

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*

SUPPLEMENTAL BRIEF FOR THE PETITIONER

VIRGINIA A. SEITZ
GORDON D. TODD
SIDLEY AUSTIN LLP
*1501 K Street, N.W.
Washington, DC 20005*

KANNON K. SHANMUGAM
Counsel of Record
AIMEE W. BROWN
MARIA E. ELIOT*
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com*

SUDHIR V. RAO
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
*1285 Avenue of the Americas
New York, NY 10019*

* Admitted in Maryland and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

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In the earlier briefing in this case, petitioner and respondent agreed that the Court's decision in *City of Austin v. Reagan National Advertising*, No. 20-1029, would have no bearing on the correct resolution of the question presented here. See Pet. 20; Br. in Opp. 22. That remains true. If anything, the Court's decision underscores the need for further review on that question. In *City of Austin*, the Court held that a distinction between on-premises and off-premises signs is content neutral and thus not subject to strict scrutiny. See slip op. 6. But the Court had no occasion to address whether the targeted taxation of a small group of billboard owners—separate and apart from any on-premises/off-premises distinction—triggers strict scrutiny. That is the question on which the lower courts are divided, and it warrants the Court's review.

In the decision below, the Maryland Court of Appeals upheld Baltimore’s tax on “outdoor advertising displays”—a tax that falls on only four billboard owners. See Pet. 3. The Baltimore City Code defines an “outdoor advertising display” as a sign that “directs attention to a business, commodity, service, event, or other activity” that is “sold, offered, or conducted somewhere other than on the premises on which the display is made.” Art. 28, § 29-1(d). Petitioner argued that the tax must be subject to heightened scrutiny under the First Amendment because it singled out a speech platform, targeted a small group of speakers, and discriminated on the basis of a billboard’s content. See Pet. App. 23a-35a. The court below rejected each of those arguments and upheld the tax, holding that neither the targeted nature of the tax nor the distinction between on-premises and off-premises signs required the application of heightened scrutiny. See *ibid.*

The Ohio Supreme Court subsequently invalidated a Cincinnati tax on outdoor advertising signs that is materially identical to Baltimore’s tax, except that it does not distinguish between on-premises and off-premises signs. See *Lamar Advantage GP Co. v. Cincinnati*, No. 2020-0931, 2021 WL 4201656, at *1-*2 (Sept. 16, 2021), petition for cert. pending, No. 21-900 (filed Dec. 13, 2021); see generally Reply Br. 3-5 (discussing *Lamar*). The Ohio Supreme Court held that the tax was subject to strict scrutiny because it “targeted a small group of speakers.” *Lamar*, 2021 WL 4201656, at *9. And because the city’s only stated interest was in raising revenue, the court concluded that the tax was unconstitutional under the First Amendment. See *ibid.*

There is therefore now an unambiguous conflict between state courts of last resort on an important question of First Amendment law. If anything, by holding that the on-premises/off-premises distinction does not trigger

strict scrutiny on its own, the Court's decision in *City of Austin* removes the only potential basis for distinguishing between the appropriate constitutional treatment of the Baltimore and Cincinnati taxes. Both taxes target a protected speech platform and a small number of speakers. Yet the Maryland and Ohio courts of last resort reached opposite results after applying different levels of scrutiny to the taxes at issue, with the Ohio court accepting the targeted-taxation rationale for heightened scrutiny and the Maryland court rejecting it. The Court's decision in *City of Austin* thereby clarifies the conflict between the lower courts and highlights the need for further review.

* * * * *

There is no reason to delay resolution of this important question of constitutional law. Petitioner here, and all of the parties in *Lamar*, have urged this Court to grant review on the question, which has broad ramifications not just for the billboard industry but beyond. Respondent has not disputed the existence of a conflict, nor can it plausibly do so now in the wake of the Court's decision in *City of Austin*. This case is now an obvious candidate for the Court's review. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

VIRGINIA A. SEITZ
GORDON D. TODD
SIDLEY AUSTIN LLP
*1501 K Street, N.W.
Washington, DC 20005*

KANNON K. SHANMUGAM
AIMEE W. BROWN
MARIA E. ELIOT*
PAUL, WEISS, RIFKIND,
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