



Date: April 22, 2024

To: Members, Assembly Privacy and Consumer Protection Committee

From: Peter Blocker, Vice President of Policy

Subject: **OPPOSITION to AB 2829 (Papan), as amended on April 1, 2024**

The California Taxpayers Association and the organizations listed below respectfully oppose AB 2829, a discriminatory 5 percent tax on the digital advertising services of taxpayers with gross annual revenue exceeding \$100 million. A tax on digital advertising will increase costs for California advertisers and consumers, will be met with numerous legal challenges, and will create a chilling effect on California's tech industry.

CalTax and the organizations listed below oppose AB 2829 for the following reasons:

Increases Costs for Small California Advertisers and Raises Prices for Consumers. While framed as a tax on large advertising service providers, the economic burden of the digital

advertising tax will fall squarely on California purchasers because it is limited to revenue from advertising services in California. Advertising service providers subject to the tax would immediately either raise prices for California advertisers or add the tax to their invoices, like a sales tax. The tax would make otherwise affordable and effective digital advertising channels prohibitively expensive, pricing small California businesses, nonprofits, places of worship, civic organizations, and others that advertise on digital platforms out of the market in an already inflationary economy. In addition, the tax would raise costs for small businesses buying digital advertising services, causing them to raise prices for consumers, where the ultimate burden of any tax always falls.

Unconstitutional Under ITFA. AB 2829 is substantially similar to Maryland’s first-in-the-nation digital advertising tax, enacted in 2020, which has been the subject of litigation since its passage. Maryland’s elected comptroller, the defendant in several of the suits concerning the digital advertising tax, has publicly stated he believes the state should no longer expend resources “to defend a law that was constitutionally questionable at the time of enactment.” AB 2829 would be met with legal challenges similar to those being litigated in Maryland.

The Internet Tax Freedom Act, implemented by the Clinton administration in 1998 and made permanent by the Obama administration in 2016, prohibits discriminatory taxes on electronic commerce, defined as “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer or delivery of property, goods, services, or information, whether or not for consideration.” The federal law expressly prohibits states or political subdivisions from imposing “discriminatory taxes on electronic commerce.”¹ AB 2829 would impose a tax on only digital advertising, in clear violation of the Internet Tax Freedom Act.

Specifically, the bill singles out online platforms with \$100 million or more in global annual gross revenue. Only those platforms would be subject to the tax, while traditional forms of advertising – namely, billboards or advertisements placed in newspapers – would not be taxed.

Violates First Amendment Rights. AB 2829 is also ripe for a challenge on the basis that it violates taxpayers’ First Amendment rights. The bill would unconstitutionally limit taxpayers’ speech by prohibiting taxpayers from listing any costs associated with the tax on an invoice, fee, or line item provided to a consumer of digital advertising services. Additionally, the provision to statutorily prevent taxpayers from communicating to their customers about the tax would unnecessarily hinder tax transparency.

Runs Afoul of the Federal Commerce Clause. AB 2829 almost certainly would be challenged as a violation of the U.S. Constitution’s Commerce Clause. The Commerce Clause prohibits state laws that discriminate against interstate commerce, and is generally interpreted to ban laws favoring in-state interests at the expense of out-of-state interests. AB 2829 sets a threshold of \$100 million in *global annual gross revenue*. The bill would tax many out-of-state businesses, with potentially minimal advertising activities in California, while preventing businesses from passing on any costs associated with the tax. The effect would result in shifting the tax burden from businesses’ California customers to their out-of-state customers, effectively discriminating against out-of-state customers in violation of the Commerce Clause.

¹ 47 U.S. Code § 151, n. § 1101(a)(2).

Harms California's Business Climate. AB 2829 would create a disincentive for businesses to locate and grow in California, and would exacerbate California's reputation as a challenging state in which to do business.

Leaves Important Administration Questions for Regulations. AB 2829 omits any language regarding the sourcing or apportionment of receipts for the tax. Rather, the California Department of Tax and Fee Administration would be responsible for adopting regulations "governing collections, reporting, refunds, and appeals." Leaving important sourcing rules to the regulatory process ignores the important policy implications of a broad-based digital advertising tax. For instance, AB 2829 would apply only to the gross revenue derived from digital advertising in the state. How will California determine who is in the state? Will California use a network-based tracking system? Will the state utilize Wi-Fi positioning of mobile devices? How will the state handle the growing utilization of encryption to obscure users' locations? Is it even realistically possible to reliably obtain the information necessary for sourcing?

Voters Do Not Want Tax Increases. A January 18 poll by the Berkeley Institute of Governmental Studies found that only 13 percent of California's registered voters support tax increases as a method of bridging the state's deficit. Opposition to tax increases was strong across all partisan, age, and ethnic groups polled, with Black and Latino voters voicing the strongest opposition.

For these reasons, CalTax and the organizations listed below respectfully oppose AB 2829.

On behalf of...

California Taxpayers Association	Greater San Fernando Valley Chamber of Commerce
Association of National Advertisers	Imperial Valley Regional Chamber of Commerce
California Attractions and Parks Association	La Canada Flintridge Chamber of Commerce
California Broadband and Video Association	Laguna Niguel Chamber of Commerce
California Business Roundtable	Motion Picture Association
California Chamber of Commerce	Oceanside Chamber of Commerce
California Retailers Association	Orange County Taxpayers Association
Carlsbad Chamber of Commerce	Santa Maria Valley Chamber of Commerce
Council on State Taxation	Silicon Valley Leadership Group
CTIA – The Wireless Association	Simi Valley Chamber of Commerce
Cupertino Chamber of Commerce	Solano County Taxpayers Association
Dana Point Chamber of Commerce	Technet
Family Business Association of California	West Ventura County Business Alliance
Greater High Desert Chamber of Commerce	
Greater Irvine Chamber of Commerce	

cc: The Honorable Diane Papan, California State Assembly

The California Taxpayers Association is a nonpartisan, nonprofit association formed to support good tax policy, oppose unnecessary taxes and promote government efficiency. Established in 1926, CalTax is the oldest and largest group representing California taxpayers.