IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

MICHAEL LABELL, et al.	)	
	)	
Plaintiffs,	)	Case No. 2015 CH 13399
	)	
v.	)	(Transferred to Law)
	)	
THE CITY OF CHICAGO, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Introduction

The issue before the Court is whether the City of Chicago is entitled to impose its amusement tax – a 9% tax on charges paid for the privilege to enter, witness, view, or participate in amusements that take place *within Chicago* – on Internet-based streaming video, audio, and gaming services ("streaming services") by taxing only customers of such streaming services who provide Chicago billing addresses. Defendants fail to provide any sufficient basis for the City's authority to tax only customers of streaming services with Chicago billing addresses. Therefore, the Court should grant Plaintiffs' motion for summary judgment and deny Defendants' motion.

Statement of Facts

There are no material facts in dispute; the parties have admitted to each other's respective statements of fact, therefore, both Plaintiffs' and Defendants' facts are taken as true.

Argument

I. The City's application of the amusement tax to customers of streaming services with Chicago billing addresses exceeds its authority under Article VII, § 6(a) of the Illinois Constitution on its face and as applied to Plaintiffs.

Amusement Tax Ruling #5 (the "Ruling")[1] extended the City's amusement tax to any customer of a streaming service who provides a Chicago billing address to the service provider. (Pls.' SOF 12.) This method for determining who must pay the tax has a fatal flaw: It will inevitably impose the tax on people whose use of streaming services occurs entirely outside Chicago, whom the City has no authority to tax.

[1] Defendants claim that Plaintiffs' challenge is really a challenge to § 4-156-020(G)(1) of the Municipal Code of Chicago ("Code"), rather than to the Ruling because the City amended the Code in November 2015 "to incorporate the key terms of the Ruling." (Defs.' Mem. at 4). But this distinction does not affect the merits of Plaintiffs' claims. Thus, Plaintiffs cite to either the Ruling or the Code when referring to the City's attempt to impose the amusement tax on customers of streaming services with a Chicago billing address.

Home rule units may not extend their home rule powers, including their taxing power, to activity beyond their borders except where the General Assembly has expressly authorized them to do so. *Hertz Corp. v. City of Chi.*, 2017 IL 119945, ¶ 14. And the General Assembly has not expressly granted the City the authority to tax amusements beyond its borders. *See* Section I.C below). Therefore, the City's application of the amusement tax to customers of streaming services with Chicago billing addresses – irrespective of whether they use the services within Chicago – exceeds the City's authority under Article VII, § 6(a) of the Illinois Constitution.

Plaintiffs challenge the Ruling's application of the amusement tax to customers of streaming services with Chicago billing addresses on this basis both on its face and as applied to Plaintiffs. "A party challenging a statute's facial constitutionality bears the burden of showing that the statute is unconstitutional in all of its applications." *People v. Wiggins*, 2016 IL App (1st) 153163, ¶ 75. "By contrast, an 'as applied' constitutional challenge requires a defendant to show that the statute violates the constitution as it applies to him." *Id*. The distinction between facial and as applied challenges is relevant because it goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint. *People v. One 1998 GMC*, 2011 IL 110236, ¶ 62. Plaintiffs seek injunctive relief to prevent the City from imposing the amusement tax on *any* customers of streaming services, which necessitates a facial challenge. Plaintiffs also seek damages in the form of the return of the taxes Plaintiffs have already paid for streaming services, which necessitates an as applied challenge. Under either type of challenge, Plaintiffs' argument is the same: applying the amusement tax to customers of streaming services with Chicago billing addresses exceeds the City's constitutional authority.

A. Plaintiffs have proved their facial challenge.

Defendants assert that Plaintiffs can only succeed on their facial challenge if they establish that there are "no circumstances" under which the ordinance would be valid. (Defs.' Mem. at 5 (citing *Carter v. City of Alton*, 2015 IL App. (5th) 130544 ¶ 20).) And Defendants argue that Plaintiffs cannot succeed on their facial challenge because, Defendants say, some Chicago residents use streaming services exclusively or primarily within Chicago. *Id*.

But recent Illinois Supreme Court precedent belies Defendants' reliance on the "no circumstances" formulation. In *People v. Burns*, 2015 IL 117387, the Court specifically rejected the proposition that a statute is facially unconstitutional only if no set of circumstances exists under which the statute would be valid. *Id*. at ¶¶ 26-27. Instead, the Court held that in a facial challenge a plaintiff must establish that a law is unconstitutional in all of its applications, but when assessing whether a statute meets this standard, a court must consider only applications of the statute in which it actually authorizes or prohibits conduct. *Id*. at ¶ 27 (citing *City of L.A. v. Patel*, 135 S. Ct. 2443, 2451 (2015)).

Under either formulation – the "no circumstances" formulation or the "all applications" formulation" – Plaintiffs have proved a valid facial claim. The City's *method* of taxing streaming services exceeds its authority under the Article VII, § 6(a) of the Illinois Constitution under all circumstances and in all of its applications because that method imposes the tax based on a customer's billing address, not on whether a customer actually uses streaming services in Chicago. Defendants argue that this method should survive a facial challenge because there may be some customers with Chicago billing addresses who only use those services within the City. But under the City's application of the "no circumstances" formulation, a facial challenge to a City tax on *all* customers of streaming services *wherever they lived* would fail because some

customers of streaming services may use those services only in Chicago. The City's application of the "no circumstances" formulation cannot be correct because it would shield governments from any number of blatantly unconstitutional laws. But the City's *method* of taxing streaming services is unconstitutional in all circumstances. The City's method of taxing streaming services *always* involves taxing amusements that take place outside of its boundaries because customers of streaming services can use those services anywhere and the City has no way to ensure or know that it only taxes amusements that take place in Chicago. Thus, the City's method of taxing customers of streaming services based on whether those customers have a Chicago billing address rather than where they use those amusements is unconstitutional because in every circumstance, and in all applications of that method, the City is taxing amusements outside of Chicago.

In *Hertz*, the Illinois Supreme Court struck down a Chicago ordinance on its face that imposed a lease tax on all Chicago residents who leased vehicles from rental agencies located within three miles of Chicago's borders – based on the assumption that all Chicago residents would use the rental vehicles primarily in the City – in the absence of written proof that a Chicago resident customer would use the vehicle primarily outside of Chicago. 2017 IL 119945 at ¶ 5. The Court found that the ordinance was an improper extension of the City's home rule power to tax beyond its borders because it imposed the lease tax "not on actual use within the City's borders but on the lessee's stated intent to use the property in Chicago or, failing any statement of intent, on presumed use based upon the lessee's residence address." *Id*. at ¶ 29. If the Court had adopted Defendants' application of the "no circumstances" formulation, it would have rejected the facial challenge because one could have come up with a circumstance where the imposition of the tax on Chicago residents leasing vehicles from rental agencies outside the

City might be valid: where the customer did, in fact, drive the leased vehicle exclusively in Chicago. But the Court did not evaluate the Chicago ordinance in *Hertz* in that manner, and this Court should not do so either.

Defendants attempt to distinguish *Hertz* by asserting that the amusement tax, unlike the lease tax struck down in *Hertz*, does not require "actual use" in the City because it applies to charges paid for the privilege of viewing amusements in Chicago. (Defs.' Mem. at 11.) But the City does *not* apply the amusement tax to charges paid for the privilege of viewing streaming services in Chicago: It applies to customers of streaming services with Chicago billing addresses and does not apply to customers who do not have Chicago billing addresses, even though *all* streaming service customers have the same privilege to use them in Chicago.

Defendants further argue that "the court in *Hertz* clearly believed that the City had no basis for assuming that a Chicago resident renting a car from a suburban location would actually use the car in Chicago," but here the City can safely assume that customers of streaming services with Chicago billing addresses will use such services in Chicago. (Defs.' Mem. at 12.) But the City argued in *Hertz* that it *did* have a basis for assuming that a Chicago resident renting a car from a suburban location would use the car in Chicago. And the City provides no reason why the Court should credit its assumption in this case even though the Court refused to accept the same assumption in *Hertz*. Indeed, *Hertz* criticized the City for citing "no authority for the proposition that mere residence in a taxing jurisdiction gives that jurisdiction the ability to impose taxes on the resident regardless of whether the taxed property or activity is connected to the taxing entity." *Hertz*, 2017 IL at ¶ 25. Here again, the City provides no authority for the proposition that a person's mere residence in Chicago (let alone the mere use of a Chicago billing address) gives the City the authority to tax that person's use of streaming services entirely outside of Chicago.

Defendants also attempt to distinguish this case from *Hertz* by asserting that there is no "conclusive presumption" of use based on Chicago residency. (Defs.' Mem. at 12.) But just as the lease tax conclusively presumed that any Chicago resident who leased a car within three miles of Chicago would use the car in Chicago, the Ruling conclusively presumes that a customer of streaming services with a Chicago billing address will use the services in Chicago.

Finally, Defendants assert that this case is unlike *Hertz* because the City is not requiring providers of streaming services to ask customers where they intend to use streaming services. (Defs.' Mem. at 13.) But the City does require providers of streaming services to ask customers for a billing address, which the City uses as the sole basis of determining whether a customer uses streaming services in Chicago. If anything, that makes the amusement tax's application to streaming services *worse* than the lease tax in *Hertz*: The presumption in *Hertz* was rebuttable, but here any customer of streaming services with a Chicago billing address will always pay the amusement tax regardless of whether he or she uses those services in Chicago.

B. Plaintiffs have proved their as-applied challenge.

Defendants assert that Plaintiffs' as-applied challenge cannot succeed because Plaintiffs "have testified that they almost always use [streaming services] either at home or elsewhere in the City." (Defs.' Mem. at 6.) But Plaintiffs have testified that they have used, and do use, streaming services outside Chicago. (Defs.' SOF 3, 8.) And that is exactly the harm that Plaintiffs complain about: They are taxed based on their Chicago billing addresses regardless of where they consume the services.

Defendants claim that taxing customers based on their Chicago billing addresses is a charge for the "privilege of viewing amusements in Chicago" and that a customer's choice "to watch the videos exclusively in Chicago, partly in Chicago, or not at all" is irrelevant. (Defs.' Mem. at 11.)

But the City does not actually tax the privilege of using streaming services in Chicago because it does not apply the tax to people who use streaming services in Chicago but do not have billing addresses in Chicago. And if the City could tax customers of streaming services for the privilege of using those services in Chicago, *regardless of whether they take advantage of that privilege*, as the City claims, then the City could tax *every* customer of streaming services *wherever they live* because they *all* have the ability to use those services in Chicago. Because the City may not tax activity that takes place outside of Chicago, and the method it uses for taxing streaming services applies to Plaintiffs' activity outside of Chicago, the Ruling is unconstitutional.

Defendants receive no help from *Rozner v. Korshak*, 55 Ill. 2d 430, 433 (1973), in which the Illinois Supreme Court "upheld Chicago's home rule authority to impose its annual 'wheel tax' (a/k/a 'City sticker tax') on Chicago residents who use their vehicles in Chicago, even though the vehicles are also used in other places." (Defs.' Mem. at 5.) *Rozner* did not address the method by which the City applied the wheel tax – *i.e.*, it did not concern whether the City could impose its wheel tax on cars driven outside of Chicago. Rather, *Rozner* addressed whether an ordinance raising the price of city stickers and increasing the number of classes of vehicles was invalid because the General Assembly had not approved the change. 55 Ill. 2d at 433-34. Here, in contrast, Plaintiffs do challenge the method by which the City taxes streaming services.[2] *Rozner* is simply inapposite.

Defendants' assertion that Plaintiffs may not bring their as-applied challenge "without first exhausting their administrative remedies by filing a refund claim with the Department" has no

[2] Besides, the wheel tax is easily distinguished from the amusement tax on streaming services. No one would have any reason to pay for a city sticker for a car that would never be physically present in Chicago. But someone with a Chicago billing address could pay the amusement tax for streaming services that would be consumed exclusively outside Chicago.

merit. (Defs.' Mem. at 6.) The only case Defendants cite in support of this argument, *Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth.*, 315 Ill. App. 3d 179 (2000), provides at least two reasons why Plaintiffs are not required to exhaust administrative remedies in this case. First, plaintiffs need not exhaust their administrative remedies before seeking judicial relief if their complaint – like Plaintiffs' complaint here – attacks the constitutionality of an ordinance on its face. *Id*. at 186. Second, plaintiffs need not exhaust their administrative remedies where – as here – no issues of fact are presented or agency experience involved. *Id*. at 187. There are no disputes of fact in this case; it presents a "pure issue of law" that "does not require fact finding by the administrative agency or an application of its particular expertise." *Id*. at 188.

C. The Mobile Sourcing Act does not give the City the authority to tax customers of streaming services based on their billing addresses.

There is no merit in Defendants' argument that the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638/1 et seq. ("Mobile Sourcing Act"), gives the City express and implied authority to tax streaming services based on customers' Chicago billing addresses alone. (Defs.' Mem. at 7.) As an initial matter, a statutory authorization for a municipality's extraterritorial exercise of power cannot be implied; it must be express. *Seigles, Inc. v. City of St. Charles*, 365 Ill. App. 3d 431, 435 (2d Dist. 2006). And the Mobile Sourcing Act does not expressly authorize the City to tax customers of streaming services with Chicago billing addresses when they use those services outside of Chicago.

Defendants assert that the Mobile Sourcing Act authorizes the City's method of taxing streaming services because the Act expressly approves that method for taxation of "mobile telecommunications services." (Defs.' Mem. at 8.) Defendants argue that the statute's definition of "mobile telecommunications services" encompasses streaming services because they are "charges for, or associated with, the provision of commercial mobile radio service" and/or

"charges for, or associated with, a service provided as an adjunct to a commercial mobile radio service." (*Id.*) And, according to Defendants, because some mobile service providers, such as AT&T, provide streaming services, "[a]t a minimum, the Mobile Sourcing Act applies to streaming services provided by telecommunications companies. (Defs.' Mem. at 9.) But the Mobile Sourcing Act is about allowing municipalities to tax "mobile telecommunications services" – basically cell phone services – and cannot be stretched so broadly. The Mobile Sourcing Act does not expressly authorize the City to impose a tax on streaming services based on a customer's billing address.

The Mobile Sourcing Act exists as a result of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. § 116 et seq., which Congress passed to establish sourcing requirements for state and local taxation of mobile telecommunication services. To implement the federal statute, Illinois adopted its own Mobile Sourcing Act, which authorizes a local jurisdiction to tax a customer's purchases of mobile communications services only if the jurisdiction is the "customer's place of primary use, regardless of where the mobile telecommunications services originate, terminate, or pass through." 35 ILCS 638/20(b). In essence, this allows a municipality to tax a cell phone customer if his or her residential street address or primary business street address and the cell phone service provider's licensed service area are in the municipality's boundaries. 35 ILCS 638/10.

The "mobile telecommunications services" that the Mobile Sourcing Act authorizes local jurisdictions to tax do not include the streaming services at issue in this case. The Mobile Sourcing Act defines "mobile telecommunications service" to include:

> any charge for, or associated with, the provision of *commercial mobile radio service*, as defined in Section 20.3 of Title 47 of the Code of Federal Regulations . . . , or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, that is billed to the customer by or for the

> customer's home service provider regardless of whether individual transmissions originate or terminate within the licensed service area of the home service provider.

35 ILCS 638/10 (emphasis added).

The Code of Federal Regulations, in turn, defines "commercial mobile radio service" as:

> A *mobile service* that is: (a) (1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

47 C.F.R. § 20.3 (emphasis added). And the Code of Federal Regulations defines "mobile service" as:

> *A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves*, [including]:
>
> (a) Both one-way and two-way radio communications services;
>
> (b) A mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and
>
> (c) Any service for which a license is required in a personal communications service under part 24 of this chapter.

47 C.F.R. § 20.3 (emphasis added).

The federal regulation's definition of "mobile services" does not encompass streaming services, which means that the regulation's definition of "commercial mobile radio services" likewise does not encompass streaming services. Therefore, streaming services also are not "mobile telecommunications services" – the only things the Mobile Sourcing Act authorizes municipalities to tax. Streaming services also are not services "associated with" or "adjunct to" commercial mobile radio services. Such "associated" and "adjunct" services include a mobile

telecommunications service provider's charges for wireless data access or charges for the transmission or receipt of text or picture messages; they do not include any charge for any transaction conducted over the Internet.

Further, providers of streaming services are not "home service providers," which the Mobile Sourcing Act defines as a facilities-based carriers or resellers with a customer contract for the provision of mobile telecommunications services, 35 ILCS 638/10 – in other words, cellular service providers like Verizon and Sprint. And although a company that is a "home service providers" could additionally provide streaming services, that does not authorize the City to tax customers of *all* streaming services – regardless of whether they are from a provider that is also a home service provider – based on their Chicago billing addresses.

Thus, the application of the amusement tax to streaming services exceeds the City's constitutional authority, and this Court should declare it invalid and enjoin its enforcement.

II. The amusement tax applies to streaming services differently than it applies to in-person amusements in violation of the Uniformity Clause of the Illinois Constitution.

The Court should strike down the amusement tax for the additional reason that it violates the Illinois Constitution's Uniformity Clause, under which "a non-property tax must be based on a real and substantial difference between the people taxed and not taxed, and must bear some reasonable relationship to the object of the legislation or to public policy." *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 247 (1992) (citing *Searle Pharmaceuticals, Inc. v. Dep't of Revenue*, 117 Ill. 2d 454, 468 (1987)).

A. The amusement tax violates the Uniformity Clause because it applies to streaming services differently than it applies to other amusements.

The amusement tax, by its terms, applies to amusements "within the City of Chicago." Chi. Mun. Code 4-156-020. But the City imposes the amusement tax on customers of streaming

services with Chicago billing addresses regardless of whether they use those services in Chicago, and it *never* applies the tax to customers of streaming services who do not have Chicago billing addresses, even if they use those services in Chicago. Defendants provide two justifications for these different classifications. Neither is sufficient.

First, Defendants assert that the "City provides protection and other benefits to its residents and their property on a regular and ongoing basis, whereas non-residents are here only on occasion as visitors." (Defs.' Mem. at 15.) But residents and non-residents who use streaming services in Chicago both receive the same protection and benefits from the City. When the City applies the amusement tax to customers of other amusements, like sporting events, theatrical performances, and concerts, it taxes both resident and non-resident customers of such amusements that take place in Chicago. This is presumably because both categories of customers receive protection and benefits from the City while they are engaged in those amusements in Chicago. But when the City applies the amusement tax to streaming services, it only applies to customers with billing addresses in Chicago – not necessarily Chicago residents – while not taxing non-resident customers of streaming services who do use streaming services in Chicago. So the City has failed to provide any real or substantial difference between residents and non-residents as it relates to their use of streaming services in Chicago.

Second, Defendants attempt to justify the City's method of taxation by arguing that, "[c]onsistent with the Mobile Sourcing Act, along with the evidence in this case, it is reasonable to assume that residents use the [streaming services] here on a regular basis . . . [and] non-residents will use them here only occasionally." (Defs.' Mem. at 15.) As explained in Section I.C above, the City cannot rely on the Mobile Sourcing Act for applying the amusement tax to customers of streaming services; just as an act of the General Assembly was necessary for local

jurisdictions to tax cellular-service customers based on their billing addresses, an act of the General Assembly is necessary for local jurisdictions to tax streaming services on that basis. In the absence of such legislation, the City only has the authority to tax amusements that take place within Chicago, and it cannot provide any basis to tax amusements based on customers' billing addresses alone.

Defendants claim it would not be practical or feasible to tax non-residents who use streaming services in Chicago and that "administrative convenience is a legitimate uniformity justification." (Defs.' Mem. at 15.) But the Illinois Supreme Court does not accept administrative convenience as a legitimate uniformity justification where the government achieves its "convenience" arbitrarily. *Searle Pharm., Inc.*, 117 Ill. 2d at 474 (finding a Uniformity Clause violation where a statute prevented certain corporations that elected to file a federal consolidated return from carrying back their losses to reduce state income taxes but allowed certain corporations that did not elect to file a consolidated federal return to do so); *see also*, *U.S.G. Italian Marketcaffe v. City of Chi.*, 332 Ill. App. 3d 1008, 1017 (1st Dist. 2002) (rejecting City's administrative convenience argument where City imposed a litter tax on food sold for on-premises consumption but not carry-out-only businesses). And here the City attempts to achieve its administrative convenience objective arbitrarily: There is no real and substantial difference between customers of streaming services with Chicago billing addresses and those with no Chicago billing address that is related to the objective of taxing the use of streaming services in Chicago. *See Searle Pharm., Inc.*, 117 Ill. 2d at 474. Indeed, customers with Chicago billing addresses are not even necessarily Chicago residents and many Chicago residents provide a non-Chicago billing address to their streaming services providers. (*See, e.g.*, Pls.' Exs. M, N) (explaining that Plaintiffs Emily Rose and Natalie Bezek continued to pay the amusement tax

even after they were no longer Chicago residents.) The City's objective in determining when a customer uses streaming services in Chicago could be achieved in any other number of arbitrary ways, including by requiring customers of streaming services that work in Chicago or those who use CTA pay the amusement tax.

B. The amusement tax violates the Uniformity Clause because it subjects streaming services to greater taxation than automatic amusement devices that deliver the same types of entertainment.

The amusement tax violates the Uniformity Clause for a second reason: because the City does not impose it on customers of "automatic amusement devices" – devices that provide video, music, and gaming entertainment, such as video machines, jukeboxes, and pinball machines (Pls.' SOF 5) – but does impose the tax on customers of streaming services – which provide similar video, music, and gaming entertainment over the Internet – with Chicago billing addresses. None of Defendants' alleged differences between customers of automatic amusement devices and customers of streaming services is a "real and substantial" difference that could justify treating customers of streaming services with Chicago billing addresses worse than customers of automatic amusement devices even though those services – video, audio, and gaming entertainment – are the same. *See Geja's Cafe*, 153 Ill. 2d at 247.

First, Defendants assert that automatic amusement devices are owned by a business whereas streaming services are used on devices owned by the customers themselves. (Defs.' Mem. at 15.) But, even if that is true,[3] it does not explain why this is a "real and substantial" difference that could justify treating customers of automatic amusement devices differently from streaming-service customers.

[3] It is not always true. Indeed, as Plaintiffs' counsel writes this, he is listening to Spotify on a device owned by his employer.

Second, the City says that customers cannot take automatic amusement devices away from the establishments where they use them, while customers of streaming services can access such services anywhere. (Defs.' Mem. at 15.) Again, Defendants fail to explain how this a real and substantial difference that could justify a difference in taxation between automatic amusement devices and streaming services.

Third, Defendants assert that an automatic amusement device is shared among all of an establishment's customers, whereas streaming services can be used exclusively by one customer. (Defs.' Mem. at 15.) Again, Defendants fail to explain how this purported difference relates to the differences in taxation.

Fourth, Defendants claim that automatic amusement devices are "operated with coins on a per-use basis, whereas streaming services are generally paid for by credit card on a subscription basis, including unlimited use." (Defs.' Mem. at 15.) But nothing in the amusement tax requires the streaming services that are taxed be paid by customers on a subscription basis, rather than a per use basis. And presumably the City believes that a customer who pays to view a video on the Internet on a per use basis is subject to the amusement tax. And, again, in any event, it is not apparent how this supposed difference justifies a difference in taxation.

Finally, the City says that automatic amusement devices generally provide a more limited selection of amusements than streaming services. (Defs.' Mem. at 16.) Again, Defendants provide no argument as to why this alleged difference justifies taxing devices and streaming services differently.

Defendants also argue that, even if automatic amusement devices and streaming services are similar, the City can tax them differently for administrative convenience. (Defs.' Mem. at 16.) Defendants state that requiring owners of automatic amusement devices to collect a 9% tax from

patrons who pay money to use those devices would be administratively inconvenient because it would be difficult to collect a 9% tax on the small amount of money that patrons of automatic amusement devices pay. (*Id*.) But collecting the tax from owners of automatic amusement devices based on use would not cause the City any administrative inconvenience; as with all amusements, including streaming services, the City would require owners of automatic amusement devices to collect the tax and remit it to the City on a monthly basis. The City argues that it would be inconvenient for the owners or customers of automatic amusement devices to pay the amusement tax; but the "administrative convenience" justification that the courts have recognized applies to *governmental entities'* administrative and collection capacities, not the convenience to customers or providers of amusements. *See, e.g., Searle Pharm., Inc.*, 117 Ill. 2d at 474 (administrative convenience to state of processing tax returns); *Valstad v. Cipriano*, 357 Ill. App. 3d 905, 917 (4th Dist. 2005) (administrative convenience to Illinois EPA of identifying and imposing a fee); *DeWoskin v. Lowe's Chi. Cinema*, 306 Ill. App. 3d 504, 521 (1st Dist. 1999) (administrative convenience to County of collecting a tax). Besides, collecting the amusement tax is more inconvenient for providers of streaming services than it is for owners of automatic amusement devices: The owner of an automatic amusement device in Chicago would simply have to remit a percentage of all money collected from a given device, but a streaming-service provider that serves customers around the world must make special arrangements to collect and remit taxes only from those customers who have Chicago billing addresses. Accordingly, Defendants provide no reason that justifies treating customers of streaming services differently than customers of automatic amusement devices.

Defendants assert that a 9% tax on streaming services might not always be higher than a flat tax of $150 per year on automatic amusements devices. (Defs.' Mem. at 16.) But the 9% tax

applies to customers of streaming services, and the $150 tax on automatic amusement devices applies to owners of such devices, not to the customers who use them – so customers of streaming services *always* pay more tax than customers of automatic amusement devices.

Contrary to Defendants' argument, the fact that Plaintiffs do not subscribe to Xbox Live Gold or other online gaming products has no bearing on their standing to bring their Uniformity Clause claim. (*See* Defs.' Mem. at 16.) Plaintiffs bring both facial and as-applied challenges to the differential treatment in taxation between themselves, as customers of streaming services, and customers of automatic amusement devices. And Defendants concede that Plaintiffs are customers of streaming services that provide video and audio amusements, and that automatic amusement devices provide video and audio amusements. So if the City's application of the amusement tax to customers of streaming services, but not automatic amusement devices, violates the Uniformity Clause on its face, the Court must strike down the application of the amusement tax to customers of streaming services entirely. And if the discriminatory taxation violates the Uniformity Clause as applied to Plaintiffs, the Court must enter an order preventing the City from applying the amusement tax to Plaintiffs.

C. The amusement tax violates the Uniformity Clause because it taxes certain performances delivered through streaming services at a higher rate than it taxes certain in-person live performances.

The Ruling also violates the Uniformity Clause for the additional reason that it taxes certain performances delivered through streaming services at a higher rate than it would tax those same performances presented in person. The Code exempts from the amusement tax "admission fees to witness in person live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity, including all balconies and other sections, is not more than 750 persons," and taxes such performances in a

space with a capacity of greater than 750 persons at a reduced rate of 5%. (Pls.' SOF 6.) Defendants assert that the purpose of the exemption is to "foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors." (Defs.' Mem. at 18.)

But Defendants identify no real and substantial differences between performances delivered live and performances delivered through streaming services that bears a reasonable relationship to the City's purpose of fostering the production of live performances. *See Geja's Cafe*, 153 Ill. 2d at 247. Defendants never actually identify what the real and substantial differences between an amusement that is viewed in person and one delivered through streaming services actually are. Rather, Defendants assert that there must be real and substantial differences because "people pay to attend events that they could have viewed for free, or for a much lower price, on a television or other device." (Defs.' Mem. at 19.)

But the price that people are willing to pay for an amusement does not provide a relevant distinction between live performances and streaming services of those performances that relates to the City's state purpose of fostering the production of live performances. And the City does not explain why the difference in price that people are willing to pay for live performances versus viewing streaming services of those performances necessitates that the City tax streaming services but not live performances in order to foster the production of live performances.

The City's purpose to foster the production of live performances can be fulfilled by customers watching such performances via streaming services since City residents who view such performances on the Internet can be just as enriched as persons who view them in person, and those who produce such performances can profit from having them sold through streaming services. (Pls.' Mem. at 18.) Defendants assert that this ignores the many other reasons for

encouraging attendance at live cultural events such as attracting tourists from out of town and increasing business at hotels, restaurants, and stores. (Defs.' Mem. at 19-20.) But that switches the City's stated purpose from fostering the production of live performances for the purpose of enrichment to attracting tourists and increasing business at hotels, restaurants, and stores – a purpose the City has not asserted as a basis for fully or partially exempting live performances from the amusement tax. And if the City's real justification is attracting tourists and increasing business, then the City has no basis for exempting only theatrical, musical, or cultural performances in certain small venues. Live performances that are not theatrical, musical or cultural (such as sporting events) certainly attract tourists and increase business. And if this is the City's actual justification, then it does not make sense for the City to fully exempt performances in auditoriums that hold not more than 750 people, when while charging a 5% amusement tax on customers of live performances in auditoriums that hold more than 750 people. Presumably, the live performance in a larger auditorium would attract more tourists, shoppers, and diners.

Defendants assert that the Illinois Supreme Court sanctioned the favoring of "live fine arts performances" over other forms of amusement in *Pooh-Bah Enters. v. County of Cook*, 232 Ill. 2d 463 (2009). (Defs.' Mem. at 18.) But *Pooh-Bah* did not address the Uniformity Clause; rather, it upheld dismissal of a First Amendment challenge to the Amusement Tax's exemption of "live fine arts performances" but not "adult entertainment cabarets." 232 Ill. 2d at 496.

Defendants' reliance on *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62 (2008) is also misplaced. In *Empress Casino*, plaintiffs challenged a 3% surcharge that applied only to riverboat casinos in Illinois that had adjusted gross receipts over $200 million in a calendar year 2004 as a violation of the Uniformity Clause. *Id*. at 65. There, the Court found that subclassifications and exclusions were sufficient to satisfy Uniformity Clause scrutiny as long as

they are reasonable and that quantitative differences in adjusted gross receipts may be sufficient to justify a classification. *Id*. at 80. But Plaintiffs do not challenge a classification based on adjusted gross receipts, and the Code exempting live performances does not make classifications on this basis. Rather, the Code distinguishes between certain live performances – that are exempt from the amusement tax – and the same live performances viewed on streaming services – which are subject to the amusement tax. The City has failed to justify this discrimination.

III. The amusement tax discriminates against electronic commerce in violation of the Internet Tax Freedom Act.

The Internet Tax Freedom Act ("ITFA"), which is set forth in a note to 47 U.S.C. § 151, provides that no state or political subdivision of a state may impose multiple or discriminatory taxes on electronic commerce. ITFA § 1101(a). In this case, the amusement tax imposes an unlawful discriminatory tax on electronic commerce by taxing streaming services but not similar amusements that take place in Chicago in two ways. First, the Code requires customers of streaming services to pay the amusement tax, even as the Code entirely exempts users of "automatic amusement devices" from taxation. Second, the Code fully or partially exempts live theatrical, musical, and cultural performances at theaters and other venues from the amusement tax while taxing streaming services that provide access to similar or identical theatrical, musical, or cultural performances over the Internet.

To defend against Plaintiffs' ITFA claim, Defendants argue that streaming services are different from live performances – and therefore can be taxed differently under the ITFA – because one type of service is delivered on the Internet and the other is not. (Defs.' Mem. at 19.) Defendants also attempt to distinguish streaming services from automatic amusement devices based in part on the fact that streaming services are delivered on the Internet, while the video, audio, and games provided on automatic amusement devices are not. (Defs.' Mem. at 15-16

(*e.g.*, "An [automatic amusement device] is a stationary device that the customer may not take away from the establishment, whereas [streaming services] can be used on a mobile device, at any location that the customer may choose").) These arguments fail because the ITFA specifically prohibits the City from taxing goods or services differently based on whether they are provided through the Internet. *See Performance Mktg. Ass'n v. Hamer*, 2013 IL 114496, ¶ 23.

Otherwise, Defendants attack Plaintiffs' ITFA claim with the same arguments they make against Plaintiffs' Uniformity Clause claim. Those arguments fail under the ITFA for the same reason they fail under the Uniformity Clause, which Plaintiffs addressed above in Section II.

IV. The amusement tax's application to streaming services used outside Chicago violates the Commerce Clause of the United States Constitution.

The City's application of the amusement tax to customers who use streaming services outside Chicago also violates the Commerce Clause of the United States Constitution.

A. Plaintiffs have standing to bring a Commerce Clause claim.

Defendants assert that Plaintiffs lack standing to bring a Commerce Clause claim because the purpose of the Commerce Clause is to protect citizens from discrimination by the governments of other states, not to protect people from taxes imposed by their own states, and because the class protected by the Commerce Clause is competitors, not consumers. (Defs.' Mem. at 21.) But Defendants argument receive no support from the cases Defendants cite to support it, *Geja's Cafe*, 153 Ill. at 256, and *Terry v. Metro. Pier & Exposition Auth.*, 271 Ill. App. 3d 446, 455 (1995). Neither of those cases address the dismissal of a plaintiff for lack of standing under the Commerce Clause, and the portions of the decisions that Defendant quote concern the merits of the plaintiffs' claims, not standing. Plaintiffs can find no case where a court found that a plaintiff who was subject to a discriminatory tax, as plaintiffs are here, lacked standing to challenge it under the Commerce Clause. In Illinois, the general rule of standing is that a plaintiff who

attacks the constitutionality of a statute must be within the class of those directly affected by it. *Ball v. Vill. of Streamwood*, 281 Ill. App. 3d 679, 687 (1st Dist. 1996). Since Plaintiffs are subject to the tax on streaming services, they have standing to challenge it as a violation of the Commerce Clause.

B. Plaintiffs have proved their facial and as-applied challenges under the Commerce Clause.

To address Plaintiffs' Commerce Clause claim, Defendants rely on the same arguments they made against Plaintiffs' claim that taxing streaming-service customers based on their billing addresses violates the Illinois Constitution – that Plaintiffs have failed to raise proper facial and as applied claims. Those arguments fail with respect to the Commerce Clause for the same reasons they fail under Plaintiffs' other claims. *See* Section I, above.

Again, the Illinois Supreme Court has specifically rejected the "no set of circumstances" formulation when evaluating a facial constitutional challenge that Defendants rely on. *Burns*, 2015 IL at ¶¶ 26-27. And the United States Supreme Court's decision in *Patel*, 135 S. Ct. at 2451, applied the "in all applications" formulation rather than the "no set of circumstances" formulation.

Indeed, since it decided *United States v. Salerno*, 481 U.S. 739 (1987), the United States Supreme Court has *never* applied the "no set of circumstances" formulation to a facial challenge to a statute under the dormant Commerce Clause. *See, e.g. Granholm v, Heald*, 544 U.S. 460, 476 (2005); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-82 (1997); *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 389-94 (1994); *New Energy Co. v. Limbach*, 486 U.S. 269, 274-80 (1988). The Court notably did not apply *Salerno* to a challenge brought to a state income tax statute under the foreign commerce prong of the Commerce Clause.

See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71, 82-83 (1992) (Rehnquist, J. dissenting) (arguing that the Court should have applied *Salerno*).

The Supreme Court has made clear that a statute that, by its terms, impermissibly regulates, discriminates against, or burdens interstate commerce is invalid in its entirety, regardless of whether the law might be permissibly applied in some circumstances. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n. 6 (1992) (noting that a law imposing a tax collection obligation on every vendor advertising in the state three times a year would, on its face, unduly burden interstate commerce due to the risk that thousands of jurisdictions might impose the same requirement); *Limbach*, 486 U.S. at 276 (law that discriminated against only some, but not all, out-of-state companies nevertheless *per se* invalid); *Edgar v. MITE Corp*., 457 U.S. 624, 642-43 (1982) (Illinois law that applied to tender offers with sufficient connection to Illinois as well as tender offers that would not include a single Illinois shareholder struck down in its entirety). Thus, the "no set of circumstances" rule does not apply to a facial challenge under the Commerce Clause and does not warrant dismissing Plaintiffs' Commerce Clause claim.

C. The Mobile Sourcing Act does not authorize the City to tax streaming services used outside of its boundaries.

Defendants assert that the Commerce Clause claims also fail as a matter of law because Congress has authorized use of the Mobile Sourcing Act, at least for telecommunications providers. That argument lacks merit because, as explained in Section I.C above, the Mobile Sourcing Act only applies to "mobile telecommunications services," which do not include streaming services. Nothing in the Mobile Sourcing Act indicates that Congress or the General Assembly intended to allow municipalities to tax streaming services in the same manner that the Mobile Sourcing Act allows them to tax mobile telecommunications services.

D. The City's application of the amusement tax on customers of streaming services with Chicago billing addresses violates the requirements of the Commerce Clause.

A local tax satisfies the Commerce Clause only if it "(1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Quill Corp.*, 504 U.S. at 311. The application of the amusement tax to streaming services violates requirements (1), (2) and (4).

First, Defendants assert that the Ruling taxes an activity with a substantial nexus with the State, as it taxes Chicago residents who pay for and receive the privilege of viewing or listening to amusements in Chicago. (Defs.' Mem. at 23.) But for an activity to have a substantial nexus with a particular jurisdiction, there must be a connection between the jurisdiction and the activity itself – not just a connection between the jurisdiction and the actor the government seeks to tax. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992). The Ruling's use of billing addresses as a proxy for use of streaming services within Chicago does not ensure a substantial nexus between the City and activities it is taxing. At most, it ensures only that the City has a connection with the *actor* who pays the tax – which, again, is not enough.

Defendants next assert that the tax on customers of streaming services with Chicago billing addresses is fairly apportioned. (Defs.' Mem. at 23.) Defendants assert that the tax is externally consistent because, under the Mobile Sourcing Act, it is reasonable to assume that the taxpayer's resident will be his or her place of primary use. (Defs.' Mem. at 24.) Again, the Mobile Sourcing Act is irrelevant because it does not pertain to taxation of streaming services. Putting that aside, the tax is *not* externally consistent. To be externally consistent, a tax must apply only to that portion of the revenues from the interstate activity that reasonably reflects the in-state component

of the activity being taxed. *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 238 Ill. 2d 332, 345-46 (2010). The tax on customers of streaming services with Chicago billing addresses does not apply only to that portion of the revenues from the interstate activity that reasonably reflects the in-state component of the activity being taxed. The City just assumes that customers of streaming services with Chicago billing addresses do not use such services outside of Chicago at all.

Finally, Defendants assert that taxing customers of streaming services with Chicago billing addresses is fairly related to services provided because the Chicago residents who pay the tax receive many services from Chicago. (Defs.' Mem. at 23.) But Chicago residents who pay the tax when they use streaming services outside of Chicago receive no benefits from the City related to their use of streaming services outside of Chicago. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) ("the measure of the tax must be reasonably related to the extent of the contact"). And customers of streaming services who do not have a Chicago billing address but use streaming services in Chicago receive the same benefits related to the use of streaming services in Chicago but are not required to pay the tax.

Conclusion

For the reasons stated above and in Plaintiffs' motion for summary judgment, the Court should deny Defendants' motion for summary judgment and grant Plaintiffs' motion.

Dated: December 20, 2017

Respectfully submitted,

One of their attorneys

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CERTIFICATE OF SERVICE

I, Jeffrey Schwab, an attorney, hereby certify that on December 20, 2017, I served the foregoing Plaintiffs' Combined Response in Opposition to Defendants' Motion For Summary Judgment and Reply in Support of Their Motion for Summary Judgment on Defendants' counsel of record by the Court's Electronic Filing System and electronic mail to Steve Tomiello (Steven.Tomiello@cityofchicago.org).

Jeffrey M. Schwab