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**U.S. Supreme Court Update**

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**U.S. SUPREME COURT UPDATE**

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**First Amendment Challenge to Baltimore Billboard Tax**

\*43 In *Clear Channel Outdoor, LLC v. Raymond* (Docket No. 21-219), Clear Channel Outdoor LLC<sup>1</sup> ('Clear Channel') filed a Petition for a Writ of Certiorari to review the judgment of the Court of Appeals of Maryland that upheld the denial of Clear Channel's requests for refunds of Baltimore City excise taxes paid on the privilege of exhibiting outdoor advertising displays in the City. The Court of Appeals of Maryland held that the Baltimore City tax does not violate the First Amendment to the U.S. Constitution or Article 40 of the Maryland Declaration of Rights. Clear Channel asserts in its Petition that the billboard tax is subject to heightened scrutiny, and such tax by singling out speech platforms, such as Baltimore's, is 'presumptively incompatible with the First Amendment' to the U.S. Constitution.

We also briefly discuss *James Clay, et. al. v. Commissioner of Internal Revenue* (Docket No. 21-237), where members of the Miccosukee Tribe of Indians of Florida (the 'Tribe') request review of an Eleventh Circuit decision that upheld the U.S. Tax Court's decision that certain distributions made to tribal members from casino revenue (referred to as 'gross receipts tax[es]' on 'all amounts received by the [Tribe's] casino') were taxable income. The Tribe asserts that 'the clear language of Title 25 of the Code of Federal Regulations, and the exclusive authority over federally recognized Indian Tribes granted to the Secretary of Interior under 25 U.S.C. § 2, controls the determination of how the Miccosukee Tribe compensates its members for the use of their lands, to the exclusion of any other federal agency, including the Internal Revenue Service.'

We also wait for the Court's decision on whether to grant certiorari in *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611). The issue in that case is whether the New York Opioid Stewardship Act's payment is a 'tax' within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341. Finally, we continue to track the MoneyGram cases: *Delaware v. Pennsylvania*, 220145 and *Arkansas et al. v. Delaware*, 220146. The dispute is over which state is entitled to escheat, or take custody of, the proceedings of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc.

**Clear Channel's First Amendment Challenge to Baltimore's Billboard Tax**

\*\*2 Clear Channel asserts in its Petition for Writ of Certiorari that this case 'presents an exceptionally important question of constitutional law: whether a tax targeting off-premises billboards is subject to heightened scrutiny under the First

Amendment. By answering that question in the negative, Maryland's highest court singled out one form of speech for a unique financial burden and unduly limited the reach of the First Amendment's protections.‘ The First Amendment to the U.S. Constitution provides, ‘Congress shall make no law . . . abridging the freedom of speech, or of the press[.]’<sup>2</sup> The First Amendment is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution. The Maryland Court of Appeals held that the local tax on billboard operators was subject only to rational-basis review, not heightened scrutiny (also known as ‘strict scrutiny’) and under this standard of review, the tax passes constitutional muster.

### **History of the Baltimore billboard tax.**

In 2013, the Baltimore City Council enacted an ordinance that imposes an excise tax ‘on the privilege of exhibiting outdoor advertising displays in the City ‘ (the ‘Billboard Tax’ or ‘Ordinance’).<sup>3</sup> An ‘outdoor advertising display’ is defined as ‘an outdoor display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made (i.e., ‘off-site billboards’); and (ii) sold, offered, or conducted on the premises only incidentally if at all.’<sup>4</sup> The tax is levied on the ‘advertising host’—defined as the person who owns or controls the billboard and charges for its use as an outdoor advertising display.<sup>5</sup> The Billboard Tax is assessed on an annual basis based on the size and type of display: \$15 per square \*44 foot for an electronic display that changes images more than once a day and \$5 per square foot for any other display. The Billboard Tax does not depend on the number of advertisements on a given display, the duration of an advertisement, or the subject matter of an advertisement.

### **Procedural history.**

In 2013, Clear Channel filed a lawsuit against the City of Baltimore in the U.S. District Court for the District of Maryland. Clear Channel argued that the Billboard Tax imposed an unconstitutional regulatory fee in violation of its right to freedom of speech under the First and Fourteenth Amendments to the U. S. Constitution. The City moved to dismiss the lawsuit on the basis that the Ordinance imposed a general revenue tax (rather than a regulatory fee) that was forbidden to be reviewed in the federal court under the Tax Injunction Act (‘TIA’).<sup>6</sup> (As our readers know, the TIA forbids federal district courts from ‘enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.’<sup>7</sup>) The U.S. District Court for the District of Maryland granted summary judgment in favor of Baltimore City and dismissed Clear Channel's lawsuit because it lacked *subject matter* jurisdiction under the TIA.

**\*\*3** Clear Channel then paid the Billboard Tax under protest and filed refund claims with the Director Department of Finance of Baltimore City. Baltimore denied the requests for refund and Clear Channel sought review of the denied refund requests in the Maryland Tax Court, again arguing that Baltimore's Billboard Tax violated the First and Fourteenth Amendments to the U.S. Constitution (and Article 40 of the Maryland Constitution). The Maryland Tax Court rejected Clear Channel's arguments and held that an excise tax imposed on off-premises billboards is a ‘tax on the privilege of continuing in business, not on exercising free speech.’ As explained in Clear Channel's Petition for Writ of Certiorari, ‘the Maryland Tax Court further found that the act of hiring billboard space ‘does not possess sufficient communicative elements for the First Amendment to come into play.’‘ Consequently, the Maryland Tax Court applied rational-basis review and upheld the Billboard Tax as rationally related to the legitimate state interest in collecting public revenues.

Clear Channel then appealed the Tax Court's decision to the Maryland Circuit Court for Baltimore City, which affirmed in favor of Baltimore City. Next, Clear Channel appealed to the Maryland Court of Special Appeals. After that lower court affirmed the denial of Clear Channel's claims for refunds, Clear Channel filed an appeal with the Maryland Court of Appeals.

### Standard of Review: 'Heightened Scrutiny' or 'Rational Basis'

The Court of Appeals of Maryland began its Opinion by recognizing that '[u]nder the constitutional provisions that protect freedom of speech and of the press, differential taxation of those who operate platforms for speech is 'constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.' Those constitutional provisions require 'heightened scrutiny' of tax laws that 'single out the press,' that 'target a small group of speakers,' or that 'discriminate on the basis of the content of taxpayer speech.'<sup>6</sup> As a result, the Court of Appeals explains that 'the resolution of this case depends on whether the First Amendment's heightened scrutiny standard is to be applied here and, if so, whether the Ordinance survives that scrutiny.'

In reviewing the question of whether a tax will trigger heightened scrutiny, the Court of Appeals reviews Supreme Court precedence, in particular *Leathers v. Medlock*.<sup>8</sup> Applying the principles of *Leathers*, the Court of Appeals first examined whether there was evidence that the Ordinance, in intent or effect, was designed to suppress the expression of ideas or viewpoints and answered that question in the negative. Then, the Court of Appeals 'consider[ed] 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 the taxpayer speech.'

**\*\*4** The Maryland Court of Appeals begins its analysis of whether the Ordinance 'singles out the press' by noting that 'Clear Channel does not primarily urge a heightened scrutiny standard based on a theory that the Ordinance singles out the press, [but] it does assert that off-site billboards are part of the 'the press.' Per the Court of Appeals, this argument 'seems a bit of a stretch.' In addition, the Court of Appeals opines that '[t]he fact that a billboard may function on occasion or in some measure like the traditional 'press' does not make it equivalent to a newspaper or broadcaster for purposes of the First Amendment.' It further finds that 'Clear Channel's billboards thus may qualify as a medium that in some small aspect functions similarly to what is traditionally referred to as 'the press.'

However, even from that perspective, the Ordinance can hardly be said to 'single out' the press.' The Court of Appeals makes clear that in its view, '[a] tax singles out the press when some aspect of it indicates a 'purposeful attempt to interfere with First Amendment activities' or it 'is structured so as to raise suspicions that it was intended to do so.' *Leathers*, 499 U.S. at 448, 11 S.Ct. 1438. Here, the Court of Appeals finds the Billboard Tax is imposed on all billboard operators of off-site billboards in the City who sell advertising on those billboards and 'has no direct or indirect effect on the extent of the circulation of billboards' and there 'is no indication that the City has taxed billboard operators to interfere with First Amendment activities or that the tax is structured to raise suspicion that it was intended to do so.' Accordingly, the Court of Appeals concludes that the Ordinance does not trigger heightened scrutiny under **\*45** the First Amendment by 'singl[ing] out the press.'

With respect to its analysis of whether the Ordinance 'targets a small group of speakers,' the Maryland Court of Appeals concludes that 'a tax targets a small group of speakers when it distinguishes among members within related types of media, not simply when it applies to a specific form of media.' Here, the Court of Appeals finds that the Billboard Tax applies to all off-site billboards in the City for which the operator charges customers for displaying the customer's advertising and does not distinguish among billboards according to any other factor (e.g., duration or extent of speech or subject matter). The Court of Appeals thus concludes that '[t]he fact that there are only four taxpayers affected by the Ordinance is due largely to market conditions, not the structure of the Ordinance.' As a result, the Court of Appeals finds that the Ordinance does not trigger heightened scrutiny under the First Amendment by 'targeting a small group of speakers.'

Finally, the Maryland Court of Appeals examines whether the Ordinance 'discriminates based on content.' The Court of Appeals explains that 'Clear Channel argues that the Ordinance discriminates on the basis of the content of the taxpayer speech because it applies only to off-premises billboards, and one must read a billboard in order to determine whether it qualifies as an off-premises or on-premises sign.' It cites the Supreme Court's recent decision in *Reed v. Town of Gilbert*,<sup>9</sup> which held that 'content-based restrictions on speech in signs could manifest both in obvious ways, such as by relating to the subject matter of a sign, and

in more subtle ways, such as by relating to a sign's function or purpose.' However, the Court of Appeals find that, 'even after the *Reed* decision, a distinction between on-premises signs and off-premises signs in a regulatory or tax law does not discriminate on the basis of content and therefore does not trigger heightened scrutiny under the First Amendment.'

**\*\*5** Based on the above, the Maryland Court of Appeals concludes that the Ordinance is subject to rational basis review, rather than heightened scrutiny, and such Ordinance clearly survives the application of the rational basis test, 'as a revenue raising measure that is clearly within the taxing authority of the City.'

### Dissent

Justice Getty dissented from the Maryland Court of Appeals majority's conclusion. Justice Getty concludes that '[t]he City's tax raises constitutional concerns that should prompt more rigorous judicial scrutiny.' Specifically, Justice Getty believes that 'billboards are a constitutionally protected medium of communication and, thus, any legislation potentially affecting the 'speech' from this platform implicates free expression concerns.' Furthermore, Justice Getty maintains that 'allowing a tax on the 'privilege' of maintaining a speech platform necessary to convey speech that falls within the ambit of the First Amendment is an attempt to draw a line that runs contrary to prior Supreme Court precedent.'

In addition, Justice Getty finds that 'the Ordinance is not 'generally applicable.' Instead, the Ordinance applies solely to one class of speech platforms - 'outdoor advertising displays' - which ratchets our review to a higher bar of scrutiny. The Ordinance's application to off-premises, but not on-premises, signage further winnows the tax's focus and presents a potential content-based distinction that is blatantly contrary to the First Amendment.' As a result, Justice Getty concludes that for the Billboard Tax to be constitutionally permissible, it must meet a more onerous standard of heightened scrutiny, and thus, he would have required the Court to reverse the Court of Special Appeals and, upon remand, require the City to meet the heightened burden of strict scrutiny.

### Question presented.

'Whether a tax singling out off-premises billboards is subject to heightened scrutiny under the First Amendment.'

### Federally Recognized Indian Tribe's Challenge to Eleventh Circuit's Determination that Payments Are Taxable Net Gaming Revenue

In *James Clay, et. al. v. Commissioner of Internal Revenue* (Docket No. 21-237), members of the Miccosukee Tribe of Indians of Florida (the 'Tribe') requests review of an Eleventh Circuit decision that upheld the U.S. Tax Court's decision that certain distributions made to Tribal members from casino revenue constituted unreported taxable income. The Tribe asserts that the courts below incorrectly adopted **\*46** the position of the Internal Revenue Service which recast payments for the use of tribal lands as taxable distributions of net gaming revenue. According to the Tribe, 'the clear language of Title 25 of the Code of Federal Regulations, and the exclusive authority over federally recognized Indian Tribes granted to the Secretary of Interior under [25 U.S.C. § 2](#), controls the determination of how the Miccosukee Tribe compensates its members for the use of their lands, to the exclusion of any other federal agency, including the Internal Revenue Service.' In its Petition for Writ of Certiorari, the Tribe argues that Title 25 sets out at Part 162 the process and procedure under which a federally recognized Tribe uses and permits the use of its lands, and more particularly, '*there is no model business lease form because of the need for flexibility in negotiating and writing business leases.*'<sup>10</sup> (emphasis added).

**\*\*6** The Eleventh Circuit explained that the Tribe members 'do not dispute that their per capita payments qualify as 'gross income' under the Code'. Rather, as explained by the court, the Tribe members 'are left to argue that Congress exempted their payments from taxation.' Per the Eleventh Circuit Court, they point to the Miccosukee Settlement Act of 1997 or an exemption for land lease payments for exemption from taxation. However, the Eleventh Circuit concludes that '[n]either of the asserted exemptions, however, offers relief.'

Specifically, the court explains that under the Miccosukee Settlement Act of 1997 ‘no ‘moneys paid’ or ‘lands conveyed’ to the Tribe under the Settlement Act or the [settlement] agreement would be ‘taxable under Federal or Statelaw.’ ‘ The Eleventh Circuit found that the casino's land was not conveyed under the Settlement Act. In addition, the Eleventh Circuit makes clear that ‘an exemption for ‘lands’ only exempts income ‘derived directly’ from those lands’and that the Supreme Court has already held that casino revenues do not derive directly from the land; therefore, the Settlement Act of 1997 (and the settlement agreement) does not provide an exemption from tax.

The Eleventh Circuit further rejects the members' argument that the payments are tax exempt because they stem from a lease for the use of the Tribe's lands. The Circuit Court finds a factual and legal problem with respect to this argument. Factually, the Eleventh Circuit points out that the U.S. ‘[T]ax [C]ourt found there was no lease agreement, and that finding was not clearly erroneous.’ In this regard, the Circuit Court notes the casino's financial statements reinforce the point that ‘[n]o rental payment is currently required for the use of’ the Tribe's land.’ As a result, the Circuit Court concludes that ‘it is hard to make the case that the payments were lease payments without a lease.’ Next, the Eleventh Circuit focuses on a ‘doctrinal’ problem - that tax exemptions must be ‘clearly expressed.’ The Eleventh Circuit finds that the Tribal members have not identified any statutory exemption for lease payments.

### Question presented.

‘Whether the clear language of Title 25 of the Code of Federal Regulations, and the exclusive authority over federally recognized Indian Tribes granted to the Secretary of Interior under 25U.S.C. § 2, controls the determination of how the Miccosukee Tribe compensates its members for the use of their lands, to the exclusion of any other federal agency, including the Internal Revenue Service.’

### Pending Petitions

#### New York Opioid Stewardship Payment: Is it a ‘Tax’ Under the ‘Tax Injunction’ Act

A petition in *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611) asks whether the New York Opioid Stewardship Act's payment (the ‘Payment’) is a ‘tax’ within the meaning of the Tax Injunction Act (the ‘TIA’). The TIA forbids federal district courts from ‘enjoin[ing], suspend[ing], or restrain [ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.’ The Second Circuit Court of Appeals determined that the annual Payment required of opioid manufacturers and distributors under New York's Opioid Stewardship Act (‘OSA’) is a ‘tax’ within the meaning of the TIA, and therefore, the United State District Court for the Southern District of New York lacked jurisdiction to invalidate or enjoin enforcement of the Payment. The case was distributed for conference on September 27, 2021.

#### Footnotes

- 1 Formerly Clear Channel Outdoor, Inc.
- 2 [U.S. Constitution. Amend. I.](#)
- 3 Ordinance 13-139 (June 20, 2013), codified as amended at Baltimore City Code, Article 28 (Taxes), § 29-1 *et. seq.* (2020).
- 4 *Id.* § 29-1(d).
- 5 *Id.* §§ 29-1(b), 29-3.
- 6 28 U.S.C. 1341.
- 7 *Id.*
- 8 *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S. Ct. 1438, 113 L.Ed.2d 494 (1991).
- 9 *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L.Ed.2d 236 (2015).
- 10 25 C.F.R. § 162.402.

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