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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NETCHOICE,

Plaintiff,

v.

CITY OF CHICAGO DEPARTMENT OF FINANCE; MICHAEL BELSKY, in his official capacity as City Comptroller; ANNETTE GUZMAN, in her official capacity as Budget Director; NICK LUCIUS, in his official capacity as Chief Information Officer,

Defendants.

No. 2026CH02417

Hon. Lynn Weaver Boyle

DEFENDANTS' MEMORANDUM IN SUPPORT OF
THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiff NetChoice is a trade association whose members include social media companies. Plaintiff challenges the City of Chicago's expansion of its longstanding amusement tax scheme to cover companies that provide social media amusement. This Social Media Amusement Tax (the "Tax") imposes on each business a 50-cent per-person charge that is triggered when the business has more than 100,000 Chicago consumers, and the charge is assessed monthly on the number of consumers over 100,000.

None of Plaintiff's counts states a claim against the Tax. *First*, Plaintiff contends that the Tax is preempted by the Internet Tax Freedom Act ("ITFA") because the Tax is imposed on social media companies but not on offline services. But as the statutory text and binding caselaw make clear, ITFA is triggered only when there are offline services *similar* to the online service, and Plaintiff does not (and cannot) identify offline services similar to social media amusement. Plaintiff's failure to satisfy this essential element of the claim is fatal. *Second*, Plaintiff argues that the Tax is unconstitutional under Illinois law because it is not authorized by the General Assembly. This fails to state a claim because the General Assembly has authorized the City to tax amusements, and social media amusement is an amusement. *Third*, Plaintiff posits that the Tax contravenes the First Amendment because it discriminates against media companies and is content based. But the Tax fits under settled First Amendment precedent permitting the taxation of media entities. The Tax, moreover, applies to companies based on the manner in which their businesses operate, not the content of social media posts. *Last*, Plaintiff claims that the Tax violates the Commerce Clause because it could result in companies being taxed twice for a single person's social media use. But companies are taxed only when a person actually uses social media in Chicago, and the Commerce Clause permits a jurisdiction to tax conduct occurring within its borders, even if another jurisdiction also wishes to tax conduct when it occurs within *its* borders. For these and other reasons discussed below, the Complaint should be dismissed with prejudice.

BACKGROUND

The City has long generated revenue by taxing common amusements. *See Labell v. City of Chicago*, 2019 IL App (1st) 181379, ¶ 7 (describing the enactment of the City's amusement tax ordinance in 1947). For example, the City imposes a 9% tax on the admission fees or other charges paid for watching or participating in any "theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition," as well as "carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities." Municipal Code of Chicago, Ill. ("MCC") §§ 4-156-010, -020(A)(1).

Moreover, the City has consistently expanded its amusement tax regime to cover new amusements that emerge as technology develops and the internet becomes a common vehicle for providing entertainment. In 2015, the City amended its Municipal Code to confirm that its amusement tax applies to watching, listening to, or participating in amusements delivered electronically, such as television shows, movies, videos, music, and games provided over streaming services like Netflix, Hulu, Spotify, and Amazon Prime. *Id.* § 4-156-020(A)(2); *see also Labell*, 2019 IL App (1st) 181379, ¶¶ 1, 6, 10 (upholding tax). And in December 2025, the City extended the scheme to reach sports gambling, including wagers placed "over the internet or through a mobile application." MCC § 4-156-973.

That same month, the City enacted the Tax at issue here, which covers yet another form of online entertainment—"the activity of social media amusement." *Id.* § 4-156-1000 (noting enactment through Coun. J. 12-19-25, p. 38125, Art. IX, § 1). The Tax went into effect on

January 1, 2026, *see* Compl. ¶ 21, and was clarified by amendments enacted on June 17, 2026, and effective as of June 23, 2026, *see* Ex. A (SO2026-0025395). The amendments revised and removed certain language, and state that they "are intended to clarify, rather than to change, existing law," and that they are "retroactive to January 1, 2026." *Id.* §§ 2–3.[1]

The Tax operates as follows: To be subject to the Tax, a website must be a "social media business," which is "a for-profit entity that: (a) provides individuals with access to *social media* for the activity of *social media amusement* and (b) collects, maintains, uses, processes, sells, or shares consumer data, other than consumer contact information, in support of the entity's business activities." *Id.* § 1 (amendments to MCC § 4-156-1010) (emphasis added).

"Social media," in turn, is defined as "websites, applications, products, and internet platforms that allows consumers to view, share, and otherwise engage with images, videos, and audio presented in types and formats such as performances, promotions, memes, augmented reality, artificial intelligence, or live streams." *Id.* But as the definition makes clear, the material on the platform must primarily be supplied by the end users who use it, rather than by the platform itself: if "substantially all of the content made available to users (excepting incidental interactive user functions such as chat or comments) is individually created or selected for inclusion *by those who maintain the website, application, product, or platform*," then the platform is not deemed "social media." *Id.* (emphasis added).

[1] Among other revisions, the amendments deleted language saying that "social media" does not include any "bona fide new website, application, or platform," and further deleted a rule of interpretation stating that the Tax does not "apply to or affect the rights of any news-gathering organization." Ex. A § 1 (amendments to MCC §§ 4-156-1010, -1040(d)). The amendments also removed a rule of interpretation saying that a "social media business" does not include "single purpose community groups for education or public safety." *Id.* (amendments to MCC § 4-156-1040(a)(9)). And the amendments struck another rule of interpretation stating that "social media business" does not include "a streaming service, online video game, or website where the content is not user generated but includes interactive functions that enable chat, comments, reviews, or other interactive functionality that is incidental to, not directly related to or dependent upon providing the content." *Id.* (amendments to MCC § 4-156-1040(a)(4)).

Moving on, "social media amusement" is defined as "engagement with media content delivered through the use of social media for the substantial purpose of entertainment and enjoyment." *Id.*

Summing up, these definitions establish that the Tax applies to (i) for-profit businesses that (ii) provide access to images, videos, and audio that are (iii) primarily supplied by users of the platform, rather than the platform itself, (iv) for engagement by users for the substantial purpose of entertainment and enjoyment.

As to the amount of the Tax, a social media business that collects consumer data on more than 100,000 Chicago consumers in a calendar year is required to pay, each month, $0.50 per person for each Chicago consumer in excess of 100,000 for that month. MCC §§ 4-156-1020(a)–(b).

LEGAL STANDARDS

A section 2-615 motion to dismiss "challenges the legal sufficiency of the complaint" and whether the allegations state a cause of action. *Omega Demolition Corp. v. Ill. State Toll Highway Auth.*, 2022 IL App (1st) 210158, ¶ 36. The court takes well-pleaded facts as true and views them "in the light most favorable to the plaintiff," *id.*, but "will not admit conclusory allegations or conclusions of law not supported by specific facts," *Ash v. PSP Distrib., LLC*, 2023 IL App (1st) 220151, ¶ 19. "[A] pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient." *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (1st Dist. 2009). "[A]bsent the necessary allegations, even the general policy favoring the liberal construction of pleadings will not satisfy the requirement that a complaint set forth facts necessary for recovery under the theory asserted." *Id.*

In addition, because the Complaint raises constitutional challenges to the Tax, Plaintiff bears a heavy burden. "Like statutes, municipal code provisions are presumed constitutional, and the burden of rebutting that presumption rests with the challenging party, who must demonstrate a clear constitutional violation." *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶ 15. "A reviewing court must affirm the constitutionality of a statute or ordinance if it is 'reasonably capable of such a determination' and resolve any doubt as to the statute's construction in favor of its validity." *Id.* (quoting *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20).

ARGUMENT

I. The Tax Is Not Preempted By The Internet Tax Freedom Act.

In Count I, Plaintiff alleges that the Tax is preempted by the Internet Tax Freedom Act, 47 U.S.C.A. § 151 note, § 1100 *et seq*., because the Tax "singles out and targets online social media businesses for taxation and is not imposed on any offline services." Compl. ¶ 65. This claim fails as a matter of law. Under the relevant section of ITFA, a tax on internet services is preempted when similar offline services go untaxed. But Plaintiff does not and cannot identify offline services that are similar to social media amusement for purposes of ITFA. Plaintiff's failure to establish this essential element of its claim warrants dismissal, as we now explain.

Plaintiff invokes section 1101(a)(2) of ITFA, which prohibits state and local governments from imposing "multiple or discriminatory taxes on electronic commerce." § 1101(a)(2). And a tax is "discriminatory" under ITFA when it applies to electronic commerce but "is not generally imposed. . . on transactions involving *similar* property, goods, services, or information accomplished through other means." § 1105(2)(A)(i) (emphasis added); *see also* Compl. ¶¶ 60, 62, 65. ITFA's plain language thus requires Plaintiff to identify—at a minimum—internet and offline services that are "similar." *See Labell*, 2019 IL App (1st) 181379, ¶ 61 (explaining that, "under the ITFA, a discriminatory tax exists only when similar property, goods, services, or information are taxed when purchased electronically but not when purchased offline . . ."). For instance, in *Labell*, the plaintiffs argued that ITFA preempted the City's amusement tax on internet streaming services because it was different from the tax imposed on the offline activity of using automatic amusement devices, such as movie and video booths and jukeboxes. 2019 IL App (1st) 181379, ¶ 59. The court rejected the claim because streaming services and automatic amusement devices were not similar, but rather had a "real and substantial difference." *Id.* ¶¶ 52, 56, 65.

Here, Plaintiff identifies no offline services similar to social media amusement. Its claim therefore fails as a matter of law under *Labell*. *Cf. DPH Aurora Props., LLC v. City of Aurora,* 2025 IL App (2d) 240540, ¶ 54 (affirming dismissal of equal protection discrimination claims where plaintiffs failed to identify a similarly situated comparator); *Kaczka v. Ret. Bd. of Policemen's Annuity & Ben. Fund of Chicago*, 398 Ill. App. 3d 702, 707 (1st Dist. 2010) (same).

Plaintiff cites *Performance Marketing Association v. Hamer*, 2013 IL 114496, *see* Compl. ¶ 61, but that case simply emphasizes Plaintiff's failure. *Hamer* found a violation of ITFA where Illinois imposed a tax on retailers that used online companies to market their products over the internet, but not on retailers that used offline print publishers or over-the-air broadcasters for marketing. 2013 IL 114496, ¶ 23. The court concluded that the tax was discriminatory under ITFA because the marketing arrangements (known as "performance marketing") were similar, aside from the taxed arrangements involving ads on the internet, and the others using print or broadcast advertising. *Id.* ¶¶ 8, 19. But here, Plaintiff does not and cannot identify offline services similar to social media amusement.

Plaintiff essentially concedes this, for it pivots to alleging that ITFA prohibits a tax even when internet services "have no 'similar' off-line equivalent." Compl. ¶ 63. Plaintiff's only support for this idea is a statement by a single Congressman during the original passage of ITFA.

See H.R. Rep. No. 105-570, Part I, together with Additional Views, June 5, 1998, at 33; *see also* Compl. ¶ 63 (citing same).

This flies in the face of both *Hamer* and *Labell*, where, as just explained, preemption turned on whether the internet service was similar to offline services. In neither case did the court suggest that a tax could be preempted simply because it applied, in isolation, to internet activity. ITFA does not say this, either. The Court should reject Plaintiff's attempt to read into ITFA language that is not there. Courts "may only look to other interpretive aids, such as legislative history, when the statutory language is ambiguous." *Johnson v. Amazon.com Servs., LLC*, 2026 IL 132016, ¶ 21 (citing *People v. Grayer*, 2023 IL 128871, ¶ 20); *see also People v. Castillo*, 2022 IL 127894, ¶ 34 ("It is only when the meaning of a statute is ambiguous that a court looks beyond the statutory language and considers . . . the legislative history of the statute."). Likewise, in the preemption context, courts "do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language." *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994); *see also Fed. Nat'l Mortg. Ass'n v. City of Chicago*, 874 F.3d 959, 962 (7th Cir. 2017).

The statutory language is not ambiguous here. The plain language of ITFA's definition of a "discriminatory" tax includes the word "similar," which requires a comparison between "similar" online and offline services. Indeed, "discrimination," as commonly understood, means "the act, practice, or an instance of unfairly treating a person or group *differently from other people or groups on a class or categorical basis*." *Discrimination*, Merriam-Webster, https://www.merriam-webster.com/dictionary/discrimination (last visited June 11, 2026) (emphasis added). This requires comparing two things. Because the operative ITFA language is clear, the lone Congressman's view of ITFA is irrelevant. Plaintiff must identify offline services similar to social media amusement, and its inability to do so requires dismissal of its ITFA claim.

II. The Tax Is Authorized By Illinois State Law.

In Count II, Plaintiff argues that the Tax is an occupation tax and that, pursuant to Article VII, section 6(e) of the Illinois Constitution, the City cannot impose it without General Assembly authorization. *See* Compl. ¶¶ 74–76. As we explain below, the General Assembly has authorized municipalities to tax amusements, and social media amusement is an amusement. The Tax is therefore backed by state legislative authorization, and Count II fails as a matter of law.[2]

The legislative authority to tax amusements is found in 65 ILCS 5/11-42-5, which states in relevant part that "[t]he corporate authorities of each municipality may license, tax, regulate, or prohibit hawkers, peddlers, pawnbrokers, itinerant merchants, transient vendors of merchandise, theatricals and other exhibitions, shows, and amusements and may license, tax, and regulate all places for eating or amusement." And the Illinois Supreme Court has held that "amusement" within the meaning of the statute "is synonymous with diversion, entertainment, recreation, pastime, and sport," *Stiska v. City of Chicago*, 405 Ill. 374, 379 (1950) (internal quotations omitted), and is "broad enough to include participative entertainment," *Greater Chicago Indoor Tennis Clubs, Inc. v. Vill. of Willowbrook*, 63 Ill. 2d 400, 405 (1976).

Social media amusement easily qualifies as an amusement under these authorities. People visit social media for diversion, entertainment, recreation, and as a pastime, as the platforms host a variety of serendipitous material posted by other users. Plaintiff does not dispute this. Instead, Plaintiff argues that social media does not qualify as an amusement because it is used for non-

[2] For purposes of this motion, the City assumes (but does not concede) that the Tax is an occupation tax, and we proceed to explain why Article VII, section 6(e) is nonetheless satisfied because the Tax is authorized by Illinois statute.

amusement purposes, such as "monitoring local safety and security, exploring employment opportunities, and accessing live-breaking news updates." Compl. ¶ 74(a).

The Appellate Court has rejected this line of argument as a matter of law. In *Communications & Cable of Chicago, Inc. v. City of Chicago*, the plaintiffs argued that the City's authority to tax amusements did not apply to cable television because cable provides "informational, educational and other non-amusement programming." 282 Ill. App. 3d 1038, 1047 (1st Dist. 1996). And the court recognized that "the entertainment or amusement quality of the programming may well vary from channel to channel." *Id.* at 1048. Even so, the court held that the City could tax cable television as a single amusement activity. *Id.* In doing so, the court expressly "decline[d] to adopt plaintiffs' proposed approach of analyzing the content of the programming" to determine whether the service was "predominately" amusement. *Id.* Such a standard would be "immensely burdensome and problematic," as it would "not only require an examination and analysis of the entertainment or amusement value of each program viewed by cable subscribers, but also the content of every entertainment performance viewed by those subject to the amusement tax." *Id.*

So too here. The City may tax engagement with social media as an amusement because it is a single amusement activity, just as viewing cable television was a single amusement activity in *Communications & Cable*. It does not matter that social media, like cable television, includes content that some may view as educational, informational, or news. Indeed, given the near-infinite amount of material on social media, *see infra* at Argument § III.B.1, assessing the "amusement value" of each piece would be exponentially more difficult and burdensome than with cable television programs. Section 11-42-5 does not require this, and the binding decision in

Communications & Cable rejects it.[3]

Plaintiff also argues that the Tax is imposed on the collection of consumer data rather than on consumers' social media use. *See* Compl. ¶ 74(b). This argument fares no better. For one, it is irrelevant; the manner of taxation has nothing to do with whether social media amusement qualifies as an amusement under section 11-42-5. That statute is simply a general enabling statute authorizing the taxation of amusements; it does not mandate any particular manner of taxation. Indeed, not all amusements are taxed based on customer use. For example, the City's tax on automatic amusement devices is a flat, per-device annual fee exacted from the device's owner, regardless of the number of times the device is used by customers. MCC § 4-156-160. And cases have upheld other methods of taxation tailored to the way that different amusements operate. *See, e.g.*, *Greater Chicago Indoor Tennis Clubs*, 63 Ill. 2d at 406 (upholding gross receipts tax on tennis club admission fees); *Isberian v. Vill. of Gurnee*, 116 Ill. App. 3d 146, 147, 150 (1st Dist. 1983) (upholding a $0.25 per-admission tax on theme park); *Commc'ns & Cable*, 282 Ill. App. 3d at 1042, 1048 (upholding a 7% tax on cable television subscription fees).

What's more, Plaintiff is simply incorrect that the Tax is imposed on data collection. The Tax is explicitly imposed "on the activity of social media amusement." MCC § 4-156-1020(a). And the amount of tax a social media business pays is based on the number of Chicago

[3] Plaintiff invokes *Chicago Health Clubs v. Picur*, 124 Ill. 2d 1 (1988), *see* Compl. ¶ 74(a), but that case is of no help. *Picur* addressed a place of business (a health club) that offered multiple activities, some that were amusements, and others that were not. The Court held that, in that situation, the business could not be subject to an amusement tax. But as the Appellate Court later made clear in *Communications & Cable*, *Picur*'s approach does not apply when only a single activity is at issue. *See* 282 Ill. App. 3d, at 1038–39 (explaining that in *Picur,* "a variety of separate non-amusement *activities* were involved," whereas "[i]n the present case, the single activity of watching television is at issue"). That is the case here: the Tax applies only to the single activity of "social media amusement." In that situation, there is no basis to scrutinize, on a case-by-case basis, the individual amusement content of the lone activity taxed. *See id.*

consumers over 100,000 who use the platform and from whom the business collects data, not the volume of data collected. *Id.* § 4-156-1020(b). Under this calculation method, the amount of tax scales with the number of users of the amusement, thereby taxing the amusement activity itself. The Court should disregard Plaintiff's attempt to conflate a tax on the number of customers using an amusement with a tax on collecting data from customers.

Last, Plaintiff complains that the Tax is not assessed on a physical location constituting a "place for" amusement. Compl. ¶ 74(c). But by its plain text, section 11-42-5's grant of authority to tax "amusements" is separate from the authority it confers to tax "places for . . . amusement." The statute therefore distinguishes between the two types of taxes, and the authority to tax "amusements" suffices to authorize the Tax. For all these reasons, Count II should be dismissed.

III. The Tax Accords With The First Amendment.

In Count III, Plaintiff alleges that the Tax violates the First Amendment because it discriminates against the "press—*i.e.*, social media websites"—by treating them "differently from other enterprises," and by "target[ing] a small group" of social media businesses. Plaintiff also contends that the Tax draws content-based lines. *See* Compl. ¶¶ 82–84, 87–94. Plaintiff is wrong on all fronts.

A. The current version of the Tax governs Plaintiff's claim.

At the outset, Count III is deficient because it attacks old ordinance provisions that no longer exist. Specifically, Count III alleges that the Tax is content based under the First Amendment because the Tax exempts "any bona fide news website, application, or platform" and "single-purpose community groups for education or public safety." Compl. ¶¶ 91–92 (emphasis removed) (citing pre-amendment sections 1010 and 1040(a)(9)).

These provisions were deleted by the June 2026 amendments. Ex. A § 1 (amendments to MCC §§ 4-156-1010, -1040). And that is fatal to Plaintiff's claim because it is the amended version of the ordinance, not the prior version, that governs this case. The amended version governs all time periods the Tax has been in effect—from January 1, 2026, through the present—because the City Council expressly mandated that the amendments "shall be retroactive to January 1, 2026." Ex. A § 3. The Illinois Supreme Court has held that where, as here, the legislative body "has clearly expressed an intention that a statute be given retroactive effect, [courts] must honor that intention" unless doing so would violate a constitutional protection against retroactive application. *Allegis Realty Invs. v. Novak*, 223 Ill. 2d 318, 332 (2006).

Here, there is no constitutional concern with applying the June 2026 amendments retroactively. Indeed, Plaintiff has not pled a constitutional challenge to their retroactive application despite having—and rejecting—the opportunity to amend its Complaint after the amendments' enactment. *See* Plaintiff's July 17, 2026 Opp. to Mot. for Extension at 3. And for good reason: the Illinois Supreme Court has rejected constitutional challenges to retroactive tax laws, explaining that a retroactive statute is presumed constitutional, and a plaintiff has a "formidable" burden to "clearly establish any constitutional invalidity." *Allegis Realty*, 223 Ill. 2d at 334, 341 (upholding retroactive tax under Illinois and federal constitutions); *see also Commonwealth Edison Co. v. Will Cnty. Collector*, 196 Ill. 2d 27, 49 (2001) (same under Illinois constitution); *McGinley v. Madigan*, 366 Ill. App. 3d 974, 988 (1st Dist. 2006) (same). Plaintiff could not carry that "formidable" burden even had it tried. *See Allegis*, 223 Ill. 2d at 332.

In addition to being retroactive, the June 2026 amendments expressly state that they merely clarify the ordinance. Ex. A § 2. This is an additional reason why the Tax's current language applies to the whole period the Tax has been in effect, from January 1, 2026, to the present. "[A] clarification of the prior statute . . . must be accepted as a legislative declaration of the meaning of the original Act." *K. Miller Constr. Co. v. McGinnis*, 238 Ill. 2d 284, 301 (2010);

see also People v. Stewart, 2022 IL 126116, ¶ 22 (holding that clarifying amendments applied to the time period before amendments); *Wells Fargo Bank v. Zajac*, 2017 IL App (1st) 160787, ¶¶ 24–29 (same).[4]

For these reasons, the current ordinance language governs the case. As result, the prior ordinance provisions that Count III points to in arguing the Tax is unlawfully content based have no bearing on resolution of Count III. *See Allegis*, 223 Ill. 2d at 341 (holding that a retroactive amendment "cured the defects on which plaintiffs' challenge . . . was based"); *Zajac*, 2017 IL App (1st) 160787, ¶ 29 (concluding prior law was "inapplicable" after a clarifying amendment).[5]

There is another fatal consequence from Plaintiff's failure to amend—the Complaint does not lodge any claim against the new language added to the ordinance by the June 2026 amendments. "The purpose of a complaint is to crystallize the issues in controversy, so that a defendant will know what claims it has to meet." *Bright v. Yenchko*, 2026 IL 132015, ¶ 22 (quoting *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (1st Dist. 2008)). Plaintiff's Complaint, however, was filed before the June 2026 amendments and was not amended, and thus fails to

[4] Whether an amendment clarifies prior law is fundamentally a question of the legislature's intent, *Stewart*, 2022 IL 126116, ¶ 20, and the June 2026 amendments satisfy the three circumstances indicating a legislative intent to clarify, *see id.* First, the amendments make explicit that they are "intended to clarify . . . [the] existing law." Ex. A § 2; *see also Harris Bank St. Charles v. Weber*, 298 Ill. App. 3d 1072, 1080 (2d Dist. 1998). Second, the amendments resolved a question about the Tax's scope and exemptions. Third, the amended Tax is consistent with the prior version. Both versions tax platforms primarily hosting user-generated content for purposes of amusement; the amendments simply make that more explicit in the definitions of "social media," "social media business" and "social media amusement" themselves, rather than through (since deleted) rules of interpretation.

[5] What's more, the removed language did not make content-based exclusions from the Tax, but simply illustrated certain types of platforms that were not subject to the Tax due to application of the Tax's content-neutral provisions. For example, as the pre-amendment version made clear, "social media business[es]" do not include "website[s] where the content *is not user generated*." Ex. A § 1 (amendments to MCC § 4-156-1040(a)(4)) (emphasis added). That is, a website primarily providing material that is supplied by the company rather than a user is not subject to the Tax. This content-neutral provision served to exempt news organizations, because they primarily supply material (news articles) provided by themselves (through their journalist employees) rather than host user-generated content.

provide fair notice of any claim against the Tax's amended language. Plaintiff cannot now advance claims or arguments based on that language. *See Ely v. OSF Healthcare Sys.*, 2025 IL App (4th) 240905-U, ¶ 64 ("A defendant has the right to receive fair notice, in the current version of the complaint, of what allegations the defendant will have to defend against . . ."); *cf. Gold Realty Grp. Corp. v. Kismet Cafe, Inc.*, 358 Ill. App. 3d 675, 680 (1st Dist. 2005) (reversing summary judgment for plaintiff "on an issue entirely absent from the pleadings," and explaining that the reason for amending a complaint is to "foster efficiency and fairness").

B. Plaintiff fails to state a First Amendment claim.

Count III should be dismissed because the Tax satisfies the doctrine governing the taxation of businesses engaged in First Amendment activity.

1. The Tax comports with *Leathers v. Medlock*.

While the Complaint cites a few older United States Supreme Court cases striking down certain taxes on traditional print journalism, Plaintiff ignores the Court's later decision in *Leathers v. Medlock*, 499 U.S. 439 (1991), which acknowledged those cases but went on to uphold taxation of an electronic communications medium—cable television—that supplies information protected by the First Amendment. *Id.* at 444–48.

In upholding the tax, *Leathers* emphasized that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* at 451 (quoting *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 547 (1983)). The Court likewise made clear that taxing media companies is "constitutionally suspect only in certain circumstances"—namely, when a tax "threatens to suppress the expression of particular ideas or viewpoints" and "hinder the press as a watchdog of government activity." *Id.* at 444, 447. To assess this, courts examine whether a tax scheme (1) "single[s] out the press" for taxation; (2) targets a small group of speakers; or (3) discriminates on the basis of the content of an entity's speech. *Id*. But when these concerns are absent, it is not problematic to tax companies that are conduits for First Amendment speech: "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id.* at 453; *see also Am. Multi-Cinema, Inc. v. City of Warrenville*, 321 Ill. App. 3d 349, 354–56, 359 (2d Dist. 2001) (upholding municipal amusement tax under *Leathers*).

The Tax easily survives analysis under the *Leathers* factors—indeed, none of them are present here. Plaintiff therefore fails to state a claim that the Tax violates the First Amendment.

First, the Tax does not single out social media companies. Rather, the Tax merely adds social media amusement to Chicago's longstanding amusement tax scheme, which covers myriad other amusement activities, some of which involve First Amendment expression, and others that do not. For example, the City imposes amusement taxes on theatrical, dramatic, and musical performances; motion picture shows; animal shows; circuses and rodeos; and sports and athletic contests. MCC § 4-156-010, -020(A)(1). And the City has consistently applied amusement taxes to address changes in entertainment trends and technologies. In recent years, the City made clear that electronically-streamed television, movies, music, and online games are taxed amusements, and the City expanded its scheme to apply to online sports wagering as well. *See* MCC §§ 4-156-020(A)(2), -973.

Like the tax on cable companies upheld in *Leathers*, the City's amusement tax scheme applies to a "broad range" of activities and therefore does not "single out the press" or "threaten to hinder the press as a watchdog of government activity." *Leathers*, 499 U.S. at 447; *see also Am. Multi-Cinema, Inc.*, 321 Ill. App. 3d at 356 (upholding amusement tax against First

Amendment challenge because of the tax's "broad application"); *Deja Vu Showgirls v. State, Dep't of Tax.*, 130 Nev. 719, 731 (2014) (rejecting First Amendment challenge to state's live entertainment tax, which applied to "raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events"). This remains the case even if, as Plaintiff contends, some other forms of media are not subject to Tax. *See* Compl. ¶ 83.[6] The question under *Leathers* is whether the government singles out the media for taxation, not whether its tax scheme covers *all* types of media. Indeed, *Leathers* held that Arkansas could lawfully tax cable television while exempting newspapers, magazines, and satellite television. 499 U.S. at 442–43, 453.

As to the second *Leathers* factor, Plaintiff has not pleaded facts showing that the Tax "targets a small group of speakers." *Id.* at 447. Plaintiff's allegation on this point is conclusory, and therefore insufficient. *See supra* at 4–5. That alone resolves this factor in the City's favor.

But the factor is not triggered here in any event. The concern with a tax that applies to only a small group of speakers is that it can lead to "censorship of particular ideas or viewpoints," *Leathers*, 499 U.S. at 447, thereby "distort[ing] the market for ideas," *id.* at 448. But that is not plausibly the case for social media businesses, which feature nearly endless quantities of diverse content provided by users. Indeed, each social media business large enough to have at least 100,000 consumers in the City is—itself—an expansive and continuously updating marketplace of ideas, to say nothing of the industry as a whole. The Supreme Court has remarked that "Facebook and YouTube alone have over two billion users each," with "Facebook users . . . shar[ing] more than 100 billion messages every day," and "YouTube see[ing] more

[6] Plaintiff is wrong that social media is the only form of media taxed by the City as an amusement. As explained, the City imposes an amusement tax on paid television and video or audio streaming services, which can supply news or other media programming. *See* MCC § 4-156-020(A)(2).

than 500 hours of video uploaded every minute." *Moody v. NetChoice, LLC*, 603 U.S. 707, 715, 179 (2024). And Plaintiff itself alleges that social media businesses "display" a "staggering amount" of content "created by others." Compl. ¶¶ 28–29 (quotation marks and citations omitted). The breadth of material on these platforms, and the ease by which it can be uploaded and viewed by users, renders them categorically different from traditional media, which face distinct financial and distribution constraints. Indeed "Facebook and YouTube each produced—on a daily basis—. . . . roughly 1.3 billion times as many bytes [of data] as there are in an issue of the New York Times." *Moody*, 603 U.S. at 794 (Alito, J., concurring).

Against this endless amount of content, the Tax cannot plausibly be viewed as "resembl[ing] a penalty for particular speakers or particular ideas." *Leathers*, 499 U.S. at 449. It applies broadly to companies providing social media amusement, regardless of the myriad ideas that may exist in the underlying material posted on their platforms. In this way, it is no different from the tax upheld in *Leathers*, which posed no threat of censorship to particular views because it applied to "the services provided by a large number of cable operators offering a wide variety of programming throughout the State." *Id*.

Third, and finally, the Tax does not regulate on the basis of content. "A regulation of speech is facially content based under the First Amendment if it targets speech based on its communicative content—that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (cleaned up).

That is not the case here. The Tax does not apply to social media companies based on the ideas or topics discussed on their platforms. Instead, it turns on the manner in which their businesses operate—it applies to a company that is (1) a "for-profit entity" that (2) "provides individuals with access to social media for the activity of social media amusement," and that (3) "collects, maintains, uses, processes, sells, or shares consumer data, other than consumer contact information, in support of the entity's business activities." Ex. A § 1 (amendments to MCC § 4-156-1010) (definition of "social media business"). And for material to qualify as "social media" (and therefore for a company to be a "provide[r]" of "social media," *id.*), the material that users engage with must, in the main, be provided by people other than those who maintain the platform—that is, the material is provided by the platform's end users, not by the company. *Id.* (amendment to MCC § 4-156-1010) (definition of "social media"). If, in contrast, "substantially all of the content made available to users (excepting incidental interactive user functions such as chat or comments) is individually created or selected for inclusion by those who maintain" the platform, then it is not providing "social media." *Id*. (amendment to MCC § 4-156-1010). As these definitions make clear, the Tax applies based on how a company structures its business and the manner in which the material on a platform is supplied. The messages or viewpoints expressed on social media have nothing to do with it. The same is true as to the Tax's exclusion of companies with fewer than 100,000 annual Chicago consumers. *See* Compl. ¶¶ 25, 88. That provision turns on the number of users, not the content of the ideas or messages appearing on a platform.

* * *

As shown above, there is no basis under *Leathers* to apply heightened First Amendment scrutiny to the Tax; the Tax poses no threat of censorship to social media; it does not target a small group of speakers; and it is content neutral. The Tax therefore is subject to "highly deferential rational basis review," which it easily survives because there is clearly "a conceivable basis for finding [it] rationally related to a legitimate state interest." *City of Chicago v. Haywood*, 2018 IL App (1st) 180003, ¶ 23; *see also Am. Multi-Cinema, Inc.*, 321 Ill. App. 3d at 359 (applying rational basis review to amusement tax impacting movie theater); *Leathers*, 499 U.S. at 451 (noting the "strong presumption in favor of duly enacted taxation schemes," which applies even when speech is at issue). Taxing social media businesses $0.50 per the number of Chicago consumers per calendar month in excess of 100,000 is rationally related to generating revenue for the City, a critical government function. *See Am. Multi-Cinema, Inc.*, 321 Ill. App. 3d at 359; MCC § 4-156-1000 (the "purpose of the tax is revenue generation for the City of Chicago by taxing the activity of social media amusement"). The Tax is therefore lawful under the First Amendment, and Count III should be dismissed.[7]

2. The Tax is lawful under *Pooh-Bah Enterprises, Inc. v. County of Cook*.

Count III is deficient for an additional reason: Its claim that the Tax is unlawfully content based is foreclosed by the Illinois Supreme Court's binding decision in *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463 (2009). In that case, the Court held that it did not violate the First Amendment for the City's amusement tax scheme to exempt an activity from its reach, even if the exemption could be viewed as content based, because the exemption was a valid form of government subsidy. *See id.* at 496. Thus, while the Tax no longer includes the exemptions that the Complaint contends are content based, and the Complaint does not otherwise identify

[7] For purposes of this motion, the City assumes that Plaintiff's members qualify as media entities to which the *Leathers* analysis applies, and we have shown that the Tax is nonetheless lawful under *Leathers*. But Plaintiff has alleged no facts showing that its members serve the same role as the "press," which is to serve as a "check on government abuse," *Leathers*, 499 U.S. at 447, and "shed . . . light on the public and business affairs of the nation," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). Moreover, the differences in how each of Plaintiff's members operate their social media platforms may result in at least some members enjoying little or no First Amendment protection in the first place. *See Moody*, 603 U.S. at 745–48 (Barrett, J., concurring). The City reserves the right to contest these points in the future, as well as to more generally contest the application of the First Amendment to the activities of Plaintiff's members, should that become necessary. *See id.* at 723–26. But as we explain in this brief, Plaintiff's claim can and should be dismissed categorically at this stage in the litigation because the Tax satisfies *Leathers* and rational basis review. For those reasons, Count III fails to state a claim.

exclusions that are allegedly content based, *see supra* at Argument § III.A, such exemptions would nonetheless be lawful under *Pooh-Bah*, as we now explain.

Pooh-Bah addressed City and Cook County amusement taxes that applied to amusements like movies and performances at adult cabarets, but that exempted live fine arts performances at small venues. The plaintiff operated an adult cabaret, and it argued that the exemption violated the First Amendment because it distinguished between performances based on their content. *See Pooh-Bah*, 232 Ill. 2d at 469. The Court rejected the claim. As the Court explained, the exemption of fine arts performances at small venues from the tax amounted to a government subsidy for those performances, which is permissible under the First Amendment. *Id.* at 496–98.[8] The First Amendment did not require the City to exempt other performances, such as those at adult cabarets, because the City could decide to subsidize only a particular category of performances. *Id.*

As an initial matter, the Court was not convinced that the exemption was content based; it explained that "[a] more appropriate label for the difference between adult entertainment cabarets and small fine arts venues might be 'format' or 'activity' rather than content." *Id.* at 498. That was because the "[p]laintiff is not being denied an exemption for engaging in speech. Rather, plaintiff is denied the exemption because it is not a small fine arts venue. Similarly, movie theaters are denied the exemption not because of the expressive content of their performances, but because they are not small fine arts venues. Defendants are not aiming at the suppression of dangerous ideas, and plaintiff cannot seriously argue that denying it this exemption will have the effect of coercing it to refrain from any speech." *Id.* at 502.

[8] Tax exemptions "are a form of subsidy that is administered through the tax system"—the exemption amounts to a subsidy to the exempted entity because an exemption "has much the same effect as a cash grant to the organization of the amount of tax it would have to pay" if the tax applied. *Regan*, 461 U.S. at 544.

Regardless, *Pooh-Bah* made clear that "even if the difference is one of 'content,' the Supreme Court has quite clearly stated that 'it is well established that the government can make content-based distinctions when it subsidizes speech.'" *Id.* at 498 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188–89 (2007)). This accords with the United States Supreme Court's rulings that "a tax scheme does not become suspect simply because it exempts only some speech," *Leathers*, 499 U.S. at 451, and that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right, and thus is not subject to strict scrutiny," *Regan*, 461 U.S. at 549; *see also Admiral Theater, Inc. v. Cook Cnty. Dep't of Revenue*, 534 F. Supp. 3d 929, 935 (N.D. Ill. 2021) (discussing *Pooh-Bah*, *Regan,* and *Davenport* in rejecting argument that City's small venue exemption triggers heighted scrutiny under the First Amendment).

Under *Pooh-Bah*, it does not violate the First Amendment to exempt certain websites or platforms from the Tax, even if that could be viewed as drawing a content-based line. Such exemptions would amount to government subsidies permitted by the First Amendment.

IV. Count IV Fails To State A Violation Of The Commerce Clause.

In Count IV, Plaintiff alleges that the Tax violates the Commerce Clause. Courts assess a local tax under the Commerce Clause using a four-part test, asking whether the tax (1) "is applied to an activity with a substantial nexus with the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Plaintiff invokes only the second prong, contending the Tax is not fairly apportioned because it is not "internally consistent." *See* Compl. ¶¶ 104–13. Under the internal consistency test, a court assesses "'[w]hat would happen if all States did the same'"—*i.e.*, they all adopted the same tax at issue in the lawsuit. *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545

U.S. 429, 437 (2005). A tax passes the test when adoption of the tax "by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), *superseded by statute*, 49 U.S.C. § 14505.

Count IV fails for two reasons: Plaintiff cannot meet the standard governing facial challenges, and in any event, the Tax satisfies the internal consistency test.

A. Count IV fails as a facial challenge.

At the outset, Plaintiff's theory that the Tax violates the internal consistency test rests on a single hypothetical: a student domiciled in New York who attends school in Chicago. Compl. ¶ 112. Plaintiff posits that if New York adopted the Tax, a social media company would be subject to multiple taxation—it would pay $0.50 to both New York and the City for the student's social media use. *Id.* ¶¶ 107–13.

But Count IV raises a facial challenge, for it seeks to enjoin the Tax in its totality, not just its application to a particular hypothetical situation. *See id.* ¶¶ 6–7, 113; *see also id.* at 21 (seeking declaration "that the [Tax] violates the Commerce Clause of the U.S. Constitution"). And "[a] facial challenge to the constitutionality of a statute is the most difficult challenge to make successfully," because "a statute is facially invalid only if no set of circumstances exists under which the statute would be valid." *Oswald v. Hamer*, 2018 IL 122203, ¶ 40. Therefore, to prevail on its facial challenge, Plaintiff cannot merely posit one (or even many) situations in which the Tax could be unlawful. Rather, Plaintiff must show that it is invalid in *all* instances; if the Tax could be validly applied in even one situation, the facial challenge fails. *See id.*; *Labell*, 2019 IL App (1st) 181379, ¶ 21.

Plaintiff makes no effort to show that the Tax violates the Commerce Clause in all of its applications. Plaintiff musters only its lone hypothetical. While we show below that even that hypothetical is lawful under the internal consistency test, a single unlawful application would not be enough to facially enjoin the Tax across the board. This alone is reason to dismiss Count IV.

B. The Tax is internally consistent.

Count IV also fails for the independent reason that the Tax is internally consistent, because replication of the tax by other jurisdictions would not result in unlawful multiple taxation. To begin, consider that the Tax reaches only social media use that occurs in the City. A company's tax liability turns on the number of its "Chicago consumers" each month (a company pays $0.50 for each consumer over 100,000, *see* MCC § 4-156-1020(b)), and to count as a "Chicago consumer," a person must meet two requirements tied to physical presence in the City. First, the person must be a "Chicago resident," meaning that they are present "in the City for other than a temporary or transitory purpose" or "domiciled in the City." *Id.* § 4-156-1010. Second, the person must also "use[] social media in the City." *Id.* Under these provisions, then, a company owes the $0.50 tax only when a Chicago resident uses the company's platform within the City. The recent amendments confirm the point: "There is no tax liability attributable for a Chicago consumer for a calendar month if there is no use by that consumer during the month even if there is previously collected data on that consumer." Ex. A § 1 (amendments to MCC § 4-156-1040(d)).

Now replicate the Tax in New York. There, the tax would operate identically: a social media company would owe tax for a person only if the person is a New York "consumer," meaning the person would have to be a New York resident and use social media in New York during the month; if there is no use in New York, then no tax is owed to New York.

Under this replication hypothetical, a company could incur tax liability to New York and the City for the same individual only when that individual is a "consumer" in both jurisdictions—the person would have to qualify as a "resident" of both jurisdictions and *use* the company's platform in both jurisdictions during the same month. This could be the case of Plaintiff's hypothetical student: She would be a Chicago resident because she is a student in Chicago, and she would use social media in Chicago in December while taking a break from finals. And she would also be a New York resident based on her New York domicile, and she would also use social media there while spending the December holidays visiting her parents.

But the Supreme Court has squarely held that this kind of cumulative liability for distinct instances of local activity does not offend the internal consistency test. In *American Trucking Associations, Inc. v. Michigan Public Service Commission*, the Court addressed a flat $100 annual tax imposed by Michigan on each truck undertaking point-to-point hauls within Michigan—*i.e.*, intrastate hauls. 545 U.S. at 431–32. The plaintiffs argued—just as Plaintiff argues here—that the tax failed the internal consistency test because, if other states replicated Michigan's tax, an interstate truck doing local business in many states would end up paying the tax in each of them, while a purely intrastate hauler would pay only once, in the particular state where it operated. *See id.* at 431–32, 437–38; Br. Pet'rs, *Am. Trucking Assocs., Inc. v. Mich. Pub. Serv. Comm'n*, 2005 WL 470916, at *16 (2005). The Court rejected that argument. It acknowledged that if all states replicated the Michigan tax, "an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars"—but that truck "would have to do so only because it engages in *local* business in all those States," thus causing it to pay the tax in each state. 545 U.S. at 438. Far from being problematic, this was to be expected: "An interstate firm with local outlets normally expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike." *Id.*

The same is true here. The Tax imposes the $0.50 charge only as to consumers who use social media in Chicago, so any replicating jurisdiction would likewise impose its charge only as to consumers who use social media there. Each jurisdiction would tax purely local activity—a consumer's use of a platform in that jurisdiction—just as each replicating state in *Michigan Public Service* would impose its own tax on truck hauls within its borders. Neither the City nor a replicating jurisdiction would tax a social media business for a resident's use of social media *outside* the jurisdiction. As in *Michigan Public Service*, there is no multiple taxation of interstate transactions, but only taxation of distinct instances of local activity. *See id.* (explaining that the Michigan tax "focuse[d] upon local activity," was "assessed evenhandedly," and did not "seek to tax a share of interstate transactions"). That does not violate the Commerce Clause.[9] For all these reasons, Count IV should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety, with prejudice.

[9] Indeed, courts routinely uphold taxes that apply only when a person or entity chooses to engage in activity within the taxing jurisdiction. *E.g.*, *Jefferson Lines*, 514 U.S. at 185 (holding that Oklahoma's tax on the in-state purchase of bus tickets for routes that originated in Oklahoma was internally consistent); *West v. Gerregano*, No. M2025-00165-COA-R3-CV, 2025 WL 3650277, at *7–8 (Tenn. Ct. App. Dec. 17, 2025) (slip copy), *appeal denied* (Mar. 30, 2026) (holding that Tennessee's professional privilege tax was internally consistent because it imposed the tax only on individuals who chose to be licensed or registered in Tennessee); *Ferrellgas Partners, LP v. Dir., Div. of Tax'n*, No. A-3904-18T1, 2021 WL 115643, at *10 (N.J. Super. Ct. App. Div. Jan. 13, 2021) (per-owner partnership filing fee imposed on entities with New Jersey income did not violate the Commerce Clause).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney for Defendants, hereby certifies: that on July 31, 2026, I served a copy of the foregoing **Defendants' Memorandum In Support Of Their Motion to Dismiss** on the following counsel at the e-mail addresses below:

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