IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. BROOKE E. LIERMAN, *Defendant*.	No. 1:21-cv-410-LKG

PLAINTIFFS' SUPPLEMENTAL OPENING BRIEF
ON THE MEANING OF THE PASS-THROUGH PROVISION

Pursuant to the Court's March 14, 2024, scheduling order, plaintiffs respectfully submit this supplemental brief addressing the proper interpretation of the pass-through provision, Tax-Gen. § 7.5-102(c). The provision specifies that a taxpayer "may not directly pass on the cost of the tax imposed under this section to a customer . . . by means of a separate fee, surcharge, or line-item." *Id.*

Earlier in these proceedings, plaintiffs and the State jointly stipulated that the pass-through provision does not prohibit taxpayers from "*indirectly* passing on the cost of the tax" by raising their downstream prices as a general matter. *See* Dkt. 68 at 1 (emphasis added). The parties agreed that the provision prohibits taxpayers only from "directly" passing on the cost of the tax, which occurs "only when" the cost of the tax "is imposed on the customer by means of a 'separate fee, surcharge, or line-item'" stated on a customer invoice or the like. *Id.* Plaintiffs took the position that, so construed, the pass-through provision is an unconstitutional speech ban that bars their members from identifying the fact and magnitude of the tax increase in communications to customers.

The Court subsequently dismissed the First Amendment claim as moot (Dkt. 98), but the Fourth Circuit reversed and remanded (90 F.4th 679). At oral argument, the judges of the Fourth Circuit expressed uncertainty as to whether they could rely on the parties' stipulation concerning the meaning of the pass-through provision; they also were unclear whether the pass-through provision is best understood as a speech ban or a price-control regulation. *See generally* CA4 Oral Arg. Tr. 1:40-8:50. Rather than interpret the statute as a matter of law in the first instance on appeal, the Fourth Circuit remanded to this Court for it to "decide whether the pass-through provision restrains speech and, if so, whether it passes constitutional muster." 90 F.4th at 688-689.

Plaintiffs (like the State) continue to adhere to the joint stipulation concerning the meaning of Tax Gen. § 7.5-102(c). Below, we explain why the joint stipulation reflects the best understanding of the statutory language as a matter of Maryland law. In light of the reasoning below, the Court should hold that the pass-through provision is a speech ban and declare it facially invalid under the First Amendment.

ARGUMENT

The pass-through provision states that a taxpayer "may not directly pass on the cost of the tax imposed under this section to a customer . . . by means of a separate fee, surcharge, or line-item." Tax Gen. § 7.5-102(c). The meaning of those words, and their implementation and enforcement by the Comptroller, is a question of Maryland state law. In Maryland courts, as in federal courts, the "starting point in the interpretation of any statute is with the plain language of the statute itself." *Thanos v. State*, 632 A.2d 768, 773 (Md. 1993). As we have argued (*e.g.*, Dkt. 31, at 56), the plain language of Tax-Gen. § 7.5-102(c) confirms that the provision regulates speech rather than conduct. None of the concerns raised at the appellate oral argument suggest otherwise.

1. We begin with the definitions of the terms used. "When searching for the meaning of a statutory word" or phrase, Maryland courts "turn first to recognized dictionaries." *Davis v. State*, 255 A.3d 56, 70 (Md. 2021). Contemporary dictionary definitions of the key statutory words confirm our reading of the law.

Take first the meaning of "pass on." When used with the word "on," the word "pass" means "to transfer from one person to another." *Pass*, Webster's Third New International Dictionary 1650 (2002 ed.) (defining "pass" in the sense of "passed it on"). In this way, the phrase "pass on" has a similar meaning to the phrases "pass through" or "pass along," which are generally understood as referring to a seller "charg[ing] to the buyer" the added cost of an increase in the price of an input. *Pass-through*, Black's Law Dictionary (11th ed. 2019). In light of these definitions, the words "pass on the cost of the tax imposed" appearing in Tax Gen. § 7.5-102(c) means taxpayers charging to their customers the cost of the Maryland digital advertising tax.

To pass on "directly" means to do so "[i]n a straightforward manner." *Directly*, Black's Law Dictionary (11th ed. 2019). The parties agree that the word has a specific meaning in Tax Gen. § 7.5-102(c), which draws from the words surrounding it: To pass on "directly" means to pass on "by means of a separate fee, surcharge, or line-item." That makes sense because the statute does not regulate the "passing on" of the tax taken alone, but rather only the passing on of the tax "by means of a separate fee, surcharge, or line-item." The plain-language definition of a "fee" is a "charge or payment for labor or services." *Fee*, Black's Law Dictionary (19th ed. 2019); *accord Fee*, Webster's Third New International Dictionary 833 (2002 ed.) (defining "fee" in the relevant sense as "a fixed charge"). And a "separate" fee is a charge that is "set apart" from other fees or charges.

Separate, Webster's Third New International Dictionary 2069 (2002 ed.) (defining "separate" to mean "set or kept apart").

The word "surcharge" bears a similar meaning—it is "a charge in excess of the usual or normal amount," such as "an additional tax, cost, or impost." *Surcharge*, Webster's Third New International Dictionary 2299 (2002 ed.); *accord Surcharge*, Black's Law Dictionary (19th ed. 2019) (defining a "surcharge" in the relevant sense as an "additional tax, charge or cost"). In ordinary experience, a surcharge is likewise set apart and stated separately from the normal fee on top of which it is charged.

And a "line-item" is "a single entry or notation to which a particular dollar amount is attached," typically on "a financial statement." *Line item*, Black's Law Dictionary (19th ed. 2019); *accord Item*, Webster's Third New International Dictionary 1203 (2002 ed.) (defining "item" in the sense of "one of a series of separate listings . . . given in a statement of charges").

2. Putting these definitions together yields a straightforward meaning: The pass-through provision forbids taxpayers from passing on the cost of the Maryland digital advertising tax to their consumers "by means of" a separately-stated charge, including on a financial statement, identifying the fact and magnitude of any price increase that is attributable to the tax. A communication that does *not* include a separate fee, surcharge, or line-item calling out the fact and magnitude of the Maryland digital advertising tax is permissible; but one that includes such additional information—one that expressly attributes rising prices to Maryland tax policy—is a violation of the statute.

Under *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017), the pass-through provision is thus plainly a speech regulation. The Supreme Court there held that a law that "tells merchants nothing about the amount they are allowed to collect," but

instead regulates "how sellers may communicate their prices," is a speech regulation. *Id.* at 47. The law at issue in *Expressions Hair Design* required vendors who wished to employ differential pricing for credit card and cash users to do so only by offering a "discount for the use of cash." *Id.* at 40. The Court held that the law did not regulate what sellers "could collect" because it permitted differential pricing. *Id.* at 47. The law regulated only how the seller "convey[ed] that price" in communications to customers. *Id.*

Just so here. The pass-through provision does not prevent a company that sells digital advertising from increasing its prices as a general matter. All that it prohibits is increasing prices *by means of* a separate fee, surcharge, or line-item—that is, by means of customer communications that identify the fact and magnitude of the tax and thereby attribute rising prices to Maryland lawmakers. Under the commonsense logic of *Expressions Hair Design*, that is a regulation of speech. *See also BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir. 2008) (a law that does not prohibit "raising prices to account for the new tax" and bars a seller only from "saying why it has raised prices" is one that "regulates speech, not conduct").

3. At oral argument, the judges of Fourth Circuit inquired whether the pass-through provision operates effectively as a regulation of pricing conduct rather than speech by forbidding taxpayers from accounting for the tax with line-items altogether, even on internal documents. The answer is *no*.

The provision here forbids "directly" passing on the cost of the tax "*to a customer . . . by means of* a separate fee, surcharge, or line-item." Tax-Gen. § 7.5-102(c) (emphasis added). The cost of the tax is "directly" passed on "to a customer . . . by means of" a line-item or separate fee only if the line-item or separate fee is shared in a customer-facing communication. As a practical matter, it would be impossible for a company to pay—much

less "directly" pass on—a tax without somehow identifying it on internal accounting documents. But if Maryland lawmakers had meant to reach such purely internal accounting, they presumably would have drafted Tax-Gen. § 7.5-102(c) to say simply that taxpayers "may not pass on the cost of the tax imposed under this section." Reading the pass-through provision to accomplish that result renders much of the text—including the words "directly" and "by means of a separate fee, surcharge, or line-item"—surplusage. In Maryland, as elsewhere, court must read "statute[s] as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Johnson v. State*, 225 A.3d 44, 50 (Md. 2020). That basic principle reinforces that Tax-Gen. § 7.5-102(c) forbids the *statement* of the tax as "a separate fee, surcharge, or line-item" in communications "to a customer"—communication rather than conduct.

4. Finally, the judges of the Fourth Circuit inquired at the oral argument whether Tax-Gen. § 7.5-102(c) is best read to forbid only *misleading* statements to customers on invoices or other financial statements. The answer to that question also is *no*.

The pass-through provision is a categorical ban on *all* separate fees, surcharges, and line-items—it draws no distinction between truthful and misleading statements. To be sure, in operation, it bans misleading statements just as well as truthful ones. But that does not mean that the law has a legitimate sweep saving it from invalidation. A speech ban that fails strict scrutiny—one that is not narrowly tailored to serve a compelling governmental interest—is by definition facially invalid. *See generally, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

Moreover, at no point in this litigation has the State ever asserted an interest in protecting consumers from misleading statements, nor does any such interest appear in the legislative history. If that had been the interest underlying the pass-through provision (as

distinct from lawmakers' interest in insulating themselves from political accountability), it would have been easy to tailor the provision to that purpose by forbidding only misleading line-items, surcharges, or fees. But it also would have been unnecessary, since misleading statements in commercial transactions are already banned by the Maryland Consumer Protection Act (Md. Com. Law § 13-303(2)) and Unfair or Deceptive Trade Practices Act (Md. Com. Law § 13-301(1)).

Nor is the pass-through provision narrowly tailored to prevent misleading statements on invoices in any event. It is fundamental that a regulation of speech "may only survive strict scrutiny if it is the 'least restrictive means' of achieving the interest it serves." *Soderberg v. Carrion*, 645 F. Supp. 3d 460, 489–90 (D. Md. 2022) (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)). A speech ban sweeps "too broadly" and is "unconstitutionally overinclusive" when it "'unnecessarily circumscribes protected expression'" in excess of what is needed to achieve the compelling state objective invoked to justify it. *Id.* at 489 (quoting *Central Radio v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (in turn quoting *Republican Party of Minnesota*, 536 U.S. at 775).

That would be the case here, if avoiding misleading speech had ever been the interest asserted by either the Comptroller or lawmakers. The pass-through provision does not bar only misleading line-items; rather, it bars *all* line-items. In any event, a line-item identifying the amount of and reason for a surcharge is not misleading. *Cf. Rojas v. Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 541 (D. Md. 2019) ("[I]nclusion of [a] line-item charge . . . amounted only to a representation that Defendants assessed this fee as part of the . . . price—a representation that was, in fact, true."). And truthful line-items that attribute responsibility for rising prices to lawmakers is plainly protected speech. The provision thus

"infring[es] on speech that does not pose the danger" that the judges (but not the State) raised at oral argument. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). That is all the more so because, again, there is no evidence that misleading line-items occur with any frequency.

CONCLUSION

Tax Gen. § 7.5-102(c) regulates taxpayer communications to customers concerning the fact and magnitude of price increases attributable to the Maryland digital advertising tax. It does not survive strict scrutiny and therefore must be struck down on its face as a violation of the First Amendment.

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Respectfully submitted,

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