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Supreme Court Update

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SUPREME COURT UPDATE - STATE AND LOCAL TAXES

DEBRA S. HERMAN is a partner in the New York City office of the law firm Hodgson Russ LLP. She would like to thank Katherine Piazza McDonald, an associate in the New York City office, for her contributions to the article.

***33** This article focuses on current challenges before the U.S. Supreme Court that involve state and local tax matters, including: (1) First Amendment challenges to municipal billboard taxes; (2) a multistate challenge to the SALT deduction cap; and (3) a Commerce Clause challenge to New Jersey's per partner filing fee. This article also discusses (4) the denial of the petition in *Healthcare Distribution Alliance v. James*.

1. First Amendment Challenges to Municipal Billboard Taxes

In September of 2021, *Clear Channel Outdoor, LLC v. Raymond* (Docket No. 21-219), Clear Channel Outdoor LLC[1] ('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.

Briefs Filed in First Amendment Challenge to Baltimore Billboard Tax Case

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[.]'[2] 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 and under this standard of review, the tax passes constitutional muster.

****2** The question presented before the Court is '[w]hether a tax singling out off-premises billboards is subject to heightened scrutiny under the First Amendment.' On September 15, 2021, the City of Baltimore field its Brief-in-Opposition and on

September 22, 2021, Clear Channel filed its Reply Brief. The Chamber of Commerce of the United States of America and Out of Home Advertising Association of America filed amicus briefs in support of Clear Channel.

Baltimore's brief-in-opposition

On September 15, 2021, the Department of Finance of Baltimore City (‘Baltimore ‘) filed a brief-in-opposition to Clear Channel's Petition for Writ of Certiorari. In its opening statement, Baltimore argues that Clear Channel's petition should be denied because there is no conflict for the Court to resolve. Specifically, Baltimore argues that three appellate panels outside of Maryland, in Ohio (one panel) and in Pennsylvania (two panels), have addressed similar First Amendment challenges to a billboard tax and followed the U.S. Supreme Court's opinion in *Leathers v. Medlock.*[3] We note that Baltimore is citing to the three-judge panel decision in *Lamar Advantage GP Co. LLC v. City of Cincinnati,* which as discussed more fully below, is overturned by the Ohio Supreme Court shortly after the filing of Baltimore's brief-in-opposition. Baltimore also argues that Clear Channel's petition should be denied because the tax at issue is not ‘constitutionally suspect [for First Amendment purposes]‘ because it does not ‘suppress the expression of particular ideas or viewpoints.‘ Baltimore suggests that the billboard tax ‘applies equally to any person who charges for billboard space in Baltimore‘ and does not ‘single[] out the press, target[] a small group of speakers, or discriminate[]

on the basis of the content of the taxpayers' speech.‘

Baltimore's first argument: the lower court correctly followed the Court's precedents and there are no genuine conflicts between the appellate courts

Baltimore argues that following an application of *Leathers*, the billboard tax at issue ‘does not single out the press, is not structured to fall on a small group ***34** of speakers, and does not discriminate based on the content of speech‘ and should not be subject to strict scrutiny. Also, the City argues that there is no conflict among the appellate courts because 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 of the Maryland Court of Appeals.‘

Baltimore reviews two Pennsylvania appellate decisions in which the court held that ‘[u]nder the reasoning of *Leathers*, . . . the [local billboard] tax cannot be deemed to be unconstitutional.‘[4] Similarly, it cites to an Ohio appellate decision that held that the Cincinnati billboard tax passed constitutional muster under the *Leathers* reasoning.[5] Baltimore argues that taken 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.‘ Baltimore goes on to distinguish the remaining cases cited by the Petitioner as support, concluding that ‘Petitioner's argument for certiorari amounts to little more than the assertion that Maryland's high court applied y.‘

Baltimore's second argument: the question presented is only important to the Petitioner and does not warrant the Court's review

****3** Baltimore succinctly states that the billboard tax does not ‘censor, chill, or restrict anyone's speech‘ and ‘[n]one 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.’‘ Baltimore concedes that there may be cause to expand ‘what this Court considers the press beyond traditional sources of journalism, but this is not such a case.‘ Per the City of Baltimore, using the reasoning applied in *Leathers*, ‘[b]illboards are not a new speech platform‘ and Petitioner's ‘market dominance [does not make] it more vulnerable.‘ In sum, the City of Baltimore argues that Clear Channel's petition for review should be denied.

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Clear Channel's reply brief

On September 28, 2021, Clear Channel filed a brief in support of its Petition for Writ of Certiorari, in reply to Baltimore's arguments raised in its brief-in-opposition. In its reply brief, Clear Channel argues that there is a clear conflict between appellate courts given the recent decision by the Ohio Supreme Court, discussed below, which reversed the Ohio appellate court and held the Cincinnati billboard tax was unconstitutional under the First Amendment.[6] In support of its contention that the billboard tax at issue should be subject to review under strict scrutiny, Clear Channel argues that ‘taxes singling out speech platforms are presumptively incompatible with the First Amendment.‘

Clear Channel's first argument: the lower court's decision conflicts with a recent decision of the Ohio Supreme Court

Clear Channel makes clear that Baltimore, in its brief-in-opposition, argued there is no conflict among the appellate courts because 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.‘[7] And, now, the Ohio Supreme Court ‘expressly rejected the Maryland Court of Appeals' analysis‘ and ‘unanimously held that a materially identical tax . . . was invalid under the First Amendment.‘

After engaging in a full discussion of the facts and analysis of the Ohio Supreme Court's decision (discussed below), Clear Channel highlights two key factors that lead to the Ohio Supreme Court's holding that the billboard tax violated the First Amendment. ‘First, the court recognized that a ‘tax that selectively singles out the press or targets a small group of speakers creates the danger that the tax will be used to censor speech.’ Second, the court explained that ‘it is not necessary to prove that the purpose of a tax is to suppress or punish speech to establish that the tax violates the First Amendment,’ because ‘a selective tax creates . . . a potent tool for censorship.’‘ Given the Ohio Supreme Court's explicit rejection of the Maryland Court of Appeal's reasoning, ‘there is now an indisputable conflict that warrants the Court's review.‘

Clear Channel's second argument: the lower court's decision conflicts with decisions of this Court and other lower courts

****4** Relying again on the Ohio Supreme Court's analysis, Clear Channel contends that the Cincinnati billboard tax should be ‘subject to heightened scrutiny because it singles out the ‘press' and targets a small number of speakers, . . . [and]

presents a threat of government censorship and chilled expression.‘ Clear Channel maintains that Baltimore's argument that billboards are not considered ‘press‘ rests on ‘conclusory assertions and a glaringly incomplete account of the Supreme Court's jurisprudence.‘

Next, Clear Channel rejects Baltimore's contention that the tax does not target a small number of speakers ‘because it does not fall on any speakers at all, only ‘companies selling a particular mode of speech,’ and because it applies equally to all billboard operators.‘ Specifically, it makes clear that the Supreme Court has rejected any distinction between ‘actual speakers and publishers of protected speech.‘ Furthermore, Clear Channel argues that is a distinction without a difference because the tax here burdens ‘actual speakers.‘

Clear Channel's third argument: the question presented is important and warrants review in this case

Clear Channel argues that the Maryland Court of Appeals decision below ‘denies First Amendment protection to a speech platform‘ and ‘opens the door for targeted taxation of new forms of communication technology. This Court's intervention is sorely needed to halt a dangerous erosion of First Amendment rights and reaffirm that the changing media landscape does not

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provide cover for unconstitutional taxation schemes.‘ Clear Channel cites again to the clear conflict of law between appellate courts since the filing of Baltimore's reply brief.

Amicus brief filed by the Chamber of Commerce of the United States of America in Support of Clear Channel

The Chamber of Commerce of the United States of America (‘Chamber of Commerce ‘) filed an amicus brief in support of Clear Channel. In its opening statement, the Chamber of Commerce maintains that if the lower court's decision is left to stand, local legislatures and tax authorities would have ‘free rein to impose such a targeted tax without meaningful First Amendment scrutiny.‘ After summarizing Clear Channel Outdoor, LLC's allegations ***35** and request for relief, the Chamber of Commerce enumerates two reasons that the Court should grant review: the lower court's decision conflicts with the Court's First Amendment precedents and the petition presents an exceptionally important First Amendment question.

With respect to its first argument, the Chamber of Commerce argues that the Court of Appeals of Maryland went against the First Amendment precedents of the Court when it used rational basis review to support upholding the billboard tax. The Chamber of Commerce cites two important factors for the Court to consider.

First, the Chamber of Commerce states that the lower court's decision ‘disregarded th[e] Court's precedents holding that tax regimes singling out a small number of identified speakers trigger heightened First Amendment scrutiny.‘ The Chamber of Commerce highlights that ‘the tax at issue affects just four entities, and that approximately 90% of the resulting tax revenue comes from Petitioners alone.‘ It further cites to *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[8] where it argues that ‘the Court . . . held the specialized tax at issue in that case, which fell solely on thirteen publishers, and predominantly on one . . ., was unconstitutional not only because it singles out the press, but also because it targets a small group of newspapers.‘

****5** Second, the Chamber of Commerce contends that the lower court's decision ‘relied on outdated, ossified conceptions of what the majority below deemed ‘the press' that cannot be squared with the First Amendment, judicial precedent, or the technological and economic reality of how individuals, groups and businesses in the United States communicate and consume information today. ‘ Specifically, the Chamber of Commerce argues that the Maryland Court of Appeals ‘refused to subject the tax that uniquely burdens Petitioner and three other firms to any heightened scrutiny by categorically ruling that a company in the business of operating billboards is not equivalent to a newspaper or broadcaster for purposes of the First Amendment.‘ The Chamber of Commerce finds that this differentiation sets a ‘preference for the institutional press over publishers‘ and should be ‘constitutionally suspect.‘ Citing *Lovell v Griffin,*[9] the Chamber of Commerce states the Court ‘has long held, ‘the liberty of the press is not confined to newspapers and periodicals' and [t]he press . . . comprehends every sort of publication which affords a vehicle of information and opinion.‘ The Chamber of Commerce claims that the Court of Appeals of Maryland failed to acknowledge that billboard companies are in the business of speaking in the same manner as other newsgathering companies and should be afforded the same protections under the First Amendment to the U.S. Constitution.

Finally, the Chamber of Commerce argues that the petition presents an exceptionally important First Amendment question. The Chamber of Commerce maintains that ‘Petitioner's industry affords an essential means of communication that should not be relegated to second-class status relative to other public media.‘ The Chamber of Commerce further argues that the ‘implications of the decision below are not confined to billboards‘ but also to ‘new, emerging platforms‘ that are equally susceptible to targeted taxes. Per the Chamber of Commerce, ‘by granting the petition, the Court would show solicitude and ensure appropriate protection for both long-standing and newly-emerging means of speech that otherwise face risks from state and local governments . . . .‘

Amicus brief filed by the Out of Home Advertising Association of America in Support of Petitioner

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The Out of Home Advertising Association of America ('OAAA') filed an amicus brief in support of Clear Channel. The OAAA is a trade organization for out-of-home advertisers and represents the interests of over 800 members, which it represents is ninety percent of the industry. The OAAA enumerates three reasons that the Court should grant Clear Channel's request for review: (1) billboards are an important medium for speech on issues of public concern; (2) Baltimore's ordinance targets billboards and burdens speech; and (3) the decision below distinguished the Court's precedents on grounds that are contrary to the First Amendment and to the vital speech function of billboards.

****6** First, the OAAA identifies the core of the Court of Appeals decision - '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 intepretators of the government' to its citizens.' And that 'billboards do not qualify because they are, according to the court, merely commercial advertising vehicle[s] that dabble[ ]

in non-commercial content.' The OAAA argues in response that the lower court's characterization of billboards was deeply wrong. For example, among others, OAAA highlights how '[b]illboards have played a prominent role throughout American history, rallying support for political and social causes.' *Metromedia, Inc.,* 453 U.S. at 501. The OAAA also argues that billboards reach a greater audience than newspapers or magazines because a billboard does 'not require [an] act of volition by the audience.' Also, OAAA explains that the ability of billboards to reach an audience 'without regard to their news consumption curation is critical for public speech of this sort.' The OAAA also contends that non-commercial speech on matters of public concern, such as political and religious commentary, is a significant portion of billboard activity and that billboards have been an 'efficient vehicle for presenting speech to a broad cross-section of people . . . on issues of public concern. ' The OAAA also highlights government agencies increased use of digital billboards to quickly spread urgent messages like emergency warnings.

Second, OAAA argues that Baltimore's ordinance targets billboards and burdens speech. Citing *Grosjean v. American Press Company,*[10] the OAAA underscores that the Court has previously '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.' Using the same reasoning as in ***36** *Grosjean*, OAAA argues that '[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.' Thus, OAAA maintains that a tax imposed on billboards burdens speech in the same manner as a tax only on newspapers and should be subject to a heightened level of scrutiny.[11]

OAAA's third argument is that the Maryland Court of Appeals decision is contrary to this Court's precedents on the vital speech function of billboards protected under the First Amendment. Specifically, the OAAA disagrees with the Maryland Court of Appeals holding that this Court's decisions are 'limited to taxes targeting the institutional press [such as] newsgathering organization[s] that curate[] what [they] disseminate[] according to journalistic principles. ' The OAAA explains that this analysis is 'contrary to basic First Amendment principles, and the effort to distinguish billboards from newspapers ignores key features of each.'

****7** The OAAA explains that this Court has 'consistently reject[ed] the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'[12] Quoting Chief Justice Burger, the OAAA makes clear that '[t]he very task of including some entities within the 'institutional press' while excluding others . . . is reminiscent of the abhorred licensing system of . . . England[,]

a system the First Amendment was intended to ban from this country.'[13]

Finally, the OAAA argues that heightened scrutiny should apply to the review of the Baltimore tax, as this level of scrutiny 'has never been limited to taxes imposed only on newspapers.' Like the Chamber of Commerce, the OAAA cites to the Court's precedent in *Minneapolis Star*[14] ; where 'the tax applied not simply to newspaper manufacturers or newspapers themselves, but to the paper and ink used to create newspapers. It was a tax on the medium used to communicate information[, . . .] which

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is precisely the function of the tax here[.]‘ The OAAA concludes by warning ‘that [if] billboards can be subject to special taxes without any additional scrutiny or justification, [there will be] a dangerous narrowing of the First Amendment.‘ As such, the OAAA argues that billboards should continue to be afforded proper protection under the First Amendment and the Baltimore tax should be subject to a heightened level of scrutiny.

City of Cincinnati's First Amendment Challenge to Ohio's Billboard Tax

The City of Cincinnati (‘Cincinnati‘) asserts in its Petition for Writ of Certiorari that the Court should grant review because there is a constitutional conflict between the highest courts of two states, Maryland and Ohio.[15] The Supreme Court of Ohio held in *Lamar Advantage GP Company, L.L.C. v. City of Cincinnati,*[16] that the City of Cincinnati's billboard tax violated the First Amendment, reaching the opposite conclusion as the Maryland Court of Appeals did in the Clear Channel case discussed above.

The Cincinnati billboard tax

Chapter 313 of the Cincinnati Municipal Code sets forth an excise tax on the licensed business privilege of charging others to use billboard space.[17] The billboard tax raises revenue for the City of Cincinnati by imposing ‘an excise tax on the privilege of installing, placing, and maintaining outdoor advertising signs‘ in Cincinnati.[18] The tax is levied on billboard operators (i.e. ‘advertising hosts‘) and not upon the persons who rent billboard space. Specifically, the Municipal Code requires an ‘advertising host,‘ that is one who owns or controls an outdoor advertising sign in the City of Cincinnati, to pay a tax that is the greater of seven percent of the gross receipts generated by the outdoor advertising sign or an annual minimum that is calculated based upon the type, location, and square footage of the sign. The law expressly prohibits an advertising host to issue a statement to an advertiser reflecting the tax and from indicating that an advertiser would absorb the cost of the tax.

****8** Also, the Cincinnati Municipal Code excludes on-site signs from the definition of the term ‘outdoor advertising sign.‘[19] The lower court notes that ‘[b]y excluding on-site signs, the city exempted numerous - potentially thousands - of advertising signs from the tax.‘ The lower court also highlighted exclusions for some signs displayed in the public right-of-way and signs erected or displayed on city-owned property, including public-transit stops and streetcar stations.

Procedural history

Appellants, Lamar Advantage GP Company, LLC (‘Lamar‘) and Norton Outdoor Advertising, Inc. (‘Norton‘), are ‘advertising hosts.‘[20] Per the court's findings, they ‘engage in the business of leasing billboard space for the dissemination of commercial and noncommercial speech‘ and own approximately 450 and 415 billboards, respectively. The lower court also finds that the Appellants control most of the market for billboard advertising in Cincinnati, and ‘because the billboard tax would make their less profitable billboards unsustainable, Lamar and Norton have estimated that the tax might cause them to remove a total of 70 to 80 billboards.‘ With respect to the messages on the billboards, the lower court finds that approximately 70 to 75 percent consists of paid advertisements, and the remaining 25 to 30 percent consists of advertising that is donated for public-service announcements. The court notes that ‘the paid advertisements are not only for commercial speech, however, but also include political advertisements for candidates to local office, including judges and members of city council, as well as noncommercial speech of nonprofit organizations, religious groups, advocacy groups, and charities.‘ The Supreme Court of Ohio also states in its findings of fact that the Appellants ‘exercise editorial control over the messages displayed on their billboards,‘ and cited certain examples of such.

In separate filings, the Appellants brought actions against the City of ***37** Cincinnati in Hamilton County Court of Common Pleas. Seeking declaratory judgment and injunctive relief, the Appellants argued that the billboard tax violated their ‘constitutional rights to free speech and a free press‘ afforded under the First Amendment. After consolidating the cases, the

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trial court granted a temporary restraining order, a preliminary injunction, and permanently enjoined Cincinnati from enforcing the billboard tax.

The City of Cincinnati appealed to the First District Court of Appeals. As explained by the lower court, the First District Court of Appeals affirmed in part and reversed in part, 'holding that the city's prohibition against speech between advertising hosts and their customers about who bore the cost of the tax violated the First Amendment. However, the court of appeals concluded that the tax itself did not violate the First Amendment because it is content neutral and does not single out billboard operators in a way that chills or threatens to censor their speech.'

****9** The Appellants appealed to the Supreme Court of Ohio. The Court accepted the Appellants' appeal to review the sole question of whether the 'constitutionally mandated heightened First Amendment scrutiny applies to a discriminatory excise tax on billboards that targets a small group of speakers or singles out the press.'

Freedom of the press and history of the free-press clause

Reversing the Court of Appeals decision, and applying strict scrutiny, the Court finds the billboard tax is unconstitutional. The Supreme Court of Ohio begins by discussing freedom of speech and freedom of the press and the history of the free-press clause under the First Amendment to the U.S. Constitution. According to the lower court, 'the press' includes 'mediums that exercise editorial discretion in publishing the content of others in addition to their own content.'[21] The lower court explains that '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'[22] The Supreme Court of Ohio observes that the Appellants 'use printing technology for mass communication and exercise editorial discretion over the messages that they publish[.]' The lower court further acknowledges that the 'Supreme Court of the United States has consistently rejected the proposition that the 'institutional press' is afforded more protection by the First Amendment than other speakers.' As such, the Supreme Court of Ohio concludes 'as speakers and publishers of speech, both Lamar and Norton are protected by the rights of freedom of speech and of the press enshrined in the First Amendment to the United States Constitution.'

The lower court proceeds to discuss the prohibition against selective taxation of the press. In this regard, the court observes that '[t]he First Amendment, then, precludes the government from singling out the press for disparate treatment through selective taxation.'[23] The Supreme Court of Ohio begins with a discussion of the United States's Supreme Court decision in *Grosjean v. Am. Press Co.*. As explained by the court, 'the state of Louisiana imposed a two percent tax on gross receipts from advertising, targeting publications with weekly circulations above 20,000,' which tax 'fell exclusively on 13 newspapers, while 4 other daily newspapers and 120 weekly newspapers were not taxed.' Per the court, 'the tax was unconstitutional because it had the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.' Similarly, the Supreme Court of Ohio relies on the U.S. Supreme Court's holding in *Minneapolis Star*, explaining that a 'special tax that applies only to certain publications protected by the First Amendment [ ] . . is facially discriminatory, singling out publications for treatment [that is unique to the local law]'[24]

After examining the U.S. Supreme Court precedent, the Supreme Court of Ohio gleaned the following four principles. First, 'the press may be subjected to a generally applicable tax.' Second, 'a tax is unconstitutional if an official must look at the content of speech to determine whether the tax applies to it. ' Third, 'a tax that selectively singles out the press or targets a small group of speakers creates the danger that the tax will be used to censor speech. ' Fourth, it is not required 'to prove that the purpose of a tax is to suppress or punish speech to establish that the tax violates the First Amendment.'

Ohio Supreme Court rules that the billboard tax is unconstitutional

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****10** The Supreme Court of Ohio held that the City of Cincinnati's 'selective tax on billboards violates the First Amendment.' The lower court explains the reasoning behind its ruling using the first of the four principles set forth above: 'the tax in this case is not generally applicable' because it does not apply to 'all or many business equally' and does not 'apply to all advertisers or even to all advertising signs.'

Specifically, the lower court finds that 'by enacting [ ] exceptions, the city has targeted a small group of speakers to bear most of the burden of a tax. ' Furthermore, the lower court determined that strict scrutiny applied and the government did not bear its burden. Namely, the City of Cincinnati relies on the fact that the billboard tax will raise revenue, but 'the need to raise revenue cannot justify the special treatment of the press' when there is a means of raising revenue that exists that does not raise concerns under the First Amendment. '[T]herefore [the Cincinnati billboard tax] impermissibly infringes on the rights to free speech and a free press enshrined in the First Amendment to the United States Constitution.'

2. Multistate Challenge to $10,000 Cap on the State and Local Tax ('SALT ') Deduction

In *State of New York et. al. v. Yellen* (Docket No. 21-279), Petitioners are the States of Connecticut, Maryland, New Jersey, and New York. Petitioners assert in their Petition for Writ of Certiorari that the Court should grant review because this case 'presents a novel and important question about the limits of federal taxation power.' The Petitioners brought a claim against the government 'alleging that the $10,000 cap on the federal income tax deduction for money paid in state and local taxes, enacted as part of the Tax Cuts and Jobs Act (P.L. 115-97) ('TCJA'), violated the Constitution.' Petitioners argue that 'the state and local tax deduction is constitutionally mandated [under the Sixteenth Amendment to the U.S. Constitution], or alternatively that the cap violates the Tenth ***38** Amendment because it coerces them to abandon their preferred fiscal policies.' (The Tenth Amendment 'reserves to the States respectively, or to the people,' any powers not delegated to the United States by the Constitution, nor prohibited by the States.) The Court of Appeals for the Second Circuit ('Second Circuit') affirmed the district court's ruling that while the claims were not barred by the Anti-Injunction Act ('AIA') the claims lacked merit.

Question presented

'Whether Congress's imposition of a $10,000 cap on the SALT deduction violates Article I, Section 8 and the Tenth and Sixteenth Amendments of the United States Constitution.'

History of the SALT deduction

The Second Circuit observes that the federal tax code has 'long permitted' a SALT deduction where taxpayers could 'deduct from their taxable income all the money they paid in state and local income and property taxes.' After a brief discussion of the history of the federal tax code, the Second Circuit explains that while the SALT deduction has been 'a mainstay of the federal Tax Code ' since the ratification of the Sixteenth Amendment in 1913, numerous amendments to the Tax Code has 'made the deduction more difficult or less attractive for taxpayers to claim.' The Second Circuit discusses the standard deduction introduced in 1944, the limitation on the types of state and local deductions allowed in 1964, and the introduction of the alternate minimum tax ('AMT') scheme in 1986, as well as other notable changes to the deduction at issue. The lower court generally observes that the SALT deduction has remained durable over time but not unchanged.

****11** In 2017, Congress passed the TCJA which imposed a $10,000 cap on the SALT deduction. As noted by the lower court, the impact of this legislation was felt by those taxpayers in high-tax states, such as Connecticut, Maryland, New Jersey, and New York. Petitioners commenced this action to enjoin the enforcement of the SALT deduction cap, claiming 'that [the SALT cap] violates the Sixteenth Amendment . . . must permit 'a deduction for all or a significant portion of state and local taxes,'. . . [and] violates both Article I, Section 8 and the Tenth Amendment because it coerces [the states] to lower taxes or cut spending.'

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Procedural history

The District Court rejected the Government's assertion that the Petitioners lack standing to sue and that the action should be barred by the Anti-Injunction-Act, 26 U.S.C. § 7421(a) (the 'AIA'). However, the District Court dismissed the Petitioners' complaint, which per the lower court was on the basis 'that the Constitution does not require a SALT deduction as part of every federal income tax scheme and that the complaint failed to assert a plausible claim of coercion.' On appeal, the Petitioners argue that the District Court erred on the merits, while the Government continues to maintain that the District Court lacked jurisdiction and otherwise defends the District Court's judgment.

Lower court decision

Affirming the decision of the District Court, the Second Circuit found no error in the lower court's reasoning. The Second Circuit's opinion begins by rejecting the Government's argument that the Petitioners lack standing to sue and that this action is barred by the AIA. As explained by the court, in order to establish standing, a 'plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'[25] Here, the Second Circuit concludes that the Government presented a facial challenge to the Petitioners' standing and the question of standing 'turns solely on whether the Petitioners have sufficiently alleged an injury in fact. ' Concluding that the Petitioners have standing, the Second Circuit relies on the evidence provided by the Petitioners that show the SALT deduction cap would cause their respective states to lose millions of dollars in tax revenue.[26]

Citing the U.S. Supreme Court's decision in *South Carolina v. Regan*, the Second Circuit similarly rejected the Government's jurisdictional argument under the AIA explaining that there is no alternative avenue for the taxpayers to litigate their claim.[27] (The AIA provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.' In other words, the provision generally 'withdraws jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes,' *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1, 5 (1962)).

****12** Turning to the merits of the case, the Second Circuit starts with the text of the relevant constitutional provisions. The lower court finds that 'Congress's broad power to tax is limited only by restrictions expressed in or arising from the Constitution.' It observes that '[o]f course, Article 1, Section 8, the Tenth Amendment, and the Sixteenth Amendment do not expressly require the SALT deduction or limit Congress's tax power to do away with it. But [ ] recognize that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism. ' The Second Circuit explains that the States argue that principles of federalism protect each states' sovereign authority to raise revenue and determine their own fiscal priorities, and then concludes that the Petitioners fail to demonstrate 'how the 2017 cap on the deduction unconstitutionally undermines their state sovereign authority over fiscal matters or their ability to raise revenue.' In this regard, the Second Circuit states that while Petitioners argue that 'the SALT deduction lowers 'the effective cost of state and local taxes,' they point us to nothing that compels the federal Government to protect taxpayers from the true costs of paying their state and local taxes. ' Thus, the Second Circuit rejects Petitioners' claim that the Constitution mandates the SALT deduction.

***39** The lower court then addresses Petitioners' alternative assertion, that 'the SALT deduction cap coerces them to abandon their preferred fiscal policies in favor of lower taxes and reduced spending, in violation of the Tenth Amendment.' The Second Circuit explains that while Congress may use its taxing and spending authority to encourage or incentivize the states, that "pressure' may not amount to 'compulsion' because '[t]he Constitution simply does not give Congress the authority to require the States to regulate.'' The lower court frames the question here as whether the Petitioners 'ha[ve] a legitimate choice . . . or whether the financial inducement in reality 'is a gun to the head.''

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Citing *NFIB*,[28] the Second Circuit focuses on the two factors critical to the Supreme Court's ruling that a Congressional condition was unconstitutionally coercive: (1) Congress threatened to terminate or revoke new funding and preexisting funding; (2) Congress threatened 'to withhold funds constituting ten percent of state budgets.' After a review of the qualitative figures presented by the Petitioners, the lower court states 'the cost to individual taxpayers pales in comparison to . . . 10 percent of the States' budgets' and do 'not exert [] undue pressure as to raise a constitutional concern.' Affirming the decision of the District Court, the Second Circuit holds the SALT deduction cap does not 'unconstitutionally infringe[] on state sovereignty' and the plaintiffs fail to state a Tenth Amendment claim.

3. Commerce Clause Challenge to New Jersey's Per Partner Filing Fee

****13** In *Ferrellgas Partners, L.P. v. Director, Division of Taxation* (Docket No. 21-641), the taxpayer, Ferrellgas Partners L.P. ('Ferrellgas'), a publicly traded limited partnership, challenges New Jersey's Gross Income Tax imposition of a flat, annual levy on any partnership deriving any income from the state. The levy, called a 'fee' is calculated by multiplying the number of partners in a partnership by $150, subject to a cap of $250,000.

Ferrellgas paid the maximum $250,000 fee to New Jersey in 2009, 2010 and 2011, notwithstanding that approximately one percent of its propane gas sales occur in New Jersey. The Director of the New Jersey Division of Taxation (the 'Division') denied the refund claims. Ferrellgas appealed to the New Jersey Tax Court. Both parties moved for summary judgment on the question of whether New Jersey's fee on partnerships violates the 'internal consistency' test required by the fair apportionment prong, articulated by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), to satisfy the Dormant Commerce Clause of the U.S. Constitution. The Tax Court granted summary judgment in favor of the Division. Ferrellgas appealed to the Superior Court of New Jersey, Appellate Division, where the Tax Court's decision was sustained substantially for the reasons expressed by the Tax Court Judge, and then to the Supreme Court of New Jersey, where review was declined.

Question presented

'Whether a levy that raises revenue for a State's general fund, and that is not restricted to the in-state activities of the levy-payor, may be characterized as a locally focused regulatory fee, and thus be imposed without regard to whether it is internally consistent?'

New Jersey Partnership Filing Fee

N.J.S.A. 54A:8-6(b)(2)(A) requires each entity classified as a partnership for federal income tax purposes that has more than two owners and any income derived from New Jersey sources to pay a filing fee of $150 for each owner with an interest in the entity, up to a maximum of $250,000, when filing its informational partnership tax return. (Hereinafter referred to as the 'PFF').

The lower court observed that 'the regulations initially proposed by the Division to implement the PFF included 'an apportionment methodology for partnerships . . . liable for the [PFF] that have partners . . . that never enter New Jersey.' 35 N.J.R. 1573(a) (Apr. 7, 2003). The Division later explained that 'only partners or professionals without nexus would be subject to apportionment.' 35 N.J.R. 4310(a)(Sept. 15, 2003).' Pursuant to N.J.A.C. 18:35-11.2(c), the PFF is calculated as the sum of the following amounts: (1) the number of resident partners multiplied by $150; plus (2) the number of nonresident partners with physical nexus to New Jersey multiplied by $150; plus (3) the number of nonresident partners without physical nexus to New Jersey multiplied by $150 and the resulting product multiplied by the corporate allocation factor of the partnership. The lower court also noted that a Technical Bulletin issued by the Division further provided that the 'PFF would not apply to partnerships that had 'all ... operations and facilities ... located outside New Jersey.'

Dormant Commerce Clause

****14** Ferrellgas challenges the constitutionality of the PFF on the basis that it violates the Dormant Commerce Clause of the U.S. Constitution. Specifically, Ferrellgas argues that the PFF is not fairly apportioned and discriminates against interstate commerce. It also argues that the PFF is a tax, not a uniform fee, imposed on interstate commerce that does not satisfy the internal consistency test, in violation of the Dormant Commerce Clause. Ferrellgas argues that the Division could cure the constitutional violation by allowing apportionment of the PFF.

The Division argues that the PFF ‘is a regulatory fee intended to defray administrative costs associated with ‘processing, examining and auditing’ plaintiffs partner and partnership returns, and thereby valid under *Am. Trucking Assns v. Mich. Pub. Serv. Comm'n,* 554 U.S. 429 (2005) (ATA - Michigan).‘ The Division maintains that the PFF was not excessive and therefore should be upheld, as the test for a regulatory fee is ‘whether the amount is excessive when the benefits to a taxpayer are compared to the State's interests under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).‘ In addition, the Division argues that ‘even if the PFF is deemed a tax, it still does not violate the Dormant Commerce Clause because it is: (1) ‘fairly apportioned under its regulations'; (2) non-discriminatory since it applies to any partnership; and (3) co-relative to the services provided by the State (since plaintiff maintained storage facilities in New Jersey and was able to do business here).‘

The Commerce Clause provides: ‘Congress shall have Power to . . . regulate ***40** Commerce with foreign Nations, and among the several States, and with Indian tribes.‘ U.S. Const. art. 1, §8, c. 3 As explained by the lower court, ‘[a]lthough the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.‘ *United Haulers Assn v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 338 (2007). This implied restraint on state authority to regulate interstate commerce is commonly known as the Dormant Commerce Clause.

First, the Tax Court examined ‘the ‘commerce’ or the transaction or activity which is being allegedly discriminated by the PFF.‘ The Tax Court concluded that ‘simply because [Ferrellgas] may be considered involved in interstate commerce does not mean that the PFF is automatically implicated, and without more, render a levy, regardless of whether it is labeled a fee or a tax, as violating the [Dormant Commerce Clause]. . . . Rather, the question . . . is what is the activity for which the PFF is imposed under the Challenged statute, and whether the same discriminates against [Ferrellgas's] investment activity by improperly favoring investment activity . . . in a local business, operation or activity, to the disadvantage of that same investment activity by an out-of-State business, operation or activity.‘ The Tax Court focused on the requirement that the PFF applies only to partnerships that derive New Jersey source income. It also found that ‘the PFF is imposed to expense the costs of and for a purely intrastate or local activity, which is tracking of New Jersey source income via filed returns.‘ Thus, it concludes that the PFF does not violate the Dormant Commerce Clause, ‘even if it is imposed on an interstate commerce participant, such as [Ferrellgas].‘

****15** Next, the Tax Court examined whether the PFF facially discriminates against Ferrellgas or Ferellgas' activity. The lower court observed that there can be ‘no facial discrimination or disparate impact on interstate commerce. ‘ Per the court, ‘[i]f a statute discriminates facially or in practical effect, it is invalid.‘ The lower court found that ‘there are no in-state businesses gainers or out-of-state business losers;‘ therefore, the law is facially neutral and regulates even-handedly. The lower court also finds that there is no proof that the PFF causes a disparate impact on Ferrellgas' investment activity. Specifically, the Tax Court focuses on the four-part test set forth in *Complete Auto Transit* to pass constitutional muster under the Dormant Commerce Clause. Under *Complete Auto*, the tax must ‘be applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned, [

] not discriminate against interstate commerce, and [be] fairly related to the services provided to the state.‘ The Tax Court explains that ‘[a] tax is fairly apportioned if it is internally and externally consistent.‘ It further notes that ‘[i]nternal consistency is based on a pure hypothesis: a presumption that each State will impose a tax exactly the same as the challenged tax, and therefore the taxpayer's total income will be taxed multiple times unless reasonably apportioned.‘ The Tax Court finds that ‘the mechanical application of the hypothetical math under the internal consistency component of *Complete Auto* is not a substitute

for its burden of proving, at least *prima facie*, that the PFF results in a disparate impact on its interstate investment activity.‘ The Tax Court relies on the U.S. Supreme Court's decision in *ATA-Michigan*, ‘where the Court upheld the validity of Michigan's ‘flat $100 fee’ because it did not tax activity that takes place, in whole or in part, outside the State.‘ 545 U.S. at 434. The New Jersey Tax Court underscored how ‘[t]he Court conced[ed] that if the same fee was imposed by all states, ‘an interstate truck’ would pay much more in fees, under the hypothetical internal consistency test.‘ *Id* at 438. ‘[And how] [t]he Court explained away this hypothetical problem by holding that a trucker transporting goods in-and-out of state is paid much more ‘only because it engages in local business in all those States.’ ‘ Ibid. Consequently, based on this precedent, the Tax Court concludes that Ferrellgas' ‘reliance on the hypothetical 50 states as proof of disparate impact on interstate commerce (i.e., on its investment activity) is misplaced, and is certainly not the law.‘

Having concluded that the statute was not discriminatory facially or in practical effect, the lower court next addressed whether the statute met the burden-benefit balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Tax Court explains that ‘a statute that regulates a business or trade will be upheld provided it is done ‘even-handedly to effectuate a legitimate local public interest,’ and does not impose such a burden on interstate commerce that is ‘clearly excessive in relation to the putative local benefits.’‘ *Wayfair, Inc.*, 138 S. Ct., at 2091 (citing and quoting *Pike,* U.S. at 142). ‘Since neither [Ferrellgas] nor Taxation provided any data, evidence or other proof on why the PFF fails or passes the *Pike* balancing, should that test even apply here, the court finds that grant of summary judgment in this regard to either party is inappropriate.‘

4. Petitions Denied: New York Opioid Stewardship Payment: Is it a ‘Tax‘ Under the ‘Tax Injunction‘ Act

****16** *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611), cert. den. Oct. 4, 2021, asked 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 Court denied the Petition on October 4, 2021.

Footnotes

1 Formerly Clear Channel Outdoor, Inc.

2 U.S. Constitution. Amend. I.

3 499 U.S. 439 (1991).

4 *See Adams Outdoor Adverts., Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (1995); *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966 (2005).

5 *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 155 N.E.3d 245 (2020).

6 *Lamar Advantage GP Co. v. Cincinnati*, No. 2020-0931, 2021 WL 4201656.

7 Resp. Brief in Opp., pg. 14.

8 460 U.S. 575 (1983).

9 303 U.S. 444 (1938).

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10 297 U.S. 233 (1936).

11 *See e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

12 *See e.g., Citizens United v. FEC*, 558 U.S. 310 (2010); *Lovell v. Griffin*, 303 U.S. 444 (1938).

13 *First Natl. Bank v. Bellotti*, 435 U.S. 765, 801 (1978).

14 460 U.S. at 591.

15 City of Cincinnati Ohio v Lamar Advantage GP Company LLC (Docket No. 21-900)

16 No. C-180675, 2020-Ohio-3155, __ N.E.3d __ (2021).

17 CMC 313-3.

18 Id.

19 As originally enacted, the term ‘outdoor advertising sign‘ was defined by incorporating the definition of the term ‘off-site sign.‘ An ‘off-site sign‘ was defined as a commercial sign that ‘proposes or promotes a commercial transaction to be conducted on a premises other than the premises on which the sign is located‘ or that ‘directs attention to a good, product, commodity, business, service, event, or other object that serves as the basis of a commercial transaction that is not conducted‘ on the premises on which the sign is located. CMC 1427-03-O.

20 CMC 313-1-A1.

21 *Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986).

22 *Lovell v. Griffin*, 303 U.S. 444 (1938).

23 *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

24 *Minneapolis Star & Tribune Co*. 460 U.S. 575 (1983).

25 *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

26 New York provided a specific estimate that the SALT deduction cap will cause New York's real estate transfer tax revenue to decrease by $15.3 million in 2019 and $69.2 million in 2020.

27 *South Carolina v. Regan*, 465 U.S. 367 (1984).

28 *Nat'l Fed'n of Indep. Bus. V. Sebelius* ‘(*NFIB*‘), 567 U.S. 519 (2012)

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