No. 24-1727

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Plaintiffs-Appellants,

v.

BROOKE E. LIERMAN,

Defendant-Appellee.

On Appeal from the United States District Court
For the of Maryland, Hon. Lydia Kay Griggsby
No. 1:21-cv-410

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* certifies that the National Taxpayers Union Foundation is a nonprofit, tax-exempt organization under Internal Revenue Code §501(c)(3) and is incorporated in the District of Columbia. *Amicus* further states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

s/ Tyler Martinez
Tyler Martinez

Dated: November 7, 2024

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal level. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, and engages in direct litigation and *amicus curiae* briefs upholding taxpayers' rights and challenging administrative overreach by tax authorities. Accordingly, *Amicus* has an institutional interest in this case. All parties consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

The very first political speech of the Founders was speech about taxes. From the first agitation against the Sugar and Stamp Acts—both of which raised taxes on the Colonists—to the Declaration of Independence, the United States was founded on a rich history and tradition of speaking about taxes. The Constitution itself set up multiple provisions for protecting interstate and international trade from burdensome state tax schemes, even prior to adopting the First Amendment. And even today, the issues of state and local taxes are routinely voted upon by the people of the states.

[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Therefore, tax speech is quintessentially American political speech subject to robust First Amendment protections.

Maryland's law banning itemized tax disclosures fails to meet strict scrutiny, which applies here as the restriction on speech is content-based and concerns political speech regarding tax policy. Maryland has not demonstrated a compelling government interest that justifies this restriction, nor has it shown that the law is narrowly tailored to achieve any such interest. By preventing businesses from indicating the tax's impact on pricing, the law restricts a truthful, non-misleading form of speech, inhibiting consumers' understanding of cost structures within Maryland.

Furthermore, even under the lesser (but still heightened) "commercial speech" scrutiny standard, Maryland's law would fail because the State lacks a substantial governmental interest in concealing tax impacts from consumers. Transparency in taxation fosters informed public discourse, which is precisely what the First Amendment aims to protect. The District Court improperly accepted Maryland's conclusory justifications without demanding the rigorous evidentiary support that heightened scrutiny requires.

This Court should therefore find Maryland's law unconstitutional, as it unlawfully suppresses a fundamental form of political expression about tax policy, vital to both consumer awareness and broader democratic discourse.

ARGUMENT

I. TAX SPEECH IS QUINTESSENTIALLY AMERICAN POLITICAL SPEECH.

America was founded on political speech concerning taxes. The slogan "no taxation without representation" is "one piece of elementary school folklore that turns out to have been true." Judge Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1379 (2008). The First Amendment challenge before this Court is an opportunity to affirm the Founding Era's understanding that discussion of tax rates is essential and a fundamental bulwark to protecting liberty.

The original public meaning of the Constitution's First Amendment clearly encompasses political speech and that especially of speech about taxes. The phrase "no taxation without representation," for example, dates to the 1750s. *Id.* at 1378 (discussing sermon by Jonathan Mayhew, a Boston-based preacher). By May of 1765, Patrick Henry wrote the Virginia Resolves, laying out arguments on why taxation without representation were unfair and unconstitutional under British law. *See, e.g.*, National Constitution Center, *On this day: "No taxation without representation!"* (Oct. 7, 2022)[2] James Otis would further take up the slogan in response to the Sugar Act and Stamp Act, which he claimed violated the British

[2] *Available at*: https://constitutioncenter.org/blog/no-taxation-without-representation.

constitution. *The Founders' Legal Case*, 44 HOUS. L. REV. at 1379 (discussing the "legal argument[s] brought under the unwritten British Constitution" against the taxes.). And, that same summer, Massachusetts called for a meeting of the Colonies—what would later be called the Stamp Act Congress—to be held in New York in October that year. National Constitution Center, *id*.

The result was a set of resolutions from the Colonies appealing to Britian's unwritten constitutional principles. RESOLUTIONS OF THE CONTINENTAL CONGRESS (Oct. 19, 1765).[3] The Colonists resolved that taxes could not be imposed on citizens "but with their own consent, given personally, or by their representatives" the latter of which must be chosen by the Colonists themselves, not Parliament. *Id*. (para. 4). The Resolutions further complained that the Stamp Act extended the jurisdiction of admiralty courts beyond what the English system of separation of powers allowed. *Id*. (para. 9). Therefore, because the taxes would "be extremely burthensome and grievous; and from the scarcity of specie, the payment of them absolutely impracticable," the Colonists asked for the repeal of the Stamp Act and related taxes. *Id*. (para. 10).

As relations with the King and Parliament worsened, Thomas Jefferson and Jonh Dickinson penned a exhortation for the Empire to act on the Colonists concerns. A DECLARATION BY THE REPRESENTATIVES OF THE UNITED COLONIES OF NORTH-

[3] *Available at*: https://avalon.law.yale.edu/18th_century/resolu65.asp.

AMERICA, NOW MET IN CONGRESS AT PHILADELPHIA, SETTING FORTH THE CAUSES AND NECESSITY OF THEIR TAKING UP ARMS (July 6, 1775).[4] Jefferson and Dickinson made the argument that "Parliament adopted an insidious manoeuvre calculated to divide us," via "a perpetual auction of taxations." *Id.* Of particular import was that the taxes were "unknown sums that should be sufficient to gratify" the Crown. *Id.* In other words, clear communication of how much taxes and when the Colonists were expected to pay were a significant driver of the push toward the American Revolution. Of course, on July 4, 1776, the Declaration of Independence listed among its grievances the "imposing Taxes on us without our Consent." The founders used tax speech as a major vehicle for political change. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).[5]

Taxes helped create the United States and the Founders put into place multiple provisions in the proposed Constitution to prevent states from exceeding their taxing and regulatory powers over interstate goods and services. The Articles of Confederation had failed, creating "occasions of dissatisfaction between the States" as each state regulated and taxed the other's goods. THE FEDERALIST No. 22 (Hamilton). Hamilton recognized that commerce was paramount: "It is indeed evident, on the most superficial view, that there is no object, either as it respects the

[4] *Available at*: https://avalon.law.yale.edu/18th_century/arms.asp.
[5] *Available at*: National Archives, "America's Founding Documents" Website https://www.archives.gov/founding-docs/declaration-transcript.

interests of trade or finance, that more strongly demands a federal superintendence." *Id*. The solution was to set up a new constitution to ensure "[a]n unrestrained intercourse between the States." THE FEDERALIST No. 11 (Hamilton). What was needed was not a confederacy, but a federalist union where "[a] unity of commercial, as well as political, interests, can… result from a unity of government." *Id*. The resulting Constitutional provisions were subject to quite a lot of debate on how to best protect interstate commerce from state interference and taxation. *See, e.g.*, James Madison, "Journal" (Sept. 15, 1787), in THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY–SEPTEMBER, 1787, 378-81 (Gaillard Hunt ed.) (1908).[6]

From the debates in the Constitutional Convention, what emerged were several provisions aimed at limiting the taxing powers of the states. There is an express denial of states to tax imports and exports between the states (save for very limited inspection fees). U.S. CONST. art. I, § 10, cl. 2 (Import/Export Clause). The Constitution further placed a limit on states from taxing tonnage of shipping. U.S.

[6] *Available at*: https://www.gutenberg.org/files/40861/40861-h/40861-h.htm. Some argue the Constitution's purpose was only to protect commercial and tax interests of the Founders themselves, though that has been heavily criticized as being one of many factors in outlaying the Constitution. *Compare, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1921) *with* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958). Nevertheless, it is plain that reining in state powers over taxation and regulation of interstate trade was an important issue in crafting the Constitution and hotly debated via the robust exercise of the freedom of speech.

CONST. art. I, § 10, cl. 3 (Tonnage Clause). And the Founders placed a general protection of the privileges and immunities of citizenship as well as an express grant for the federal government to regulate commerce. U.S. CONST. art. IV, § 2 (Privileges and Immunities Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause). Taken together, these clauses help create a framework for protecting against overzealous taxation by any one individual state,[7] and would have informed the drafters of the First Amendment of the need to keep tax speech protected.

Talking about taxes still animates our political discourse to this day. *See*, *e.g.*, Brandon Arnold, *Ballot Breakdown: A Voter's Guide to Ballot Measures Across the Country*, National Taxpayers Union (Oct. 25, 2024)[8] (analysis of the 32 most important tax and fiscal policy ballot measures in 20 states); Tax Foundation, *Tracking 2024 Presidential Tax Plans*, Website[9] (comparing tax policy proposals among major party presidential candidates during the campaign). Drivers living in

[7] The metes and bounds of what a state may tax is always being refined by court cases, and Maryland is no exception. Maryland's attempt to tax the Second Bank of the United States produced the landmark decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 445–47 (1827) the Supreme Court used the Import/Export and Dormant Commerce Clauses to analyze Maryland's attempt to require businesses to pay a tax to acquire a license to sell goods the state. And in *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015), the Court held that Maryland's personal income tax scheme was unconstitutional when it failed to give a full tax credit for income taxes paid to other states.

[8] *Available at*: https://www.ntu.org/publications/detail/ballot-breakdown-a-voters-guide-to-ballot-measures-across-the-country.

[9] *Available at*: https://taxfoundation.org/research/federal-tax/2024-tax-plans/.

the District of Columbia still feature the slogan "Taxation Without Representation" on their car license plates. *See, e.g.*, Katherine Brodt, *In Washington, "Taxation Without Representation" is History*, Boundary Stones (Feb. 12, 2020)[10] (detailing history of the political branding of the District of Columbia's license plates).

At issue in this case is how Maryland seeks to silence an effective and customizable message from businesses to alert their customers that the cost of doing business is taxed greater in Maryland than elsewhere. But Md. Code, Tax-Gen. § 7.5-102(c) bans this effective and succinct political speech about taxes. As discussed below, this speech ban cannot survive heightened First Amendment judicial scrutiny.

II. MARYLAND'S BAN ON TAX SPEECH FAILS STRICT SCRUTINY.

Americans talk about taxes, and any state's attempt, as here, to ban this political speech strike at the very heart of the First Amendment's protections. Strict scrutiny applies to this statute because it bans political speech and is a content-based restriction on speech, and both trigger the highest tier of judicial scrutiny. Maryland has not shown that § 7.5-102(c) is either created for a compelling governmental interest, nor has it show the law is properly tailored to that interest. Therefore, Md. Code, Tax-Gen. § 7.5-102(c) fails strict scrutiny. The District Court, however, found that strict scrutiny did not apply. JA 79. This is error.

[10] *Available at*: https://boundarystones.weta.org/2020/02/12/washington-taxation-without-representation-history.

The Supreme Court has consistently held, "[l]aws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (internal citation and quotation marks omitted); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (collecting cases).

The Court has further held that if a law is dependent on content in any way, that law is subject to strict scrutiny. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) ("The Act would be content based if it required 'enforcement authorities' to 'examine [a message's] content… to determine whether' a violation has occurred.") (citation omitted). This is plainly a restriction on speech, since "the conduct triggering coverage under," § 7.5-102(c) "consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (noting that a law is "content-based because it applied or did not apply as a result of…[the] message expressed" (internal quotation marks omitted)); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."); *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017) (holding ordinance content-based,

even as applied to commercial speech, where it required officials to "evaluate the speech" to determine if it was "done 'for [a particular] purpose'"). And the State's burden is great: "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (internal quotation marks omitted) (collecting cases). The State has failed to prove either a compelling interest or narrow tailoring to that interest in defending its ban on speech about taxes.

Maryland cannot "dictat[e] the subjects about which persons may speak and the speakers who may address a public issue," particularly in regarding tax rates. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978). *Bellotti* is instructive here for the question at bar. At issue in *Bellotti* was a Massachusetts law that prohibited corporations—in that instance, banks and banking associations—from "influencing or affecting the vote on any question submitted to the voters" other than those questions directly at issue to the business itself. *Id*. at 768 (discussing Mass. Gen. Laws Ann. ch. 55, § 8). And that same law specifically stated that any "question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals" would not qualify for the exception for corporate speech that directly affected the business. *Id*. But companies wished to speak about an upcoming ballot measure that would have materially changed the

taxing structure for individuals in Massachusetts (i.e. the ballot measure raised tax rates). *Id*. at 769.

The *Bellotti* Court held that the corporate identity of the speakers or what they spoke about did not matter, for the First Amendment protects both political speech by individuals and by corporations even on matters not of "business concern" to an enterprise. *Id*. at 777 ("It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."). That is because "'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" *Id*. at 776–77 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (bracket in *Bellotti*). Because there is "inherent worth [in] the speech in terms of its capacity for informing the public," freedom of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id*. at 777.

Thus any "legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest" is baldly unconstitutional. *Id*. at 784. Where "[t]he legislature has drawn the line between permissible and impermissible speech," it runs afoul of the First Amendment because a state "legislature is constitutionally disqualified from dictating the subjects

about which persons may speak and the speakers who may address a public issue." *Id*. at 784, *id*. at 785 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). States cannot tell companies to "'stick to business'" because such government overreach "is unacceptable under the First Amendment." *Id*. at 785. This is especially troubling "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Id*.

If anything, the case at bar is even better than the banks' arguments in *Bellotti*. At issue here is Md. Code, Tax-Gen. § 7.5-102(c), which prohibits sellers of digital services from itemizing on their invoices any "separate fee, surcharge, or line-item" that details the effect of Maryland's higher tax structure. The parties agree that businesses are free to raise rates exactly as high as needed to pay the extra Maryland taxes—the business simply barred to speak on the invoices as to *why* the prices are higher as an itemized line. *See, e.g.*, Op. Br. at 16-17 (discussing Def. Supp. Br. Regarding the Interpretation of the Pass-Through Provision at JA 50).[11]

[11] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017), discussed in the Opening Brief at 17, is helpful in understanding the relation between prices on an invoice and speech. *Expressions*, however, arrived at the Court on a convoluted procedural posture where the scope of relief and the situations the New York law applied to were unclear—and thus the Supreme Court's remanded for further review by the lower courts. *Id*. at 48.

Under strict scrutiny, Maryland must articulate both a compelling interest and show that its solution narrowly tailored to avoid burdening constitutionally protected conduct. *Citizens United*, 558 U.S. at 340. If its law is novel, and not merely a retread of already-approved approaches, it must provide concrete evidence that the new law also survives heightened scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). And the high Court has rejected "mere conjecture as adequate to carry a First Amendment burden." *Id*. at 392. Instead, the state must prove the strength of its interest. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to… prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural") (citation and punctuation omitted). The state has not met this demanding standard on a certainly novel theory that businesses cannot disclose factual tax information on their invoices.

But the District Court below did not hold the state to the standard of strict scrutiny. *See, e.g.*, JA 85. Indeed, the District Court appears to take, at face value, that Maryland's taxes "advances the State's interest in exercising the power to levy taxes, so that the State can generate revenue to fund improvements to public

education from the funds generated through the tax." *Id*. In other words, the District Court switched the burden and then allowed the state to rely on conjecture that its speech ban would help it collect more taxes.

The question is not whether taxes are a legitimate state interest, but whether a *ban* on talking about how taxes increase the costs of services in the state is a legitimate state interest. Raising revenue is not a weighty enough interest to regulate First Amendment activity. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (holding that, while the government "certainly" had an interest in raising revenue, it had to demonstrate a relationship to the distinction at issue); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 586 (1983) (same); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (noting "problem" in reciting governmental "interests only at the highest order of abstraction, without ever explaining how they are served… by its content-based exemptions"). The District Court erred when it took the state's conclusory statements at face value, rather than asking how the state had an interest in regulating the speech of merchants.

Maryland's law fails a First Amendment strict scrutiny tailoring analysis too. As the Supreme Court observed in *Buckley v. Valeo,* laws regulating speech must be drafted with precision, otherwise they force speakers to "hedge and trim" their preferred message. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (*per curiam*) (quoting

Thomas v. Collins, 323 U.S. 516, 535 (1945)). Thus, to "pass First Amendment scrutiny," the government must show the regulation is "tailored" to the government's "stated interests." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). This ensures that laws do not "cover[] so much speech" as to undermine "the values protected by the First Amendment." *Id*. at 165–66. The result is a fact-intensive analysis of the burdens imposed, and whether those burdens *actually* advance the government's interest. Maryland must match its efforts closely to promoting its interest. It has not done so.

The District Court below believed that there were alternative channels for companies to discuss their displeasure with Maryland's tax structure. JA 86. But "it cannot be assumed that 'alternative channels' are available." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981). "'Although in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like.'" *Id*. (quoting *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977)). That is because "[t]he options to which sellers realistically are relegated... involved more cost and less autonomy" than their preferred method. *Id*. (quoting *Linmark*). Regardless, it is the State's burden to prove its law is narrowly tailored and that the state has no alternative than to regulate the political speech. *See*, *e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 797 (3rd ed. 2006)

("The government's burden when there is an infringement of a fundamental right is to prove that no other alternative, less intrusive of the right, can work."). And, in any event, the First Amendment guarantees to speakers the right to decide "what to say and what to leave unsaid." *Hurley, v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co.*, 475 U.S. 1, 11 (1986) (plurality opinion)); *cf. Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) ("*WRTL II*") (noting "the fundamental rule… that a speaker has the autonomy to choose the content of his own message." (Roberts, C.J., controlling opinion) (citation and quotation marks omitted).

In this instance, the best and most compelling method to communicate with consumers is to state the exact amount they pay extra due to Maryland's law. But that same law made that option not available to the business under Md. Code, Tax-Gen. § 7.5-102(c). Contrary to the hypotheticals presented by the District Court, JA 86, no one wants to read a soliloquy on taxation on an invoice. A billboard in the middle of Baltimore does not necessarily reach the people buying digital services. A TV commercial cannot communicate with particularity how Maryland's higher taxes hurt an individual consumer's choices.

But showing that Maryland law adds to the cost to the consumer is a compelling argument against the latest round of novel taxation. That is why the Supreme Court has long held that "that "one-on-one communication" is "the most

effective, fundamental, and perhaps economical avenue of political discourse." *McCullen*, 573 U.S. at 488 (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988) and collecting cases). Invoices are one-on-one communication and explain the surcharges as due to Maryland law is the quickest, most effective way to show the link between higher taxes and higher prices.

The District Court decision below instead placed the onus on the challengers, rather than the state. Even if it had applied the proper test, Maryland has, after multiple rounds of litigation, failed to show a compelling interest or that Md. Code, Tax-Gen. § 7.5-102(c) is narrowly tailored to that interest. Section 7.5-102(c) therefore fails strict scrutiny and must be held unconstitutional.

III. MARYLAND'S BAN ON TAX SPEECH FAILS HEIGHTENED SCRUTINY UNDER THE COMMERCIAL SPEECH SCRUTINY.

Commercial speech is reviewed under a more permissive test than strict scrutiny. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). But "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). Even under commercial speech scrutiny, Maryland still needs to prove that its speech ban supports a substantial governmental interest and is properly tailored to that interest. The State again has failed to do so here.

At the outset, the Supreme Court has long held that there are "special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the 'commonsense distinctions' that exist between commercial and noncommercial speech." *Id*. at 502 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1977)).[12] That is because "[r]egulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages." *Id*. The Court has held that "such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech." *Id*. at 503 (quoting *Cent. Hudson,* 447 U.S. at 566, n. 9).

Therefore, in order to restrict or prohibit "commercial speech that is neither misleading nor connected to unlawful activity" the "governmental interest in regulating the speech" must be "substantial." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 755 (9th Cir. 2019) (*en banc*) (internal quotation marks and citations omitted). Maryland has provided no substantial interest in the

[12] Of course, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Virginia State Bd. of Pharmacy,* 425 U.S. at 761 (collecting cases from selling newspapers to political campaign finance advertisements). Speech is still protected "even though it is carried in a form that is 'sold' for profit… and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Id*. (collecting cases).

hiding the fact that its state laws increase prices to consumers on each digital services transaction. At best it appears that Maryland fears the public will react harshly to the new taxes, but that is hardly a substantial interest. *See* Section I, *supra*; *see also 44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations" when they "rest solely on the offensive assumption that the public will respond 'irrationally' to the truth.").

Even under commercial speech scrutiny, the State still shoulders the burden of demonstrating that its statute is closely tailored—such scrutiny "demand[s] a close fit"—to avoid "'sacrific[ing] speech for efficiency.'" *McCullen*, 573 U.S. at 486 (quoting *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988)) (last bracket in *McCullen*). Thus, the government must demonstrate that Md. Code, Tax-Gen. § 7.5-102(c) does "burden substantially more speech than is necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Speech bans are still connotationally suspect, even in commercial speech. *44 Liquormart*, 517 U.S. at 501 (Stevens, J., concurring) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages… there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

Simply put, Maryland has not shown that Md. Code Ann., Tax-Gen § 7.5-102(c) is tailored to any substantial interest. Bans are strong medicine, especially when they limit the truthful telling of government activity. But the District Court did

not hold the state to the heightened scrutiny that still applies to commercial speech. This is reversible error. Even merchants have the right to say when a locality's taxes raise the prices of their goods or services.

CONCLUSION

Amicus respectfully requests that this Court reverse the decision below, hold Md. Code Ann., Tax-Gen § 7.5-102(c) to be unconstitutional, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 4,747 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of National Taxpayers Union Foundation in Support of Appellees and Affirmance using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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