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

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

In the earlier briefing in this case, the petitioner made three arguments as to why it asserted that Baltimore's excise tax on the leasing of billboard space was unconstitutional. *See, e.g.,* Pet. Sup. Br. 2; Pet. Br. 17–20 (asserting (1) that the tax targets "the press," (2) that it targets a small group of speakers, and (3) that its use of an off-premises/on-premises distinction to define billboards is content-based discrimination). One of those three arguments just disappeared.

The Court's recent decision in *City of Austin v. Reagan National Advertising*, No. 20-1029, essentially eliminates petitioner's third argument. As petitioner itself explained, "[i]n *City of Austin*, the Court held that a distinction between on-premises and off-premises signs is content neutral and thus not subject to strict scrutiny." Pet. Sup. Br. 1 (citing slip op. 6). Thus, the Court has already rejected petitioner's only argument that alleged actual discrimination based on the content of speech. Remarkably, however, petitioner attempts to spin the loss of a third of its arguments as "underscore[ing] the need for further review" of its remaining arguments. *Id.* Petitioner is wrong.

Petitioner's only two remaining arguments are that any business providing access to a speech platform is part of "the press" for the purposes of applying the prophylactic rule of *Minneapolis Star & Tribune Co. v. Minnesota Comm'r. of Revenue*, 460 U.S. 575 (1983) against taxes targeting "the press," and that excise taxes that target all participants in a market are constitutionally infirm simply because a small group of participants have cornered that particular market. *See* Pet. Br. 17–20. Neither the Court's precedents nor the facts of this case support petitioner's arguments.

Petitioner's supplemental brief largely ignores its own first argument, likely because the assertion that commercial billboard operators are members of "the press" merely because they provide access to a speech platform is plainly absurd. *See* Pet. Sup. Br. 1–4. Although the First Amendment's protections apply to everyone, the Court created a special prophylactic rule in *Minneapolis Star* against differential taxation of "the press" (in that case, newspapers) to avoid "undercutting the basic assumption of our political system that *the press* will often serve as an important restraint on government." 460 U.S. at 585 (emphasis added). Nobody actually believes that commercial billboard operators serve as an important restraint on government. If they did serve such a role, this Court's precedents would not allow billboards to be banned outright. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion) (billboards can be banned). Moreover, if petitioner's assertion that all businesses that provide access to speech platforms are part of "the press" were true, this Court's precedents would not squarely state that various other speech platforms can be banned as well. *See, e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020) (automated calls and texts to cell phones, a.k.a., robocalls, can be banned); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428–29 (1993) (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949) for the point that sound trucks can be banned). Equating commercial billboards (or robocalls, or loudspeakers) with newspapers ignores reality, ignores the rationale of the prophylactic rule in *Minneapolis Star*, and ignores the vital purpose of the First Amendment itself.

Instead, petitioner focuses its supplemental brief almost entirely on its second argument, Pet. Sup. Br.

1–4, but that assertion, that its near-monopoly market position insulates it from an otherwise unobjectionable excise tax, is equally absurd, *id*. Petitioner argues that the challenged excise tax "targeted a small group of speakers," *id.* at 2, but that is simply false as a factual matter. In reality, Baltimore's challenged excise tax on the leasing of billboard space does not target any speaker or speakers, but rather applies to *every business* (whether or not it is also a speaker itself) that charges for the use of billboard space in the Baltimore City geographic market. *See, e.g.,* Pet. App. 31a (Maryland Court of Appeals finding that tax "applies to *all* off-site billboards" in Baltimore for which the operator charges to display advertising) (emphasis added). As a factual matter, the only reason that Baltimore's challenged excise tax applies to only four corporate entities is because there are only four businesses conducting this economic activity here *because* Petitioner Clear Channel Outdoor, LLC has effectively cornered the market for charging for the use of billboard space in Baltimore City. E. 172, T. 132 (petitioner operates 733 of the 760 commercial billboards in Baltimore, i.e., more than 95% of the market).

Baltimore's tax is not *structured* to target only a few market participants out of many in the way that the taxes were in *Minneapolis Star*, 460 U.S. at 577–78 (exemption of first $100,000 worth of ink and paper from tax meant that only fourteen of 388 newspapers paid the tax) and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 224 & 229 n.4 (1987) (content-based exemptions meant that only three publications paid). Rather, the excise tax here applies to *all* the businesses in the market for leasing out billboard space in Baltimore, and it is only petitioner's near-monopoly market position in that market which renders the tax applicable to a "small group" of

businesses. If the 760 commercial billboards in Baltimore were operated by 760 individual entities, the tax here would apply to all 760 entities, and petitioner's argument plainly would not apply. To suggest that a corporation can use the First Amendment to insulate itself from an excise tax on its economic activity simply by achieving a near-monopoly over that economic activity in the market to which the excise tax applies is patently absurd. Moreover, petitioner's argument would undermine excise taxes on any other economic activity that could arguably be described as related to a speech platform, most notably the sale cell phones (where Apple and Samsung control more than 85% of the handset market in the United States[1]) and the sale of cell-phone plans (where a few providers control roughly 98% of the carrier market[2]). To argue, as petitioner does here, that the First Amendment was intended to shield near-monopolists from excise taxes that participants in a more competitive market would have to pay is plainly at odds with both the Court's precedent and common sense.

* * *

There is no need for further review of Baltimore's excise tax. The Maryland Court of Appeals properly applied the clear framework set out in *Leathers v.*

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[1] *See Mobile Vendor Market Share in United States of America – March 2022*, Statcounter Globalstats Website, *available at https://gs.statcounter.com/vendor-market-share/mobile/united-states-of-america* (last visited April 27, 2022) (listing Apple with 57.65% of the market and Samsung with 28%).

[2] *See Cell Phone Providers*, Open Markets Institute Website, *available at https://concentrationcrisis.openmarketsinstitute.org/industry/cell-phone-providers/* (last visited April 27, 2022) (listing top four providers as controlling 98% of the market in 2018).

Medlock, 499 U.S. 439 (1991). This petition should be denied.

As for *Lamar Advantage GP Co. v. Cincinnati,* No. 20200931, 2021 WL 4201656, (Sept. 16, 2021), petition for cert. pending, No. 21-900 (filed Dec. 13, 2021), if the Ohio high court found that Cincinnati's neutral excise tax on the economic activity of a nearly monopolized market violated the First Amendment precisely because the market was nearly monopolized, that is an obvious misapplication of the binding precedent in *Leathers.* In that case, Cincinnati's petition should not be granted; rather, the Ohio ruling should be summarily reversed.

Respectfully submitted,

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