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 Writ of Certiorari to the United States Court of Appeals for Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal excise tax on the commercial activity of charging for the use of billboard space in Baltimore abridges the freedom of speech, or of the press.

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RESPONDENT'S BRIEF IN OPPOSITION

Henry J. Raymond, Director of the Department of Finance for the Mayor and City Council of Baltimore, respectfully opposes the petition for writ of certiorari to review the decision of the Court of Appeals of Maryland.

OPINIONS BELOW

On March 15, 2021, the Court of Appeals of Maryland issued its opinion, reproduced in the appendix to the petition ("Pet. App.") at 1a–51a and reported at 472 Md. 444. The opinion of the Court of Special Appeals of Maryland (Pet. App. 52a–70a) is reported at 244 Md. App. 304. The opinions of the Circuit Court for Baltimore City (Pet. App. 71a–82a) and of the administrative agency known as the Maryland Tax Court (Pet. App. 83a–90a) are unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law[.]

Relevant provisions of Article 28, Subtitle 29, of the Baltimore City Code are reproduced at Pet. App. 106a-108a. Additional relevant provisions of the same are reproduced in the appendix to this opposition (Opp'n App., *infra*, 1a).

Relevant provisions of Baltimore's Zoning Code, Article 32, Titles 1 and 17 of the Baltimore City Code are reproduced in the appendix to this opposition (Opp'n App., *infra*, 2a-4a).

STATEMENT

> Any excise tax has a built-in, and moneyed, interest group arrayed against it, and that group will bring a lawsuit challenging, as a matter of course, its enactment.

Nadav Shoked, *Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation*, 79 Ohio St. L. J. 801, 813 (2018)

> First Amendment litigation is often opportunistic, meaning that litigants turn to the First Amendment as their authority of choice when little other authority is on point.

Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133, 177 (2016)

This case is only important to companies that would rather not pay duly enacted, constitutional excise taxes. The real question presented in the petition for writ of certiorari is whether moneyed interests can stretch the First Amendment so far from its original meaning that it invalidates an annual, content-neutral, municipal excise tax on the commercial activity of charging to use billboard space. The answer should be no. The multiple appellate courts that have addressed this question thus far, applying this Court's precedent in the same way, have already answered no. No further guidance is needed.

The First Amendment challenge presented by Petitioner Clear Channel Outdoor, LLC ("Clear Channel") to this tax is controlled by this Court's opinion in *Leathers v. Medlock*, 499 U.S. 439 (1991). Maryland's highest state court applied *Leathers*. Maryland's intermediate state court applied *Leathers*. Maryland's trial court and administrative agency

both applied *Leathers*. And the three appellate panels outside Maryland that have addressed similar First Amendment challenges to taxes on the business of charging to use billboard—two in Pennsylvania, one in Ohio—all applied *Leathers* as well, and they all reached the same conclusion. There simply is no conflict among the various courts to resolve.

Petitioner's efforts to find a conflict by diving into legally and factually dissimilar cases border on the comical. From taxes on lobbying, to outright bans of particular content in certain publications, and sex-offender registration requirements, the subject matter of the cases Petitioner cites is unrelated to the excise tax on the business of charging for the use of billboard space at issue here.

The only commonalities in the allegedly conflicting cases seem to be a citation to *Minneapolis Star & Tribune Co. v. Minnesota Comm'r. of Revenue*, 460 U.S. 575 (1983) and a First Amendment violation finding. The only case Petitioner cites that addressed Petitioner's question and resulted in the outcome Petitioner seeks was a single trial court's decision, which was unanimously reversed by Ohio's intermediate appellate court. Should Ohio's highest court overrule its intermediate court, then there may be an actual conflict among the lower courts, but at the present, there is not.

A tax is "constitutionally suspect [for First Amendment purposes] when it threatens to suppress the expression of particular ideas or viewpoints," *Leathers*, 499 U.S. at 447, but this tax on charging for the use of billboard space threatens no such suppression. This tax has no regulatory purpose nor effect. It applies equally to any person who charges

for billboard space in Baltimore, no matter what the billboard says or even if it says nothing. The economic transaction is what is taxed, not its subject. If Petitioner charges no one for the use of one of its billboards, that billboard is not subject to the tax. Petitioner produced no evidence below that the tax increased the prices it charged,[1] dissuaded it from leasing space to certain speakers,[2] or even dissuaded it from pursuing this particular business in Baltimore. All the excise tax does is take a small portion of Petitioner's considerable profits and use that money to fund government services. While it is understandable that Petitioner would prefer to keep *all* its profits,[3] the First Amendment does not give it a right to refuse to pay its taxes.

As this Court explained in *Leathers*, even "a tax scheme that discriminates among speakers does not

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[1] A Clear Channel executive testified that because Clear Channel already charged as much as the market would bear, Clear Channel cannot "pass along" the excise tax to its customers. E. 169, T. 129.

[2] The executive also testified that Clear Channel would not put up an advertisement critical of Baltimore City now that the excise tax is in place, but he pointed to no actual advertisement that Clear Channel had rejected for this reason. E. 196–98, T. 156–58. The only example provided of an advertisement critical of the City was from a pension dispute with unions in 2010, three years before the tax was enacted. *Id.* And even then, before the tax, he testified that "there was a level of concern in 2010 that we always had." E. 193, T. 153. He also admitted that there was no "meaningful difference" between the content that Clear Channel posted in Baltimore and the content that it posted elsewhere in the region, or even elsewhere in the country. E. 126, T. 86.

[3] The same executive explained that making money was the "main reason we wake up every day." E. 207, T. 167.

implicate the First Amendment unless it discriminates on the basis of ideas," or "is directed at, or presents the danger of suppressing, particular ideas." 499 U.S. at 450–53. Such suppression occurs when a tax singles out the press, targets a small group of speakers, or discriminates on the basis of the content of the taxpayers' speech. *Id.* at 447. Baltimore's tax does none of these things, and Petitioner's attempt to argue otherwise defies both legal precedent and common sense.[4] The ordinance that Petitioner challenges is a content-neutral excise tax on a particular business that applies uniformly to a rationally defined class and does not invite censorship. Thus, the Maryland Court of Appeals correctly applied the clear framework provided by *Leathers* and ruled that the ordinance is neither subject to heightened scrutiny nor a violation of the First Amendment.

No further review is necessary. This petition should be denied.

A. Background

The Baltimore City Code establishes an excise tax on the business of charging others to use billboard space. The ordinance taxes "the privilege of exhibiting outdoor advertising displays in the City," Pet. App. 107a, and defines an "outdoor advertising display" as "a 10 square foot or larger image or

[4] Most notably, Clear Channel argues that the same prophylactic rules this Court has developed for the journalistic endeavors of the press apply to commercial billboard operators and that its own lucrative near-monopoly position in a particular advertising market should afford it greater First Amendment protections than those afforded to operators in more competitive marketplaces.

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." Pet. App. 106a–107a. The ordinance does not impose a tax on speech. As Clear Channel concedes, the tax "applies equally to commercial and non-commercial" messages. Pet. App. 5. Indeed, the content of a message plays no role in determining whether a billboard operator is subject to the tax and the ordinance was passed "for the sole purpose of raising general revenues." Pet. App. 3.

The only condition that triggers the tax is the act of charging others to use a billboard. *See* Opp'n App., *infra*, 1a, Balt. City Code, Art. 28 § 29-5 (providing that the tax applies only to "advertising hosts"); and Pet. App. 106a, Art. 28 § 29-1(b) (defining "advertising host" to mean someone who "owns or controls a billboard, posterboard, or other sign" and "charges fees for its use"). Thus, Clear Channel is only subject to the tax when it charges others to use one of its billboards, regardless of the content of the message. If a billboard owner displays only its own content, or does not charge others to display content, the owner is not subject to the tax. Balt. City Code, Art. 28 §§ 29-1(b), 29-5. Similarly, the tax does not apply to persons who purchase space on Clear Channel's billboards. *Id.*

The City assesses the tax once a year, according to the size and type of billboard. Electronic billboards are subject to a tax rate of $15 per square foot of advertising imagery, and any other type of billboard is subject to a tax rate of $5 per square foot of advertising imagery. Pet. App. 108a. Clear Channel

has two sizes of billboards subject to the tax: poster billboards, measuring 12 feet by 25 feet, and bulletin billboards, measuring 14 feet by 48 feet. E. 108–09, T. 68–69. Thus, when Clear Channel charges others to use a non-electronic poster billboard that measures 12 feet by 25 feet (300 square feet), the City assesses Clear Channel an annual tax of $1,500. Similarly, the annual tax on a non-electronic 14 feet by 48 feet bulletin billboard (672 square feet) is $3,360. If Clear Channel charges others to use its billboards, this one-time, annual excise tax is the only charge Clear Channel must pay under the ordinance, no matter how many paid messages appear on the billboard or how many different businesses pay Clear Channel to make use of their billboard space. *Id.*[5]

The tax applies uniformly to all billboard operators that charge others for the use of their billboard space. The only billboard operators not subject to the tax are government entities, which the City lacks any authority to tax.[6] In practice, the tax

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[5] Clear Channel charges as much as $7,700 for just four weeks of advertising on one of its larger non-electric billboards. *See* Clear Channel Outdoor, "National Advertising Rates" (spreadsheet), line 69 (showing rates for a bulletin size sign in Baltimore), *available at* https://clearchanneloutdoor.com/how-to-buy/rates/ (last visited Sept. 11, 2020). The company charges as much as $1,260 for just four weeks of advertising on the smaller poster billboards, which measure 12 feet by 25 feet. *Id.* at line 77.

[6] The City has "the power to tax to the same extent as the State of Maryland," Balt. City Charter, Art. II § 40(a), and the State cannot tax itself. For instance, Baltimore City has no legal power to tax the State for charging to place advertisements on bus shelters owned by the Maryland Transit Administration.

applies to four billboard operators because only four billboard operators charge others for the use of their billboard space in Baltimore City. Clear Channel, in particular, "has a near-monopoly on Baltimore's [billboard] advertising market." Luke Broadwater, *Billboard company sues over city tax*, Balt. Sun, Aug. 17, 2013, at A1. In 2000, the City generally banned the construction of new billboards. Jamie Stiehm, *O'Malley signs his first bill into law, prohibits construction of billboards*, Balt. Sun, Mar. 28, 2000, at B5. In 2013, when this tax took effect, Clear Channel operated about 95 percent of the billboards in Baltimore City. *Id*. In 2017, the company maintained that market dominance, operating 733 billboards, with only three competitors who collectively operated about thirty other billboards. E. 172, T. 132.

This number, "somewhere in the 760 range," *id.*, is the total number of billboards in Baltimore City. The tax applies to all of them. Although Clear Channel repeatedly cites a "100,000" figure for the number of "signs" in Baltimore City (a figure which was stipulated to by the parties, E. 759), this figure includes all "signs" subject to regulation by the zoning code, from flags to barber poles to a canvas awning with a café's name written on it. *See* Opp'n App., *infra*, 3a-4a, Balt. City Code, Art. 32 §§ 17-102(c)-(d), 17-410. Unsurprisingly, the excise tax on charging for the use of *billboard* space does not apply to the majority of these signs, either because they are not

billboards or because nobody is charging for their use.[7]

As Clear Channel concedes, the "tax advances a single purpose: raising revenues . . ." Pet. App. 5. The City enacted the tax as part of a ten-year financial plan to fix a long-term $750 million structural deficit. *See* Luke Broadwater, *Billboard companies object to proposed city tax*, Balt. Sun, Apr. 26, 2013, at A6. Along with generating revenue, the tax allowed the City to diversify its revenue sources and thereby begin to reduce the financial burden on Baltimore homeowners. E. 590, T. 39. The City also imposes various other taxes and fees, including a cable franchise fee, a conduit fee, a telecommunications tax, an admission and amusements tax, and an energy tax. E. 611–13, T. 25–36.

B. Facts and procedural history

Petitioner Clear Channel Outdoor, LLC "is one of the world's largest outdoor advertising companies with over 450,000 displays in 31 countries across" five continents. Clear Channel Outdoors, "About Us," *available at* https://company.clearchanneloutdoor.com/ (last visited Sept. 6, 2021). When Baltimore City enacted an excise tax impacting Clear Channel's commercial activity of charging for the use of their 733 billboards in Baltimore, Clear Channel sued.

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[7] At times, Clear Channel goes still further and asserts without support that there are 100,000 *commercial* signs in Baltimore. *See* Pet. App. 18. No such showing was ever made. The stipulation was only that "there are more than 100,000 signs in Baltimore City." E. 769. How many of those beyond the 760 billboards are *commercial* signs is nowhere in the record.

After its federal suit was dismissed for lack of jurisdiction, Clear Channel paid its taxes under protest and sought a refund. When a refund was denied, Clear Channel sought review of that denial in the administrative agency known as the Maryland Tax Court. When the administrative agency affirmed the denial, Clear Channel sought judicial review from the Circuit Court for Baltimore City. When the trial court affirmed the administrative agency's decision, Clear Channel appealed to Maryland's intermediate appellate court. When a three-judge panel of that court unanimously affirmed, Clear Channel sought review from Maryland's highest state court and was granted certiorari.

The Maryland Court of Appeals affirmed as well, applying the clear guidance of *Leathers* to the case before it. Because there was no evidence of a legislative intent to suppress any idea or viewpoint, Maryland's high court explained it must

> 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."

Pet. App. 25a (quoting *Leathers*, 499 U.S. at 447).

First, the Maryland court held that, although billboards can be used for expressive speech and warrant First Amendment protection, billboard operators are not a part of "the press," in the way that periodical publishers and broadcasters have been held to be. *Id.* at 26a–29a. Whereas "the press" is generally understood to consist of entities engaged in newsgathering and journalism of some sort or

another, Clear Channel is "more accurately described as a commercial advertising vehicle that dabbles in non-commercial content, paid and unpaid." *Id.* at 27a.

Second, the Maryland court held that the tax did not target a small group of speakers because market conditions, not the structure of the tax, limited the number of entities that paid the tax to four. *Id.* at 31a. The court rejected Clear Channel's "over-inclusive" attempt to group "billboards with all other commercial signs for purposes of th[e] analysis" because billboards and all other signs are not "similarly-situated members of the same medium." *Id.* at 30a. In so doing, the court explicitly distinguished this case from *Minneapolis Star*, 460 U.S. 575 (1983) and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), which involved taxes that were structured to disproportionally impact a subset of similarly situated newspapers and magazines. *Id.* In fact, it is Clear Channel's near-monopoly market position as a billboard operator that limits the group to four. All billboard operators that charge for the use of billboards in Baltimore are equally subject to the tax, whether they operate one billboard or 733.

Third, the Maryland high court held that Baltimore's tax did not discriminate based on the content of taxpayer speech because "[i]t is the commercial transaction, not the content of the message, that triggers the tax." *Id.* at 32a. The court addressed Clear Channel's assertion that *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), rendered the on-premises/off-premises distinction in the definition of billboards a content-based distinction and reasoned, based on both Justice Alito's and Justice Kagan's concurrences in *Reed* (together representing a

majority of the justices on the Court), that it too did not find the distinction to be content-based. *Id.* The court also noted that many courts and commentators have since adopted a similar interpretation of *Reed*. *Id.* at 33a–35a.

As there was no evidence of the kind of illicit intent present in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and none of the three criteria identified in *Leathers* applied, the Maryland Court of Appeals, in a 6-1 decision, held that the Baltimore tax was subject only to a rational basis review. Pet. App. 35a–36a.

The single dissenting judge did so based on a theory that equates all taxation with regulation and requires that any tax on a business pass heightened First Amendment scrutiny if "that business is the dissemination of messaging." Pet. App. 43a. He argued that *Leathers* did not apply at all. *Id.* at 48a n.5. And, untethered from this Court's guiding precedent, the dissenting judge could not decide on the level of scrutiny he would apply to Baltimore's tax. *Compare id.* at 47a n.4 (advancing intermediate scrutiny), *with id.* at 51a (advancing strict scrutiny).

REASONS FOR DENYING THE PETITION

The decision below faithfully applied *Leathers*, this Court's most recent decision involving a free speech challenge to a tax, which made clear that even "a tax that discriminates among speakers is constitutionally suspect only in certain circumstances." 499 U.S. at 444. Such a tax "does not implicate the First Amendment unless it discriminates on the basis of ideas." *Id.* at 450 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983)). Baltimore's excise tax does not single out the press, is not structured to fall on a small

group of speakers, and does not discriminate based on the content of speech. Thus, under this Court's clear precedent in *Leathers*, this tax is not subject to strict scrutiny. 499 U.S. at 447. As much as Clear Channel would like a conflict to exist, there is no conflict. This Court's review is unnecessary.

The Maryland court correctly applied this Court's precedent. So far, every appellate panel that has faced a set of facts like the one at issue here—a tax on the economic activity of charging to use billboard space—has applied *Leathers* and reached the same conclusion. Although Clear Channel pretends to ask this Court for clarification, it really seeks a radical expansion of First Amendment restrictions on taxation of content-neutral economic activities. At bottom, Petitioner is really arguing that the state court misapplied a settled rule, which is not a ground for certiorari. Moreover, the issue in this case is not extremely important. It only impacts Clear Channel who has a near-monopoly on the activity taxed under the Baltimore ordinance.

A. The decision below faithfully applied this Court's precedents, and the supposed conflicts are not genuine.

Every appellate panel that has considered a First Amendment challenge to a tax on charging to use billboard space has applied *Leathers* and reached the same conclusion that the Maryland Court of Appeals reached below.

In *Adams Outdoor Advert., Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa. Commw. Ct. 1995), a three-judge panel of Pennsylvania's intermediate appellate court held that "[u]nder the reasoning of

Leathers . . . the [local billboard] tax cannot be deemed to be unconstitutional." *Id.* at 26.

Ten years later, another panel of that same court heard a similar challenge to a billboard tax in and rejected it, citing both *Adams* and this Court's holding in *Leathers* that "taxing First Amendment speakers offends the constitution when it singles out the press, targets a small group of speakers or discriminates on the basis of the content of the speech." *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966, 971 n.4 (Pa. Commw. Ct. 2005).

In January 2020, a three-judge panel of Maryland's intermediate appellate court explained that *Leathers* sets forth three ways a tax can violate the First Amendment and held that the excise tax on charging to use billboard space "falls into none of these three categories." Pet. App. 70a.

In June 2020, a three-judge panel of Ohio's intermediate appellate court overturned the single trial judge who agrees with Clear Channel's arguments, citing both *Leathers* and the Maryland appellate opinion applying *Leathers* to a tax on charging to use billboards. *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 155 N.E.3d 245, 254 (Ohio Ct. App. 2020), *appeal allowed*, 154 N.E.3d 98 (Oct. 13, 2020).[8]

And, of course, in March of this year, six of the seven judges on Maryland's highest court carefully applied *Leathers* and the rest of this Court's jurisprudence on First Amendment tax challenges to

[8] As noted above, Ohio's highest court has heard an appeal from the intermediate court's decision, but has not yet issued its own opinion.

find that Baltimore's excise tax on charging for the use of billboard space did not abridge the freedom of speech or of the press.

Together, these cases display a remarkably uniform understanding, across three states, of exactly how this Court's precedents on First Amendment challenges to taxes apply to taxes on charging to use billboards and the result that should be reached. The allegedly conflicting cases Clear Channel highlights do not concern this subject matter, and do not interpret this Court's precedent in ways that conflict with the Ohio, Pennsylvania, and Maryland courts' interpretation of the same.

The Vermont case invalidating a tax on lobbying expenditures did so not by calling lobbyists the press nor by merely counting their number, but by noting that lobbying—petitioning the Government for a redress of grievances—is "core political speech protected by the First Amendment" and analogizing the need to protect that speech from differential targeting to the need to protect the freedom of the press. *Vermont Soc. of Ass'n Executives v. Milne*, 172 Vt. 375, 378 (2001) (citing *Minneapolis Star*). Although the Vermont tax was viewpoint-neutral, it singled out expenditures on speech for taxation based on the subject matter of the speech (i.e., lobbying) and was therefore content-based discrimination. Here, the Baltimore tax does not depend on the subject matter of the speech; the tax applies to everyone who charges for the use of billboards.

The Third Circuit case invalidating a ban on alcohol advertisements in college newspapers, but not in other newspapers, did not even involve taxation. *Pitt News v. Pappert,* 379 F.3d 96, 111 (3d Cir. 2004).

It dealt with media regulations that discriminated based on the content of speech and targeted a narrow segment of the traditional press. *Id.* at 112. This is inapplicable to Clear Channel's challenge of a tax (not a regulation). Moreover, Baltimore's tax is on an economic activity outside the press, and it treats similarly situated economic activity equally.

The Fifth Circuit case invalidating a law that treated similarly situated cable providers differently also did not deal with taxation. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012). That case's holding—that a Texas law regulating who could get statewide cable franchises infringed the First Amendment because it "plainly discriminate[d] against a small and identifiable number of cable providers" among a larger group of similarly situated cable providers—has no relevance to a tax case about billboard operators charging for the use of billboard space who are treated equally under the law. *Id.* at 639.

The Ninth Circuit case also did not deal with a tax, but with direct restrictions on speech. *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014). That case invalidated a law that "directly and exclusively burden[ed] speech" by requiring sex-offenders to report their online activity. *Id.* at 573. The court did not directly apply *Minneapolis Star*'s holding on taxation, but merely analogized to it, noting that the law that burdened sex-offenders' free expression was similar to the Minnesota law that "burdened specific publishers' ability to engage in free speech." *Id.* A similar analogy would not hold here, as the Baltimore's tax on a specific economic activity neither directly burdens speech nor discriminates among billboard providers.

The Rhode Island case was decided on the third criteria identified in *Leathers*, specifically, that the State's tax on printed materials resulted in content-based discrimination. *Ahlburn v. Clark*, 728 A.2d 449, 454 (R.I. 1999) (exempting bibles from tax applicable to all other publications "is anything but content neutral"). And the Northern District of Florida case, currently on appeal to the Eleventh Circuit, granting a preliminary injunction against regulating only a few of many similarly situated social-media entities merely invoked *Minneapolis Star* for the point identified as the second criteria in *Leathers*—that targeting a small group of speakers for discriminatory treatment requires strict scrutiny. *NetChoice, LLC v. Moody*, No. 21-220, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021). Neither holding conflicts in any way with the Maryland Court of Appeals' holding in the case below.

In short, the only case that Petitioner has pointed to that conflicted with the careful reasoning and assiduous application of precedent in the Maryland case was the single trial court case that was promptly overturned by Ohio's intermediate appellate court. *Lamar Advantage*, 155 N.E.3d at 254. None of the other cases cited give any reason to believe that those courts would have reached a different conclusion if Clear Channel's case had been before them. So Petitioner's argument for certiorari amounts to little more than the assertion that Maryland's high court applied *Leathers* incorrectly. It did not.

Clear Channel's two primary arguments on the merits both rely on baseless fictions that it seeks to perpetuate through force of repetition. The first is that commercial billboard operators are members of the press. *See* Pet. App. 17–18. They are not. And

while the First Amendment's protections apply to everyone, this Court's jurisprudence 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). Clear Channel tries to extend this rule to any "speech platform," not just the press, Pet. App. 11, but there is no basis in this Court's precedents for doing so.

Indeed, such an expansion would substantively conflict with many of this Court's rulings finding that specific speech platforms, including billboards, may be significantly curtailed, if not outright banned, without infringing on the First Amendment. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion) ("offsite commercial billboards may be prohibited"), *id.* at 541 (Stevens, J., concurring on this point); *id.* at 559–61 (Burger, J., concurring on this point); *id.* at 570 (Rehnquist, J., concurring on this point); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020) (refusing to invalidate a federal ban on the speech platform of automated calls and texts to cell phones, and instead striking down a content-based exception to the ban on First Amendment grounds). *See also 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 could be banned entirely if the ban applied equally to all speech on such a platform); *Reed v. Town of Gilbert*, 576 U.S. at 169 (citing *Discovery Network*, for the same). A speaker's ability to put a news headline on a billboard, or send it on an automated text, or blare

it over a loudspeaker while driving down the street, does not turn every entity that makes a business out of supplying such a speech platform a member of the press.[9] Equating 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.

Clear Channel's second baseless fiction is that Baltimore's excise tax targets a small group of speakers. Pet. App. 18–19. It does not. While there are only four commercial entities engaging in the business of charging for the use of billboards in Baltimore, and therefore only four commercial entities paying the excise tax on that business, the speakers—the people who display their messages on the billboards—are not subject to the tax. *See* E. 169, T. 129 (Clear Channel executive admitting that the tax does not increase customers' prices). The four billboard operators are also not subject to the tax when one of them engages in its own speech (or exclusively presents the speech of others for free) on a billboard. Moreover, to whatever extent the speech of actual speakers could be burdened incidentally by this tax on commerce, the burden would apply *equally* to each speaker using any one of the 760 billboards in Baltimore.

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[9] Petitioner's argument—that merely being engaged in the process of disseminating messages affords one membership in "the press"—is particularly over-inclusive "in a world in which everyone carries a soapbox in their hands" and "virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world." *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of cert).

Even if the analysis were to focus not on actual speakers, but on the companies selling a particular mode of speech, the tax at issue does not target a small group of such sellers. Whereas the tax in *Minneapolis Star* and *Arkansas Writers'* specifically excluded similarly situated publications either by content or by circulation, such that it fell on only a small number, here the tax applies to anyone who charges to use a billboard. The reason the excise tax applies to only four sellers of billboard space in Baltimore is that Clear Channel enjoys a near-monopoly on charging for the use of billboard space, with control of roughly 95 percent of the market. Clear Channel does not and should not get greater First Amendment protections just because it has effectively cornered a particular advertising market.

Clear Channel's final argument is that because the ordinance includes an on-premises/off-premises distinction, the tax discriminates based on content. Pet. App. 19–20. It does not. The off-premises clause in the ordinance defining an "outdoor advertising display" merely serves to identify such displays as billboards, which are defined with an off-premises clause in Baltimore's zoning code. *See* Opp'n App., *infra*, 2a, Balt. City Code, Art. 32 § 1-303(g) ("[b]illboard" is "any sign that directs attention to a business or commodity that is: (i) sold or offered somewhere other than on the property on which the sign is located; or (ii) sold or offered on that property only incidentally, if at all"). The resulting technical exclusion of on-premises signs from the tax has little, if any, practical effect on this tax since the tax applies only to the economic activity of *charging* for use of billboard space. The operator of an on-premises sign (e.g., a restaurant with an on-premises sign

spotlighting itself) is unlikely to charge itself for the use of its own sign. Thus, regardless of this Court's clarification of *Reed* when it decides *City of Austin v. Reagan National Advertising of Texas*, No. 20-1029 (*cert. granted* June 28, 2021), the Baltimore tax should survive. If the allegedly content-based off-premises clause is declared infirm, that would not doom the Baltimore tax ordinance. In fact, the ordinance has an explicit severability clause and the offending clause could easily be severed without significant practical effect. *See* Opp'n App., *infra*, 2a, Balt. City Code, Art. 28 § 29-12 (severability clause); *see also Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2349 (when a statute "includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward"). Thus, there is no good reason to review this question in this case, nor to hold this case until *City of Austin* is decided, as the question's resolution should have no practical consequence on the Baltimore annual excise tax on charging to use billboards.

In sum, there is no conflict between this Court's holdings and the Maryland court's holding. This Court's decisions, the most recent being *Leathers*, have served as clear guides to all the appellate courts that have addressed First Amendment challenges to taxes on charging to use billboards, and all those courts have reached the same result. Clear Channel would change that result to avoid paying taxes, but to do so would radically diverge from this Court's precedent, throw settled law into confusion, and prompt innumerable disputes over content-neutral tax schemes that may indirectly burden a means of communication. Thus, the petition should be denied.

B. The question presented is only important to the Petitioner and does not warrant this Court's review.

Countless critical questions of First Amendment law are deliberated in the American judicial system today, but this is not one of them. Baltimore's excise tax on charging to use space on billboards does not censor, chill, or restrict anyone's speech. It was not put in place to do so, and it does not do so inadvertently. There is no confusion about any of this in the lower courts, and no grave misunderstanding. The Maryland Court of Appeals applied the clear guidance of *Leathers* and correctly rejected Petitioner's challenge. None of the principles that animate the First Amendment are at issue here because Baltimore's excise tax "does not . . . discriminate[ ] on the basis of ideas," *Leathers*, 499 U.S. at 450, nor does it risk doing so.

Cases undoubtedly exist where a government structures taxes in ways that discriminate unfairly, chill expression, stifle criticism, or cripple publishers, but this is not such a case. Although there will certainly be many fascinating cases involving technological innovations, social media, and new platforms of non-traditional speech intersecting to require expansions of what this Court considers the press beyond traditional sources of journalism, this is not such a case.

Billboards are not a new speech platform. Their place in American constitutional law is well established, as is the extent and the limits of the protections they receive as a medium.

Excise taxes are also familiar and well established in the Court's jurisprudence. Indeed, "the practice of

using targeted taxes to fund government operations, such as excise taxes, dates from the founding." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 567 (2005) (Thomas, J., concurring) (citing The Federalist No. 12, p. 75 (J. Cooke ed.1961)). The taxing power encompasses "wide discretion in selecting the subjects of taxation." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938). And when "seeking to raise revenue," a government "may choose among multiple forms of taxation on property, income, transactions, or activities." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 284–85 (2011).

Baltimore chose to tax, *among other things*, the economic activity of charging others to use billboard space. Even "in the First Amendment context," duly enacted taxes enjoy a "strong presumption" of constitutionality. *Leathers*, 499 U.S. at 451 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983)). Clear Channel has put forward neither evidence nor argument that should undermine that presumption. While Petitioner would like another opportunity to claw back the taxes it paid, another chance to argue that visual loudspeakers (i.e., billboards) are no different than newspapers, and another opportunity to pretend that its own market dominance makes it more vulnerable, such a rehearing would serve no one but Petitioner.

The law is clear. It was correctly applied. Clear Channel's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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ARTICLE 28
TAXES

SUBTITLE 29 - OUTDOOR ADVERTISING

§ 29-5. Annual reports; Payment of tax.

(a) *Report.*

(1) Each advertising host must file a report with the Finance Director on or before July 10 of each year for the preceding tax year (July 1 through June 30).

(2) The report must:

(i) specify the number of separate spaces made available by the advertising host for the exhibition of outdoor advertising displays;

(ii) indicate the location and size of each outdoor advertising display exhibited in the preceding tax year;

(iii) be in a form the Director approves; and

(iv) contain any additional information required by the Director.

(b) *Payment due with report.*

The tax imposed by this subtitle is due at the time the report is filed.

(Ord. 13-139.)

§ 29-12. Severability.

If any part, section, paragraph, clause, sentence, or provision of this subtitle is held invalid for any reason, or inapplicable to any person or entity, the remainder of this subtitle, or other applications of any portion held inapplicable in certain circumstances, will not be affected, and to this end the provisions of this subtitle are declared severable.

(Ord. 13-139.)

ARTICLE 32
ZONING

TITLE 1 – GENERAL PROVISIONS

SUBTITLE 3 – DEFINITIONS

§ 1-303. "Bail bond establishment" to "Child day-care home".

. . .

(g) *Billboard*.

"Billboard" means any sign that directs attention to a business or commodity that is:

(i) sold or offered somewhere other than on the property on which the sign is located; or

(ii) sold or offered on that property only incidentally, if at all.

. . .

(Ord. 16-581; Ord. 17-015; Ord. 18-110; Ord. 20-350.)

TITLE 17 – SIGNS

SUBTITLE 1 – PURPOSE OF TITLE; DEFINITIONS

§ 17-102. Definitions.

. . .

(c) *Attention-getting device.*

"Attention-getting device" means any pennant, flag, feather flag, festoon, spinner, streamer, searchlight, balloon, inflatable sign, strobe light, or similar device or ornamentation designed for the purpose of attracting attention.

(d) *Awning or canopy sign.*

"Awning or canopy sign" means a sign that is printed on, or is attached above, on, or under the outer edge of, an awning, canopy or other fabric, plastic, or structural protective cover over a door, entrance, window, or outdoor service area.

. . .

(Ord.18-216; Ord. 20-350.)

SUBTITLE 4 – REQUIREMENTS BY SIGN TYPE

§ 17-410. Moving or flashing signs.

(a) *General prohibitions.*

Except as provided in subsection (b) of this section, no sign may have or consist of:

(1) any moving, rotating, or animated part; or

(2) any flashing, blinking, fluctuating, or animated light.

(b) *Exception*.

The movement and flashing described in subsection (a) of this section is allowed on the following sign types:

(1) electronic signs; and

(2) barber poles or similar structures that have a rotating graphic.

(Ord.18-216.)