No.__________

In the Supreme Court of the United States

CITY OF CINCINNATI, OHIO, ET AL.,
PETITIONERS,

V.

LAMAR ADVANTAGE GP COMPANY, LLC, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Relying on the same First Amendment precedent from this Court, the highest courts of Ohio and Maryland reached conflicting conclusions about whether taxing the business privilege of charging for the use of billboard space abridges the freedom of speech, or of the press.

The question presented, upon which this conflict exists, is:

Whether a municipal excise tax on the business privilege of charging for the use of billboard space abridges the freedom of speech, or of the press.

PARTIES TO THE PROCEEDING

Petitioners (Defendants-Appellees in the Supreme Court of Ohio) are the City of Cincinnati; Nicole Lee, in her official capacity as Treasurer of the City of Cincinnati, Ohio; Art Dahlberg, in his official capacity as Director of Buildings and Inspections for the City of Cincinnati, Ohio; and Reginald Zeno, in his official capacity as Finance Director for the City of Cincinnati, Ohio.

Respondents (Plaintiffs-Appellants in the Supreme Court of Ohio) are Lamar Advantage GP Company, LLC, d.b.a. Lamar Advertising of Cincinnati, Ohio, and Norton Outdoor Advertising, Inc.

RELATED PROCEEDINGS

Supreme Court of Ohio

Lamar Advantage GP Co., L.L.C. v. City of Cincinnati, No. 2020-0931, 2021-Ohio-3155, ___ N.E.3d ___ (2021).

First District Court of Appeals, Hamilton County, Ohio

Lamar Advantage GP Co., L.L.C. v. City of Cincinnati, No. C-180675, 2020-Ohio-3377, 155 N.E.3d 245 (2020).

Hamilton County, Ohio, Court of Common Pleas

Lamar Advantage GP Co., LLC v. City of Cincinnati, No. A-1804105, 114 N.E.3d 831 and 114 N.E.3d 805 (2018).

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PETITION FOR A WRIT OF CERTIORARI

The City of Cincinnati respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1a-27a) is reported at 2021-Ohio-3155; as of the time of this petition, it has not yet been reported in N.E.3d.

The opinion of the Ohio First District Court of Appeals (Pet. App. 28a-51a) is reported at 2020-Ohio-3377, 155 N.E.3d 245 (2020).

There are two trial court orders related to this matter. The first (Pet. App. 52a-61a) is reported at 114 N.E.3d 831 (Ohio C.P., Nov. 9, 2018). The second (Pet. App. 62a-112a) is reported at 114 N.E.3d 805 (Ohio C.P., Oct. 17, 2018).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on September 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press[.]

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

The billboard tax at issue, found in Chapter 313 of the Cincinnati Municipal Code, is reproduced at Pet. App. 113a-122a.

Chapter 895 of the Cincinnati Municipal Code, which sets forth various billboard regulations, is reproduced at Pet. App. 123a-143a.

The Tax Injunction Act, 28 U.S.C. § 1341, states: "The district courts shall not enjoin, suspend or restrain 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."

STATEMENT

A. Facts and Procedural History

1. Chapter 313 of the Cincinnati Municipal Code ("CMC") includes an excise tax on the licensed business privilege of charging others to use billboard space. CMC 313-3 (Pet. App. 116a-117a.) This "billboard tax" is modeled after those found in other municipalities, including Baltimore, and was designed to raise revenues that are used to support, among other things, human services, responses to the opioid epidemic, operation of a winter homeless shelter, youth employment initiatives, and other municipal programs that support the public health and welfare. The billboard tax is one of many license and franchise taxes levied by Cincinnati, such as an admissions tax, a hotel tax, a short-term rental tax, and a motor vehicle license tax.

The billboard tax is paid by "advertising hosts," i.e., billboard operators, such as Lamar Advantage GP Co., LLC and Norton Outdoor Advertising ("Lamar" and "Norton"), whose special licenses allow them to engage in billboard rental businesses that amount to a franchise. The number of licenses available in Cincinnati are limited, and those who do not hold licenses cannot engage in the billboard rental business. CMC 895-5 and 895-13 (Pet. App. 129a-131a and 134a-136a). As the record established below, Lamar and Norton currently hold most, but not all, the existing billboard licenses in Cincinnati.

The billboard tax raises revenues by imposing "an excise tax on the privilege of installing, placing, and maintaining outdoor advertising signs" in Cincinnati.

CMC 313-3. (Pet. App. 116a-117a.) "Outdoor Advertising Sign" is defined as meaning either "a sign for which its owner or operator receives, or is entitled to receive, rent or other consideration from another person or entity in exchange for the use of the sign, including for the placement of a message on the sign" or as "a sign that is offered or made available by its owner or operator for use by another person or entity, including for the placement of a message on the sign, in exchange for rent or other consideration." CMC 895-1-O (Pet. App. 125a).

The tax is levied on billboard operators exercising their privilege to engage in the sign rental business. It is not levied upon the persons who rent billboard space to convey their messages, or upon the billboard operators when they use their billboards to convey their own messages. The tax equals the greater of: (i) seven percent of gross receipts generated by the operation of the billboard, or (ii) a flat amount calculated upon a billboard's leased sign-face area. CMC 313-3 (Pet. App. 116a-117a). License holders do not incur tax liability for placing signs on government property or for erecting very small signs. CMC 313-5 (Pet. App. 117a-118a).

The messages communicated via the billboards, whether commercial or noncommercial, are not considered in assessing the tax. It is only the billboard operator's choice to sell space and time to third parties that gives rise to tax liability.

2. Soon after the tax was enacted, Lamar and Norton sought to block it via separate complaints for declaratory, injunctive, and other relief. Relevant here, they argued that the tax violated their First Amendment right to freedom of speech. After

consolidating the matters, the trial court, largely on First Amendment grounds, applied a variation of strict scrutiny to the matter, declared the tax to be illegal and unconstitutional, and granted a permanent injunction enjoining Cincinnati from enforcing the tax. (Pet. App. 52a-112a.)

3. Cincinnati appealed the injunction to the First District Court of Appeals of Ohio. That court reversed, relying on this Court's *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) cases, as well as Maryland's *Clear Channel Outdoor, Inc. v. Dir., Dep't of Fin.,* 247 A.3d 740 (2020) case. It found that the trial court erred when it applied strict scrutiny because the tax is content-neutral; does not threaten to suppress the expression of any particular ideas or viewpoints; does not single out a small group of speakers; and that differential taxation of billboard operators was justified because of their unique operations that are fundamentally distinct from other media actors, such as news organizations. (Pet. App. 28a-51a.)

4. Lamar and Norton appealed to the Supreme Court of Ohio. Relying on the same cases from this Court, and specifically rejecting Maryland's highest court's analysis in *Clear Channel*, it reversed. It found that the tax unconstitutionally infringed upon billboard operators' First Amendment rights by taxing a small group of speakers' advertising revenue and means of communication. Equating the business privilege tax with those that "were a cause of the American Revolution," the Ohio court concluded that

it impermissibly burdened First Amendment protections and was subject to strict scrutiny. (Pet. App. 1a-27a.)

B. The Conflict between Ohio and Maryland

This case presents the important constitutional question of whether a municipal excise tax on the business privilege of charging for the use of billboard space abridges the freedom of speech, or of the press. Ohio's highest court has said that it does; Maryland's highest court has said it does not. As of the time of this filing, a petition for a writ of certiorari from the Maryland case is pending before this Court in *Clear Channel Outdoor, LLC v. Raymond,* No. 21-219.

When the petition in *Clear Channel* was filed, Maryland was the only state to have its highest court make a ruling on this issue. Reviewing Baltimore's similar billboard tax, it ruled that the content-neutral excise tax did not infringe upon the First Amendment. In reaching that conclusion, the Maryland court relied on this Court's decisions in *Grosjean, Minneapolis Star & Tribune Co.*, *Arkansas Writers' Project*, and *Leathers*. After analyzing those and other Maryland cases, the court concluded that Baltimore's billboard tax was subject to a rational-basis review because it did not single out the press or target a small group of speakers and was content neutral. *Clear Channel,* 247 A.3d at 759-760.

Subsequently, Ohio's highest court released the underlying opinion, in which it reviewed Cincinnati's billboard tax. After considering *Grosjean, Minneapolis Star*, *Arkansas Writers' Project*, and *Leathers*, it found Cincinnati's billboard tax unconstitutional. It equated

billboard operators with the press and held that the tax singled them out impermissibly. It found that requiring that the sign be leased or offered for lease by its owner to another caused the tax to apply to the communicative aspects of the billboards. It rejected the idea that the billboard tax applied only to commercial transactions and, instead, said that the billboard tax was akin to the tax on advertising revenue invalidated by *Grosjean*. It equated taxing billboard space to the ink-and-paper tax this Court found problematic in *Minneapolis Star*. And it found the tax was not generally applicable because it did not apply to a broader selection of industries, did not apply to all forms of advertising, and excluded enough signs that it was targeted at small group of speakers who bore most the burden of the tax. (Pet. App. 21a-24a.) In reaching its decision, the Ohio court "acknowledged" and entirely rejected *Clear Channel*. (Pet. App. 24a-25a.)

While the Maryland court decided the tax did not single out the press because nothing about its design interfered with protected speech, the Ohio court stated that "a purpose to censor is not required for a tax to violate the First Amendment." (Pet. App. 24a-25a).

While the Maryland court found that the tax would not impact the billboard owners' ability to circulate messages, the Ohio court found that the Cincinnati tax would "require them to remove their less profitable billboards." (Pet. App. 24a-25a.)

And while Maryland's court found that the City of Baltimore's tax did not single out a small number of group of taxpayers because market conditions had led to there being so few billboard operators, the Ohio court found that the Maryland court could only reach

that conclusion by improperly "exclud[ing] from its analysis other commercial signs that were not subject to tax. * * * And although the court attributed that disparity to 'market conditions' caused by the consolidation of ownership of the limited number of billboards in the city, that does not change the fact that Baltimore enacted a tax that applies to only a small number of speakers that overwhelmingly bear the burden of a tax on a medium of expression." (Pet. App. 25a.)

When *Clear Channel* came to this Court, there was no interstate conflict because the intermediate court in Ohio had upheld Cincinnati's tax and Ohio's highest court had not spoken. That is no longer the situation.

The highest courts of Maryland and Ohio have each considered the same First Amendment question, applied the same law from this Court, and reached diametrically opposed conclusions. Because there is now an interstate conflict on this important First Amendment issue, this Court should resolve that conflict by granting the City of Cincinnati's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

A. There is a constitutional conflict between the highest courts of two states.

This case, along with Maryland's *Clear Channel*, presents a fundamental First Amendment question regarding the taxation of billboards. Cincinnati obviously agrees with Maryland's highest court's reading of the law in this area. As demonstrated by *Clear Channel*, this Court's jurisprudence shows that

both the Cincinnati and Baltimore taxes fully comport with the First Amendment. These taxes apply to licensed commercial activity, not speech.

Of course, Lamar and Norton can now make the opposite argument. They can point to Ohio's highest court as to why this Court's decisions render both Cincinnati and Baltimore's billboard taxes violative of the First Amendment.

Because of this conflict and the inevitable confusion that creates, this Court should grant review of this matter.

1. This Court's Press-Tax Cases

Throughout both this and the *Clear Channel* case, the lower courts have relied upon this Court's decisions in *Grosjean, Minneapolis Star*, *Arkansas Writers' Project*, and *Leathers*. These press-tax cases set the stage for the question presented both here and in *Clear Channel*.

In *Grosjean*, this Court considered a tax that was imposed on advertisements in publications that had a large circulation. The tax was designed, however, "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." 297 U.S. at 251. Unsurprisingly, this Court found a tax that was designed to target certain newspapers that had been critical of the government violated the First Amendment. *Id.*

In *Minneapolis Star*, this Court was faced with a use tax on the cost of paper and ink used in making various publications. The tax included exemptions that caused the tax to be paid only by a few, select publishers. Unlike traditional use taxes, which serve

to compliment a sales tax by eliminating an incentive to make major purchases in states with lower sales taxes, "the use tax on ink and paper serve[d] no such complementary function; it applie[d] to all uses, whether or not the taxpayer purchased the ink and paper instate, and it applie[d] to items exempt from the sales tax." 460 U.S. at 582.

While recognizing that the government may impose economic regulations of the press, this Court found that the tax at issue singled out the press and improperly targeted only a small subset of publishers. In turn, this Court declared the tax unconstitutional: "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment." *Id.* at 592-593.

In *Arkansas Writers' Project*, this Court considered whether a sales tax scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals, violated the First Amendment guarantee of freedom of the press. This was more problematic than the tax in *Minneapolis Star*, both because it was not applied evenly to all magazines and because "a magazine's tax status depends entirely on its *content*." 481 U.S. 221, 229 (emphasis sic.). Because the tax was not content-neutral, it required the state to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end," a burden that the state could not meet. *Id.* at 231 (citing *Minneapolis Star*, 460 U.S. at 591-592).

This Court again faced a tax that singled out a portion of the media for taxation in *Leathers*, which involved a tax that treated cable companies differently than other forms of media. The cable companies argued that this form of differential taxation violated their First Amendment rights by taxing their services while exempting or excluding newspapers, magazines, and satellite broadcast services from the tax. This Court disagreed.

After reviewing the above cases, this Court noted that they "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447.

> Absent a compelling justification, the government may not exercise its taxing power to single out the press. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

Id. (internal citations omitted).

Applying those standards, *Leathers* found there was nothing improper about taxing the cable

companies. It found that the tax was generally applicable and there was no indication the cable industry had been singled out in a "purposeful attempt to interfere with its First Amendment activities." *Id.* While this Court recognized that there is a danger of censorship with "a tax scheme that targets a small number of speakers," the tax at issue was generally applicable to all, and there was no danger in "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State." *Id.* at 449. This Court added that the tax was also content-neutral because "[t]here is nothing in the statute that refers to the content of mass media communications." *Id.* As such, the cable companies would only prevail on their constitutional challenge if they could show an additional basis for concluding that their First Amendment rights had been violated.

In attempting to do so, the cable companies argued that treating cable media differently from other forms of media demonstrated improper discrimination even if the tax was content-neutral. This argument was rejected, and this Court found that "[i]nherent in the power to tax is the power to discriminate in taxation" and that legislatures possess "'especially broad latitude in creating classifications and distinctions in tax statutes.'" *Id.* at 451 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983)). In turn, "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." *Leathers*, 499 U.S. at 453. As such, Arkansas' decision to subject the cable companies to a sales tax while

exempting other media did not violate the First Amendment. *Id.*

Both here and in *Clear Channel*, the highest courts of two different states have applied these press-tax cases to billboard taxes. But they applied them in completely different manners, invoked opposing standards of review, and reached conflicting constitutional conclusions.

2. Ohio and Maryland's highest courts have created an interstate conflict by interpreting this Court's press-tax cases in diametrically opposing manners.

The lack of clearer guidance in the press-tax cases for determining the constitutionality of a business-privilege tax, such as the billboard tax, led the highest courts of two states to reach two disparate conclusions that are not legally reconcilable.

Ohio said billboard operators are members of the press; Maryland said they are not. Ohio said the billboard tax violated *Grosjean* by taxing billboard business privileges in this context; Maryland said this did not implicate the First Amendment. Ohio found the tax applied to a means of communication and the communicative elements of the billboards; Maryland held it was levied on a commercial transaction. Ohio found that the tax singled out a small group of companies that bore the burden of the tax; Maryland found that the tax applied to all billboard operators and only fell upon a few due to market conditions that allowed them to monopolize the market. Ohio applied strict scrutiny and found the tax unconstitutionally violated the First Amendment; Maryland applied a

rational basis and found the tax constitutional. This conflict needs to be resolved.

The billboard operators here, just like those in *Clear Channel*, argued they were members of the press and, in turn, that the billboard tax improperly singles out members of the press. Concluding that billboards are used as forms of mass communication and that billboard operators are able to exercise editorial discretion over the messages they allow on their billboards, the Ohio court found that they were equivalent to members of the press. (Pet. App. 9a-10a.)

The Maryland court considered that argument to be "a bit of a stretch." 247 A.3d. at 755. While recognizing that billboards companies enjoyed First Amendment rights of free speech, it found just because "a billboard may function on occasion or in some measure like the traditional 'press' does not make it equivalent to a newspaper or broadcaster for purposes of the First Amendment." *Id.* at 471.

Important to the Maryland court's analysis was this Court's *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). That case provides that billboards may be heavily regulated—even to the point of being regulated out of existence. *Id.* at 502. In contrast, it is self-evident that it would be unconstitutional to regulate the newspapers out of existence. The Ohio court attacked that conclusion by pointing to *Minneapolis Stars'* holding that a purpose to censor is not required for a tax to run afoul of the First Amendment. (Pet. App. 24a-25a.)

Both courts found that the billboard tax essentially taxed commercial advertising sales. Relying on *Grosjean,* the Ohio court found that this was improper. (Pet. App. 21a-22a.) Maryland, on the other hand,

noted that, while advertising revenue was taxed in *Grosjean*, it was how that tax was designed and applied that caused this Court to find it unconstitutional. 247 A.3d at 756. In considering *Grosjean*, Ohio considered *what* was taxed; Maryland considered *how* it was taxed.

The Ohio court found that the tax was on the communicative aspects of the billboard because tax liability "does not attach simply because a sign is built or already exists—it also requires that the sign is leased or offered for lease by its owner to another." (Pet. App. 21a-22a.) Maryland found that the tax did not consider the content of what was being communicated because all that mattered was that the billboard company charged for the message to be displayed: "It is the commercial transaction, not the content of the message, that triggers the tax." 247 A.3d at 758.

Ohio held this was not an excise tax on a commercial transaction. Instead, relying on *Minneapolis Star* striking down a paper-and-ink tax, it found this was really a tax on the means of communication. (Pet. App. 21a-22a.) Maryland, however, found that *Minneapolis Star* struck down the tax not because it was taxing the means of communication, but because it was improperly singling out higher circulation newspapers. 247 A.3d. at 757. The Ohio court rejected Maryland's analysis by finding that the tax must impact circulation because it would "require [the billboard operators] to remove their less profitable billboards." (Pet. App. 23a.)

The two courts are also at loggerheads regarding *Leathers*. While the instant tax applies to all billboard operators in Cincinnati, the Ohio court found that

exceptions to the tax caused it to be "targeted [at] a small group of speakers to bear most the burden." (Pet. App. 22a-23a.) Because that burden fell mostly upon two companies, the Ohio court found that meant the tax unconstitutionally infringed upon their First Amendment rights.

With Baltimore's billboard tax primarily impacting four companies, the Maryland court faced a similar situation. 247 A.3d at 765-758. But instead of focusing simply on the number of companies that were affected by the tax, the Maryland court looked at causation and asked why a small number of companies were affected: "The fact that there are only four taxpayers affected by the Ordinance is due largely to market conditions, *not the structure of the ordinance*. * * * [T]he city banned the construction of new billboards 20 years ago, which has effectively barred new entrants from challenging Clear Channel's near monopoly of the medium. In our view, the Ordinance does not trigger heightened scrutiny under the First Amendment by targeting a small group of speakers." *Id.* (emphasis added) .

Relying on *Leathers* and its earlier finding that it was quite the stretch to even classify billboard operators as the press, Maryland found that "a tax on selected segments of the media, like the tax on billboards here, does not necessarily trigger heightened scrutiny or violate the First Amendment. Instead, differential taxation triggers heightened scrutiny 'when it threatens to suppress the expression of particular ideas or viewpoints.'" 247 A.3d at 754 (quoting *Leathers*, 499 U.S. at 447). Finding the billboard tax did not single out the press, target a small group of speakers, or discriminate on the basis

of content, it found that only a rational-basis review applied to the tax, and upheld it. *Id*. at 759-760.

The Ohio court reached the opposite conclusion. It applied strict scrutiny, declared the tax unconstitutional, and, comparing the billboard tax singled out the press, targeted a small group of speakers, and taxed the communicative aspects of the billboards. (Pet. App. 21a-23a.)

The divergent readings of this Court's press-tax cases involve vastly different approaches and have created a conflictual chasm that cannot be crossed. The Ohio court looked at what was taxed to the exclusion of how or why it was taxed. Maryland, however, did not see those cases as presenting a checklist and, instead, delved into the details of the tax. Put differently, Ohio looked to the form of the tax, while Maryland looked at the impact of the tax. This Court can resolve that conflict by accepting this case and determining which court's analysis reaches the correct constitutional result.

Additionally, the conflict over whether market conditions can create a small group that is taxable turns upon an issue that *Leathers* left open. *Leathers* and its progeny tell us that a tax cannot be targeted at a small group without offending the First Amendment. Left unanswered is how to define what amounts to a small group.

As Maryland noted, this Court has ruled that billboards may be heavily regulated, even to the point of forbidding them altogether. 247 A.3d. at 756 (citing *Metromedia*, 453 U.S. at 502). In Cincinnati, Baltimore, and many other states and municipalities across the country, this regulation has created market conditions that have allowed certain companies to

reach near monopoly status.[1] As such, any tax on billboards will inevitably fall upon those few companies who have been able to effectively buy up most of the market.

By taking advantage of those market conditions, billboard operators have winnowed their group down to a small number of companies. This small group of billboard operators argues that taxing them violates their First Amendment rights. Ohio agreed and ruled that what matters is this group's size. Maryland disagreed and ruled that what matters is how and why this group is small.

Leathers does not tell us if it is the final number or the math behind that final number that matters. It seems unlikely that this Court intended for First Amendment protections to hinge on simple arithmetic. The constitutionality of a tax should not turn simply on whether two, four, or one hundred companies are affected—a tax that improperly targets a group of 1,000 is just as unconstitutional as a tax that improperly targets a group of one. No matter the size of the group, what should matter is if, as in *Grosjean*, that group was improperly targeted or capable of being selectively targeted.

The Cincinnati tax applies to all billboard operators. Permissible regulations on billboards gave some billboard operators the opportunity to corner markets by buying up most the competition. Should someone be able to buy its way out of taxes? According to the Ohio court, they can; according to Maryland they cannot. This Court should resolve that conflict.

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[1] Unsurprisingly, the billboard operators have not taken issue with these regulations.

* * * * * *

When the petition for a writ of certiorari in *Clear Channel* was filed, there was no interstate conflict. The question presented was interesting, but not necessarily one demanding this Court's attention. But now that Ohio has released the underlying decision, an irretractable conflict between the highest courts of two states exists: had Baltimore's tax had been considered in Ohio, it would have been deemed an unconstitutional violation of the First Amendment; had Cincinnati's tax been considered in Maryland, it would have been upheld.

Given this is a taxation issue, the Tax Injunction Act, 28 U.S.C. § 1341, will prevent other federal courts from stepping in to offer any guidance on this conflict. The only place this First Amendment conflict may be resolved is here.

Resolving this conflict is important to the nation. Although this case focuses on billboards, the answer to the First Amendment question at hand will apply to many other industries, especially given the important "small group" question left open in *Leathers*. As this Court knows from its recent *FCC v. Prometheus Radio Project* decision, 141 S.Ct. 1150 (2021), more and more forms of communication are being consolidated throughout the United States. A consolidated billboard market may be at issue in this case, but the outcome of this case will apply to other forms of media too.

This case will answer what it means to single out the press, instructing if Ohio was right when it looked at *what* was taxed or if Maryland was right when it

looked at *how* and *why* it was taxed. It will also answer the question of what "targeting a small group of speakers" means for these purposes and whether all that matters is that a tax applies to a numerically small group or whether something more is required to render a tax constitutionally offensive.

This case presents an excellent vehicle for resolving this constitutional conflict. The lower courts considered similar taxes. They applied the same law. They made their findings on First Amendment grounds. And they came to diametrically opposite conclusions.

This Court should grant this petition and resolve this conflict.

B. The decision below is wrong.

For the reasons discussed above, Maryland's highest court got the law right when it found Baltimore's billboard tax constitutional. Whereas the Maryland court properly applied and analyzed this matter considering this Court's press-tax cases, the Ohio court failed to do so. But, in addition to the reasons set forth above, the Ohio court also wrongly read one of the foundational principles of *Leathers*.

One of the reasons this Court upheld the tax on the cable companies in *Leathers* was because the sales tax was "of general applicability" that applied "to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions." *Leathers*, 499 U.S. at 447. Those services included such things as "natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph service;

the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities." 499 U.S. at 447.

Having held "repeatedly that a state may impose on the press a generally applicable tax," and finding that the "tax does not single out the press and does not therefor threaten to hinder the press as a watchdog of government activity," this Court found that the tax in *Leathers* did not discriminate against the cable companies. *Id.* (citing *Jimmy Swaggart Ministries v. Board of Education of Cal.,* 493 U.S. 378, 387-388 (1990); *Arkansas Writers' Project,* 481 U.S. at 229; and *Minneapolis Star*, 460 U.S. at 586 and fn.9).

In *Leathers*, the generally applicable tax along with its exceptions and exemptions were found in a single chapter of the Arkansas code of laws. Here, Cincinnati's license tax laws are found in different chapters of its municipal code. The Ohio court found that difference in form meant the billboard tax was "not generally applicable" because "it does not apply to all or many businesses equally" and, instead, improperly singled out the billboard operators. (Pet. App. 22a.)

The substance of Cincinnati's tax laws, however, demonstrates a common form of tax that is applied to many of the same services specifically referenced by this Court in *Leathers*. The form of Cincinnati's tax in this case may be different than what was considered

in *Leathers,* but the effect is the same with some industries being taxed while other industries are not.

The press-tax cases show that this Court intends for the impact of the tax to be what matters. That advertising revenue was taxed in *Grosjean* was not the problem—that the tax was designed to target specific publications critical of the government, rather, was the problem. That paper and ink being taxed in *Minneapolis Star* was not fatal to the legislation—that it was a never-before-seen use tax that targeted a select portion of newspapers is what killed it. That a sales tax applied to publications was not problematic in *Arkansas Writers' Project*—that it was directed only at specific types of publications was.

There is nothing wrong with a tax on advertising, paper and ink, or publications in general. These levies only become unconstitutional when a tax is wielded, or capable of being wielded, to punish or silence targeted speakers for their expression.

Cincinnati's billboard tax is one of many excise taxes. It was not implemented as a punitive measure, as happened in *Grosjean.* It is not a "use" tax in name only or designed to selectively target individual speakers, like the tax in *Minneapolis Star.* The content of what is communicated does not matter, unlike the tax in *Arkansas Writers' Project.* Instead, the billboard tax is a general excise tax on the exercise of a commercial business privilege, a privilege possessed by anyone who holds a billboard license. Similar general taxes exist in Cincinnati for things such admissions, short-term rentals, and motor vehicle taxes, just like the other taxes referenced in *Leathers.*

Just as a municipality can tax hotels for leasing out a room, so too can a municipality impose a tax on leasing out a billboard. Both are taxes on the exercise of commercial business privileges, not speech. Just because someone subjected to a tax may occasionally engage in protected speech does not change the nature of the underlying transaction.

Billboard operators are not members of the press, they are purveyors of real estate. Yet even if this Court were to engage in the "bit of a stretch" of declaring billboard operators to be members of the press, it would not change the impact of the billboard tax because the billboard operators here would still be treated the same as the cable companies were in *Leathers*.

Here, just as in *Leathers*, "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." 499 U.S. at 453. Just like the cable tax in *Leathers,* the Cincinnati billboard tax is not directed at and does not present a danger of suppressing any ideas. It applies to all billboard operators, not just Lamar and Norton. It is directed only at the licensed privilege of leasing billboards to others, the message or idea plays no role.

The Ohio court put form over substance. That elevation distorts the foundational principle of the press-tax cases: the tax's impact is what matters. Maryland properly recognized this and Ohio was wrong when it decided otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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