NetChoice

Christopher Marchese, Counsel
1401 K St NW, Ste 502
Washington, DC 20005
netchoice.org

November 2022

NY's Data & Digital Ads Tax Bills Are Unconstitutional—Just Ask Maryland

Maryland enacted the country's first-of-its-kind digital advertising tax last year. A Maryland circuit court judge has already struck it down as unconstitutional.[1] Like Maryland's ad tax, New York's proposals to tax the sales of consumer personal data and digital advertising violate the (1) Supremacy Clause and (2) Dormant Commerce Clause.

New York should abandon its ill-fated bills, including S1124, S4959, and S6727. Barring that, the State should avoid collecting digital taxes until any law has survived constitutional challenge—otherwise the State will have to return all collected taxes, creating an embarrassing headache for the government and lawmakers.

NY's Proposals Violate the Internet Tax Freedom Act & Thus Violates the Supremacy Clause.

Under the Internet Tax Freedom Act, states are prohibited from imposing "multiple or discriminatory taxes on electronic commerce."[2] States violate the ITFA when (1) they tax "essentially the same" internet transaction as another jurisdiction without giving offsetting credits, or when (2) they discriminate by imposing burdens on electronic commerce "not generally imposed" on "transactions involving similar property, goods, services, or information accomplished by other means."[3] Because state laws must yield to federal laws under the Supremacy Clause, and because New York's proposals violate the ITFA, the proposals are preempted by federal law.

New York's proposals would impose "multiple" taxes without offsetting credits. S4959 and S1124, for example, would tax internet transactions of New Yorkers' data already subject to

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[1] *Comcast of California/Maryland/Pennsylvania/Virginia/West Virginia LLC et al. v. Comptroller of the Treasury of Maryland*, Case No. C-02-CV-21-000509 (Md. Cir. Ct. Anne Arundel County 2022).
[2] 47 U.S.C. § 151; ITFA § 1101(a).
[3] ITFA § 1105(2)(A)(I).

other taxes on the same data transactions elsewhere. None of the bills offsets these duplicative taxes.

And like Maryland's law, New York's proposals violate the ITFA by discriminating against electronic commerce. Both Maryland's law and all New York's proposals impose new taxes on electronic transactions related to data or digital ads without also imposing the same taxes on similarly situated transactions. For example, New York's proposals would tax the *New York Times*' digital ads but not its printed ads.

NY's Proposals Violate the Commerce Clause.

"The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation."[4] Just like Maryland's law, New York's proposals violate the Constitution's Commerce Clause by (1) regulating and burdening out-of-state commerce, (2) penalizing extraterritorial conduct, and (3) imposing discriminatory taxes on interstate commerce.

First, because the bills would tax out-of-state data collectors that use data from New Yorkers collected in the stream of commerce, they violate the Commerce Clause's ban on states regulating or burdening interstate commerce.

And second, the bills both penalize and discriminate against interstate commerce by imposing progressively greater liability for in-state commerce based on an entity's out-of-state presences. Under the Commerce Clause, apportionment formulas must "not result in discrimination against interstate or foreign commerce."[5] Formulas impermissibly discriminate when they subject businesses to higher taxes for out-of-state activity—here, New York's do just that. Each proposal would tax an entity conducting interstate commerce at higher rates than their in-state-only competitors. Just as Maryland's law violated the Commerce Clause, so too do New York's proposals.

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[4] MeadWestvaco Corp. v. Illinois Dep't of Revenue (2008).
[5] Container Corp. v. Franchise Tax Board, 463 U.S. 159, 170 (1983).