No.

In the Supreme Court of the United States

CLEAR CHANNEL OUTDOOR, LLC, PETITIONER

v.

HENRY J. RAYMOND, DIRECTOR,
DEPARTMENT OF FINANCE OF BALTIMORE CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tax singling out off-premises billboards is subject to heightened scrutiny under the First Amendment.

CORPORATE DISCLOSURE STATEMENT

Clear Channel Outdoor, LLC, formerly Clear Channel Outdoor, Inc., is a wholly owned subsidiary of Clear Channel Outdoor Holdings, Inc. Clear Channel Outdoor Holdings, Inc., has no parent corporation, and Pacific Investment Management Company LLC owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D. Md.):

Clear Channel Outdoor, Inc. v. *Mayor and City Council of Baltimore*, Civ. No. 13-2379 (Dec. 28, 2015)

Maryland Tax Court:

Clear Channel Outdoor, Inc. v. *Department of Finance of Baltimore City*, No. 16-0571 (Feb. 27, 2018)

Circuit Court for Baltimore City:

Clear Channel Outdoor, Inc. v. *Director, Department of Finance of Baltimore City*, No. 18-1778 (Oct. 24, 2018)

Maryland Court of Special Appeals:

Clear Channel Outdoor, Inc. v. *Director, Department of Finance of Baltimore City*, No. 2910 (Jan. 29, 2020)

Maryland Court of Appeals:

Clear Channel Outdoor, Inc. v. *Director, Department of Finance of Baltimore City,* No. 9 (Mar. 15, 2021)

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Clear Channel Outdoor, LLC, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (App., *infra*, 1a-51a) is reported at 472 Md. 444. The opinion of the Maryland Court of Special Appeals (App., *infra*, 52a-70a) is reported at 244 Md. App. 304. The opinions of the Circuit Court for Baltimore City (App., *infra*, 71a-82a) and the Maryland Tax Court (App., *infra*, 83a-90a) are unreported. The opinion of the district court dismissing for lack of federal jurisdiction (App., *infra*, 91a-105a) is reported at 153 F. Supp. 3d 865.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on March 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press[.]

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

Relevant provisions of Article 28, Subtitle 29, of the Baltimore City Code are reproduced in the appendix to this petition (App., *infra*, 106a-108a).

STATEMENT

This case presents an exceptionally important question of constitutional law: whether a tax targeting off-premises billboards is subject to heightened scrutiny under the First Amendment. By answering that question in the negative, Maryland's highest court singled out one form of speech for a unique financial burden and unduly limited the reach of the First Amendment's protections. What is more, the decision below conflicts with the decisions both of this Court and of lower courts on how properly to apply the First Amendment to state laws that

target speech platforms. This Court's intervention is sorely needed.

The City of Baltimore imposes a tax on "outdoor advertising displays" within city limits. An "outdoor advertising display," in turn, is defined as a display that directs attention to a business, event, or other activity that is conducted somewhere other than on the premises of the display. The tax applies to just four billboard owners and does not fall on any other sign publishers, other forms of media, or other businesses. The tax was adopted for the sole purpose of raising general revenues.

Petitioner, one of the Nation's largest billboard advertising companies, challenged the tax under the First Amendment. But in the decision below, the Maryland Court of Appeals upheld the tax, concluding that it was not subject to heightened scrutiny under the First Amendment. Purporting to apply this Court's decision in *Leathers* v. *Medlock*, 499 U.S. 439 (1991), the Maryland Court of Appeals recognized this Court's ruling that targeted taxes on First Amendment activities are inherently suspect. But it reasoned that such protections are afforded only to the institutional press; that petitioner is not part of the press; that the tax does not target a small number of speakers; and that the distinction between on-premises and off-premises signs is content-neutral.

The decision of the Maryland Court of Appeals is irreconcilable with this Court's First Amendment precedents, especially *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and the decisions of lower courts applying *Minneapolis Star* and its progeny. As this Court's decisions establish, the threats of censorship, chilled expression, and viewpoint discrimination are present when the government singles out *any* publication medium for a special burden, whether or not the medium is part of the traditional press.

Consistent with that principle, lower courts have applied *Minneapolis Star* to accord a diverse array of speech publishers and speakers heightened protection from targeted financial burdens. But in the decision below, the majority defied that expansive understanding of who and what may count as the "press" for First Amendment purposes and laid down a rule that would deny many speech platforms robust First Amendment protection. That rule would apply equally to "old media" publishers as well as to increasingly prevalent "new media" platforms—including social media—that have replaced more traditional forms of journalism for many Americans. The Court should grant review to provide much-needed guidance to the lower courts on the recurring and far-reaching issues of First Amendment law implicated in this case.

This case comes to the Court as municipalities are desperately searching for new sources of revenue. That reality, combined with an increasing intolerance of free speech, has led municipalities to seek to impose crippling financial burdens on speech platforms that disseminate highly visible and politically unpopular speech. The question presented could not be more important or more timely. The petition for a writ of certiorari should be granted.

A. Background

1. In 2013, Baltimore enacted a tax on "outdoor advertising displays" within city limits. Baltimore City Code Art. 28, § 29-2 (2020). An "outdoor advertising display" is defined as a display that "directs attention to a business, commodity, service, event, or other activity" that is "sold, offered, or conducted somewhere other than on the premises on which the display is made." *Id.* § 29-1(d). The tax is levied on the "advertising host"—defined as the person

who owns or controls the billboard and charges for its use. *Id.* §§ 29-1(b), 29-3.

Baltimore's billboard tax is assessed annually based on the size and type of display: $15 per square foot for an electronic display that changes more than once a day, and $5 per square foot for any other display. Baltimore City Code Art. 28, § 29-3 (2020). The tax thus does not depend on the number of advertisements on a given display or the duration of an ad. And it applies equally to commercial and non-commercial speech. The tax advances a single purpose: raising revenues for the general fund. App., *infra*, 3a-5a.

The billboard tax is imposed only on billboard owners; it does not fall on any other sign publishers, other forms of media, or other businesses. The tax excludes, *inter alia*, on-premises signs, government-owned signs, and signs smaller than 10 square feet. Nor has the tax been applied to mobile signs. The tax thus applies to only 760 billboards—out of the more than 100,000 signs in Baltimore—which are owned by just four companies. App., *infra*, 5a. And the tax is independent of, and in addition to, all other taxes and fees imposed by the state and local governments, including property taxes, sales taxes, and fees for sign permits.

2. "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (internal quotation marks and citation omitted). Though often associated with commercial speech (advertising products, services, and attractions), billboards also display news, political speech, and issue advocacy. As technology has advanced, various entities have increasingly turned to billboards—especially digital billboards, which can be updated in real time—to convey their messages. Newspapers use digital

billboards to publish breaking news; local television stations broadcast weather forecasts and give real-time sports updates; and governments transmit urgent public-safety notices. App., *infra*, 41a (Getty, J., dissenting). As with publishers of any other form of mass media, billboard publishers make editorial determinations with respect to the content of every message displayed. *Id.* at 5a-6a.

While performing many of the same functions, billboards have certain advantages over other speech platforms. Their affordability provides a forum for ideas that might not otherwise have one, and their visibility allows those ideas to reach a vast swath of the population that might not otherwise receive them. Billboards thus play a critical role in expanding the marketplace of ideas, particularly given that consumers increasingly seek information from a small number of curated sources. App., *infra*, 41a-43a (Getty, J., dissenting).

3. It is settled law that billboards are entitled to First Amendment protection. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 48-49 (1994); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 807, 817 (1984); *Metromedia*, 453 U.S. at 500-501 (plurality opinion); *id.* at 524 (Brennan, J., concurring in the judgment). This Court has recognized that billboards are a "well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (plurality opinion). And it has recognized that there may be legitimate governmental interests in regulating billboards—in particular, a safety interest in eliminating potential traffic hazards and an aesthetic interest in improving the appearance of cities. See *Taxpayers for Vincent*, 466 U.S. at 807, 817; *Metromedia*, 453 U.S. at 507-508 (plurality opinion). But those rationales will not withstand scrutiny if an ordinance's other features diminish their

credibility. See *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410, 418-419 (1993); *Ladue*, 512 U.S. at 52, 54-55.

B. Facts And Procedural History

1. Petitioner is one of the Nation's largest outdoor-advertising companies. Petitioner's billboards publish messages covering a wide range of subjects. Approximately 40% of petitioner's billboards display paid and unpaid non-commercial speech, serving as a source of emergency messages, breaking news, and information about politics, social issues, and other topics of national and local importance. App., *infra*, 5a-6a; 1 Tr. 109.

2. In 2013, petitioner brought suit against the City of Baltimore in federal district court, contending that Baltimore's billboard ordinance imposed an unconstitutional regulatory fee in violation of the First Amendment. The City moved to dismiss, arguing that the ordinance did not impose a regulatory fee but instead a general revenue tax that was immune from attack in federal court under the Tax Injunction Act, 28 U.S.C. 1341. In so doing, the City represented that the tax advanced no regulatory purpose, including safety or aesthetic interests, but rather was purely a fundraising measure. Accepting the City's representation, the district court dismissed the case for lack of federal jurisdiction. App., *infra*, 6a-7a, 92a, 95a-105a.

Petitioner continued to pay the tax under protest and filed refund requests with respondent, the Director of the Department of Finance of Baltimore City. Respondent denied those requests. App., *infra*, 7a.

3. Petitioner then sought review in the Maryland Tax Court, again arguing that Baltimore's billboard tax violated the First Amendment. The court rejected petitioner's argument and concluded that an excise tax imposed on off-premises billboards is a "tax on the privilege of continuing in business, not on exercising free speech."

App., *infra*, 87a. The court reasoned that the act of hiring billboard space "does not possess sufficient communicative elements for the First Amendment to come into play." *Ibid.* (internal quotation marks and citation omitted). In the court's view, the tax was directed at "a means of expression rather than the expression itself" and thus did not infringe on petitioner's free-speech rights. *Id.* at 88a. As a result, the court applied rational-basis review and upheld the tax, concluding that it was rationally related to the legitimate state interest in collecting public revenues. *Id.* at 88a-90a.

4. Petitioner appealed the Tax Court's decision to the Maryland Circuit Court for Baltimore City and the Maryland Court of Special Appeals. Both courts affirmed. App., *infra*, 52a-70a, 71a-82a.

5. Petitioner then sought review in the Maryland Court of Appeals. The court granted review and affirmed, upholding Baltimore's billboard tax in a divided decision. App., *infra*, 1a-36a.

a. Disagreeing with the Tax Court, the Maryland Court of Appeals acknowledged at the outset that billboards are a speech platform entitled to protection under the First Amendment. App., *infra*, 12a-13a. The court nevertheless held that the tax was subject only to rational-basis review. *Id.* at 35a. In reaching that conclusion, the court purported to apply the criteria articulated in *Leathers*, but it rejected petitioner's arguments that the tax was subject to heightened scrutiny because it singled out a speech platform, targeted a small group of speakers, and discriminated on the basis of a billboard's content. *Id.* at 24a-35a.

The court first determined that petitioner was not part of the "press" and the tax did not "single out" the press. App., *infra*, 26a-29a. In the court's view, a tax only "singles out the press" when "some aspect of it indicates a

purposeful attempt to interfere with First Amendment activities or it is structured so as to raise suspicions that it was intended to do so." *Id.* at 28a (internal quotation marks and citation omitted). While recognizing that petitioner exercises editorial discretion in allocating advertising space, the court posited that petitioner was not a "newsgathering organization that curates what it disseminates according to journalistic principles." *Id.* at 27a. Thus, the court concluded that, although a billboard may "function[] similarly" to the traditional press, it is not "equivalent to a newspaper or broadcaster for purposes of the First Amendment." *Id.* at 27a-28a. The court added that the tax did not "single out" the press because it applied to all off-premises billboard operators and "ha[d] no direct or indirect effect on the extent of the circulation of billboards." *Id.* at 28a-29a.

The court further determined that the tax did not target a "small group of speakers." App., *infra*, 29a-31a. The court acknowledged that the tax burdened only four taxpayers, but attributed that fact to historic market conditions. *Id.* at 31a. The court reasoned that a law only "targets a small group of speakers when it distinguishes among members within related types of media, not simply when it applies to a specific form of media." *Id.* at 30a. In the court's view, because the tax "appli[ed] to all off-site billboards" and did not distinguish among members of that group, the tax did not trigger heightened scrutiny. *Id.* at 31a.

Finally, the court determined that the tax was content-neutral. App., *infra*, 31a-35a. The court rejected petitioner's argument that one must read and interpret a sign to determine if it qualifies as an off-premises sign subject to the tax or an exempt on-premises sign. *Id.* at 32a. Relying primarily on Justice Alito's concurring opinion in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), the

court reasoned that the tax's distinction between on-premises and off-premises signs "d[id] not discriminate on the basis of content." *Id.* at 32a-34a.

Accordingly, the court concluded that none of the *Leathers* criteria triggered heightened scrutiny. App., *infra*, 35a. The court thus applied only rational-basis review and upheld the tax as constitutional. *Ibid.*

b. Judge Getty dissented. App., *infra*, 37a-51a. He rejected the Tax Court's "blurry distinction" between a tax aimed at the so-called "privilege" of maintaining a speech platform and a tax aimed at regulating speech itself. *Id.* at 38a-39a. Because Baltimore's billboard tax "applie[d] solely to one class of speech platforms," Judge Getty determined that it was subject to heightened scrutiny. *Id.* at 39a. Drawing an analogy to *Minneapolis Star*, Judge Getty reasoned that taxing the square footage of a billboard is "akin to taxing the ink and paper" of a newspaper. *Id.* at 45a. Thus, in his view, the tax was "singularly focused on the media or individual classes of media therein" and should have been subject to strict scrutiny. *Id.* at 51a. In addition, Judge Getty would have found the tax to be subject to strict scrutiny because it "categorize[d] the class of billboards to which [it] applie[d]" based on the content of a billboard's message. *Id.* at 50a.

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question regarding the constitutional limits on the targeted taxation of a protected speech platform. The decision below is irreconcilable with this Court's decisions regarding laws that target speech platforms. Under a proper application of those decisions, there can be little doubt that the billboard tax at issue, which is targeted at a small number of billboard operators, is subject to heightened scrutiny. The decision below also conflicts with the decisions of other federal and

state courts subjecting laws that target speech platforms to heightened scrutiny under the First Amendment. The resulting confusion is reason enough to grant review. And if the decision below is allowed to stand—especially at a time when new speech platforms are expanding and municipalities are looking for creative ways to raise revenue—it will open the door to more such laws, imposing burdens on the freedom of speech at a time when it is under increasing threat.

Taxes singling out speech platforms, such as Baltimore's, are presumptively incompatible with the First Amendment. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With Decisions Of This Court, Federal Courts Of Appeals, And State Courts Of Last Resort

The Maryland Court of Appeals' conclusion that "newsgathering" organizations receive greater First Amendment protection than other speech platforms cannot be reconciled with this Court's First Amendment jurisprudence or with the decisions of lower courts. The Court should grant review to clarify that government efforts to single out and impose special burdens on protected speech platforms and speakers—not just "newsgathering organizations" that operate under "journalistic principles"—are subject to heightened scrutiny under the First Amendment.

1. This Court has long held that the government may subject speech platforms to generally applicable taxes without running afoul of the First Amendment. See *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983); *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991). But just as "clearly established" is the principle that targeted taxation of speech platforms,

unless justified by some special characteristic of the platform, raises concerns that strike at the heart of the First Amendment. *Arkansas Writers' Project Inc.* v. *Ragland*, 481 U.S. 221, 227 (1987); see, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Minneapolis Star*, 460 U.S. at 581; *Leathers*, 499 U.S. at 447.

Targeted taxation of a speech platform poses the triple threat of censorship, chilled expression, and viewpoint discrimination. This Court has explained that the Framers crafted the First Amendment's speech and press clauses against the backdrop of the Crown's "persistent effort"—first through prior restraint, then through taxes on newspapers and advertisers—to limit the "free expression of any opinion which seemed to criticize" the British government. *Grosjean*, 297 U.S. at 245-248. In light of that history, the core First Amendment problem with selective taxation of a speech platform is the limitation of free expression and flow of information vital to an "informed public opinion." *Id.* at 250.

The Court has further explained that a tax that singles out publishers carries a latent threat of abuse by virtue of its "structure." *Minneapolis Star*, 460 U.S. at 580. As a result, "[i]llicit legislative intent is not the *sine qua non* of a violation." *Id.* at 592; see *Leathers*, 499 U.S. at 445; *Arkansas Writers' Project*, 481 U.S. at 228. As the Court has put it, "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star*, 460 U.S. at 585. That weapon can "operate as effectively as a censor to check critical comments," suppress particular viewpoints, and, in the process, distort the public discourse. *Ibid.*; see *Leathers*, 499 U.S. at 447. In short, "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy

burden on the State to justify its action." *Minneapolis Star*, 460 U.S. at 592-593.

Applying the foregoing principles, the Court in *Minneapolis Star* invalidated a state use tax on newspaper ink and paper, both because it singled out the press and because it targeted a small group of speakers (namely, newspapers with a large circulation) for a special financial burden. See 460 U.S. at 586-592. Those features "present[ed] such a potential for abuse that no interest suggested by Minnesota c[ould] justify the scheme." *Id.* at 592. A few years later, the Court struck down a sales tax on general-interest magazines that exempted newspapers, religious, professional, trade, and sports journals. See *Arkansas Writers' Project*, 481 U.S. at 229. That tax similarly targeted a small group of magazines, and it did so based on the magazines' content. See *id.* at 229-230.

In later decisions, the Court reaffirmed that a tax that singles out the press, for reasons unrelated to the platform's unique features, is unconstitutional. In *Leathers*, for instance, the Court reiterated that, because the press "will often serve as a restraint on government," targeted taxation of the press "could operate 'as effectively as a censor to check critical comment.'" 499 U.S. at 446 (quoting *Minneapolis Star*, 460 U.S. at 585). Surveying its previous decisions, the Court identified three distinct characteristics of a tax, each of which triggers heightened scrutiny: (1) when a tax "singles out the press"; (2) when it "targets a small group of speakers"; and (3) when it "discriminates on the basis of the content of taxpayer speech." *Id.* at 447. The Court went on to hold that the tax at issue—a statewide, generally applicable sales tax that treated different forms of media differently—was not unconstitutional. See *id.* at 447-448. The Court emphasized that the tax in *Leathers* was unlike the tax in *Minneapolis*

Star, which "selected a narrow group to bear fully [its] burden." *Id.* at 448.

2. Unlike the Maryland Court of Appeals, lower courts have read *Minneapolis Star* and *Leathers* to require heightened scrutiny when laws target a speech platform or a small number of speakers beyond just traditional "newsgathering organizations."

a. In *Vermont Society of Association Executives* v. *Milne*, 172 Vt. 375, 389 (2001), the Vermont Supreme Court applied heightened scrutiny to a special tax on lobbying expenditures. The tax was "aimed exclusively at lobbying expenditures" and thus singled out a "discrete group of First Amendment speakers." *Id.* at 384, 385. Relying on *Minneapolis Star* and *Leathers*, the court explained that heightened scrutiny applies to laws that "single out and burden First Amendment *interests*" or "freedoms protected by the First Amendment." *Id.* at 382-383 (emphasis added). Notably, the court did not confine those decisions to laws targeting the traditional press. Because the sole purpose of the tax at issue in *Vermont Society of Association Executives* was to generate revenue to fund campaign-finance grants to gubernatorial candidates, it did not survive strict scrutiny. See *id.* at 385-389.

In dissent, and much like the Maryland Court of Appeals here, Judge Morse reasoned that the tax on lobbying expenditures did not "single out" the press because the tax was functionally identical to a "general sales tax." 172 Vt. at 397. But the majority rejected that premise, explaining that the tax, like the one at issue here, was a "special tax" aimed "exclusively" at protected First Amendment activity, making it "completely distinct" from a generally applicable sales tax. *Id.* at 384.

b. In *Pitt News* v. *Pappert*, 379 F.3d 96 (2004) (Alito, J.), the Third Circuit did not limit the protections articulated in *Minneapolis Star* and *Leathers* to the institutional press. There, the court considered a Pennsylvania law barring "advertising of alcoholic beverages" in communications media affiliated with universities and other educational institutions. *Id.* at 102. Drawing upon *Minneapolis Star* and related case law, the court held that the law was presumptively unconstitutional because it "target[ed] a narrow segment of the media" and singled out a small group of speakers. *Id.* at 105. The court reasoned that "courts must be wary that taxes, regulatory laws, and other laws that impose financial burdens are not used to undermine freedom of the press and freedom of speech." *Id.* at 110. Because the government can "seek to control, weaken, or destroy a disfavored segment of the media by targeting that segment," the court explained, laws that "impose special financial burdens on the media or a segment of the media must be carefully examined." *Id.* at 110-111.

c. In *Time Warner Cable, Inc.* v. *Hudson*, 667 F.3d 630 (2012), a case that did not involve newspapers or other speakers within the traditional press, the Fifth Circuit reaffirmed that laws that "singl[e] out a small number of speakers for onerous treatment are inherently suspect." *Id.* at 638. Applying *Minneapolis Star*, the court invalidated a Texas law that "plainly discriminate[d] against a small and identifiable number of cable providers" by limiting their ability to acquire a valuable statewide franchise to build cable networks and provide programing services. *Id.* at 639. The court concluded that the exclusion of a handful of cable providers—which distribute third-party content much like billboard operators—was "structured in a manner that carries the inherent risk of undermining

First Amendment interests." *Id.* at 640 (internal quotation marks and citation omitted).

d. In *Doe* v. *Harris*, 772 F.3d 563 (9th Cir. 2014), the Ninth Circuit relied on *Minneapolis Star* to apply intermediate scrutiny to a California law that required sex offenders to report their Internet identifiers, such as e-mail addresses and usernames. "Just as the tax on paper and ink in *Minneapolis Star* inevitably burdened specific publishers' ability to engage in free speech," the court explained, "so too" did California's reporting requirement "inevitably burden sex offenders' ability to engage in protected speech on the Internet." *Id.* at 573.

e. Other courts have similarly applied heightened scrutiny to invalidate laws that differentially tax speakers, regardless of whether the speakers were members of the traditional press. See, *e.g.*, *Ahlburn* v. *Clark*, 728 A.2d 449, 452 (R.I. 1999) (non-canonized religious literature). Very recently, a district court preliminarily enjoined a Florida statute that imposed "sweeping requirements" on some, but not all, social-media providers. *NetChoice LLC* v. *Moody*, No. 21-220, 2021 WL 2690876, at *1 (N.D. Fla. June 30, 2021). Invoking *Minneapolis Star* and its progeny, the court explained that the statute's targeting of a "small subset of social-media entities"—namely, the largest providers—sufficed to trigger application of strict scrutiny. *Id.* at *10.

Notably, an Ohio trial court recently invalidated on First Amendment grounds an excise tax the City of Cincinnati had levied on off-premises billboards—a materially identical tax to the one at issue here. See *Lamar Advantage GP Co., LLC* v. *City of Cincinnati*, 114 N.E.3d 805, 821-822 (Ohio Com. Pl. 2018); *Lamar Advantage GP Co., LLC* v. *City of Cincinnati*, 114 N.E.3d 831, 837 (Ohio Com. Pl. 2018). As the court explained, *Minneapolis Star*'s holding as to the unlawful selective taxation of

newspapers "applies a fortiori to a tax directed towards and imposed selectively upon similar means by which First Amendment rights are exercised." 114 N.E.3d at 817. Although an intermediate court reversed, the Ohio Supreme Court granted review, and the case is now pending following oral argument. See *Lamar Advantage GP Co., LLC* v. *City of Cincinnati*, 155 N.E.3d 245, 249 (Ohio Ct. App. 2020), appeal allowed, 154 N.E.3d 98 (Oct. 13, 2020).

3. The decision below cannot be reconciled with the foregoing decisions. The tax here is subject to strict scrutiny because it singles out certain billboards and burdens a small number of billboard operators. While the majority acknowledged that billboards are a speech platform entitled to First Amendment protection, it failed to grapple with the First Amendment interests at stake in applying this Court's precedent. App., *infra*, 10a-35a.

a. The majority misread this Court's decisions in *Minneapolis Star* and *Leathers* to require strict scrutiny when a tax intentionally singles out a speech publisher that is part of the traditional press. App., *infra*, 26a-29a. In declining to apply strict scrutiny, the majority reasoned that a billboard was not "equivalent to a newspaper or broadcaster for purposes of the First Amendment" and that there was "no indication that the City has taxed billboard operators to interfere with First Amendment activities." *Id.* at 27a, 29a.

This Court, however, has never held that strict scrutiny applies *only* when a tax singles out traditional "newsgathering organizations." To the contrary, it has emphasized that the "liberty of the press is not confined to newspapers and periodicals" and that the press includes "every sort of publication which affords a vehicle for information and opinion." *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). As Justice Gorsuch recently explained, the Bill of

Rights "protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas." *Berisha* v. *Lawson*, 141 S. Ct. 2424, 2425 (2021) (opinion dissenting from denial of certiorari). Lower courts have accordingly read *Minneapolis Star* and *Leathers* to protect against the targeted burdening of a wide variety of speakers and speech platforms beyond the traditional press. See, *e.g.*, *Vermont Society of Association Executives*, 172 Vt. at 386.

The majority's further suggestion that evidence of illicit legislative intent is required to trigger heightened scrutiny also defies this Court's clear, contrary guidance. As the Court has explained, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. That is because taxes that single out the press carry the inherent potential to limit the free flow of information. See *id.* at 585; *Grosjean*, 297 U.S. at 250. And the threats of censorship, chilled expression, and viewpoint discrimination are equally present—and pernicious—whether the government singles out a newspaper, bookstore, theater, or billboard operator for a differential tax burden. For example, Baltimore's billboard tax creates a real risk that billboard publishers will be deterred from publishing messages critical of the City. That is precisely the chilling risk the Supreme Court identified in striking down Minnesota's targeted tax. See *Minneapolis Star*, 460 U.S. at 588.

b. The majority's conclusion that the tax did not target a small number of speakers also runs headlong into this Court's precedents. Baltimore's tax falls upon only four speakers, which operate only 760 of the over 100,000 commercial signs in Baltimore. App., *infra*, 5a. As this Court has recognized, a law that "targets a small number

of speakers" poses the "danger of censorship" and allows the government to "distort the market for ideas"—the same concerns posed by content-based regulations. *Leathers*, 499 U.S. at 448.

The majority ignored that principle by defining the "appropriate reference group" for analyzing the tax to include only other "off-site billboards in the City for which the operator charges customers for displaying the customer's advertising." App., *infra*, 29a, 31a. Reasoning that the tax targets all speakers in that gerrymandered group, the majority concluded that the tax does not "target[] a small group of speakers." *Id.* at 31a. But it is precisely when a tax is tailored to target such a "narrowly defined group" that the tax "begins to resemble more a penalty for a few" large enterprises than a constitutionally legitimate exercise of state power. *Minneapolis Star*, 460 U.S. at 592. No tax could target a "small group of speakers" if the "appropriate reference group" is defined narrowly enough. The majority's reasoning creates an irreconcilable conflict with this Court's precedents.

4. The decision below also implicates a conflict among the federal courts of appeals on a separate question: whether regulations that distinguish between on- and off-premises signs are content-based. The tax here is limited to signs that "direct[] attention to a business, commodity, service, event, or other activity" that is "sold, offered, or conducted somewhere other than on the premises on which the display is made." Baltimore City Code Art. 28, § 29-1(d) (2020). This Court recently granted certiorari to decide whether such on- and off-premises distinctions are content-based and thus subject to strict scrutiny. See *City of Austin* v. *Reagan National Advertising of Texas,* No. 20-1029 (cert. granted June 28, 2021). While the majority below concluded that Baltimore's tax was content-neutral, App., *infra*, 33a-35a, the Court need not address

the question in order to resolve the ultimate question presented here. Regardless of the outcome in *City of Austin*, Baltimore's tax should be subject to strict scrutiny because it targets a protected speech platform.*

What is more, the on-premises/off-premises distinction here is even more problematic than the one at issue in *City of Austin*. The distinction here is used as a vehicle for imposing a *tax*, not for sign zoning or regulation, and Baltimore has expressly disclaimed advancing any governmental interest other than fundraising. As the Court explained in *Minneapolis Star*, targeted taxation gives the government a particularly "powerful weapon against the taxpayer selected," which can "operate as effectively as a censor to check critical comments." 460 U.S. at 585. Indeed, the Framers viewed "singling out the press for taxation as a means for abridging the freedom of the press" for precisely that reason. *Id.* at 585 n.7. The decision below rejects that general understanding and is an affront to this Court's First Amendment jurisprudence, which recognizes the significant risks imposed by differential taxation.

* * * * *

By taking a cramped view of who and what may count as the "press," the decision below departs sharply from the decisions of this Court and of lower courts. The conflict created by the decision reflects the more general and widespread confusion among lower courts on how to apply this Court's relevant First Amendment jurisprudence. The Court should grant review to clarify that a tax that singles out certain billboards and burdens a small number

* Should the Court choose not to grant the petition outright, petitioner respectfully requests that the Court hold the petition pending its decision in *City of Austin*.

of billboard operators is subject to heightened scrutiny under the First Amendment.

B. The Question Presented Is Important And Warrants Review In This Case

The question presented in this case is undeniably important and has far-reaching implications. The decision below guts the First Amendment's protections for billboard operators and other discrete groups of publishers, and it places non-traditional forums for speech in jeopardy. That decision is especially troubling because it comes at a time when municipalities face ongoing budget deficits and when the political environment is growing increasingly intolerant of free speech. Those realities significantly increase the substantial risk that governments will censor and chill expression, particularly of unpopular speech, under the guise of raising revenue. The Court should grant review to address the Maryland Court of Appeals' grave misunderstanding of this Court's precedents and to resolve the lower courts' confusion on the scope of the First Amendment's protections for billboards and other non-traditional speech platforms.

1. This case concerns a dangerous tax: one that singles out a specific speech platform and a small group of speakers. As technological innovation spawns ever more varied speech platforms, the decision below opens the door to targeted taxation of those platforms and other non-traditional speakers. Americans increasingly consume information through non-traditional media. In particular, individuals and small organizations play an ever more prominent role in disseminating news and other protected speech through social media. In 2020, over half of American adults reported consuming news "often" or "sometimes" from social media. See Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in*

2020, Pew Research Center (Jan. 12, 2021) <tinyurl.com/socialmedianews2020>. Indeed, among young Americans, social media is the most popular news platform, beating out print, television, radio, and broadcast media. See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, Pew Research Center (Dec. 10, 2018) <tinyurl.com/newssources2018>. Like billboards, social media and other alternative publishing platforms actively expand the marketplace of ideas without the barriers to access associated with more traditional media.

Non-traditional platforms will continue to be a key component of how Americans learn about events and issues in the news, especially given that technological advances already have enabled "virtually anyone in this country [to] publish virtually anything for immediate consumption virtually anywhere in the world." *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting from denial of certiorari) (internal citations omitted). The Court has consistently recognized that the press includes "every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452. As Chief Justice Burger explained, "[i]t is not strange that 'press,' the word for what was [at the Framing] the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 800 n.5 (1978) (concurring opinion); see David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013 Cato S. Ct. Rev. 15, 30-34. That principle is especially important now as the lower courts navigate the contours of free-speech protections for new media. The Maryland Court of Appeals' unjustifiably narrow interpretation of the "press" cabins the First Amendment and deprives non-traditional publishers of the protection

from government censorship rightfully afforded under the Constitution.

2. The Court should address the question presented now. That question is particularly significant because it arises at a time when municipalities are in sore need of revenue. See, *e.g.*, *Lamar*, 114 N.E.3d at 820 (describing excise tax on off-premises billboards as part of the "solution" to make up a projected budget shortfall of $2.5 million). That need for revenue, combined with an increasing hostility toward free-speech principles, creates a heightened risk of state censorship and chilled expression. Because of their lower barriers to entry, billboards and new-media platforms provide unique opportunities for sharing unpopular or provocative messages outside the mainstream. Those speech platforms thus play an important role in expanding the marketplace of ideas.

The decision below will permit municipalities to impose, at little political cost, crippling financial burdens on such speech platforms. Indeed, if such taxes are permitted under the First Amendment, there is no obvious limit on the amount of the tax that could be imposed. Municipalities could raise the tax levels to rates that would make it untenable to publish any speech at all. The decision places billboard operators and other non-traditional media that disseminate highly visible (and at times politically unpopular) speech at a significant risk of censorship. If allowed to stand, the erroneous reasoning of the majority below will jeopardize free-speech rights for all non-traditional forums.

3. This case is an ideal vehicle for resolving the question presented. At every stage of the proceedings below, the question presented was briefed by both parties and squarely addressed by each court. And there is no dispute that if strict scrutiny applies, respondent's lone rationale of raising revenue does not survive it.

* * * * *

The Court's guidance on the question presented is sorely needed. The decision below conflicts with decisions of the federal courts of appeals and state courts of last resort, and there is no reason to think the conflict will be resolved without this Court's intervention. What is more, the decision below is seriously flawed and guts the First Amendment's protections for non-traditional speech platforms. And if the decision is allowed to stand, there is a significant risk that governments will use laws targeting particular speech platforms and speakers as a means of raising revenue while censoring unpopular content. The Court should grant review to make clear that the First Amendment does not tolerate such laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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