

MTC ITFA Panel and Presentation

Tue, Nov 14, 2023

Nancy Prosser

I will now take this opportunity to introduce our very esteemed panel. So starting on my left, Jonathan White, my colleague, one of our counsel at MTC, if you've been following our project, you know Jonathan's been doing some yeoman's work. Some of the different research Jonathan has been right in the heart of and early on, when we knew ITFA was a topic we would need to be focusing on, I said Jonathan, why don't you do what you can to get up to speed on ITFA. So, he's kind of a developing ITFA guru so it made sense for him to be part of this. Next to him Professor Andrew Appleby from Stetson Law School. We had the opportunity yesterday to hear from him on a couple of different topics, but but ITFA is another one of those areas where he has a good bit of experience. And we thought it would be helpful to bring kind of that academic perspective to the discussion. So welcome, Professor. Next to him Joe Bishop Henchmen with the National Taxpayers Union Foundation. Joe, you should know if you don't, he's been a player in our world for a long time. He was with Tax Foundation for many years with McDermott for a while. Joe kind of does it all when it comes to SALT. And so again, another great voice on this topic that we wanted to have at the table. And then last but not least, Mr. Mark Nebergall at the end. If you've been participating in our project, you've heard Mark's voice at times, because Mark is not shy about speaking up and asking questions. So now some of you can put a face together. But when it comes to ITFA and things in terms of digital taxation, his work as President of Softech puts him squarely in the midst of a lot of these topics that relate to ITFA, so thank you all so much for being here today.

So okay, well, that's interesting. Okay, so some of you feel like you at least know something about ITFA so that's a good place to start. But I think going forward, all the rest of the polls, if you will, will be open ended just collecting data from you. And we'll see what we get. So hopefully, it will work. But yeah, okay, you're right. Yes. Yes, we could. And please do try and talk into the microphone so that we can make sure our folks at home but yes, I think Joe was saying if the answer was a lot, we could all just stop this and go on to the next part of the program. So anyway, okay. But no, I'm going to turn to Jonathan for this next phase of our project or presentation.

Jonathan W. White

All right. So this is for the 9% that said "none." The Internet Tax Freedom Act preempts taxes on internet access and multiple or discriminatory taxes on electronic commerce. And this is what we got, we got court cases and we got state guidance that they put out, there was no regs on Internet Tax Freedom; it's kind of like Public Law 86-272 in that way. So introductory slide basics, check. So I want to get into specific key terms. And also this portion is not a presentation. This is just these basic slides before we get to the panel. So this is not a presentation. I'm just going to read these, more or less. So this is what the language says more or less: no state or political subdivision may impose any of the following taxes and just to repeat myself taxes on internet access and multiple or discriminatory taxes on electronic commerce. And then preemption is telling the states they can't do this, can't do that. So have the picture the stop sign there. That's--I don't know if you can see the cite, but that's the author's own work. This is a handpainted stop sign from a couple of jobs ago, when I lived in a different country, I would drive home every day and I would see the stop sign. And I would stop. And I'd see the stop sign and say I'll stop, but...do I have to? And maybe that's some of your attitude toward ITFA. Do I have to or...?

Yes, so four key terms, internet access, multiple taxes, discriminatory taxes, electronic commerce. I'm gonna work through those, in turn, basically just reading the relevant language from the statute. So Internet access: service that enables users to connect to the internet. There's also some key language, "access content, information, or other services offered over the internet"--that'll come back up later. And then is the purchase, use, or sale of telecommunications by a provider of Internet service described in the previous subparagraph is that telecommunications is purchased, used or sold to provide such service, meaning the service described in paragraph (a) to otherwise enable users to access content, information, or the services, that's that phrase, again, offered over the Internet. And then, kind of a big one includes services incidental to providing internet connection, when furnished with an internet connection such as a homepage, email, and instant messaging, video clips and personal electronic storage capacity. You'll hear more about that one later, probably. Continuing: does not include voice over IP, I'm not going to read this one. But that's basically what this is. And Part E, the same things that I just read on the previous slide, but independently, or, not packaged with Internet access. So again, homepage, email, instant messaging, video clips, personal electronic storage capacity, whether or not it's packaged with Internet access.

Moving right along: multiple tax, any tax imposed by one state or political subdivision on essentially the same electronic commerce, that's a key term we're going to cover that's also subject to another tax imposed by another state or subdivision without credit for taxes paid in other jurisdictions. Another key term that can be read broadly, depending.

Discriminatory tax: I think this is where the action is going forward. A lot of the cases you'll see on the Internet access provision, but discriminatory tax, there's that key term "electronic commerce," any tax imposed by a state or political subdivision thereof, on electronic commerce, that's not generally imposed and legally collectible on similar property, goods, or services or information accomplished through other means--I'll get to this in a moment, but I believe that "accomplish through other means" refers back to electronic commerce, which is gonna be defined in a couple slides. There's a second portion, it's not generally imposed and legally collectible at the same rate. So essentially the same thing but referring to "has to be the same rate," there's a phaseout exception there in the final clause. Continuing with discriminatory tax, (iii) imposes an obligation to collect or pay the tax on a different person than something involving similar property, goods, services, information, again, accomplished through other means. And then (iv), I'm just gonna read this one "establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on those providers than the general rate." So that is discriminatory tax, but electronic commerce and another, there's sort of another subsection to discriminatory tax that gets a little bit less focus, and that's right here. But we're going to come back to electronic commerce definition, don't worry. So, any tax imposed by a state or subdivision if the sole ability to access a site on a remote sellers out of state computer server is considered a factor in determining the remote seller site collection obligation or, a provider of Internet access or online services is deemed to be the agent of a remote seller for determining tax collection. So, tax as a result of, couple things display of the remote sellers information or content, and the processing of orders through the out of state computer server of a provider Internet of Internet access or online services. I've left a few things on there because I want to ask the question, what does that mission sound like something specific. That is the second part of discriminatory tax. So, the first one is the sort of similar, I call the similar portion, and this is the other, or nexus, portion.

Electronic commerce, this might be the most important slide in the deck. Electronic commerce defined as a transaction conducted over the Internet or through Internet access, and then there's some flush language comprising the sale, license, offer, or delivery of property goods, services, information. This goes back to discriminatory tax. The first portion, I'm just gonna go back a couple slides. Right here, electronic commerce, but it also goes back to multiple tax, you can see that in the definition, as well.

And then some accessory and expired terms taxes on internet access. A tax on Internet access is a tax on Internet access regardless of whether the tax is imposed on a provider or a buyer. And then, something I don't have highlighted on the slide. It doesn't include a tax levied on net income, capital stock, net worth, or property value. That's an exception, essentially, for income taxes, for shorthand. But it applies to the term tax on Internet access, doesn't apply to the rest.

And then the ITFA legacy clause. This was the clause that allowed certain taxes that were preexisting to stay in effect. I just have this on here, because that has expired. And I think June 30, 2020. So that's, that's gone now going forward. It's still relevant to some cases for some different reasons. But the legacy clause basically is expired. So that's the key terms.

Nancy Prosser

So, panelists, we want to turn to you next. And again, just trying to level set here. Mr. Nebergall, so you'd have something to say, which is great. But let's go on to the next slide. Because while we were having this panel discussion, we want to hear from you. You know, did we, did he, like language, is anything missing from your perspective. But, Mr. Nebergall.

Mark Nebergall

Jonathan, could you go back to slide number 11, please?

Nancy Prosser

Can you hear that? Is that on?

Mark Nebergall

Can you hear me now?

Jonathan W. White

I don't think I can, I gotta leave this up for the for the polling. But I will in a moment when we close. Alright, sorry. What was your, what was your question?

Mark Nebergall

I want you to go back to slide 11. I wanted to talk about the sort of the discriminatory tax prerogative, which is sort of the heart of the statute. And in order for the audience to understand what I'm going to say they need to get what I was gonna try to boil it down for, you know, you're reading all this gibberish in the statute. But what does it mean? And, you know, so I'll wait till you're done. We'll go back and go back to the gibberish.

Nancy Prosser

Well, while we're waiting for that, Joe, or professor, do you have any, any thing that you would want to say as far as what, what we've compiled so far? As far as relevant language from the statute? Would you add anything?

Andrew Appleby

Yeah, I think that's the relevant language we can talk about and looks like we will talk about what that language means; almost nothing in ITFA means what you think it means. And so we I think that's the important piece. This is the relevant language, but let's talk about what that truly means. Okay.

Nancy Prosser

All right. Well, let's just, just quickly get in your last three...two...one, we'll close out the poll and go back to slide 11 for Mark.

Mark Nebergall

Okay, what you have on the screen now, is the sort of the definition of what a discriminatory tax is. You got two paragraphs here on the first slide, there's, there's two more on slide 12. And the way we--at least, the people that do this for a living--characterize both of these paragraphs is if you tax something on the internet, and you don't tax something, the equivalent product that's sold outside the internet, it's a discriminatory tax. Or if you tax the internet at a higher rate than the offline equivalent, it's a discriminatory tax. Now could you go to the next slide please? Okay, these, these are two more parts of the discriminatory tax definition. And I will say that the both of these, neither of these paragraphs ever been brought up in any litigation that I'm aware of. Number four, I'm not even sure I understand what it means. Number three, I think is either traveling incognito or flying under the radar. But I think all states have, you know, marketplace facilitator provisions. And they're auditing somebody. There's a chance that the person on the other side can bring this paragraph, romanette three up as a defense.

Jonathan W. White

Yeah, I feel the same way about paragraph four. That's my "just read it instead of trying to offer any context." So I agree with you on that.

Mark Nebergall

I mean, I was on the ground when all this stuff was developed. It was 25 years ago. I don't remember what whoever wrote this was thinking when they wrote it.

Andrew Appleby

And there is a case out there in Illinois that looks at this, but the language was very--more on a statutory basis was ultimately tossed. And so, you don't see much of this anymore. Really these kind of minimal nexus and attributional nexus provisions that we don't really need anymore, anyway, with the the advent of Wayfair, so.

Nancy Prosser

All right, well, that's a good mention of cases. Because that's, that's, that's where we're going next. So Jonathan, I'll turn it back to you to talk about some of the cases then.

Jonathan W. White

All right. Yeah, again, this is not a presentation of all these cases. So I'm gonna get through these pretty quick. So, these are just here for cites for you. A lot of people know Performance Marketing, and Labell. These are two cases--one's out of Illinois, one is Chicago, the city, one the taxpayer won, one the taxpayer lost. Gartner is kind of similar, it's based on the sort of "similar to other things," "delivered through other means," as Performance Marketing and Labell. Everyone knows, I think, Comptroller of Maryland versus Comcast, that's the challenge to the Maryland digital advertising tax.

I had the definition of electronic commerce up earlier, and how that you have to plug that definition into the definition of discriminatory tax. Electronic commerce essentially says something done over the Internet. These three cases here are cases that stopped right there at that. They had a challenge under ITFA and the court said, this thing doesn't turn on the Internet-ness of what's being taxed here. So therefore, it's not electronic commerce. So, we didn't get to the discriminatory provision and that similar language and stuff like that.

Internet access, there's several of these, I think the one the one at the top, taxpayer won in that one. And this goes to some of the detail and that definition of Internet access from earlier. I can't remember the exact detail, but it was, I think they were purchasing telecommunication services to resell them

essentially, in one way or another. And that was held to be Internet access. The taxpayer won that case, the two J2 cases--similar. And then there was an Apple case. This is out of New Orleans. And in this case, that personal electronic storage capacity language was important. That being added to the definition of Internet access in I think 2007, that came up in that case.

Again, I'm just blasting through these so we can get to the what the panel thinks. So, that's the key cases, you'll have these slides as a resource. So, you'll have all these citations. And then we'll hear what the what the panel has to say.

Nancy Prosser

So, we're going to do the same dance. So, we'll, we'll ask the panelists what they think. While we're doing that if you could go to the next slide, Jonathan will open up the next poll. And again, keep in mind, part of what we're trying to do as staff with this project is trying to get our arms around, for everybody's sake, you know, all the relevant resources, you know, information you need to know if you're diving into ITFA. So that's what we're kind of doing this real low level, sort of, review. So again, yes, Mr. Nebergall.

Mark Nebergall

Yeah, just, you know, this, ITFA has been on the books for 25 years. And in all that time, all we have is this little handful of cases, that fit on what, two or three slides. So, there hasn't been a whole lot of case law. And although we're starting to get more, and you mentioned the Comcast case out of Maryland, that it was dismissed on jurisdictional grounds. You should know that the Comptroller 31 or 32 days ago, denied a whole bunch of refund claims. And the time for filing suit in the Maryland tax court, I think, expired yesterday. And I know for a fact that there's a whole bunch of petitions that have been filed. So you know, look for look for news on that.

Nancy Prosser

Yes, at lunch, we learned that Mr. Nebergall was involved with maybe filing a few of those yesterday. A few of them. He fessed up but anyway, Joe, Professor, any thoughts on this?

Joseph Bishop Henschman

No, I agree with Mark. There's not been a lot of case law out there. And that's a good question. I mean, it's a good philosophical question about why that is. Is it because states haven't really pushed the envelope on this? Is it because taxpayers have been able to, you know, where they did want to challenge something, they had other, other legal avenues in which to challenge it. But we are seeing this increase now. I think because we are starting to see more, more statutes that address ITFA and so, I was, I really wanted to walk through the statute like we did here, because you know, you can just think ITFA, oh, that's you can't discriminate against internet commerce, but the statute has a lot in it. And it really ought to be, you know, out on the desk as a checklist as you're looking through provisions that may be challenged, because there's a lot of stuff out there and professor's got a very good article in Tax Notes that actually goes into a few more things that really have never been raised in any case, and may never really be raised in any case. So, for instance, if, if a provider doesn't provide screening technology to prevent children from accessing porn, they lose all ITFA protections. Maybe it'll never come up. But like, that's how thorough the statute is. It's got a lot in it.

Nancy Prosser

Professor, from you?

Andrew Appleby

I think that's about it. The one thing I'll say is that we haven't really seen states pushing the limit with tax regimes, a brand new tax regime, really dedicated only to Internet commerce, like we're seeing now with the Maryland digital advertising tax. And so as that proliferates, if it proliferates, maybe the data excise tax proposals and other types of proposals like that, that are targeted directly at internet commerce, we're going to see more of the ITFA arguments and ITFA cases, and we'll get into a lot of these questions that are raised here, what is similar, etc. And we're going to get to see that because we have these regimes now that are pushing that limit.

Nancy Prosser

And I'll just say as early Christmas gift from your friends at the MTC, we did give you as a link to the entirety of ITFA. So you know, if you really want to dive in, or you want to give somebody a gift, you know, the for the, you know, for the tax nerd in your family, give them a link to ITFA, we did give that to you as part of the materials. And of course, it'll be part of the, the web page also. So okay, well, that's good. We've kind of level set now on a couple of things. So thank you all for the polling info. Why don't we close that one out? And nice mention from Joe about secondary sources. So, Jonathan, let's take a look at some of those.

Jonathan W. White

Yeah, again, little exercise in reading slides here. Some secondary sources started with some intro material, just CRS documents that I've found, some of them from when I was still in my old job. But you got the title and the cite, so you can find these. Law review article type stuff here. As you would expect, this thing passed--big preemption bill. There was this explosion of scholarship, and then not a lot after that until this year, 25th Birthday of ITFA, we got this article by Walter Hellerstein and Andrew Appleby, Internet Tax Freedom Act at 25. Fantastic resource--goes through a bunch of cases and stuff like that--a lot of good points in that.

And then I wanted to show some administrative sources as well, as I said earlier, there's no regs for this, like there is for the IRC. So it's court cases, and whatever guidance the departments can put out. So, for discriminatory tax, for that portion of it, I really only found one thing. And that's from the Ohio Department of Tax, they're kind of just walking through in a policy doc, almost like what they would do in a private letter ruling in this one, covering a portion of their sales tax--I think sales tax--under the discriminatory provision. And then, because it's a full, I guess, because it's a full prohibition on Internet access taxes, there's more guidance from those people asking if this is Internet access, or if that's Internet access, that definition of Internet access, as I walk through before was amended at least once, which I think led to some uncertainty, and, you know, led to some requests for guidance like this.

And then I have just some additional commentary stuff that I found, you know, less important than the previous three slides, I guess. That is some starter material. Some secondary sources, like law review article stuff, if you really want to read something, some state guidance if you're curious what other states have done, and then some additional bedside reading.

Nancy Prosser

Okay, so again, we'll ask our panelists if they think there's anything that's of particular note, but we'll go ahead and go to the next slide to open up the poll. And I'll just say before we do go to the panelists. We had a law school intern work with us for a few weeks this summer. And so that was one of the things we told him to do is like, go out there, find anything and everything you can find with your law school resources that we don't have access to on ITFA and so that's been another thing that Jonathan has been slowly going through, because we're just trying to get our arms around anything and everything that might be helpful out there. So with that said, Gentlemen, any anything else you would add or anything that, that you have turned to for your own knowledge or something you've written?

Joseph Bishop Henschman

I call Mark. So I'm glad he's here. But you know, they're just, even on the 20 minute ride from Newark station to here this morning. I mean, he was, we were going through the statute, and he was like, what about that? And what about that, and that's never been used. And that doesn't link up anything. I mean, there's a lot of stuff in this statute. So you know, really, whenever you have a tax that's essentially trying to tax goods or services, that you're not taxing the equivalent of you really gotta open up, open up and just look at it. And you know, I know this group is very familiar with every preemption statute that is on the federal books, but not all state legislators are and sometimes they have to be reminded, oh, you know, there's, there are provisions you got to worry about on some of these things. And this is a big one.

Mark Nebergall

Yeah, there's, I think something fell on the cutting room floor when ITFA was being drafted. If you look at the definitional sections, you'll find a definition for bit tax. But there's nothing in the thing that prohibits the imposition of the bit tax, ITFA has the ban on Internet access and discriminatory taxes. I think there were supposed to be a number three, and that was bit taxes and that arose out of in the mid-1990s, someone in Brussels, Belgium floated the idea of a bit tax and it was loudly and universally ridiculed.

Nancy Prosser

That's a good question. Who the heck wrote ITFA? Isn't it Rick Pomp? Professor Pomp? I know there's somebody else in the back of the room is gonna know something about this.

Mark Nebergall

It was Jill Lessor and Ellen Fishbein from AOL.

Nancy Prosser

Oh, okay.

Joseph Bishop-Henschman

Victory has 1000 fathers, or mothers.

Nancy Prosser

Well, okay. Well, the Google antitrust litigation--oh, I think we know what that is. But thank you for that suggestion to make sure we don't miss that. So okay. Well, let's, let's close this poll out, then. Thank you for that. All right. So now we'll get to kind of the fun stuff and more juicy parts. So, thank you all for bearing with us. But there will be some more opportunities for you to, to give us your input. At this point for the panelists. Yeah. We want to just, you know, just generally speaking, you know, some of what we thought about for this presentation is, you guys come across--whether they're students in your class, professor, or, you know, a potential client that comes forward to either, you know, Joe or Mark--and they're like, this ITFA thing. What's ITFA? I need to know. So just generally, you know, what advice have you had to talk to folks about whether it's their business, legislators, you know, just kind of what are the general things that come to mind when, when you have to give advice to somebody about ITFA. While you're doing that, we'll go to the next poll. So, if you can open that, Jonathan. Somebody needs to start. Mark's staying quiet.

Joseph Bishop-Henschman

I start with the big picture, before you pick out another term and say, what does that mean? So, you know, as you mentioned, I was at the Tax Foundation for a while and Tax Foundation is big on principled tax policy, looking back to the underlying reasons why we have taxes and what makes good

tax policy and bad tax policy. And it was drilled into me there that a good sales tax--and this is really what we're dealing with sales and transaction taxes because income and property taxes are exempted--is a sales tax applies to all final sales of goods and services once, and only once. That's the ideal. And unless--you know, for the most part, no state does that. You tax a lot of inputs, you exempt a lot of services, if you're not New Mexico or South Dakota or a few other states.

And so in a lot of places, your legislatures have made the judgment that you're not going to tax services. And so when a tax comes along to tax some services if they're internet based, and mainly fall on out-of-state entities, that's what gets people like Mark and I salivating because it's ripe for an ITFA challenge there. And, you know, one of the cases that wasn't up there, but somebody in the chat mentioned, it is the Fourth Circuit federal Maryland case, which alleged ITFA violation as well as Commerce Clause and First Amendment. And that may be something we want to talk about is, you know, how much overlap is there between all of these provisions if you're challenging a tax. And there, you know, they ran into Tax Injunction Act prohibitions of trying to get into federal court. And, you know, that may be a reason why we don't see a lot of cases on this, because it's hard to get into a court where you can challenge it on a constitutional basis.

Mark Nebergall

What's the question again?

Nancy Prosser

Yeah, it doesn't look like anybody wants to know anything. No, maybe one person has been typing. But yeah, what advice would you give me?

Mark Nebergall

I'm generally not in the business of giving advice. Usually, on ITFA, usually it comes up when someone, let's say a client, comes in with an audit assessment and there's an ITFA defense. That's when I see it, in a tax controversy context, not in a--what I'd call any sort of tax planning, and you know, pre-sale, you know, business strategy.

Andrew Appleby

Yeah, I think we can talk about policy and whether ITFA is still fit for service and whether ITFA--at least the discriminatory multiple tax prongs--should be amended or repealed. But I don't know that we want to do that right now. So, I think that we can talk about a few oddities in the actual language itself. I don't know if it's a good time to do that, or if we want to move on a little bit. But I think there are a few aspects of ITFA, that aren't as obvious just by reading the language that we could talk about a little bit.

Jonathan W. White

So for this question, set of questions, all I had was just coming from my perspective as working in a tax department. So that's the context I have, what I would tell them, is focused on the definition of electronic commerce and its place in the discrimination provision. I've seen a lot of proposed arguments and things and court cases that I had on the page that--where the alleged discrimination is not between something on the internet and something not on the internet, but that's critical to have. So, you never know, like, how quickly and how much pressure you might have as a tax policy person in a department to get some answer back. So, my advice to the people that I've given advice to or to give advice to, I guess, is, um, you know, pay attention to that one definition and its place in the statute.

Joseph Bishop-Henchman

It says "similar," and I've had someone--not ask for anything--but they swore it said substantially similar or identical, and I was like, no, it's says similar.

Andrew Appleby

There are courts who have said that, though, so Courts interpreted that term "similar" to mean "identical." So that's one of the maybe not an oddity, but a really important determination when we're looking at tax, potentially, an ITFA violative tax is what does "similar" mean. And so if we're looking at the discriminatory piece, it says "similar." And so what does that mean? Does it mean identical? Does it mean substantially similar? And the second part of that is, well, what if there isn't something that is done in a traditional way that's similar? Does that mean that a state can tax it to any extent they want to? Or does that mean, they can't impose any tax on it? Or that's a creative argument? I think it undercuts the purpose of ITFA, and maybe leads to some absurd results. But there's a lot of nuance there with that similar determination. So, we can talk more about that if you'd like. And I think we should come back to that definition of electronic commerce because it is very, very broad.

Nancy Prosser

But what about any other advice to the workgroup? I mean, obviously, Mark, you've been participating actively in that. Any, any thoughts? When it comes to ITFA with the workgroup? Don't hold back.

Mark Nebergall

I do. But I don't want to offend the group.

Nancy Prosser

Now come on, Mark, this is what this is all about. You're not gonna--we want to hear--this is why we asked you to come because we want to hear what your perspective is. Oh, my goodness. He's shaking his head no. Come on. Speak up.

Mark Nebergall

With regard to your, your digital products workgroup. The Internet Tax Freedom Act is a serious obstacle to what you're trying to do.

Nancy Prosser

Alright, well, somebody did get some feedback. And of course, you can give us more feedback as we go forward. But we just thought we would ask, so. So, alright, let's move on then. So, so, now let's talk about that. Yeah, the preemption language again, just, just trying to go back to that, you know, the preemption piece which I think sometimes these, you know, people don't necessarily think is still really in play. They think more, it's more the discrimination/anti-discrimination language. And I know, Mark, you brought this up during the workgroup meeting one day about hey, don't, don't forget about the, this basic preemption language. So, you know, here what, what, what do people need to know? And when you're talking with people, and you know, there are still any of the areas for risk, disputes, and then this question of burden of proof, you know, if, if you're gonna make a challenge, does--any thoughts there?

Mark Nebergall

In my experience, the taxpayer always has the burden of proof. So who has it? I mean, almost universally, it's on the taxpayer. And from a practical standpoint, where a court of law, you know, the taxpayer comes in and makes his prima facie case, you know, the burden of persuasion shifts to the other side to move forward with the evidence. Hornbook litigation, you know, law.

Andrew Appleby

And something along those lines kind of related to that is whether the taxpayer, or the court rather, will give any sort of deference to the administrative agency's interpretation of a particular statute coming up, obviously, in Maryland digital advertising tax cases. So, there's a lot of both the federal level and

state level a lot of movement on that as to what level of deference, if any, a court should give to the agency's interpretation.

Mark Nebergall

I would say to that, that a court would not likely give deference to an agency's interpretation of federal law. State law? Maybe. Federal law I would say no--at least, that's what I would tell the judge.

Jonathan W. White

On burden of proof, I just wanted to--maybe this is one of those things, an oddity or the panel can tell me I'm crazy, but, I'm not a litigator, so. I don't know what--I can't read behind the scenes of these two cases, but to me, you read the Performance Marketing case, and the Labell case. There seems to be a clear and obvious difference in the way the court treated the state and the taxpayer in those cases. I don't know if it rises to the level of a burden of proof. And I can point to a few differences in the cases and the way they were brought. And so, therefore, the way the court addressed the issues and in what order and stuff that might be responsible for it. But it seemed like--I'll give an example. In--in the one where the taxpayer lost in Labell, the taxpayer brought a state level uniformity, constitutional uniformity argument as well. So, the court works through that state constitutional issue before they worked through federal statutory issue. And in that state, there was a bunch of case law on that provision of the Constitution. They use that as real and substantial difference or something like that, for uniformity under the Illinois constitution. And when they came to the ITFA they kind of, whether they meant to or not, they seem, I'm reading between the lines here, but they seem to have a ready-made similar analysis, ready to go and they used it and so were they going to really say it was real and substantial difference for the uniformity clause and then the opposite for ITFA. And that came out, the taxpayer lost there. So, it, almost like the way that case was brought affected the burden of proof, but again, it's reading between the lines and trying to make something out of these two cases.

Mark Nebergall

The reason the taxpayer lost the ITFA argument in Labell, is because the court wasn't persuaded that internet music streaming is similar to coin operated jukeboxes.

Jonathan W. White

Understood, and the first time I read it, that's as far as it went. But there's something about those two cases. I mean, that they feel completely different. I mean, it, maybe that's it, maybe it's as simple as Mark said, like they made a gut reaction at the beginning. And that drove the whole thing.

Mark Nebergall

Well, you should know that there was a following case to Labell called Apple versus the city of Chicago--the press probably know that--Apple made some, some different arguments than the tax--the people in Labell made and primarily it involved internet streaming of music. And Apple instead of pointing to coin operated jukeboxes was pointing to satellite radio.

Jonathan W. White

And this is, this is kind of my other point, decide from the, the uniformity arguments that whose responsibility is it to point at what, so in, was there a difference like in the following Apple case? Like, why did they choose to point to this over that and whose responsibility is it to point at something.

Mark Nebergall

Apple had better lawyers.

Jonathan W. White

Okay, no, now I understand.

Mark Nebergall

The reason I know is I was one of them.

Jonathan W. White

We knew what you meant Mark.

Nancy Prosser

Mark, that case--that case settled, though. Right? Well, but it's a factual--it settled. Well. I mean, it went away for certain reasons. And, of course that was a case that those of us who are aware of it, were watching it intently and hoping it might give us some more answers. Now, you know, Apple did what it did and the city or, you know, decided however they did, but you know, just, just for the record because I--

Mark Nebergall

Nancy, they made us an offer we couldn't refuse.

Nancy Prosser

Well, which, which goes back to what we were saying earlier about the few number of cases that, you know, it's kind of a crapshoot for both parties, because there's so little out there to give. I mean, I would say, probably in some regards, there's so little guidance out there for the parties to look to, to argue to the court. And so you're kind of flying with that a little bit. So, I mean, isn't that another reason maybe why we haven't seen more cases?

Joseph Bishop-Henchman

And even in the cases that we do have, it becomes this...one side says, oh, it's like this thing. And the other side says, no, it's like the other thing. And it's debating, like, what counts as similar? What type of thing are we comparing it to? So

Mark Nebergall

One other aspect of the cases is the tendency to confuse the similarity of the product with the similarity of the delivery method. And the language of the statute assumes that the delivery method will be different. In a lot of times, in an attempt to not rule for the taxpayer that the court will go off on this delivery method tangent, there's a fair amount of that in the Labell case.

Nancy Prosser

So, so, this is just a nice segueway into the anti-discrimination language, you're already kind of getting there. So, you know, again, just, you know, thank you for bearing with us as we kind of worked through the other pieces and parts seems like we're kind of at, you know, here's sort of the crux of the areas of dispute. Again, we're just trying to see, do we agree with that, that, you know, you need to keep in mind, the actual preemption language, just the scope of what ITFA covers. But at the end of the day, it may be more, but this anti-discrimination language and what's similar, what's not similar. So, I want to hear more from you all about that, please. And from the audience.

Joseph Bishop-Henchman

I wasn't around 25 years ago for the drafting of the statute. But obviously, anti-discrimination is not a new concept for anybody that works in interstate taxation, and interstate law. You know, it pops up as one of the prongs of Complete Auto, but it goes back even further than that, and kind of core to the Dormant Commerce Clause was analysis that the Supreme Court has done since, you know, 200 years

ago, notwithstanding the fact that we have two or three Supreme Court justices that don't believe in that. But like, you know, put that aside and discriminatory or punitive measures on interstate commerce--up until the 1950s, States couldn't tax interstate commerce at all. So, all of this would have been preempted under--you know, if there had been an internet in the 1940s--at the state level or local level it would have been preempted under those doctrines. Now that went away, because, you know, times have changed, and we want to allow states to tax interstate commerce, but we still have these doctrines to make sure that it's not discriminatory or punitive. And, you know, it shows up here in this statute. And I think this is maybe a wordy but still decent definition of what it means to have a discriminatory tax. And to me, it matches, in a lot of ways, the Commerce Clause jurisprudence that we've had from the court.

I think, you know, Professor, one of your conclusions--and you just, you, in your article, and then here, you've also asked kind of, well, do we still need it? And you haven't made your case for that yet. So, I'm not, you know, let me not, nor will you, but and, you know, it's above the pay grade of everybody in this room, it's up to Congress, who today are fist fighting each other on Capitol Hill. So, I'm glad to be in a room where we can disagree but disagree civilly. But, you know, the, the anti-discrimination element, it's, to me, it flows through this historical, this history that we have where we want to make sure that states are not taxing more than their fair share and harming or overly burdening interstate commerce, including here. So, you know, at least for those two or three justices, they like statutes, not applying the Complete Auto tests. And in my experience, it's, it's hard to get government and attorneys for taxpayers agreeing on applying the Complete Auto test. Maybe we have more luck on, on agreeing on what ITFA says, other than maybe disagreeing about what, what is "similar."

Mark Nebergall

And leaving it up to the commerce clause to supplant ITFA is, is it's not a good idea because as Joe said, you've got some justices on the Supreme Court that don't believe in the Dormant Commerce Clause. And if that, you know, those, those Justices would not agree with the four-part Complete Auto test. So, you know, relying on the Commerce Clause, is it may not--may not work.

Andrew Appleby

Just to tie into that a little bit, we do have here an anti-discrimination provision. So, we also have another prong that precludes certain taxation. Here, we're looking at discrimination. And we talked about discrimination, we're looking at disparate treatment in favor of x against y. So, we necessarily have a comparison when we're talking discrimination. That's why we have that language, the similar language. So, I think when we look at applying that test, we have to think about how we're going to apply that. If we apply that, interpret that test too broadly, then we may end up turning this discrimination provision into a preemption preclusion provision. I don't think that was the intent of this particular provision. And maybe I'll ask that question to the rest of the audience or the panelists. You know, how do we apply this similar test if there isn't something similar?

Mark Nebergall

I've got an answer to that. I would say if there's nothing similar then by, by definition, the tax targets the internet. And I would say it's a per se violation, you know, you need to read the language of the statute a little more closely. It says if it's not imposed on something similar, then it will be discriminatory, and it's not imposed on anything similar, then it would be by definition discriminatory.

Andrew Appleby

And I would disagree, I think that reading turns this into a preemption provision where you're never going to be able to impose tax on electronic commerce unless there is something, some old traditional way of doing it in a similar way.

Mark Nebergall

Well, the obvious answer is make your tax broad so that it does tax similar stuff. If it's not similar then you can't, you just can't do it.

Andrew Appleby

I don't disagree with that.

Jonathan W. White

I just wanted to say on that, I think there does need to be something similar, I think internet native or digitally native things. But the definition of electronic commerce says, "turn on Internet access" or whatever. So, internet native things are you can tax them, there's not a full preemption of that. There does need to be a comparison class, something else that is not taxed. And I guess what I would point to is that if they wanted to do a full preemption they could have and they did it for Internet access. So, the discrimination provision has to stand in contrast to that full preemption.

Nancy Prosser

So, nobody else has any thought--Oh, two participants typing. Maybe somebody is giving us some thoughts at this point. So, do any of you think with, with something like the 4R Act, which has an anti-discrimination provision, we do have some more case law out there? Would you look at that, perhaps by analogy to see what the court has done there? Oh, well, what are you--Oh, okay. All right. Mindmeld! So, yeah, so just any, any thought about what to look to by analogy, or would you say that's not analogous?

Joseph Bishop-Henchman

Well, somebody just said, CSX, Alabama, that was a 4R Act case. You know, looking to see the comparable burdens, because, well, you know, look, we're here in New Jersey, where all the railroads in this state were bankrupt in the 1970s, in part because of excessive local taxation. And I think it was said at the time, no railroad operated in New Jersey profitably, because of the burden of taxes on them, the property taxes. And they can't move. So you, you lard up the interstate railroads with, with local property taxes, and I think some townships got 90% of their revenue from railroad lines going through the town. And, you know, that's where the 4R Act, well, you know, that's one of the provisions where the 4R Act came from was to stop the practice. And so, I think it's got a very good--also has a very good definition of discriminatory tests. And you see a lot of parallels in how the language is applied there. And to me, all of these 4R Act cases are states and localities trying it a new way. So, you know, okay, we can't just impose all of our property tax burden on the small number of railroads, we have to do it on comparable property, it makes sure that the rates are equivalent and comparable property. But what if we do it this way? What if we invent a new tax? What if we raise the fuel tax? What if we get fuel tax, but then equal fuel tax, but then give a rebate to non-railroads, and all of this has been tried, and the Supreme Court bought none of it. So, I think that--that is instructive.

Nancy Prosser

So, any thoughts from the audience or questions from the audience? This is just going a lot more quietly than I expected. But, but, but, maybe, I mean, is that because maybe that's a good thing that we've sort of defined--yeah, it's the anti-discrimination, and it's all going to turn on "is it similar or not similar?" Is that where we're all going to duke it out down the road? I'm sorry. Oh, Mr. Friedman. Hi. How are you? I'm good. It's always good to see you. Do you want to come wander around? Because I know you'd like to talk and walk.

Jeff Friedman

Shall we? Yeah a couple of reactions to some things I heard. Regarding the notion of discrimination. Constitutional discrimination has been defined by the court over and over again, there's a whole slew of US Supreme Court cases dealing with constitutional Dormant Commerce Clause discrimination under the Complete Auto test. When we're dealing with statutorily defined discrimination, whether it's the 4R Act, which has a very specific meaning, or ITFA, which has a specific meaning, they differ. Define them for us--we can fight over those words, but different. Regarding this notion as "similarity" when nothing compares--the topic that you guys were talking about before--I would just encourage, look at the very specific language used in the ITFA discrimination clause, the first part of it, of course. And if you look at the plain language of the text of the statute, which is usually where we start, it doesn't seem a requirement that there be something to compare against. If something is unique on the internet and taxed, I think a fair reading of the statute is it's discriminatory. I know people don't like that interpretation. And maybe they feel like it's not necessarily aligning with the purpose. But it seems to me that a plain reading of the of the federal statute would require a determination that if it's targeted at electronic commerce, and there's nothing to compare it against offline--which is some arguments that we hear from time to time--I think that requires a determination that the tax is in fact discriminatory. Those are the two points I wanted to make. Thanks, Nancy.

Nancy Prosser

Thank you, Jeff. So, I guess my takeaway, that if your view of ITFA were to withstand court scrutiny and become kind of the standard, then as it develops, and there are more arguably, what they call maybe natively digital things, the states are just not be able to tax it because we're going to--

Joseph Bishop-Henchman

Discriminatorily tax. You can't discriminatorily tax it.

Nancy Prosser

--but they were--I'm trying to say there's no equivalent a state can point to there's just, it just simply does not exist. And doesn't, doesn't that mean the end result is the state simply cannot tax that if you can't point to something that says we're treating everything else the same.

Joseph Bishop-Henchman

So, New Mexico has been going over regulations on how they tax digital advertising, and on every call, I'm reminding people, this is not the same as Maryland, New Mexico is a broad tax, they tax all goods and services. They're doing good work. I gotta go, you know, go to war with them. And so, I've had that conversation I don't know how many times in the last year. And

Nancy Prosser

Thank you for having that conversation because it's really important.

Joseph Bishop-Henchman

And that's how you avoid that problem is because if you, if you can go to the court and say, we tax everything, we tax all goods and services. So, if there if there is a non-digital equivalent, and we're not gonna do the taxpayers work for you, and tell you what the non-digital equivalent is, but whatever it is, they pay sales tax, and I'd be on the state side on that one.

Jonathan W. White

I agree with you, but I don't think that's what they're saying.

Joseph Bishop-Henchman

Because states want to have their cake and eat it--no offense--cake and eat it too. They want to not tax non-digital goods and services that are provided by people in the state and then tax the digital equivalent provided by out-of-state service providers. At least that's my read on why states don't tax services. You know, and I've been in I don't know how many fights where a legislator or an administrator wants to expand the sales tax base and every lobbyist that you can think of shows up at the hearing and says, no, we're different don't tax me. And, you know, I think, I think that's where it comes from, ultimately. Because you get every tax expert left, right, and center and they'll say you should tax all final sales of goods and services.

Nancy Prosser

I'm sorry, Mr. Oliner.

Brian Oliner

On the point about the discrimination. I go back to Jonathan's point, is that if the intent here, was that anything that's electronic commerce, and that has no equivalent anywhere, therefore, is discriminatory, you don't need the discriminatory language in the statute, the language become surplus language. We're taught basic statutory interpretation, a legislature doesn't do that. So why would you need it? Why wouldn't you just say, if it's electronic commerce, it doesn't get taxed, period.

Nancy Prosser

And that was Brian Oliner, the General Counsel at FTA. Also very involved in the Maryland digital advertising tax litigation before he joined FTA. So just a little context, so yeah, Brian is one of those people who has thought about this quite a bit as well. So another perspective, thank you, Brian.

Brian Oliner

But I only said somewhat on my very first call, it's too complicated to say know it all.

Nancy Prosser

Oh yeah. No, no, I know. That's what we're trying to do here. We're trying to point out, you know, because that's the thing, it seems to get very nuanced, or there's, so you know, just want to get any, any of the points out here that we can, because getting back to, you know, what you said earlier Mark, you know, for our projects, purpose, and just otherwise, I always think of ITFA as this little dark cloud that's hanging over, you know, any attempt to tax things that maybe you did, you just have to be--he's shaking his head. Am I saying something wrong here?

Mark Nebergall

The cloud isn't little.

Nancy Prosser

Okay. It's not a little cloud. It's a big, huge, cloud, well, so, okay, so, but Mark, so, what do we do with that? Seriously, help us out here. If it's a big dark cloud, then, then what is your recommendation? How do people--how do legislators--how should people be thinking about this? I mean you've been dealing with this for years.

Mark Nebergall

You just do it? I mean, you got to deal with it. And, you know, when you're the legislators looking at expanding the tax base, and in an area that's, that's inherently digital, he's got to look at this and say, what are the, what is, what's my litigation risk? You know, is my, is my, am I going to bankrupt the state

with, with refunds if this doesn't go the right way? You know, that's, you know, that those should be sobering thoughts for a legislator, what are the, what is the risk that we'll have to refund the taxpayer if we go out and collect a whole bunch of this tax and give it back? You're not gonna like that.

Andrew Appleby

Just one quick point on the, the how to deal with it. The courts need to deal with this, too. There have been some suggestions that we can just skip this "similar" analysis, or just as a matter of law say that advertising is advertising. And I think you need to deal with that, too. It says similar. So, you have to use--go through a fact-based determination and see if this is similar or not. And maybe it is, maybe it is similar, and maybe it's discriminatory. Or maybe it's not, but you need to go through that process. You can't shortcut that statutory language.

Mark Nebergall

Could you use an example other than advertising? It's a business driving Joe crazy.

Nancy Prosser

Well, I'm sorry. Yes, Mr. Brewer, chair of the work group.

Gil Brewer

Thank you, Nancy. I just say the whole question surrounding ITFA's impact is--I think cloud is a good description. And big is a good description. And cloud because it's amorphous, you can't tell. You don't know what exactly it means. But it is big. Potentially, it could cover a lot of things. And this discussion about well, you know, what options could a state have just reminded me of something someone shared with me once as a joke, but I'm kind of curious what your reaction is to it. What if the state adopted a statute that said, the legislature's intention is to impose tax on various digital products and any similar products? That would not necessarily be digital, but we're going to tax something similar. And if a court finds that it is similar and would be preempted, then our intention is it's not preempted. We want to impose tax on whatever is similar. How would that be administered? What would a court do with that?

Mark Nebergall

The court would probably rule it invalid and void for vagueness under the due process clause of the Constitution. Nobody knows. No reasonable person can know.

Gil Brewer

Mark, I'm sorry. I just want to say that's one case I will take you on. Because, void for vagueness, good luck.

Andrew Appleby

Well, maybe just a follow up point on the grand scale of ITFA. If we look at that definition of electronic commerce, I think if we look at that plain language, I don't really know what these days is not electronic commerce. You know, a landscaping service--well, you're gonna go on the internet and you find that person and you send them an email and they mow your lawn, and then you send them payment with Venmo or Zelle. And so how was that not electronic commerce? What is not electronic commerce under this incredibly broad definition? And what that means, I don't know if that means that now everything's electronic commerce and we can impose post tax on anything, or if it just completely eviscerates any of the actual discrimination of ITFA. So, kind of go either way. But I think that definition of electronic commerce is something that we think about as well.

Nancy Prosser

So, we're just doomed, I guess? No, no, we're not. We're not. But, but seriously, I just, we wanted to try and have some of this conversation to point out, you know, what, what are some of the various arguments as people look at this language trying to make sense of it? Yeah, what do you get in the record to try and determine? And, and I guess, just like with a lot of the cases that we deal with, the ones that go forward? And also, we know, the Maryland digital advertising tax, and there's a third case, maybe there will be others? I suppose eventually, there will be some sort of determination out of Maryland courts. We'll see what, what, what issue they, they rule on, if ITFA is part of that. But even there that's just one more case. I mean, it's not like some nationwide applicable case, it's one case out of Maryland. So, what does that mean? Does that mean any, anything more than just this handful of other cases that we have?

Mark Nebergall

I think the Maryland situation is different. When it finally gets decided, you have a whole bunch of other states that have been looking at following Maryland's lead. And when the case--early cases--got filed in state court, and then a federal court, it sort of froze them in their tracks. And I think that that freeze is going to continue while these cases in the Maryland Tax Court play out. So, there is sort of a national impact to it.

Nancy Prosser

So, you're saying there are actual other cases on digital advertising?

Mark Nebergall

No, there's other states have looked at passing laws similar to Maryland's digital, they call it internally, the DAGR Tax, digital advertising gross revenues.

Nancy Prosser

Right, no, so, there are states that have looked at similar bills or picking up the same bill. And so, yeah, since that, state legislators are waiting to see what happens there. But still, I mean, it is one case, and it's just handful, apparently, will there be anything more? Okay, Jeff has some thoughts on that.

Jeff Friedman

Nancy, um, you know, maybe it's possible that the Internet Tax Freedom Act is working. I mean, it's been 25 years since its enactment, it's been extended four or five times before made permanent. We've seen very little—relatively speaking--case law, maybe it's served as kind of a disincentive for states to single out and tax electric commerce. In other words, it's working. Maryland may be an outlier. I think Brian and I can disagree on that--I see you Brian--but we generally don't see targeted taxes on electronic commerce. Maryland digital advertising tax aside. There's been some applications of it and certainly there has been some case law, but not a lot. And I think that Maryland legislature turned a blind eye to comments from the public that you're encroaching on the ITFA and Commerce Clause and First Amendment, but just most legislators do want to hear it and don't go that far.

Mark Nebergall

It's just to amplify what Jeff just said, not only did Congress extend it three or four times before making it permanent, they also expanded it significantly along the way.

Nancy Prosser

Yes, Brian Oliner.

Brian Oliner

Brian Oliner--I'm supposed to announce that, right? On the question of it working, putting whether Maryland's law complies or doesn't comply with statute because of mostly discrimination issue in the electronic commerce. It may be it worked as a hiatus while we all try to figure out what all this was. And what was going to be new and developed and gave this, as they said, when initially enacting this, this new area of commerce, a chance to evolve, grow, and show what it is. Maybe that was appropriate at the time, but that gets back to these comments. Is it still appropriate--now we have a knowledge of what this is and what it's doing and how it's changing commerce, how it's changing consumers and changing businesses--to now give it a chance to make--to be an adult in the commerce world, like the regular bricks and mortars are adults and they pay their share, should that be--do we need to relook at it from that perspective and say, okay, it did work. But now it needs to evolve.

Mark Nebergall

And one could argue that it's needed more than ever given Maryland's behavior.

Brian Oliner

But could it be? But that's what I'm saying about evolving? Could it evolve to address whether what Maryland did was right or wrong, but still take into effect that this is an income producing world or a stream of commerce that needs to pay its fair share?

Nancy Prosser

And I think maybe, Brian, part of what I hear you say, some of those thoughts I've had coming from a Texas background. But you know, Texas was one of the states that did impose tax on Internet access, before ITFA even started, you know, its initial preemption in 98. And you know, you can ask Texas, what the final numbers were in 2020, when they lost that revenue stream, and it was right, where's--in the billions? Where's, where's my Texans? Phillip is that right, it was like a billion or so per biennium? I don't know, it was a number, whatever it was, I mean, there was a lot of revenue. And that's one of those things, I think, to Brian's point that I think of, we know the digital economy is the growth area and and states should be--arguably--be able to look at revenue stream, you know, those things that are going to allow them to have a steady revenue stream. But, you know, but I know we are all stuck until Congress--if Congress--decides to do something. But yeah, you hear these arguments of expand your tax base, get rid of business inputs, but, but where do you go? If you're already taxing most things? You know, services, but then you're gonna have to probably be careful about ITFA even there, but yeah, any thoughts on that?

Joseph Bishop-Henchman

Well, you're on better grounds there. I mean, the, my response to the "well, they need to pay their fair share" is if it's about everybody paying their fair share on a non-discriminatory equal basis, ITFA shouldn't be a deterrent, then. Where ITFA comes in if it taxes multiple, or it's discriminatory, or if it's on Internet access. And I read a portion of his article on Internet access, where, you know, I guess, you know, I sometimes wonder, do we still need that? Because, you know, isn't it ubiquitous, but you know, I'm in DC, and it's not ubiquitous, and the Professor reminded us that, at this point, this tax on extra Internet access is a tax on, on basically succeeding in the world, and having access to everything. And so, you know, I guess, you know, you want another 25 years on that one, at least.

Andrew Appleby

I don't know if there's a problematic prong, although maybe the definition that got added in 2007.

Joseph Bishop-Henchman

Texas had a problem getting rid of, you know, yeah.

Nancy Prosser

Oh, yeah. It was already in your tax base, then. Yeah. So. Deborah Bierbaum?

Deborah Bierbaum

Deborah Bierbaum. I'll give my perspective from back in 1996, when a lot of Internet companies including Ellen Fishbein from AOL, came to me, and they were concerned because states, through mostly administrative practices and not legislation, were trying to interpret Internet access as telecommunications. So, if you want one of the most discriminate, discriminatory tax services, look at telecom, and they all universally around the table don't want to be telecom companies. We don't want to be taxed as telecom. I would say maybe the service is not new, but you haven't fixed discriminatory taxes. And I think that's key. There was more to what happened then. New York ruled in 1997, that Internet access was not telecom pre-Internet Tax Freedom Act. But I think that was one of the big problems from my recollection in the nineties.

Nancy Prosser

Thank you, Deborah. So, any other thoughts? We're about where we wanted to be timewise before we hand things over, but any final thoughts and I don't know, Jonathan, are we--yeah, final thoughts. Do we have any final, oh, one more for anybody that's out there? Yes, sir.

Mark Nebergall

How many sitting in the room think their state was grandfathered by the grandfather provision of ITFA, even though it's expired. How many people even know whether their state was grandfathered? Which state?

Nancy Prosser

Texas was

Jonathan W. White

I don't think Hawaii are in the room, maybe they're on the phone, but I think they were in that exception.

Mark Nebergall

And just, just for the for the record, you know, the, the expansions of the scope of the, the ITFA made after its initial enactment were not grandfathered.

Nancy Prosser

Well, anything else from you, Joe, that you--words of wisdom? Advice?

Joseph Bishop-Henchman

Thank you for doing this panel, for talking about it. And I actually learned more about ITFA preparing for this panel than I thought I already knew. And, you know, hello, you know, we're not reaching full agreement, nor was that really expected, you know, hope to at least share perspective on it. And, you know, we are on the same page on a lot of stuff on Capitol Hill, I was told a story of when I was working on the Tax Cuts and Jobs Act, and what became that in 2017. Going around the hill offices and explaining, I was asked to talk about state implications on things as I still do today, for a different employer. And over and over again, you know, the Federal guys are talking about their thing. And then I talked about how it affects the States, and 100% of the time, 99% of the time, substantially most of the time, the congressman or staff would say, oh, this would affect States wouldn't it. That's about as much thought as they would put into these things. And there was one who was like a former state legislator, a lot of former state legislators there, and they really should know that. But like, you know, state taxes matter. And so, thank you for doing what you're doing. And you know, we'll see you in the courthouse.

Nancy Prosser

Are there any last thoughts from you?

Andrew Appleby

Just sort of tying along with that point, I think that if a state court adopts the interpretation of that discriminatory provision--anti-discriminatory provision--to say that if there is no similar or traditional offering, that means we cannot impose--we the states cannot impose--tax on anything electronic commerce, I think that may be enough of an impetus to actually get the attention of Congress, and you may end up with an amendment or repeal of the, at least the discriminatory provision of ITFA. So that might be unintended consequence there.

Joseph Bishop-Henchman

They're trying to get the votes today to pass the budget passed tomorrow. So we'll see, yeah.

Mark Nebergall

We need to, to keep in mind that the, the godfather to the Internet Tax Freedom Act is Senator Wyden, and he's still chairman of the Senate Finance Committee last time I looked.

Nancy Prosser

Right. Yes, thank you for that reminder.

Jonathan W. White

My final thought is kind of my initial thought, which is for state tax administrators to focus on the discrimination provision, sure, but electronic commerce in that definition. As Mark said, with the Labell case there was some conflation of the internet-ness of the thing, and the "similar" or whatever. That's true. And I read that too. And that's, you know, in my notes when I pulled out the case. Sure enough, I wrote basically, they, it's almost like they identified it as not turning on the Internet, even though I don't believe from the case they were briefed on that. So, focus on you know, keep that in mind, that there's two steps there, there is the discrimination or similar analysis. But just to get through the door, you have to have electronic commerce, which means that the thing has to be on the Internet, I don't have a better word, the Internet-ness of it.

The other thing is just the full, the full preemption thing, or the full discrimination thing that we were talking about earlier, I agree that if it's super broad, then maybe you don't have a problem. But I don't think that's what the other people are saying that a couple of people here today. I think the point there is they're trying to say that if it's, if there's no non-Internet thing, it's automatically discriminatory. There is no similar analysis there. And I've thought about the statute really hard, specifically, the definition of Internet access, where you do have a full preemption, there is no similar thing. They added in 2007-- and I read this earlier, but I couldn't figure this out--"homepage, electronic mail, instant messaging, personal electronic storage capacity; video clips" is kind of still head scratcher. But I think they added those things because they're Internet native. Those are the things they called out and identified in the definition of Internet access, because they didn't want a similar analysis taking place. That's evidence that under the discrimination provision, you do need a similar, you know, comparison class and an analysis of "similar." I think that's the Internet native things that they wanted to protect, they called out in that Internet access definition. That's the only way I can make sense of that expansion.

Nancy Prosser

Well, terrific. Thank you all so much to our panel. Really appreciate this discussion. We will certainly have more as part of our workgroup going forward but hopefully this is kind of a, a baseline level set for

some of you so you kind of know what some of the terms mean, you have some resources for if somebody comes to, in your state and says I need something on ITFA fast, you've got some resources. But again, Mark, Joe, Professor Appleby, and of course my great colleague, Jonathan, wonderful job, and thank you all so much.