

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

**MOTION FOR LEAVE TO FILE *AMICUS*  
*CURIAE* BRIEF AND BRIEF OF *AMICUS*  
*CURIAE* OF OUT OF HOME ADVERTISING  
ASSOCIATION OF AMERICA IN SUPPORT OF  
PETITIONER**

---

KEITH BRADLEY  
*Counsel of Record*  
SQUIRE PATTON BOGGS (US)  
LLP  
1801 California Street,  
Suite 4900  
Denver, CO 80202  
(303) 830-1776  
keith.bradley@squirepb.com

BENJAMIN C. GLASSMAN  
ELLEN PHILLIPS  
SQUIRE PATTON BOGGS  
(US) LLP  
201 E. Fourth St.  
Suite 1900  
Cincinnati, OH 45202

*Counsel for Amicus Curiae*

September 15, 2021

---

The Out of Home Advertising Association of America (“OAAA”) moves the Court for leave to file the attached brief as *amicus curiae* in the above-captioned case. Petitioner Clear Channel Outdoor, LLC, (“Clear Channel”) has consented to the filing of this brief, pursuant to a blanket consent filed with the Court. Respondent Henry J. Raymond, Director, Department of Finance of Baltimore City, does not consent.

The question presented is whether Baltimore’s tax ordinance singling out billboards, Balt. City Code art. 28, § 29-2, is subject to heightened scrutiny under the First Amendment. Clear Channel unsuccessfully challenged that ordinance on First Amendment grounds in the Maryland Tax Court; the Maryland Court of Appeals ultimately upheld the tax court’s decision, concluding that under this Court’s precedents, the First Amendment protects only the “institutional press,” and not any other protected speech or speaker, from targeted taxation. See Pet. App. 36a. The court thus declined to apply any heightened scrutiny to the tax targeting billboard speech. Clear Channel has petitioned for certiorari.

OAAA seeks to file an *amicus* brief in support of the petition. As the principal trade organization for out-of-home (“OOH”) advertisers in the United States, OAAA brings together over 800 members—ninety percent of the industry—to protect, unite, and advance the OOH advertising industry. Among other things, OAAA advocates for the industry to legislators, administrative agencies, and courts, to inform decisionmakers about the value of OOH advertising.

OAAA respectfully submits that its proposed brief would be useful to the Court, because it would provide extensive information about what speech actually occurs through billboards, and about characteristics of billboards, particularly current-day billboards, that make them especially suited for speech on matters of public concern. The brief highlights the use of billboards for speech on matters such as political debate, religious testament, and public safety. It would also inform the Court of the growing importance of billboards as one of the few remaining forms of broad-based mass communication in an age of fragmented media markets where many people receive news and information from a self-curated set of online publications and social media platforms. Additionally, it explains the crucial role billboards play as an inexpensive, broad-reaching speech forum for those trying to break into public consciousness with insurgent or unpopular speech. As the leader of the OOH industry for nearly a century, OAAA is uniquely placed to inform the Court on these topics.

No counsel for a party authored the proposed amicus brief in whole or in part, and no person or entity, other than OAAA and its counsel, made a monetary contribution to the brief's preparation or this submission.

As noted above, all parties other than Respondent Henry J. Raymond have consented in writing to the filing of the brief. OAAA gathers that Respondent has planned to submit a response to the petition; that Respondent has not requested additional time for its response brief; and that Respondent has consented to a different *amicus* brief in support of Petitioner (to be submitted by the U.S. Chamber of Commerce),

without seeking additional time for its response brief. OAAA did not provide Respondent with notice of this brief 10 days before the filing. In asking for Respondent's consent, OAAA offered to share the brief with Respondent a day in advance of filing, for Respondent's review in deciding whether to consent to the filing of the brief. Respondent declined this offer. OAAA also informed Respondent that the brief is substantially similar to a brief that OAAA filed in the Maryland Court of Appeals on a substantially similar issue, to which the same Respondent had consented before that Court.

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT .....	4
I.    Billboards are an important medium for speech on issues of public concern .....	4
A.    Billboards have long served as a forum for free expression.....	5
B.    Non-commercial speech on matters of public concern is a significant portion of billboard activity .....	11
C.    With advanced technology, billboards have become an even timelier and more informative media form .....	24
II.    Baltimore’s ordinance targets billboards and burdens speech.....	29
A.    The tax is greater for billboards with greater reach .....	29
B.    A tax specific to billboards burdens speech.....	31

III.	The Decision below distinguished this court’s precedents on grounds that are contrary to the first amendment and to the vital speech function of billboards .....	34
A.	The institutional press receives no special treatment under the First Amendment .....	35
B.	Billboards and newspapers cannot be meaningfully distinguished for First Amendment purposes .....	37
CONCLUSION .....		39

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987).....	33, 37
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	35, 36
<i>First Natl. Bank v. Bellotti</i> , 435 U.S. 765 (1978) (Burger, C.J., concurring) .....	36, 37
<i>Grosjean v. American Press Company</i> , 297 U.S. 233 (1936).....	31
<i>Leathers v. Medlock</i> , 499 U.S. 439 (1991).....	33
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938).....	35
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981).....	2, 5, 28
<i>Minneapolis Star &amp; Tribune Co. v. Minn. Commr. of Revenue</i> , 460 U.S. 575 (1983).....	30, 31, 32, 36
<i>Packer Corp. v. Utah</i> , 285 U.S. 105 (1932).....	9
<i>Pennekamp v. Florida</i> , 328 U.S. 331 (1946).....	35

## Statutes

Balt. City Code art. 28, § 29-2 .....	29
Balt. City Code art. 28, § 29-3(a) .....	30

## Other Authorities

<i>#ThankfulThisHoliday Case Study</i> , LAMAR, <a href="https://www.lamar.com/~media/DBF0E994AA63492282AEA87C5CDB6A92.pdf">https://www.lamar.com/~media/DBF0E994AA63492282AEA87C5CDB6A92.pdf</a> .....	23
<i>ABC SuperSign</i> , Disney Advertising Sales Local, <a href="https://www.abcfullcircle.com/abcsupersign/">https://www.abcfullcircle.com/abcsupersign/</a> .....	28
<i>About the Awards</i> , OBIE, <a href="https://obieawards.org/About-The-Awards">https://obieawards.org/About-The-Awards</a> .....	1
<i>About OAAA</i> , OAAA, <a href="https://oaaa.org/AboutOAAA.aspx">https://oaaa.org/AboutOAAA.aspx</a> .....	23
<i>Advertising</i> , Pew Research Center (Mar. 26, 2014), <a href="https://www.pewresearch.org/journalism/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising/">https://www.pewresearch.org/journalism/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising/</a> .....	37
Alexandra Deabler, <i>Maryland Crab Restaurant Hits Back at PETA's Billboard With Its Own</i> , Fox News (Sept. 5, 2018), <a href="https://www.foxnews.com/food-drink/maryland-crab-restaurant-hits-">https://www.foxnews.com/food-drink/maryland-crab-restaurant-hits-</a>	



back-at-petas-billboard-with-its-own.....	18
Alexandra Hutzler, <i>'My Daddy Needs a Kidney': Florida Man's Search for Donor Now a Billboard in Times Square</i> , Newsweek (Aug. 6, 2021, 3:38 PM).....	21
Alexis C. Madrigal, <i>Local News Is Dying, and Americans Have No Idea</i> , The Atlantic (Mar. 2003) <a href="https://www.theatlantic.com/technology/archive/2019/03/local-news-is-dying-and-americans-have-no-idea/585772/">https://www.theatlantic.com/technology/archive/2019/03/local-news-is-dying-and-americans-have-no-idea/585772/</a> .....	7
<i>Billboards That Point to Jesus</i> , Signs and Wonders, <a href="https://signswonders.co/billboards/">https://signswonders.co/billboards/</a> .....	17
Chris Hill (@ChhillieHill), Twitter (Sept. 22, 2020, 10:09 PM), <a href="https://twitter.com/ChhillieHill/status/1308589374553174018">https://twitter.com/ChhillieHill/status/1308589374553174018</a> .....	13
<i>Citizens Commission on Human Rights</i> , OOH Case Study <a href="https://oaaa.org/Portals/0/Public%20PDFs/Case%20Studies/Citizens%20Commission%20on%20Human%20Rights.pdf?ver=2021-05-25-150631-060">https://oaaa.org/Portals/0/Public%20PDFs/Case%20Studies/Citizens%20Commission%20on%20Human%20Rights.pdf?ver=2021-05-25-150631-060</a> .....	18
Daniel Mandelker, <i>Billboards, Signs, Free Speech, and The First Amendment</i> , 55 Real Property, Trust and Estate Law Journal 367, 369 (Fall/Winter 2020), <a href="https://landuselaw.wustl.edu/articles/BillboardsSigns1A.pdf">https://landuselaw.wustl.edu/articles/BillboardsSigns1A.pdf</a> .....	9

- David Griner, *Twitter Launches Ads About Racial Inequality in Cities That Have Been Hubs of Protest*, ADWEEK (June 19, 2020),  
<https://www.adweek.com/creativity/twitter-launches-ads-about-racial-inequality-in-cities-that-have-been-hubs-of-protest/>..... 10
- Donald J. Trump, Jr. (@donaldjtrumpjr), Instagram (Aug. 17, 2021),  
[https://www.instagram.com/p/CSsufeWjSRP/?utm\\_medium=copy\\_link;](https://www.instagram.com/p/CSsufeWjSRP/?utm_medium=copy_link;) ..... 15
- Gallery of Current Winners, OBIE,  
<https://obieawards.org/Current-Winners> .. 21, 22
- New Billboard Calls Out Conor Lamb For Voting To Keep His Constituents Stuck in Highway Traffic, Gives Drivers Access To Details About The Vote, Associated General Contractors of America Newsroom (Sept. 13, 2021)*  
<https://www.agc.org/news/2021/09/13/new-billboard-calls-out-conor-lamb-voting-keep-his-constituents-stuck-highway> ..... 13
- Holly Meyer, *Truck Driver Calls Billboard Ministry a Sign From Above*, USA Today (Sept. 23, 2013, 9:30 PM)..... 16, 17
- Ideological Placement of Each Source's Audience*, Pew Research Center (Oct. 20, 2014).  
<https://www.pewresearch.org/journalism/2014/10/21/political-polarization-media->

habits/pj_14-10-21_mediapolarization-08/.....	8
<i>Industry Principles, About OAAA, <a href="https://oaaa.org/AboutOAAA/WhoWeAre/OAAACodeofIndustryPrinciples.aspx">https://oaaa.org/AboutOAAA/WhoWeAre/OAAACodeofIndustryPrinciples.aspx</a> .....</i>	38
James Crump, <i>North Carolina Billboard Depicts Joe Biden Eating Ice Cream While Afghanistan Falls</i> , Newsweek (Aug. 19, 2021, 8:08 AM) .....	15
Jolls & Johnsen, <i>Media Literacy, supra</i> , at 1384; Abby K. Wood & Ann M. Ravel, <i>Fool Me Once: Regulating “Fake News” and Other Online Advertising</i> , 91 S. Cal. L. Rev. 1223, 1236–37 (2018) .....	8
Joseph S. Pete, <i>Union Says ‘Steelworkers of NW Indiana’ Billboards Supporting Trump Are Misleading</i> (Sept. 9, 2020).....	12
Kevin S. Held, <i>Billboard Honoring Fallen Marine Appears in Hometown of Wentzville</i> (Aug. 31, 2021, 1:25 PM), <a href="https://fox2now.com/news/missouri/billboard-honoring-fallen-marine-appears-in-hometown-of-wentzville/">https://fox2now.com/news/missouri/billboard-honoring-fallen-marine-appears-in-hometown-of-wentzville/</a> .....	20
<i>Lamar Advertising Launches National Campaign to Honor Teachers for Teacher Appreciation Week</i> , LAMAR News & Events, (May 3, 2021), <a href="https://www.lamar.com/About/NewsandEvents/lamar-launches-national--teacher-appreciation-campaign-050321">https://www.lamar.com/About/NewsandEvents/lamar-launches-national--teacher-appreciation-campaign-050321</a> .....	19

<i>Lamar Advertising to Display FEMA Emergency Alerts on Digital Billboards Nationwide</i> , LAMAR News & Events (Dec. 8, 2020), <a href="https://www.lamar.com/About/NewsandEvents/lamar-to-display-FEMA-alerts-on-digital-billboards-nationwide-1282020">https://www.lamar.com/About/Newsand Events/lamar-to-display-FEMA-alerts- on-digital-billboards-nationwide- 1282020</a> .....	26
<i>Live from NYC's Times Square!</i> , Earthcam, <a href="https://www.earthcam.com/usa/newyork/timesquare/?cam=tsstreet">https://www.earthcam.com/usa/newyork/ timesquare/?cam=tsstreet</a> .....	28
Lynn Trimble, <i>Here's the Story Behind That Anti-Trump Billboard in Downtown Phoenix</i> , Phoenix New Times (March 20, 2017).....	14
Melissa Corcoran Hopkins, <i>Brief History of the Editorial Cartoon</i> , RIT Archive Collections, <a href="https://archives-exhibits.rit.edu/exhibits/show/editorial-cartoons/essays/history-cartoons">https://archives- exhibits.rit.edu/exhibits/show/editorial- cartoons/essays/history-cartoons</a> .....	31
Nikki Usher & Michelle D. Layser, <i>The Quest to Save Journalism: A Legal Analysis of New Models for Newspapers from Nonprofit Tax-Exempt Organizations to L3Cs</i> , 2010 Utah L. Rev. 1315, 1320–21 (2010).....	7
Northwest Indiana Business Headlines, <a href="https://www.nwitimes.com/business/local/union-says-steelworkers-of-nw-indiana-billboards-supporting-trump-are-misleading/article_8b84d94f-146e-">https://www.nwitimes.com/business/loca l/union-says-steelworkers-of-nw- indiana-billboards-supporting-trump- are-misleading/article_8b84d94f-146e-</a>	

58af-8c26-c442813dad16.html.....	12
<i>OOH basics</i> , History of OOH, OAAA <a href="https://oaaa.org/AboutOOH/OOHBasics/HistoryofOOH.aspx">https://oaaa.org/AboutOOH/OOHBasics/HistoryofOOH.aspx</a> .....	22
<i>Pass It On</i> , Current OAAA PSA Campaigns, <a href="https://oaaa.org/AboutOOH/PublicService/CurrentOAAAPSACampaigns/PassItOn.aspx">https://oaaa.org/AboutOOH/PublicService/CurrentOAAAPSACampaigns/PassItOn.aspx</a> .....	19
<i>PETA, MD Seafood Industry Get Crabby with Billboards</i> , OAAA Outlook Newsletter (Sept. 17, 2018), <a href="https://oaaa.org/StayConnected/OAAAOutlookNewsletter/tabid/867/id/5559/Default.aspx">https://oaaa.org/StayConnected/OAAAOutlookNewsletter/tabid/867/id/5559/Default.aspx</a> .....	18
Slater Teague, <i>Local Billboard Part of FBI's National Campaign Seeking Tips of Capitol Riots</i> , WJHL 11 (Jan. 15, 2021 9:24 PM), <a href="https://www.wjhl.com/news/local/fbi-using-billboards-locally-nationally-to-ask-for-tips-after-capitol-riots/">https://www.wjhl.com/news/local/fbi-using-billboards-locally-nationally-to-ask-for-tips-after-capitol-riots/</a> .....	27
Stephen E. Gottlieb, <i>Law and the Polarization of American Politics</i> , 25 Ga. St. U.L. Rev. 339, 347 (2008).....	8
Steven L. Johnson, Brent Kitchens, & Peter Gray, <i>Facebook Serves as an Echo Chamber, Especially for Conservatives. Blame Its Algorithm</i> , Wash. Post (Oct. 26, 2020),	

<a href="https://www.washingtonpost.com/opinions/2020/10/26/facebook-algorithm-conservative-liberal-extremes/">https://www.washingtonpost.com/opinions/2020/10/26/facebook-algorithm-conservative-liberal-extremes/</a> .....	8
Tessa Jolls & Michele Johnsen, <i>Media Literacy: A Foundational Skill for Democracy in the 21st Century</i> , 69 Hastings L.J. 1379, 1382–83 (2018).....	8
<i>True American Hero Neil Armstrong Honored by Clear Channel Outdoor</i> , Clear Channel Outdoor (August 28, 2012), <a href="https://company.clearchanneloutdoor.com/true-american-hero-neil-armstrong-honored-clear-channel-outdoor/">https://company.clearchanneloutdoor.com/true-american-hero-neil-armstrong-honored-clear-channel-outdoor/</a> .....	20
<i>Vintage Billboards on Alabama Highways, From 1930–60s</i> , Marketing, OAAA (May 25, 2017), <a href="https://oaaa.org/StayConnected/NewsArticles/Marketing/tabid/324/id/4931/Default.aspx">https://oaaa.org/StayConnected/NewsArticles/Marketing/tabid/324/id/4931/Default.aspx</a> .....	5
<i>We’re #SendingLove Across the Globe in the World’s Largest User Generated Digital Out of Home Campaign</i> , Talon (May 18, 2020), <a href="https://talonoutdoor.com/news/were-sendinglove-across-the-globe-in-the-worlds-largest-user-generated-digital-out-of-home-campaign">https://talonoutdoor.com/news/were-sendinglove-across-the-globe-in-the-worlds-largest-user-generated-digital-out-of-home-campaign</a> .....	28

## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Out of Home Advertising Association of America (“OAAA”) is the principal trade organization for out-of-home (“OOH”) advertisers in the United States. It brings together over 800 members—ninety percent of the industry—to protect, unite, and advance the OOH advertising industry. OAAA leads the industry in developing principles and practices on topics such as environmental stewardship, safety, and privacy; and OAAA advocates for the industry to legislators, administrative agencies, and courts, to inform decisionmakers about the value of OOH advertising. OAAA also runs the annual “OBIE” awards, honoring the “best, most innovative, breathtaking activations in [the OOH] industry.” *About the Awards*, OBIE, <https://obieawards.org/About-The-Awards> (last visited Sept. 14, 2021).

Despite the name “advertising,” OAAA members actually publish and promote speech on a diverse array of topics, both commercial and non-commercial. Non-commercial topics cover a wide range, including political, social, and charitable messages. In addition, OAAA members donate over \$500 million a year in public service advertising.

The decision by the Maryland Court of Appeals, for which this Court’s review is sought, treats billboard

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner received timely notice of this filing, and has given its consent to this filing in a letter lodged with the Clerk of the Court. Respondent did not receive timely notice of this filing and has not consented.

providers as second-class speakers, with distinctly lesser rights to freedom of speech. But this Court has long recognized that billboards are an important forum for public speech. See, *e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). That importance has grown with changes in billboard technology that make them capable of ever-more complex messages, and with the declining ability of other media to reach audiences as broad and diverse as billboards can. OAAA submits this brief to inform the Court about the public speech that takes place through billboards, and about the serious risks to speech that the decision below presents. OAAA urges the Court to grant the petition.

### SUMMARY OF THE ARGUMENT

This Court long ago recognized that targeted taxes singling out particular publishers of speech create intolerable First Amendment concerns. Parting ways with other lower courts applying these protections, the Maryland Court of Appeals concluded that this Court's precedents protect only the "institutional press," and not any other protected speech or speaker, from targeted taxation.

The City of Baltimore imposes a tax that singles out just four owners/operators of out of home signage in the City, and that does not apply to any other form of speech or business and is unconnected to any other tax, fee or levy. The Court of Appeals nonetheless refused to apply any heightened scrutiny to that tax whatsoever because the court believed billboards are an inferior form of speech not worthy of the First



Amendment protections accorded to the traditional press.

This brief demonstrates that billboards are a medium for speech that is at the core of the First Amendment: political debate, religious testament, public safety, and more. Speech on matters of public concern is not merely an incidental use of billboards. It is routine and commonplace. In fact, it is a particularly important use of billboards, because they are one of the most effective and efficient ways for a person with a novel or controversial message to reach a wide audience.

Furthermore, the importance of billboards as a medium for public speech has grown over the years. For one thing, media markets have fragmented. A majority of people now receive news and information from a self-curated set of online publications and social media platforms, creating an unsurprising and endless confirmation bias feedback loop. Billboards are one of the few remaining forms of mass communication that can genuinely engage a wide audience without pre-selection on the basis of their political opinions, religious convictions, community memberships, or personal preferences.

In addition, modern digital billboards are able to change messages instantaneously, allowing them to provide information in real time and to participate in a current, vibrant, and relevant public discourse. Indeed, digital billboards display real-time news, sports, weather, and other current information, as well as emergency messages, amber and silver alerts, and the like. In fact, other news outlets use digital

signage to amplify their own news reporting by “teasing” lead stories.

Billboards and newspapers share the relevant characteristics that make targeted regulations inappropriate under the First Amendment. Billboard owners and newspapers both sell advertisements. Both billboards and newspapers present speech on matters of public concern. Both engage in editorial decisionmaking about what speech to present. Both, particularly with respect to digital billboards, select the information to present to audiences. Indeed, early newspapers—broadsheets—were often posted on walls, just like billboards.

The decision below allowed a law that specifically taxes a subset of billboards, without any particular justification or rationale, on grounds that laws targeting billboard speech do not need any heightened scrutiny. That principle is a dangerous narrowing of the First Amendment. It is at odds with decisions from other courts, but if allowed to stand it may not be the last, easily spreading to other means of communication as well. OAAA urges the Court to grant certiorari to review the decision of the Maryland Court of Appeals.

## **ARGUMENT**

### **I. BILLBOARDS ARE AN IMPORTANT MEDIUM FOR SPEECH ON ISSUES OF PUBLIC CONCERN.**

At its core, the decision below held that the rights guaranteed by the First Amendment are greater for certain types of speakers, namely “newspapers,

broadcasters, magazines, and other topical periodicals . . . the sort of media that . . . act as ‘interpreters of the government’ to its citizens.” Pet. App. 26a. Billboards do not qualify because they are, according to the court, merely “commercial advertising vehicle[s] that dabble[] in non-commercial content.” Pet. App. 27a.

This characterization of billboards was deeply wrong.

**A. Billboards have long served as a forum for free expression.**

Billboards “have played a prominent role throughout American history, rallying support for political and social causes.” *Metromedia, Inc.*, 453 U.S. at 501. Examples abound. During the World Wars, billboards were prominent forums for messages communicating patriotism and urging citizens to contribute to war efforts:



*Vintage Billboards on Alabama Highways, From 1930–60s, Marketing, OAAA (May 25, 2017),*

<https://oaaa.org/StayConnected/NewsArticles/Marketing/tabid/324/id/4931/Default.aspx>.

Messages like these are certainly “interpreting the government” for citizens, telling them about expectations of civic duty.

Billboards have long been an important way to communicate such messages. In certain ways they are more important than newspapers, because of a fundamental difference in how they reach audiences. A newspaper or magazine presents messages to a person who chose to read the publication. Often that interaction will involve a purchase, too, a decision by the potential reader to buy the newspaper and thus pay for the chance to receive the messages. But even for free-distribution newspapers, a person must choose to pick it up. Billboards do not require that act of volition by the audience. A person wishing to communicate a message can, through a billboard, make it visible and present for all who pass by. If you want to exhort citizens to contribute to the war effort, you will not want to rely solely on messages in newspapers. The ability of billboards to reach readers generally without regard to their news consumption curation is critical for public speech of this sort.

Billboards are a particularly efficient vehicle for presenting speech to a broad audience. Because they do not require printing and distribution networks, like newspapers and magazines, and do not require sophisticated communications technology, they are relatively inexpensive. The low cost makes them particularly favorable for speech by upstart political candidates, small non-profits, and groups with unpopular messages. A well-funded speaker can use

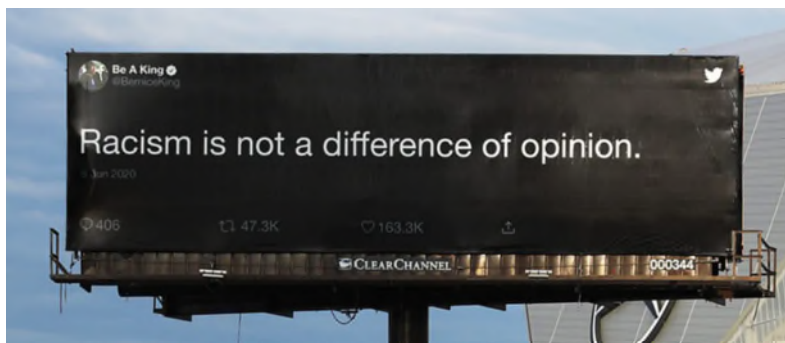
multiple media in parallel; a speaker who has not already attracted support but wants to communicate to the public will often turn to billboards, as the most efficient way to start reaching wide audiences. The combination of wide reach and relatively low cost makes billboards particularly valuable for those trying to break into public consciousness with insurgent or unpopular speech. Former U.S. Senator Barbara Mikulski, from the State of Maryland, described this dynamic vividly: “I know that billboards play an important role in political campaigns. When I first ran for Baltimore City Council . . . I challenged two political machines. I got out there, and I knocked on 15,000 doors, and I had a sweat equity campaign. I did not have big radio, big TV, but I sure had big billboards, because I could afford it.” (Court of Special Appeals Joint Record Extract, “E.” 523).

Billboards have become even more important, as a way to speak on issues of public concern to wide audiences, as media markets have fragmented and traditional media outlets have lost audience. The newspaper industry is fading. See Nikki Usher & Michelle D. Layser, *The Quest to Save Journalism*, 2010 Utah L. Rev. 1315, 1320-21 (2010); Alexis C. Madrigal, *Local News Is Dying, and Americans Have No Idea*, *The Atlantic* (Mar. 2003) <https://www.theatlantic.com/technology/archive/2019/03/local-news-is-dying-and-americans-have-no-idea/585772/>. And newspapers that remain are often associated with certain political viewpoints, resulting in a narrower audience. See *Ideological Placement of Each Source’s Audience*, Pew Research Center (Oct. 20, 2014). <https://www.pewresearch.org/journalism/>

2014/10/21/political-polarization-media-habits/pj\_14-10-21\_mediapolarization-08/. Broadcast television has been splintered into hundreds of channels distributed through cable or satellite. See Stephen E. Gottlieb, *Law and the Polarization of American Politics*, 25 Ga. St. U.L. Rev. 339, 347 (2008). The availability of internet news has led many Americans to receive information from their own targeted news sources, and many Americans rely on social media such as Facebook or Twitter as their primary sources for news and information. See Tessa Jolls & Michele Johnsen, *Media Literacy: A Foundational Skill for Democracy in the 21st Century*, 69 Hastings L.J. 1379, 1382-83 (2018); see also, 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-conservative-liberal-extremes/>.

The new sources are valuable in many ways, but they are also polarizing. People receive the news and information that they choose, or that internet companies have chosen for them by means of algorithms operating on their apparent preferences and attitudes, gleaned by tracking their internet activity. See Jolls & Johnsen, *Media Literacy*, *supra*, at 1384; Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. Cal. L. Rev. 1223, 1236-37 (2018). The well-documented result is that people tend to see information that reinforces whatever opinions they already had. The online media environment is a particularly difficult place to present someone with a new idea.

Billboards fill that gap. A billboard presents its message to, any person who passes through a particular geographic area; and billboards often stand near roadways and public spaces. A billboard does not target its message for conservative or liberal viewers or those that have shopped at a particular store in the last seven days. Billboards inherently and effectively reach a broad cross-section of people. See Daniel Mandelker, *Billboards, Signs, Free Speech, and The First Amendment*, 55 Real Property, Trust and Estate Law Journal 367, 369 (Fall/Winter 2020) (billboards “carry messages, demand attention, and can be effective in informing, shaping, and mobilizing public opinion”); see also *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (“Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer.” But “[t]he young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce.”). A speaker that wants to present people with ideas that might be different from what they were already thinking will often choose a billboard. Even Twitter, one of the most prominent social media companies that people rely on for news, uses billboards for its own public speech:



David Griner, *Twitter Launches Ads About Racial Inequality in Cities That Have Been Hubs of Protest*, ADWEEK (June 19, 2020), <https://www.adweek.com/creativity/twitter-launches-ads-about-racial-inequality-in-cities-that-have-been-hubs-of-protest/>.

That billboards are often the lowest cost, most available, and most effective vehicle for challenging entrenched orthodoxy is also what makes them particularly vulnerable. Especially in jurisdictions dominated by one major party, established politicians may not appreciate the contrary messaging being displayed on billboard faces. Indeed, in Baltimore during particularly contentious union benefit negotiations, two public sector unions took out a billboard criticizing the Mayor.



(E. 507).

This led some within the City government to attempt to retaliate against petitioner Clear Channel by attempting to impose content and viewpoint



restrictions into a site lease. (See E. 196–98, 235–37, 486–88, 507–09).

Thus, in today’s fragmented marketplace of ideas, the broad reach of billboards has made them a particularly important mode of public speech.

**B. Non-commercial speech on matters of public concern is a significant portion of billboard activity.**

Public speech through billboards is not just an incidental afterthought. It is commonplace, and is an important part of the billboard market. Billboards are frequently used to promote or to attack political candidates:



Joseph S. Pete, *Union Says ‘Steelworkers of NW Indiana’ Billboards Supporting Trump Are Misleading*, (Sept. 9, 2020) Northwest Indiana Business Headlines, [https://www.nwitimes.com/business/local/union-says-steelworkers-of-nw-indiana-billboards-supporting-trump-are-misleading/article\\_8b84d94f-146e-58af-8c26-c442813dad16.html](https://www.nwitimes.com/business/local/union-says-steelworkers-of-nw-indiana-billboards-supporting-trump-are-misleading/article_8b84d94f-146e-58af-8c26-c442813dad16.html).



Chris Hill (@ChhillieHill), Twitter (Sept. 22, 2020, 10:09 PM), <https://twitter.com/ChhillieHill/status/1308589374553174018>.

In Pennsylvania, for instance, an organization utilized the unique function of road-side billboards to highlight a candidate's vote limiting states' ability to add highway capacity:



*New Billboard Calls Out Conor Lamb For Voting To Keep His Constituents Stuck in Highway Traffic, Gives Drivers Access To Details About The Vote, Associated General Contractors of America Newsroom (Sept. 13, 2021) <https://www.agc.org/news/2021/09/13/new-billboard-calls-out-conor-lamb-voting-keep-his-constituents-stuck-highway>.*

These two examples were purchased by organizations; individuals also use billboards for political commentary. Here, an individual is using a billboard to express criticism of President Trump, in a way that is hard to imagine happening in any other medium:



Lynn Trimble, *Here's the Story Behind That Anti-Trump Billboard in Downtown Phoenix*, Phoenix New Times (March 20, 2017), <https://www.phoenixnewtimes.com/arts/anti-trump-billboard-mural-downtown-phoenix-9175014>.

According to the Phoenix New Times, the sponsor of this billboard is a local businesswoman, owner of several commercial buildings, who previously used this billboard to exhort people to recycle, and who then commissioned a local artist to design this critical image. *Id.* Another individual is using a billboard to criticize President Biden, again in a way that is hard to imagine in other media:



Donald J. Trump, Jr. (@donaldjtrumpjr), Instagram (Aug. 17, 2021), [https://www.instagram.com/p/CSsufeWjSRP/?utm\\_medium=copy\\_link](https://www.instagram.com/p/CSsufeWjSRP/?utm_medium=copy_link); see also James Crump, *North Carolina Billboard Depicts Joe Biden Eating Ice Cream While Afghanistan Falls*, Newsweek (Aug. 19, 2021, 8:08 AM), <https://www.newsweek.com/joe-biden-billboard-wilmington-north-carolina-afghanistan-taliban-1620967>.

People also use billboards for commentary on issues of religion. For instance, an atheist organization in Tennessee used a billboard to declare its lack of faith to the masses:



(E. 553). While a church in Ohio proclaimed its views on sexuality:



(E. 568). And this example spreads a message about a religious faith.



Holly Meyer, *Truck Driver Calls Billboard Ministry a Sign From Above*, USA Today (Sept. 23, 2013, 9:30 PM),

<https://www.usatoday.com/story/news/nation/2013/09/23/jesus-billboard-ministry/2858243/>.

This particular billboard was rented by an individual who routinely rents billboards along major highways in Wisconsin to communicate messages of faith like this. *Id.* He currently has 25 posters like this running on



billboards across his state. *Id.*; cf. also *Billboards That Point to Jesus*, Signs and Wonders, <https://signswonders.co/billboards/> (last visited Sept. 13, 2021) (describing one organization’s 30-year campaign of “billboard evangelism” that reaches 25 million people a year).

Billboards like the foregoing are often designed to be purposefully provocative to generate “earned media,” amplifying their messages and triggering public debate in a very real sense. In Baltimore, for example, in 2018 a series of billboards posted by PETA and a local crab shack debated the ethics of meat eating and generated dozens of local and national news stories.



PETA billboard targeting crab industry in Baltimore, MD.



Jimmy's Famous Seafood responds to PETA with billboard.

*PETA, MD Seafood Industry Get Crabby with Billboards*, OAAA Outlook Newsletter (Sept. 17, 2018),

<https://oaaa.org/StayConnected/OAAAOutlookNewsletter/tabid/867/id/5559/Default.aspx>; see also, e.g., Alexandra Deabler, *Maryland Crab Restaurant Hits Back at PETA's Billboard With Its Own*, Fox News (Sept. 5, 2018), <https://www.foxnews.com/food-drink/maryland-crab-restaurant-hits-back-at-petas-billboard-with-its-own>.

Billboards are also used to effectively spread public service messages. For instance, a billboard-led campaign seeking to educate New Yorkers about COVID-19-related discrimination generated 11 earned media stories and a reach of 347.8 million viewers.



*Citizens Commission on Human Rights*, OOH Case Study

<https://oaaa.org/Portals/0/Public%20PDFs/Case%20Studies/Citizens%20Commission%20on%20Human%20Rights.pdf?ver=2021-05-25-150631-060> (last visited Sept. 13, 2021). And the “Pass It On” campaign has



spread messages of encouragement for nearly twenty years.



*Pass It On*, Current OAAA PSA Campaigns, <https://oaaa.org/AboutOOH/PublicService/CurrentOAAAPSACampaigns/PassItOn.aspx> (last visited 9/13/2021).

Billboards are also used to support social causes, such as recognizing the hard work of teachers,



*Lamar Advertising Launches National Campaign to Honor Teachers for Teacher Appreciation Week*, LAMAR News & Events, (May 3, 2021), <https://www.lamar.com/About/NewsandEvents/lamar-launches-national-teacher-appreciation-campaign-050321>, commemorating the loss of an important figure in American history,



*True American Hero Neil Armstrong Honored by Clear Channel Outdoor, Clear Channel Outdoor (August 28, 2012),*

<https://company.clearchanneloutdoor.com/true-american-hero-neil-armstrong-honored-clear-channel-outdoor/>, or honoring a local fallen hero,



*Kevin S. Held, Billboard Honoring Fallen Marine Appears in Hometown of Wentzville, Fox2Now (Aug. 31, 2021, 1:25 PM),*  
<https://fox2now.com/news/missouri/billboard-honoring-fallen-marine-appears-in-hometown-of-wentzville/>.

Billboards even helped a man in Florida find an organ donor when a roadside billboard featuring a picture of him and his daughter with the phrase “my daddy needs a kidney” caught the attention of a media company with a billboard in Times Square.



Alexandra Hutzler, *'My Daddy Needs a Kidney': Florida Man's Search for Donor Now a Billboard in Times Square*, Newsweek, (Aug. 6, 2021, 3:38 PM), <https://www.newsweek.com/my-daddy-needs-kidney-florida-mans-search-donor-now-billboard-times-square-1617097>.

The following billboard received one of the industry's coveted OBIE awards, in the "Nonprofits and Public Service" category, for 2021.



Gallery of Current Winners, OBIE, <https://obieawards.org/Current-Winners> (last visited Sept. 13, 2021).

The gallery of recent and past winners of OBIE awards is a library of examples showing just how prevalent public speech is on billboards. See *id.*

A billboard can use graphics to communicate complex ideas in an instant of viewing. The anti-Trump and anti-Biden posters above demonstrate that facility of billboards. Neither has any text that is visible at a distance; each communicates a complex message about the speaker's views of the politician, encapsulated in a powerful image. Thanks to that capability of billboards, even posters that are delivering commercial advertising messages can often include important non-commercial messages. For example, consider this 1931 advertisement for Coca-Cola:



*OOH basics*, History of OOH, OAAA  
<https://oaaa.org/AboutOOH/OOHBasics/HistoryofOOH.aspx> (last visited Sept. 13, 2021).

This billboard promoted the soda, of course. But it was also one of the first public presentations of the modern design of Santa Claus. *Id.* The image,

appearing in the depths of the Great Depression, communicates complex messages about hope, prosperity, and culture.

Many billboard owners also generate their own content. For instance, one company started a “#ThankfulThisHoliday” campaign where individuals could upload their own photos to digital billboards to spread holiday cheer.



*#ThankfulThisHoliday Case Study*, LAMAR, <https://www.lamar.com/~media/DBF0E994AA63492282AEA87C5CDB6A92.pdf> (last visited Sept. 13, 2021).

OAAA members donate over \$500 million a year in public service advertising. *About OAAA*, OAAA, <https://oaaa.org/AboutOAAA.aspx> (last visited Sept. 13, 2021). That amount alone represents nearly 10% of annual OOH advertising revenue, a significant contribution of public speech that is curated by the companies donating the space. The volume of public

speech being transmitted through paid use of billboards is even larger.

**C. With advanced technology, billboards have become even timelier and more informative.**

Part of the dismissive attitude towards billboards seems to come from the notion that a billboard is simple and static. As the examples above demonstrate, they are far from simple. Moreover, because digital billboard messages can be replaced remotely and instantaneously, their messages can remain current and fresh. Today, people receive real-time news from billboards, as well as up-to-the-minute information about traffic, safety, and weather. In fact, traditional news outlets often rent billboards to publish breaking news:



(E. 530.) Or the weather forecast:



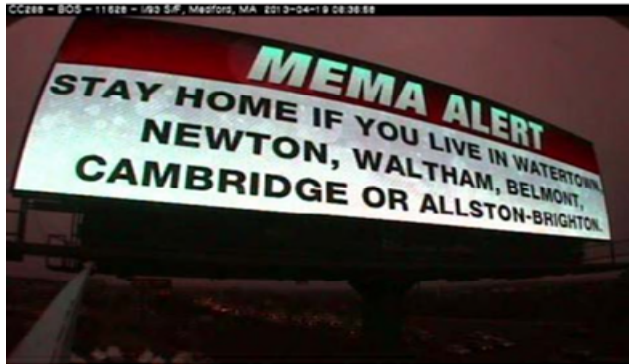
(E. 532.) Or real-time sports updates:



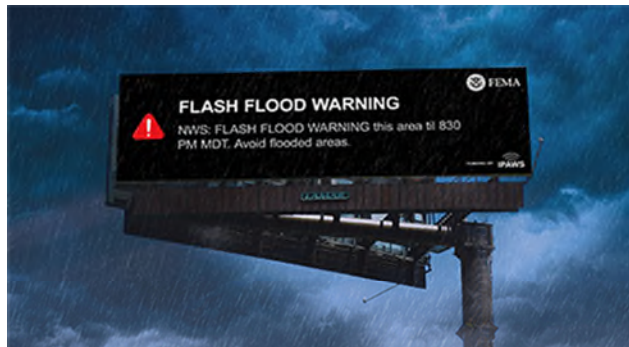
(E. 537.)

Government agencies use digital billboards to quickly spread urgent messages like emergency warnings.





(E. 531);



*Lamar Advertising to Display FEMA Emergency Alerts on Digital Billboards Nationwide*, LAMAR News & Events (Dec. 8, 2020), <https://www.lamar.com/About/NewsandEvents/lamar-to-display-FEMA-alerts-on-digital-billboards-nationwide-1282020>. And the FBI uses billboards to enlist public assistance in capturing suspects:





(E. 535),



Slater Teague, *Local Billboard Part of FBI's National Campaign Seeking Tips of Capitol Riots*, WJHL 11 (Jan. 15, 2021 9:24 PM), <https://www.wjhl.com/news/local/fbi-using-billboards-locally-nationally-to-ask-for-tips-after-capitol-riots/>.

Modern billboards can also instantly display images across the world, such as during the #sendinglove campaign, where 68 OOH advertisers donated \$15 million worth of space for individuals to upload photos to “send” to a prominent city anywhere in the world.



*We're #SendingLove Across the Globe in the World's Largest User Generated Digital Out of Home Campaign,* Talon (May 18, 2020), <https://talonoutdoor.com/news/were-sendinglove-across-the-globe-in-the-worlds-largest-user-generated-digital-out-of-home-campaign>.

One need only look at Times Square in New York City, New York (livestream available: *Live from NYC's Times Square!*, Earthcam, <https://www.earthcam.com/usa/newyork/timessquare/?cam=tsstreet> (last visited Sept. 13, 2021) to see the impressive technological advancements in billboards. For example, the “ABC SuperSign” displays news, previews, and headlines from ABC News and ESPN (*ABC SuperSign*, Disney Advertising Sales Local, <https://www.abcfullcircle.com/abcsupersign/> (last visited Sept. 13, 2021)).

Billboards today have evolved beyond the static images that the Court considered, decades ago, in *Metromedia*. A digital billboard is a one-location media source, engaged in speech every bit as much as a traditional newspaper.

## II. BALTIMORE’S ORDINANCE TARGETS BILLBOARDS AND BURDENS SPEECH.

Baltimore’s ordinance taxes “the privilege of exhibiting outdoor advertising displays in the City.” Balt. City Code art. 28, § 29-2. The tax applies to any person that “owns or controls a billboard, posterboard, or other sign; and . . . charges fees for its use as an outdoor advertising display,” *id.* § 29-1(b)—which, as noted above, billboard operators often do for speech on matters of public concern. The annual tax is \$15 per square foot for digital signs and \$5 per square foot for static signs. *Id.* § 29-3(a).

### A. The tax is greater for billboards with greater reach.

The court below concluded that the Baltimore tax “has no direct or indirect effect on the extent of the circulation of billboards.” Pet. App. 28a. This mattered because the court believed this Court’s cases apply heightened scrutiny when a tax is based on the “components of newspaper production” so as to tax a greater amount of speech more heavily. *Id.* But the court’s assessment in terms of “circulation” could almost have been designed to give special treatment to newspapers and related print publications—the only speech media that have “circulation.”

The circulation of a newspaper is a measure of how widely its speech reaches, based on how many people buy the newspaper. For a billboard, the

corresponding measure is the number of people who can see the billboard and perceive its messages as they pass by. The characteristics that determine that potential audience are simple: the location of the billboard in relation to highways, public spaces, and other areas of traffic; and the size of the billboard.

The Baltimore tax is proportional to the size of the billboard: \$5 or \$15 (depending on the type of billboard) per square foot. See Balt. City Code art. 28, § 29-3(a). The size of the billboard also determines, naturally, the underlying cost of producing the speech—the cost of installing the billboard, and the cost of the periodic replacements of posters with new messages. Size, for a billboard, is the direct analog of the ink and paper used to print a newspaper. See *Minneapolis Star & Tribune Co. v. Minn. Commr. of Revenue*, 460 U.S. 575, 592–93 (1983) (invalidating tax on a newspaper’s use of ink and paper).

Moreover, the tax differentiates between static billboards and digital billboards. As explained above, the key feature of digital billboards is that they enable instantaneous updates, so a billboard can display real-time news and information. A digital billboard can disseminate a significantly greater amount of speech, including critical speech on issues of public concern, than a static billboard. And the Baltimore tax is, correspondingly, three times higher, just as the *Minneapolis Star* tax was higher “for the largest newspapers,” Pet. App. 28a (quoting 460 U.S. at 578).

**B. A tax specific to billboards burdens speech.**

Beginning with *Grosjean v. American Press Company*, 297 U.S. 233 (1936), this Court has recognized that a tax targeting the press is “not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.” *Id.* at 250. The Court there struck down a tax imposed only on newspapers because “it is seen to be 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.*

A tax imposed solely on billboards, and particularly a tax targeting a subset of billboards, limits the circulation of information just like a tax only on newspapers. Certainly billboards are vital participants in the marketplace of ideas. They disseminate information, opinion, and arguments in special ways that are nearly unique to billboards. Consider the billboard criticizing President Biden, depicted above. No newspaper article could have delivered the message that way. The closest analog is the venerable tradition of political cartoons, which for hundreds of years have been an important means to hold politicians to account. See Melissa Corcoran Hopkins, *Brief History of the Editorial Cartoon*, RIT Archive Collections, <https://archives-exhibits.rit.edu/exhibits/show/editorial->

cartoons/essays/history-cartoons (last visited Sept. 13, 2021). But a billboard is like a political cartoon that can be presented to hundreds of thousands or millions of people, over and over again as they pass by.

If a person subject to the Baltimore tax wants to limit its tax liability, the course of action is clear: reduce the number of billboards it offers, or make them smaller in area and thus smaller in audience. The tax discourages speech in just the same ways as a tax on newspaper ink.

In 1983, the Court elaborated that “[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.” *Minneapolis Star*, 460 U.S. at 585. Specifically, “[w]hen the State singles out the press . . . 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.* Recognizing this danger, the Court then established a heightened standard of review for ordinances causing “[d]ifferential taxation of the press.” *Id.*

A tax imposed specifically and solely on billboards burdens speech too, just like a tax only on newspapers. If there is no heightened scrutiny for Baltimore’s tax of \$15 per square foot of billboard, there is no barrier to a tax of \$150 per square foot, or \$1,500 per square foot or more. Recall how Senator Mikulski got her start in politics: Running for the

Baltimore City Council, in a campaign dependent on billboards. Legislators' power to tax billboards into submission is the power to hobble the candidates and commenters that might challenge their rule.

The Court reaffirmed the heightened scrutiny for taxes targeting the press two more times. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987), the Court reiterated that “a discriminatory tax on the press burdens rights protected by the First Amendment,” even where “there is no evidence of an improper censorial motive.” *Id.* at 227–28. “[S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.” *Id.* at 228. “[A] tax limited to the press raises concerns about censorship of critical information and opinion.” *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). The government thus cannot single out the press “[a]bsent a compelling justification.” *Id.*

A tax special for billboards carries the same risk of censorial threat. Billboards carry uncomfortable messages. Many of the examples above are likely distasteful to some people, or present ideas that some people disagree with vehemently. In fact, they are even more likely to present controversial arguments than newspapers, precisely because a billboard can reach viewers who did not choose to receive the message. Newspapers rely, for their business, on

people's wanting to pick them up. Either people choose to buy the newspaper, or they choose to read it and, by doing so, increase the circulation that the newspaper relies on to sell advertising. Billboards are a correspondingly valuable opportunity for speakers to communicate messages their audiences might not have chosen to hear. It is particularly important not to expose this forum to censorship through taxation.

**III. THE DECISION BELOW DISTINGUISHED THIS COURT'S PRECEDENTS ON GROUNDS THAT ARE CONTRARY TO THE FIRST AMENDMENT AND TO THE VITAL SPEECH FUNCTION OF BILLBOARDS.**

By its plain terms, the Baltimore tax is solely for billboards and taxes larger billboards more. To conclude that, nonetheless, the tax does not receive any heightened degree of scrutiny, the Maryland Court of Appeals held that this Court's decisions are limited to taxes targeting the institutional press—"newsgathering organization[s] that curate[] what [they] disseminate[] according to journalistic principles." Pet. App. 27a. That analysis is contrary to basic First Amendment principles, and the effort to distinguish billboards from newspapers ignores key features of each.



**A. The institutional press receives no special treatment under the First Amendment.**

It is hard to see why words pressed onto a paper and distributed in the form of a booklet should receive greater protection, under the First Amendment, than words blown up and placarded on a sign for all to see.

This Court has “consistently reject[ed] the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)). Decades ago the Court instructed that “[t]he liberty of the press is not confined to newspapers and periodicals.” *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). “[T]he purpose of the Constitution,” the Court explained, “was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.” *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946). As Chief Justice Burger aptly stated: “The very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.” *First Natl. Bank v. Bellotti*, 435 U.S. 765,

801 (1978) (Burger, C.J., concurring). Nowadays, with “the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.” *Citizens United*, 558 U.S. at 352. *Minneapolis Star* could not have been solely about the institutional press when it was decided, and that limitation of its holding is even less viable today.

Moreover, heightened scrutiny for targeted taxes has never been limited to taxes imposed only on newspapers. In *Minneapolis Star* itself, the tax applied not simply to newspaper manufacturers or newspapers themselves, but to the paper and ink used to create newspapers—in other words, it was a tax on the medium used to communicate information. 460 U.S. at 591. That is precisely the function of the tax here—taxing the billboard space where information is communicated. Judge Getty, dissenting below, understood this reality: “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.” Pet. App. 45a (Getty, J., dissenting) (quotation marks and citation omitted).

Further, in *Arkansas Writers’ Project*, the tax at issue *excluded* newspapers and applied only to “general interest” magazines. 481 U.S. at 223. The Court nonetheless applied heightened scrutiny, not questioning whether general interest magazines

qualified as the “press,” *see id.* at 227–28—and certainly not whether the challengers employ “journalistic principles,” Pet. App. 27a.

**B. Billboards and newspapers cannot be meaningfully distinguished for First Amendment purposes.**

The Court of Appeals sought to draw multiple distinctions between newspapers and billboards, such as the notion of “journalistic principles.” None of the claimed differences passes First Amendment muster.

*First*, billboards often carry commercial advertising. Pet. App. 26a–27a. So do newspapers. The ability to sell commercial ads, to be viewed by the readers of the newspaper, is central to the business model of most newspapers. Jesse Holcomb & Amy Mitchell, *Revenue Sources: A Heavy Dependence on Advertising*, Pew Research Center (Mar. 26, 2014), <https://www.pewresearch.org/journalism/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising/>. A billboard differs only in that a given billboard might carry a primarily commercial message at one time and a non-commercial public message at another time, instead of combining them onto one piece of paper. Even that distinction, however, is fading as digital billboards can display commercial and noncommercial messages at the same time, rotating between the two types throughout the day. The Baltimore tax is due annually, on the basis of whether the billboard’s owner has sold space at any time during the year.

**Second**, newspapers curate the information they provide, using “journalistic principles.” Pet. App. 27a. Billboard owners also make their own editorial choices about some of the messages they display. OAAA members generate their own content, and also choose which messages to distribute when they donate \$500 million a year in advertising space to causes they deem worthy of publication. Even for paid advertising, OAAA’s Code of Industry Principles encourages members to reject advertising that is “misleading, offensive, or otherwise incompatible with individual community standards.” *OAAA Code of Industry Principles*, About OAAA, <https://oaaa.org/AboutOAAA/WhoWeAre/OAAACodeofIndustryPrinciples.aspx> (last visited Sept. 13, 2013). Moreover, digital billboards frequently are literally and directly used to disseminate news.

**Third**, the Court of Appeals suggested that a tax receives heightened scrutiny only if it distinguishes according to “the duration or extent of speech (*e.g.*, the circulation of a newspaper).” Pet. App. 31a. Billboards do vary in the duration and extent of speech. To be sure, while a billboard is in place, its viewership is fixed by its geography and its size. For newspapers too, the extent of speech depends on *ex ante* financial choices: how many copies to print. A billboard owner chooses whether to install a billboard, and of what size; whether to leave the billboard in place; and whether to sell space on the billboard. These choices are made for longer time scales than a daily news cycle, but they are choices nonetheless, and the Baltimore tax affects them. A speech-targeting tax should not be immune from First Amendment scrutiny just because the speakers are, due to the time

scale of their operations, less capable of withdrawing their speech to avoid the tax.

## CONCLUSION

Under any reasonable understanding of “the press,” and any proper protection of speech, billboards should be covered. Billboards fill a particular niche in the world of free expression that goes to the very heart of the First Amendment. Insurgent political speech, public advocacy of controversial topics, and the ability to disseminate these messages widely are at the core of protected speech. A tax special for billboard is a tax on free expression that deforms the market for ideas.

Billboards also routinely generate or select their own content to support public service campaigns or commemorate important events. If this content were printed and circulated as a magazine instead of published on a billboard, none would dispute that it is protected speech. And billboards play a distinct role in the exchange of ideas, because they allow the publication of news instantly, in a wide, non-selective manner that crosses lines of polarization that confine newspapers and the “institutional” press.

The decision below, holding that billboards can be subject to special taxes without any additional scrutiny or justification, is a dangerous narrowing of the First Amendment. The Court should grant the petition for certiorari.

Respectfully submitted,

KEITH BRADLEY  
*Counsel of Record*  
SQUIRE PATTON BOGGS (US) LLP  
1801 California Street, Suite 4900  
Denver, CO 80202  
(303) 830-1776  
keith.bradley@squirepb.com

BENJAMIN C. GLASSMAN  
ELLEN PHILLIPS  
SQUIRE PATTON BOGGS (US)  
201 E. Fourth St.  
Suite 1900  
Cincinnati, OH 45202  
(513) 361-1200  
benjamin.glassman@squirepb.com  
ellen.phillips@squirepb.com

*Counsel for Amicus Curiae*

September 15, 2021