No. 21-219

In the Supreme Court of the United States

CLEAR CHANNEL OUTDOOR, LLC, PETITIONER

v.

HENRY J. RAYMOND, DIRECTOR,
DEPARTMENT OF FINANCE OF BALTIMORE CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF FOR THE PETITIONER

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In its brief in opposition, respondent primarily argued that this Court should deny review because there was no conflict in the lower courts involving "a tax on the economic activity of charging to use billboard space." Br. in Opp. 14. The day after respondent filed its brief, the Ohio Supreme Court blew up that argument. It unanimously held that a materially identical tax targeting certain billboards was invalid under the First Amendment. In so holding, the Ohio Supreme Court expressly rejected the Maryland Court of Appeals' analysis in the decision below. Respondent has effectively conceded that, in the wake of the Ohio decision, there is an unambiguous conflict between state courts of last resort on an important question of First Amendment law. See *id.* at 4.

For the reasons set out by the Ohio Supreme Court, moreover, the decision below cannot be reconciled with this Court's precedents (or the decisions of lower courts in related contexts). Taxes targeting speech platforms and small groups of speakers must be subject to heightened scrutiny. Respondent would have the Court believe that this case has little to do with speech. But the Court has established that the First Amendment's protections extend to any speech platform that provides information and opinion—a category that indisputably includes billboards. In exercising discretion over the publication of speech, such platforms are properly treated as protected First Amendment speakers. And respondent cannot evade heightened scrutiny by claiming that the tax's narrow targeting is due to market conditions, particularly where respondent's own policies contributed to those conditions.

Respondent is left to contend that the Court should deny review because the case is important only to petitioner. That is belied by the Ohio Supreme Court's decision, which involved different companies in a different jurisdiction. But more broadly, respondent seemingly concedes the targeted nature of the tax here, yet refuses to come to grips with the import of the decision below. That decision paves the way for targeted taxation of any nontraditional speech platform. Such a threat is hardly abstract, particularly at a time when municipalities are looking for new ways to raise revenue. The question presented is thus both important and timely. The Court should grant the petition and hold that taxes singling out speech platforms are presumptively incompatible with the First Amendment.

A. The Decision Below Squarely Conflicts With A Recent Decision Of The Ohio Supreme Court

Respondent first contends that "every appellate panel that has considered a First Amendment challenge to a tax on charging to use billboard space" has "reached the same conclusion," relying on decisions from intermediate appellate courts in Pennsylvania and Ohio. Br. in Opp. 14-16; see *id.* at 4. But the Ohio Supreme Court unanimously reversed the intermediate court's decision and created a square conflict. See *Lamar Advantage GP Co.* v. *Cincinnati*, No. 2020-0931, 2021 WL 4201656, at *1 (Sept. 16, 2021). That conflict plainly warrants the Court's review.

1. In *Lamar*, the Ohio Supreme Court considered Cincinnati's billboard tax, which (like Baltimore's tax) applied to "outdoor advertising signs." See 2021 WL 4201656, at *1. The tax was levied on the "advertising host," based on the greater of a share of the revenue from the sign or a minimum amount based on the size and type of the display. See *ibid.* The tax was "imposed predominantly on [the] two companies" that challenged the tax (and "control[led] most of the market" for billboard advertising in Cincinnati). *Id.* at *2, *9.

The Ohio Supreme Court first concluded that the billboard companies were "protected by the rights to freedom of speech and of the press" under the First Amendment, recognizing that "press" extends beyond the institutional news media. 2021 WL 4201656, at *4. The court then canvassed this Court's decisions in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project Inc.* v. *Ragland*, 481 U.S. 221 (1987); and *Leathers* v. *Medlock*, 499 U.S. 439 (1991), and distilled several fundamental principles, two of particular note. See 2021 WL 4201656,

at *4-*8. *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." *Id.* at *8. *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." *Ibid.*

Applying those principles, the Ohio Supreme Court concluded that Cincinnati's billboard tax violated the First Amendment. See 2021 WL 4201656, at *8-*10. The court reasoned that the tax applied only to a limited category of signs and thereby "targeted a small group of speakers to bear most of the burden of [the] tax." *Id.* at *9. As such, the tax was "structured in a way that burdens activities protected by the First Amendment." *Ibid.* The court then concluded that the city's interest in raising revenue "cannot justify the special treatment of the press." *Ibid.* (citation omitted).[1]

2. Notably, the Ohio Supreme Court directly confronted the decision below and "d[id] not find [the Maryland Court of Appeals'] analysis to be persuasive." 2021 WL 4201656, at *9. The Ohio Supreme Court first rejected the conclusion that the tax did not single out the press because it was not intended to "interfere with protected speech." *Ibid.* The court explained that "a purpose to censor is not required for a tax to violate the First Amendment." *Ibid.* (citing *Minneapolis Star*, 460 U.S. at 592). The court then rejected the conclusion that the tax

[1] While the Ohio Supreme Court noted that there was evidence that the tax would require the companies to remove some of their billboards, see 2021 WL 4201656, at *9, the same was true here: petitioner presented evidence that its annual payments under the tax were declining, reflecting the removal of now-unprofitable signs. See 1 Tr. 135-136.

"did not target a small number of speakers." *Id.* at *9. The court explained that the Maryland court improperly "excluded from its analysis other commercial signs that were not subject to the tax" and that the tax "applies to only a small number of speakers that overwhelmingly bear the burden." *Ibid.*

Given respondent's concession that the facts of these cases are materially identical (Br. in Opp. 4, 14-16), and given the Ohio Supreme Court's express rejection of the reasoning of the decision below, there is now an indisputable conflict that warrants the Court's review.

B. The Decision Below Conflicts With Decisions Of This Court And More Generally With Decisions Of Other Lower Courts

As the Ohio Supreme Court explained, the decision below departs sharply from this Court's precedents on the targeted taxation of speech platforms, as well as lower courts' application of those precedents in related contexts. The tax here is subject to heightened scrutiny because it singles out the "press" and targets a small number of speakers. The tax therefore presents a threat of government censorship and chilled expression. Respondent's contrary arguments (Br. in Opp. 16-22) lack merit.

1. Respondent contends (Br. in Opp. 18-20) that billboards are not part of the "press." That contention rests on conclusory assertions and a glaringly incomplete account of this Court's jurisprudence. In respondent's view, "common sense" dictates that the "rules this Court has developed for the journalistic endeavors of the press" cannot "apply to commercial billboard operators." *Id.* at 6 & n.4. Respondent asserts that "there is no basis in this Court's precedents" to "extend" *Minneapolis Star*'s protections for the institutional press to other speech platforms. *Id.* at 19.

Respondent has it exactly backwards. There is no support in this Court's precedents for the proposition—central to the decision below—that newspapers or "news-gathering organizations" enjoy greater First Amendment protections than other forms of media. To the contrary, the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United* v. *FEC*, 558 U.S. 310, 352 (2010) (citation omitted); see generally Chamber Br. 10-13. Instead, the Court has explained that "press" includes "every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938). Conspicuously absent from respondent's brief is any citation of *Lovell*, or other decisions in which the Supreme Court has evinced an expansive understanding of the "press." See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

Petitioner falls comfortably within this Court's conception of the press, given that it exercises editorial control over and publishes a wide variety of messages—a point respondent does not dispute. See Pet. 5-6; *Lamar*, 2021 WL 4201656, at *4. Indeed, the targeted nature of the tax gives rise to exactly the risks of censorship and chilling that offend the First Amendment. As one of petitioner's senior executives testified at trial, there is "[n]o way" petitioner would be willing to publish a message critical of respondent under the current tax regime. 1 Tr. 157-158. Respondent notes that the executive did not identify any particular message that petitioner had rejected. See Br. in Opp. 5 n.2. But the risk of chilled speech is itself the problem, for "the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." *Minneapolis Star*, 460 U.S. at 588 (alterations and citation omitted).

Respondent additionally suggests that applying *Minneapolis Star*'s protections to billboards would "substantively conflict" with this Court's holdings that billboards can be regulated and even prohibited. Br. in Opp. 19. That too is incorrect. As the Court observed in *Minneapolis Star* itself, differential treatment of the press may be "justified by some special characteristic of the press." 460 U.S. at 585. Billboards' special characteristics may justify zoning regulations that are appropriately tailored to serve the governmental interests in traffic safety and aesthetics. See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507-508 (1981) (plurality opinion). But neither of those interests is implicated by a tax with the sole purpose of raising revenue. See Br. in Opp. 4-5, 10. In any event, in the First Amendment context, this Court has squarely rejected the type of "greater-includes-the-lesser" reasoning that respondent advances here. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 762-768 (1988).

2. Respondent next contends (Br. in Opp. 20-22) 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. That contention is profoundly flawed.

This Court has definitively rejected respondent's purported distinction between "actual speakers" and publishers of protected speech. A publisher engages in First Amendment protected activity when it "exercis[es] editorial discretion" over which messages to "include in its repertoire." *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). But even under respondent's framework, the tax here burdens "actual speakers." In addition to publishing the constitutionally

protected speech of others, petitioner also routinely publishes speech on its own behalf, including news and messages acknowledging significant public events. See, *e.g.*, 1 Tr. 80, 115-116, 159.

Respondent also significantly understates the extent to which the tax here targets a narrow group of speakers. Respondent asserts that "[t]he only billboard operators not subject to the tax are government entities." Br. in Opp. 8. That is irrelevant; the tax is subject to heightened scrutiny because it targets a single form of media. See *Minneapolis Star*, 460 U.S. at 591. Regardless, as in *Lamar Advantage*, the tax here "does not apply to all advertisers—or even to all advertising signs." 2021 WL 4201656, at *8. Among other things, it excludes signs promoting on-premises activities and signs smaller than 10 square feet. See Pet. 5. The result is that respondent has targeted a small group of speakers—four billboard companies—to bear the burden of a tax whose sole purpose is to raise revenue.

Respondent contends that the tax applies to so few entities because petitioner has "cornered" a particular market. See Br. in Opp. 21. But respondent conveniently ignores that petitioner's market position derives from respondent's *own* 20-year-old moratorium on billboard construction. See *id.* at 9. In any event, a tax that targets a small number of speakers suffers from the same First Amendment defect regardless of the competitiveness of the market: the tax's narrow targeting removes the political check on the taxing authority, thereby creating opportunities for abuse. See, *e.g.*, *Ragland*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 585.

3. Consistent with the foregoing, lower courts have applied heightened scrutiny to a wide variety of laws targeting speakers and speech platforms. Respondent attempts to minimize those decisions (Br. in Opp. 16-18) by

dwelling on irrelevant factual differences, but each court recognized the principle that *Minneapolis Star* and *Leathers* require heightened scrutiny for laws that target protected speech interests, not just the institutional press. See *Vermont Society of Association Executives* v. *Milne*, 172 Vt. 375, 382 (2001) (lobbying); *Pitt News* v. *Pappert*, 379 F.3d 96, 110-111 (2004) (the media); *Ahlburn* v. *Clark*, 728 A.2d 449, 452 (R.I. 1999) (religious literature); *Time Warner Cable, Inc.* v. *Hudson*, 667 F.3d 630, 639-640 (5th Cir. 2012) (cable providers); see also *NetChoice, LLC* v. *Moody*, Civ. No. 21-220, 2021 WL 2690876, at *1 (N.D. Fla. June 30, 2021) (social media networks).

Nor can respondent distinguish *Doe* v. *Harris*, 772 F.3d 563 (9th Cir. 2014), on the ground that the challenged law there "directly burdened" a group's speech. Br. in Opp. 17. The law here does the same. See p. 4 n.1, *supra*. *Minneapolis Star* makes clear that taxes levied on the instrumentalities of speech—whether the ink and paper used in publications, or the square footage of a billboard—directly burden protected speakers. See 460 U.S. at 577.

4. Because the tax here applies only to off-premises but not on-premises signs, it also potentially implicates the question whether such a distinction is content-based—which is presented in *City of Austin* v. *Reagan National Advertising of Texas*, No. 20-1029 (to be argued Nov. 10, 2021). But both sides agree that the Court need not address that question in order to resolve the question presented here: this case involves a tax, not a zoning regulation, and petitioner has disclaimed the interests at issue in *City of Austin*. See p. 7, *supra*. Regardless of the outcome in *City of Austin*, heightened scrutiny applies here because Baltimore's tax targets a protected speech platform and a small number of speakers. For that reason, the Ohio Supreme Court applied strict scrutiny to Cincinnati's tax, even though Cincinnati had amended its

ordinance to eliminate the on-premises/off-premises distinction. See *Lamar*, 2021 WL 4201656, at *1-*2.[2] The Court can therefore comfortably grant review and proceed to the merits in this case while *City of Austin* remains pending.[3]

C. The Question Presented Is Important And Warrants Review In This Case

The decision below denies First Amendment protections to a speech platform and provides a roadmap for municipalities to use targeted taxation to silence or chill disfavored speakers. Contrary to respondent's contention (Br. in Opp. 23-24), the decision's ramifications extend far beyond the billboard industry. The Court should grant review to address the Maryland Court of Appeals' grave misunderstanding of its precedents.

1. Respondent argues that this case presents no serious First Amendment concerns because it involves a tax on the "economic activity of charging others to use billboard space." Br. in Opp. 24. But the ordinance itself states that it is a "tax on the privilege of exhibiting outdoor advertising displays in the City"—in other words, a tax on the privilege of engaging in constitutionally protected speech. Baltimore City Code Art. 28, § 29-2 (2020). And the tax is levied not on each transaction in which advertising space is sold, but rather on the sign itself. As

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[2] Respondent contends (Br. in Opp. 21-22) that the tax's distinction between on-premises and off-premises signs could be severed without significant practical effect. That is a remedial question of state law that the Maryland courts may answer in the first instance on remand. Regardless, the critical point is that the tax is invalid with or without the on-premises exclusion.

[3] If the Court concludes otherwise, it should at a minimum hold the petition pending its decision in *City of Austin*.

the Ohio Supreme Court recognized, that is unambiguously a tax on maintaining and using a platform for speech. See *Lamar*, 2021 WL 4201656, at *2.

2. Respondent insists (Br. in Opp. 23, 24) that this case matters only to petitioner, thereby unwittingly conceding that the tax here burdens an exceedingly small group of speakers. As the Ohio Supreme Court's decision in *Lamar* illustrates, however, the question presented here has implications for other companies across the billboard industry. And beyond that, permitting Baltimore's tax to stand would embolden other local governments desperately in need of revenue to levy similar taxes on nontraditional speech platforms and speakers. Respondent's only answer is to assert that "[b]illboards are not a new speech platform." Br. in Opp. 23. True enough, but taxes targeting billboards are a relatively new phenomenon, and taxes targeting new-media platforms are now cropping up as well. See Chamber Br. 18-19. 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 provide cover for unconstitutional taxation schemes.

* * * * *

There is now a clear conflict between state courts of last resort on the important question of First Amendment law presented here. In upholding a tax targeting a protected speech platform and a small group of speakers, the decision below opens the door to taxes that censor and chill speech. The Court should grant review and make clear that the First Amendment's protections extend beyond the institutional media.

Respectfully submitted.

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