IN THE MARYLAND TAX COURT —– 23-DA-OO-0654
PEACOCK TV, LLC 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.

Accordingly, on this 14th day of August 2026, for the reasons discussed below, the Maryland Tax Court hereby GRANTS in part and DENIES in part the Petitioner's motion, GRANTS in part and DENIES in part the Respondent's motion, and, ultimately, the Court REVERSES the Respondent's decision. The refund must be paid with interest, as applicable under Maryland law.[1, 2]

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 applies to businesses that have at least $1 million in annual gross revenues derived from digital

[1] This decision is one of three decisions published on this date regarding the Tax. The other two involve Google LLC and Apple Inc. While some arguments and facts differ among these three decisions, the Court's legal conclusions and ultimate outcomes are similar.
[2] The Court takes official notice that there is past and ongoing litigation in other jurisdictions involving similar taxation matters that merely provide persuasive authority.

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. [3]

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

First, the Tax violates sections 1101(a) and 1105(2)(A)(i) of the federal Internet Tax Freedom Act ("ITFA") because the Tax fits the definition of 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). Petitioner's Memorandum (12/5/23) at 2–3, 13–19; Petitioner's Consolidated Reply Brief (1/24/24) at 1, 3–20; Petitioner's Post-Trial Response Brief (12/17/25) at 8–9.[4]

---

[3] 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); s*ee 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).

[4] 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

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."[5] Specifically, the Tax discriminates against out-of-state interests, is not fairly apportioned, and taxes extraterritorial values, thus regulating commerce inappropriately. Petitioner's Memorandum (12/5/23) at 3, 19–24; Petitioner's Consolidated Reply Brief (1/24/24) at 20–28.

Third, the Tax violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because it discriminates against out-of-state commerce.[6] Petitioner's Memorandum (12/5/23) at 3, 19, 23–24.

Fourth, the Tax violates the foreign Commerce Clause of the U.S. Constitution because only "Congress shall have the power . . . [t]o regulate Commerce with foreign Nations" and the Tax interferes with the United States' commerce with other nations.[7] Petitioner's Memorandum (12/5/23) at 3, 24–27; Petitioner's Consolidated Reply Brief (1/24/24) at 28–34.

Finally, the Tax violates the First Amendment of the U.S. Constitution and Article 40 of the Maryland Constitution's Declaration of Rights because it is a "law . . . abridging the freedom of speech, or of the press" by requiring content-based distinctions.[8] Petitioner's Memorandum (12/5/23) at 3, 28–30; Petitioner's Consolidated Reply Brief (1/24/24) at 34–36.[9]

---

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.

[5] U.S. CONST. art. I, § 8, cl. 3.

[6] U.S. CONST. amend. XIV, § 1.

[7] U.S. CONST. art. I, § 8, cl. 3.

[8] U.S. CONST. amend. I.

[9] Article 40 of the Maryland Constitution's Declaration of Rights reads as follows, "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiment on all subjects, being responsible for the abuse of that privilege." MD. CONST. DECL. OF RIGHTS art. 40. The courts of Maryland have held that this provision is in *pari materia* with the First Amendment to the U.S. Constitution. *See Pendergast v. State*, 99 Md. App. 141 (1994). Thus, we need not discuss it separately from the U.S. Constitution.

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

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 (1/8/24) at 12–14; Respondent's Reply Brief (2/7/24) at 4–7.

Second, the ITFA does not confer a private right of action to enforce it. Respondent's Memorandum (1/8/24) at 14–22; Respondent's Reply Brief (2/7/24) at 7–9.

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 (1/8/24) at 22–33; Respondent's Reply Brief (2/7/24) at 10–16.

Fourth, the Tax does not violate the dormant Commerce Clause because it does not discriminate between similarly situated companies in Maryland and other states. Respondent's Memorandum (1/8/24) at 33–35; Respondent's Reply Brief (2/7/24) at 16–21.

Fifth, the Tax does not violate the dormant Commerce Clause because it is fairly apportioned. Respondent's Memorandum (1/8/24) at 33–34, 36–41.

Sixth, 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 (1/8/24) at 41–42.

---

[10] U.S. CONST. amend. X.
[11] U.S. CONST. art. VI, cl. 2.

Seventh, the Tax does not violate the foreign Commerce Clause because it does not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. Respondent's Memorandum (1/8/24) at 45–49; Respondent's Reply Brief (2/7/24) at 21–23.

Finally, the Tax does not violate the First Amendment or Article 40 of the Maryland Constitution's Declaration of Rights because Maryland law does not threaten to suppress the expression of particular ideas or viewpoints. Respondent's Memorandum (1/8/24) at 49–55; Respondent's Reply Brief (2/7/24) at 23–25.

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

[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].")

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).

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

[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).

intent."); s*ee 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 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]

---

[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.
[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.

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 Memorandum (12/5/23) at 16. 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 Reply Brief (2/7/24) at 14–15. We begin our analysis by turning to those four cases, which are less than persuasive at best.

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

[21] This decision is not reported.

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 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 Reply Brief (2/7/24) at 16), 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 Reply Brief (2/7/24) at 16. 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?

[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.

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
- 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:
  - o Programmatic
  - o 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, the Petitioner introduced the testimony of four witnesses (two fact and two expert), and the Respondent presented two witnesses (one expert and one fact). The Court found each of the six 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.

<u>Testimony of Petitioner's Fact Witness Larry Allen</u>

Mr. Allen, an executive with Comcast, [23] testified for the Petitioner and brought to bear notable advertising and management experience with several companies. He stated that the advertising industry

[23] At the time of the hearing, the Petitioner was wholly owned by Comcast Corporation. Petitioner's Memorandum (12/5/23) at 1.

considers digital advertising to be advertising delivered, bought, or sold on the Internet. For example, television and radio signals may be emitted digitally, but the advertising using those media is not digital because the advertising is not being delivered using the Internet. He further testified that his experience with the word "programmatic" was only with the term "programmatic guaranteed" which referred to advertising inventory delivered largely through the Internet, that is, directly sold but executed through use of the Internet.

Testimony of Petitioner's Fact Witness Ryan McConville

Mr. McConville, another Comcast executive with years of advertising experience, testified for the Petitioner that the advertising industry considers digital advertising to be advertising delivered over the Internet, and non-digital advertising is not delivered using the Internet. To the average consumer, he said, there is no way to tell, content-wise, whether it is one or the other. He also testified that programmatic advertising is advertising only bought over the Internet, and that the Interactive Advertising Bureau ("IAB") and the advertising industry, in general, use that definition.

Testimony of Petitioner's Expert Witness Greg Ebbecke

Mr. Ebbecke testified for the Petitioner and was certified as an expert in the field of marketing and media planning. Tr. July 30, 2025, 234. He testified that he has 18 years of experience with Harmelin Media and is currently its vice president of strategic planning. His firm manages $700-$800 million of advertising a year for its clients. He defined advertising as any commercial messaging designed to turn favor to a client and create a sale. He defined digital advertising as advertising delivered exclusively over the Internet; correspondingly, all other advertising to him is non-digital. At one point he testified that if he went to a client and proposed doing a digital non-Internet advertising campaign, he would expect to be fired because he showed a lack of understanding of the advertising field. He defined programmatic advertising as advertising bought over the Internet.

During cross-examination, Mr. Ebbecke testified that at the highest level, digital and non-digital advertising are not interchangeable. For example, he admitted that there are digital advertisements over cable television which do not use the Internet. His ultimate conclusion, however, was that digital and non-digital advertising are "similar" because they share the common goal of inducing a sale.

<u>Testimony of Petitioner's Expert Witness Robert Palmatier</u>

Professor Palmatier was the last witness for the Petitioner and was certified as an expert in marketing and advertising. Tr. July 30, 2025, 323. He has been an educator for 20 years and is currently a marketing and advertising professor at the University of Washington. Prior to becoming an educator, he also had experience as a practitioner in those disciplines. He was proffered and accepted as an expert in his field. He testified that his definition of digital advertising, drawn from his academic research, is advertising that uses the Internet to promote products and services to audiences and platform users. Citing Wikipedia, he testified that digital advertising includes online advertising, online marketing, Internet advertising, or web advertising. Tr. July 31, 2025, 11. Citing Amazon, he testified that digital advertising is a form of marketing used by companies to promote a brand, product, or services through online channels. Tr. July 31, 2025, 14. He also found support for his definition on both the IAB and eMarketer websites. Professor Palmatier concluded that there are many definitions, but all of them are similar to each other.

Responding to the testimony of Professor Kenneth Wilbur, whose earlier testimony in a related Tax case was incorporated into the case at bar,[24] he said that Professor Wilbur's definition of digital advertising (i.e., must be programmatic and visual) never occurred to him and that it was "obvious" that

[24] Professor Wilbur testified on July 28–29, 2025, in the related matters involving Apple Inc. and Google LLC, and his testimony in those appeals was entered into evidence in this appeal by stipulation of the parties and concurrence of the Court. See Tr. July 30, 2025, 103–04; Tr. July 31, 2025, 274–75. He testified in the case at bar on July 31, 2025. His testimony in both hearings is summarized below.

digital advertising meant internet advertising. Professor Palmatier demonstrated to the Court that from five different academic perspectives, digital advertising is "similar" to non-digital advertising, and that all digital advertising is electronic commerce. Tr. July 31, 2025, 76. He opined that the digital aspect is simply an enabling technology applied to the same goal advertising has always had, i.e., getting consumers to buy something.

On cross-examination, Professor Palmatier admitted that digital advertising has some characteristics that are peculiar to that form of advertising (e.g., clickable links), but stated that all forms of advertising have some tradeoffs and differing characteristics, and that, over time, more advanced aspects of technology continue to be developed, but the basic theories of advertising have not undergone any change in decades. The theories from generations ago still apply with the new technologies. When asked if the level of targeting granularity in digital advertising can be achieved in the non-digital realm, Professor Palmatier again stated that specific targeting is simply a new technology to be used, but it does not change the goal of advertising and that sometimes, as he discussed in an Airbnb case-study, non-digital advertising can still work better than digital. Tr. July 31, 2025, 173–74.

When asked to pick which item in this series does not fit: airplane, helicopter, a Tesla, a motorcycle, a horse and cart, and a rocket ship, Professor Palmatier said they are all similar forms of transportation, showing a sequence of technology, but were all still "similar." All characteristics, he said, do not have to be the same for two or more methods of transportation to be similar. Finally, he said that, unlike Professor Wilbur, he searched and found the definitions he used via academic research, not from synthesis.

<u>Testimony of Respondent's Expert Witness Kenneth Wilbur</u>

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; Tr. July 31, 2025,

230. 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, namely, 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," *id.* at 302, or "sharing in really important characteristics," *id.* at 303. At the same time, he also recognized that the Webster's Dictionary second definition 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, while everything on the Internet is digital, not everything digital is necessarily on the Internet; that perception is "slang."

His 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.

At one point in his direct testimony, Professor Wilbur was asked by the Court to list three areas of disagreement with Professor Palmatier, whose testimony he had just attended. First, he said that he believed that all Internet advertising services are digital, but that not all digital advertising services are over the Internet. Second, programmatic advertising services involve automation, optimization, and messaging besides just the purchase. Third, academic literature primarily explains what was in the world 2½–12 years ago (he said an average of 5 years ago), and absence of new theories in the literature is not an indication that they do not exist. He thinks digital is not similar to non-digital.

During cross-examination in the other hearing of the related Tax appeals, 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. [25]

[25] 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 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.

In cross-examination for the case at bar, Professor Wilbur admitted that the first digital advertising appeared in 1994, 31 years ago, not 2½ -12 years ago. He also admitted that he did not draw his definition of digital advertising services (programmatic and visual) from any prior publication, but that the first time it was reduced to writing was in his report for the Respondent. He also agreed that it is more common than not to consider digital advertising as Internet advertising. Finally, he stated that he would adopt incorrect industry parlance in a published article if it would help him get a different point across.

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, 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). Even the Respondent's expert witness, Professor Wilbur, testified that programmatic advertising, as he defines it, uses the Internet for sales. Tr. July 31, 2025, 357–58.

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 Tax, advertising services, digital advertising services, and the ITFA, 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 42. 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.[26]

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 by a wide margin. 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.

[26] 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.

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 (1944). 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.[27] 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.

[27] 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.

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, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Petitioner argues that the Tax violates prongs 2 and 3. Petitioner's Memorandum (12/5/23) at 3, 20–24. The Respondent replies by noting that the Tax applies equally to in-state interests that meet the thresholds of $100 million global revenue and $1 million in Maryland of digital advertising, and that the Tax is internally and externally consistent. Respondent's Memorandum (1/8/24) at 34–41. The Court examines the two prongs in order.

Prong 2 (fair apportionment and internal/external consistencies). 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.[28] 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-

---

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

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.

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.

Prong 3 (discrimination) is allegedly violated because the Tax targets only companies located outside Maryland due to its high global revenue threshold of $100 million. The Respondent argues that the Tax does not violate the discrimination 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 Envtl 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'ns, 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.

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.[29]

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 argues in a single sentence that the Tax violates the Due Process Clause. The sentence comes in the Petitioner's discussion of prong 2 of *Complete Auto.* Petitioner's Memorandum (12/5/23) at 24. Similarly, the Respondent argues that the Tax passes the Due Process test because it is fairly apportioned also as discussed in its explication of prong 2 of *Complete Auto*. Respondent's Memorandum (1/8/24) at 41-42.

It is true that the U.S. Supreme Court in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018) 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 Commerce Clause. As the Respondent properly

[29] 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.

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.

C. Foreign Commerce Clause

The Respondent correctly points out that there are two inquiries that must be undertaken in evaluating whether a state law is compatible with the foreign Commerce Clause. Pursuant to *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 451 (1979), the Court must inquire whether the tax creates a substantial risk of international multiple taxation and second, whether the tax prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments. Respondent's Memorandum (1/8/24) at 45. The Petitioner agrees with those tests and notes that in several instances, the United States has opposed efforts by other countries to impose digital service taxes, like the Tax, on global commerce. Petitioner's Memorandum (12/5/23) at 26–27. The Court is not convinced that it would invite global economic fragmentation in the digital advertisement services tax arena for other states to adopt a similar tax as in Maryland. Efforts to tax digital advertisement services are bound to proceed internationally and what happens in Maryland would not, in the Court's opinion, disrupt the federal government's efforts to keep other countries from doing the same. The Tax therefore does not violate the foreign Commerce Clause.

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

D. First Amendment[30]

The Petitioner cites *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) as being directly on point to the case at bar with respect to the First Amendment. In the Supreme Court case, a sales tax exemption was given to magazines that were "religious, professional, trade, or sports periodical[s]." *Id.* at 222. The plaintiff was the publisher of a general interest monthly magazine, which carried articles on many subjects, including religion and sports, but did not qualify as a religious, professional, trade, or sports periodical. The Supreme Court struck down the statute on First Amendment grounds, stating that official scrutiny of the content of publications was incompatible with the First Amendment's guarantee of freedom of the press.

The Respondent counters that a more recent Supreme Court decision, *Leathers v. Medlock*, 499 U.S. 439 (1991), requires a deeper analysis of whether a tax is directed at or presents the danger of suppressing particular ideas. The Respondent also argues that the Tax protects the press, rather than suppresses it, by reducing the tax burden on news media entities. In attempting to protect the press, however, the Tax also has the effect of suppressing speech that does not fit within the definitions of "broadcast entity" or "news media entity." CODE §§ 7.5-101(d), (g)(1). In other words, to protect its exemption, a publication would be wise not to drift into the territory of an "aggregator or republisher of third-party content" which are not exempt. Code § 7.5-101(g)(2). Moreover, even under a rational basis test, the fact that the statute requires that a publication have a "primary" purpose invites discrimination on the basis of the content of the speech.

---

[30]As noted *supra* in n.9, the Court finds that Article 40 need not be discussed separately from the First Amendment.

This Court also agrees with the Petitioner's point that the word "news" in the statute is undefined, implying that it is somewhat vague. Petitioner's Memorandum (12/5/23) at 30. In addition, the word "primarily" in the statute is also vague and undefined. Vagueness in a statute that deals with activities of the press is usually fatal when measured against the First Amendment.[31, 32]

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.

---

[31] Philip A. Dynia, *Vagueness*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (August 10, 2023, last updated on November 5, 2025), https://firstamendment.mtsu.edu/article/vagueness.

[32] Having concluded that the Tax is violative of the First Amendment, the question of severability must be answered, namely, assuming that the Tax is otherwise valid, can the press exemption be stricken from the Tax leaving the rest of the Tax intact or must the Tax be invalidated in its entirety because of the unconstitutional exemption? That is a question beyond the scope of the Court's authority. Nevertheless, the Court offers the following as dictum:

Recent U.S. Supreme Court precedent leans somewhat heavily to preserving an underlying law if a particular provision is found to be unconstitutional. The last reported case in which the Supreme Court found a provision non-severable was *Murphy* in 2018, while there have been three decisions thereafter that each found an unconstitutional provision severable: *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), *Barr v. American Ass'n of Political Consultants*, 591 U.S. 610 (2020), and *Collins v. Yellen*, 594 U.S. 220 (2021). While the presence of a severability clause in the statutes under review in Seila and Barr made the decision to find severability easier (*see Selia Law LLC* at 230), such clauses are by no means necessary or determinative.

The Tax does not contain a severability clause, but a review of the legislative history shows that the law did not contain the exemption when originally passed. Thus, the law originally was meant to function without the exemption, and that fact argues in favor of excising the exemption without eviscerating the entire statute.

A recent law review article discussing the U.S. Supreme Court's seven decisions over the last decade on the subject of severability concludes that severability should be the norm, "rebutted only by an inseverability clause or something else with the force of law." William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 2 (2023). This Court agrees.

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 Judgement is GRANTED with respect to the ITFA, the dormant Commerce Clause, the Due Process Clause, and the First Amendment and is DENIED in all other respects. The Respondent's Motion for Summary Judgement is GRANTED with respect to the foreign Commerce Clause and is DENIED in all other respects.[33] Judgement is for the Petitioner. The Respondent will issue a refund of the Tax paid by the Petitioner, with interest in accordance with Maryland law.[34]

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: J. Friedman, Esq., D. Schlueter, Esq., C. Kearns, Esq., and C. Capouet, Esq.

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

---

[33] An approach that the Legislature could have taken that might be constitutional as to the First Amendment would be to create a non-profit exemption, as local news media outlets, especially in print news, contain many nonprofit entities. There already exist nonprofit sales and use exemptions in Maryland. Code § 11-204. *See also* Code § 4-104.

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