional statute that prohibited states from authorizing college sports gambling because that statute interfered

with states' legitimate authority. Respondent argues that this Court should disregard any argument Petitioner raises under the ITFA because *Murphy* dictates that the ITFA violates the anti-commandeering proscriptions of the Tenth Amendment.

The flaw in Respondent's argument, however, is that unlike interstate commerce, the Constitution does not grant Congress plenary authority to regulate intercollegiate gambling. Therefore, *Murphy* is inapposite and does not preclude Congress from enacting the ITFA as an exercise of its plenary authority to regulate interstate commerce. The Petitioner prevails on this point.

For all the above reasons, the Court finds that, after a hearing and decision on the meaning of "similar" in the context of this case, there are no material facts in dispute, and the case is ripe for a decision on the cross-motions for summary judgment.²⁵ The Court concludes that the ITFA is valid, that the Tax violates the ITFA, that the Petitioner's motion for summary judgment on this count is GRANTED, and that the Respondent's motion for summary judgment on this count is DENIED.

II. U.S. Constitution

The Court now moves to analyze the parties' non-ITFA legal questions of law with regard to the Tax.

A. Dormant Commerce Clause

The seminal case on the subject of state tax viability with respect to the dormant Commerce Clause employs a four-prong test: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the state. *Complete Auto Transit*,

²⁵ Without the hearing, the Petitioner's motion for summary judgment would have had to be denied; the Petitioner would not have prevailed on the narrow scope of its motion.

Inc. v. Brady, 430 U.S. 274, 279 (1977). The Petitioner argues that the Tax violates prongs 2, 3, and 4. Petitioner’s Memorandum (3/5/24) at 21–31; Petitioner’s Reply (5/2/24) at 8–12.

Prong 2 (fair apportionment and internal/external consistencies) is allegedly violated because the rate of the Tax increases based on a taxpayer’s global activities that need not have any connection with Maryland—a violation of fair apportionment.

According to U.S. Supreme Court precedent, a state’s taxation must be fairly apportioned, that is, have both internal and external consistency. A brief explanation of these concepts was stated in *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), as follows:

Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. . . .

External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. See *Goldberg, supra*, at 262; *Container Corp., supra*, at 169-170. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching.

Id. at 185 (citations omitted).

The external consistency test in the case at bar is allegedly violated because the tax rate increases based on a taxpayer’s global activities that need not have any connection with Maryland, a violation of fair apportionment. Similarly, the Tax’s graduated tax rate increases in direct proportion to the Petitioner’s global revenues and not its Maryland activity. This, too, is a violation of fair apportionment and creates external inconsistency. Respondent contends that U.S. Supreme Court precedent permits the

imposition of graduated tax rates.²⁶ This contention, however, misses the mark because the issue is not whether a graduated tax rate is permissible, but whether the result of such graduated tax rates taxes activity outside the state.

In a predecessor case, the U.S. Supreme Court stated the test this way: “The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.” *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). The tax rate increases as a taxpayer’s global revenues increase. A taxpayer’s global revenue has nothing to do with its Maryland activity. Therefore, the Tax graduated rate schedule does not reasonably reflect the in-state component of the digital advertising activity being taxed. As a result, the Tax unquestionably taxes activity outside of Maryland in violation of the external consistency test.

Indeed, one of the other lessons of *Jefferson Lines* is that the Court should consider the “practical effect” of the investigated tax. *Jefferson Lines*, 514 U.S. at 183. Here, the economic reality is that out-of-state revenues play a major role in both the threshold of imposition of the Tax (global revenues of \$100 million or more) and in the tax rate (global revenues up to \$15 billion) and thus, the tax amount. This result imposes more tax on the Petitioner the more activity it conducts outside of Maryland. Increases in tax are wholly unrelated to increased Maryland activity. The only factor restricted to Maryland in the tax computation is the Maryland revenues generated from digital advertising services (\$1 million or more).

Thus the “practical effect” is that the Tax in its operation discriminates against more globally robust companies in interstate commerce to the advantage of the Maryland tax coffers. This it may not do. The Tax is not fairly apportioned and interferes with interstate commerce.

²⁶ *Maxwell v. Bugby*, 250 U.S. 529 (1999); see also *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015).

The Tax is unfairly apportioned in both theory and in fact. As an illustration, take two companies with the same amount of digital advertising service revenue in Maryland, say \$10 million. Company A has \$100 million of global revenues and pays a 2.5% tax on the \$10 million, or \$250,000. Company B has just over \$15 billion of global revenues and pays a tax of 10% of the \$10 million, or \$1,000,000. That is not a fair apportionment of the tax to the economic activity within Maryland. Consequently, the Tax must be judged as not fairly apportioned.

The Respondent cites *Washington Bankers Ass'n v. State*, 495 P.3d 808 (Wash. 2021) for the proposition that a state “may use global gross revenues to establish the rate of the tax.” Respondent’s Response (4/11/24) at 18. In that case, the state imposed an additional 1.2 percent tax on financial institutions with consolidated global net income of at least \$1 billion. As with the Tax, the Washington tax was imposed only on the in-state revenue. That case is distinguishable in several respects. For instance, there was already a tax on the in-state revenue for all financial institutions, whereas in Maryland, there is no tax on in-state digital advertising services if a vendor has less than the taxing thresholds of \$1 million digital advertising services in-state and \$100 million global revenues. In other words, the Washington tax in question was an add-on, not an initial tax. Also, the tax rate was fixed at 1.2 percent, not a graduated rate starting at 2.5 percent with a potential of 10 percent based on global revenues. Even to a casual observer, the point at which the Maryland tax became unfair would have to be somewhere in between. Finally, the court in *Washington Bankers* only evaluated prong 3. While the prongs may have overlapping characteristics, no party raised a prong 2 argument. Thus, it can hardly be considered instructive in the case at bar.

Prong 3 (discrimination) is allegedly violated because the Tax favors in-state interests to the detriment of out-of-state interests. The Petitioner argues that the Tax violates the discrimination prong of *Complete Auto* because the Maryland General Assembly designed it to only apply to out-of-state

advertisers. The Respondent argues that the Tax does not violate the third prong of *Complete Auto* because the Tax applies uniformly to in-state and out-of-state taxpayers. The Respondent is incorrect, as explained below. Unfair apportionment is *de facto* discrimination.

As a matter of law, the Tax discriminates in an unconstitutional manner. “A tax that unfairly apportions . . . is a form of discrimination against interstate commerce.” *Armco v. Hardesty*, 467 U.S. 638, 644 (1984). More recently in *Wynne*, 575 U.S. 542 (2015), the U.S. Supreme Court recognized that a consistency test “helps courts identify tax schemes that discriminate against interstate commerce.” 575 U.S. at 562. The Tax consistently targets out-of-state companies to the benefit of in-state companies. As set forth above, the Tax graduated rates unfairly apportion. Unfair apportionment, as the U.S. Supreme Court has recognized, is a form of discrimination. The unfair apportionment of the Tax graduated rates informs its practical and intended effect of only applying to non-Maryland companies. Therefore, the Tax unconstitutionally discriminates in violation of the third prong of *Complete Auto*.

The U.S. Supreme Court test for whether a statute discriminates unconstitutionally against interstate commerce is to determine whether it regulates commerce “evenhandedly with only incidental effects on, interstate commerce.” *Oregon Waste Sys. v. Dep’t of Env’tl Quality of Oregon*, 511 U.S. 93, 99 (1994), (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). A restriction on interstate commerce that favors an in-state economic interest is “virtually per se invalid.” *Id.* In the case of *Am. Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266 (1987), a mere \$25 tax imposed on both in-state and out-of-state tractor trailers was held to be unconstitutionally discriminatory because it favored the in-state users who made greater use of the state’s roads, while the out-of-state users paid the full tax, even if they used the state’s road only once. The “nominally equivalent” fee was “more valuable” to local trucking businesses, in violation of the dormant Commerce Clause. *Id.* at 296.

Similarly, in the case at bar, the Tax favors in-state businesses because there appear few, if any, with global revenues that meet the Tax threshold of \$100 million per year. The Tax may on its face be neutral to in-state and out-of-state businesses, but it is demonstrably “more valuable” to in-state businesses.

The Petitioner argues that Prong 4 (fair relation of the tax to state services) of *Complete Auto* is allegedly violated because the Tax’s tax rate changes due to fluctuations in global revenues, regardless of the company’s revenues in Maryland, advertising or otherwise, citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). The Respondent again replies by noting that the Tax applies equally to in-state interests that meet the \$100 million global revenue and \$1 million Maryland revenue digital advertising thresholds. It is not happenstance, however, that Maryland has no companies (or possibly one according to testimony) that meet these thresholds. The economic reality is that the Tax in its everyday operation discriminates against more globally robust companies in interstate commerce to the advantage of the Maryland tax coffers. Global revenues have no relationship to in-state services under the Tax to those payors. Thus, prong 4 is violated as well. The Petitioner prevails on this point.

In sum, the economic reality is that the Tax in its everyday operation discriminates against more globally robust companies in interstate commerce to the advantage of the Maryland tax collectors, both because the tax rate is not proportional to the economic benefits in Maryland (i.e., is not fairly apportioned and especially fails the external consistency test) and because the revenue threshold favors in-state businesses over global businesses (i.e., discrimination). In the Court’s opinion, by tying two of the three factors in the tax equation to global revenues (the tax rate and the \$100 million threshold), while leaving the only remaining factor as in-state digital advertising services revenue, unconstitutional

discrimination has occurred.²⁷ Moreover, prong 4 is violated because payors of the tax do not receive any extra benefit from the Tax for extra dollars paid due to higher global revenues.²⁸

Thus, the Petitioner’s motion for summary judgment on this count is GRANTED, and the Respondent’s motion for summary judgment on this count is DENIED.

B. Due Process Clause

The Petitioner’s Due Process Clause argument is very brief and includes the apportionment issue from its dormant Commerce Clause discussion. Petitioner’s Memorandum (3/5/24) at 4–5, 27–28.

The Respondent gives the Due Process Clause more attention, noting “significant parallels” between the dormant Commerce Clause and the Due Process Clause. Respondent’s Memorandum at 43–45, Respondent’s Response at 19–20, citing *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018).

It is true that the U.S. Supreme Court in *Wayfair* said that there are “significant parallels” between the dormant Commerce Clause and the Due Process Clause restrictions. It is also true, however, that the same Court has said that whether the dormant Commerce Clause and the Due Process Clause are violated are two separate and distinct questions. *Wynne*, 575 U.S. 542 (2015). The court in *Wynne* agreed that due process does not prevent a state from taxing global revenues, for example, but if there is discrimination favoring the home state in that process then there is a violation of the dormant

²⁷ Had the Maryland General Assembly imposed a similar tax with a threshold on non-digital advertising services, this Court might have been brought to an entirely different conclusion on the ITFA and dormant Commerce Clause questions. Similarly, the imposition of a uniform sales tax on all Maryland advertising irrespective of medium or a company’s global revenues could have aided the Respondent.

²⁸ The Petitioner also argued that the Tax violates the “multiple tax” prohibition of the ITFA because there is a “substantial risk” that the Tax will be applied by multiple states and thus tax the same digital advertising services across state lines without a mechanism for credits on the Maryland Tax. Petitioner’s Petition (8/28/23) at ¶¶ 60-62. The Court is not convinced that this issue is ripe for adjudication. A “risk” of a multiple tax is not equivalent to a multiple tax. Further, the issue appears to be subsumed by the apportionment discussion in prong 2 of *Complete Auto*.

Commerce Clause. As the Respondent properly noted, the Due Process Clause has two requirements of its own: “(1) a minimal connection between the interstate activities and the taxing State, and (2) a rational relationship between the income attributed to the State and the intrastate values of the enterprise.” *ConAgra Foods RDM, Inc. v. Comptroller of the Treasury*, 241 Md. App. 547, 565 (2019). The Court finds that in this case, the second requirement has not been met, for the same reasons that prong 3 of *Complete Auto* has not been met. The Tax violates due process because the Tax is discriminatory. The Petitioner prevails on this point.

Thus, the Petitioner’s motion for summary judgment on this count is GRANTED, and the Respondent’s motion for summary judgment on this count is DENIED.

CONCLUSION

For the above reasons, the Court finds that there is no genuine dispute as to any material fact and that, as a matter of law, the Petitioner’s Motion for Summary Judgment is GRANTED on all counts. The Respondent’s Motion for Summary Judgment is DENIED on all counts. Judgment is for the Petitioner. The Respondent will issue a refund of the Tax paid by the Petitioner, with interest in accordance with Maryland law.²⁹

CERTIFIED TRUE COPY

TEST: Andrew Berg, Clerk

NOTICE: You have the right to an appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review MUST be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries or online.

CC: D. Baum, Esq., C. Roberts, Esq., A. Phillips, Esq., Z. Atkins, Esq., and A. Chittiappa, Esq.

J. Wisner, Esq., B. Grossman, Esq., M. Singerman, Esq., and R. Nacrelli, Esq.

²⁹ Issues or other matters raised, but not specifically addressed in this opinion, were deemed redundant, *de minimus*, irrelevant, or without merit.