Good afternoon, Chair Roemer, Vice Chair Lorenz, and Distinguished Members of the Committee,

My name is Daniel Wood. I am an attorney at the law firm Pillsbury Winthrop Shaw Pittman. For half my legal career I was an Assistant General Counsel of the Texas Department of Banking where I worked mainly on matters involving the regulation of money services business (or MSBs) such as money transmitters. For the past seven years, I have been in private practice at Pillsbury, advising and representing the MSB industry.

Today I am appearing on behalf of the MSBA—the Money Services Business Association—of which my firm is a founding member. The MSBA is the largest trade association of the MSB industry. I understand that the Executive Director of the MSBA has already given testimony to this Committee regarding HB 451. Today I wish to speak on the narrow topic of the constitutionality of HB 451 if it were to become law.

## I. State Taxes or Surcharges on Transactions That Cross State Lines Violate the Constitution's Commerce Clause

The Commerce Clause of the United States Constitution states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."[1] Although the Commerce Clause is an affirmative grant of power to Congress, as Justice Alito wrote in a recent majority opinion, the Supreme Court has long interpreted the Commerce Clause to also contain a "negative command" that restricts the power of States to regulate foreign or interstate commerce.[2] This restriction is known as the "Dormant Commerce Clause."

The Dormant Commerce Clause prohibits a State from enacting measures that discriminate against foreign or interstate commerce.[3] Courts analyze cases involving discrimination against foreign commerce (like H.B. 451's tax on international remittances) very similarly to cases involving discrimination against interstate commerce.[4] In fact, courts tend to be even more skeptical of legislation that discriminates against foreign commerce than legislation that discriminates against interstate commerce.[5] And, of particular relevance for H.B. 451 and similar legislation, the Supreme Court has repeatedly held that the Dormant Commerce Clause prohibits discriminatory taxation regimes involving both foreign and interstate commerce; in the case of foreign commerce, the Supreme Court has held that "state taxation must not impair federal uniformity in an area where it is essential that the federal government 'speak with one voice.'"[6]

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542, 548-549 (2015).

[3] Id.

[4] See, e.g., Antilles Cement Corp. v. Acevedo Vila, 408 F.3d 41, 46 (1st Cir. 2005) ("Although the language of dormant Commerce Clause jurisprudence most often concerns interstate commerce, essentially the same doctrine applies to international commerce.").

[5] See, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

[6] Knoll, Michael S. and Mason, Ruth, "The Dormant Foreign Commerce Clause After Wynne" 39 Virginia Tax Review 357 (2020); citing Japan Line, 441 U.S. at 448.

State laws that are discriminatory on their face, as well as facially neutral laws that have discriminatory effects on foreign or interstate commerce, are "virtually per se" invalid and are subject to "strictest scrutiny" by courts.[7] A state's burden for justifying a law that discriminates against foreign or interstate commerce is so high that "facial discrimination by itself may be a fatal defect."[8]

### A. Taxes and Surcharges that Discriminate Against Interstate or Foreign Commerce are Invalid under the Dormant Commerce Clause

The Supreme Court has established a four-part test for evaluating whether a state tax or surcharge on foreign or interstate transactions may withstand a challenge under the Dormant Commerce Clause. To be valid, the state tax must: (1) apply to an activity with a substantial nexus to the State, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the State.[9] Although a four-part test, the key aspect of the analysis is the third part of the test: whether the state law discriminates against foreign interstate commerce.

Supreme Court precedent holds that state tax and surcharge laws that discriminate against foreign or interstate commerce violate the Dormant Commerce Clause. For example:

- Justice Alito, writing for the majority, found that a state law that imposed higher taxes on foreign income violated the Dormant Commerce Clause because it "discriminated in favor of intrastate over interstate economic activity."[10]

- Justice Thomas, writing for the majority, found that a state law that law imposed higher surcharges on the disposal of solid waste from other states than the surcharge on the disposal of in-state waste violated the Dormant Commerce Clause because it afforded "differential treatment of in-state and out-of-state economic interests that benefit[ed] the former and burden[ed] the latter."[11]

- Justice Alito, writing for the majority, found that a state law that imposed a residency requirement to obtain a state license impermissibly discriminated against out-of-state residents and therefore violated the Dormant Commerce Clause.[12]

- A state law imposing a usage tax on natural gas that favored in-state businesses over out-of-state business through the applications of its credits and exemptions violated the Dormant Commerce Clause.[13]

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[7] See Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978), Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

[8] Id.

[9] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[10] Wynne, 575 U.S. 542 at 551.

[11] Oregon Waste v. Dep't of Envtl. Quality, 511 U.S. 93, 99–101 (1994).

[12] Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019).

[13] Maryland v. Louisiana, 451 U.S. 726 (1981).

- A state law that denied a tax exemption to nonprofit organizations operating principally for the benefit of out-of-state residents, while granting the exemption to nonprofit organizations operating principally for the benefit of state residents, violated the Dormant Commerce Clause because of this disparate tax treatment.[14]

- A state law that imposed disparate transfer taxes on in-state vs. out-of-state sales of securities violated the Dormant Commerce Clause because it "discriminat[ed] between transactions on the basis of some interstate element."[15]

- A state tax law that exempted local manufacturers violated the Dormant Commerce Clause because it "tax[ed] a transaction or incident more heavily when it crosse[d] state lines than when it occur[ed] entirely within the State."[16]

Like the many state laws described above that the Supreme Court has held violate the Dormant Commerce Clause, state laws that impose greater taxes or charges on out-of-state or international remittances, or on remittances initiated by out-of-state residents, facially discriminate against interstate commerce.

### B. HB 451 and Similar State Legislation Discriminate against Interstate and Foreign Commerce

HB 451 would impose a 7% tax on licensed money transmitters and their authorized delegates on all international money transfers from a customer in Ohio to a person outside of the United States. However, there would be no charge for a money transfer within Ohio. Thus, H.B. 451, on its face, would treat intrastate commerce differently than foreign commerce by imposing higher charges on transactions in foreign commerce than it would on intrastate transactions that take place solely within Ohio.

The bill authorizes licensed money transmitters and authorized delegates to pass this 7% charge on to their customers. Ohio residents who pay the charge would be able to claim an income tax credit of up to $2,000 per year. However, out-of-state residents who pay the charge would not be able to claim any tax credit. Thus, H.B. 451, on its face, would treat Ohio residents differently than out-of-state residents engaged in the very same transaction by imposing higher charges on customers who are not residents of Ohio than customers who are Ohio residents.

These two characteristics, which facially discriminate against foreign and interstate commerce, fundamentally conflict with the Supreme Court's long established Dormant Commerce Clause jurisprudence. Other states have proposed similar remittance tax legislation that shares these characteristics[17], and one state has enacted a remittance tax law with these characteristics.[18] These characteristics are also closely analogous to many of the state taxes and surcharges the Supreme Court has invalidated as facially discriminatory under the Dormant Commerce Clause.

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[14] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

[15] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 332, n. 12 (1977).

[16] Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

[17] See, e.g., Pennsylvania SB 1170 (2024).

[18] 63 Okl. St. _ 2-503.1j.

As a result, if challenged under the Dormant Commerce Clause, courts would likely begin from the position that laws such as H.B. 451 and similar state legislation are "virtually per se" invalid and are subject to strict scrutiny.[19]

### C. HB 451 and Similar State Legislation Would Not Survive Strict Scrutiny

The Supreme Court has repeatedly held that state laws that impose taxes or surcharges that discriminate against foreign or interstate commerce are subject to strict scrutiny and are presumptively invalid. This means that, even if facial discrimination alone does not invalidate a state law (which it may), such a law "can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose."[20]

If H.B. 451 or similar state laws are challenged under the Dormant Commerce Clause, their proponents will likely argue that the legislation's facial discrimination against interstate or foreign commerce is justified by the underlying legislative policy. For example, H.B. 451 would use funds collected through the remittance tax to create a fund to defray law enforcement costs related to undocumented immigration, human trafficking, and drug trafficking. Other states have proposed or enacted laws to create similar funds from revenues derived from taxes or surcharges on foreign or interstate remittances.[21]

However, H.B. 451 is not narrowly tailored to advance a legitimate local purpose. Rather, it applies broadly to all international remittances, and would impose the charge on all out-of-state residents. As described above in Section I.A., there are numerous use cases for international remittances that bear no relation to the purported local purpose of combatting undocumented immigration, human trafficking, and drug trafficking, including military families sending money to servicemembers abroad, families sending money abroad for study-abroad expenses, and residents of other states who need to transfer money for perfectly legitimate purposes while visiting Ohio. Moreover, there is no rational basis to conclude that a resident of another state is more likely to be involved in facilitating undocumented immigration, human trafficking, or drug trafficking in Ohio than a resident of Ohio itself; in fact, the opposite is much more likely to be true. Finally, as described above in Section I.E., H.B. 451's impact on the illegal activities that it is notionally designed to address will likely be limited.

As the Supreme Court has stated, a state's burden for justifying a law that discriminates against foreign or interstate commerce is so high that "facial discrimination by itself may be a fatal defect."[22] H.B. 451 would likely be held invalid under the Dormant Commerce Clause because it facially discriminates against foreign and interstate commerce, and because its purported justifications would fail under strict scrutiny.

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[19] Philadelphia v. New Jersey, 437 U.S. at 624; Hughes v. Oklahoma, 441 U.S. at 337.

[20] Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019) (citations and quotation marks omitted);

[21] See, e.g., Pennsylvania SB 1170 (2024); 63 Okl. St. § 2-503.1j (creating the "Drug Money Laundering and Wire Transmitter Revolving Fund").

[22] Hughes, 441 U.S. at 337.