

# ADVERTISING: REVENUE SOURCE OR FIRST AMENDMENT RIGHT?



**2024 NCSL Executive Committee Task Force on SALT**

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# AGENDA

- Policy & Legal Arguments Supporting Digital Ad/Barter Taxes
- Arguments Opposing Digital Ad/Barter Taxes
  - Constitutional Foundation
  - ITFA
  - Dormant Commerce Clause
  - Consumption Tax Model
  - Pyramiding Effects

# What **free things online** do you take advantage of?

- A. News and Information (CNN, Axios, Medium, Reddit, SSRN, Apple News)
- B. Search / Email (Google, Bing, Yahoo)
- C. Software and Apps (Google Chrome, Mozilla Firefox, Google Docs, GIMP (photo editing), Audacity (audio editing))
- D. Social Media and Communication Tools (Facebook, Instagram, X, WhatsApp, LinkedIn, iMessage)
- E. Music and Video Streaming (YouTube, Spotify, Pandora)
- F. Navigation and Travel (Google Maps, Waze)
- G. Online Education and Courses (Coursera, edX, Khan Academy, YouTube, iTunes U)
- H. Cloud Storage (Google Drive, Microsoft OneDrive, Dropbox, iCloud)
- I. Language Translation Tools (Google Translate, Microsoft Translator, Babylon)
- J. Calculators – Mortgage, Investment, etc.
- K. Others?!?!?! The list is nearly infinite.

**“If you want more of something, subsidize it; if you want less of something, tax it.”**

**Ronald Reagan**

## KEY POLICY & LEGAL ARGUMENTS IN SUPPORT OF DIGITAL AD/BARTER TAXES

- The Constitution grants states the broad power to raise revenue
- ITFA preemption applies narrowly
- Digital ads / barter taxes do not discriminate against interstate commerce
- A barter tax is consumption tax gap filler
- Pyramiding effects are overblown.

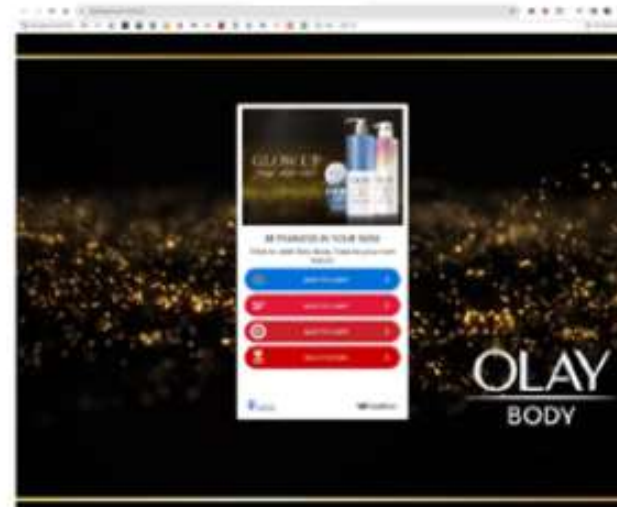
# RESPONSE TO CONSTITUTIONAL FOUNDATION ARGUMENT

- Prof. Kim argues the states have broad authority to tax.
- This argument ignores 200 years of Commerce Clause jurisprudence and a quarter-century of a federal statute that bars discrimination
- States have broad authority to tax activity occurring within their borders as long as it **doesn't discriminate** against **interstate or electronic commerce**.
- If you want to **tax all advertising occurring in your state** you can do so (e.g., New Mexico)!
- Jerrymandering thresholds is clever but does not cure illegality...



## RESPONSE TO ITFA ARGUMENT

- Prof. Kim argues no ITFA discrimination because online and offline ads are not similar...
  - ITFA defines discriminatory tax: **one imposed on electronic commerce but not generally imposed on transactions involving similar services or information accomplished through other means.**
  - Similar means “showing resemblance in qualities, characteristics, or appearance; alike but not identical,” Collins English Dictionary: 21<sup>st</sup> Century Edition 1432 (5<sup>th</sup> ed. 2000)
  - Digital ads and traditional ads all serve: to disseminate commercial messages targeting an audience to attract customers.
  - Sounds pretty similar.
  - Prof. Kim would read ITFA out of existence





Digital advertising (website)



Non-digital advertising (billboard)



# RESPONSE TO DORMANT COMMERCE CLAUSE ARGUMENT

- Prof. Kim argues digital ad / barter taxes do not discriminate against interstate commerce.
  - Every proposed ad tax attempts to export the tax burden to large and out-of-state companies.
  - You can only tax activity in your state.
  - High thresholds could exclude all in-state firms (e.g., Nebraska and Maryland) or punish large taxpayers based on their global activity.
  - The problem is not the use of thresholds per se, but rather the **use of thresholds to discriminate** against both electronic and interstate commerce. Again, Jerrymandering does not cure the problem.
  - **Pass through prohibition** also illegal attempt to export tax burden.

# THE BARTER TAX MODEL FALLACY

- Prof. Kim argues that the tax applies to the consumption of “free” services (by barter theory) by using ad tax revenue as a proxy
  - Users are not exchanging information for services but are merely being observed by providers offering free services to collect data.\*
  - Even if these interactions were considered barters, their minimal value is not adequately represented by ad revenue, making it unjustifiable to label these barter taxes as consumption taxes.
  - Using ad revenue as a proxy changes the activity being taxed and the identity of the taxpayer.
  - A “tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.” *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U. S. 358, 374 (1991).
  - A tax on in state revenue measured by the amount of out of state revenue a company has, is a tax on out-of-state revenue.
  - A tax on free service barter measured by ad tax fees paid by someone else is a tax on someone else. If you want to tax consumption do so under your sales tax.



# QUESTIONS?

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