
COMCAST OF
CALIFORNIA/MARYLAND/
PENNSYLVANIA/VIRGINIA/WEST
VIRGINIA, LLC

COMCAST OF MARYLAND LIMITED
PARTNERSHIP

COMCAST OF DELMARVA, LLC

COMCAST OF POTOMAC, LLC

COMCAST OF BALTIMORE CITY, LLC

COMCAST OF MARYLAND, LLC

COMCAST CABLE
COMMUNICATIONS MANAGEMENT,
LLC
1701 John F. Kennedy Blvd.
Philadelphia, PA 19103

VERIZON MEDIA INC.
770 Broadway
New York, NY 10003

Plaintiffs,

v.

COMPTROLLER OF THE TREASURY
OF MARYLAND,

Defendant.

Serve On:
Peter Franchot
Comptroller of Maryland
80 Calvert Street, Room 121
Annapolis, MD 21401

and

**IN THE
CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY**

Case No. C-02-CV-21-000509

Brian Frosh)
Attorney General of Maryland)
200 St. Paul Place)
Baltimore, MD 21202)

COMPLAINT FOR DECLARATORY JUDGMENT

Comcast of California/Maryland/Pennsylvania/Virginia/West Virginia, LLC, Comcast of Maryland Limited Partnership, Comcast of Delmarva, LLC, Comcast of Potomac, LLC, Comcast of Baltimore City, LLC, Comcast of Maryland, LLC, Comcast Cable Communications Management, LLC, and Verizon Media Inc. (hereinafter, “Plaintiffs”) file this complaint against the Comptroller of the Treasury of the State of Maryland (hereinafter, “Comptroller”).

INTRODUCTORY STATEMENT

1. On March 18, 2020, the Maryland General Assembly passed H.B. 732, which enacted the Digital Advertising Gross Revenues Tax (the “Tax”). Governor Lawrence Hogan, Jr. vetoed the Tax, but on February 12, 2021, the General Assembly overrode his veto. The Tax took effect on March 14, 2021 and applies to tax years beginning after December 31, 2020. 2021 Maryland Laws, Chapter 37 (codified at Md. Code Ann., Tax-Gen. § 7.5-101, *et seq.*).

2. The Tax is the first state tax in the United States to target digital advertising services.

3. The Tax violates the Internet Tax Freedom Act (“ITFA”), a federal statute that bans states from imposing multiple or discriminatory taxes on electronic commerce. The Tax violates ITFA by choosing to single out advertising conducted through electronic

commerce, while not taxing traditional, non-digital advertising, such as billboards and classified ads.

4. The Tax is imposed on gross revenues derived from digital advertising services in Maryland at graduated rates, from a minimum rate of 2.5% to a maximum rate of 10% of such revenues.

5. The Tax rate increases based on the level of a taxpayer's global annual gross revenues, without regard to how much of those annual gross revenues are earned from digital advertising, or how much are earned in Maryland.

6. The General Assembly provided no method to determine which digital advertising service revenues are derived from Maryland. Instead, the legislature directed the Comptroller to adopt regulations defining this and several other critical elements of the Tax. But, despite the Tax applying to tax years beginning after December 31, 2020, the Comptroller has neither issued any explanatory guidance nor notified the public as to when such guidance may be available.

7. The Tax creates significant Tax liabilities that impact Plaintiffs' financial statements upon its enactment. Additionally, the Tax contains criminal liability provisions. For example, a person who is required to file a Tax return and willfully fails to do so is guilty of a misdemeanor. At the time of filing this complaint, Plaintiffs and other taxpayers are entering into advertising agreements that will extend into 2022 and beyond. Yet, as described below, Plaintiffs have no adequate administrative remedy to challenge the Tax's constitutionality. In fact, Plaintiffs have no administrative remedy at all.

8. The Tax violates the United States and Maryland Constitutions. It facially violates the ITFA and, therefore, the Supremacy Clause of the United States Constitution. It facially violates Article 2 of the Maryland Constitution's Declaration of Rights, the Due Process Clauses of the United States Constitution and the Maryland Constitution's Declaration of Rights, Articles 8 and 14 of the Maryland Constitution's Declaration of Rights, and the Commerce Clause of the United States Constitution.

9. This Court should declare that the Tax is illegal pursuant to the ITFA, the Due Process Clauses of the United States Constitution and the Maryland Constitution's Declaration of Rights, Articles 8 and 14 of the Maryland Constitution's Declaration of Rights, and the Commerce Clause of the United States Constitution.

THE PARTIES

10. Comcast of Maryland, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

11. Comcast of Maryland Limited Partnership is a limited partnership with its principal place of business in Philadelphia, Pennsylvania.

12. Comcast of California/Maryland/Pennsylvania/Virginia/West Virginia, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

13. Comcast of Delmarva, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

14. Comcast of Potomac, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

15. Comcast of Baltimore City, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

16. Comcast Cable Communications Management, LLC is a limited liability company with its principal place of business in Philadelphia, Pennsylvania.

17. Verizon Media Inc. is a corporation with its principal place of business in New York, New York.

18. Plaintiffs each derived at least \$1,000,000 of gross revenues from digital advertising services in Maryland in 2020 and each Plaintiff expects to each derive at least \$1,000,000 of gross revenues from digital advertising services in Maryland in 2021 and beyond. Plaintiffs each derived in excess of \$100,000,000 of global annual gross revenues in 2020 and each expects to derive in excess of \$100,000,000 of global annual gross revenues in 2021 and beyond. Thus, the Tax will be imposed on each Plaintiffs' gross revenues derived from digital advertising services in Maryland in 2021 and beyond.

19. The Comptroller is the Maryland state agency responsible for collecting revenues, enforcing laws related to those revenues, paying the State's bills, and keeping the State's accounts. Peter Franchot is the State's Comptroller.

JURISDICTION AND VENUE

20. Jurisdiction is founded under the Maryland Declaratory Judgment Act, Md. Code Ann., Cts. and Jud. Proc. § 3-401, et seq.

21. An actual controversy exists between the Plaintiffs and the Comptroller.

22. The granting of declaratory relief will serve to terminate the uncertainty or controversy with respect to Plaintiffs.

23. This Court has jurisdiction over the Comptroller pursuant to Md. Code Ann., Cts. & Jud. Proc. §§ 6-102 and 6-103 because the Comptroller maintains its principal place of business in the State and the actions complained of herein arose in the State.

24. Venue of this declaratory judgment action in this County is appropriate pursuant to Md. Code Ann., Cts. & Jud. Proc. § 6-201, as the Defendant has carried on regular business in this County.

25. The facts have accrued wherein a legal decision is sought or demanded. The facts in this matter have arisen and this matter is neither future, contingent, nor uncertain.

FACTS

Background of H.B. 732

26. On March 18, 2020, H.B. 732, *Taxation – Tobacco Tax, Sales and Use Tax, and Digital Advertising Gross Revenues Tax* was deemed passed enrolled.

27. On May 7, 2020, Governor Hogan vetoed H.B. 732 – *Taxation – Tobacco Tax, Sales and Use Tax, and Digital Advertising Gross Revenues Tax*, along with two other bills: S.B. 669/H.B. 1095 – *Public Health – Prescription Drug Affordability Board Fund* and H.B. 932 – *21st-Century Economy Fairness Act*.

28. On February 11, 2021, the House of Delegates voted to override Governor Hogan’s veto by a vote of 88 - 48.

29. On February 12, 2021, the Senate voted to override Governor Hogan’s veto by a vote of 29 - 17.

30. Pursuant to Article 2, Section 17(d) of the Maryland Constitution, H.B. 732 took effect on March 14, 2021.

H.B. 732 – Digital Advertising Gross Revenues Tax

31. Maryland imposes the Tax on the “annual gross revenues of a person derived from digital advertising services in the State.” Md. Code Ann., Tax-Gen. § 7.5-102(a).

a. “Annual gross revenues” is defined as “income or revenue from all sources, before any expenses or taxes, computed according to generally accepted accounting principles.” Md. Code Ann., Tax-Gen. § 7.5-101(b).

b. “Digital advertising services” is defined to include “advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services.” Md. Code Ann., Tax-Gen. § 7.5-101(d).

c. “Digital interface” is defined as “any type of software, including a website, part of a website, or application, that a user is able to access.” Md. Code Ann., Tax-Gen. § 7.5-101(e).

d. “User” is defined as “an individual or any other person who accesses a digital interface with a device.” Md. Code Ann., Tax-Gen. § 7.5-101(f).

32. The Tax rate varies from 2.5% to 10% of a person’s assessable base determined in reference to the person’s “global annual gross revenues” from all sales, including sales of other than digital advertising services. The Tax rate is:

a. 2.5% of the assessable base for a person with global annual gross revenues of \$100,000,000 through \$1,000,000,000;

b. 5% of the assessable base for a person with global annual gross revenues of \$1,000,000,001 through \$5,000,000,000;

c. 7.5% of the assessable base for a person with global annual gross revenues of \$5,000,000,001 through \$15,000,000,000; and

d. 10% of the assessable base for a person with global annual gross revenues exceeding \$15,000,000,000. Md. Code Ann., Tax-Gen. § 7.5-103.

33. “Assessable base” is defined as “the annual gross revenues derived from digital advertising services in the State.” Md. Code Ann., Tax-Gen. § 7.5-101(c).

34. The Tax purportedly applies solely to a person’s annual gross revenues derived from digital advertising services in Maryland. To determine the part of the annual gross revenues of a person that are derived from digital advertising services in Maryland, total gross revenues from digital advertising services are apportioned by using a fraction:

a. The numerator of which is the annual gross revenues of a person derived from digital advertising services in Maryland; and

b. The denominator of which is the annual gross revenues of a person derived from digital advertising services in the United States. Md. Code Ann., Tax-Gen. § 7.5-102(b)(1).

35. Section 2 of H.B. 732 provides no rules to determine a taxpayer’s numerator of the apportionment fraction described in Md. Code Ann., Tax-Gen. § 7.5-102(b)(1). Instead, the Tax’s provisions direct the Comptroller to “adopt regulations that determine the state from which revenues from digital advertising services are derived.” Md. Code Ann., Tax-Gen. § 7.5-102(b)(2).

36. Section 2 of H.B. 732 contains no credit mechanism to adjust a taxpayer's Tax liability for taxes paid to other States on the same digital advertising service revenues that are subject to the Tax.

H.B. 732 – Digital Advertising Gross Revenues Tax Filing and Payment Obligations

37. Each person that, in a calendar year, has annual gross revenues derived from digital advertising services in Maryland of at least \$1,000,000 must complete, under oath, and file with the Comptroller the Tax return by April 15th of the next year. Md. Code Ann., Tax-Gen. § 7.5-201(a). That person must file with the return an attachment that states any information that the Comptroller requires to determine annual gross revenues derived from digital advertising services in Maryland. Md. Code Ann., Tax-Gen. § 7.5-201(c).

38. Persons, including responsible officers of a corporation, who willfully fail to file or falsely file returns required by Md. Code Ann., Tax-Gen. § 7.5-201 may be subject to certain criminal penalties, including fines and possible imprisonment. Md. Code Ann., Tax-Gen. §§ 13-1001(g), 13-1002(b).

39. H.B. 732 failed to amend the provisions of the Tax-General Code that authorize taxpayers to apply for revisions of assessments of Tax or to claim refunds of Tax following payment of assessments, *see* Md. Code Ann., Tax-Gen. § 13-508(a) (listing the other types of taxes for which taxpayers may apply to revise assessments or claim refunds) – thereby leaving persons subject to the Tax with no administrative remedies to contest imposition of the Tax or to seek a refund.

40. Each person that reasonably expects its annual gross revenues derived from digital advertising services in Maryland to exceed \$1,000,000 must complete, under oath, and file with the Comptroller a declaration of estimated tax by April 15th of that year. Md. Code Ann., Tax-Gen. § 7.5-201(b)(1).

41. Each person required to file a declaration of estimated tax for a taxable year must complete and file with the Comptroller quarterly estimated tax returns by June 15, September 15, and December 15 of that year. Md. Code Ann., Tax-Gen. § 7.5-201(b)(2).

42. Persons required to file a declaration of estimated tax must make estimated tax payments to the Comptroller in the amount of at least 25% of the estimated Tax shown on the declaration or amended declaration for a taxable year with the declaration or amended declaration that covers the year and with each quarterly return for that year. Md. Code Ann., Tax-Gen. § 7.5-301(b)(1).

43. For persons required to file a declaration of estimated tax, the taxpayer must pay any unpaid Tax for the year shown on the person's return. Md. Code Ann., Tax-Gen. § 7.5-301(b)(2). For persons that are not required to file a declaration of estimated tax, the taxpayer must pay the Tax with the return applicable to the period for which the Tax is due. Md. Code Ann., Tax-Gen. § 7.5-301(a).

44. H.B. 732 requires Plaintiffs to make their first estimated tax declarations and payments to the Comptroller by April 15, 2021.

45. Plaintiffs must make additional estimated tax declarations and payments by June 15, September 15, and December 15, 2021.

46. Plaintiffs' first Tax returns are due by April 15, 2022.

H.B. 732 – Effective Date

47. Pursuant to Section 6 of H.B. 732, the Tax provisions “shall be applicable to all taxable years beginning after December 31, 2020.”

48. Pursuant to Section 7 of H.B. 732 as-enrolled on March 18, 2020, the Tax provisions “shall take effect July 1, 2020.”

49. The General Assembly overrode Governor Hogan’s veto of H.B. 732 on February 12, 2021.

50. Pursuant to Md. Const. art. II, § 17(d), “Any Bill enacted over the veto of the Governor, or any Bill which shall become law as the result of the failure of the Governor to act within the time specified, shall take effect 30 days after the Governor’s veto is overridden, or on the date specified in the Bill, whichever is later”

51. H.B. 732 specifies that the Tax applies to taxable years beginning after December 31, 2020. The tax became effective on March 14, 2021, which is 30 days after the override of the Governor’s veto.

DECLARATORY JUDGMENT

52. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 51.

53. If this Court grants a declaratory judgment in this case, it will terminate the uncertainty and controversy giving rise to this proceeding and make unnecessary subsequent administrative or judicial review proceedings.

54. Antagonistic claims are present between Plaintiffs and the Comptroller which indicate imminent and inevitable litigation and potential criminal penalties.

55. Plaintiffs attack the statutory scheme of the Tax as a whole as facially unconstitutional.

56. Plaintiffs' challenge to the Tax does not involve factual exploration.

57. Plaintiffs are not barred from bringing this action by the nature of an alternative, exclusive administrative remedy as none exists.

58. The Comptroller is unable to afford relief to Plaintiffs on non-constitutional grounds.

COUNT ONE
The Tax Violates the United States Supremacy Clause and the Internet Tax Freedom Act

59. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58.

60. Article VI, clause 2, of the United States Constitution – the Supremacy Clause – states, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

61. In pertinent part, ITFA bars states – including Maryland – from imposing discriminatory taxes on electronic commerce. ITFA, 47 U.S.C. § 151, n. § 1101(a)(2).

62. Pursuant to ITFA § 1105(2)(A)(i) – (iv), a prohibited discriminatory tax is: “(A) any tax imposed by a State or political subdivision thereof on electronic commerce that— (i) 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; (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period; (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means; [or] (iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means”

63. ITFA § 1105(3) defines “electronic commerce” as “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.”

64. In pertinent part, ITFA bars states – including Maryland – from imposing multiple taxes on electronic commerce. ITFA § 1101(a)(2).

65. Pursuant to ITFA § 1105(6)(A), a prohibited multiple tax is “any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.”

66. The Supremacy Clause applies ITFA to state taxes, including the Tax.

67. The Tax is a discriminatory tax on electronic commerce, and is therefore prohibited by ITFA, because Maryland imposes the Tax on advertising accomplished through electronic commerce but does not impose the Tax on advertising accomplished through other means, such as billboards or classified ads displayed on a physical medium.

68. The Tax is a multiple tax on electronic commerce, and is therefore prohibited by ITFA, because: (1) the Tax lacks an apportionment formula, creating a substantial risk that the same or essentially the same digital advertising service will be subject to another tax imposed by another State or political subdivision thereof; and (2) the Tax lacks a credit for taxes paid in other jurisdictions.

69. Thus, the Tax violates ITFA – a federal statute – because it discriminates against electronic commerce and is a multiple tax on digital advertising. The Maryland General Assembly has chosen to single out online advertising, while protecting local traditional advertising.

70. Plaintiffs request a declaration that Section 2 of H.B. 732 violates ITFA and is therefore facially unconstitutional.

COUNT TWO

The Tax Violates the Maryland Supremacy Clause and the Internet Tax Freedom Act

71. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58. In addition, Plaintiffs hereby incorporate by reference Paragraphs 59 – 70 of Count One.

72. Pursuant to Article 2 of the Maryland Constitution’s Declaration of Rights, “The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.”

73. Article 2 of the Maryland Constitution’s Declaration of Rights “recognize[s] that the provisions of the United States Constitution supersede any law enacted by the General Assembly.” *Scherr v. Handgun Permit Review Bd.*, 163 Md. App. 417, 450 (2005). *See also Simbaina v. Bunay*, 221 Md. App. 440, 452 (2015) (stating that the “federal supremacy obligation found in Article 2 of [the Maryland] Declaration of Rights” is “similar” to the United States Supremacy Clause).

74. Article 2 of the Maryland Constitution’s Declaration of Rights applies ITFA to Maryland taxes, including the Tax.

75. For the same reasons as in Count One, Plaintiffs request a declaration that Section 2 of H.B. 732 violates ITFA and is therefore facially unconstitutional.

COUNT THREE

The Tax violates the Due Process Clauses of the United States Constitution

76. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58.

77. Pursuant to the Fifth Amendment to the United States Constitution, “No person shall ... be deprived of life, liberty, or property, without due process of law[.]”

78. Pursuant to the Fourteenth Amendment to the United States Constitution, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

79. The definitions contained in the Tax are vague and overbroad. It is impossible for Plaintiffs and other taxpayers to accurately determine whether gross receipts from their activities are subject to the Tax. The Tax is thus unenforceable and unconstitutional in violation of the Due Process Clauses of the United States Constitution.

80. Moreover, Section 2 of H.B. 732 is devoid of any necessary provisions that instruct Plaintiffs on how to determine when “revenues from digital advertising services are derived” from Maryland sources and subject to the Tax. There is no method for determining the tax base. Thus, Plaintiffs and other taxpayers do not have adequate notice as to when, or the extent to which, they would be liable for the Tax, including any related penalties, interest, and potential criminal liability.

81. Additionally, there is no administrative mechanism to contest the Tax. The Comptroller administers the Tax. *See* Md. Code Ann., Tax-Gen. § 2-102(4). Administrative remedies are available only if a taxpayer protests a denied refund claim or is assessed by the Comptroller. *See* Md. Code Ann., Tax-Gen. § 13-510(a). Plaintiffs and other taxpayers do not have the ability to pay the Tax and file a refund claim because the relevant forms are not available. *See* Md. Code Ann., Tax-Gen. § 13-901(a). Plaintiffs and other taxpayers also do not have the ability to protest an assessment, as the assessment revision application statute was not amended to apply to the Tax. *See* Md. Code Ann.,

Tax-Gen. § 13-508(a). Yet, the Tax requires affected taxpayers and Plaintiffs to make payments which must be reflected in their financial statements.

82. Plaintiffs request a declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Due Process Clauses of the United States Constitution.

COUNT FOUR
The Tax violates the Due Process Clause of the Maryland Constitution’s Declaration of Rights

83. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58. In addition, Plaintiffs hereby incorporate by reference Paragraphs 76 – 82 of Count Three.

84. Pursuant to Article 24 of the Maryland Constitution’s Declaration of Rights, “That no man ought to be ... deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”

85. Maryland courts construe Article 24 “*in pari materia* with the federal Due Process Clause.” *City of Annapolis v. Rowe*, 123 Md. App. 267, 270 (1998).

86. For the same reason as in Count Three, Plaintiffs request a declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Due Process Clause of the Maryland Constitution’s Declaration of Rights.

COUNT FIVE
The General Assembly improperly delegated its taxing authority to the Comptroller with respect to calculating the Tax

87. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58.

88. The General Assembly improperly delegated its taxing authority to the Comptroller with respect to calculating the Tax, in violation of Articles 8 and 14 and the Due Process Clause of the Maryland Constitution's Declaration of Rights.

89. Article 8 of the Maryland Constitution's Declaration of Rights requires, "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

90. Article 14 of the Maryland Constitution's Declaration of Rights requires, "That no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature."

91. Pursuant to Article 24 of the Maryland Constitution's Declaration of Rights, "That no man ought to be ... deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

92. The General Assembly provided no statutory guidelines to determine how much of a taxpayer's digital advertising services business is derived from Maryland, and instead abdicated the entirety of this critical determination to the Comptroller.

93. The portion of a taxpayer's gross revenues that is derived from digital advertising services in Maryland, and therefore subject to the Tax, will be determined by multiplying the taxpayer's total gross revenues from digital advertising services in the United States by an apportionment fraction.

94. Although the General Assembly provided for an apportionment fraction, *see* Md. Code Ann., Tax-Gen. § 7.5-102(b)(1), the statute simply directs the Comptroller to set

the terms for determining the fraction through regulations, *see* Md. Code Ann., Tax-Gen. § 7.5-102(b)(2).

95. Instead of providing any statutory guidelines to the Comptroller for making this determination, the fraction is “defined” by the Act as a tautology, in which the result of the fraction (that is, a taxpayer’s tax base) – “the annual gross revenues of a person derived from digital advertising services in the State,” Md. Code Ann., Tax-Gen. § 7.5-102(b)(1) – is identical to the numerator of the fraction, which is also described as “the annual gross revenues of a person derived from digital advertising services in the State,” Md. Code Ann., Tax-Gen. § 7.5-102(b)(1)(i).

96. Having provided no statutory guidelines to the Comptroller, the net result of the statutory apportionment fraction “definition” in the Act is as if the Comptroller was simply directed to figure out the tax base, thus skipping over any legislative resolution as to how this type of digital activity needs to be measured and tracked, and fairly attributed to Maryland.

97. Plaintiffs request a declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of Articles 8 and 14 and the Due Process Clause of the Maryland Constitution’s Declaration of Rights.

COUNT SIX

The Tax violates the Commerce Clause of the United States Constitution because the Tax discriminates against interstate commerce

98. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58.

99. Pursuant to article I, section 8, clause 3 of the United States Constitution – the Commerce Clause: “The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

100. For a state tax that affects interstate commerce to pass muster under the dormant Commerce Clause, it must satisfy the four-prong test set forth by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277 – 79 (1977).

The tax must:

- a. Be applied to an activity with a substantial nexus with the taxing state;
- b. Be fairly apportioned to activities carried on by the taxpayer in the state;
- c. Not discriminate against interstate commerce; and
- d. Be fairly related to services provided by the state. *Id.* at 277 – 79, 287.

101. The Tax violates the Commerce Clause because it discriminates against interstate commerce. The Tax’s graduated rate structure is based on global annual revenues from all sources instead of being based on Maryland business activity.

102. Plaintiffs request a declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Commerce Clause of the United States Constitution, because it discriminates against interstate commerce.

COUNT SEVEN

The Tax violates the Commerce Clause of the United States Constitution because the Tax is not fairly apportioned

103. Plaintiffs hereby incorporate by reference herein all allegations contained in Paragraphs 1 – 58.

104. In order for a tax to be fairly apportioned for purposes of satisfying dormant Commerce Clause scrutiny, it must be internally and externally consistent. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

105. Internal consistency requires that, for a tax to be fairly apportioned, “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.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *see also Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015).

106. “External consistency ... looks ... 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.” *Jefferson Lines, Inc.*, 514 U.S. at 185. *See also Container Corp. of Am.*, 463 U.S. at 169.

107. The Tax violates the Commerce Clause because it is not internally consistent. Section 2 of H.B. 732 provides: (i) no credit for taxes paid to other states on the same digital advertising service revenues; and (ii) no discernable methodology

whatsoever for taxpayers to apportion digital advertising service revenues to Maryland, thereby impermissibly applying the Tax to revenues and activities carried on outside of Maryland. Indeed, application of the Tax depends on an undefined test reliant entirely on unissued Comptroller guidance that would attribute taxable gross revenues to Maryland. The Tax violates the Commerce Clause because it is not externally consistent. The Tax rate increases based on global activities that do not have any connection with Maryland. In fact, because of the Tax rate differential, companies with large global presences, but lesser Maryland digital advertising service revenues, could be responsible for more Tax than local companies with much greater receipts from Maryland digital advertising services.

108. Plaintiffs request a declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Commerce Clause of the United States Constitution, because it is not fairly apportioned.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court set this matter for a hearing, and prays for judgment as follows:

109. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of ITFA;

110. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Due Process Clauses of the United States Constitution;

111. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Due Process Clause of the Maryland Constitution's Declaration of Rights;

112. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of Articles 8 and 14 and the Due Process Clause of the Maryland Constitution's Declaration of Rights, because it improperly delegates the General Assembly's taxing authority to the Comptroller;

113. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Commerce Clause of the United States Constitution, because it is not fairly apportioned;

114. A declaration that Section 2 of H.B. 732 is unconstitutional on its face, in violation of the Commerce Clause of the United States Constitution, because it discriminates against interstate commerce; and

115. Such other and further relief as the Court deems just and proper.

DATED: April 15, 2021

Respectfully submitted,

/s/ Jeffrey A. Friedman

Jeffrey A. Friedman

CPF#9501050005

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Attorney for Plaintiffs

RULE 1-313 CERTIFICATION

I, Jeffrey A. Friedman, hereby certify, pursuant to Rule 1-313 of the Maryland Rules of Civil Procedure, that I am a member, duly admitted and in good standing, of the Bar of the State of Maryland. I was admitted before the Maryland Court of Appeals on January 5, 1995.

Dated: April 15, 2021

/s/ Jeffrey A. Friedman
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