IN THE
SUPREME COURT OF MARYLAND

September Term, 2022

No. 32

COMPTROLLER OF MARYLAND,

Appellant,

v.

COMCAST OF CALIFORNIA, MARYLAND, PENNSYLVANIA, VIRGINIA, WEST VIRGINIA, LLC*, et al.*,

Appellees.

On Appeal from the Circuit Court for Anne Arundel County
(Alison L. Asti, Judge)
Pursuant to a Writ of Certiorari to the Appellate Court of Maryland

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BRIEF OF AMICI CURIAE, PETER A. JOHNSON, PH.D., ASSOCIATION OF NATIONAL ADVERTISERS, AMERICAN ADVERTISING FEDERATION, INTERACTIVE ADVERTISING BUREAU, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF APPELLEES

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March 31, 2023

TABLE OF CONTENTS

<u>TABLE OF CITATIONS</u>

INTEREST OF AMICI CURIAE[1]

Amicus Peter A. Johnson, PhD, is a nationally recognized marketing industry consultant and economist, with over 30 years of academic and executive leadership conducting research into the advertising industry and its regulation. After receiving his doctorate in comparative public policy from Cornell University, Dr. Johnson taught at Columbia University and Bryn Mawr College. In 2001, Dr. Johnson was hired by the U.S. Direct Marketing Association (DMA) as its Senior Economist and ultimately, Vice President of Research, leading a staff conducting research into consumer and business trends driving the performance of key U.S. marketing channels, as well as consumer data and privacy regulation, postal economics, remote sales and use taxes, internet and e-commerce regulation, and consumer attitudes towards marketing. While at DMA, he co-authored a Supreme Court Amicus Brief on the use of consumer data for marketing purposes.

In 2008, Dr. Johnson joined the Mobile Marketing Association (MMA) as its first Vice President of Market Intelligence and Strategy leading research into the use of mobile devices as marketing platforms. Coordinating the work of some of the world's leading media research firms, Dr. Johnson's team produced over one hundred consumer and business studies conducted in over 40 countries published in 7 different languages. In 2011, Dr. Johnson launched his research consultancy, partnering with industry experts and academics to conduct market and economic impact analyses for clients in the digital,

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[1] Pursuant to Maryland Rule 8-511, all parties consented to the filing of this Amici Brief.

data, and high tech marketing industries, and non-digital marketing channels.

Dr. Johnson's professional appointments have included ex-officio memberships of the Board of Directors of the Marketing Accountability Standards Board (MASB)[2] and the US Media Rating Council (MRC).[3] He has provided testimony to Congress on issues of state taxation of internet commerce,[4] and was an expert witness in *Newegg Inc. v. Ala. Dept. of Rev.*, involving state sales tax implications of e-commerce transacted by Alabama residents.[5] Since 2014, his research into the economics of paper-based communications media has been cited by the U.S. Postal Service and others as the definitive source for the contribution of that industry to the U.S. economy.[6] Dr. Johnson has made numerous panel appearances with and his research has been cited by federal agencies including the Federal Trade Commission, the Federal Communications Commission, the U.S. Census Bureau, and the U.S. Bureau of Labor Statistics on consumer privacy, taxation of e-commerce, postal economics, and statistical measurement of economic activity in the data-driven economy. Dr. Johnson co-authored the *Value of Consumer Data* series of studies (2013, 2015.)[7]

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[2] https://themasb.org/

[3] https://mediaratingcouncil.org/

[4] Most relevantly, "The Business Activities Tax: The Tax Burdens Felt by Small Businesses Engaged in Interstate Commerce." Hearing by the US House of Representatives Committee on Small Business, Nydia M. Velázquez, Chairwoman, February 14, 2008.

[5] Ala. Tax Tribunal No. S 16-613.

[6] https://21stcenturypostal.org/ema-mailing-industry-job-study-by-state/

[7] https://www.prnewswire.com/news-releases/dma-announces-groundbreaking-economic-study-on-value-of-data-at-dma2013-227660101.html

Amicus Association of National Advertisers ("ANA") membership includes client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). ANA serves the marketing needs of 20,000 brands by leveraging the 12-point ANA Growth Agenda, endorsed by the Global CMO Growth Council, educating and advocating for more than 50,000 industry members that collectively invest more than $400 billion in marketing and advertising annually.

Amicus American Advertising Federation ("AAF") protects and promotes the well-being of advertising through a unique, national coordinated grassroots network of over 60 corporate members, including brands, agencies, and media companies; 35,000 advertising professionals in more than 150 local advertising clubs; and 4,000 student members in over 140 college chapters.

Amicus Interactive Advertising Bureau ("IAB") develops industry standards, conducts research, and provides legal support for the online advertising industry. Through its public policy advocacy, IAB works to build a sustainable consumer-centric media and marketing ecosystem and to raise the industry's political visibility and profile as a driving force in the global economy through grassroots advocacy, member fly-ins, research, and public affairs campaigns.

Amicus American Association of Advertising Agencies ("4As") is a non-profit trade association established in 1917 to promote, advance, and defend the interests of its member agencies, employees, and the advertising and marketing industries overall. Today, the organization serves more than 600 member agencies which direct more than

85% of the total U.S. advertising spend. 4As is committed to protecting the best interests of its members, their employees and the industry at large. With its best-in-class learning and career development programs, 4As fuels a robust diversity pipeline of talent for its members and the marketing and media industry, fostering the next generation of leaders.

Amici have a significant and abiding interest in the outcome of the Questions Presented for Review. The imposition of Maryland's digital advertising gross receipts tax threatens the economic health and competitiveness of the advertising industry.

SUMMARY OF ARGUMENT

Maryland's digital advertising tax is imposed on advertising services transacted over digital interfaces but not on non-digital advertising. Federal law— the Internet Tax Freedom Act, "ITFA," as amended, prohibits state and local jurisdictions from taxing goods and services transacted via e-commerce unless they also tax otherwise similar goods and services transacted by non-digital means. Maryland defends its differential taxation of digital advertising arguing those services are materially dissimilar.

Advertising is the paid transmission of commercially relevant messages to audiences of potential consumers of identified goods or services. Marketers know that advertising services delivered on digital and non-digital platforms are similar because they share fundamental business features, including:

- *Digital and Non-Digital Advertising Have the Same or Similar Ad-Supported Business Models* (similar relationships to media audiences, how they monetize those audiences through selling ad services, and similar consumer experiences).

- *Digital and Non-Digital Advertising Have the Same or Similar Consumer-Based Value-Propositions* (ad services in digital and non-digital media seek to help marketers influence consumers' purchase decisions; marketers' ad dollars therefore follow consumers' overall media consumption patterns, regardless of technology).

- *Digital and Non-Digital Advertising Have the Same or Similar Ad Campaign Design and Implementation* (in digital and non-digital media alike, marketers design campaigns to identify and reach the totality of persuadable groups of consumers across all relevant media; their campaigns use universal pricing "currencies").

- *Digital and Non-Digital Advertising Employ the Same or Similar Campaign Formats and Impact Measurements* (the finished campaigns employ ad formats that appear materially similar to consumers across media types; and campaigns in all media types face fundamentally identical challenges in measuring campaign success).

Advertising is advertising, no matter in which media it occurs. This brief clarifies the key business processes involved in all advertising so as to explain the principal ways in which it is fundamentally similar in both digital and non-digital media.

ARGUMENT

I. DIGITAL AND NON-DIGITAL AD PUBLISHERS SHARE MATERIALLY SIMILAR CONSUMER FACING BUSINESS MODELS AND CLIENT VALUE PROPOSITIONS

a. To Assess "Similarity," Digital And Non-Digital Advertising Must Be Defined.

Maryland's digital advertising tax is imposed on "advertisement services on a digital interface," including "banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services."[8]

"Advertisement services on a digital interface" means advertising delivered via data transmission over the internet or via SMS ("texts"). This data must be received by a

[8] Tax-Gen. § 7.5-101(e)(1).

device in a consumer's possession or control: presumably, a computer such as a PC, laptop, tablet, or smartphone; "smart" TVs; certain in-car digital devices; and some internet-enabled home digital assistants, game consoles and consumer wearables. "Interfaces" means these digital devices must enable an individual consumer not only to receive media content and ads, but also to interact with them.[9]

By contrast, non-digital advertising is distributed through communications media that do not deliver digital data to such consumer-controlled digital devices: printed paper (the postal service's delivery network for direct mail and catalogs; business directories, circulars, magazines and newspapers); out-of-home media such as billboards and handbills; telephone lines and faxes; cinemas; traditional broadcast radio and TV; aerial advertising; and potentially, product packaging.[10]

To ascertain "similarity" or "dissimilarity" between digital and non-digital advertising, ad platforms may be broadly classified as follows:

Table 1: Non-Digital and Digital Ad Media

NON-DIGITAL	**DIGITAL**
Postal: Direct Mail & Catalogs	Desktop Web: Publishers
Print: Magazines	Web: Search
Print: Newspapers	Web: Social
Print: Business Directories and Circulars	Web: E-Commerce
Broadcast Radio	Mobile Apps
Broadcast TV	Connected Game Consoles

[9] A digital interface is broadly understood as any "medium through which humans interact with computers." https://www.igi-global.com/dictionary/interface-technology-trends-implications-for-news-and-information-services/42201. As discussed *infra*, consumer interactivity also occurs via non-digital media, *e.g.* direct mail campaigns.
[10] Product packaging is normally considered integral to marketers' overall brand strategies. Aerial advertising encompasses any type of marketing taking place in the sky. https://dashtwo.com/aerial-advertising/

Cinema	Digital Assistants and Wearables
Out of Home (Billboards, handbills)	SMS: Text
Telephone: Telemarketing / Call Centers	
Aerial	
Product Packaging, Menus, etc.	

b. Sellers Of Digital And Non-Digital Advertising Share Materially Similar Consumer-Facing Business Models.

Advertising is the paid transmission of commercially relevant messages to audiences of potential consumers of identified goods or services. These messages are not delivered by the advertiser themselves, but rather by intermediary content providers (hereinafter "media" or "publishers") who share the same business model, irrespective of the communications technology used. Essentially, publishers make money by distributing content to attract audiences they can profitably "monetize" at scale. They can monetize this audience directly (by charging it fees) or indirectly, by selling advertising opportunities (a/k/a "ad inventory") to third-party businesses.[11] Ad revenues may significantly subsidize the content cost to the audience, or in some cases, eliminate it altogether. In turn, these reduced or eliminated consumer costs (in industry parlance, "ad supported" costs) may help publishers attract a larger audience than would otherwise be possible, especially among price-sensitive consumers.

The ad-supported business model is ubiquitous in both digital and non-digital media. It originated in the earliest days of print newspapers[12] and has been adopted by publishers in every new communications media developed since. Thus, consumers'

[11] Each of these two principal media business models has numerous variants. https://journalift.org/overview-of-the-most-popular-media-business-models/
[12] https://www.britannica.com/topic/advertising

access to commercial broadcast TV and radio publishers was almost from inception fully "paid for" by ads and sponsorships. Most print newspapers traditionally used advertising to reduce the price paid by readers. And, digital search engines sell ads next to commercial search results, but not next to generic searches, which enables them to provide consumers with non-commercial search results on a cost-free and ad-free basis.

c. Consumers Evaluate Advertising In Digital And Non-Digital Media According To Fundamentally Similar Criteria.

Publishers across all media often portray paid advertising as an implicit social contract in which consumers understand they "pay" for free or below market-cost content with attention to ads.[13] But marketers recognize that this implicit exchange can be a double-edged sword. Consumers seek to consume publishers' content, not advertising that comes with it. Consumers thus evaluate ads in every media through how ads affect the content they enjoy, and secondarily, by how it helps them as consumers.

Encountering 4,000 to 10,000 ads and brand exposures across all media in a typical day,[14] "there is a battle for human attention. Attention is a finite resource and advertisers can only capture so much of it."[15] This "ad clutter" risks consumers developing "ad blindness"[16] or "ad amnesia"[17] or worse. Marketers fight against ad

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[13] See among others, Dunfee, T. W., Smith, N. C., & Ross, W. T. (1999). Social Contracts and Marketing Ethics. *Journal of Marketing*, *63*(3), 14–32. https://doi.org/10.1177/002224299906300302

[14] https://lunio.ai/blog/strategy/how-many-ads-do-we-see-a-day/

[15] https://permission.io/blog/how-many-ads-per-day/

[16] https://www.forbes.com/sites/forbescommunicationscouncil/2021/12/15/strategies-for-overcoming-ad-blindness/?sh=1c25259d32ef

[17] https://kirkpatrickcreative.com/prevent-ad-amnesia/#.ZB9U_xPMLvU

clutter using consumer-friendly strategies: introducing them to new or useful products, helping them save money, being entertaining, and so forth.[18]

So, while the quantity and content of advertising may vary from publisher to publisher across the different types of digital and non-digital media, “from the consumer’s perspective, these are artificial or irrelevant classifications.”[19] For consumers, just as for marketers, advertising is advertising—digital or non-digital makes little difference.

II. DIGITAL AND NON-DIGITAL AD PUBLISHERS OFFER THE SAME OR SIMILAR VALUE PROPOSITIONS TO MARKETERS

a. Advertising In All Media Seeks To Move Consumers Towards Purchase.

The goal of advertising is to communicate with persuadable consumers among media audiences so as to make them aware of brands, consider them, try and buy them, and ultimately become “brand loyal” repeat customers. In marketing terminology this sequence is called the consumer’s “path to purchase” or relatedly, the “customer journey.”[20] Given this universal objective, marketers primarily regard publishers in every media as conduits to consumers. The real “product” publishers sell to marketers is NOT their ad inventory – a 30 second TV spot, a half-page space in a magazine, or a home-page takeover on a website. Instead, it is the quantity and characteristics of consumers

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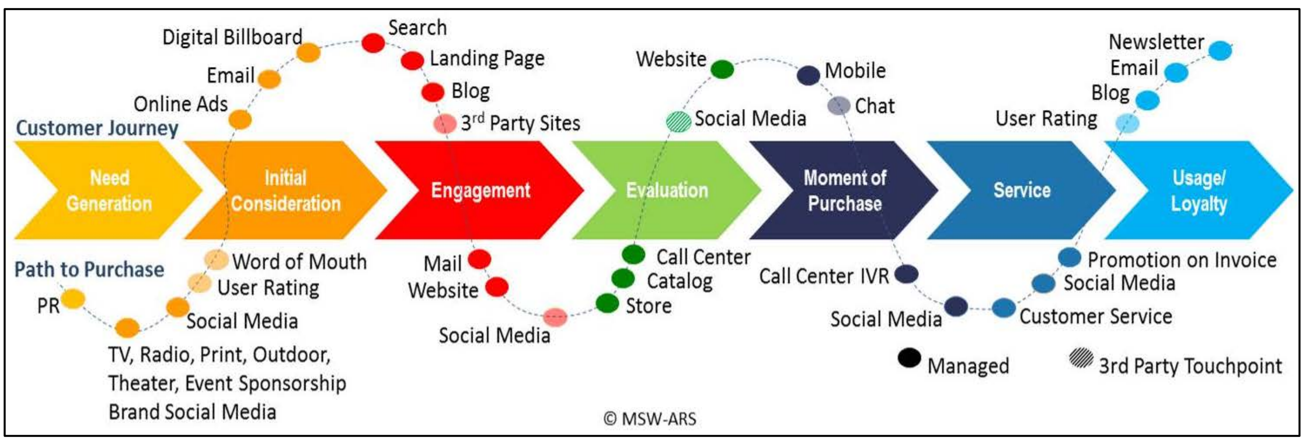
[18] https://www.marketingcharts.com/advertising-trends/creative-and-formats-117208
[19] Katz, Helen. The Media Handbook (Routledge Communication Series) (p. 3). Taylor and Francis. Kindle Edition.
[20] https://www.ruleranalytics.com/blog/click-attribution/path-to-purchase/

who consume their content, together with what is known about their likelihood to move along the path towards purchase.

The following chart, from *The Brand Strength Monitor*, illustrates how the path to purchase involves multiple advertising "touchpoints" across all the different digital and non-digital media. The blocks along the horizontal axis (e.g., Need Generation, Initial Consideration, Engagement, etc.) represent the steps comprising the path to purchase, from beginning to end. The circles interspersed throughout the chart ("PR," "TV," "Radio," "Social Media," etc.) represent the types of advertising, both digital and non-digital, that marketers commonly use during each of the steps.

Figure 1: Digital and Non-Digital Advertising Moves Consumers Along the Path to Purchase[21]



As illustrated, all available advertising opportunities, whether digital or otherwise, comprise a single integrated ecosystem of highly similar, mutually-reinforcing tools in a single toolkit "with shoppers 'pinballing' across multiple offline and online touchpoints

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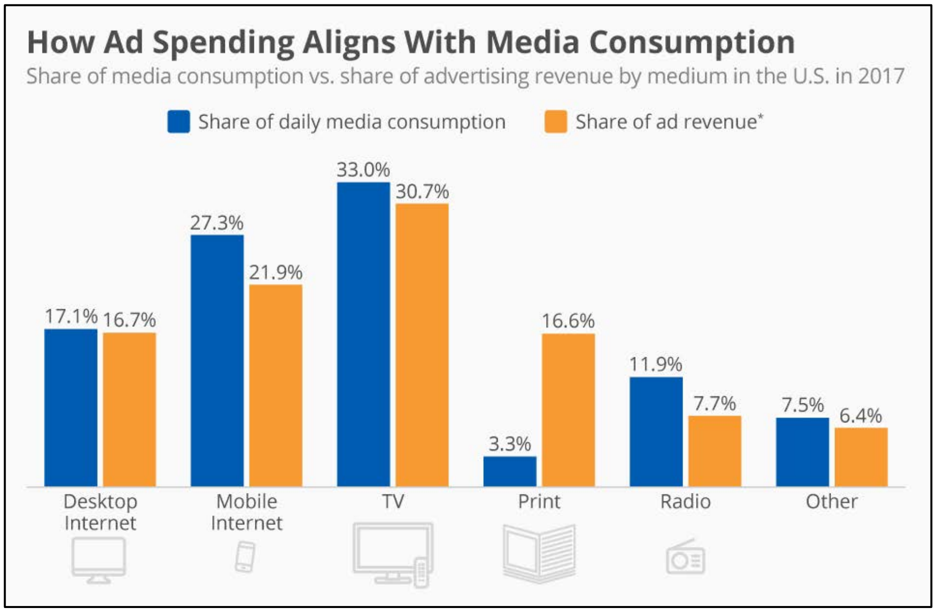
[21] http://blog.thebrandstrengthmonitor.com/2018/06/12/six-observations-on-category-differences-in-the-path-to-purchase/

in the path to purchase."[22] These digital and non-digital touchpoints are alternatives and complements which marketers combine using a single fundamental criterion: among which audiences, in which media, can ads efficiently find consumers who can be moved towards purchase and brand loyalty?

b. Advertisers Allocate Advertising Based On Consumers' Media Usage.

While the answer, "in which media can consumers be found?" will vary significantly from brand to brand and campaign to campaign, where marketers in the aggregate allocate their ad buys in any given year is actually fairly predictable: the marketing industry's overall purchase of advertising media has always been heavily determined by how consumers engage with media in general. Put most simply: where consumers spend their time, marketers' ad dollars will follow.

Figure 2: Aggregate Ad Expenditure Follows Overall Consumer Media Usage



[22] https://www.warc.com/newsandopinion/opinion/warc-from-home-path-to-purchase--what-is-it-and-how-is-it-changing/en-gb/3556

As can be seen in the above graph,[23] in 2017, the most recent year for which data is publicly available, aggregate ad dollars closely align with consumers' media consumption. A similar graph from the 1990s would show consumer media consumption and ad dollars heavily concentrated in TV; another graph from the 1950s would show them heavily concentrated in newspapers, magazines, radio, and catalogs. The crucial lesson to be drawn: advertisers strive to reach consumers where they consume media; their spending patterns are not primarily due to any unique features inherent in the advertising in one media or another. And, as demonstrated in Figure 2, marketers devote significant percentages of their ad dollars to both digital and non-digital media to achieve their goals.

III. DIGITAL AND NON-DIGITAL AD SERVICES PLAY THE SAME OR SIMILAR ROLES IN AD CAMPAIGN PLANNING, PRICING AND PURCHASING

Buying advertising inventory can be enormously expensive and its results are difficult to predict and measure. Accountable to CFOs, marketers will typically seek to "optimize" their advertising budgets – i.e., allocate them across digital and non-digital media in the most efficient way possible:[24] by placing the right message in front of precisely those consumers most likely to be "in market" while avoiding spending money

[23] https://www.statista.com/chart/682/share-of-media-time-vs-share-of-total-ad-spend/
[24] "Marketing Optimization is the process of improving the marketing efforts of an organization in an effort to maximize the desired business outcomes." https://www.marketingoptimizer.com/marketing-optimization/

on ads sent to less receptive consumers.[25]

a. Marketers Use Market And Audience Research To Find Receptive Consumers In Any Ad Media, Whether Digital Or Non-Digital.

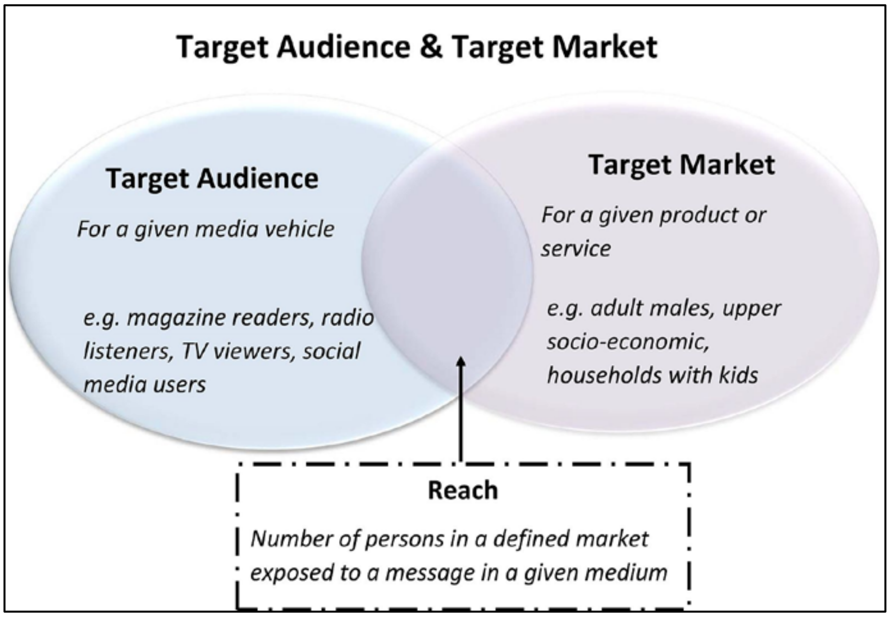
Generally speaking, marketers optimize ad campaigns irrespective of digital or non-digital media in two key steps.

- The first step involves consumer targeting. Marketers use market research to identify which consumers are most likely to be open to moving along their brand's path to purchase. [*E.g.*, suburban home-owners are more likely candidates to buy lawn-care products than are urban apartment dwellers.]
- The second step is audience segmentation. Here, marketers work with audience measurement firms to "map" the brand's consumer targets onto corresponding groups of media audiences. Using this mapping, marketers' media buyers identify ad inventory for their campaigns looking for where these audience segments cluster across the total palette of digital and non-digital media. The audience research for all media is provided by independent audience measurement agencies, with many of the largest, such as Nielsen, providing research in digital and non-digital media alike.

The following figure illustrates this two-step procedure graphically:

[25] https://www.forbes.com/sites/daviddoty/2019/08/13/a-reality-check-on-advertising-relevancy-and-personalization/?sh=2a224a127690

Figure 3: Marketers Map Target Audiences In Digital and Non-Digital Media To Reach Target Consumer Markets[26]



Marketers strive to send their ad messages to as close to 100% of their brand's potential target consumers as they can, not just a sliver of them. To do this, marketers look across all media to assemble 100 Gross Rating Points, or GRPs, where 1 GRP equals 1% of their desired target audience.[27] This quest for 100 GRPs is a fundamental reason why the marketing industry employs ads in all media, both digital and non-digital, since it is extremely unlikely that a single media or publisher will yield more than a portion of the total GRPs sought.[28]

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[26] https://en.wikipedia.org/wiki/Target_audience

[27] Marketers use "Gross" Rating Points because a rating point can involve duplicative ad exposures: 1 gross rating point means an ad will reach 1% of a campaign's total target audience, 2 GRPs means either 2% of the target audience reached once, or 1% of the audience reached twice, and so on.

[28] Marketers typically buy many more than 100 GRPs because of overlapping, duplicate audiences across media.

The following sample media vehicle buying plan from Hubspot, a Customer Relationship Management (CRM) provider, illustrates the next stage in the ad buying process. Once they have identified optimal GRPs in different media, marketers then purchase ad inventory in specific media "vehicles" (a particular TV show, a particular magazine or website, etc.). This typically leads marketers to buy "multi-channel" marketing campaigns that can include a dozen or so digital and non-digital media vehicles. Thus, in this example, the marketer has bought digital media vehicles such as Facebook and Google, as well as non-digital media vehicles such as an advertisement in the Boston Globe Sports Section and out-of-home posters in the Red Line subway.[29]

Table 2: Sample Digital and Non-Digital Media Vehicle Ad Buying Template For The Boston Ad Market[30]

Paid Media Monthly Budget Planning and Reporting Template			Example	
	Business Goal	Increase sales to existing customers		
	Monthly Budget	$10,000.00		
	Total Spent	$10,600.00		
	Remaining Budget	-$600.00		
Type	Date(s)	Name of Platform, Site, or Publication	Description	Spend
Radio & TV	January 1 - January 10	WPRI	Radio Ad	$300.00
Video (Online)	January 1 - January 10	YouTube	Video Ad for Product	$700.00
Video (Online)	January 11 - January 20	Hulu	Video Ad for Product	$400.00
Social Media	January 4	Facebook	Event Promotion Ad	$400.00
Newspaper	January 5	Boston Globe	Ad in Sports Section	$2,000.00
Email/Newsletter	January 6	theSkimm	Ad in 1/6 Newsletter	$400.00
Billboard	January 7 - January 28	Boston Billboard Sales	Ad off of I-95	$400.00
Influencer	January 8	Taylor Swift	Insta Post from Taylor	$500.00
Transit	January 9 - January 23	MBTA	Ads at Copley Station	$1,000.00
Magazine	January 10	Entertainment Weekly	Ad in 1/10 Issue	$2,000.00
Transit	January 11 - January 25	MBTA	Ads on Red Line Train	$500.00
Search	January 12 - January 28	Google	Google Search Ads	$500.00
Radio & TV	January 13	WBZ	TV ad for 6:00 News	$600.00
Display	January 14 - January 30	Google	Display Network Ad	$900.00

[29] https://blog.hubspot.com/marketing/media-planning
[30] https://blog.hubspot.com/marketing/media-planning

b. Digital And Non-Digital Media Charge For Ads In The Same Or Similar Ways.

Publishers in every media typically charge marketers for ad inventory using one of two pricing methods (sometimes called ad "currencies"). The most common method is for a publisher to charge an advertiser based on the quantity of advertising delivered by the media vehicle, adjusted for the GRPs of the vehicle. This pricing is typically used in broadly targeted, high-volume brand advertising. The second pricing method is based on the number of times a consumer responds directly to an ad they have been sent. This method is most often used in more narrowly targeted, low-volume direct mail marketing and catalogs, and digital and non-digital search-based advertising.

Notwithstanding nominal pricing differences in ad inventory in specific media vehicles (a 15-second spot on the evening news may charge more than a digital video ad on a cooking website but less than a billboard next to a busy interstate), marketers are able to make bulk "up-front" ad buys across all media vehicles using valid cross-platform cost comparisons.[31] To make this possible, publishers in both digital and non-digital media charge per impression, the lowest common-denominator unit of advertising: a single ad exposure to a single consumer in any media adjusted for GRPs. Bought in units of one thousand, and expressed as "Cost Per Mille" (Mille = thousand), CPMs are the universal currency for translating a brand's "reach objectives" into required budgets throughout the ad media ecosystem. Since one ad impression in one media equals one ad

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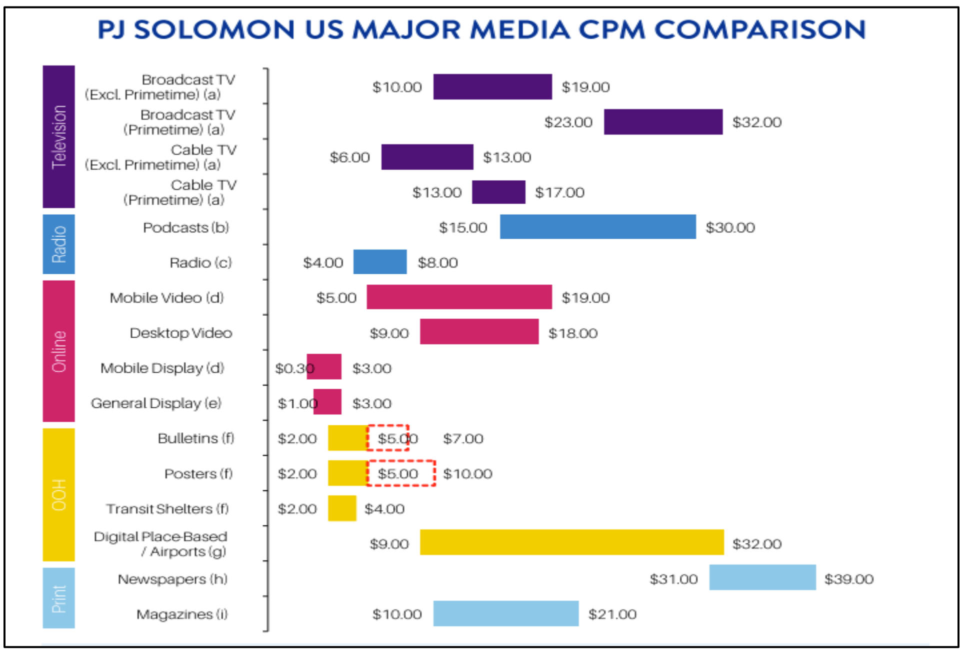
[31] Katz, Helen. The Media Handbook (Routledge Communication Series) (pp. 66-67). Taylor and Francis. Kindle Edition.

impression in any other, regardless of whether the media vehicle is digital or non-digital, CPMs put "all media on a level playing field" for buying purposes.[32]

As can be seen in the following exhibit taken from the research firm PJ Solomon comparing average prices in 2018 (the most recent year for which aggregate data is publicly available), marketers can compare CPMs that range widely across and within digital and non-digital media platforms:

Figure 4: CPMs Are Universally Used To Compare the Cost of Ads in Digital and Non-Digital Media[33]



The secondary method that publishers in non-digital and digital media use to charge for advertising inventory involves response-based pricing. In this method an advertiser is charged based on actions consumers take (or do not) after having been

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[32] *Id. at* p. 67.
[33] https://billboardinsider.com/pj-solomon-cpm-comparison-shows-bulletins-posters-and-shelters-a-good-value/

exposed to an ad. In its most generic form, this approach is known as "cost per action." The nature of the action will depend on the media available to the consumer: a post-card, a phone call, a text message, or a click on a website. When a consumer responds to or interacts with a digital or non-digital ad by one of these means, the advertiser pays a fee to the publisher.

Given its strategic position next to marketers' online points of sale, digital search advertising has employed the "cost per click." But, cost-per-action pricing is not unique to digital, much less digital search. The Yellow Pages with its use of toll-free phone numbers (Ma Bell originally owned both the publication and the phone lines) first pioneered the idea of charging advertisers based on the consumer's response to a print-based search: the more 800-number calls, and the longer they lasted, the more the advertiser would be charged.[34] This "cost-per-call" pricing is functionally identical to digital search engine's cost-per-click pricing. In The Yellow Pages' heyday, it was just as successful in attracting search-based ad dollars.[35]

IV. FINALIZED AD CAMPAIGNS SHARE THE SAME OR SIMILAR FORMATS AND MEASUREMENT CHALLENGES

a. Ad Formats Are The Same Or Similar In Digital And Non-Digital Advertising.

[34] The current cost to business per call to an 800-number is between 6 and 30 cents per minute. https://www.businessnewsdaily.com/29-should-my-business-get-a-toll-free-number.html

[35] As recently as 2009, US Yellow Pages search ad revenue amounted to $26 billion, exceeding that of digital search engines' ad revenues by several billions of dollars. YP ad revenues declined steadily thereafter. https://www.linkedin.com/pulse/death-yellow-page-directories-jon-harari/

The format of digital advertising is not only similar to non-digital advertising services—the two are often identical.

For example, a banner ad is simply a static, visual display of a commercially relevant message. There is nothing unique to its format. As a term, “banners” have long been used in a variety of non-digital media, including event marketing,[36] in-store advertising,[37] out-of-home advertising,[38] and even aerial advertising.[39] In its digital form, one of the most common banner ads, for example, is that of the 300 X 600 “half page” ad.[40] Marketers who work in print media recognize it as visually identical to the non-digital half-page ads they know from print magazines and newspapers. Another digital banner ad format is the 3 X 1 rectangle, which has the identical aspect ratio to one of the most common non-digital formats of out-of-home billboards.[41]

As for interstitials, the term originated in broadcast radio and TV advertising, where programming and consumers alike referred to them as “commercial breaks.” As one digital marketing agency clarified the interstitial’s non-digital origins, **“**Standard TV ads are relatively short promotional messages (typically between 30 to 60 seconds) that are placed between media segments (interstitial) in a TV program.”[42]

Finally, as an “ad” format, digital search advertising is fundamentally similar in

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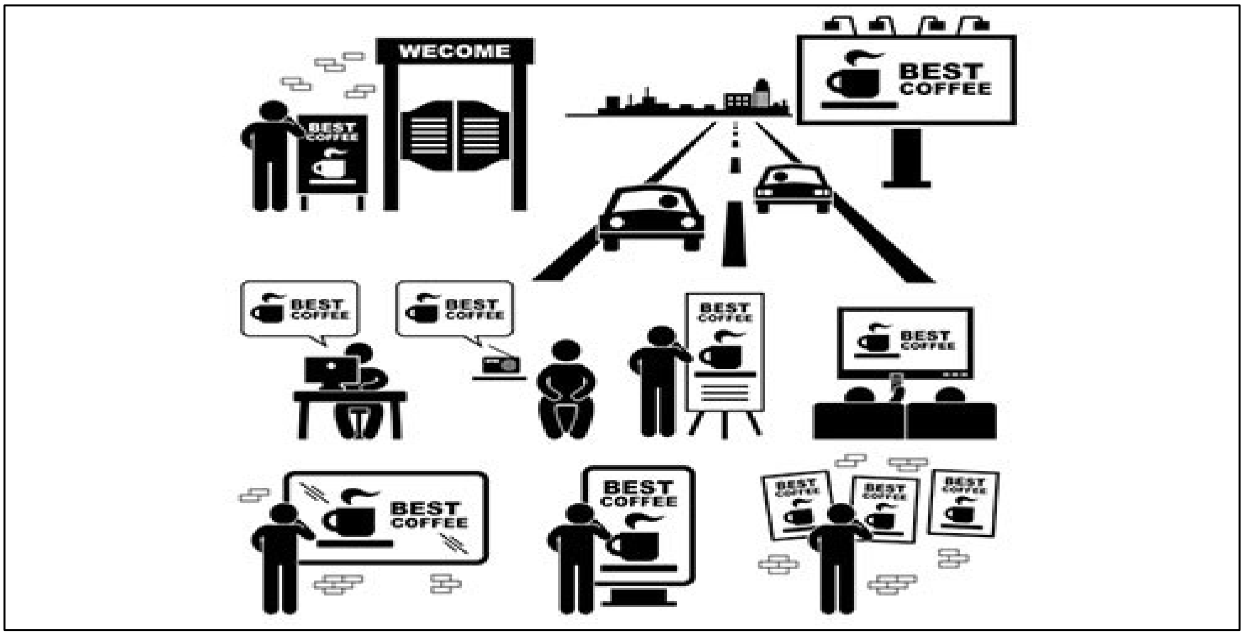
[36] https://inevent.com/blog/marketing/event-banners-marketing.html
[37] https://www.ballantine.com/ultimate-guide-store-display-advertising/
[38] https://en.wikipedia.org/wiki/Out-of-home_advertising
[39] “Airplanes towing banners, skywriting, drones and even flogos are forms of aerial advertising.” https://dashtwo.com/aerial-advertising/
[40] https://www.monetizemore.com/blog/most-common-banner-ads-sizes/
[41] https://www.capitoloutdoor.com/types-of-billboards/
[42] http://www.althos.com/tutorial/TV-advertising-tutorial-ad-types.html

form and function to search ads appearing offline. Search advertising is essentially a simple display of the names and contact information of multiple businesses provided to consumers who are actively looking for a product or service. It is neither unique to digital, nor did it originate there. Search ads in non-digital media were first popularized by The Yellow Pages, followed by classified advertising listings and help-wanted ads in print newspapers and penny-savers. During the 1990s, search advertising took audio form as short spoken text over the telephone generated in response to a voice inquiry.[43] Digital's deployment of search ads is therefore the web's adaptation of non-digital media's pre-existing practices.

In the final analysis, ad formats are similar across all media because the marketers who pay for them need them that way in order to achieve consistent brand messaging in whatever media they use, whether digital or non-digital:

[43] Perhaps the most famous telemarketing example being 1-800-MovieFone, which allowed consumer to use keypads to search for movies among multiple nearby cinemas.

Figure 5: Marketers' Branding Needs Promote Ad Format Similarity Across Digital and Non-Digital Media [44]



b. Marketers Face Fundamentally Similar Challenges In Measuring The Sales Effectiveness Of Ad Campaigns In Digital And Non-Digital Media.

The purpose of all advertising is to produce more revenue for the business than it costs to run the ad campaign. But ascertaining whether a brand's advertising succeeds in doing so is usually the biggest challenge. Simply stated, there is almost never a clear and obvious connection between ads that consumers see, and what they actually buy. As a result, there is enormous room for both wasted ad dollars and missed sales opportunities. Over the decades, marketers and their agencies have developed some well-researched metrics and techniques to address the challenges of measuring advertising's sales impact measurement that are common across both digital and non-digital media.

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[44] https://splashomnimedia.com/blog/online-vs-offline-where-should-your-ad-be

There are many sources of this measurement challenge, but the main cause is multiple ad exposures in multiple media at different points along the path to purchase. No matter the media involved, marketers must ask themselves whether sales were influenced by ads,[45] and if so, *which* ads, in *which* media and vehicles, contributed *which percent* of total sales? This is the problem of "sales attribution" in advertising.

Marketers, agencies and market research firms have developed a variety of techniques they use across digital and non-digital media to solve this problem. The gold standard solution normally involves statistically correlating sales data from all the brand's various sales channels with the volumes of ads delivered through all media vehicles to produce a "multi-channel attribution model." The goal of this model is to give advertising in each media, whether digital or non-digital, proper credit for its share of sales to the brands' end consumers.

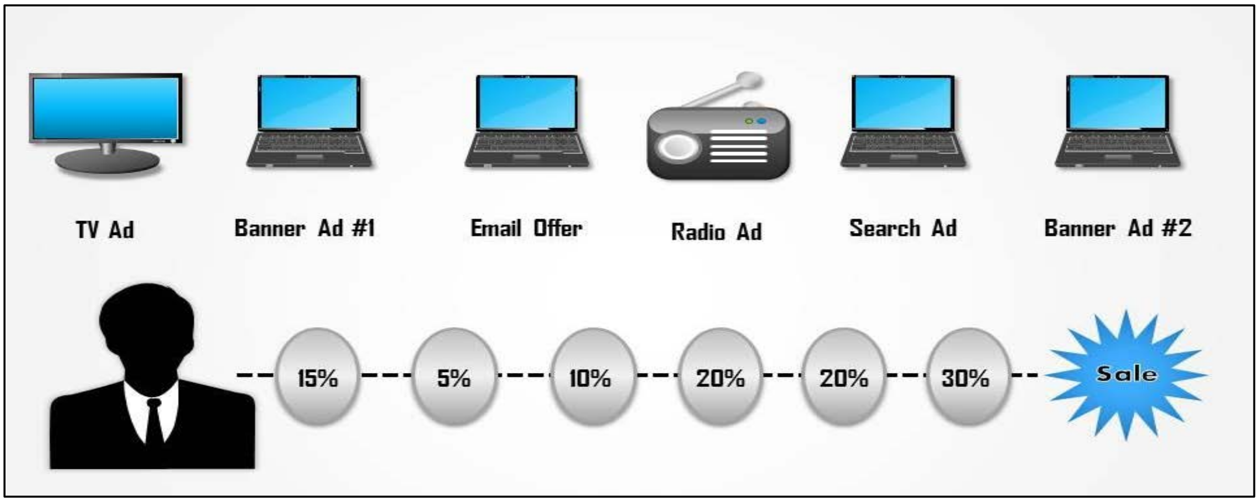
The following figure shows how a multi-channel attribution model might estimate the relative sales impact of ads in different online and offline media.[46] In this campaign, had the marketer not created a multi-channel attribution model, it would have seemed that the final ad in the series was solely responsible for the brand's sales. In reality, the model's statistical analysis shows that advertising in the two non-digital channels (of TV

[45] By no means are all brand's sales attributable to its advertising. A great many sales are due to "organic" [unprompted] demand and some sales are caused by "category spillover" from a competitor's ad campaigns. https://back2marketingschool.com/spillover-effect/

[46] https://www.slideteam.net/1114-multi-channel-attribution-model-powerpoint-presentation.html.

and radio) together generated 35% of sales, even though there is no directly trackable connection.

Figure 6: Multi-Channel Attribution Modeling Gives Each Digital and Non-Digital Media Proper Credit for Its Contribution to Sales[47]



In this example, if the marketer were to try to optimize its advertising by shifting ad dollars from TV and radio into the final digital banner #2, it would almost certainly see sales *decrease*. In both digital and non-digital advertising, the successful marketer is challenged to avoid both false positives (over-attributing sales to the most easily measured media, or ads closest to the point of sale) and false negatives (under-attributing sales to the harder to measure media or ads further upstream from the point of sale).

V. DIGITAL AND NON-DIGITAL ADVERTISING MAKE SIMILAR USE OF CONSUMER INTERACTIVITY AND DATA

Although much attention has been devoted to the use of individual-level consumer data in digital advertising, the phenomenon is neither new nor unique to digital. It was

[47] https://www.slideteam.net/1114-multi-channel-attribution-model-powerpoint-presentation.html

pioneered in offline direct marketing – most particularly direct mail, catalogs, and telemarketing during the 1960s.

Consumer data is best understood as individual consumer responses to or interactions with advertisements where records of those interactions are stored and analyzed on a database for marketers' future campaign planning. Measuring responses to ad campaigns originated in direct mail and catalogs. There, the inherently addressable nature of postal media required marketers to track which consumers did or did not make purchases via mail order or 800 numbers in response to offers. (Catalogs normally must have individual names and addresses to be delivered, as will also be the case with the shipping of any parcel resulting from an order.)

From analyzing response records, marketers learned that consumers who bought more often should receive more direct mail and catalogs, and those who bought less, should be sent fewer or different catalogs since to do otherwise would be unprofitable. Thanks to the use of promo codes and coupons in other traditional media, as well as the use of consumer loyalty programs in retail stores, the identification and addressability of individual consumers and their buying proclivities became more widespread. After being adopted by email advertising, which works similarly to direct mail, these data practices migrated to the digital ad arena.

Today, marketers and publishers in both non-digital and digital turn to a common pool of market research houses, audience measurement firms, and data aggregators – many of which are now subsidiaries of the ad agency holding companies that create ad campaigns in every available media – to achieve a more detailed understanding of who their best consumers and most devoted audiences are.

CONCLUSION

To summarize: digital advertising is but one segment of a vast, complex, and highly integrated ecosystem of specialized providers of substantially similar and fungible ad services that are combinable in a myriad of ways. In this ecosystem, digital advertising's use of high-speed data transmission to deliver less expensive, more timely advertising to consumers' electronic devices both supplements and complements what consumers already receive via their TV, radio or newspaper. As such, digital advertising represents a natural evolution in advertising's economic efficiency, not a revolutionary break with it. Claims of material dissimilarity between digital and traditional ad platforms simply do not square with what ad services' most heavily invested clients know to be the case.

Respectfully submitted,

Dated: March 31, 2023

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CERTIFICATION OF WORD COUNT AND COMPLIANCE

1. This brief contains 5,091 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements in Rule 8-112.

/s/ M. Celeste Bruce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2023 a copy of the foregoing was served by consent via MDEC only on the following:

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CITATION AND VERBATIM TEXT OF ALL PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

STATUTES:

RULES:

Md. Code Ann. Tax-Gen. § 7.5-101. Terms defined.

(a) In this title the following words have the meanings indicated.
(b) “Annual gross revenues” means income or revenue from all sources, before any expenses or taxes, computed according to generally accepted accounting principles.
(c) “Assessable base” means the annual gross revenues derived from digital advertising services in the State.
(d) “Broadcast entity” means an entity that is primarily engaged in the business of operating a broadcast television or radio station.
(e)
(1) “Digital advertising services” includes advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services.
(2) “Digital advertising services” does not include advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast entity or news media entity.
(f) “Digital interface” means any type of software, including a website, part of a website, or application, that a user is able to access.
(g)
(1) “News media entity” means an entity engaged primarily in the business of newsgathering, reporting, or publishing articles or commentary about news, current events, culture, or other matters of public interest.
(2) “News media entity” does not include an entity that is primarily an aggregator or republisher of third-party content.
(h) “User” means an individual or any other person who accesses a digital interface with a device.

Maryland Rule 8-511. Amicus curiae

(a) Authorization to File Amicus Curiae Brief. — An amicus curiae brief may be filed only:
(1) upon written consent of all parties to the appeal;
(2) by the Attorney General in any appeal in which the State of Maryland may have an interest;
(3) upon request by the Court;
(4) as provided in subsection (e)(1) of this Rule; or
(5) upon the Court's grant of a motion filed under section (b) of this Rule.
(b) Motion and Brief. —
(1) Content of Motion. — A motion requesting permission to file an amicus curiae brief shall:
(A) identify the interest of the movant;
(B) state the reasons why the amicus curiae brief is desirable;
(C) state whether the movant requested of the parties their consent to the filing of the amicus curiae brief and, if not, why not;
(D) state the issues that the movant intends to raise; and
(E) identify every person, other than the movant, its members, or its attorneys, who made a monetary or other contribution to the preparation or submission of the brief, and identify the nature of the contribution.
(2) Attachment of Brief. — Copies of the proposed amicus curiae brief shall be attached to two of the copies of the motion filed with the Court.
Cross references. — See Rule 8-431 (e) for the total number of copies of a motion required when the motion is filed in an appellate court.
(3) Service. — The movant shall serve a copy of the motion and proposed brief on each party.
(4) If motion granted. — If the motion is granted, the brief shall be regarded as having been filed when the motion was filed. Within ten days after the order granting the motion is filed, the amicus curiae shall file the additional number of briefs required by Rule 8-502 (c).
(c) Time for filing. — Except as required by subsection (e)(3) of this Rule and unless the Court orders otherwise, an amicus curiae brief shall be filed at or before the time specified for the filing of the principal brief of the appellee.
(d) Compliance with Rules 8-503 and 8-504. —
(1) Generally. — An amicus curiae brief shall comply with the applicable provisions of Rules 8-503 and 8-504, except as provided in subsection (d)(2) of this Rule.
(2) Exception. — An amicus curiae brief filed pursuant to subsection (e)(1) or (f)(3) of this Rule shall comply with the applicable provisions of Rule 8-112. It may, but need not, comply with the provisions of Rules 8-503 and 8-504.
(e) Brief supporting or opposing discretionary review. —
(1) Motion not required. — An amicus curiae brief may be filed in the Court of Appeals on the question of whether the Court should issue a writ of certiorari or other extraordinary writ, or in the Court of Special Appeals on the question of whether the Court should grant an application for leave to appeal. A motion requesting permission to file such an amicus brief is not required, provided that the amicus curiae brief is signed by an attorney pursuant to Rule 1-311.
(2) Required Contents. — A brief filed pursuant to subsection (e)(1) of this Rule shall state whether, if the writ is issued or application is granted, the amicus curiae intends to seek consent of the parties or move for permission to file an amicus curiae brief on the issues before the Court.
(3) Time for Filing. —

(A) Unless the Court orders otherwise, an amicus curiae brief on the question of whether the Court of Appeals should issue a writ of certiorari or other extraordinary writ shall be filed within seven days after the petition is filed.
(B) Unless the Court orders otherwise, an amicus curiae brief on the question of whether the Court of Special Appeals should grant an application for leave to appeal shall be filed within 15 days after the record is transmitted pursuant to Rule 8-204 (c)(1).
(4) Length. — A brief filed pursuant to subsection (e)(1) of this Rule shall not exceed 1,900 words.
(f) Reply brief; oral argument; brief supporting or opposing motion for reconsideration. — Without permission of the Court, an amicus curiae may not (1) file a reply brief, (2) participate in oral argument, or (3) file a brief in support of, or in opposition to, a motion for reconsideration. Permission may be granted only for extraordinary reasons.
(g) Appellee's reply brief. — Within ten days after the later of (1) the filing of an amicus curiae brief that is not substantially in support of the position of the appellee or (2) the entry of an order granting a motion under section (b) that permits the filing of a brief not substantially in support of the position of the appellee, the appellee may file a reply brief limited to the issues in the amicus curiae brief that are not substantially in support of the appellee's position and are not fairly covered in the appellant's principal brief. Any such reply brief shall not exceed 3,900 words.