APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS
OF MARYLAND

No. 9

September Term, 2020

24-C-18-001778

CLEAR CHANNEL OUTDOOR, INC.

v.

DIRECTOR, DEPARTMENT OF FINANCE OF
BALTIMORE CITY

Filed: March 15, 2021

Barbera, C.J.,
McDonald
Watts
Hotten
Getty
Booth
Biran,

JJ.

Opinion by McDonald, J.
Getty, J., dissents.

OPINION

The power to tax is a necessary and essential power of government. Freedom of speech is a necessary and essential element of a democracy. Under the constitutional provisions that protect freedom of speech and of the press, differential taxation of those who operate platforms for speech is "constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."[1] Those constitutional provisions require "heightened scrutiny" of tax laws that "single out the press," that "target a small group of speakers," or that "discriminate on the basis of the content of taxpayer speech."[2] This case requires us to apply that test to a local tax on billboard operators.

A Baltimore City ordinance imposes a tax on the privilege of selling advertising on billboards that are not located on the premises where the goods or services being advertised are offered or sold. Petitioner Clear Channel Outdoor, Inc. ("Clear Channel"), which is in the business of selling advertising on its billboards in the City, sought a refund from the Respondent City Director of Finance of the taxes that it has paid pursuant to that ordinance. Clear Channel asserted that the ordinance is unconstitutional because a tax related to the sale of advertising on its

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[1] *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

[2] *Leathers*, 449 U.S. at 447.

billboards cannot survive the heightened scrutiny that is applied under the constitutional provisions that protect freedom of speech and of the press. The City denied the request for a refund and Clear Channel initiated this litigation by pursuing an administrative appeal of that decision in the Maryland Tax Court.

The Tax Court was not persuaded by Clear Channel's constitutional arguments and upheld the City's rejection of the refund request. On judicial review of the Tax Court decision, the Circuit Court for Baltimore City and the Court of Special Appeals reached the same conclusion. So do we.

I. BACKGROUND

A. Baltimore City Enacts a Billboard Tax

1. The Ordinance

In June 2013, the Baltimore City Council enacted an ordinance that imposed an excise tax "on the privilege of exhibiting outdoor advertising displays in the City." Ordinance 13-139 (June 20, 2013), *codified as amended at* Baltimore City Code, Article 28 (Taxes), §29-1 *et seq.* (2020) ("the Ordinance").[3] The Ordinance defined an "outdoor advertising display" as:

> [A]n outdoor display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and (ii) sold, offered, or conducted on the premises only incidentally if at all.

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[3] Unless otherwise indicated, statutory references are to sections of Article 28 of the Baltimore City Code.

§29-1(d). The signs containing such displays are commonly referred to as billboards. However, as the definition indicates, the Ordinance does not encompass a sign that advertises a business or other activity on the premises where the sign is located—*i.e.*, the Ordinance applies only to off-site billboards.

The Ordinance levies the tax on the "advertising host"—defined as a person who owns or controls the billboard and charges for its use as an outdoor advertising display. §§ 29-1(b), 29-3.[4] The tax is assessed annually based on the size and type of display: $15 per square foot for an electronic display that changes images more than once a day[5] and $5 per square foot for any other display. §29-3. The tax does not depend on the number of ads, the duration of an ad, or the subject matter of an ad. The advertiser who purchases an ad to be displayed on a billboard is not taxed under the Ordinance.

According to the City, the sole purpose of the Ordinance is to generate revenue. At the time of its passage, the City's Bureau of Budget and Management Research estimated that the Ordinance would generate $1 million in tax revenue for the 2014 fiscal year and $1.7 million for each fiscal year thereafter. *See* Memorandum from the Bureau of Budget & Management Research to the President and Members of the Baltimore City Council (April 25, 2013), available at https://perma.cc/J7T9-KH6T.

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[4] While individuals and various types of entities are included in the definition of "person" in the ordinance, governmental entities are excluded. §29-1(e).

[5] A digital billboard may change images frequently during a day and thus serve multiple advertisers in the same location during that day. A different City law limits the frequency of the alteration of images on a digital billboard. Baltimore City Code, Article 32 (Zoning), §17-407(c).

The Ordinance is part of the City's *Change to Grow* Ten-Year Financial Plan and, according to the Bureau, was "included in the plan to help protect arts and culture funding from further cuts." *Id.*

2. Billboards in Baltimore City

It is undisputed that the Ordinance affects 760 signs operated by four entities, including Clear Channel. It also appears to be undisputed that Clear Channel owns the vast majority of the affected billboards, which account for approximately 90% of the tax revenue generated by the Ordinance. The highly concentrated billboard market in the City may be due, at least in part, to the fact that the City banned the construction of new billboards in March 2000.[6]

While Clear Channel primarily displays content supplied by third parties who pay for the use of its billboards, it also occasionally displays its own content. Although the billboards are largely devoted to commercial advertising, like other advertising platforms, some of the billboards also on occasion carry messages concerning sports and breaking news, as well as political messages and public service announcements, sometimes without charge. Like other advertising platforms, Clear Channel decides what it will allow to appear on its billboards as it allocates the limited space available. Testimony and exhibits presented in the Tax Court

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[6] *See* Baltimore City Code, Article 32 (Zoning), §17-406(a)(1) (2020) ("Except as otherwise specifically provided in this Code, the erection, conversion, placement, or construction of new billboards, static or digital, is prohibited"); Jamie Stiehm, *O'Malley Signs His First Bill into Law, Prohibits Construction of Billboards; Industry Has Threatened to Challenge Law in Court*, The Baltimore Sun (Mar. 28, 2000), available at https://perma.cc/F8PB-3KYG.

hearing touched upon the editorial discretion exercised by Clear Channel. Clear Channel prohibits some messages outright, such as those related to sexually-oriented businesses and those it deems factually inaccurate. According to Clear Channel, it vets political messages for factual accuracy and ensures that no side of a political issue or electoral race receives favorable pricing.

B. Clear Channel Challenges the Tax

Shortly after the City enacted the Ordinance, Clear Channel sought to have it struck down as unconstitutional. An initial foray in federal court failed on jurisdictional grounds. Clear Channel then pursued a refund of taxes paid to the City under the Ordinance, citing the same constitutional grounds. That effort resulted in litigation in State courts, including this appeal.

1. Federal Declaratory Judgment Action Fails for Lack of Jurisdiction

In August 2013, Clear Channel brought an action challenging the Ordinance in federal court, arguing that the Ordinance impermissibly regulated commercial speech in violation of the First and Fourteenth Amendments of the United States Constitution. The City responded that, because the Ordinance imposes a tax, the Tax Injunction Act deprived the federal court of subject matter jurisdiction.[7] In December 2015, the federal district court agreed and granted summary judgment in favor of the City. *Clear Channel Outdoor, Inc. v. Mayor*

[7] The Tax Injunction Act prohibits federal district courts from enjoining, suspending, or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341 (2020).

and City Council of Baltimore, 153 F. Supp. 3d 865, 875 (D. Md. 2015).

2. Clear Channel Pays Taxes and Requests a Refund

Following the federal court decision, Clear Channel paid the tax due under the Ordinance for the 2014 and 2015 fiscal years under protest. It requested a refund from the City, reiterating its argument that the tax is unconstitutional under the First and Fourteenth Amendments, and also invoking Article 40 of the Maryland Declaration of Rights. The City denied Clear Channel's refund request. It responded to Clear Channel's arguments, asserting that, because the Ordinance is a revenue-raising measure that satisfies rational basis review, it is constitutional. In July 2016, Clear Channel paid the tax due under the Ordinance for the 2016 fiscal year and again requested a refund—a request that was again rejected by the City.

3. Maryland Tax Court Affirms Denial of Refund

Clear Channel pursued an administrative appeal of the City's denial of its refund requests in the Maryland Tax Court. Again invoking the First Amendment and Article 40, Clear Channel argued in the Tax Court that messages on billboards are constitutionally protected speech. It asserted that the tax imposed by the Ordinance targets a limited number of speakers, thereby chilling speech, and that the burden that the Ordinance places on such speech is not narrowly tailored and outweighs any governmental interest that the Ordinance advances.

The Tax Court rejected Clear Channel's arguments. It noted the "strong presumption in favor of duly enacted taxation schemes." *Clear Channel Outdoor, Inc. v.*

Department of Finance of Baltimore City, Appeal No. 16-MI-BA-0571 (February 27, 2018), 2018 WL 1178952 at *2-3 (quoting *Leathers v. Medlock*, 499 U.S. 439, 451 (1991)). The Tax Court concluded that an excise tax imposed on the privilege of exhibiting outdoor advertising displays is "a tax on the privilege of continuing in business, not on exercising free speech." *Id.* Indeed, the Tax Court continued, Clear Channel's conduct as a billboard operator was insufficiently communicative for the First Amendment to come "into play," because Clear Channel "does not express or say anything; it only sells space to advertisers who say things." *Id.* The Tax Court concluded that the Ordinance does not "impose[] a burden on free speech" and is rationally related to the legitimate governmental purpose of raising revenue. *Id.*

The Tax Court also concluded that, although the burden of the tax falls only on Clear Channel and a few other billboard operators, the Ordinance does not target a limited number of speakers. According to the Tax Court, the criteria used to determine the amount of tax (size and type of billboard) did not raise a constitutional issue because those criteria are unrelated to the extent of circulation and apply to all off-premises billboards. *Id.* The Tax Court stated that there was a rational basis for classifying large and immobile billboards separately from other signs for tax purposes. *Id.* The Tax Court further noted that the tax applies to a small group of billboard operators at least in part because of "the City's long-standing zoning regulation controlling billboards and the concentrated marketplace in the City," not the Ordinance's structure. *Id.*

Based on this analysis, the Tax Court affirmed the City's denial of Clear Channel's refund requests.

4. Judicial Review of the Tax Court Decision

Clear Channel sought judicial review of the Tax Court's decision in the Circuit Court for Baltimore City. That court affirmed the Tax Court's decision, reiterating much of the Tax Court's analysis and concluding that the decision was legally correct and supported by substantial evidence. *Clear Channel Outdoor, Inc. v. Department of Finance of Baltimore City*, Case No. 24-C-18-001778 (October 24, 2018), 2018 WL 7890750. Clear Channel then appealed to the Court of Special Appeals, which also affirmed the Tax Court in a reported decision. *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, 244 Md. App. 304 (2020). Clear Channel then filed a petition for a writ of *certiorari*, which we granted.

II. DISCUSSION

Clear Channel asks us to reverse the decisions of the courts below and ultimately that of the Tax Court. It argues that the Ordinance violates the constitutional provisions that protect freedom of speech. It contends that a tax on a billboard advertising business is subject to "heightened scrutiny" under those constitutional provisions and that the Ordinance improperly targets a small group of speakers—billboard operators—in levying the tax.

A. Standard of Appellate Review

The Tax Court is an administrative agency, and its decisions are reviewed under the same appellate standards generally applied to agency decisions under the Maryland Administrative Procedure Act. Maryland Code, Tax-General Article, §13-532(a)(1). In an appeal from judicial review of an agency decision, we directly review the agency's decision rather than the decision of a circuit

court or of the Court of Special Appeals. *Office of People's Counsel v. Public Service Commission*, 461 Md. 380, 391 (2018). Accordingly, we review directly the Tax Court's decision and apply the same standard of review as those courts did.

When the Tax Court interprets Maryland tax law, we accord that agency a degree of deference as the agency that administers and interprets those statutes. *Comptroller v. Wynne*, 431 Md. 147, 160-61 (2013). In this case, the Tax Court decision turned on application and analysis of the First Amendment of the federal Constitution as well as Article 40 of the Maryland Declaration of Rights. Because our review concerns issues of constitutional law, we do not defer to the agency's determination of those issues. *Wynne v. Comptroller*, 469 Md. 62, 80 (2020).

B. Governing Principles under the State and Federal Constitutions

1. The First Amendment and Article 40

The First Amendment to the federal Constitution is made applicable to the states by the Fourteenth Amendment and, in relevant part, enjoins the enactment of laws "abridging the freedom of speech, or of the press." Its Maryland counterpart, Article 40 of the Maryland Declaration of Rights, provides "[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." Although the two constitutional provisions are worded differently and this Court has sometimes held out the possibility that Article 40 could be construed differently from the First Amendment in some circumstances, the Court has

generally regarded the protections afforded by Article 40 as "coextensive" with those under the First Amendment. *Newell v. Runnels*, 407 Md. 578, 608 (2009); *State v. Brookins*, 380 Md. 345, 350 n.2 (2004). Neither party has suggested that the circumstances of this case provide a reason for departing from that general rule, and we see none. Accordingly, our analysis of Clear Channel's contentions under the First Amendment applies equally to the same issues under Article 40. For convenience, we will refer solely to the First Amendment in discussing the applicable standards in this opinion, but that discussion also encompasses the application of Article 40.

2. Standard for Review of Legislation under the First Amendment

In its decision in this case, the Tax Court considered whether it should apply strict scrutiny, also called "heightened scrutiny," or rational basis scrutiny to the Ordinance, and concluded that rational basis was the appropriate test. The heightened scrutiny standard is well established in the case law for situations in which legislation infringes First Amendment rights. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 362 (1976). The source of a rational basis test in these circumstances is less clear as the judiciary does not have a freestanding general charge to review all legislation for rationality. A rational basis test does apply when a party challenges a classification in legislation under the Equal Protection Clause in circumstances where neither a fundamental right nor a suspect classification is involved. *Regan v. Taxation with Representation*, 461 U.S. 540, 546-51 (1983). Many cases involving challenges to legislation under the First Amendment have also relied on the Equal Protection Clause, and the courts have applied a rational basis test after concluding that the heightened scrutiny test under

the First Amendment was not applicable. *Id.*; *see also Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 n.3 (1987) (noting that a publication's "First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause"). Although Clear Channel has not explicitly invoked the Equal Protection Clause in its complaint in this case, it is at least implicit in its argument that a tax triggered by the sale of advertising on off-site billboards treats it unequally. Thus, it was not inappropriate for the Tax Court to conclude that it should apply a rational basis test if heightened scrutiny under the First Amendment did not pertain to the matter at hand.[8]

In any event, there does not appear to be any dispute that, if a rational basis test is applied, the Ordinance passes that test as a revenue raising measure that is clearly within the taxing authority of the City. Thus, the resolution of this case depends on whether the First Amendment's heightened scrutiny standard is to be applied here and, if so, whether the Ordinance survives that scrutiny.

3. Billboards and Speech

There is no dispute that billboards are a platform for speech and that the text or images that appear on billboards are entitled to some First Amendment protection. *Metromedia, Inc. v. City of San Diego*, 453

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[8] Clear Channel has contended, without much elaboration, that, if heightened scrutiny does not apply, an intermediate scrutiny test should be applied. However, none of the cases concerning the taxation of speech platforms on which it relies applies such a test and, for the reasons stated later in this opinion, the cases it cites involving intermediate scrutiny do not apply in the circumstances of this case. *See* footnote 16 below.

U.S. 490, 501 (1981) (plurality opinion) ("Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages"); *Donnelly Advertising Corp. of Maryland v. City of Baltimore*, 279 Md. 660, 667 (1977) (ads on billboards are "entitled to some protection by the First Amendment, whether they be of a commercial, political, or charitable nature"). However, it is also true that billboards "combine communicative and noncommunicative aspects," the latter of which "the government has legitimate interest in controlling." *Metromedia*, 453 U.S. at 502. Because the regulation—or taxation—of the noncommunicative aspects of a medium may "impinge to some degree on the communicative aspects," it has fallen to the courts to reconcile the exercise of those governmental powers with the protection provided by the First Amendment. *Id.*

4. Taxation and the First Amendment

a. Supreme Court Case Law

Taxation is, of course, essential to the support of government—a certainty sometimes equated to mortality.[9] Unsurprisingly, perhaps, the Supreme Court has reiterated that, even in the context of the First Amendment, there is a strong presumption in favor of the validity of tax legislation. *Leathers v. Medlock*, 499 U.S. 439, 451 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 547-48 (1983). Nevertheless, the choices that a legislature makes in devising a tax scheme may be a means of penalizing or discouraging speech and thereby violate the First Amendment. The Supreme Court has

[9] Benjamin Franklin is said to have coined the phrase "Nothing is certain except death and taxes." National Constitution Center, *Benjamin Franklin's last great quote and the Constitution* (November 13, 2019).

grappled in a series of cases with defining when a taxation scheme involving public media may infringe First Amendment rights. *See Leathers, supra.*; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Grosjean

In *Grosjean,* Louisiana imposed a 2% gross receipts tax on the sale of advertising in newspapers, magazines and other publications with a circulation of more than 20,000 copies per week. 297 U.S. at 240. Only 13 of the 137 newspapers circulating in Louisiana at that time were subject to the tax. *Id.* at 241. The publishers of the newspapers subject to the tax brought an action to enjoin it, invoking the First Amendment.

In discerning the purpose of the First Amendment, the Supreme Court recounted a brief history of British taxes on newspapers that were effectively "taxes on knowledge" and that acted as a prior restraint on the free press, which the Court lauded as "one of the great interpreters between the government and the people." *Id.* at 246-50. The Court observed that the opposition to such laws was not so much an effort to avoid taxation as to "preserve the right of the English people to full information in respect of the doings and misdoings of their government." *Id.* at 247. On the other hand, the Court stated that the concern that a particular tax might be motivated to suppress criticism did not relieve newspapers from "ordinary forms of taxation for support of the government." *Id.* at 250.

In the case before it, the Court found the Louisiana tax to be "suspicious" as the tax was measured, not by the

volume of advertising, but solely by the extent of the newspaper's circulation, with the "plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251. Although not explicitly mentioned in the Court's opinion, it was apparently well known at the time that the proponents of the measure had a retaliatory motive similar to that underlying the English tax legislation described in the Court's opinion as part of the Framers' inspiration for the First Amendment.[10]

Minneapolis Star

The *Minneapolis Star* decision concerned certain amendments to the Minnesota sales and use taxes. Prior to the amendments, periodic publications such as newspapers had been exempt from those taxes. 460 U.S. at 577. As a result of the amendments, the newspapers remained exempt from the sales tax, but ink and paper used in the publications were made subject to the use tax; a provision exempted the first $100,000 of those items consumed by a publication. *Id.* at 577-78. The end result was that only a small fraction of the newspapers circulating in Minnesota—14 of 388 newspapers—were subject to the use tax and one publisher accounted for two-thirds of the revenues from the tax. *Id.* at 578-79.

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[10] *See City of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 284-85 (1958) (noting that the tax under review in *Grosjean* was supported by Senator Huey Long as a form of retaliation against publications that had opposed his political agenda); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (quoting a circular distributed by the Louisiana governor and Senator Long characterizing the publications subject to the tax as "lying newspapers" and the Louisiana tax as a "tax on lying"); *see also* Edward J. Gerald, The Press and the Constitution 1931-1947 at 100-01 (1948).

The Supreme Court found that, although newspapers are appropriately subject to general economic regulation, including taxes, this application of the Minnesota sales and use taxes singled out the press for special treatment. 460 U.S. at 582. The Court observed that the use tax on paper and ink did not serve the normal function of a use tax—offsetting the incentive a sales tax creates for purchasing taxable items out-of-state—because the Minnesota tax applied to items (ink and paper) that were exempt from the sales tax. *Id.* at 582. In addition, and contrary to the "ordinary rule" in Minnesota that only the ultimate retail sale and not intermediate transactions were taxed, this use tax applied to intermediate components even though they would ultimately become part of a publication sold at retail. *Id.* Moreover, the tax not only singled out the press, but targeted a small subset of the press—those using paper and ink costing in excess of $100,000. The Court rejected Minnesota's justification for this disparity—that it was favoring smaller businesses—because the state's tax "resemble[d] more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." *Id.* at 592. The Court stated that, even if the legislature had no "illicit" intent, "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." *Id.* at 592-93.

Arkansas Writers' Project

The *Arkansas Writers' Project* decision concerned application of a gross receipts tax on the sale of tangible personal property in Arkansas. There were numerous exemptions from the tax, including for: "[g]ross receipts or gross proceeds derived from the sale of newspapers" and "religious, professional, trade and sports journals

and/or publications printed and published within this State . . . when sold through regular subscriptions." 481 U.S. at 224. The Court struck down the tax on two grounds. First, as with the sales and use tax in *Minneapolis Star*, the exemptions from the Arkansas tax meant that the tax effectively targeted a small group of speakers—those magazines not encompassed in the exemptions. *Id.* at 229. Second, the tax discriminated based on content of a taxpayer's speech because application of the magazine exemption depended on a review of the subject matter of the publication. *Id.* As to the latter rationale, the Court stated that it did not matter that the tax was based on the general subject matter of the publication, as opposed to the expression of a particular viewpoint on that subject matter. *Id.* at 230.

Leathers

In the *Leathers* decision, the Supreme Court reprised its prior discussions of the First Amendment in the context of tax laws affecting the media, but distinguished the operation of the tax in question from those that the Court had found to violate the First Amendment in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*.

The *Leathers* case arose from an amendment that extended an Arkansas sales tax on sales of personal property and specified services to include the services of cable television operators. Sales of newspapers and magazines remained exempt from the tax, and the amendment did not extend the tax to satellite broadcast television services. 499 U.S. at 441-43. The tax was challenged as violative of the First Amendment. The Court thus addressed the question "whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media." *Id.* at 444.

The Court summarized the principles it distilled from its prior decisions:

> [D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

499 U.S. at 447 (citations omitted).[11] The Court also stressed that the inevitable classifications and distinctions made by legislatures in designing a tax statute are entitled to a strong presumption of constitutionality. *Id.* at 451-52.

As to the case before it, the Court observed that the Arkansas tax was generally applicable and did not single out the press; nor was it structured so as to raise suspicions that it was intended to interfere with a cable operator's First Amendment activities. 449 U.S. at 447-48. In contrast to the operation of the tax and exemption in

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[11] Although the *Leathers* opinion referred to the standard of review in such cases with the phrase "heightened scrutiny," the Supreme Court later indicated that the standard was equivalent to that meant by the more familiar phrase "strict scrutiny." *See Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 661 (1994).

Arkansas Writers' Project—which effectively targeted a small group of magazines for the tax and exempted others—the tax at issue in *Leathers* applied uniformly to all cable systems in the state. *Id.* Finally, the Supreme Court concluded that the tax did not discriminate on the basis of the content of taxpayer speech. *Id.* at 449. The Court stressed that the underlying concern of the First Amendment is the potential for censorship of ideas. Thus, "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id*. at 453.[12]

b. Maryland Case Law

This Court has considered the constraints that the free speech provisions of the State and federal constitutions place on taxation of media on two occasions. Prior to most of the Supreme Court cases described in the previous section of this opinion, this Court considered a challenge to a Baltimore City ordinance that imposed a sales tax on the sale of advertising in various media, including billboards. *City of Baltimore v. A.S. Abell Co*., 218 Md. 273 (1958). Several decades later, following all of the Supreme Court decisions described above, this Court applied the principles set forth in those cases to decide whether the exclusion of an advertising circular from the

[12] In the Arkansas state courts, the cable television operators had also contended that the tax, which did not apply to satellite television services, violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court left it to the Arkansas Supreme Court to address that issue on remand. 499 U.S. at 453. The state supreme court later held that the different treatment accorded to cable television and satellite television operators under the Arkansas law satisfied the rational basis test and did not violate the Equal Protection Clause. *Medlock v. Leathers*, 842 S.W.2d 428, 431 (Ark. 1992).

"newspaper exemption" to the State sales tax violated the First Amendment. *Maryland Pennysaver Group, Inc. v. Comptroller*, 323 Md. 697 (1991).

A.S. Abell Co.

In *A.S. Abell Co.*, two Baltimore City ordinances imposed a tax on the gross sales of advertising space and time in newspapers, radio and television broadcasts, and billboards. 218 Md. at 278. A regulation under those ordinances exempted most broadcast advertising from the tax—which this Court noted as a possible indication of "discrimination in a constitutional sense against the newspapers." *Id.* at 280. The Court engaged in an extended discussion of the *Grosjean* decision, the leading Supreme Court precedent at that time. Applying that decision to the situation before it, the Court observed that the Baltimore City tax was imposed on only a segment of the advertising industry—primarily newspapers and broadcasters—and "singled out" entities subject to the protection of the First Amendment. *Id.* at 287-88. The Court held that such a tax violated the free speech rights of the newspapers and broadcasters and effected just as serious a restraint upon First Amendment rights as one with an ulterior retaliatory motive, as apparently had been the case with the tax in *Grosjean*. *Id.* at 289.

The Court did not classify billboards as equivalent to newspapers and broadcast media and did not reach the question whether a tax on billboard advertising revenue would violate the First Amendment. It assumed, without deciding, that the tax was constitutional as it related to billboard operators. *Id.* at 289. However, the Court concluded that the City would not have adopted the tax if the tax had applied only to billboard advertising and that therefore the provision concerning billboards was not

severable. *Id.* at 289-90.[13] Accordingly, the Court struck down the tax as it related to billboard advertising as well.

Maryland Pennysaver

Several decades later and a few months after the Supreme Court's decision in *Leathers*, this Court had occasion to apply that decision in *Maryland Pennysaver*. That case involved a publication printed on newsprint and referred to as an advertising circular or "pennysaver." The publication consisted largely of commercial ads purchased by businesses and classified ads purchased by individuals, but also included content labeled "Community News" consisting primarily of announcements of activities such as meetings, fundraisers and social events, as well as some columns on topics of local interest authored by public officials. 323 Md. at 699-700. The publisher sought to have the publication declared exempt from the State sales tax under a regulation known as the "newspaper exemption." Alternatively, the publisher argued that exclusion of the pennysaver from that exemption would violate the First Amendment. *Id.* at 701.

This Court first determined that the pennysaver did not fall within the newspaper exemption as a matter of statutory and regulatory construction. 323 Md. at 701-11. It then assessed the constitutional question by reviewing the four Supreme Court decisions outlined in the previous section of this opinion and quoting extensively from *Leathers*. In concluding that application of the sales tax to the pennysaver was constitutional, the Court noted that the sales tax was broad-based, that other publishers with

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[13] The Court made a similar assumption as to the constitutionality of the tax as it applied to out-of-state purchasers of advertising and came to a similar conclusion as to severability of that application of the tax.

advertising targeted to localities were subject to the tax, and that it was not inappropriate to treat the pennysaver differently from a newspaper in light of the pennysaver's "overwhelming commercial speech content." *Id.* at 714-15. It concluded that there was "no threat to the dissemination of ideas" in treating a pennysaver differently from a newspaper and that there was no infringement of First Amendment rights.[14] The Court also held that the exclusion of shopping advertisers from the definition of newspaper in the sales tax regulations was not unconstitutionally vague, at least as applied to the publication before the Court. *Id.* at 716-17.

c. Summary

We discern the following principles from the decisions of the Supreme Court and this Court outlined above:

- The potential for censorship or prior restraint by the government was the animating concern of the First Amendment, particularly with respect to "the press" as the interpreter of the activities of the government to its citizens and with respect to a law that was effectively a "tax on knowledge." However, to demonstrate infringement of First Amendment rights, it is not essential that a party show, or that a court find, that a legislature had an illicit intent in enacting a law that has such an effect. *Grosjean; Minneapolis Star; A.S. Abell Co.*
- Tax laws are presumed to be valid and constitutional, even in the context of a First

[14] Even if the law was considered a restriction on speech in the pennysaver, the Court held that the tax was not a "restriction of constitutional dimension." 323 Md. at 715.

Amendment challenge. The First Amendment does not exempt the press, or other speakers, from broad-based taxes. *Grosjean; Leathers*.

- A tax may not "single out the press" unless there is a compelling reason for doing so. *Grosjean; Minneapolis Star; Leathers*.
- A tax that targets a small group of speakers among the press is suspect, particularly when that small group is defined by the content of its publication, even if not by the expression of a particular viewpoint. *Grosjean; Minneapolis Star; Arkansas Writers' Project; Leathers*.
- Differential taxation of speakers is particularly suspect under the First Amendment when it discriminates on the basis of the content of speech and targets the expression of particular ideas or viewpoints. *Grosjean; Arkansas Writers' Project; Leathers.*

C. Whether the Ordinance Is Constitutional

Applying the principles outlined in the previous section of this opinion, we conclude that the First Amendment does not require heightened scrutiny of the Ordinance and that the Tax Court correctly concluded that the Ordinance is constitutional.

First, there is no dispute that the Ordinance is within the taxing power of the City,[15] was properly enacted by

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[15] The City has the "power to tax to the same extent as the State of Maryland has or could exercise said power within the limits of Baltimore City as a part of its general taxing power." Baltimore City Charter, Article II, §40; Maryland Constitution, Article XI-A; *see generally* Department of Legislative Services, Maryland Handbook Series, Vol. VI (Maryland Local Government) at 108 (2018) (taxing authority

the Mayor and City Council, and is entitled to the strong presumption of validity accorded to such enactments.

As this Court did in *Maryland Pennysaver*, we look to the framework provided by *Leathers*. *Leathers* makes clear that a tax on selected segments of the media, like the tax on billboards here, does not necessarily trigger heightened scrutiny[16] or violate the First Amendment. Instead, differential taxation triggers heightened scrutiny "when it threatens to suppress the expression of particular ideas or viewpoints." 499 U.S. at 447. The Tax

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of Baltimore City under State law established in Baltimore City Charter).

[16] Clear Channel argues that even if the Ordinance is not subject to strict scrutiny, it should be subject to intermediate scrutiny, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Turner* concerned a "must carry" regulation of the Federal Communications Commission ("FCC") that required cable television systems to devote a portion of their channels to local broadcast television stations. In upholding the regulation, the Supreme Court applied an intermediate scrutiny test rather than heightened or strict scrutiny. Although the FCC regulation was content-neutral, it directly concerned what speech would appear on the cable stations, unlike the excise tax at issue in this case.

Likewise, the intermediate scrutiny applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) has no application here. *Central Hudson* concerned a state regulation that directly regulated commercial speech—it prohibited advertising by utilities that promoted the use of electricity. Accordingly, the four-part test created by that decision was addressed to how a regulation restricts content.

Even if an intermediate standard were to be applied, the Ordinance would satisfy that standard. *Cf. Donnelly Advertising Corp. of Maryland v. City of Baltimore*, 279 Md. 660, 668-70 (1977) (applying intermediate scrutiny and rational basis tests in holding that ordinance requiring removal of all off-premises signs in urban renewal district did not violate First or Fourteenth Amendments).

Court made no finding of a retaliatory motive or potential for censorship such as that which inspired the tax law in *Grosjean* and the record would not support such a finding, if one had been made.[17] There is no evidence that the Ordinance, in intent or effect, is designed to censor or exert a prior restraint on the press. Nothing in the legislative history of the Ordinance suggests such an intent and, as outlined below, the tax imposed by the Ordinance has no relation to the content of the ads that might be displayed on Clear Channel's billboards. The Ordinance does not regulate the size of a billboard, where it can be located, what it can say or who can say whatever it says.

In the absence of a finding that the Ordinance was designed to suppress the expression of ideas or viewpoints, we consider the criteria identified in *Leathers* that may require heightened scrutiny: (1) whether the Ordinance "singles out the press"; (2) whether it "targets a small group of speakers"; and (3) whether it "discriminates on the basis of the content of taxpayer speech." 499 U.S. at 447. Although Clear Channel primarily focused on the second *Leathers* criterion in the Tax Court and in its petition for *certiorari* in this case,[18] it

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[17] Clear Channel suggests that an owner of a site leased for a billboard may be wary of messages critical of local officials and that, some years ago, City officials might have been unhappy about a billboard advertisement purchased by a public employees' union that was critical of the City government at that time. Neither conjecture was linked to the Ordinance.

[18] In its petition for a writ of *certiorari*, Clear Channel posed the following two questions:

> 1 - Is the operation of billboards protected by the First Amendment, thereby subjecting its taxation to heightened scrutiny?

has asserted in brief and argument that all three apply. Accordingly, we shall address all three.

1. Whether the Ordinance Singles Out the Press

Although Clear Channel does not primarily urge a heightened scrutiny standard based on a theory that the Ordinance singles out the press, it does assert that off-site billboards are part of "the press." This seems a bit of a stretch. The First Amendment decisions invalidating taxes on which Clear Channel relies—*Grosjean, Minneapolis Star, Arkansas Writers' Project,* and *A.S. Abell Co.*—all singled out newspapers, broadcasters, magazines, and other topical periodicals for special treatment—the sort of media that, in the words of the *Grosjean* decision, act as "interpreters of the government" to its citizens and that report on the "doings and misdoings" of government.

Nevertheless, as methods of expression change, the First Amendment principles that protect speech adapt. For example, the Supreme Court noted that, upon the rise of cable television during the latter half of the 20th century, a cable television operator "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 494 (1986). As a result, a cable television operator is thus "engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers*, 499 U.S. at 444.[19] Billboards have long displayed messages

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2 - Does the Tax single out a single platform for speech or a small group of speakers, thereby subjecting it to heightened scrutiny?

[19] This Court has similarly recognized that freedom of the press is not necessarily limited to traditional media when the communication

other than commercial advertising and the development of digital billboards creates the opportunity for a single billboard to display a greater number and variety of messages.

Even so, the billboards subject to the Ordinance are more akin to the advertising circular in *Maryland Pennysaver* which, although it devoted some space to editorial content, was primarily a medium for advertising. While Clear Channel exercises some discretion in deciding how to allocate the scarce space on its billboards to its best advantage, it does not claim to be a newsgathering organization that curates what it disseminates according to journalistic principles. It is more accurately described as a commercial advertising vehicle that dabbles in non-commercial content, paid and unpaid.

The fact that a billboard may function on occasion or in some measure like the traditional "press" does not make it equivalent to a newspaper or broadcaster for purposes of the First Amendment. Unlike traditional media that fall within the rubric of "the press," billboards could be limited or banned entirely—as Baltimore City has done prospectively—under the land use laws for esthetic and safety reasons without offending the First Amendment.[20] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512, 541, 559-61, 570 (1981); *Major Media of*

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involves "such free and general discussion of public matters as seems essential to prepare people for an intelligent exercise of their rights as citizens." *Howard Sports Daily v. Weller*, 179 Md. 355, 361 (1941).

[20] A billboard operator may be of two minds about this. While such regulation could portend the demise of the operator's business, it also—as in the case of Clear Channel's Baltimore City billboard business—erects a barrier to entry that fortifies the market power of a dominant incumbent operator.

the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986).

Clear Channel's billboards thus may qualify as a medium that in some small aspect functions similarly to what is traditionally referred to as "the press." However, even from that perspective, the Ordinance can hardly be said to "single out" the press. A tax 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." *Leathers*, 499 U.S. at 448. The tax in *Grosjean* singled out widely circulated newspapers and had the "direct tendency" to "restrict circulation." 297 U.S. at 244-45. The Supreme Court found this effect similar to the early English "taxes on knowledge" that curtailed the circulation of newspapers and thus "the opportunity for, the acquisition of knowledge by the people in respect of . . . the doings or misdoings of their government" that the framers of the First Amendment had in mind. *Id.* at 247. The key in *Grosjean* was not simply that the tax was assessed on an element of the press, but that it singled out those that most acted as government watchdogs. Similarly, the tax in *Minneapolis Star* "single[d] out the press for a different method of taxation" under the otherwise broad-based use tax by taxing components of newspaper production (ink and paper) for the largest newspapers in the state and thus had the effect of "a penalty for a few of the largest newspapers." 460 U.S. at 578.

By contrast, the Ordinance in this case taxes all operators of off-site billboards in the City who sell advertising on those billboards and has no direct or indirect effect on the extent of the circulation of billboards. The fact that it applies only to billboards,

without more, is insufficient to deem it a tax that "singles out" the press. As in *Leathers,* there is no indication that the City has taxed billboard operators to interfere with First Amendment activities or that the tax is structured to raise suspicion that it was intended to do so.

2. Whether the Ordinance Targets a Small Group of Speakers

To determine whether the Ordinance targets a small group of speakers, one must first decide how to define the appropriate reference group. "Small," of course, is a word of comparison. If the relevant universe is defined as all entities subject to a tax, then the tax is universal. If the relevant reference group is defined to include many besides those subject to the tax, then the taxed group is by comparison "small."

Unsurprisingly, the parties choose different reference groups to assess this question. Clear Channel argues that the Ordinance targets a small group of speakers because it applies to 760 billboards controlled by four entities, but not the many other outdoor commercial signs in the City or the many other businesses in the City. The City limits its comparison to off-site billboards.

It is instructive to consider the taxes in *Grosjean, Minneapolis Star*, and *Arkansas Writers' Project,* the groups of speakers affected by those taxes, and the benchmark group referenced in each of those cases by the Supreme Court. As indicated in *Leathers*, the design of the taxes in each of those cases affected a smaller group within a larger universe of similar members of the same media. The tax in *Grosjean* singled out higher circulation newspapers but left many more newspapers with lower circulation untaxed. The tax in *Minneapolis Star* fell on newspapers that consumed more paper and ink—which

presumably correlated to higher circulation—but left the many more newspapers that consumed less of those components untaxed. As the Court observed in *Leathers*, both of those taxes "selected a narrow group to bear fully the burden of the tax." 499 U.S. at 449. Similarly, the tax in *Arkansas Writers' Project* exempted newspapers and numerous categories of magazines and left only a few magazines subject to the tax, which "operated in much the same way as did the . . . exemption in *Minneapolis Star*." *Id.* at 446.

Given that the test is whether a law "targets" a small group of "speakers," implying that there are other speakers who are not targeted, the appropriate reference group should include similarly-situated members of the same medium. Thus, the principle drawn from these cases is that a tax 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.

It is over-inclusive to group off-premises billboards with all other commercial signs for purposes of this analysis. Billboards have characteristics as a medium that can warrant separate treatment from other signs. *See Metromedia*, 453 U.S. at 509 ("We [] hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."). Moreover, to hold that any tax on a particular form of media—or group of entities that could be characterized as "speakers"—automatically qualifies as targeting a small group of speakers would inject the First Amendment as a new uniformity requirement for tax

legislation that would encumber a legislature's legitimate and important ability to tax.[21]

The Ordinance applies to all off-site billboards in the City for which the operator charges customers for displaying the customer's advertising. It does not distinguish among billboards according to any other factor, such as the duration or extent of speech (*e.g.*, the circulation of a newspaper) or its subject matter. The fact that there are only four taxpayers affected by the Ordinance is due largely to market conditions, not the structure of the Ordinance. As noted above, the City banned the construction of new billboards 20 years ago, which has effectively barred new entrants from challenging Clear Channel's near monopoly of the medium.

In our view, the Ordinance does not trigger heightened scrutiny under the First Amendment by targeting a small group of speakers.

3. Whether the Ordinance Discriminates Based on Content

As noted earlier, the tax imposed by the Ordinance does not depend on what messages are displayed on a billboard, who a message is attributed to, or how long any particular message is displayed. Unlike the tax in

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[21] *See Herman v. Mayor and City Council of Baltimore*, 189 Md. 191, 197 (1947) ("The State . . . may impose different taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinction or to maintain a precise, scientific uniformity with respect to composition, use, or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government.").

Arkansas Writers' Project, even the general content of the message does not matter. What matters is whether Clear Channel charges the person or entity responsible for the message to display it on the billboard. If Clear Channel devoted a billboard entirely to its own message or to a message of someone else without charge, no tax would be levied under the Ordinance, regardless of the substance of the message. It is the commercial transaction, not the content of the message, that triggers the tax.

Clear Channel argues that the Ordinance discriminates on the basis of the content of taxpayer speech because it applies only to off-premises billboards, and one must read a billboard in order to determine whether it qualifies as an off-premises or on-premises sign. It cites the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), which held that content-based restrictions on speech in signs could manifest both in obvious ways, such as by relating to the subject matter of a sign, and in more subtle ways, such as by relating to a sign's function or purpose.

The decision in *Reed* did not hold that an on-premises/off-premises distinction—a common distinction made in the regulation of billboards—was a content-based regulation that would trigger heightened scrutiny under the First Amendment. The sign regulation at issue in *Reed* was content-based on its face for other reasons. 576 U.S. at 164. Notably, while all nine justices joined in the judgment in that case, there were four separate opinions filed in the case. Of the six justices who joined the primary opinion in the case, three also joined Justice Alito's concurrence, which listed types of sign regulation that are *not* content-based. Included on that list were sign regulations "distinguishing between on-premises and off-

premises signs." *Id.* at 174-75 (Alito, J., concurring). Justice Kagan's opinion, joined by two other justices, cautioned against an overly expansive definition of content-based sign regulation and, it seems safe to say, would likewise not find an on-premises/off-premises distinction in sign regulation to trigger strict scrutiny. *See id.* at 179-85 (Kagan, J., concurring).[22]

We join the many courts and commentators who have concluded that, even after the *Reed* decision, a distinction

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[22] As noted in the text, the *Reed* decision did not involve the regulation or taxation of off-premises billboards. Clear Channel primarily relies on a Sixth Circuit decision that extrapolated the holding in *Reed*. That case concerned a Tennessee sign law that prohibited signage within a certain distance of a public roadway, but exempted from that prohibition signs "located on the same premises as the activity or property advertised." *Thomas v. Bright*, 937 F.3d 721, 725 (6th Cir. 2019), *cert. denied*, 141 S.Ct. 194 (2020). The Sixth Circuit concluded that the Tennessee law was not content neutral because it required "Tennessee officials to assess the meaning and purpose of the sign's message in order to determine if the sign violated the Act." *Id.* at 730-33; *see also Reagan National Advertising v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), *petition for cert. filed,* No. 20-1029 (Jan. 28, 2021) (holding that sign code prohibiting digitization of off-premises signs was content-based).

The *Thomas* decision affirmed a similar holding in the federal district court that has been characterized as an "outlier" in terms of its assessment of *Reed* and the on-premises/off-premises distinction. Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1993 (2016). Moreover, the Sixth Circuit limited the breadth of its decision, noting that "[t]here might be many formulations of an on/off-premises distinction that are content-neutral, but the one before us is not one of them." *Thomas*, 937 F.3d at 733. The Tennessee law at issue directed officials to determine a sign's "purpose" and enumerated criteria to determine whether that purpose made it an on or off-premises sign. *Id.* at 725-26. The Ordinance in this case does not contain similar directions or criteria concerning the purpose or subject matter of a billboard.

between on-premises signs and off-premises signs in a regulatory or tax law does not discriminate on the basis of content and therefore does not trigger heightened scrutiny under the First Amendment. *See, e.g.*, *Adams Outdoor Advertising LP v. Pennsylvania Department of Transportation*, 930 F.3d 199, 207 n.1 (3d Cir. 2019) (noting that *Reed*'s concurring opinions by Justices Alito and Kagan, "which received a total of six votes, both indicated that on-premise sign regulations are content neutral" and that strict scrutiny would not apply to billboard regulation merely because they exempted on-premise signs); *Geft Outdoor LLC v. Consolidated City of Indianapolis & County of Marion*, 187 F.Supp.3d 1002, 1017 n.2 (S.D. Ind. 2016) (noting that "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content based and therefore do not trigger strict scrutiny"); *Citizens for Free Speech, LLC v. County of Alameda*, 114 F.Supp.3d 952, 968-71 (N.D. Cal. 2015) (noting that "onsite/offsite" distinctions are "content-neutral under the First Amendment's free speech clause," even after *Reed*); *see also* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1993 n.82 (2016) ("regulations distinguishing between on-premises and off-premises signs should probably be treated as content-neutral regulations of place as the very same sign is treated differently only because of the location in which it is placed"); S.L. Trevarthen & A.M. Hapner, *The True Impact of Reed v. Town of Gilbert on Sign Regulation*, 49 Stetson L. Rev. 509, 533-34 (2020) (concluding that local government may continue to regulate or prohibit off-premise billboards after *Reed*); *cf. Lone Star Security & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1200 (9th Cir. 2016) (holding that a city ordinance that distinguished between billboards that "advertise" and all others "refers

to the activity of displaying a message to the public, not to any particular content" and was constitutional under *Reed*).

4. Summary

An ordinance imposing a tax related to the sale of advertising on billboards is indisputably within the City's taxing power and, under First Amendment precedent, is entitled to a strong presumption of constitutionality. Differential taxation of media is subject to heightened scrutiny under the First Amendment when a tax suppresses or threatens to suppress particular ideas or viewpoints by (1) singling out the press, (2) targeting a small group of speakers, or (3) discriminating on the basis of the content of taxpayer speech. The Ordinance at issue in this case does not do so and thus is not subject to heightened scrutiny under the First Amendment.[23] The Ordinance clearly survives the application of a rational basis test and, accordingly, is constitutional.

III. CONCLUSION

For the reasons set forth above, we hold that the Ordinance does not violate the First Amendment to the federal Constitution or Article 40 of the Maryland Declaration of Rights. The Tax Court properly upheld the

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[23] Notably, the courts that have considered First Amendment challenges to excise taxes based on the sale of advertising on off-premises billboards have reached the same conclusion. *See Lamar Advantage GP Co., LLC v. City of Cincinnati*, 155 N.E.3d 245 (Ohio Ct. App. 2020), *appeal allowed*, 154 N.E.3d 98 (Oct. 13, 2020); *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa. Commw. Ct. 1995), *appeal denied*, 676 A.2d 1201 (May 30, 1996); *see also Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966 (Pa. Commw. Ct. 2005) (affirming denial of preliminary injunction in First Amendment challenge to billboard advertising excise tax on ground that challenger had not shown likelihood of success on the merits).

City's decision to deny Clear Channel's requests for tax refunds.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY THE PETITIONER.

GETTY, J., dissenting:

> [I]t is said, that a right to tax, in this case, implies a right to destroy; that it is impossible to draw the line of discrimination between a tax fairly laid for the purposes of revenue, and one imposed for the purpose of prohibition.
>
> Chief Justice John Marshall
>
> *McCulloch v. Maryland*, 17 U.S. 316, 376 (1819).

I respectfully dissent from the Majority's conclusion that Baltimore City's ("the City") excise tax ("the Ordinance") "on the privilege of exhibiting outdoor advertising displays in the city" must only satisfy the low threshold of rational basis review. Balt. City Code, art. 28 § 29-2; *see* Maj. Slip Op. at 33-34. The City's tax raises constitutional concerns that should prompt more rigorous judicial scrutiny. Departing from my colleague's concise and well-written analysis, I instead believe that billboards are a constitutionally protected medium of communication and, thus, any legislation potentially affecting the "speech" from this platform implicates free expression concerns.

As Chief Justice John Marshall explained 200 years ago, the "line of discrimination" is difficult to discern. *McCulloch*, 17 U.S. at 376. The Tax Court concluded that an excise tax imposed on the privilege of exhibiting outdoor advertising displays is "a tax on the privilege of continuing in business, not on exercising free speech." *Clear Channel Outdoor, Inc. v. Dep't of Fin. of Balt. City*, Appeal No. 16-MI-BA-0571 (Feb. 27, 2018), 2018 WL 1178952 at *3; *see* Maj. Slip Op. at 6-7. But how does one distinguish between the "privilege" of being in the business of speech and the speech itself?

The Tax Court's decision assumes that the act of leasing billboard space does not contain sufficient communicative elements to implicate the First Amendment. However, allowing a tax on the "privilege" of maintaining a speech platform necessary to convey speech that falls within the ambit of the First Amendment is an attempt to draw a line that runs contrary to prior Supreme Court precedent. If the needle can be thread so that the "privilege" of being in the speech business is taxable, yet the speech is not, may local governments, or the state, impose a tax specific to operating radio stations, or printing newspapers, just for the "privilege" of owning that speech platform? To what extent can a municipality tax a provider of speech by distinguishing the speech platform needed for them to convey the speech from the speech that is being disseminated? And why is this "privilege" defined as being outside the bounds of First Amendment protection?[1]

The Tax Court also assumed, and the Majority agrees, that the Ordinance does not "impose[] a burden on free speech." *Clear Channel Outdoor*, 2018 WL 1178952 at *3; *see* Maj. Slip Op. at 33. Instead, I think we can assume that billboard providers like Clear Channel will pass the costs of this tax on to their customers—who are providing the speech. The logic of the Tax Court confusingly, and improperly, creates a blurry distinction between being in

[1] If billboards are not considered speech platforms protected by the First Amendment, what is to stop state regulations on the types of messaging or speakers utilizing the medium? Certain political campaigns and candidates may lose a valuable means to interject their messaging into the marketplace of ideas. If outdoor advertising is protected by the First Amendment, but legislatures may impose taxes that are not generally applicable but focused on a singular medium, are more traditional, sacred vehicles of free expression next in line for governmental revenue raising measures?

the business of conveying speech and the content of the speech that is actually conveyed.

In light of this foggy logic in demarcating a standard, I would find that the Ordinance is not "generally applicable." Instead, the Ordinance applies solely to one class of speech platforms—"outdoor advertising displays"—which ratchets our review to a higher bar of scrutiny. The Ordinance's application to off-premises, but not on-premises, signage further winnows the tax's focus and presents a potential content-based distinction that is blatantly contrary to the First Amendment. Deferring to the City's broad power to tax cannot wash away these concerns. For this tax to be constitutionally permissible, it must meet a more onerous standard of heightened scrutiny.

This Court must acknowledge the potential for a tax to adversely affect paramount constitutional rights, even if that is not the intent of the legislative body, here the city council, in enacting the tax. Indeed, the city council need not intend to burden free speech by limiting speakers and ideas in the marketplace for its enactments to cause that result. The First Amendment protects against both intentional and unintentional burdens on free speech, which can only be achieved by scrutinizing the tax under a heightened burden of review.

A. Any Regulation of Billboards Inherently Implicates Free Expression Concerns, Prompting Heightened Scrutiny.

Billboards have both physical properties, subject to regulations similar to other structures, and communicative elements that enjoy First Amendment protection. Accordingly, any regulation of billboards inherently implicates free expression concerns,

prompting heightened scrutiny. The combination of physical construction and communicative expression form the definitional elements of a "billboard." *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 522-24 (1981) (Brennan, J., concurring). The City's zoning code recognizes this dual identity, defining "billboards" by their physical location and their intended communicative purpose. *See* Balt. City Code, art. 32 § 1-303(g) ("'Billboard' means any sign that directs attention[.]"). Further, 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).

This Court's decision in *Maryland Pennysaver* is distinguishable from the Ordinance here. *Maryland Pennysaver Grp., Inc. v. Comptroller*, 323 Md. 697 (1991). Notably, the retail sales tax examined by the Court in that case was extraordinarily broad and applied to mostly everyone, except for newspapers. This is fundamentally different than a tax that targets one industry or speaker. Moreover, in finding that the pennysaver publication did not fall within the "newspaper exception," the Court distinguished the pennysaver because of its "overwhelming commercial speech content." *Id.* at 714-15. As explained in *Metromedia*, the speech disseminated on billboards varies and encompasses a wide-ranging variety of messages. 453 U.S. at 501 (plurality opinion). The commercial speech disseminated in the pennysaver and considered by this Court, which consisted almost entirely of advertisements,[2] has considerable differences to the breadth of speech disseminated on billboards.

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[2] The Court in *Maryland Pennysaver* viewed four illustrative pennysavers in the record extract, totaling 249 pages. 323 Md. at 699-70. Within those 249 pages, the Court noted that three half-pages were

In evaluating the constitutionality of the Ordinance, this Court should not overlook the role billboards serve in the local media landscape, their ability to provide alternative means of communication, and the public interest the tax may serve compared to the public interest it may hinder if access to this form of messaging is limited by the tax's economic burden. *See Metromedia*, 453 U.S. at 557-58 (Burger, J., dissenting) ("The uniqueness of the medium, the availability of alternative means of communication, and the public interest the regulation serves are important factors to be weighed[.]").

Billboards hold a unique position within local media, offering a platform for both advertisement and speech that contributes to the public interest. As Clear Channel, amicus curiae, and the record highlight, billboards convey a broad array of messages, from commercial speech advertising products, services, and attractions, to public information delivering news, political speech, and public awareness campaigns. *See Metromedia*, 453 U.S. at 501 (plurality opinion) (citation omitted).

Local and national voices alike gravitate towards the medium, as the comparatively low cost of outdoor advertising provides an affordable option for ideas and speakers to enter the public discourse. *See* Dan Rodricks, *Mikulski's Plea for Billboards*, Balt. Sun (Nov. 1, 1991), https://www.baltimoresun.com/news/bs-xpm-1991-11-01-

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devoted to columns written by politicians serving around Maryland. In viewing the May 18, 1983, Kent Island/Grasonville pennysaver, the Court noted that it contained two-and-a-half-pages of "Community News," which "consist[ed] primarily of announcements of activities, such as meetings, fundraisers, and social events . . . ." *Id.* at 699. The Court also noted that the pennysaver included two pages each containing a chapter of a "serialized Western novel" that was available for purchase from the publisher. *Id.*

1991305147-story.html [https://perma.cc/HWF4-MTQA] (quoting former United States Senator Barbara Mikulski on her use of billboards in political campaigns: "I know that billboards play an important role in political campaigns. . . . I did not have big radio, big TV, but I sure had big billboards"). Campaigns expressing controversial, nontraditional, or marginalized views often utilize billboards as speech platforms. In all, billboards are an accessible medium that the non-incumbent may use to challenge the status quo.

In our modern technology-driven society, billboards are also a medium that expands the marketplace of ideas in a world where consumers frequently seek information from a concentrated bubble of sources. *See, e.g.*, Amanda Hess, *How to Escape Your Political Bubble for a Clearer View*, N.Y. Times (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/arts/the-battle-over-your-political-bubble.html [https://perma.cc/HW6N-3X3L]. To this end, much has been made of our fractured media and how such polarization affects what speech reaches different audiences. For example, the ability to seek out information and ideas in the echo chamber of social media shows the arduous task of introducing new information and ideas to an audience rapt by a concentrated mass of digital sources. *See, e.g.*, Steven L. Johnson, Brent Kitchens, & Peter Gray, *Facebook Serves as an Echo Chamber, Especially for Conservatives. Blame Its Algorithm*, Wash. Post (Oct. 26, 2020), https://www.washingtonpost.com/opinions/2020/10/26/facebook-algorithm-conservativeliberal-extremes/ [https://perma.cc/4H2V-9BSP]. Yet, billboards reach a plethora of audiences and inject speech into the marketplace of ideas without regard for the preferences of the viewer.

The messages displayed on billboards "are constantly before the eyes of observers on the street[]" and can "be seen without the exercise of choice or volition," thus interjecting ideas into what is all too often a closed conversation. *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932). The driver stuck in traffic or the pedestrian on the sidewalk cannot help but read the content their gaze finds on outdoor advertising. Such messaging has the potential to enliven public discourse or sell a car, but in either case, billboards contain communicative elements that entitle them to protection under the First Amendment.

Inevitably any regulation of billboards will touch on the medium's communicative elements. *See Metromedia*, 453 U.S. at 502-03 (plurality opinion). Those First Amendment concerns must be assessed. *Id.* (quoting *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 91 (1977)) ("[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."). Even if the Ordinance is an excise tax on the "privilege" of conducting Clear Channel's business, when that business is the dissemination of messaging, the tax inherently implicates the First Amendment. *See Clear Channel Outdoor, Inc. v. Dir., Dep't of Fin. of Balt. City*, 244 Md. App. 304, 314-15 (2020).

Speech is protected even if it occurs on a platform that is sold for profit. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976) ("[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment."). Commercial speech clearly falls within the First

Amendment's protective cloak.[3] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). A tax on the sale of display space on outdoor advertising implicates both these constitutional concerns.

By not extending traditional First Amendment protections to outdoor advertisers, we defy the Supreme Court's evolving understanding of who and what may count as "media" or "speech," and thus how constitutional concerns with both have broadened. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 352 (2010) (recognizing the blurred line between traditional media and other platforms that may provide social and political commentary alongside advancements of technology and rejecting the proposition that the former inherently enjoys constitutional protections greater than the latter). Though rapid advancements in communications technology may have hastened this "freedom of the press" pluralism, the Supreme Court's extension of First Amendment protections to "every sort of publication which affords a vehicle of information and opinion" is long standing. *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938) ("The liberty of the press is not confined to newspapers and periodicals.").

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[3] The Supreme Court adopted a four-part test to determine the validity of restrictions on commercial speech, distinguishing the process from its analysis of "fully protected speech":

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507 (1981) (plurality opinion) (citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563-66).

A tax on billboard display space imposes an incidental burden on speech, thus its constitutionality must be evaluated, at the least, under an intermediate level of scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). Taxing an outdoor advertiser's display space is akin to taxing the ink and paper used by newspapers; both taxes target a medium's means of communication, and thus "impose[] some 'burden'" on speech. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 577-78, 583 (1983). Imposing a tax on the revenue generated from the sale of outdoor advertising space indirectly implicates the ability to speak because these additional costs inevitably will be passed through to customers seeking to utilize this platform.

Because of these incidental First Amendment concerns, the Ordinance's burden on speech must be no greater than is essential to further the alleged government interest. *See, e.g.*, *Turner Broad. Sys.*, 512 U.S. at 662; *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Taxation of billboards is not per se unconstitutional, but like other billboard regulations, it must be shown to further an important government interest while infringing upon free expression no further than required to achieve this interest. *See Metromedia*, 453 U.S. at 502-03 (plurality opinion); *Donnelly Advert. Corp. v. City of Balt.*, 279 Md. 660, 668-69 (1977). Using this standard, this case should be remanded to the Tax Court where the Ordinance must be analyzed against a heightened burden of at least intermediate scrutiny, as a court should evaluate any such regulation on billboards.

In arguing against applying to the tax a heightened burden of scrutiny, much was made, both in the City's

brief and at oral argument, of the potentially "absurd result" of a hypothetical situation in which the City may heavily regulate or even ban the location or construction of billboards, yet not so easily tax these platforms. This is a misguided dismissal of a court appropriately applying the intermediate scrutiny warranted by the First Amendment implications present in either hypothetical regulation. There is nothing "absurd" about such jurisprudence.

As "large, immobile, and permanent structures," billboards are subject to regulation "like other structures." *Metromedia*, 453 U.S. at 502 (plurality opinion) (citation omitted). Such regulation stems from the state's police powers, often embodied in a municipality's zoning code. *See Donnelly Advert. Corp.*, 279 Md. at 671; *see also* Balt. City Code, art. 32 § 17-406. But both the Supreme Court and this Court acknowledge that these regulations affect a billboard's communicative aspects as well. Challenges to such laws demand an accounting of such First Amendment concerns through heightened scrutiny. *See Metromedia*, 453 U.S. at 502 (plurality opinion); *Donnelly Advert. Corp.*, 279 Md. at 668-69.

For either regulation to be upheld—the hypothetical zoning law or a tax like the one we assess *sub judice*—it must (i) derive from a constitutionally recognized power of the government, (ii) further a substantial or important government interest (iii) that is "unrelated to the suppression of free expression," and (iv) the "incidental restriction" on First Amendment rights must be "no greater than is essential" to further the government's interest. *Taxpayers for Vincent*, 466 U.S. at 805 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Both this Court's and the Supreme Court's precedent show that

zoning regulations often fulfill these mandates. *See Metromedia*, 453 U.S. at 509 (plurality opinion) (stating legislative concerns about traffic hazards caused by billboards presented legitimate interest unrelated to suppressing speech and doing so as necessary to achieve this end); *Donnelly Advert. Corp.*, 279 Md. at 669, 671 (holding city's police power extended to phase-out period for billboards as part of larger "urban renewal projects" that represented "an important government interest . . . unrelated to the suppression of free expression and no greater than essential").

If the billboard tax falls to this heightened standard, but a zoning law prevails, it is not an "absurd result." It is the court appropriately fulfilling its role of evaluating the constitutionality of such a law within the context of how that law burdens the First Amendment. *See generally Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Such an evaluation should utilize a standard of scrutiny more rigorous than rational review. This Court should respect its own precedent, and that of the Supreme Court, and apply a heightened level of scrutiny to laws affecting billboards.[4] *See, e.g.*, *Taxpayers for Vincent*, 446 U.S. at 805; *Donnelly Advert. Corp.*, 279 Md. at 668-69.

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[4] Using the standard set by the Supreme Court for regulation that produces an indirect burden on free speech, intermediate scrutiny is the appropriate heightened burden to apply. *See Taxpayers for Vincent*, 466 U.S. at 804-05 (1984); *Donnelly Advert. Corp.*, 279 Md. at 671.

B. The Ordinance Is Not Generally Applicable and Applies a Tax to One Class of Speakers Utilizing One Medium, Therefore Warranting Heightened Scrutiny.

The Ordinance is not generally applicable, but instead applies a tax to one class of speakers utilizing one medium—such taxes targeted at media platforms warrant heightened scrutiny. "It is beyond dispute" that media entities are subject to "generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune*, 460 U.S. at 581. But it is beyond the pale for the government to impose such economic regulations upon just the media or certain speakers therein. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986) (citing *Minneapolis Star & Tribune*, 460 U.S. at 582-83) ("We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, since the burden of the tax inevitably fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers[.]").

The Ordinance is just such a selectively applied tax. *See Minneapolis Star & Tribune*, 460 U.S. at 585. It is not "generally applicable." *Leathers vs. Medlock*, 499 U.S. 439, 447 (1991) ("[A] State may impose on the [media] a generally applicable tax").[5] The tax is "single in kind" in

[5] The City asserts that *Leathers* controls the Court's assessment of such taxes selectively applied to certain media. *See* Maj. Slip Op. at 22-23, 27; *Leathers*, 499 U.S. at 453. But Baltimore's Ordinance may be distinguished from the sales tax in *Leathers* in meaningful ways. *Leathers* concerned a "generally applicable" sales tax affecting the gross receipts of cable companies while otherwise exempting traditional members of "the press." *See* 499 U.S. at 441-42. The City relies too heavily on the *Leathers* Court's affirmation that a general tax may apply to the media, in whole or in part. *See id.* at 450-53. The Ordinance was never a general tax which exempted certain media but not

that it applies solely to billboards as a medium. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); *see also* Balt. City Code, art. 28 §§ 29-1(d), 29-2. In so doing, it takes aim at a specific sub-segment of constitutionally protected speakers. By "appl[ying] only to a single constituency," the Ordinance potentially insulates itself from larger political accountability. *Leathers*, 499 U.S. at 445-46. This narrow focus can operate like a censorial cudgel. *See Minneapolis Star & Tribune*, 460 U.S. at 585. Even if the government's intention is not to censor speech, such may be the effect when the extra burden of not otherwise general taxes is applied. *See id.* at 585, 588. No malicious legislative intent to curb speech need be found to prompt these constitutional concerns. *See id.* at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."). This differential taxation "places such a burden on the interests protected by the First Amendment that we cannot countenance this treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585.

The Ordinance's application to only certain speakers within the category of outdoor advertisers augments our constitutional concerns. That the tax singles out Clear Channel as a speaker is not constitutionally offensive, as the company's local monopoly makes this fact an incidental result. *Cf. Grosjean*, 297 U.S. at 250-51; *see generally* E. 350 (discussing Clear Channel owning nearly ninety-five percent of the signage affected by the

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billboards. It specifically applies only to billboards. *See* Balt. City Code, art. 28 § 29-2. At best for the City's position, the Ordinance is more akin to must-carry provisions that apply only to cable companies and were thus reviewed under intermediate scrutiny. *Turner Broad. Sys.*, 512 U.S. at 662-63.

Ordinance). But Baltimore's billboard tax applies solely to companies controlling and selling outdoor advertising display space, and just to those "off-premises" signs larger than ten square feet. *See* Balt. City Code, art. 28 § 29-1(b) & (d).

By not applying to smaller signage, or that which is "on-premises," the Ordinance treads perilously close to distinguishing among like speakers based on their content or dissemination. *See Leathers*, 499 U.S. at 447-49. Such a tax may be doubly violative of the First Amendment by applying to a subset of a subset of speakers, and making this distinction based on the messages conveyed. *See id.* at 448-49 (discussing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987)). When a court finds content-based distinctions in legislation affecting speech, the law must overcome the heightened burden of strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 170-71 (2015).

The City inherently establishes a content-based distinction by defining an "outdoor advertising display" as that which "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." Balt. City Code, art. 28 § 29-1(d)(i) (cleaned up). It categorizes the class of billboards to which the tax applies based on whether they convey a message related to the property to which they are affixed, or to happenings elsewhere. *See id.* Such content-based distinctions must overcome the heightened burden of strict scrutiny. *See Reed*, 576 U.S. at 170-71. Though the Supreme Court's plurality holding in *Metromedia* permitted such a distinction in the context of zoning regulations, it did so after assessing San Diego's

regulation under a heightened burden akin to intermediate scrutiny. *See* 453 U.S. at 511-12.

This Court should reverse the Court of Special Appeals and, upon remand, require the City to meet the heightened burden of strict scrutiny for taxes singularly focused on the media or individual classes of media therein. *See Minneapolis Star & Tribune*, 460 U.S at. at 592-93.

CONCLUSION

The Constitution demands a more strenuous review of regulations, taxation, and related legislation that implicates the First Amendment, directly or indirectly. The First Amendment demands of us a stauncher defense for constitutionally protected mediums of communication. While the line of demarcation may be difficult to discern, here the ordinance clearly requires review at a higher standard of scrutiny. It is for these reasons that I respectfully dissent.

APPENDIX B

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2910

September Term, 2018

Case No. 117025007

CLEAR CHANNEL OUTDOOR, INC.

v.

DIRECTOR, DEPARTMENT OF FINANCE OF
BALTIMORE CITY

Filed: January 29, 2020

Berger,
Beachley,
Wells,

JJ.

Opinion by Berger, J.

OPINION

This appeal involves a constitutional challenge to Baltimore City Ordinance 13-139 ("the Ordinance"), which imposes an excise tax ("the Tax") on outdoor advertising displays. Balt. City Code Art. 28, § 29. Clear Channel Outdoor, Inc. ("Clear Channel") owns or operates hundreds of billboards subject to the Tax. It initially challenged the Ordinance in the United States District Court for the District of Maryland, claiming that the Ordinance violated its First and Fourteenth Amendment rights. The District Court granted summary judgment in favor of Baltimore City, holding that the Ordinance was a tax, and therefore, it lacked subject matter jurisdiction to determine the merits of the claim.

Clear Channel subsequently paid the Tax under protest. It then filed a refund request with the Director, Department of Finance of Baltimore City ("the City"), which was denied. Clear Channel sought review of the denial in the Maryland Tax Court, challenging the constitutionality of the tax on First and Fourteenth Amendment grounds, as well as Article 40 of the Maryland Constitution. The Tax Court affirmed the City's denial of the refund request. Clear Channel filed a petition for judicial review in the Circuit Court for Baltimore City, which affirmed the Tax Court's decision. On appeal, Clear Channel presents two questions for our review, which we rephrase as follows:[1]

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[1] Clear Channel's questions, as presented are:

1. Is the operation of billboards that carry the commercial and non-commercial messages of third parties and the billboards'

1. Whether the operation of billboards is protected by the First Amendment and Article 40, thereby subjecting its taxation to heightened scrutiny.

2. Whether the Ordinance targets a specific platform for speech and a small group of speakers, thereby subjecting it to heightened scrutiny.

As we shall explain, we hold that the Ordinance does not implicate Clear Channel's right to freedom of speech. Accordingly, we affirm.

FACTS AND PROCEEDINGS

In 2013, Ordinance 13-139 was signed into law, imposing an excise tax "on the privilege of exhibiting outdoor advertising displays in the City." Balt. City Code Art. 28, § 29-2. The tax is levied upon advertising hosts, which includes "a person who: (1) owns or controls a billboard, posterboard, or other sign; and (2) charges fees for its use as an outdoor advertising display." *Id.* An outdoor advertising display is defined as:

> an outdoor display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and (ii)

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owner protected under the First Amendment and Article 40, subjecting its taxation to heightened scrutiny?

2. Does a targeted tax on four entities engaged in protected speech violate the First Amendment and Article 40 where, as here, the government interest served by the tax is insufficient to justify the burden on speech as a matter of law and, in any event, the tax is not narrowly tailored to burden no more speech than necessary to advance that interest?

> sold, offered, or conducted on the premises only incidentally if at all.

Id. at § 29-2(d). The Tax is assessed based upon the size of the display and whether it is an electronic display as follows:

> (a) *In general.*
>
> The annual amount of the tax imposed is at the following rates per square foot of advertising imagery:
>
> (1) $15 per square foot of advertising imagery for an electronic outdoor advertising display that changes images more than once a day; and
>
> (2) $5 per square foot of advertising imagery for any other outdoor advertising display.
>
> (b) *Tax for a single space.*
>
> If a single space is used for multiple outdoor advertising displays during the course of one reporting period, the advertising host who makes that space available:
>
> (1) must pay the annual tax as if the display that would generate the highest tax liability had been in place for the entire year; and
>
> (2) need not pay an additional tax for any other displays in that space.

Id. at §29-3. Each advertising host must file an annual report with the Finance Director specifying the number of advertising spaces it made available for the exhibition

of advertising displays, and the location and size of each display.[2] *Id.* at §29-5.

Although there are three other groups that own or operate billboards in Baltimore, Clear Channel owns or operates the majority, and therefore, bears the majority of the Tax's burden. Clear Channel is assessed $1,500 annually when it charges third parties to use a billboard measuring 12 feet by 25 feet, and $3,360 annually when it charges third parties to use an electronic billboard, measuring 14 feet by 48 feet.[3]

The bill file that was introduced into evidence before the Tax Court explains the City's motive for enacting the Ordinance. The Ordinance, which was enacted as part of a ten-year financial plan for Baltimore, is purely a revenue raising measure. The City sought to diversify its revenue portfolio in order to lower property tax rates, increase infrastructure investment, and better manage the City's pension and retiree healthcare liabilities. The Tax on outdoor advertising displays was specifically enacted to help protect the arts and culture funding from further cuts. Further, the City's budget director testified that the revenues generated from the tax are placed into the City's General Fund.

Clear Channel initially challenged the Ordinance in the United States District Court for the District of Maryland in 2013. *See Clear Channel Outdoor, Inc. v. Mayor & City Council of Baltimore,* 153 F. Supp. 3d 865 (D. Md. 2015). In its Complaint for Declaratory and

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[2] Notably, the City imposes various other taxes and fees, including a telecommunications tax, a parking tax, a pole fee, and an energy tax. *See* Balt. City Code Art. 28.

[3] Electronic billboards in Baltimore City are able to display up to six advertisements per minute.

Injunctive Relief, Clear Channel argued that Ordinance 13-139 violated its right to freedom of speech under the First and Fourteenth Amendments. *Id.* at 868. The City filed a motion to dismiss for failure to state a claim and lack of subject matter jurisdiction under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341 (2012), arguing that the Ordinance was a Tax, not a fee. *Id.*

The TIA "provides that federal courts lack subject-matter jurisdiction to enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.* at 870 (citing 28 U.S.C. § 1341) (quotations omitted). The Court denied the motion to dismiss in 2014, explaining that at that stage of the litigation, "the ordinance [was] a fee, not a tax, for the purposes of the TIA." *Id.* at 868. The City filed a motion for reconsideration, which the court denied as well. *Id.* Thereafter, Clear Channel filed a motion for summary judgment and the City filed a cross-motion for summary judgment. *Id.* at 868-69. The Court granted summary judgment in favor of the City, holding that the Ordinance was a "tax" under the TIA, and therefore, it lacked subject matter jurisdiction to determine the merits of the claim. *Id.* at 875.

Clear Channel subsequently paid the Tax as owed for the 2014 and 2015 fiscal years, pursuant to the Ordinance. In February, 2016, Clear Channel demanded a refund of its 2014 and 2015 payments of the Tax and a suspension of the levy for subsequent years, citing its unconstitutionality under the First and Fourteenth Amendments. The City denied the request, explaining that the Tax was imposed to raise revenue and that it was subject to rational basis scrutiny. In July, 2016, Clear Channel paid its 2016 Tax Payment pursuant to the

Ordinance and submitted a refund request that day. The City again denied the request. Clear Channel appealed the denial in the Maryland Tax Court, challenging the constitutionality of the Ordinance.

Before the Tax Court, Clear Channel argued that outdoor advertising is a constitutionally protected medium of speech under the First and Fourteenth Amendment and Article 40 of the Maryland Declaration of Rights. Clear Channel further contended that the Tax unconstitutionally restricts that speech. It argued, therefore, that heightened scrutiny applied. Clear Channel also averred that the Tax targeted a small group of speakers on the basis of their participation in such speech, and therefore, strict scrutiny applied. The City maintained that as an excise tax, the Tax neither implicates nor burdens the First Amendment and that the Ordinance was simply a tax on the privilege to charge fees.

On February 27, 2018, the Tax Court issued a Memorandum and Order affirming the City's denial of Clear Channel's refund requests for the fiscal years 2014, 2015, and 2016. In rejecting Clear Channel's constitutional contentions, the Tax Court focused on the taxing power of the City. It found that "[a]n excise tax imposed on the privilege of exhibiting outdoor advertising displays is a tax on the privilege of continuing in business, not on exercising free speech," and that a tax on such a business, is "not violative of [Clear Channel's] rights to free speech." Finding that the First Amendment was not implicated, the Tax Court concluded that the City had a rational basis for enacting the Tax.

Clear Channel sought judicial review of the Tax Court's decision in the Circuit Court for Baltimore City. The circuit court found that the Tax Court's decision was

correct as a matter of law and that it was supported by the substantial evidence from the record. It, therefore, affirmed the Tax Court's decision. This appeal follows.

STANDARD OF REVIEW

"Because the Tax Court is an administrative agency, its decisions are reviewed under the same appellate standards generally applied to agency decisions." *Comptroller of Treasury v. Johns Hopkins Univ.*, 186 Md. App. 169, 181(2009). "[W]e look through the decision of the Circuit Court and evaluate directly the conclusions reached by the Tax Court." *Green v. Church of Jesus Christ of Latter-Day Saints*, 430 Md. 119, 132 (2013). This Court gives "great deference to the Tax Court's fact-finding." *Zorzit v. Comptroller*, 225 Md. App. 158, 169 (2015). "[W]here the Tax Court's decision is based on a factual determination, and there is no error of law, the reviewing court may not reverse the Tax Court's order if substantial evidence of record supports the agency's decision." *Supervisor of Assessments of Anne Arundel Cty. v. Hartge Yacht Yard, Inc.*, 379 Md. 452, 461 (2004).

We review the Tax Court's decisions of law *de novo*. *Johns Hopkins Univ.*, *supra*, 186 Md. App. at 181-82. Even so, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Id.* at 182 (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). Moreover, "recognizing that the agency's decision is prima facie correct and presumed valid, we must review the agency's decision in the light most favorable to it." *Comptroller of the Treasury v. Citicorp Int'l Commc'ns, Inc.,* 389 Md. 156, 163 (2005) (citations and quotations omitted). As this case involves the constitutionality of an ordinance, we

review the Tax Court's decision *de novo*. *See, e.g.*, *Schisler v. State*, 394 Md. 519, 536 (2006).

DISCUSSION

I. THE ORDINANCE IS A VALID EXCISE TAX AND DOES NOT IMPLICATE THE FIRST AMENDMENT.

Clear Channel first argues that the Ordinance unconstitutionally burdens billboard speech, which is protected by the First Amendment and Article 40 of the Maryland Constitution.[4] The Ordinance, therefore, must be analyzed under strict scrutiny instead of review under a rational basis standard. The City does not disagree that

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[4] The First Amendment of the United States Constitution provides that Congress shall make no law "abridging the freedom of speech, or of the press." Article 40 of the Maryland Constitution provides that "[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

The First Amendment and Article 40 were written in response to similar concerns and to provide similar protections, but are capable of divergent interpretations. *See, e.g., Pack Shack, Inc. v. Howard County*, 377 Md. 55, 64 n.3 (2003). *See also* Matthew S. Fuchs, *Free Exercise of Speech in Shopping Malls: Bases That Support an Independent Interpretation of Article 40 of the Maryland Declaration of Rights*, 69 Alb. L. Rev. 449, 471-72 (2006) ("Maryland courts have indeed interpreted Article 40 more broadly than the federal counterpart."); Anthony W. Kraus, *Beyond the First Amendment: What the Evolution of Maryland's Constitutional Free-Speech Guarantee Shows About Its Intended Breadth*, 47 U. Balt. L.F. 83, 84 (2017) ("Many Maryland cases … not[e] that state and federal free-speech rights are viewed as equivalents "in general" or "ordinarily," but leav[e] open the implicit possibility that it may not always be so."). Here, however, Clear Channel has not offered us any basis to interpret Article 40 differently or more broadly than the First Amendment.

the speech displayed on Clear Channel's billboards is entitled to some level of First Amendment protection. It maintains, however, that the Ordinance is a validly enacted excise tax on Clear Channel's privilege to continue in business in Baltimore City. Clear Channel displays the message of the third party, and therefore, a tax on its business does not implicate the First Amendment. We agree with the City and explain.

The City has the "power to tax to the same extent as the State of Maryland has or could exercise said power within the limits of Baltimore City as a part of its general taxing power." Balt. City Charter, Art. II, § 40. Indeed, the taxing power of the City is broad. *Am. Nat. Bldg. & Loan Ass'n v. City of Baltimore*, 245 Md. 23, 30 (1966). Moreover, "a strong presumption exists in favor of the constitutionality of legislative enactments," including revenue raising measures such as the tax at issue here. *Weaver v. Prince George's Cty.*, 281 Md. 349, 355-56 (1977). The Supreme Court has recognized this presumption even in the First Amendment context. *See Leathers v. Medlock*, 499 U.S. 439, 451 (1991).

The Baltimore City Council classified the Outdoor Advertising Tax as an excise. Balt. City Code Art. 28, § 29-2. An excise is "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Weaver*, *supra*, 281 Md. at 357. "Indeed, an excise is said to embrace every form of taxation that is not a burden directly imposed on persons or property." *Id.* at 357. "[A] tax on the *use* of property, as distinguished from a tax based on ownership exclusively, is in the nature of an excise." *Id.* at 358-59 (emphasis added).

Here, the City has imposed an excise tax on the privilege to charge others a fee to use billboard space. The Tax Court correctly concluded that the taxation of Clear

Channel's business privileges lacks "sufficient communicative elements" for the First Amendment to come "into play."[5] Clear Channel charges third parties a fee to use their property and then displays the third party's message. Although the advertisements and messages placed on the billboards may be entitled to First Amendment protection, Clear Channel's privilege to receive financial compensation for displaying those messages is not. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."). Clear Channel's economic activity is not expressive or communicative. We, therefore, agree with the City that "[t]he mere fact that billboards are a medium of communication does not transform a tax on the sale of billboard *space* into a regulation of *speech*." (Emphasis in original).

In support of its argument that billboard speech is protected by the First Amendment, Clear Channel relies on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). *Metromedia*, however, involved an ordinance which prohibited outdoor advertising displays. *Id.* at 503. The ordinance banned commercial advertising on billboards, unless within a specified exception, and certain noncommercial advertisements. *Id.* at 503. The ordinance in *Metromedia* was a content-based regulation of the speech and expression placed on billboards. The Court, therefore, focused its analysis on the levels of First Amendment protection afforded to commercial speech

[5] We note that Clear Channel directs several of its arguments in connection with the opinion issued by the circuit court. We, however, do not review the decision of the circuit court, but look through the circuit court's actions and instead review the decision of the Tax Court directly.

and noncommercial speech. *Id.* at 504-21. The Baltimore City Ordinance at issue here, however, does not regulate the content placed on Clear Channel's billboards. Certainly, as was the case in *Metromedia*, it does not seek to completely eliminate billboards and certain content placed on them.

Critically, the Tax Court noted that when Clear Channel charges a fee to third parties, "[p]etitioner does not express or say anything; it only sells space to advertisers who say things." We agree with the reasoning of the Tax Court. We acknowledge, however, that Clear Channel occasionally displays its own message. The Tax, however, is only assessed when Clear Channel charges fees to another.

We further recognize that this Ordinance is content neutral.[6] The Tax is applicable whenever an outdoor

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[6] Clear Channel cites to *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) to support its assertion that the Ordinance is content-based. In our view, these cases are distinguishable from the ordinance in this case. The regulation in *Reed* exempted three categories of signs from a permit requirement, and thus, was content-based on its face, subjecting it to strict scrutiny. *Reed*, *supra*, 135 S. Ct. at 2227. In rejecting the lower court's analysis of the regulation as content-neutral, the Supreme Court held that regulations that are facially content-based are "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228 (quotations omitted). As Clear Channel points out, *Reed* holds that a law is content based if it "draws distinctions based on the message" or "applies to particular speech because of the topic discussed." *Id.* at 2227. As we have noted, however, the Tax at issue applies regardless of the message it displays or topic it covers.

In *Thomas*, Tennessee exempted on-premise signs from an outdoor signage permit requirement. *Thomas*, *supra*, 937 F.3d at 730. The regulation required that exempted signs "be located on the same

advertiser charges a third party to use its space, regardless of the content that is displayed or who paid Clear Channel to display it. Indeed, the tax applies, regardless of whether the advertising promotes coffee from Starbucks, charity for eleemosynary institutions, or other similar types of advertising. Moreover, the tax is only triggered when an advertising host charges third parties a fee. If an advertising host seeks to publish its own speech on its own billboard, the tax is not triggered. Accordingly, we hold, that the outdoor advertising tax is a valid excise tax enacted within the City's taxing powers on the privilege to do business, and that it does not implicate the First Amendment.[7]

Inasmuch as the Ordinance does not infringe on Clear Channel's First Amendment rights, it must only survive under a rational basis review. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). Under this review, "a legislative classification will pass constitutional muster so long as it is rationally related to a legitimate

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premises as the activity" and "have as its purpose the identification of the activity, products, or services offered on that same premises." *Id.* (quotations and alterations omitted). The Court held that the regulation was content-based because of the "purpose" component of the regulation. *Id.* A State official was required to "assess the meaning and purpose of the sign's message" to determine if the on-premise exception applied. *Id.* The Court determined that there was no way to do so without "understanding the content of the message." *Id.* Here, the Ordinance imposes no such "purpose" requirement in the definition of an outdoor advertising display, and no City official assesses the meaning or purpose of a billboard.

[7] In light of our holding that the Ordinance does not implicate the First Amendment, we need not address Clear Channel's assertion that the First Amendment protects billboard speech and those who publish it. As we have explained, the tax is not targeted at the third parties that ultimately display their speech on Clear Channel's billboards.

governmental interest." *Tyler v. City of Coll. Park*, 415 Md. 475, 501 (2010). Moreover, "a statute reviewed under the rational basis test enjoys a strong presumption of constitutionality." *State v. Phillips*, 210 Md. App. 239, 274 (2013) (quoting *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 352 (1985)). Clearly, Baltimore City has a legitimate governmental interest in raising revenue, particularly for the purpose of alleviating the burden on Baltimore City taxpayers. Moreover, the Ordinance is rationally related to that interest because the Tax imposed by the Ordinance actually raises revenue, which is placed directly into the City's General Fund. We hold, therefore, that the Ordinance satisfies the rational basis test.

II. THE ORDINANCE IS UNLIKE THOSE THAT THE SUPREME COURT HAS HELD UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

Even, assuming *arguendo*, that the tax implicates the First Amendment, it is vastly different from the other taxes the Supreme Court has struck down on First Amendment grounds. *See Leathers*, *supra*, 499 U.S. 439; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Critically, each of the taxes that have been stricken involved freedom of the press and a concern that the taxes would serve as a way for the government to censor "critical information and opinion[s]," published by the press. *Leathers*, *supra*, 499 U.S. at 447. The Ordinance here presents no such

concern of censoring particular viewpoints or ideas.[8] It does not target a particular speaker or message; it merely taxes the privilege of doing business in the City.

Grosjean, the earliest Supreme Court case on which Clear Channel relies, involved a Louisiana law that targeted newspapers with weekly circulations above 20,000 copies per week and subjected the papers to a 2% tax on gross receipts from advertising. *Grosjean*, *supra*, 297 U.S. at 240. Thus, only newspapers reaching larger audiences were targeted. *Id.* at 240-41. The *Grosjean* Court discussed the history and purpose of the First Amendment and taxes imposed on the press before the First Amendment was enacted. *Id.* at 245-50. Such taxes were imposed as a way for the government to limit information disseminated to the public. *Id.* The Court held that the tax at issue was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250.

Notably, the circulation of a newspaper is quite different than a billboard. As billboards are non-moveable property, the extent of the circulation of the information it displays is based on its location. The billboard Tax, however, is levied upon all off-premise billboard owners, no matter where the signs are located or the size of the population who view the displays. It does not limit the

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[8] Clear Channel points to one example of alleged censorship by the City. In that instance, Clear Channel displayed a sign commissioned by the Baltimore police and firefighter unions in 2010, which criticized the City. The record before the Tax Court is unclear and the Tax Court did not address this lone example in its comprehensive Memorandum and Order. Notably, this one instance occurred three years before the tax was implemented. Accordingly, any concerns about alleged censorship are completely unrelated to the Tax at issue.

volume of information displayed, nor does it limit the audience that the information may reach.

Clear Channel's second argument as to why the Ordinance should be analyzed under strict scrutiny is that it targets a platform for speech and a small group of speakers within that platform. In support of its argument, Clear Channel relies on *Minneapolis Star*, *supra*, 460 U.S. 575. *Minneapolis Star* involved a special use tax on the paper and ink used in publications. *Id.* at 578. The tax provided an exemption for the first $100,000, thus, providing exemptions only for smaller newspapers with less wide-spread circulation. *Id.* The Court found the tax unconstitutional because it singled out the press and further, that it targeted only a small group of newspapers due to the exemption provision. *Id.* at 591. *Minneapolis Star* is distinguishable for several reasons. First, Clear Channel is not akin to a newspaper, which publishes its own thoughts and ideas. Second, Clear Channel sells space that it owns to third parties that may display their own message.

Critically, as the Tax Court readily observed, the tax here is not measured based on the extent of the circulation of the message that is displayed, only on the size and technology of the billboard. Further, the ordinance does not target a small group of individuals within a particular group. All off-premise billboard owners and operators are assessed the tax based on the dimensions of their billboards. The tax singles out no particular group of billboard owners while exempting others.[9]

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[9] The Ordinance does not apply to signs on the property of a business, which are vastly different from billboards as defined in Balt. City Code Art. 28 § 29-2. Therefore, Clear Channel's attempt to group itself with all types of signs in the City is unavailing.

Following *Minneapolis Star*, the Supreme Court addressed a challenge to a sales tax in *Arkansas Writers' Project*, 481 U.S. 221. Arkansas imposed a sales tax on receipts from sales of tangible personal property. *Id.* at 244. Exemptions were provided for newspapers and religious, professional, trade, and sports magazines. *Id.* Arkansas Writer's Project published a general interest monthly magazine, which included a variety of subjects, including sports and religion, however, was required to pay the sales tax. *Id.* The Court held that the tax was unconstitutional for two reasons. First, it targeted a small group within the press, as in *Minneapolis Star*, because it was not evenly applied to all magazines. *Id.* at 229. Second, the Court held that the tax included an even "more disturbing use of selective taxation than *Minneapolis Star,* because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*." *Id.* (emphasis in original).

The City Ordinance at issue in this case clearly does not single out a small group within the press. Nevertheless, even if the business of advertising displays qualifies as a press activity, the tax does not discriminate within a class as did the invalidated taxes in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*. Indeed, the tax applies evenly to all display owners who charge for the use of their outdoor displays. Further, the Ordinance clearly does not differentiate based on the content of the billboard display.

In *Leathers*, *supra*, 499 U.S. at 447, the Supreme Court addressed each of its prior holdings involving First

Amendment challenges to taxes.[10] The Court upheld the tax in *Leathers*, which exempted or excluded newspapers, magazines, and satellite broadcast services. Cable television services, however, were subject to the tax. *Id.* at 442. The Court made clear that differential taxation of certain media "does not by itself, however, raise First Amendment concerns," and is suspect only in certain circumstances. *Id.* at 444. Based on its previous holdings, the Court articulated three ways that a tax will be invalidated under the First Amendment:

> These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints.

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[10] At oral argument, Clear Channel relied heavily on *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273 (1958) for the proposition that the Tax must be struck down because it is targeted. *A.S. Abell* involved a challenge to two different taxes on advertising space and time, by newspaper publishers, radio and television broadcasters, billboard operators, and the purchasers of advertising. *A.S. Abell*, *supra*, 218 Md. at 278. The Court addressed the constitutionality of the taxes as they applied to newspaper publishers and radio and television broadcasters. *Id.* at 280-89. Although the Court invalidated the tax as a whole, it did not invalidate the tax as it applied to billboard operators and the purchasers of advertising on First Amendment grounds. *Id.* at 289. Moreover, *A.S. Abell* predates the guidance provided by the Supreme Court in *Minneapolis Star*, *Arkansas Writers' Project*, and, most recently, in *Leathers*.

> Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

Id. at 447 (citations omitted). To be struck down on First Amendment grounds, a tax must, therefore, threaten "to suppress the expression of particular ideas or viewpoints," target "a small group of speakers," or discriminate "on the basis of the content of taxpayer speech." As we have explained, the excise tax in Baltimore City Ordinance 13-139 on outdoor advertising displays falls into none of these three categories.

The Ordinance at issue here enacts a valid excise tax on outdoor advertising displays in Baltimore City and does not impermissibly burden Clear Channel's right to freedom of speech. We, therefore, hold that the Ordinance is constitutional, and that the Tax Court did not err in affirming the City's denial of Clear Channel's request for refunds. Accordingly, we affirm the judgment entered by the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX C

IN THE CIRCUIT COURT FOR
BALTIMORE CITY

Case No. 24-C-18-001778

CLEAR CHANNEL OUTDOOR, INC.
Petitioner,

v.

DIRECTOR, DEPARTMENT OF FINANCE OF
BALTIMORE CITY
Respondent.

Filed: October 24, 2018

MEMORANDUM AND ORDER

Pursuant to Section 13-532 of the Md. Code Ann. Tax General Article, Section 10-222 of Md. Code Ann. State Government Article, and Maryland Rule 7-202, Petitioner, Clear Channel Outdoor, Inc. (hereinafter "Clear Channel") filed a Petition for Judicial Review (Docket Entry #1) of the Maryland Tax Court's Order of February 27, 2018. Clear Channel was represented before

this Court by Andrew Baida, Esq. and Gordon Todd, Esq. Respondent, Director of the Department of Finance of Baltimore City's (hereinafter the "City") was represented by Steven J. Potter, Esq. and Matthew Nayden, Esq. For the reasons set forth herein, this Court finds the Maryland Tax Court's decision to be legally sound, supported by the evidence in the record, and **AFFIRMS** the decision.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves an appeal from a Tax Court decision involving a challenge to the constitutionality of Baltimore City Ordinance No. 13-139 (hereinafter, the "Ordinance") (Baltimore City Code. Art. 28, §29-2), which imposed a tax on a category of outdoor signs, including Clear Channel's billboards. Clear Channel asserted that the tax imposed by the Ordinance infringed on its rights guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as Article 40 of the Maryland Declaration of Rights. The Maryland Tax Court affirmed the Director's denial of Clear Channel's request for a refund of the tax payments made for fiscal years 2014 through 2016 related to this City Ordinance. In reaching its decision, the Tax Court addressed the City's broad powers to tax; the level of scrutiny to be applied to the Ordinance; and Clear Channel's contention that the tax is a targeted tax that chills free speech.

The Tax Court began its analysis by explaining that the City of Baltimore holds the power to tax to the same extent as the State of Maryland, and that the First Amendment does not prevent the City from imposing taxes consistent with that power. (Md. Tax Ct. Mem. & Ord. at 4). It further opined that there is a "strong presumption in favor of duly enacted taxation schemes" *Id.*, and that provided a tax is rationally related to a

legitimate state interest, like raising public revenue, it is not incumbent on the government to state its reasons, motives or policies for adopting the tax. (Md. Tax Ct. Mem. & Ord. at 4).

The Tax Court then ruled that rational basis review is the appropriate level of scrutiny applicable to the tax. (Md. Tax Ct. Mem. & Ord. at 5). The Tax Court clarified that the tax is an excise tax imposed on the privilege of continuing in business, and not a tax on exercising free speech. (Md. Tax Ct. Mem. & Ord. at 4). It acknowledged that although Clear Channel is in the business of showing messages on its billboards on behalf of others, the sheer conduct of owning, operating, and charging fees for the use of ones billboards, did not possess sufficient communicative or expressive elements to implicate the First Amendment protections. (Md. Tax Ct. Mem. & Ord. at 5). Consequently, it subjected the tax to only rational basis review because the tax did not infringe on Clear Channel's free speech rights—or any other fundamental rights—and because the tax had a rational relation to a legitimate government interest. (Md. Tax Ct. Mem. & Ord. at 5).

The Tax Court concluded by addressing Clear Channel's claims that the tax is a targeted tax, which causes a significant risk of chilling the speech of speakers fearful of further taxation and regulation. (Md. Tax Ct. Mem. & Ord. at 6). The Tax Court stated that the tax applies to all off-premises billboards and does not single out one small group of off-premises billboards while exempting others from taxation. (Md. Tax Ct. Mem. & Ord. at 6). It expressed that those billboards subject to the tax, fall within the City's broad latitude to tax because they take up space and obstruct views, distract motorists, and displace alternative uses of land. (Md. Tax Ct. Mem.

& Ord. at 6-7). Finally, it stated that it is the City's long-standing zoning regulations and concentrated marketplace that caused the majority of the tax to fall on Clear Channel, not the structure of the tax ordinance. (Md. Tax Ct. Mem. & Ord. at 7).

The tax at issue in this case was enacted by ordinance on July 20, 2013. The Ordinance imposed an excise tax on the "privilege of exhibiting outdoor displays in the City", (Baltimore City Code. Art. 28, §29-2) and defines an outdoor advertising display as an:

> outdoor display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and (ii) sold, offered, or conducted on the premises only incidentally if at all.

Baltimore City Code. Art. 28, §29-1 (d). The tax is to be paid by an advertising host—a person who "owns or controls a billboard . . . and charges fees for its use as an outdoor advertising display." Baltimore City Code. Art. 28, §29-1 (b). The tax amounts to $15 per square foot of advertising imagery of an electronic outdoor advertising display that changes images more than once a day, and $5 per square foot of advertising imagery for any other outdoor advertising display. Baltimore City Code. Art. 28, §29-3 (a). The tax is assessed by and paid to the Finance Director along with a detailed report on or before July 10 of each year for the preceding tax year. Baltimore City Code. Art. 28, §29-1 (a)(1), (2) and (b). The Ordinance excludes outdoor advertising displays by governmental entities or instrumentalities of the government, as well as those outdoor advertising displays that display activity

which is conducted on the premises where the display appears. Baltimore City Code. Art. 28, §29-1 (d) and (e)(2).

The evidence and exhibits presented before the Tax Court reflect that Clear Channel, Inc. is an outdoor media company that owns and operates outdoor signs throughout the City of Baltimore. (Md. Tax Ct. Mem. & Ord. at 1.) The Director of the Department of Finance of Baltimore City is the Baltimore City official charged with assessing and collecting the tax imposed by the Ordinance. (Md. Tax Ct. Mem. & Ord. at 1). Clear Channel owns and operates approximately ninety-five percent (95%) of the advertising displays subject to the Ordinance; some of Clear Channel's outdoor advertising displays are electronic,[1] and others are not, they are however, all offsite displays.[2] (Md. Tax Ct. Mem. & Ord. at 3). Three other entities own and operate the remaining outdoor advertising displays subject to the Ordinance. *Id.* The revenue generated from the tax is credited to the City's General Fund, and is used to benefit the general public by funding programming at public schools, theaters, and museums that are open to the general public. (Md. Tax Ct. Mem. & Ord. at 3). Baltimore City has prohibited the construction of new billboards since 2000. *See* Baltimore. City. Code, Art. 32, §17-603(a)(1).

The Tax Court affirmed the City's denial of Clear Channel's request for a refund of the Outdoor Advertising

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[1] Electronic outdoor advertising displays are those with images that change more than once a day. Baltimore City Code. Art. 28, §29-3 (a)(1).

[2] Offsite displays are those that promote businesses, commodities, services, events, and other activities that do not occur on the premises where the display appears.

tax paid in fiscal years 2014, 2015 and 2016. Clear Channel appealed the decision.

LAW AND ANALYSIS

I. STANDARD OF REVIEW

A decision of the Tax Court will be affirmed unless that decision is not supported by substantial evidence appearing in the record or is erroneous as a matter of law. *F.D.R. Srour P'ship v. Montgomery Cty.*, 407 Md. 233, 243-44 (2009). The Tax Court's decision, however, will be overturned if it was based on a material error of law. *Id.* at 244. This standard of review is both narrow and expansive in the sense that:

> It is narrow to the extent that reviewing courts, out of deference to agency expertise, are required to affirm an agency's findings of fact, as well as its application of law to those facts, if reasonably supported by the administrative record, viewed as a whole. The standard is equally broad to the extent that reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law.

State Dep't of Assessments & Taxation v. Consol. Coal Sales Co., 382 Md. 439, 455 (2004).

The Maryland Tax Court is an administrative agency, and this Court thus, does not review its findings of fact but simply examines its decision to determine: 1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision. *Baltimore Lutheran High Sch. Ass'n, Inc. v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985). Additionally, relevant to this particular case, the Court of Special Appeals has held that administrative agencies

[such as the Tax Court] are fully competent to resolve issues of constitutionality, and the validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review. *Comptroller of the Treasury v. Zorzit*, 221 Md. App. 274, 295 (2015).

The law in this area has been delineated in *Metromedia, Inc. v. City of San Diego*, where the Supreme Court recognized the importance of billboards as a well-established medium of communication, used to convey a broad range of messages. 453 U.S. 490, 501 (1981). Nevertheless, the Supreme Court also acknowledged that billboards present a unique set of problems because they combine communicative and non-communicative aspects. *Id.* at 527. The Court however, held that although regulation of the non-communicative aspects of a medium will often impinge to some degree on the communicative aspects, the government has legitimate interests in controlling the non-communicative aspect of a billboard. *Metromedia*, 453 U.S. 490, 502. Consequently, the Tax Court's particularized inquiry into the nature of the ordinance in question, to reconcile the government's legitimate interests with Clear Channel's right to expression, was correct as a matter of law. *Id.*

As the Tax Court held and this Court agrees, the tax is directed at a means of expression rather than the expression itself. (Md. Tax Ct. Mem. & Ord. at 6). The First Amendment only affords protection to regulation of actual or symbolic speech, and expressive conduct. *Virginia v. Black*, 538 U.S. 343, 358 (2003). Clear Channel's conduct of continuing in business in Baltimore City simply cannot be classified as actual or symbolic speech, or expressive conduct. The tax is an excise tax on the privilege afforded to Clear Channel to do business within Baltimore City. It is not a tax on Clear Channel's

right to free speech, because it neither regulates the type or volume of message that may be displayed on the billboard.

The tax in this case is solely a tax on the economic activity of conducting business within the City of Baltimore, and the First Amendment does not prohibit a tax on such economic activity. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[i]t is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on non-expressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.")

Consequently, because the tax is levied on Clear Channel's economic activity of owning, operating and charging a fee for the use of its billboards, and not on Clear Channel's free speech rights, or any other fundamental rights for that matter, it is subject only to rational basis review. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 216, (2003) ("we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a "rational basis" for imposing a restriction."); *see also Maryland Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 673 (1995) where the Court of Appeals held that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines , nor infringes fundamental constitutional rights, must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

The government interest in raising revenue and regulating billboards that are larger in size, distract motorists, and displace alternative uses of land is a

legitimate interest. The elected means of taxing parties that are privileged to conduct business within the City is rationally related to the government's legitimate interest. Therefore, the Baltimore City Ordinance satisfies rational basis review. *See State v. Phillips,* 210 Md. App. 239, 274 (2013)("a statute reviewed under the 'rational basis' test 'enjoys a strong presumption of constitutionality.') The Tax Court is factually correct, based on the record, in its conclusion that the Ordinance centers on Clear Channel's economic activity of charging a fee to display the messages of a third party; conduct that is peripheral to the content of the billboard. Consequently, its conclusion that the First Amendment simply does not provide protection to this non-communicative aspect of a billboard operator's business is also legally sound.

II. THE TAX COURT WAS CORRECT IN FINDING THAT THE TAX APPLIED TO ALL OFF-PREMISE BILLBOARDS, AND CLEAR CHANNEL WAS NOT SINGLED OUT FOR SPECIAL TREATMENT.

At the hearing before this Court, Clear Channel stressed the applicability of *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue* and its holding to the current case. 460. U.S. 575 (1983). The Tax Court made no reference to that case, and similarly, this Court finds the case to be immaterial, as the case is wholly distinguishable from the case at bar. In *Minneapolis Star*, the State of Minnesota imposed a use tax on the cost of paper and ink products consumed in the production of certain publications, and exempted the first $100,000 worth of paper and ink consumed in any calendar year. *Id.* By including such an exemption, the bulk of the tax fell on a small number of newspapers. *Id.* at 579.

Indeed, that case involved a targeted tax that applied to a small number of the populace, that case is nevertheless distinguishable from the current case on several grounds. First, the general rule in Minnesota at that time, was to tax only the ultimate, or retail, sale and not the components, like ink and paper. Therefore, Minnesota's decision to deviate from an already-established scheme, and carve out a provision that taxed component parts like ink and paper, singled out the press for special treatment. Such singling out, without adequate justification, created a suspicion that the goal was not unrelated to suppression of expression, which is presumptively unconstitutional. *See Minneapolis Star* at 585. In the current case, there is no preexisting general scheme that the City deviates from to single out billboard operators for special treatment.

The second important distinction between *Minneapolis Star* and the current case is that the tax in that case was targeted at the press, a category within which Clear Channel's billboards do not fall. *See City of Baltimore v. A.S. Abell, Co.*, 218 Md. 273 (1958), where the Court of Appeals applied differing rationales to billboard operators and other media such as, newspaper publishers, and radio and television broadcasters. The Court in *Minneapolis Star* focused on the important role of the press as a watchdog of government activity, and how Minnesota's differential taxation would have troubled the Framers of the First Amendment because the Minnesota tax created a threat of censoring critical comment by the press. In this case, Clear Channel's billboards are primarily for advertising, and for all the political and charitable information it displays, it simply is not in the same category as the fourth estate.

Additionally, the current case is distinguishable from *Minneapolis Star* because both cases involve a different type of tax. *Minneapolis Star* involves a use tax and the current case involves an excise tax. Finally, the use tax in *Minneapolis Star*, by taxing the component parts like ink and paper, directly taxed the output amount of the publication, while the Baltimore City Ordinance does no such thing. The Baltimore City Ordinance by no means implicates the information that is broadcasted on Clear Channel's billboards, it does not tax based on what is displayed, when the display is made, or based on the amount of information that is displayed. The Baltimore City Ordinance simply imposes a tax for Clear Channel's economic activity, which is non-expressive conduct.

The Tax Court correctly ruled that the tax applies to all off-premises billboards and that it is the City's long-standing zoning regulations and concentrated marketplace that caused the majority of the tax to fall on Clear Channel, not the structure of the tax ordinance. In *Herman v. Mayor & City Council of Baltimore*, the Court of Appeals opined that the State is not limited to *ad valorem* taxation, and that it may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. 189 Md. 191, 197 (1947). The same Court stated that "Article 23 and the Fourteenth Amendment permit discrimination, not arbitrary, in subjects or rates of taxation." *Id.* at 196; *see also Leathers v. Medlock*, 499 U.S. 439, 451 (1991) ("[i]nherent in the power to tax is the power to discriminate in taxation, legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.")

CONCLUSION

The Ordinance in this case imposes a tax on all those in the trade of owning, operating and charging fees for displaying off-site outdoor advertisements. Clear Channel is a member of this trade, and the trade is indeed made up of a small number of members, but this is because the City essentially allows Clear Channel to profit from a continued non-conforming use, as the construction of new billboards in the City has been prohibited for more than a decade. Baltimore. City. Code, Art. 32, §17-603(a)(1). Clear Channel enjoys the privilege of being a member of an exclusive trade in Baltimore City, and it is taxed accordingly as a member of that trade. The chilling effect that Clear Channel alleges is not apparent to this Court because the Ordinance is a legislative act which outlines the specific tax rate to be paid, and in order to be repealed or amended, the City must follow a set process. In the event of such an occurrence, Clear Channel will indeed have a ripe claim, and at that time, may enjoin the City's attempt. However, that is an issue for a different day.

The Tax Court's decision is correct as a matter of law, and is supported by the substantial evidence from the record. This Court therefore, **AFFIRMS** its decision.

APPENDIX D

IN THE MARYLAND TAX COURT

Appeal No. 16-MI-BA-0571

CLEAR CHANNEL OUTDOOR, INC.,
Petitioner,

v.

DEPARTMENT OF FINANCE OF
BALTIMORE CITY,
Respondent.

Filed: February 27, 2018

MEMORANDUM AND ORDER

This case concerns a challenge to the constitutionality of a tax imposed by the City of Baltimore in 2013 on a category of outdoor signs brought pursuant to the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Maryland Declaration of Rights. Petitioner, Clear Channel Outdoor, Inc. ("Clear Channel" or "Petitioner"), is an outdoor media company which owns and operates outdoor signs throughout the City of Baltimore. Respondent, the Director of the Department of Finance of Baltimore City ("City" or "Respondent"), is the Baltimore City official responsible

for collecting all Baltimore City revenue through various taxes, fines, fees and penalties.

The Baltimore City Council passed, and the Mayor signed, Ordinance 13-139 into law on June 17, 2013 (the "Ordinance"). The Ordinance imposes "a tax on the privilege of exhibiting outdoor advertising displays" in the City of Baltimore. The Ordinance defines an "outdoor advertising display" as any display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and (ii) sold, offered or conducted on the premises only incidentally if at all.

The tax is an excise tax imposed on the privilege of exhibiting outdoor advertising displays in the City of Baltimore that is exercised by an "Advertising Host," which is a person who owns or controls a billboard, poster board, or other sign and charges fees for its use as an outdoor advertising display. An Advertising host's tax liability is measured per a square foot of advertising imagery which means a square foot of space occupied by an outdoor advertising display. The annual amount of the tax imposed is $15 per square foot of advertising imagery for an electronic outdoor advertising display that changes more than once a day and $5 per square foot of advertising imagery for any other outdoor advertising display. The tax imposed is due at the time the annual report is filed by the Advertising Host.

Two months after the City enacted the tax, Clear Channel sued in federal court to block the City's imposition of the tax contending that the Ordinance restricted constitutionally protected speech. The City moved to dismiss the case on two grounds: (i) that the

Ordinance imposed a state tax that a federal court lacked jurisdiction to consider, and (ii) that Clear Channel failed to state a claim under the First Amendment. After substantial document and deposition discovery, the parties cross-moved for summary judgment. In December 2015, the District Court ruled that the Ordinance imposed a tax subject to review in the state-court system. Clear Channel paid the 2014 and 2015 taxes invoiced by the City under protest and demanded a refund on the ground that the tax is unconstitutional. The City denied Clear Channel's refund request, asserting that the tax did not unconstitutionally restrict speech. Clear Channel filed this refund action in the Tax Court, and while the refund request was pending, Clear Channel also paid its 2016 tax and filed another refund claim on the same grounds.

"Billboards in Baltimore City" are defined in the City's Zoning Code as "any sign that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the property on which the sign is located; or (ii) sold, offered, or conducted on that property only incidentally, if at all." BALTIMORE CITY CODE ART. 32, 1-303(g)(1). The zoning laws prohibit general advertising signs altogether in non-commercial areas, and in certain business and industrial areas where general advertising signs are permitted, they are subject to numerous restrictions. The zoning laws also make clear that no sign may constitute a traffic hazard and that the City may relocate or remove any sign it deems to be one.

Baltimore City has prohibited the construction of new general advertising signs for more than the last decade. Petitioner owns and operates several hundred outdoor advertising displays in the City, some of which are

electronic with images that change more than once a day. Others are nonelectronic. All of them, however, are "offsite" displays. They promote businesses, commodities, services, events, and other activities that do not occur on the premises where the display appears. Moreover, Clear Channel's displays often carry a variety of messages. Clear Channel owns and operates approximately ninety-five percent (95%), or 800 of the 830, advertising displays subject to the Billboard Ordinance. There are three (3) other entities that own or operate the outdoor advertising displays subject to the Billboard Ordinance.

Baltimore City credits the revenue generated by the Billboard Ordinance to the City's General Fund, and the revenue is used to benefit the general public by funding programming at public schools, theaters, and museums that are open to the general public.

Clear Channel contends that billboard speech is protected expression under the U.S. Constitution and Maryland Declaration of Rights, subjecting the tax to heightened rather than rational-basis scrutiny. According to Clear Channel, the Ordinance is unconstitutional for three independent reasons. *First*, the government may not impose a specific (rather than general) tax on speech. *Second*, targeted taxes on a limited number of speakers create an intolerable risk of chilling speech. *Third*, the tax is not narrowly tailored under intermediate scrutiny because by imposing a specific rather than general tax, it imposes a greater-than-necessary burden on speech.

The City of Baltimore holds the power to tax to the same extent as the State of Maryland has or could exercise said power within the limits of the City of Baltimore as part of its general taxing power. The Baltimore City Council holds the legislative power to impose different specific taxes upon different trades and

professions and may vary the rates of excise upon various products, "*Herman v. Mayor & City Council of Baltimore*, 189 Md. 191, 197 (1947). "Taxes . . . may . . . be laid on the exercise of personal rights and privileges," including "the privilege of exhibiting outdoor advertising displays in the City." Art. 28, § 29-2; *Carmichael* 301 U.S. at 508, 57 S. Ct. 868. The First Amendment does not prohibit the imposition of excise taxes, and in the First Amendment context, there is a "strong presumption in favor of duly enacted taxation schemes." *Leathers v. Medlock*, 499 U.S. 439, 451, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). If the tax is rationally related to a legitimate state interest, including collecting public revenues, it is not incumbent on the government to state its reasons, motives or policies for adapting the tax. Merely because a tax has some regulatory effect does not mean the tax violates First Amendment rights. In fact, every tax is in some measure regulatory. The power of the City to tax is broad and exertion of that power may not be judicially restrained because it may have a regulatory effect.

An excise tax imposed on the privilege of exhibiting outdoor advertising displays is a tax on the privilege of continuing in business, not on exercising free speech. The Court agrees with the City that the business of owning or controlling a billboard, poster board or other sign and charging taxes for its use as an outdoor advertising display to show messages on behalf of paying clients is not violative of Petitioner's rights to free speech. Petitioner's conduct does not possess "sufficient communicative elements" for the First Amendment to come "into play," *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Petitioner does not express or say anything; it only sells space to advertisers who say things. First Amendment protection extends only to conduct that is inherently expressive and displaying a third party's

message on an outdoor advertising billboard in exchange for financial compensation lacks any significant expressive element. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); *See e.g. Rumsfeld* 547 U.S. at 64, 126 S. Ct. 1297 ("accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."); *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 88, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (no First Amendment violation in authorizing expressive activity on private property because views expressed are not associated with owner, who was "free to publicly dissociate themselves from the views of the speakers.")

The Court finds that the tax is subject to rational basis review because the tax does not infringe Petitioner's free speech rights. The tax has a rational relation to a legitimate governmental purpose and would only be subjected to a higher level of scrutiny if it interfered with the exercise of a fundamental right such as freedom of speech. In the present case, the taxpayer has made no showing that the tax imposes a burden on free speech. It was imposed for revenue purposes on the privilege of exhibiting outdoor advertising displays and not on the right to disseminate information, ideas or speech. It is permissible to tax non-expressive conduct such as imposing a tax on the privilege of making retail sales of personal property. In the present case, this tax is directed toward a means of expression rather than the expression itself and does not burden the substance of the expression. First Amendment protection does not extend to the form of communication if there is no deterrence or interference with the expression of information and ideas. Here there is no cognizable burden on speech.

Clear Channel further claims that Baltimore City's tax unconstitutionally limits the classifications of signs and targets a small group of operators of outdoor advertising displays. The result is a targeted tax measure which causes a significant risk of chilling speech by speakers fearful of further taxation and regulation. At a minimum, the City could have drafted a sign tax to apply to a broader group of operators.

However, the City argues that the tax's classification in Art. 28, § 29-3(a) for digital billboards poses no threat to the expression of particular ideas or expressions. The amount of the tax based on size and technology is not measured by the extent of the circulation of the message shown on the outdoor advertising displays. The tax's requirement that an Advertising Host charge fees for the use of an Outdoor Advertising Display at least one time per year is consistent with the continuance of a non-conforming use and does not raise any constitutional question.

Moreover, the tax is applicable to all off-premises billboards and does not single out one small group of off-premises billboards while exempting others from taxation. The City ordinance charges any entity that owns or operates an off-premises outdoor display ten feet (10') or larger in size. There is a rational basis for classifying large and immobile billboards designed to stand out from other signs and other advertising. The billboards subject to tax take up space and may obstruct views, distract motorists and displace alternative uses of land. These physical characteristics of taxable signs are certainly within the City's broad latitude in creating classifications and distinctions in its tax statutes. Even though there are a limited number of advertising hosts subject to the tax, there is not suppression of speech. The City's long-

standing zoning regulations controlling billboards and the concentrated marketplace in the City has caused the majority of the tax to fall on the Petitioner, not the structure of the tax ordinance. Otherwise, local governments would be restricted from raising operating revenue through general taxation ordinances where there were only a few similar business enterprises.

The Court finds that the City's denial of Petitioner's requests for a refund of the Outdoor Advertising Tax for the fiscal years 2014, 2015 and 2016 shall be **AFFIRMED.**

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. GLR-13-2379

CLEAR CHANNEL OUTDOOR, INC.,
Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Defendant.

Filed: December 28, 2015

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff's, Clear Channel Outdoor, Inc. ("Clear Channel"), Motion for Summary Judgment and Defendant's, Mayor and City Council of Baltimore (the "City"), Cross-Motion for Summary Judgment. (ECF Nos. 37, 38). Principally at issue is whether Baltimore City Ordinance 13-139 (the "Billboard Ordinance"), which levies select outdoor advertising displays in the city, constitutes a tax under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341 (2012).

The Court, having reviewed the Motions and supporting documents, finds no hearing necessary. *See* Local Rule 105.6 (D.Md. 2014). For the reasons outlined below, the Court will deny Clear Channel's Motion for Summary Judgment and grant the City's Cross-Motion for Summary Judgment.

I. BACKGROUND[1]

The Billboard Ordinance became law in June 2013. *See* Balt., Md., Ordinance 13-139 (Jun. 17, 2013) (codified as amended at Balt., Md., Code art. 28, §§ 29 *et seq.* (2014)). The Baltimore City Council enacted it for "the purpose of imposing a tax on the privilege of exhibiting outdoor advertising displays in the City." *Id.* at 1:2-3. Clear Channel owns and operates approximately ninety-five percent of the advertising displays subject to the Billboard Ordinance. It alleges the Billboard Ordinance will cost it $1.5 million annually.

On August 14, 2013, Clear Channel filed a Complaint alleging the Billboard Ordinance impermissibly regulates commercial speech in violation of the First and Fourteenth Amendments to the United States Constitution. (ECF No. 1). Clear Channel seeks a declaratory judgment that the Billboard Ordinance is unconstitutional and an order enjoining the City from enforcing it. The City moved to dismiss the action on September 19, 2013, arguing this Court did not have subject-matter jurisdiction because the Billboard Ordinance is a "tax" under the TIA. (ECF No. 15). The Court denied the City's Motion to Dismiss on May 19, 2014, explaining that "at least at th[at] stage of the

[1] Unless otherwise noted, the following facts are taken from the parties' briefings on the instant motions, and are viewed in the light most favorable to the nonmoving party.

litigation, the ordinance [was] a fee, not a tax, for the purposes of the TIA." (Mem. Op. at 2, ECF No. 21). The City filed a Motion for Reconsideration (ECF No. 23), which the Court denied on August 19, 2014 (ECF No. 26).

Clear Channel filed a Motion for Summary Judgment on April 3, 2015. (ECF No. 37). The City responded by filing an Opposition to the Motion for Summary Judgment and Cross-Motion for Summary Judgment on April 20, 2015. (ECF No. 38). Clear Channel then submitted an Opposition to the City's Motion for Summary Judgment and Reply supporting its Motion for Summary Judgment on May 7, 2015. (ECF No. 39). Finally, the City submitted a Reply to Clear Channel's Opposition on May 26, 2015. (ECF No. 40).

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rule 56(c) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a

genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (citing *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir. 1984)).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. A "material fact" is one that might affect the outcome of a party's case. *Id.* at 248; *see also JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001) (citing *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001)). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *accord Hooven-Lewis*, 249 F.3d at 265. A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson*, 477 U.S. at 248.

When the parties have filed cross-motions for summary judgment, the court must "review each motion separately on its own merits to 'determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997)). Moreover, "[w]hen considering each individual motion, the court must take care to 'resolve all factual disputes and any competing, rational inferences in the light most favorable' to the party

opposing that motion." *Id.* (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)). This Court, however, must also abide by its affirmative obligation to prevent factually unsupported claims and defenses from going to trial. *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993). If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment must be granted. *Anderson*, 477 U.S. at 249-50.

B. Analysis

The Court will deny Clear Channel's Motion for Summary Judgment and grant the City's Cross-Motion for Summary Judgment because the Billboard Ordinance is a "tax" under the TIA.

"The TIA 'is a jurisdictional bar not subject to waiver.'" *Brittingham 62, LLC v. Somerset Cty. Sanitary Dist., Inc.*, No. GLR 12-3104, 2013 WL 398098, at *3 (D.Md. Jan. 31, 2013) (quoting *Antosh v. City of Coll. Park*, 341 F.Supp.2d 565, 568 (D.Md. 2004)). It provides that federal courts lack subject-matter jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. It "applies to actions where, as here, a taxpayer seeks injunctive or declaratory relief under § 1983." *Folio v. City of Clarksburg, W.Va.*, 134 F.3d 1211, 1214 (4th Cir. 1998).

When considering whether the TIA bars a federal challenge to a charge imposed by a state or local government, a district court must resolve two issues: (1) whether a plain, speedy, and efficient remedy exists in state court; and (2) whether the charge is a tax or a fee. *Collins Holding Corp. v. Jasper Cty., S.C.*, 123 F.3d 797,

799 (4th Cir. 1997). Clear Channel does not argue that Maryland state courts do not provide a speedy and efficient remedy. Thus, the sole issue before the Court is whether the Billboard Ordinance is a tax or a fee under the TIA.

"The nebulous line between tax and fee is determined by federal law." *Brittingham*, 2013 WL 398098, at *3 (citing *Folio*, 134 F.3d at 1217). As a general matter, when evaluating whether a particular charge is a tax or a fee, a court should assess "whether the charge is for revenue raising purposes, making it a 'tax,' or for regulatory or punitive purposes, making it a 'fee.'" *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). All charges fall on a spectrum with a "classic tax" on one end and a "classic fee" on the other. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992). "The 'classic tax' is imposed by the legislature upon a large segment of society, and is spent to benefit the community at large." *Valero*, 205 F.3d at 134 (citing *San Juan Cellular*, 967 F.2d at 685). "The 'classic fee' is imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes, or to raise 'money placed in a special fund to defray the agency's regulation-related expenses.'" *Id.* (quoting *San Juan Cellular*, 967 F.2d at 685).

To aid a court's assessment of where a charge falls on the spectrum, the United States Court of Appeals for the Fourth Circuit has developed a three-prong inquiry: "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the *use* of the monies obtained by the charge." *Id.* (emphasis added). This inquiry often yields an ambiguous result, as the characteristics of a charge will often place it somewhere between a classic fee and a classic tax. *Id.*

The result of the three-prong inquiry is ambiguous when, for example, a legislature imposes the charge, indicating the charge is a tax, but the charge applies to only a narrow segment of the population, supporting a finding that the charge is a fee. *See Club Ass'n of W. Va., Inc. v. Wise*, 156 F.Supp.2d 599, 613-14 (S.D.W.Va. 2001), *aff'd sub nom.*, *Club Ass'n. v. Wise*, 293 F.3d 723 (4th Cir. 2002).

When the result of the three-prong inquiry is ambiguous, the third prong becomes the most important. *See DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 125 (4th Cir. 2008); *Club Ass'n*, 156 F.Supp.2d at 614.

1. The First Prong Indicates the Billboard Ordinance Is a Tax.

The first prong indicates a charge is a tax when it is imposed by a legislature, rather than an administrative agency, and the responsibility for collecting the charge lies with the general tax assessor. *See Valero*, 205 F.3d at 134; *Collins*, 123 F.3d at 800. There is no dispute that the Baltimore City Council enacted the Billboard Ordinance and the City's general tax assessor, the Director of Finance, is responsible for collecting the charge. Balt., Md., Code art. 28, § 4-1; Balt., Md., Ordinance 13-139 § 29-5. Thus, the Court finds the first prong indicates the Billboard Ordinance is a tax.

2. The Second Prong Indicates the Billboard Ordinance Is a Fee.

The second prong indicates a charge is a fee when it is imposed upon a narrow segment of the population. *See GenOn Mid-Atl., LLC v. Montgomery Cty., Md.*, 650 F.3d 1021, 1024 (4th Cir. 2011) (quoting *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)); *see also*

Antosh v. City of Coll. Park, 341 F.Supp.2d 565, 568 (D.Md. 2004).

There is no dispute that the Billboard Ordinance affects only a narrow segment of the population and Clear Channel is primarily responsible for bearing the financial burden. Including Clear Channel, there are only four entities that own or operate the outdoor advertising displays subject to the Billboard Ordinance. (*See* Pl.'s Mot. Summ. J. Ex. 10 at 6, ECF No. 37-11). And, what is more, out of the approximately 830 advertising displays subject to the Billboard Ordinance, Clear Channel owns or operates approximately 800. (*Id.* Ex. 6 at ¶ 6, ECF No. 37-7). Consequently, Clear Channel is responsible for the vast majority of the Billboard Ordinance's financial burden, paying $1.5 million annually, while the other entities pay a comparatively meager $100,000. (*See id.* Ex. 6 at ¶ 6); (*id.* Ex. 10 at 6).

The City cites several cases outside the Fourth Circuit for the proposition that a charge can be a tax under the TIA even when it affects only a narrow segment of the population. *See*, *e.g.*, *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 737 F.3d 228, 233 (2d Cir. 2013) ("Many revenue measures that are indisputably taxes, however, fall on a limited portion of the population."); *Bidart Bros.*, 73 F.3d at 931-32 ("[A]n assessment upon a narrow class of parties can still be characterized as a tax under the TIA."). The Court, however, finds *GenOn*—a Fourth Circuit case—to be more instructive.

In *GenOn*, the Fourth Circuit considered whether a charge imposed by a county bill directed at large carbon dioxide emitters was a tax or a fee under the TIA. The court observed that the "chief problem" with the charge was that the burden fell on GenOn alone. *GenOn*, 650 F.3d at 1024. Though the bill, on its face, targeted a broad class

of would-be taxpayers, in practice, only one entity met that description and was subject to the charge. *Id.* Noting that "taxes generally apply to at least more than one entity" and "[t]he County Council . . . was thus well aware that the incidence of the charge would fall entirely on GenOn," the court held that the charge was a fee under the TIA. *Id.* at 1024-26.

Here, to be sure, there are a few entities other than Clear Channel that own or operate advertising displays subject to the Billboard Ordinance. Clear Channel, however, is primarily responsible for the Billboard Ordinance's financial burden. Indeed, the other entities' $100,000 annual responsibility appears almost de minimis when compared to Clear Channel's $1.5 million. Moreover, the Baltimore City Council was well aware that the Billboard Ordinance would primarily burden Clear Channel. (*See* Pl.'s Mot. Summ. J Ex. 21 at 2, ECF No. 37-22); (*id.* Ex. 18 at 2, ECF No. 37-19).

The City also argues the second prong indicates the Billboard Ordinance is a tax because it uses general, open-ended criteria to define the population subject to it. This argument fails for at least two reasons. First, the Billboard Ordinance significantly circumscribes the population subject to it by excluding "onsite" displays[2] and those displays smaller than ten square feet. Balt., Md., Code art. 28, § 29-1(d). Second, even assuming the Billboard Ordinance uses general, open-ended criteria, that is not a material fact. Who the charge actually affects is material. *See GenOn*, 650 F.3d at 1024 ("The fact that this charge *affects* the narrowest possible class is

[2] "Onsite displays" are displays that promote a business, commodity, service, event, or other activity conducted on the premises upon which the display appears. *See* Balt., Md., Code art. 28 § 29-1(d).

compelling evidence that it is a punitive fee rather than a tax." (emphasis added)). And, here, it is undisputed that the Billboard Ordinance primarily affects Clear Channel.

The Court, therefore, finds the second prong indicates the Billboard Ordinance is a fee.

3. The Third Prong Indicates the Billboard Ordinance Is a Tax.

The third prong indicates a charge is a tax when the revenue is paid into a general fund. *Collins*, 123 F.3d at 800-01. More important than where the revenue is placed, however, is how the revenue is used. *See id.* at 801 (quoting *Hager v. City of W. Peoria*, 84 F.3d 865, 870-71 (7th Cir.1996)); *Valero*, 205 F.3d at 135 (explaining that a court must examine the use and purpose of a charge as opposed to performing a cursory review of where the revenue is placed).

When the revenue is used to benefit the general public, the charge is a tax. *Valero*, 205 F.3d at 134; *see Club Ass'n.*, 293 F.3d at 726. Conversely, when the revenue is used to provide benefits that are "more narrowly circumscribed," the charge is a fee. *Valero*, 205 F.3d at 134.

Benefits are "more narrowly circumscribed" when the revenue is used to benefit only the regulated entities or to defray regulation costs. *Collins*, 123 F.3d at 800-01; *see State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983); *San Juan Cellular*, 967 F.2d at 686.

There is no dispute that the City credits the revenue generated by the Billboard Ordinance to the City's "General Fund." (*See* Def.'s Mot. Summ. J. Ex. 11 at 2, ECF No. 38-13); (*id.* Ex. 9 at 7, ECF No. 38-11). It is also undisputed, however, that in November 2013, the

Baltimore City Council enacted Ordinance 13-185 (the "Art and Culture Ordinance"), a "Supplemental General Fund Operating Appropriation" that allocated $250,000 of the Billboard Ordinance's revenue for "Art and Culture." (Def.'s Mot. Summ. J Ex. 14 ["Art and Culture Ordinance"] at 1, ECF No. 38-16).[3] The Art and Culture Ordinance established the Creative Baltimore Fund (the "Fund") within the Baltimore Office of Promotion and the Arts. (*Id.* at 2). The Fund was intended to provide small grants to non-profit organizations for "cultural community-based programming." (Pl.'s Mot. Summ. J. Ex. 29 at 1, ECF No. 37-30).

Clear Channel asserts that the Art and Culture Ordinance demonstrates that the Billboard Ordinance is a fee because it shows that the City always intended to use the Billboard revenue for a specific purpose: supporting arts and culture programs. (Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. & Reply Supp. Pl.'s Mot. Summ. J. at 12, ECF No. 39). Clear Channel attempts to bolsters this argument by pointing to an April 25, 2013 hearing before the City's Taxation, Finance and Economic Development Committee at which Andrew Kleine, Chief of the City's Bureau of Budget and Management Research, remarked that "$1.0 million from the [Billboard Ordinance's] proceeds have been included in the budget for arts and culture." (Pl.'s Mot. Summ. J. Ex. 21 at 2, ECF No. 37-22).

Clear Channel's argument is unavailing. The undisputed evidence that some of the Billboard Ordinance's revenue is dedicated to funding arts and

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[3] Specifically, the $250,000 allocated by the Art and Culture Ordinance represented "funds from billboard tax revenue in excess of the revenue relied on by the Board of Estimates in determining the tax levy required to balance the budget for Fiscal Year 2014." (Art and Culture Ordinance at 1).

cultural programming demonstrates that the benefits of the Billboard Ordinance are not narrowly circumscribed to regulated entities. To the contrary, the benefits reach the general public and all those who perform and enjoy the arts and cultural programming supported by the Fund. Indeed, the Fund has used Billboard Ordinance revenue to support programming at public schools, theaters, and museums—all institutions open to the general public.[4] (*See* Def.'s Mot. Summ. J. Ex. 30 at 1, ECF No. 37-31).

Moreover, Clear Channel presents no evidence that the City uses any portion of the Billboard Ordinance's revenue to provide narrow benefits to entities owning or operating billboards in Baltimore City or to defray the costs of regulating outdoor advertising. *See Hedgepeth v. Tennessee*, 215 F.3d 608, 613-15 (6th Cir. 2000) (holding that state assessment on disabled parking placards was a tax under the TIA because "[t]here [was] simply no evidence to support Plaintiffs' contention that the funds collected from the placards are paid into a special fund to benefit the regulated entities or to defray the cost of regulation").

Clear Channel further argues the third prong indicates the Billboard Ordinance is a fee because the recitals demonstrate that it has a regulatory purpose. There are two regulatory purposes that may indicate a charge is a fee: (1) "generating income ear marked to

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[4] The Art and Culture Ordinance allocated only a portion of the Billboard Ordinance revenue generated in 2014. Clear Channel presents no other spending ordinance's showing that the City uses the remainder of the Billboard Ordinance revenue to fund arts and culture. Even assuming the City uses all the Billboard Ordinance revenue to fund arts and culture, however, the benefits of this use are not limited to outdoor advertisers subject to the Billboard Ordinance.

cover the cost of regulation;" or (2) discouraging particular conduct by making it more expensive. *Hedgepeth*, 215 F.3d at 612. When a charge has one of these regulatory purposes and the revenue is used to advance the regulatory agenda, it is a fee. For example, in *GenOn*, Montgomery County, Maryland imposed a "carbon charge" to discourage greenhouse gas emissions. 650 F.3d at 1022. The Fourth Circuit held that the carbon charge was a fee because fifty percent of the revenue was earmarked for funding greenhouse gas reduction programs. *See id.* at 1025-26. Indeed, the revenue was an "integral part of the County's greenhouse gas regulatory agenda." *Id.* at 1025.

Conversely, when a charge has one of these regulatory purposes and the revenue is not used to advance the regulatory agenda, but rather to benefit the general public, it is a tax. For instance, in *Club Association*, the West Virginia legislature enacted the West Virginia Limited Video Lottery Act, which made it more expensive to operate, manufacture, service, or sell video lottery equipment by imposing licensing fees. 293 F.3d at 725. One of the avowed purposes of the Act was to "stem the proliferation of gambling in the State." *Id.* at 724. West Virginia used the revenue, however, to fund "programs that would benefit the State's populace as a whole," such as state park improvement. *Id.* at 726; *Club Ass'n*, 156 F.Supp.2d at 614. The Fourth Circuit held that the licensing fees were a tax. *Club Ass'n*, 293 F.3d at 726.

The Billboard Ordinance recitals declare that outdoor advertising "reduces the City's ability to collect revenue from other sources" and the Billboard Ordinance "properly allocat[es] the potential economic burdens caused by outdoor advertising." Balt., Md., Ordinance 13-139 at 2:5-8. At first blush, these statements suggest that

the City intended to use the Billboard Ordinance to generate revenue to cover the cost of regulating outdoor advertising. Clear Channel presents no evidence, however, that the City actually earmarks Billboard Ordinance revenue to cover the cost of any such regulation. Quite to the contrary, it is undisputed that the City has used Billboard Ordinance revenue to fund arts and culture—a purpose wholly unrelated to regulating billboards.

The Billboard Ordinance recitals also declare that "outdoor advertising endangers public safety by distracting the attention of drivers from the roadway." *Id.* at 2:1-2. This statement suggests that the City intended to discourage outdoor advertising by making it more expensive. But the City does not use Billboard Ordinance revenue to advance this regulatory agenda—there is no evidence it uses Billboard Ordinance revenue to further discourage roadway distractions or improve driver safety. Instead, like in *Club Association*, the City uses Billboard Ordinance revenue to benefit the general public by funding programming at public schools, theaters, and museums that are open to the general public.

For these reasons, the Court finds the third prong indicates the Billboard Ordinance is a tax.

In sum, the first prong indicates the Billboard Ordinance is a tax because the Baltimore City Council enacted it and the Department of Finance, the City's general tax assessor, collects the revenue. The second prong, however, indicates the Billboard Ordinance is a fee because Clear Channel is primarily affected. Because the first two prongs place the Billboard Ordinance

somewhere between a fee and tax,[5] the third prong becomes most important. *See Club Ass'n*, 156 F.Supp.2d at 613-14. The third prong strongly indicates the Billboard Ordinance is a tax because the City does not use Billboard Ordinance revenue to advance its regulatory agenda, defray regulation costs, or provide a narrow benefit to regulated entities. Thus, the Billboard Ordinance is a tax. Accordingly, the Court lacks subject-matter jurisdiction to resolve the merits of the constitutional challenge.

CONCLUSION

Based on the foregoing reasons, Clear Channel's Motion for Summary Judgment (ECF No. 37) will be **DENIED** and the City's Cross-Motion for Summary Judgment (ECF No. 38) will be **GRANTED**. A separate Order follows.

Entered this 28th day of December, 2015.

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[5] In *GenOn*, the Fourth Circuit's analysis of the first two prongs was conclusive—the charge was clearly a fee because although the charge was imposed by a legislature, indicating a tax, the charge affected only one entity, overwhelming indicating a fee. *See* 650 F.3d at 1024. The same cannot be said, however, for this case. As the Court explained above, although Clear Channel is primarily affected by the Billboard Ordinance, it is not solely affected. Thus, unlike in *GenOn*, the Court's analysis of the first two prongs is inconclusive.

APPENDIX F

ARTICLE 28
TAXES
(As Last Amended by Ord. 21-032)

SUBTITLE 29 - OUTDOOR ADVERTISING

§29-1. Definitions.

(a) *In general.*

In this subtitle, the following terms have the meanings indicated.

(b) *Advertising host.*

"Advertising host" means a person who:

(1) owns or controls a billboard, posterboard, or other sign; and

(2) charges fees for its use as an outdoor advertising display.

(c) *Finance Director; Director.*

"Finance Director" or "Director" means the Director of Finance or a designee of the Director of Finance.

(d) *Outdoor advertising display.*

"Outdoor advertising display" means an outdoor display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is:

(i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and

(ii) sold, offered, or conducted on the premises only incidentally if at all.

(e) *Person.*

(1) *In general.*

"Person" means:

(i) an individual;

(ii) a partnership, firm, association, corporation, or other entity of any kind; and

(iii) a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind.

(2) *Exclusions.*

"Person" does not include, unless otherwise expressly provided, a governmental entity or an instrumentality or unit of a governmental entity.

(f) *Square foot of advertising imagery.*

"Square foot of advertising imagery" means a square foot of space occupied by an outdoor advertising display.

(Ord. 13-139.)

§ 29-2. Tax imposed.

An excise tax is imposed on the privilege of exhibiting outdoor advertising displays in the City.

(Ord. 13-139.)

§ 29-3. Amount of tax.

(a) *In general.*

The annual amount of the tax imposed is at the following rates per square foot of advertising imagery:

(1) $15 per square foot of advertising imagery for an electronic outdoor advertising display that changes images more than once a day; and

(2) $5 per square foot of advertising imagery for any other outdoor advertising display.

(b) *Tax for a single space.*

If a single space is used for multiple outdoor advertising displays during the course of one reporting period, the advertising host who makes that space available:

(1) must pay the annual tax as if the display that would generate the highest tax liability had been in place for the entire year; and

(2) need not pay an additional tax for any other displays in that space.

(Ord. 13-139.)