No. 21-219

In the Supreme Court of the United States

CLEAR CHANNEL OUTDOOR, LLC,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.[1]

This is such a case. The Chamber's membership includes businesses that are subject in varying degrees to a wide range of local and state tax regimes that have been or could be tailored to single out specific speakers for unique tax burdens. As a result, the Chamber is well suited to offer a broader perspective on the danger posed by taxes that are targeted selectively at small groups of speakers, and the Chamber has a strong interest in ensuring that the taxes imposed upon its members comport with the First Amendment. The Chamber therefore submits this

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[1] Pursuant to Supreme Court Rule 37, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no one other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have consented to the filing of this brief.

brief to explain why, in its respectful view, the petition should be granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an exceptionally important First Amendment question: May a state or municipal government impose a tax that falls solely on a small, identified group of companies whose business is to facilitate public speech? The decision of the Maryland Court of Appeals below, if left to stand, would afford local legislatures and tax authorities free rein to impose such a targeted tax without meaningful First Amendment scrutiny. But a gerrymandered tax that a local government is free to increase, decrease, or abolish each year, at the expense of only a handful of speakers, will invariably inhibit those speakers' ability and willingness to enter the business of speech and to sponsor public expression. The Court should grant review in order to decide whether the power to tax can be aimed so selectively at specific speech platforms, or whether the government should be constrained in this context by the requirement of an important justification, lest such taxes become potential tools for censorship.

The decision below imperils the protections the First Amendment has long provided the business community in at least two ways. *First*, it conflicts with this Court's longstanding jurisprudence holding that encumbering particular speakers with unique tax burdens casts a chill incompatible with the First Amendment. The decision below held that a tax that reaches only four speakers, and predominantly draws

from a single company that is in the business of hosting protected speech, does not trigger any form of strict or heightened scrutiny. This Court's jurisprudence, however, has recognized the chilling effect of singling out identifiable speakers for unequal tax burdens, and has subjected such laws to strict or heightened scrutiny even absent evidence of improper legislative intent.

Second, the decision below held that the First Amendment protects Petitioner less than it protects the institutional press. This Court's jurisprudence, however, makes clear that the Constitution restrains the government from improperly burdening *any* speaker's rights, not just the rights of those who own or work for magazines, newspapers, or the nightly television news.

The petition presents a question of surpassing importance, both to the immediately affected industry that provides outdoor messaging and to a broader array of speech platforms beyond the traditional press. This Court has long recognized billboards' role as a venerable method of communication entitled to the protection of the First Amendment, even in the face of broad invocations of state and local governments' police powers. In this case, in contrast, Respondent justifies singling out billboards not on any aesthetic, public safety, or similar grounds, but instead based solely on a general interest in raising revenue.

If left undisturbed, the Maryland Court of Appeals' holding that such a tax requires nothing more than a rational basis could well open the door to similarly targeted taxes on particular social media companies,

online marketplaces, and other platforms that Americans increasingly use to communicate outside of the pages or broadcasts of the traditional press. Indeed, Maryland has already enacted a first-of-its-kind burden on digital advertising that similarly falls on a small number of companies in the business of speaking and hosting speech. *See* MD. CODE ANN., TAX-GEN. § 7.5-101 *et seq.* (West 2021). That state charge borne by certain speakers, like the city tax at issue in the petition, is a harbinger of what can, and likely will, become an onslaught of targeted taxes on known, disfavored speakers, including expressive businesses that present a desirable target for local governments strapped for tax revenues. The petition presents an opportunity for the Court to give these questions full First Amendment consideration before such selective tax schemes proliferate and become entrenched as a go-to revenue source around the country.

Unlike *City of Austin, Texas v. Reagan National Advertising of Austin, Inc.*, 972 F.3d 696 (5th Cir. 2020), *cert. granted* -- S. Ct. --, 2021 WL 2637836 (Mem) (U.S. June 28, 2021) (No. 20-1029), which the Court will hear during the upcoming Term, this case calls for larger examination of the fundamental limits that the First Amendment imposes on governments' abilities to single out particular speakers for increased taxation. Its import thus extends beyond billboards or even commercial speech generally. The Court should grant the petition in order to decide whether the power to tax includes the power to discriminate against small groups of speakers, and whether, at a minimum, the First Amendment demands strict or heightened scrutiny of laws that so discriminate.

ARGUMENT

I. THE DECISION CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS

In the decision below, the Court of Appeals of Maryland unsettled the law by upholding, based on mere rational-basis review, a tax directed at only four companies that are in the business of promoting speech. That decision warrants review for two reasons of particular importance to the business community.

First, the decision disregarded this Court's precedents holding that tax regimes singling out a small number of identified speakers trigger heightened First Amendment scrutiny. Such regimes invite abuse and, absent limitation, threaten to diminish speakers' incentive to speak, or to host others' speech, on topics that those imposing the selective tax may disfavor.

Second, the decision below relied on outdated, ossified conceptions of what the majority below deemed "the press" that cannot be squared with the First Amendment, judicial precedent, or the technological and economic reality of how individuals, groups and businesses in the United States communicate and consume information today. These two aspects of the decision below were central to its upholding of the tax at issue, and they present questions of exceptional constitutional and practical importance.

A. Selective Taxation Of A Small Group Of Speakers Warrants Heightened Scrutiny

It is undisputed that the tax at issue affects just four entities, and that approximately 90% of the resulting tax revenue comes from Petitioner alone. App. at 5a. Nor can it be disputed that, under the decision below, the Mayor and City Council of Baltimore, who imposed the tax in 2013, *see id.* at 3a, 23a-24a & n.15, now wield the power to double, eliminate, or make any other change to the rate of this tax, knowing it will fall exclusively on four companies and overwhelmingly on Petitioner. The First Amendment demands something more than a rational basis for gerrymandering taxes at the sole expense of a small handful of businesses whose payment obligations are defined by their speech.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court recognized that "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Id.* at 585. When a tax burdens only a small subset of the population, leaving the rest of a government's constituency unaffected, "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute." *Id.* The Court accordingly held the specialized tax at issue in that case, which fell solely on thirteen publishers, and predominantly on one, *see id.* at 578-79, was unconstitutional "not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591. In other words, the First

Amendment values at issue are disjunctive: a differential tax is suspect and subject to heightened scrutiny not only where it falls on the press, but any time it falls on a small number of speakers.

The Court reiterated the importance of considering how narrowly a tax on speakers is contoured in *Leathers v. Medlock*, 499 U.S. 439 (1991), when it addressed the constitutionality of "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout [Arkansas]." *Id.* at 449. In upholding the challenged tax, the Court emphasized that, there, the legislature had "not selected a narrow group to bear fully the burden of the tax," and further explained that "[t]he danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas." *Id.* at 448.

Accordingly, federal circuit courts have since held that "[l]aws singling out a small number of speakers for onerous treatment are inherently suspect." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012); *see also Pitt News v. Pappert*, 379 F.3d 96, 111 (3d Cir. 2004) ("A law is presumptively invalid if it 'singles out the press' or 'a small group of speakers.'") (quoting *Leathers*, 499 U.S. at 447). Such laws have been subjected to strict scrutiny, even where their narrowness traces a preexisting market reality that the legislature keyed off in crafting the tax. *See, e.g.*, *Time Warner*, 667 F.3d at 638-39 (law imposing a differential burden "must endure strict scrutiny because it targets only a few incumbents," specifically

the only two that had unexpired franchises in relevant municipalities); *Pitt News*, 379 F.3d at 111 (law banning payment to advertise alcohol in media affiliated with educational institutions, which "in practice singles out media associated with the Commonwealth's universities and colleges," cannot survive strict scrutiny).

The decision below declined to subject the City's tax to anything more than rational-basis scrutiny regardless of its targeting of a tiny set of speakers whose tax burdens were defined by their speech activity. It bears emphasizing that the decision did not deny that the tax is targeted against specific speakers and triggered by the expressive nature of their business. Indeed, Baltimore's tax undeniably falls on fewer than the number of affected newspapers in *Minneapolis Star*, and also falls more heavily on a single speaker than that tax did. *See* App. 5a; *see also, e.g.*, *Ark. Writers' Proj., Inc. v. Ragland*, 481 U.S. 221, 229 & n.4 (1987) (holding that tax that falls on just three businesses that publish speech violates the principles identified in *Minneapolis Star*). The majority below was content to observe that the tax's narrowness was "due largely to market conditions, not the structure of the Ordinance." App. at 31a. Far from alleviating concern, however, such "market" conditions are themselves a creature of the government's own ban on the construction of new billboards, *see id.* at 5a, and invite legislative abuse absent judicial check.

In the circumstances evident here, the legislature knows, with great precision and certitude, the identity of the speaker who will be subject to the tax, and is opting to impose special tax burdens solely on a se-

lect few businesses that are in the business of speaking, separate and apart from all others. The resulting threat to free expression is obvious and should be accounted for consistent with the First Amendment. *See, e.g.*, App. at 49a (Getty, J., dissenting) ("This narrow focus can operate like a censorial cudgel."). Regardless of *how* the tax has come to fall almost exclusively on Petitioner's hosting of speech, that is exactly where it falls, per the awareness and design of the taxing authority. This Court's jurisprudence calls for more significant and tailored justification in this recurring circumstance than invocation of the government's bare desire to raise revenues.

Any tax that singles out particular speakers and remains subject to adjustment, up or down, at the government's whim poses a "threat [that] can operate as effectively as a censor to check critical comment by the press." *Minneapolis Star*, 460 U.S. at 585. Such a threat inevitably chills speech, and it is present whenever the legislature singles out a small number of speakers—whether by providing exceptions and exemptions to broader taxes or by defining a tax's reach in terms of speech activities and a small set of known speakers. *See Ark. Writers' Proj.*, 481 U.S. at 228 (noting that unconstitutionality of a targeted tax "can be established even where, as here, there is no evidence of an improper censorial motive"); *Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."). Intentionally or not, taxing a small number of known speakers carries with it a threat to vary that unique financial burden based on those speakers' messages. That is why this Court has long held that "[a] tax is also suspect if it targets a small group of speakers.

Again, the fear is censorship of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447 (citation omitted, emphasis added). The decision below is problematic because it ushers in the very threat that this Court has taken care to guard against.

B. First Amendment Protection Extends To Businesses Beyond The Institutional Press

The Maryland Court of Appeals posed an additional problem because it refused to subject the tax that uniquely burdens Petitioner and three other firms to any heightened scrutiny by categorically ruling that a company in the business of operating billboards is not "equivalent to a newspaper or broadcaster for purposes of the First Amendment." App. at 27a. The court below suggested that longstanding First Amendment protections do not extend to a publisher, like Petitioner, that "does not claim to be a newsgathering organization that curates what it disseminates according to journalistic principles." *Id.* Such a preference for the institutional press over other publishers is constitutionally suspect; it finds no clear basis in the First Amendment and conflicts with this Court's jurisprudence.

The First Amendment prohibits laws "abridging the freedom … of the press," and as this Court has long held, "[t]he liberty of the press is not confined to newspapers and periodicals." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Instead, "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* As such, this Court has rejected the "suggestion that communication by corporate members of the

institutional press is entitled to greater constitutional protection than the same communication by [non-media companies]." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978); *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) ("[E]nforcement of … general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."); *Branzburg v. Hayes*, 408. U.S. 665, 690 (1972) (declining to "interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy"). And the Court has "decline[d] to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker," an approach that would amount to favoring certain means of speech over others and could erect "differentiations [that] might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United v. F.E.C.*, 558 U.S. 310, 326 (2010).

No reason is apparent why it is any more appropriate in this context to privilege one set of publishers over another for purposes of First Amendment protections. Certainly "press" status cannot be treated as talismanic in the context of impermissibly targeted taxation. This Court has instructed that it is the number of speakers targeted for special burdens, not the label they fall under, that determines whether a law is suspect under the First Amendment. Specifically, the Court ruled that "the fact that a law singles out … the press as a whole, 'is insufficient by itself to raise First Amendment concerns.'" *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 660 (1994)

(quoting *Leathers*, 499 U.S. at 452). That the traditional "press" happens to be *omitted* from a law that pinpoints certain disfavored speakers should be no more consequential under the First Amendment.

The decision below ignored these principles in applying only rational-basis scrutiny to a tax that falls predominantly on Petitioner, a company that "does not claim to be a newsgathering organization that curates what it disseminates according to journalistic principles." App. at 27a. It should suffice to note that billboard companies, no less than newsgathering companies, are in the business of speaking, which is business that the First Amendment most assuredly protects. *See, e.g.*, *id.* at 43a (Getty, J., dissenting) ("Speech is protected even if it occurs on a platform that is sold for profit."); *id.* at 5a-6a (majority opinion) (recognizing that Petitioner exercises "editorial discretion" in the messages it publishes). "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages," including those "'expressing political, social and commercial ideas.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (quoting *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 430 (Cal. 1980) (in bank) (Clark, J., dissenting)).

Nor is it apparent why the "journalistic principles" referenced by the Maryland Court of Appeals should matter to the equation. The First Amendment does not create a favored set of publishers who speak on particular topics or in particular ways that government may prefer or may bless; instead, it protects *all* speech by requiring adequate justification for laws that threaten to chill or censor. To the extent the decision below discounted Petitioner's concerns on the

basis that it is not a "newsgathering organization," it features an additional premise worthy of this Court's review.

II. THE PETITION PRESENTS AN EXCEPTIONALLY IMPORTANT FIRST AMENDMENT QUESTION

Because the principles at issue in the petition are as timely as they are important, the Court should not delay in addressing them. Petitioner's industry affords an essential means of communication that should not be relegated to second-class status relative to other public media. Nor are the implications of the decision below confined to billboards. New, emerging platforms are equally susceptible to targeted taxes and no more able to claim protection by the account of the Maryland Court of Appeals. As new means of communication are entering the scene and enabling citizens to communicate one-on-one, *en masse*, or anywhere in between, state and local governments are scouring for new and ready sources of revenue to nourish their depleted fiscs. There will thus be more and more temptation for government to direct narrowly targeted taxes at small, identifiable sets of speakers whose expression enriches the public marketplace yet may be viewed by government officials as expendable or downright displeasing. By granting the petition, the Court would show solicitude and ensure appropriate protection for both long-standing and newly-emerging means of speech that otherwise face risks from state and local governments that are hungering around the country to expand their tax revenues.

A. Although the decision below denies billboards the same First Amendment dignity accorded to newspapers, the distinction is suspect. Billboards communicate social, political, religious, journalistic, and commercial messages to communities united not by shared choices of media consumption but instead by a shared physical location. This unique method of reaching an audience is not replicated by other media and it serves an indispensable function for speakers who seek to reach localized communities effectively and without filtration. "[B]illboards are an accessible medium that the non-incumbent may use to challenge the status quo." App. at 42a (Getty, J., dissenting). They "help to communicate with and attract new customers; they allow efficient targeting of consumers in a given trade area; and they are cost-effective compared to other media." Charles R. Taylor, *Business Perceptions of the Role of Billboards in the U.S. Economy*, JOURNAL OF ADVERTISING RESEARCH, June 2003, at 151. In recent years, annual spending on billboards and other out-of-home advertising in the United States has reached as high as $8.6 billion. *Historical Revenue*, OUT OF HOME ADVERTISING ASSOC. OF AM., https://oaaa.org/AboutOOH/Factsamp;Figures/HistoricalRevenue.aspx (last visited Sept. 15, 2021).

Moreover, billboards transcend economic and commercial concerns. "Billboards serve a unique role in our society by placing both noncommercial messages … and commercial messages before a captive audience. In so doing, billboards represent a major means of advertising both commercial and noncommercial messages." Jason R. Burt, Comment, *Speech Interests Inherent in the Location of Billboards and Signs: A*

Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego, 2006 B.Y.U. L. Rev. 473, 473 (2006) (citation omitted). As Judge Getty recognized in his dissent below, burdens like the one imposed here mean that "[c]ertain political campaigns and candidates may lose a valuable means to interject their messaging into the marketplace of ideas." App. at 38a n.1; *see also id.* at 42a ("Campaigns expressing controversial, nontraditional, or marginalized views often utilize billboards as speech platforms.").

Politicians, non-profits, religious groups, issue advocates, newspapers, and local governments themselves have all employed billboards to find and speak to audiences that might otherwise be out of reach. These messages can be both paid and non-paid: Members of the Out of Home Advertising Association of America donate over $500 million annually in public service messaging, helping to promote child car safety, deter racial discrimination, and beautify public spaces with pop-up art displays, among countless other good causes. *Public Service*, OUT OF HOME ADVERTISING ASSOC. OF AM., https://oaaa.org/AboutOOH/PublicService.aspx (last visited Sept. 15, 2021). And even when it comes to commercial speech, mass public communication often conveys multiple implicit and explicit messages so as to shape the contours of American life. *See, e.g.*, *Burma-Shave Advertising Signs*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., https://www.si.edu/object/burma-shave-advertising-signs:nmah_1313589 (last visited September 15, 2021) (noting Smithsonian's inclusion of Burma-Shave advertisements offering "a commentary on the serious problem of drinking and driving").

Recognizing the essentially communicative nature of billboards, this Court has previously held that even efforts to regulate them in the name of public safety must comport with the First Amendment. *See, e.g.*, *Metromedia*, 453 U.S. at 515 (plurality opinion) (striking down regulation that distinguished between permissible and impermissible noncommercial speech on billboards); *id.* at 536 (Brennan, J., concurring) (rejecting suggestion that distinction between commercial and noncommercial billboards would be constitutional). That protection should be stronger, not more easily evaded, where the government imposes a unique burden on billboard owners solely for the sake of taxing them and thereby generating revenue off them—absent any purported concerns about traffic safety, aesthetics, or anything else peculiar to billboards as a distinct medium. *See* App. at 4a ("According to the City, the sole purpose of the Ordinance is to generate revenue."); *cf. id.* at 37a (Getty, J., dissenting) ("But how does one distinguish between the 'privilege' of being in the business of speech and the speech itself?").

The court below dubiously relied on decisions recognizing that billboards can be specially regulated pursuant to the *police power*. *See id.* at 27a ("Unlike traditional media that falls 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."). But it does not follow that government has carte blanche to single out billboards for financial burdens that are thoroughly removed from any particular concern or

regulatory interest attaching specifically to billboards. Invocation of a police power is misplaced when analyzing a decision by the government to advance its generalized interest in raising revenues through a selective tax on a small number of speakers whose burden is defined by their public expression. The core premise of the decision below seems to be that certain public media enjoy less First Amendment protection against taxation than other public media, based on perceived pedigree. Any such premise is misconceived and unfair to various media—especially new media—that may lack pedigree but be integral to public expression.

The tax at issue in this case may augur a broader effort to make the billboard industry specially shoulder mounting tax burdens. Cincinnati, Ohio, has imposed a similar charge on outdoor advertisements that falls on a similarly narrow group of speakers. *See Lamar Advantage GP Co. v. City of Cincinnati*, 114 N.E.3d 805, 810 (Ohio C.P. 2018). Billboard owners like Petitioner have challenged that tax as violating their First Amendment rights, a proposition that the Court of Common Pleas of Ohio agreed entitled them to permanent injunctive relief banning the city from collecting this selective tax. *Lamar Advantage GP Co. v. City of Cincinnati*, 114 N.E.3d 831, 835-36 (Ohio C.P. 2018), *aff'd in part and rev'd in part* 155 N.E.3d 245 (Ohio Ct. App. 2020). After an intermediate appellate court reversed that portion of the injunction, *see Lamar Advantage*, 155 N.E.3d at 255, the Supreme Court of Ohio accepted the appeal for review of the billboard owners' First Amendment claims, *see Lamar Advantage GP Co. v. City of Cincinnati*, 154 N.E.3d 98 (Table) (Ohio 2020). That court has not yet

rendered its decision, although observers noted that "[a]t oral argument, the Ohio justices appeared skeptical of the city's position." Roxanne Bland, *Billboards, Taxes, and the First Amendment*, TAX NOTES (July 15, 2021), https://www.taxnotes.com/featured-analysis/billboards-taxes-and-first-amendment/2021/07/15/76rlp.

Billboards are an important means of communicating myriad messages to diverse local audiences. Companies like Petitioner are a major sector of the U.S. economy and a significant platform for protected speech. By according them less First Amendment protection than other speakers for reasons unrelated to any medium-specific concerns, the Maryland Court of Appeals provided occasion for this Court's review.

B. As important as billboards are, they are not the only medium imperiled by the decision below. Under the court's reasoning, nearly any platform that American companies, associations, and individuals use to speak to one another outside of the institutional press would be susceptible to targeted taxation—taxation that may be calculated to burden, chill and silence disfavored speakers and speech. Such a specter is at odds with First Amendment principles and inhospitable to the development of robust, dynamic media and industries for conveying public expression.

Maryland itself exemplifies the kind of new, targeted burdens on particular speakers that are so problematic. Following a recent amendment, Section 102 of Title 7.5 of the Maryland Tax Article imposes a one-of-a-kind charge on the annual gross revenue of digital advertising services provided in Maryland. The rate of assessment depends on the taxpayer's global

annual gross revenues, with the most punitive rates reserved for a small number of identifiable entities. *See* MD. CODE ANN., TAX-GEN. § 7.5-103 (West 2021); *see also* Danielle E. Gaines, *Digital Ad Tax Debate Continues—With New Layers,* MARYLAND MATTERS (Feb. 8, 2021), perma.cc/QVY6-6V6L (reporting that bill's sponsor "says the tax would target the largest tech companies"). *Amicus*, joined by the Internet Association, NetChoice, and the Computer & Communications Industry Association, has sued to enjoin enforcement of this purported Digital Advertising Gross Revenues Tax; the case remains pending. *See* Complaint, *Chamber of Comm. of the United States of Am. v. Franchot*, No. 21-cv-410 (D. Md. Feb. 18, 2021).

Billboards and digital advertising are just two of the many modes of speech that local legislatures or tax authorities might subject to unique financial burdens falling on small groups of speakers. Companies in the business of social media, podcasting, virtual reality, video conferencing, and chat functions available to businesses, community groups, and other associations provide similarly important platforms. Such platforms and businesses may be no less chilled if subjected to special taxes—confined to some four identified speakers—that can thereafter be recalibrated however the government chooses. Of course, public expression should continue flourishing and expanding across all available media consistent with the First Amendment. Yet the court below downgraded the First Amendment protections afforded certain media as compared to others and opened the door for governments to impose special impediments via selective taxation of those it may disfavor. The Court should grant the petition to address whether and to

what extent local legislatures, judiciaries and taxing authorities should be drawing these lines in light of the First Amendment's uniform command.

III. THE PETITION RAISES IMPORTANT QUESTIONS NOT PRESENTED IN *CITY OF AUSTIN*

Finally, it is worth noting that the instant petition raises important questions about the First Amendment's constraints on state and local governments' ability to tax small numbers of speakers that are not presented in *City of Austin v. Reagan National Advertising of Austin, Inc.*, No. 20-1029, on which this Court has granted certiorari. *See* -- S. Ct. --, 2021 WL 2637836 (Mem) (U.S. June 28, 2021). That case presents a challenge to the distinction between on- and off-premise signs in City of Austin's general sign code, which the Court of Appeals for the Fifth Circuit held "runs afoul of the First Amendment" because it "is content based and fails under strict scrutiny." *Reagan Nat'l Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696, 710 (5th Cir. 2020). The government action in *City of Austin* was a regulatory exercise of the municipality's police power, seeking to "protect the aesthetic value of the City and to protect public safety." *Id.* at 709.

Here, in contrast, the challenge is to a targeted tax the "sole purpose" of which "is to generate revenue." App. at 4a. As described above, government's exercise of the general authority to tax stands apart from its exercise of the police power. The First Amendment constrains both, to be sure, but the justifications, protections, and analyses properly differ. As such, the instant petition presents important questions that

are neither posed nor expected to be addressed in *City of Austin*; it ultimately warrants plenary review, even to the extent it may be held pending this Court's decision in *City of Austin*.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted,

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