

IN THE SUPREME COURT OF MARYLAND

No. 32
September Term, 2022

COMPTROLLER OF MARYLAND

Appellant,

v.

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

Appellees.

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

**MOTION OF TAX LAW PROFESSORS FOR LEAVE TO FILE AS *AMICI CURIAE* IN
SUPPORT OF APPELLANT**

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

**Pro hac vice to be applied for*

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

Counsel for Tax Law Professors

Professors Reuven S. Avi-Yonah, David Gamage, Orly Mazur, Young Ran (Christine) Kim, and Darien Shanske (collectively, “Tax Law Professors”) respectfully ask that this Court grant leave to file the attached amici curiae brief in support of Appellant. All parties in this matter have consented to the Tax Law Professors filing an amici brief herein.

Appellees in this case challenged Maryland’s recently-passed tax on the revenues that entities of a certain size derive from digital advertising services in the state, Md. Code Ann., Tax-Gen. §§ 7.5-102, 7.5-103 (2021), obtaining a declaration in the court below that Maryland’s tax is unlawful. Professors Avi-Yonah, Gamage, Kim, Mazur and Shanske are professors of tax law with particular expertise and interest in state and local taxation, as well as digital services taxes. They seek to file this brief to provide information regarding the unique nature of digital advertising as compared to non-digital services, the implications for tax policy, and how these issues should affect the court’s analysis, in particular under the Internet Tax Freedom Act and the Commerce Clause of the United States Constitution.

This Court has the authority to allow amici curiae to participate and assist the Court. *See* Md. Rule 8-511(a), (b). Because the Tax Law Professors have a “special interest in the subject matter of [this] suit” and their brief provides “timely and useful” information for this Court to consider when adjudicating the Appellant’s appeal in this case, *see Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996), the Tax Law Professors respectfully request that this Court grant leave to file the attached amicus curiae brief in support of the Appellant.

Under Maryland Rule 8-511(b) a motion for leave to file an amicus brief must “(A) identify the interest of the movant; (B) state the reasons why an amicus brief is desirable; (C) state whether the movant requested of the parties their consent to the filing of the amicus brief and, if not, why not; (D) state the issues that the movant intends to raise; and (E) identify every person, other

than the movant, its members, or its attorneys who made a monetary or other contribution to the preparation or submission of the brief, and identify the nature of the contribution.” We address each of these in turn.

Interests: The Tax Law Professors are experts in the law of taxation.

Professor Avi-Yonah is the Irwin I. Cohn Professor of Law, and the Director of the International Tax LLM Program at the University of Michigan Law School. He specializes in corporate and international taxation and has served as a consultant to the US Department of the Treasury and the Organisation for Economic Co-operation and Development (OECD) on tax competition. He also is a member of the steering group for OECD's International Network for Tax Research. He has published more than 250 books and articles,¹ including work specifically about the taxation of digital services in the United States and overseas.²

Professor Gamage is a Professor of Law at the Indiana University Maurer School of Law, where he specializes in tax law and policy at both the U.S. state and federal levels, as well as on tax theory and fiscal federalism. He has previously served as special counsel to the U.S. Department of Treasury, Office of Tax Policy, served on a tax reform commission for the state of California, and has regularly advised other state and federal policymakers on tax policy, including helping to draft tax reform legislation for the federal government and the states of California, New York, and Illinois. He has authored or co-authored over 70 scholarly articles and

¹ See *Faculty Publications*, University of Michigan Law, <https://michigan.law.umich.edu/faculty-and-scholarship/faculty-publications?f%5B0%5D=authors%3A7309>.

² See Avi-Yonah, Reuven S.; Kim, Young Ran (Christine); and Sam, Karen, A New Framework for Digital Taxation (Mar. 25, 2022) (unpublished working paper) (on file with the University of Michigan Law School Scholarship Repository), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1333&context=law_econ_current.

essays, including specifically about the application of the Internet Tax Freedom Act to Maryland's digital advertising tax at issue in this case.³

Professor Kim is a Professor of Law at the Yeshiva University Benjamin N. Cardozo School of Law who specializes in taxation, with a particular expertise in business tax, the intersection of tax and technology, and cross-border taxation. Professor Kim teaches Federal Income Tax, Taxation of Business Entities, and International Tax. She has written extensively on taxation issues in the new digital era, including digital services taxes.⁴

Professor Mazur is an Associate Professor of Law at the Southern Methodist University Dedman School of Law. Her scholarship focuses on the intersection of tax law and technology, international and comparative taxation, and taxation in the digital economy. She is an active member of the academic and legal community in her field, including serving as the Vice-Chair to the International Tax Committee of the Tax Section of the State Bar of Texas, serving as a fellow of the Texas Bar Foundation, and serving as a member of the executive committee of the American Association of Law Schools' Section on Taxation since 2019, of which she will serve as the Chair beginning in 2023. Her work has been published in numerous law reviews and peer-reviewed journals.⁵

Professor Shanske is the Martin Luther King Jr. Professor of Law at the University of California, Davis School of Law, with significant experience advising state and local governments on tax law. He is a nationally recognized expert in taxation, particularly state and

³ See Professor David Gamage's CV, available at <https://law.indiana.edu/about/people/cv/gamage-david.pdf>.

⁴ See Professor Young Ran (Christine) Kim's CV, available at https://cardozo.yu.edu/sites/default/files/2023-03/KIM_CV_2023-03-13.pdf.

⁵ See Professor Orly Mazur's CV, available at <https://www.smu.edu/-/media/Site/Law/faculty/2022-Updated-CVs/Orly-Mazur-CV.pdf>.

local taxation and the application of federalism principles to state and local tax law. He has written extensively on tax law and public finance, including dozens of journal articles, including scholarship on the taxation of digital services.⁶

Professors Shanske and Kim also previously filed an amici curiae brief concerning the application of the ITFA to Maryland’s digital advertising tax in related litigation in federal district court. *See* Brief of Amici Curiae Tax Law Professors Shanske and Kim, *Chamber of Com. of the U.S. v. Franchot*, No. 1:21-cv-410-LKG (D. Md. Sept. 20, 2021), ECF No. 37-3.

Desirability and Relevance: The Tax Law Professors are widely published and recognized experts on the legal issues underlying Plaintiffs’ claims. The attached brief distills their expertise to “provide[] helpful information to the court regarding positions taken by the [parties].” *Wash. Gas Light Co. v. Prince George’s Cnty. Council*, No. DKC 08-0967, 2012 WL 832756, at *3 (D. Md. Mar. 9, 2012). The Tax Law Professors are in a position to further explain the operations and business models of digital advertising companies, their implications for tax policy, and the prevailing approach taken by the Supreme Court when interpreting the scope of federal preemption in the context of state tax policy, particularly under the Internet Tax Freedom Act and the Commerce Clause.

Plaintiff-Appellees in this case ask the court to apply the federal Internet Tax Freedom Act to preempt Maryland’s tax, and, by inference, similar proposed taxes in other states, and claim that the Maryland tax violates the Commerce Clause of the U.S. Constitution. As experts in the legal issues underlying Plaintiff-Appellees’ claims, the Tax Law Professors have a special interest in ensuring that this Court has a fulsome record concerning the nature of Maryland’s tax and the effects of Plaintiff-Appellees’ claims.

⁶ *See Darien Shanske*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=609815.

Consent: The Tax Law Professors sought consent to file from the parties in this case, and all parties in this matter have consented to the Tax Law Professors filing an amici brief.

Issues: If granted leave to file in this case, the Tax Law Professors intend to address the issues of the scope of the federal Internet Tax Freedom Act and the dormant Commerce Clause of the U.S. Constitution, and explain why those legal provisions should not be held to preempt Maryland's digital advertising tax. In doing so, the Tax Law Professors would seek to further explain the way Maryland's proposed digital advertising tax fulfills traditional goals of taxation, the functioning of the digital advertising market, and the Supreme Court's guidance when it comes to interpreting the scope of federal preemption of state tax schemes.

Support, Authorship, and Contribution: The Tax Law Professors support Appellant's position in this case. Amici and their counsel prepared the brief in whole, and received no monetary or other contribution from any party or any other outside source or entity.

Accordingly, the Tax Law Professors respectfully request leave of this Court to file their proposed amici curiae brief.

Dated: March 31, 2023

Respectfully submitted,

s/ Patrick Thronson

Patrick Thronson (MD Bar 18906)

JANET, JANET & SUGGS, LLC

Executive Centre at Hooks Lane

4 Reservoir Circle, Suite 200

Baltimore, MD 21208

Tel.: (410) 653-3200

Fax: (410) 653-9030

pthronson@jjsjustice.com

Samara M. Spence (TN Bar 031484)*

Aman T. George (DC Bar 1028446)*

DEMOCRACY FORWARD FOUNDATION

P.O. Box 34553

Washington, D.C. 20043

Tel.: (202) 448-9090

ageorge@democracyforward.org

sspence@democracyforward.org

**Pro hac vice to be applied for*

Counsel for Tax Law Professors

CERTIFICATE OF SERVICE

I certify that on March 31, 2023, the above motion was filed using the court's CM/ECF system, which will notify all registered counsel.

Dated: March 31, 2023

Respectfully submitted,

s/ Patrick Thronson

Counsel for *Amici*

IN THE SUPREME COURT OF MARYLAND

COMPTROLLER OF MARYLAND

Appellant,

v.

COMCAST of CALIFORNIA,
MARYLAND, PENNSYLVANIA,
VIRGINIA, WEST VIRGINIA, LLC, et al.,

Appellees

No. 32
September Term, 2022

[PROPOSED] ORDER

UPON CONSIDERATION of the Motion of Tax Law Professors for Leave to File as Amici Curiae in Support of Appellant, it is by this Court this ___ day of ___, 2023, ORDERED:

1. That the said Motion be and hereby is GRANTED.
2. The Tax Law Professors shall file their brief by _____.

Judge