



This Week in State Tax (TWIST)

August 25, 2025



Maryland: Fourth Circuit holds that prohibition on pass through of digital ad tax violates First Amendment

The U.S. Court of Appeals for the Fourth Circuit recently [ruled](#) the pass-through provision of the Maryland Digital Advertising Gross Revenues Tax was unconstitutional on the basis that it violates the First Amendment of the U.S. Constitution.

Recall, the pass-through provision of the digital advertising tax states:

A person who derives gross revenues from digital advertising services in the State may not directly pass on the cost of the tax imposed under this section to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line-item. Md. Code Ann. Tax-Gen. § 7.5-102(c).

Several trade associations brought this case in the U.S. District Court of Maryland, arguing that the provision abridges their freedom to speak and explain the tax to their customers. The District Court initially dismissed the plaintiffs' lawsuit on jurisdictional grounds under the Tax Injunction Act, but that decision was reversed by the Fourth Circuit. On remand, the District Court once again ruled against the plaintiffs, holding that although the pass-through provision regulates speech, it survives the intermediate scrutiny standard of review. Specifically, the District Court held that the provision directly advances a substantial government interest and imposes a burden on speech no more extensive than necessary. The original action by the trade associations challenged the tax on other grounds as well, but the First Amendment argument is the only one to have survived the jurisdictional challenge.

In this appeal, the Fourth Circuit again reversed the District Court. The court found that the pass-through provision failed both strict scrutiny and intermediate scrutiny as its only purpose was to restrict companies from communicating the cost of the tax to their customers, thereby insulating Maryland from potential political criticism. The court emphasized that the ability to criticize government actions, including taxation, is a fundamental aspect of free speech protected under the First Amendment, invoking the colonial protests of the Stamp Tax Act in 1765 as vivid evidence that "complaining about taxes is a grand American political tradition."

Having found that the provision was unconstitutional, the court turned to the appropriate remedy. The plaintiffs had sought a universal injunction permanently enjoining the state from enforcing the provision, but the

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Fourth Circuit noted that the authority of federal courts to impose such injunctions has been circumscribed under a recent Supreme Court decision. Therefore, it remanded the case to the District Court to determine the appropriate remedy for the plaintiffs.

In separate state court litigation, additional challenges to the digital advertising tax, including under the Internet Tax Freedom Act, are currently being considered by the Maryland Tax Court. KPMG will continue to monitor the developments surrounding the tax. For additional information, please contact [Jeremy Jester](#) with questions regarding [U.S. Chamber of Commerce v. Lierman](#).

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