# APPENDIX

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**APPENDIX A**

IN THE SUPREME COURT OF OHIO

January Term, 2021

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No. 2020-0931

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LAMAR ADVANTAGE GP CO., LLC, et al.,

v.

CITY OF CINCINNATI

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Decided: September 16, 2021

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O'Conner, C.J.,
Fischer,
DeWine,
Stewart,
Laster Mays,
Donnelly,

JJ.

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Opinion by Kennedy, J.
Donnelly, J., concurs in judgment only.

**{¶ 1}** This appeal from a judgment of the First District Court of Appeals presents a single question: is a tax imposed solely upon a small number of billboard operators a discriminatory tax that violates the rights to freedom of speech and a free press protected by the First Amendment to the United States Constitution?

**{¶ 2}** The First Amendment, as applied to the states through the Fourteenth Amendment, protects the rights to free speech and a free press from infringement by federal, state, and local government. Among the protections that it affords to the people of this country is the prohibition against selective taxation—taxes that target only a small group of speakers or that single out the press. Whether a censorial intent is manifest or absent, a selective tax creates the intolerable potential for self-censorship by the press and abuse by governmental actors aimed to suppress, compel, or punish speech. For these reasons, a selective tax imposed on activities protected by the First Amendment, unlike a generally applicable tax, is subject to strict scrutiny and may survive only if the government justifies the tax by proving that it furthers a compelling governmental interest and is narrowly tailored to achieve that interest.

**{¶ 3}** Appellee the city of Cincinnati imposes a tax on outdoor advertising signs. But through definitions and exemptions within the city's municipal code, the tax burdens fall predominantly on only two billboard operators. As speakers and publishers of speech, those billboard operators may not be singled out or targeted for engaging in expression protected by the First Amendment. Although the city has an interest in raising money to support local government, the fact

that there are alternative sources of revenue means that the tax cannot survive strict scrutiny. We therefore reverse the contrary judgment of the First District Court of Appeals and reinstate the trial court's order permanently enjoining the enforcement of the city's billboard tax, Cincinnati Municipal Code Chapter 313.

**Facts and Procedural History**

**{¶ 4}** Faced with a budget shortfall of approximately $2,500,000, the Cincinnati City Council in June 2018 passed Ordinance No. 167-2018, which enacted Cincinnati Municipal Code (hereinafter "CMC") Chapter 313 and "lev[ied] an excise tax on the privilege of installing, placing, and maintaining outdoor advertising signs in the City of Cincinnati." The city estimated that the tax would raise $709,000 to help balance the city's budget. The money raised by the billboard tax was not intended to regulate or mitigate the effects of billboards but instead was meant to fund special projects designated by city council relating to human services and public health and to restore funding to city council, the mayor, and the city clerk.

**{¶ 5}** As enacted, former CMC 313-1-O defined the term "outdoor advertising sign" by incorporating the definition of the term "off-site sign." CMC 1427-03-O, in turn, defines an "off-site sign" as a commercial sign that "proposes or promotes a commercial transaction to be conducted on a premises other than the premises on which the sign is located" or that "directs attention to a good, product, commodity, business, service,

event, or other object that serves as the basis of a commercial transaction that is not conducted" on the premises on which the sign is located. Former CMC 313-1-O also provided that an "outdoor advertising sign" includes "an outdoor advertising sign used from time-to-time as a noncommercial sign or an on-site commercial sign."

**{¶ 6}** By excluding on-site signs, the city exempted numerous—potentially thousands—of advertising signs from the tax. In addition, the ordinance excluded some signs displayed in the public right-of-way (including marquees, projecting signs, and signs relating to sponsorships), CMC 895-2(a), 723, 723-1-A2, and 723-17, signs approved by the city for special events, CMC 895-2(c), and signs erected or displayed on city-owned property, including public-transit stops and streetcar stations, CMC 895-2(d), 723-6(b), and 723-13.

**{¶ 7}** The ordinance requires an "advertising host," that is, one who owns or controls an outdoor advertising sign in the city, to pay a tax that is the greater of the following: (1) 7 percent of the gross receipts generated by the outdoor advertising sign or (2) an annual minimum amount that is calculated based upon the type, location, and square footage of the sign. CMC 313-3. In addition to imposing a tax, the 2018 ordinance also prohibited an advertising host from issuing a statement to an advertiser reflecting the tax, former CMC 313-7(a), and it prohibited a host from indicating that an advertiser would absorb the cost of the tax, former CMC 313-7(b).

**{¶ 8}** Appellants, Lamar Advantage GP Company, L.L.C., d.b.a. Lamar Advertising of Cincinnati, OH,

and Norton Outdoor Advertising, Inc., are "advertising hosts" as that term is defined by CMC 313-1-A1 and engage in the business of leasing billboard space for the dissemination of commercial and noncommercial speech. Owning approximately 450 and 415 billboards respectively, Lamar and Norton control most of the market for billboard advertising in Cincinnati. However, because the billboard tax would make their less profitable billboards unsustainable, Lamar and Norton have estimated that the tax might cause them to remove a total of 70 to 80 billboards. Further, due to competition with other advertising mediums, neither Lamar nor Norton would be able to pass on to their customers the cost of a 7 percent tax on gross revenues without losing business.

**{¶ 9}** The messages on Lamar and Norton's billboards are approximately 70 to 75 percent paid advertisements, and the remaining 25 to 30 percent of the advertising space is donated for public-service announcements or consists of Lamar and Norton's own speech (such as tributes to notable public figures and veterans). The paid advertisements are not only for commercial speech, however, but also include political advertisements for candidates for local office, including judges and members of city council, as well as the noncommercial speech of nonprofit organizations, religious groups, advocacy groups, and charities. Lamar and Norton also donate advertising space to display the noncommercial speech of charities and nonprofit organizations, public-service announcements, AMBER alerts, and public-health-and-safety messages.

**{¶ 10}** Members of city council have contacted both Lamar and Norton to request the donation of billboard space or to press for the removal of messages with which they disagree. For example, Norton ran a paid political message from an organization stating, "Voter Fraud Is a Felony," a message that Norton did not perceive to be incorrect or inflammatory. Norton, however, "receive[d] backlash from local lawmakers." Concerned that city council members held Norton's "fate in their hands," it removed the displays. A council member also approached Lamar, expressing the belief that billboards saying, "Voter Fraud Is a Felony," amounted to voter intimidation. Lamar agreed to donate space for the counter-message that voting is a right, not a crime, and it brought that message to the public as its own political speech.

**{¶ 11}** As those examples show, Lamar and Norton exercise editorial control over the messages displayed on their billboards. They edit advertisements to ensure effective marketing but also review them to be sure that the information conveyed is accurate and meets community and the companies' standards. Norton, for instance, will not post advertisements that are antireligious or proabortion, and it once agreed to post an advertisement for a plastic-surgery group only after the proposed picture was made "less revealing." Nonetheless, as Lamar's vice president, Thomas Vincent Fahey, put it, Lamar is "very apprehensive to do anything that would be critical of the city," expressing concern that city council might increase taxes in retaliation if it were not "happy with whatever message [Lamar] may have delivered on [its] displays."

**{¶ 12}** Lamar and Norton brought separate actions in the Hamilton County Court of Common Pleas against the city and its treasurer, appellee Nicole Lee, its director of the Department of Buildings and Inspections, appellee Art Dahlberg, and its finance director, appellee Reginald Zeno, seeking among other things a declaration that the tax violated Lamar and Norton's constitutional rights to free speech and a free press and requesting an injunction against the tax's enforcement. The trial court consolidated the cases, and after it granted a temporary restraining order and a preliminary injunction, the court permanently enjoined the city from enforcing the billboard tax, along with its provisions precluding billboard operators from telling its customers that price increases had been caused by the tax.

**{¶ 13}** The First District Court of Appeals affirmed in part and reversed in part, holding that the city's prohibition against speech between advertising hosts and their customers about who bore the cost of the tax violated the First Amendment. 2020-Ohio-3337, 155 N.E.3d 245, ¶ 2, 52-53. However, the court of appeals concluded that the tax itself did not violate the First Amendment, because it is content neutral and does not single out billboard operators in a way that chills or threatens to censor their speech. *Id.* at ¶ 36, 53.

**{¶ 14}** We accepted Lamar and Norton's separate appeals to review the same two propositions of law:

> l. Constitutionally mandated heightened First Amendment scrutiny applies to a discriminatory excise tax on billboards that targets a small group of speakers or singles out the press.

2. [CMC] 313-7(b), the Tax's Gag Provision, prohibits political speech.

*See* 160 Ohio St.3d 1418, 2020-Ohio-4811, 154 N.E.3d 98.

**{¶ 15}** After this court accepted Lamar and Norton's appeals, the city amended CMC 895-1-O, which now defines the term "outdoor advertising sign" to mean a sign that is leased or offered for lease by its owner to another, including for the placement of a message on the sign. The city also repealed CMC 313-7.

**{¶ 16}** Because Lamar and Norton's challenges to CMC 313-7 in their second propositions of law are now moot, we confine our analysis to Lamar and Norton's first propositions of law.

**Law and Analysis**

*Freedom of the Press*

**{¶ 17}** "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949 (1938). "[M]unicipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment." *Id.*

**{¶ 18}** The press "includes not only newspapers, books, and magazines, but also humble leaflets and circulars," *Mills v. Alabama*, 384 U.S. 214, 219, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), book publishers, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991), and cable-television providers, *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-495, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). It encompasses mediums that exercise editorial discretion in publishing the content of others in addition to their own content. *See Preferred Communications* at 494-495. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* at 452. As Professor Eugene Volokh has explained, people during the Framing Era and at the time of the ratification of the Fourteenth Amendment understood that the freedom of the press meant the right of every person to use technology (such as the printing press) to engage in mass communication. Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U.Pa.L.Rev. 459, 463 (2012).

**{¶ 19}** Here, Lamar and Norton use printing technology for mass communication and exercise editorial discretion over the messages that they publish, and the Supreme Court of the United States has consistently rejected the proposition that the "institutional press" is afforded more protection by the First Amendment than other speakers, *Citizens United v. Fed. Election Comm.*, 558 U.S. 310, 352, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Moreover,

statements "do not forfeit [First Amendment] protection because they were published in the form of a paid advertisement." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). As speakers and publishers of speech, both Lamar and Norton are protected by the rights to freedom of speech and of the press enshrined in the First Amendment to the United States Constitution.

*History of the Free-Press Clause*

**{¶ 20}** In *Grosjean v. Am. Press Co.*, the Supreme Court of the United States examined "the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment." 297 U.S. 233, 245, 56 S.Ct. 444, 80 L.Ed. 660 (1936). The court explained:

> For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing.

*Id.* The court noted that although the right to a free press had initially contemplated the right to publish without prior restraint, "mere exemption from

previous censorship was soon recognized as too narrow a view of the liberty of the press." *Id.* at 246.

**{¶ 21}** In 1712, Parliament had imposed a tax on newspapers and advertisements, and "the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown." *Id.* What followed, the court in *Grosjean* explained, was "more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal." *Id.* "The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Id.* at 247.

**{¶ 22}** Characterized as "taxes on knowledge," "the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people." *Id.* at 246. As the court in *Grosjean* noted, the taxes were simply a refined form of prior restraint that left the livelihoods of printers and publishers at the mercy of the commissioner of stamps. *Id.* at 247. The court pointed to the impact of the taxes on the colonies, suggesting that "these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that the revolution really began when, in 1765 [with the Stamp Act], that government sent stamps for newspaper duties to the American colonies." *Id.* at 246. Or as one scholar has explained, it was " 'quite likely that [the tax on] paper was more emphatically an immediate cause for the outbreak of

the spirit of revolt than the insipid [tea] of which so much has been written.' " (First brackets added in West.) West, *The "Press," Then & Now*, 77 Ohio St.L.J. 49, 80-81 (2016), quoting Wroth, *The Colonial Printer* 142-143 (2d Ed.1964).

**{¶ 23}** Reflecting on this history, the Supreme Court concluded in *Grosjean*

> that the First Amendment "was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well known and odious methods"—i.e., the newspaper stamp tax and the tax on advertisements. 297 U.S. at 249, 56 S.Ct. 444, 80 L.Ed. 660. As the court later explained, "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendments is as obnoxious * * * as the imposition of a censorship or a previous restraint. * * * For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.' " *Follett v. McCormick*, 321 U.S. 573, 577, 64 S.Ct. 717, 88 L.Ed. 938 (1944), quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

*The Prohibition Against Selective Taxation of the Press*

**{¶ 24}** The First Amendment, then, precludes the government from singling out the press for disparate treatment through selective taxation. *Grosjean* at 251.

**{¶ 25}** In *Grosjean*, the state of Louisiana had imposed a 2 percent tax on gross receipts from advertising, targeting publications with weekly circulations above 20,000. *Id*. at 240-241. The tax fell exclusively on 13 newspapers, while 4 other daily newspapers and 120 weekly newspapers were not taxed. *Id*. Reciting the history and tradition of the Free-Press Clause, the Supreme Court noted that the First Amendment was meant to protect against prior restraints on publication, which include taxes that curtail the amount of revenue raised by advertisements and tend to directly restrict circulation. *Id*. at 244-245, 248-249. The court pointed out that "it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question." *Id*. at 250-251. The court invalidated the Louisiana tax "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id*. at 250. That is, the tax was unconstitutional because it had "the plain purpose of penalizing the publishers and curtailing

the circulation of a selected group of newspapers." *Id.* at 251.

**{¶ 26}** In *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue*, the Supreme Court reviewed a use tax imposed on the costs of ink and paper consumed in the production of a publication that exempted from taxation the first $100,000 in purchases for those goods in any calendar year. 460 U.S. 575, 577-579, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). The tax fell on just 14 of the 388 paid-circulation newspapers in the state in 1974, and 16 of the 374 paid-circulation newspapers in 1975, and Minneapolis Star and Tribune Company paid roughly twothirds of the collected tax revenue for each of those years and $608,634 in 1974. *Id.* at 578-579. However, the court distinguished the facts of that case from those in *Grosjean*, because unlike the Louisiana tax at issue in *Grosjean*, "there [was] no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature." (Footnote omitted.) *Minneapolis Star & Tribune Co.* at 580. That, however, ended up being a distinction without a difference, because "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (Emphasis sic.) *Id.* at 592.

**{¶ 27}** The Supreme Court explained that Minnesota had "created a special tax that applies only to certain publications protected by the First Amendment" that "is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law." *Id.* at 581. The tax did not complement the sales tax, as a

traditional use tax does, because it applied to both in-state and out-of-state sales. *Id.* at 582. The court pointed out that "differential taxation of the press would have troubled the Framers of the First Amendment," *id.* at 583, because "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected," *id.* at 585. With generally applicable taxes, there is little concern for censorship because there is "not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.*

**{¶ 28}** Selective taxation of the press, in contrast, "can operate as effectively as a censor to check critical comment by the press." *Id.* "Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* The court determined that strict scrutiny applied to its review of the tax: "Differential taxation of the press * * * places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* And the state's need to raise revenue "cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial

threat implicit in a tax that singles out the press." (Footnote omitted.) *Id.* at 586.

**{¶ 29}** The Supreme Court gave an alternative reason for striking down the tax: "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Minneapolis Star & Tribune Co.*, 460 U.S. at 591, 103 S.Ct. 1365, 75 L.Ed.2d 295. Although the state attempted to justify the selective tax on the grounds that it was necessary to provide an equitable tax system, the court questioned the state's commitment to equity because the state had not extended the tax treatment to small businesses generally. *Id.* The court concluded, "And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." *Id.* at 592.

**{¶ 30}** In *Arkansas Writers' Project, Inc. v. Ragland*, the Supreme Court addressed a tax that subjected general-interest magazines to a sales tax on tangible personal property but provided exemptions for newspapers and religious, trade, professional, and sports magazines. 481 U.S. 221, 224, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). A general-interest-magazine publisher subject to the tax challenged it on First Amendment grounds. *Id.* at 224-225. The court invalidated the tax, determining that "it targets a small group within the press," *id.* at 229, and "cannot

be characterized as nondiscriminatory, because it is not evenly applied to all magazines," *id.* Although the tax was viewpoint neutral, it required authorities to review the content of the magazines to determine whether they fit into the exemption for religious, trade, professional, and sports magazines, and "[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 230. The court concluded that Arkansas had "advanced no compelling justification for selective, content-based taxation of certain magazines" and therefore held that the tax was "invalid under the First Amendment." *Id.* at 234. For this reason, the court determined that it was unnecessary to decide "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." *Id*. at 233.

**{¶ 31}** The Supreme Court addressed this question in *Leathers v. Medlock*, considering "whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media." 499 U.S. 439, 444, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). The Arkansas tax at issue in *Leathers* applied "to receipts from the sale of all tangible personal property and a broad range of services," including utilities, telecommunications, lodging, alterations, cleaning, repairs, printing, admission to recreational events and facilities, and cable television. *Id*. at 447. However, the law provided exemptions from the tax for newspapers and magazines. *Id.* at 443. A cable-television customer, a cable-television provider, and a trade

organization composed of approximately 80 cable-television providers from across the state filed suit to enjoin the tax as applied to cable-television services. *Id.* at 442.

**{¶ 32}** The court acknowledged that cable-television providers engage in speech and that in much of their operation they are part of the press. *Id.* at 444. It explained, however, that the fact "[t]hat [cable television] is taxed differently from other media does not by itself * * * raise First Amendment concerns." *Id.*

**{¶ 33}** The court determined that the tax on cable television was not like the taxes that it had invalidated in *Grosjean*, *Minneapolis Star & Tribune Co.*, and *Arkansas Writers' Project*. *Leathers* at 447-448. Unlike the tax at issue in *Grosjean*, the Arkansas cable-television tax was not intended to interfere with the cable-television provider's First Amendment activities by suppressing the circulation of information. *Leathers* at 444-445, 448. Unlike the tax at issue in *Minneapolis Star & Tribune Co.*, the cable-television tax did not single out the press for special treatment or target a small number of speakers to bear the burden of the tax. *Leathers* at 447-448. And unlike the tax at issue in *Arkansas Writers' Project*, application of the cable-television tax did not require consideration of the speech's content. *Leathers* at 446. Further, while the tax in in *Arkansas Writers' Project* applied to, at most, three publishers, *Leathers* at 448, the tax at issue in *Leathers* "extended * * * uniformly to the approximately 100 cable systems then operating in the State," *id.* The court noted, "This is not a tax structure that resembles a penalty for particular

speakers or particular ideas." *Id.* at 449. The court in *Leathers* then concluded:

> The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

*Id.* at 453.

**{¶ 34}** From these cases, we distill the following principles. First, the press may be subjected to a generally applicable tax. *Leathers*, 499 U.S. at 447, 111 S.Ct. 1438, 113 L.Ed.2d 494; *see also Fed. Trade Comm. v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 446, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (Brennan, J., concurring in part and dissenting in part), quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (O'Connor, J., concurring) ("'the arrest of a newscaster for a traffic violation,' for example, does not offend the First Amendment"). As the court explained in *Minneapolis Star & Tribune Co.*, there is no reason to believe that the government might use a generally applicable tax to censor, control, or punish speech if

the tax puts the same burden on the rest of its constituency. 460 U.S. at 585, 103 S.Ct. 1365, 75 L.Ed.2d 295. "[S]uch laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 761, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

**{¶ 35}** Second, a tax is unconstitutional if an official must look at the content of speech to determine whether the tax applies to it. *Arkansas Writers' Project, Inc.*, 481 U.S. at 230, 107 S.Ct. 1722, 95 L.Ed.2d 209.

**{¶ 36}** Third, a tax that selectively singles out the press or targets a small group of speakers creates the danger that the tax will be used to censor speech. *Minneapolis Star & Tribune Co.* at 591. This is true even if the tax singles out the press to its benefit: "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment." (Emphasis sic.) *Id.* at 588. "[T]he threat of burdensome taxes * * * can operate as effectively as a censor to check critical comment by the press," *id.* at 585, creating the "twin threats of selfcensorship and undetectable censorship," *Lakewood* at 762.

**{¶ 37}** Lastly, 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. "[E]vidence of an improper censorial motive" is not needed. *Arkansas Writers' Project* at 228. The structure of the tax itself in imposing greater burdens on the press or on speech may either raise a suspicion

that it was intended to interfere with expression protected by the First Amendment or create an unacceptable potential for the government to use the tax to suppress, control, or punish expression. *Leathers*, 499 U.S. at 446-449, 453, 111 S.Ct. 1438, 113 L.Ed.2d 494. As the court explained in *Minneapolis Star & Tribune Co.*, "Whatever the motive of the legislature * * *, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents *such a potential for abuse* that no interest suggested by [the government] can justify the scheme." (Emphasis added.) 460 U.S. at 591-592, 103 S.Ct. 1365, 75 L.Ed.2d 295. Because a selective tax creates such a potent tool for censorship, it offends the First Amendment.

*The Billboard Tax Is Unconstitutional*

**{¶ 38}** Applying these principles, we conclude that the city's selective tax on billboards violates the First Amendment. We reject the city's argument that the billboard tax is a tax on the noncommunicative aspects of billboards. Tax liability under the municipal ordinance 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. Further, we reject the city's contention that the ordinance taxes only a commercial transaction. The ordinance taxes advertising revenue in the same way that the tax invalidated by the Supreme Court in *Grosjean* did, and it taxes the means of communication

like the ink-and-paper use tax that was struck down by the court in *Minneapolis Star & Tribune Co.*

**{¶ 39}** And unlike the tax at issue in *Leathers*, the tax in this case is not generally applicable. It does not apply to all or many businesses equally, and it is not part of a broader tax on property or services that burdens other segments of the economy. It does not apply to all advertisers—or even to all advertising signs. As previously enacted, it excluded from taxation signs similar to those of Lamar and Norton's if they advertised goods or services provided on the same premises on which the sign was located, *see* former CMC 313-1-O and current CMC 1427-03-O, and, as amended, it still excludes many of those signs, because the tax applies only to signs that are leased or offered for lease to third parties, CMC 895-1-O. The ordinance further winnows the types of signs that are subject to the tax, excluding some signs displayed in the public right-of-way (including marquees, projecting signs, and signs relating to sponsorships), CMC 895-2(a), 723, 723-1-A2, and 723-17, signs approved by the city for special events, CMC 895-2(c), and signs erected or displayed on city-owned property, including public-transit stops and streetcar stations, CMC 895-2(d), 723-6(b), and 723-13. The tax also excludes all signs under 36 square feet in size, CMC 313-5(a)(iii), but none of Lamar or Norton's signs are that small.

**{¶ 40}** By enacting those exceptions, the city has targeted a small group of speakers to bear most of the burden of a tax intended to raise $709,000 for the purpose of balancing the city's budget. Because that tax burden is not spread across city council's constituency but is instead imposed predominantly on

two companies (Lamar and Norton), the political process may not alleviate the potential that the tax might be used to suppress, control, or punish speech. Instead, the tax is structured in a way that burdens activities protected by the First Amendment and creates a potent tool for censorship. The evidence shows that the city's council members had not been shy in asking Lamar and Norton to donate billboard space for their projects or in seeking the removal of messages with which they disagreed. The tax on Lamar and Norton's advertising revenue only increases that pressure. Even if the city passed the tax ordinance without a motive to censor billboard operators, the threat of overt censorship, self-censorship, or undetectable censorship created by the tax impermissibly infringes on rights protected by the First Amendment.

**{¶ 41}** The city's billboard tax resembles the type of taxes that were a cause of the American Revolution: taxes that curtail the amount of revenue raised by the press through advertisements and tend to directly restrict the circulation of protected expression. And it burdens First Amendment activities—the undisputed evidence is that the tax will require Lamar and Norton to remove almost 10 percent of their billboards, limiting the dissemination of protected content. As the Supreme Court instructed in *Minneapolis Star & Tribune Co.*, 460 U.S. at 585-586, 103 S.Ct. 1365, 75 L.Ed.2d 295, strict scrutiny applies and the government bears the burden to prove that the tax ordinance survives that scrutiny. *See also Reed v. Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

**{¶ 42}** The city enacted the billboard-tax ordinance to raise revenue. But as the Supreme Court has determined:

> Standing alone, [the need to raise revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the [city] could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.

(Footnote deleted.) *Minneapolis Star & Tribune Co.* at 586.

**{¶ 43}** We therefore hold that the city's billboard tax infringes on the rights to free speech and a free press protected by the First Amendment to the United States Constitution.

**{¶ 44}** We acknowledge that the Court of Appeals of Maryland, in *Clear Channel Outdoor, Inc. v. Dir., Dept. of Fin. of Baltimore*, recently upheld Baltimore's tax on the privilege of selling advertising space on billboards against claims that the tax infringed on the rights to free speech and a free press. 472 Md. 444, 477-478, 247 A.3d 740 (2021). We do not find its analysis to be persuasive.

**{¶ 45}** First, the court concluded that the tax did not single out the press because nothing indicated that the tax was intended—or raised suspicion that it was intended—to interfere with protected speech. *Id.* at 471-472. However, as the United States Supreme

Court explained in *Minneapolis Star & Tribune Co.*, a purpose to censor is not required for a tax to violate the First Amendment. 460 U.S. at 592, 103 S.Ct. 1365, 75 L.Ed.2d 295. The Maryland court also noted that the Baltimore tax had no effect on the billboard owners' circulation of messages. *Clear Channel Outdoor, Inc.* at 472. In contrast, Lamar and Norton presented uncontradicted evidence that the city's billboard tax would require them to remove their less profitable billboards.

**{¶ 46}** Second, the Maryland court determined that the Baltimore tax did not target a small number of speakers; but the court reached that conclusion only after it excluded from its analysis other commercial signs that were not subject to the tax. *Id.* at 473-474. However, the Baltimore tax—which was projected to raise between $1 million and $2 million annually—applied only to four billboard operators, with Clear Channel Outdoor, Inc., paying approximately 90 percent of the revenue generated by the tax. *Id.* at 451-452. And although the court attributed that disparity to "market conditions" caused by the consolidation of ownership of the limited number of billboards allowed in the city, *id.* at 474, 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.

**{¶ 47}** We therefore decline to adopt the Maryland high court's analysis in *Clear Channel Outdoor, Inc.*

**Conclusion**

**{¶ 48}** "The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition." *Kovacs v. Cooper*, 336 U.S. 77, 102, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Black, J., dissenting). Included in the guarantee of free speech and a free press is the prohibition against selective taxation that is designed to suppress, control, or punish speech or that is structured in such a way that the tax creates an unacceptable potential for censorship by the government or self-censorship by speakers and publishers.

**{¶ 49}** The city of Cincinnati has imposed such a discriminatory tax, singling out members of the press and placing the tax's burden on a small group of speakers and publishers in a way that both directly limits the circulation of protected speech and creates the danger that speech will be added or removed based on a desire to please, or avoid the wrath of, city council. That the tax involves billboards rather than the institutional press is of no consequence, and strict scrutiny applies. And because the city's need to raise revenue does not justify its selective tax on speech and the press, the tax does not survive strict scrutiny and therefore impermissibly infringes on the rights to free speech and a free press enshrined in the First Amendment to the United States Constitution.

**{¶ 50}** For these reasons, we reverse the judgment of the First District Court of Appeals and reinstate the trial court's order permanently enjoining the

enforcement of Cincinnati Municipal Code Chapter 313.

Judgment reversed and injunction reinstated.

O'CONNOR, C.J., and FISCHER, DEWINE, STEWART, and LASTER MAYS, JJ., concur.

DONNELLY, J., concurs in judgment only.

ANITA LASTER MAYS, J., of the Eighth District Court of Appeals, sitting for BRUNNER, J.

**APPENDIX B**

IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

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No. C-180675

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LAMAR ADVANTAGE GP CO., LLC, et al.,

v.

CITY OF CINCINNATI

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Decided: June 18, 2020

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Myers, P.J.
Winkler,
Bergeron,

JJ.

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Opinion by Winkler, J.

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**{¶1}** This appeal addresses the constitutionality of an excise tax placed on off-premises outdoor advertising signs, or billboards, within the city of Cincinnati. Two advertising companies, plaintiffs-appellees Lamar Advantage GP Company, LLC, d.b.a. Lamar Advertising of Cincinnati, OH, ("Lamar") and Norton Outdoor Advertising, Inc., ("Norton") filed suit against defendants-appellants the city of Cincinnati, Ohio, Nicole Lee, treasurer of the city of Cincinnati, Art Dahlberg, director of the department of buildings and inspections for the city of Cincinnati, and Reginald Zeno, finance director for the city of Cincinnati (collectively "the city"). Lamar and Norton challenged the constitutionality of the billboard tax and sought to preclude the city from enforcing the tax.

**{¶2}** The trial court held that the city's excise tax on billboards was unconstitutional and violated the First Amendment to the United States Constitution, and the trial court granted a permanent injunction barring the city from enforcing the tax. The city appeals the trial court's decision. For the reasons that follow, we affirm that portion of the trial court's decision holding that the city's prohibition on communications between outdoor advertising hosts and their customers regarding the tax is unconstitutional. We reverse the remainder of the trial court's decision holding the excise tax unconstitutional, and we remand for further proceedings.

**Factual Background and Procedural Posture**

**{¶3}** In June 2018, Cincinnati City Council enacted Ordinance No. 167-2018, which created an excise tax on billboards. The ordinance is embodied in Chapter 313 of the Cincinnati Municipal Code ("CMC"). The billboard tax provides that an "advertising host," who owns or controls an outdoor advertising sign in the city, must pay a tax that is the greater of either (1) seven percent of the gross receipts generated by any sign, or (2) an annual minimum tax calculated based upon the type, location, and square footage of the sign. CMC 313-3.

**{¶4}** In addition to imposing an excise tax, the ordinance also prohibits an advertising host from issuing a statement to an advertiser in which the tax is reflected. CMC 313-7(a). The ordinance also prohibits a host from indicating that an advertiser will absorb the cost of the tax. CMC 313-7(b).

**{¶5}** Soon after the passage of the billboard tax, Lamar and Norton filed separate complaints against the city challenging the constitutionality of CMC Chapter 313. In addition to challenging the billboard tax, Lamar and Norton also challenged another city ordinance, Ordinance 163, which raised the cost of permit fees for the construction and renewal of billboards ("the permit-fee ordinance"). The city has since repealed the permit-fee ordinance; however, the companies seek damages related to the permit fees. Lamar's and Norton's actions were consolidated by the trial court.

**{¶6}** In their complaints, Lamar and Norton alleged that CMC Chapter 313 was unconstitutional

under the First Amendment, the Equal-Protection Clause, and the Commerce Clause. Lamar and Norton also alleged that the city's actions constituted an unlawful taking of their private property for which an appropriation proceeding should issue, as well as claims under 42 U.S.C. 1983 and 42 U.S.C. 1988. Lamar and Norton requested damages, including a refund of any taxes, fees, and assessments collected by the city, and also requested declaratory and injunctive relief.

**{¶7}** Norton and Lamar filed motions for preliminary injunctions seeking to enjoin the city from enforcing CMC Chapter 313. The trial court held a lengthy evidentiary hearing over several days on the requests for a preliminary injunction. At the conclusion of the injunction hearing, the trial court entered an order requesting objections as to whether a permanent injunction should issue. The trial court ultimately granted in part Lamar's and Norton's motions for a preliminary injunction, and entered an order declaring the billboard tax unconstitutional under the First Amendment. The trial court then entered an order sua sponte consolidating the preliminary-injunction hearing with the issue of whether a permanent injunction should issue in accordance with Civ.R. 65. The city objected to any finding by the trial court as to whether CMC Chapter 313 was unconstitutional, but it did not object generally to the consolidation of the litigation.

**{¶8}** The trial court later entered a lengthy decision explaining its reasoning that CMC Chapter 313 violated the First Amendment. The trial court entered an order granting in part Lamar's and

Norton's requests for a permanent injunction and enjoined the city from enforcing CMC Chapter 313. The trial court included Civ.R. 54(B) language, finding that there was "no just reason for delay." It is from the issuance of the permanent injunction that the city now appeals.

**Jurisdiction**

**{¶9}** After the parties filed their merit briefs, this court ordered the parties to file supplemental briefing on the issue of whether this court had jurisdiction over the city's appeal.

**{¶10}** Appellate court jurisdiction is limited to the review of final orders. *See* Ohio Constitution, Article IV, Section 3(B)(2). An order is final and appealable only if it meets the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989).

**{¶11}** R.C. 2505.02 defines final orders. In relevant part, R.C. 2505.02(B) provides "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: * * * (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment[.]" A substantial right is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." *See* R.C. 2505.02(A)(1). R.C. 2505.02(A)(2) defines "special proceeding" as "an action or proceeding that is specially created by

statute and that prior to 1853 was not denoted as an action at law or a suit in equity."

**{¶12}** Here, the trial court declared the city's excise tax unconstitutional and permanently enjoined the city from further collection of the tax. An order that declares a legislative enactment unconstitutional affects a substantial right of the government. *Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 281 (1oth Dist.). The trial court's determination that CMC Chapter 313 was unconstitutional and could not be enforced affected a substantial right of the city.

**{¶13}** As to whether an order has been entered in a special proceeding, the character of the order on appeal is not determinative. *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 676 N.E.2d 890 (1997). Instead, courts must examine the character of the underlying action to determine whether a special proceeding exists. *Id*. Although the order from which the city appeals enters a permanent injunction, the character of the underlying proceeding brought by Norton and Lamar ultimately sought a declaration that CMC Chapter 313 was unconstitutional. An action seeking a declaratory judgment is a "special proceeding." *Riverside* at ¶ 12; *Whitley v. Progressive Cas. Ins. Co.*, 1st Dist. Hamilton No. C-110157, 2012-Ohio-329, ¶ 7. Thus, the trial court's injunction order was made in a special proceeding. Because the trial court's order affected the city's substantial rights, and it was made in a special proceeding, the order is final under R.C. 2505.02(B)(2).

**{¶14}** Even if an order is final under R.C. 2505.02, the order is only appealable if it satisfies Civ.R. 54(B), if applicable. *Chef Italiano Corp.*, 44 Ohio St.3d 86, 541 N.E.2d 64. Civ.R. 54(B) allows a court to enter "final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." When a trial court makes the determination under Civ.R. 54(B) that an interlocutory appeal "is consistent with the interests of sound judicial administration" and that "no just reason for delay exists," the trial judge has made a factual determination, which is entitled to deference. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 617 N.E.2d 1136 (1993), paragraphs one and two of the syllabus. Use of Civ.R. 54(B) language in an order, however, is not a "mystical incantation which transforms a nonfinal order into a final appealable order." *Id.* at 354.

**{¶15}** At the time the trial court entered its permanent injunction and declared CMC Chapter 313 unconstitutional, Lamar and Norton had multiple claims either still pending or that the trial court had failed to specifically dismiss. Norton and Lamar requested monetary damages and attorney's fees as part of their claims alleging that the billboard tax violated the First Amendment. In their supplemental briefs, the parties correctly assert that any damages and attorney's fees recoverable by Norton and Lamar would arise as separate claims against the city under 42 U.S.C. 1983 and 42 U.S.C. 1998. Therefore, the claims for monetary relief are sufficiently separate,

and the trial court's Civ.R. 54(B) certification is entitled to deference.

**{¶16}** Norton and Lamar also alleged several claims challenging the constitutionality of the city's billboard tax, and the trial court never addressed the other grounds, despite the apparent trial of those claims at the injunction hearing.

**{¶17}** Appellate courts have held that where a trial court enters a judgment in favor of a plaintiff on fewer than all of the alternate grounds argued by the plaintiff, this " 'does not strip the trial court's judgment of finality.' " *Cleveland v. State*, 8th Dist. Cuyahoga No. 106688, 2019-Ohio-315, ¶ 16, quoting *Riverside*, 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 281, at ¶ 12. This is because a judgment that has the effect of rendering other claims moot is final and appealable without regard to Civ.R. 54(B). *Wise v. Gursky*, 66 Ohio St.2d 241, 421 N.E.2d 150 (1981). In both *Cleveland* and *Riverside*, the courts determined that Civ.R. 54(B) did not apply when a trial court held a statute unconstitutional on one of multiple grounds raised. *See Cleveland* at ¶ 16; *Riverside*, 190 Ohio App.3d 765, 2010-Ohio-5868, 944 N.E.2d 281, at ¶ 15.

**{¶18}** The trial court's decision to hold the billboard tax unconstitutional under the First Amendment had the effect of rendering moot Norton's and Lamar's other claims challenging the constitutionality of the billboard tax. Civ.R. 54(B) does not apply to Norton's and Lamar's other claims regarding the constitutionality of the billboard tax because those claims are no longer pending. Even if Civ.R. 54(B) applied, however, the trial court's entry

included a Civ.R. 54(B) certification, which is entitled to deference.

**{¶19}** Finally, even though the city repealed the permit-fee ordinance, Norton and Lamar have surviving claims related to the permit fees that the city had collected from them pursuant to that ordinance. As to these remaining claims, the trial court's Civ.R. 54(B) certification that the legal and factual issues related to the billboard tax are separate from the issues surrounding the permit-fee ordinance is a factual determination that is entitled to deference. *See Wisintainer*, 67 Ohio St.3d 352, 617 N.E.2d 1136, at syllabus.

**{¶20}** Therefore, we hold that the city has appealed from a final, appealable order, and this court has jurisdiction over the city's appeal.

**Standard of Review**

**{¶21}** In this case, the order from which the city appeals grants a permanent injunction in favor of Lamar and Norton. Ordinarily, this court reviews the grant of a permanent injunction for abuse of discretion. *P&G Co. v. Stoneham*, 140 Ohio App.3d 260, 268, 280, 747 N.E.2d 268 (1st Dist.2000). Even though the trial court entered a permanent injunction, in doing so, the trial court declared the entirety of CMC Chapter 313 unconstitutional under the First Amendment and prohibited the city from enforcing the ordinance in all circumstances. As pointed out by the city, a duly-enacted municipal ordinance is entitled to a presumption of constitutionality with the burden placed on a challenger of the ordinance. *Arnold v.*

*Cleveland*, 67 Ohio St.3d 35, 38, 616 N.E.2d 163 (1993). The constitutionality of a legislative enactment is a question of law, which is reviewed de novo. *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, 88 N.E.3d 900, ¶ 16.

**Billboards, Taxes, and the First Amendment**

**{¶22}** In its first assignment of error, the city argues that the trial court erred in holding that the billboard tax violated the First Amendment.

**{¶23}** The First Amendment to the United States Constitution guarantees the freedom of speech. The notion that billboards are a means of "speech" entitled to First Amendment protection is not disputed. The United States Supreme Court first recognized the First Amendment protection given to billboards in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia*, the billboard owners challenged a San Diego ordinance that prohibited outdoor advertising signs. The ordinance created an exception to the general prohibition on outdoor advertising displays for those depicting religious symbols, government signs, and political-campaign signs. The Court recognized the use of billboards as a means to communicate a wide array of messages, and thus deserving of First Amendment protection. The Court held that the ordinance violated the First Amendment, although a majority could not agree on the reasoning. A plurality held that the ordinance violated the First Amendment because the ordinance made content-based distinctions among types of noncommercial speech.

Two other justices concurred and reasoned that the ordinance was content neutral, but that San Diego had failed to provide an adequate reason for a total ban.

**{¶24}** The United States Supreme Court has also recognized that the government's taxation of the media can implicate the First Amendment. The first of these cases was *Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). In *Grosjean*, Louisiana had imposed a license tax of two percent of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Only 13 of the 124 publishers in the state were subject to the tax. In holding that the tax violated the First Amendment, the Court reasoned that the tax appeared to be a calculated means to limit the flow of information.

**{¶25}** Next, the Supreme Court considered a use tax on ink and paper products consumed by publishers in *Minneapolis Star and Tribune Co. v. Minnesota Commr. of Revenue*, 400 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1984). In *Minneapolis Star*, the state of Minnesota had enacted a use tax on the cost of paper and ink products consumed in the production of a publication. The tax created an exemption for the first $100,000 worth of ink and paper consumed by a publication in a calendar year. After application of the $100,000 exemption, only 14 of 388 of the paid-circulation newspapers were required to pay the tax the first year the tax was imposed. One of those newspapers challenged the tax on First Amendment grounds.

**{¶26}** The Supreme Court invalidated Minnesota's use tax on publications for two reasons: (1) the

Minnesota tax singled out the press for differential treatment, and (2) the tax targeted a small group of newspapers. As to the first ground, the Court reasoned that singling out the press for differential treatment threatened to censor critical speech. The Court reasoned that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585.

**{¶27}** As to the second ground for invalidating Minnesota's tax, the Court reasoned that the taxing of only those publications consuming over $100,000 in ink and paper targeted a small group of newspapers. The Court reasoned that "when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." *Id.* at 591. The Court continued that "a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 591-592.

**{¶28}** The Court applied strict scrutiny to Minnesota's tax, meaning that the tax could not stand unless Minnesota could show that the burden placed on the First Amendment was necessary to achieve an overriding state interest. The Court held that Minnesota's interest in raising revenue did not justify the burden placed on the First Amendment.

**{¶29}** Following *Minneapolis Star*, the United States Supreme Court again considered whether a tax

violated the First Amendment in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). In *Arkansas Writers' Project*, the Court considered whether the Arkansas gross receipts tax, which contained an exemption for religious, professional, trade, and sports magazines, violated the First Amendment. Even though the tax applied generally to the sales of all tangible personal property, the Court determined that the differential tax treatment among magazines "suffers from the second type of discrimination identified in *Minneapolis Star*." *Id.* at 229. Because a magazine's tax status depended entirely on its content, the Court applied strict scrutiny, which required Arkansas to show that differential taxation of magazines was necessary to serve a compelling interest, and that the tax scheme was narrowly drawn to achieve that interest. Finding that none of the state's alleged interests sufficed, the Court held that the Arkansas tax violated the First Amendment.

**{¶30}** Finally, in *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), the United States Supreme Court considered the constitutionality of a generally applicable Arkansas sales tax, which exempted certain media segments. The Arkansas Gross Receipts Act imposed a four percent tax on the sale of all tangible personal property, and the tax contained an exemption for newspaper sales and magazine-subscription sales. A cable-television subscriber and provider argued that the sales tax violated the First Amendment by treating television differently.

**{¶31}** The *Leathers* Court recognized that cable television is a means of speech, but that the Arkansas tax treating cable-television providers differently than other media did not present the same concerns as *Minneapolis Star* and *Arkansas Writers' Project*. The Arkansas tax applied generally to the sale of all tangible personal property and did not single out the press for special treatment. Moreover, the Arkansas tax did not target a small group of cable providers. The tax applied to approximately 100 suppliers of cable television, and the record established that cable television provided a wide variety of messaging—including news and entertainment. Thus, the Court held that the First Amendment was not violated.

**Applying United States Supreme Court Cases to the Billboard Tax**

**{¶32}** The trial court in this case relied on *Grosjean*, *Minneapolis Star*, *Arkansas Writers' Project*, and *Leathers* in holding that the billboard tax violated the First Amendment. The trial court reasoned that these cases stood for the proposition that the government could not "single out and direct or target a tax solely at the exercise of First Amendment rights or at the means or instruments utilized in exercising First Amendment rights nor may the government impose a tax that targets a small narrow group to bear the burden of the tax." The trial court distinguished *Leathers*, the main case relied upon by the city, by reasoning that the sales tax at issue in *Leathers* applied generally to the sale of all tangible personal property, unlike the city's billboard tax. The trial court

applied the strict-scrutiny analysis used in *Minneapolis Star*, which required the city to show a compelling governmental interest that the city could not have achieved without the discriminatory tax. *Minneapolis Star*, 460 U.S. at 585, 103 S.Ct. 136, 575 L.Ed.2d 295. The trial court determined that the city had not met its burden to show that it could not have achieved its interest in raising revenue without the billboard tax.

**{¶33}** The city contends that the trial court erred in applying strict scrutiny to the billboard tax. The city relies on a recent case from Maryland in which the court considered whether a similar billboard tax violated the First Amendment, *Clear Channel Outdoor, Inc. v. Dir., Dept. of Fin. of Baltimore City*, 244 Md.App. 304, 316, 223 A.3d 1050 (Md.App.2020). Just like the city in this case, Maryland created an excise tax applicable only to billboard operators. Once implemented, the majority of the tax burden fell upon plaintiff Clear Channel, even though three other groups also had to pay the tax. Clear Channel challenged the tax under the First Amendment.

**{¶34}** The *Clear Channel* court examined the relevant United States Supreme Court decisions in *Metromedia*, *Minneapolis Star*, and *Leathers*. The court reasoned that after *Leathers*, a tax would trigger First Amendment concerns as follows:

> when it threatens to suppress the expression of particular ideas or viewpoints. 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.

*Clear Channel* at 321, quoting *Leathers*, 499 U.S. at 447, 111 S.Ct. 1438, 113 L.Ed.2d 494.

**{¶35}** The court reasoned that Maryland's billboard tax was content neutral in that the tax applied whenever an advertising host charged a fee to a third party, regardless of the advertiser's message. Maryland's tax did not threaten the expression of any particular speech. The court also rejected Clear Channel's argument that the tax targeted a small group of speakers. The court reasoned that the tax applied to all billboard owners and operators, and it did not single out any particular group of billboard operators.

**{¶36}** We consider the analysis in *Clear Channel* persuasive here. The city's billboard tax applies to billboards regardless of the message displayed, and is therefore content neutral. Nothing in the language of the tax itself or the record suggests that the tax will threaten to suppress the expression of certain viewpoints. Moreover, the billboard tax does not single out a particular group of billboard operators to bear the burden of the tax.

**{¶37}** The trial court determined that the billboard tax wrongfully targets a small, narrow group of the media. The reason that a small group of billboard operators exists is because of a decades-old "cap and replace" program instituted by the city. The "cap and replace" program essentially means that a billboard operator must surrender an existing billboard in order to construct a new billboard. As a result of the city's market restrictions on billboards, the supply of billboards has held steady over time. Norton and Lamar have an oligopoly on the market of billboard licenses in Cincinnati with an approximate total of 415 signs and 450 signs respectively. Thus, market forces and other government restrictions on billboards created a small group of billboard operators to bear the burden of the tax. The tax itself did not single out a small group for taxation.

**{¶38}** Furthermore, differential taxation of the media is not constitutionally suspect if "justified by some special characteristic of the press." *Minneapolis Star*, 460 U.S. at 585, 103 S.Ct. 1365, 75 L.Ed.2d 295. Billboard operators are different from more traditional press mediums like news organizations. Billboard operators themselves seldom display their own content, and news organizations generally publish their own content or viewpoints.

**{¶39}** As discussed in *Leathers*, differential taxation of the press "is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447, 111 S.Ct. 1438, 113 L.Ed.2d. 494. In this case, the billboard tax does not pose a danger of suppression of ideas. The billboard tax applies regardless of the

message conveyed, and the evidence presented at the injunction hearing shows that the billboard operators display a myriad of messages from various corporate, nonprofit, and government agencies. Therefore, the billboard tax does not implicate First Amendment concerns.

**{¶40}** We determine that the billboard tax does not infringe on the First Amendment. As a result, we sustain the city's first assignment of error.

**The "Not to be Separately Stated or Charged" Provision**

**{¶41}** In the city's second assignment of error, it argues that the trial court erred in separately enjoining CMC 313-7, entitled "Tax Not to be Separately Stated or Charged." CMC 313-7 limits communications between advertising hosts, like Lamar and Norton, and their customers.

**{¶42}** CMC 313-7 provides:

> (a) The tax shall not be stated or charged separately from the rent or other consideration paid by an advertiser for use or occupancy of an outdoor advertising sign or shown separately on any record thereof, or otherwise reflected upon any bill, statement, or charge made for the sign's use or occupancy issued or delivered by the advertising host.
>
> (b) No advertising host shall state in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by an

> advertiser, or that it will be added to the rent or other charge.
>
> (c) Nothing in this section prohibits an advertising host from doing the following:
>
> i. including in the rent or price it charges an advertiser an amount sufficient to recover the tax imposed by this chapter;
>
> ii. including an amount sufficient to recover the tax imposed by this chapter on a billing or invoice pursuant to the terms of a written license or lease agreement providing for the recovery of the advertising host's tax costs; or
>
> iii. otherwise recovering an amount sufficient to recover the tax imposed by this chapter on a billing or invoice pursuant to the terms of a written agreement executed prior to the effective date of this chapter.

**{¶43}** In urging us to reverse the trial court's decision, the city argues that the trial court failed to exercise judicial restraint in reaching the constitutionality of CMC 313-7. The city argues that it did not have notice that the trial court would decide the constitutionality of this provision. The record belies the city's notice argument. During closing arguments at the injunction hearing, all parties argued the constitutionality of CMC 313-7. The trial court and counsel discussed the possible severability of provisions of CMC Chapter 313. Therefore, the city

had sufficient notice that the constitutionality of CMC 313-7 would be separately considered by the trial court.

**{¶44}** The city also argues that the trial court overstated the breadth of speech that CMC 313-7 prohibits. The trial court determined that CMC 313-7 was a content-based restriction on noncommercial speech, and therefore must be subject to strict scrutiny, meaning that the city must show that CMC 313-7 is necessary to serve a compelling interest by the city, and that CMC 313-7 is narrowly drawn to achieve that end. *See Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (applying strict scrutiny to content-based regulations of political speech). The trial court reasoned that CMC 313-7 restricted noncommercial, political speech, because the provision was a calculated means for public officials to avoid accountability for the billboard tax and the inevitable increased advertising costs of billboards.

**{¶45}** The trial court's determination that CMC 313-7 prohibits political speech is not supported by the evidence at the hearing and contradicts the plain language of the ordinance. No evidence of political motive for CMC 313-7 was offered at the hearing. The plain language of CMC 313-7 only regulates the billboard operator's speech vis-à-vis an advertiser for the billboard space. Speech that "relate[s] solely to the economic interests of the speaker and its audience," or speech that "propos[es] a commercial transaction" is commercial speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 561-562, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). "The Constitution

therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-563.

**{¶46}** In *Central Hudson*, the United States Supreme Court developed a level of intermediate scrutiny to be applied to commercial speech:

> it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

**{¶47}** The Sixth Circuit applied the *Central Hudson* test to a similarly worded Kentucky tax in *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir.2008). The Kentucky statute imposed a tax on telecommunications services. Part of the Kentucky tax prohibited telecommunications providers from separately stating the tax on the bill to consumers. Kentucky's justification for the "no-stating-the-tax" provision was to avoid consumer confusion over who bore the responsibility of the tax—the providers.

**{¶48}** The *BellSouth* court held that the "no-stating-the-tax" provision violated the *Central Hudson* standard. The court reasoned that the telecommunications providers would not be engaging

in unlawful or misleading speech by telling consumers that they were raising prices as the result of a new tax. The court assumed for the sake of argument that Kentucky's justification for the provision was substantial, but the court reasoned that the provision as worded did not directly advance the government's interest. The court reasoned that the no-stating-the-tax provision allowed providers to tell consumers anything they wanted about the tax except in an invoice.

**{¶49}** As to the third prong of the *Central Hudson* test, the "reasonable-fit" prong, the court theorized multiple ways Kentucky could avoid consumer confusion that would not restrict speech, including enforcement of existing federal-consumer protection laws, or the requirement of a disclaimer stating that the tax must be borne by the providers. *BellSouth* at 508. Therefore, the court held that the no-stating-the-tax provision violated the First Amendment.

**{¶50}** The city argues that the *Central Hudson* test applicable to commercial speech is inapplicable here because CMC 313-7 is aimed at prohibiting misleading speech by advertising hosts regarding the tax. The United States Supreme Court has held that "inherently misleading" speech made in the course of a commercial transaction may be prohibited by the government. *In re R. M. J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). The city's argument that any communications between advertising hosts and their customers regarding the billboard tax is somehow inherently misleading is unpersuasive.

**{¶51}** Applying *Central Hudson* to CMC 313-7, we assume that the city has a substantial interest in

ensuring that the billboard tax operates as an excise tax and not a sales tax. The same governmental interest was at issue in *BellSouth*. However, just as in *BellSouth*, CMC 313-7 is broader than necessary to achieve the city's interest. CMC 313-7 prohibits billboard operators from issuing a bill, statement, or charge to an advertiser in which the tax is reflected. CMC 313-7(a). CMC 313-7 even prohibits "indirect" statements by billboard operators that the tax will be absorbed by the advertisers. CMC 313-7(b). However, CMC 313-7 permits billboard operators to increase rent to recover the cost of the tax. CMC 313-7(c). It is not clear how billboard operators could justifiably raise their customers' advertising costs without informing them of the billboard tax. Just as in *BellSouth*, a simple disclaimer to the customers would clear up any would-be confusion that the billboard tax remains the operators' responsibility to pay.

**{¶52}** Therefore, we determine that CMC 313-7 is broader than necessary to achieve the city's interest in ensuring that the billboard tax remains an excise tax and not a sales tax, and, therefore, CMC 313-7 fails the *Central Hudson* test. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343, 65 L.Ed.2d 341. We overrule the city's second assignment of error.

**Conclusion**

**{¶53}** We affirm that portion of the trial court's decision holding CMC 313-7 unconstitutional under the First Amendment. The remainder of the trial court's decision holding the entirety of CMC Chapter 313 unconstitutional is reversed. We remand the case

to the trial court for further proceedings consistent with this opinion and the law.

Judgment affirmed in part, reversed in part, and cause remanded.

**APPENDIX C**

IN THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

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No. A-1804105 (consolidated with A-1804125

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LAMAR ADVANTAGE GP CO., LLC, et al.,

v.

CITY OF CINCINNATI

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Entry Converting Preliminary Injunction into Permanent Injunction

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Issued: November 9, 2018

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Hartman, J.

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"It is generally improper for a court to dispose of a case on the merits following a hearing for preliminary injunction without consolidating that hearing with a hearing on the merits or otherwise giving notice to counsel that the merits would be considered." *George P. Ballas Buick-GMC, Inc. v. Taylor Buick, Inc.*, 5 Ohio App.3d 71, 5 Ohio B. 182, 449 N.E.2d 503 (6th Dist. 1982). Nonetheless, because Rule 65(B)(2) of the Ohio Rules of Civil Procedure "provides that consolidation may be ordered 'before or after beginning the hearing,' the trial court can transform a preliminary injunction hearing into a consolidated hearing at any time and may do so on its own motion." 11A Wright, Miller & Kane, Federal Practice and Procedure § 2950 (2d ed. 1995). However, "[t]his power must be tempered by the due process principle that fair notice and an opportunity to be heard must be given the litigants before the disposition of a case on the merits." Id. But "when the parties in fact presented their entire cases and no evidence of significance would be forthcoming at trial, then [a] trial court's consolidation will not be considered to have been improper." Id.; accord *Capital City Gas Co. v. Phillips Petroleum Co.*, 373 F.2d 128, 131 (2d Cir. 1967)("permanent relief might be granted after a hearing upon a temporary injunction if no genuine issues of fact are found to be present").

In the case sub judice, prior to the commencement of the hearing on the Motions for Preliminary Injunctions, the parties conducted significant discovery, including depositions. Then, following several days of testimony and extensive argument by counsel, the Court issued a Preliminary Injunction precluding Defendants from undertaking any action to

implement or enforce any and all provisions of Chapter 313 of the Cincinnati Municipal Code, including, without limitation, the outdoor advertising tax provided for therein. During this entire process, all parties acknowledged that the issues sub judice concerning Chapter 313 (which was enacted by Ordinance No. 167-2018) involved predominately legal issues. And this proposition was reiterated by the parties during oral argument held on October 23, 2018, at which time the parties specifically addressed whether the Preliminary Injunction should be converted to a permanent injunction and, if so, whether language should be included finding no just reason for delay pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure.

Additionally, the Court apprized the parties formally on November 1, 2018, of its *sua sponte* consideration of whether to convert the Preliminary Injunction into a permanent injunction. In response thereto, Plaintiff LAMAR ADVANTAGE GP CO., LLC, dba LAMAR ADVERTISING OF CINCINNATI, OH, and Defendants CITY OF CINCINNATI and its officials tendered additional written responses to such potential action by the Court, indicating no substantive objection to the conversion.

While LAMAR and Plaintiff NORTON OUTDOOR ADVERTISING, INC., filed Amended Complaints since the issuance of the Preliminary Injunction, the Amended Complaints make no new substantive allegations concerning the issues underlying the scope of the Preliminary Injunction, i.e., the constitutionality of Chapter 313 of the Cincinnati Municipal Code as adopted through Ordinance No.

167. Thus, the Amended Complaints do not alter the evidence or issues presented to the Court as it relates to Chapter 313.

And while the parties have generally acknowledged the appropriateness to issue a permanent injunction, the Court still has undertaken an independent assessment of the factors for issuance of a permanent injunction. "The test for granting a permanent injunction is similar to the test used for granting a preliminary injunction." *West Branch Local School Dist. Bd. of Ed v. West Branch Ed Ass'n*, 35 N.E.3d 551, 2015-Ohio-2753 ¶15 (7th Dist.). However, certain distinctions do exists. Whereas "[t]he preliminary injunction test requires the moving party to prove a substantial likelihood of success on the merits," a permanent injunction test requires "the party seeking it to demonstrate a right to relief under the applicable substantive law." Id. And in addition to demonstrating irreparable injury, a complaining party seeking a permanent injunction must also demonstrate the lack of an adequate remedy at law. *Ohio Hosp. Ass'n v. Ohio Bur. of Workers' Comp.*, 2007-Ohio-1499 ¶24 (10th Dist.). But ultimately, "[t]he essential prerequisite to a permanent injunction is the unavailability of an adequate remedy at law. Irreparable injury is, however, one basis, and probably the major one, for showing the inadequacy of any legal remedy. Often times the concepts of 'irreparable injury' and `no adequate remedy at law' are indistinguishable." *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123-24 (5th Cir. 1976)(internal citation omitted)). Based upon the Court's independent

assessment of these factors,[1] the Court finds the analysis supporting the issuance of the Preliminary

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[1] In support of the issuance of the *Preliminary Injunction*, the Court addressed, inter alia, the decision in *Clear Channel Outdoor, Inc. v. Department of Finance of Baltimore City*, 2018 Md. Tax LEXIS 1, 2018 WL 1178952 (Md. Tax Feb. 27, 2018), wherein the Maryland Tax Court upheld a billboard tax in Baltimore. *See Entry Granting in Part and Denying in Part Motions for Preliminary Injunction, at 20 n.10*. Since the issuance of the *Preliminary Injunction*, the decision of the Maryland Tax Court was affirmed by the Baltimore City Circuit Court. *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, Case No. 24-C-18-001778 (Baltimore City Cir. Ct. Oct. 22, 2018).

As part of the present consideration of the merits on the issuance *vel non* of a permanent injunction, this Court has also reviewed that recent decision by the Baltimore City Circuit Court. Nonetheless, the analysis by that court has not altered the conclusion of this Court on the merits. In affirming the decision of the Maryland Tax Court, the Baltimore City Circuit Court summarily accepted and proceeded from the proposition that "the tax [upon billboards imposed by Baltimore] is directed at a means of expression rather than the expression itself' and that "[t]he First Amendment only affords protection to regulation of actual or symbolic speech, and expressive conduct." *Id.* at 6. It, therefore, summarily concluded that "[the billboard tax] is not a tax on Clear Channel's right to free speech".

But well-established precedent clearly recognizes that the means of engaging in or distributing speech are protected under the First Amendment. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)("we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments"); *Kingsley Intern. Pictures Corp. v. Regents of University of State of N.Y.*, 360 U.S. 684, 690, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959)("[i]t is enough for the present case to reaffirm that motion pictures are within the

First and Fourteenth Amendments' basic protection); Ayres v. City of Chicago, 125 F.3d 1010, (7th Cir. 1995)("distribution of T-shirts is the principal means by which the group propagates its views" and "there is no question that the T-shirts are a medium of expression *prima facie* protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away"); *Romantics v. Activision Pub., Inc.*, 574 F.Supp.2d 758, 765 (ED. Mich. 2008)("[n]umerous courts have held that video games are expressive works protected by the First Amendment"); *Chicago Tribune Co. v. City of Chicago*, 705 F.Supp. 1345, 1347 (N.D. Ill. 1989)("[t]he First Amendment protects the means of newspaper distribution as well as the content and ideas expressed in newspapers").

In fact, the Supreme Court recognized in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), that billboards themselves, i.e., means of expression, are entitled to First Amendment protection. *Id.* at 524 (Brennan, J., concurring)("[t]he plurality and I agree that billboards are a medium of communication warranting First Amendment protection"); *see also Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir. 2005)("[b]ilboards and other visual signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected"); *Bill Salter Advertising, Inc. v. City of Brewton, Ala.*, 486 F.Supp.2d 1314, 1328 (S.D. Ala. 2007)("advertising billboards at issue in these proceedings are plainly entitled to First Amendment protection"). Thus, the entire foundation for the analysis of the Baltimore City Circuit Court, *i.e.*, that because the billboard tax is directed at the "means of expression rather than the expression itself' there is not a First Amendment interest implicated, is clearly repudiated by well-established case law.

However, unlike the Maryland Tax Court, the Baltimore City Circuit Court actually attempted to distinguish *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). In so doing, though, the Court initially focused upon the issue of

whether the challenged tax deviated from an already-existing tax scheme. Relying upon the fact that the tax at issue in *Minneapolis Star* was a "special use tax" that deviated from an already-existing unitary sales tax scheme, the Baltimore City Circuit Court declared *Minneapolis Star* to be "immaterial" because "there [was] no preexisting general [tax] scheme [in Baltimore] that the City deviate[d] from to single out billboard operators for special treatment." *Clear Channel Outdoor*, Case No. 24-C-18-001778, at 8. Such a proposition is spacious. Even if the deviation *vel non* from an existing tax scheme is pertinent, the absence of a particular type of tax is an existing tax scheme; and the City of Baltimore clearly deviated from that already-existing tax scheme when it isolated and targeted billboard operators for the imposition of an entirely new tax. The same is true with respect to the billboard tax imposed by the City of Cincinnati.

Additionally, the Baltimore City Circuit Court attempted to distinguish *Minneapolis Star* on the premise that the latter involved constitutional rights for the press and that because "billboards are primarily for advertising... [they] simply [are] not in the same category as the fourth estate." *Clear Channel Outdoor*, Case No. 24-C-18-001778, at 9. But "[t]he Supreme Court has made clear that courts should eschew creating a hierarchy among First Amendment rights." *Rutherford v. Katonah-Lewisboro School Dist.*, 670 F.Supp.2d 230, 245 (S.D.N.Y. 2009). Yet that is precisely what the Baltimore City Circuit Court has done (and, in so doing, contradicting its earlier assessment that the means of expression are not entitled to protection).

And in a final effort to distinguish *Minneapolis Star*, the Baltimore City Circuit Court relied upon the difference in the "type of tax" involved, i.e., a use tax versus an excise tax. *Clear Channel Outdoor*, Case No. 24-C-18-001778, at 9. But the type of tax involved is not the issue; regardless of the appellation that may be given to any particular the tax, the focus is whether, in the exercise of its taxing powers, the government has singled out and directed or targeted a tax solely at the exercise of First Amendment rights or at the means or

Injunction clearly supports the issuance of a permanent injunction.

Because the issuance of a permanent injunction as it relates to Chapter 313 of the Cincinnati Municipal Code will not resolve all the claims sub judice, the Court must consider whether to make the determination that there is no just reason for delay pursuant to Ohio R. Civ. P. 54(B).

> In deciding that there is no just reason for delay, the trial judge makes what is essentially a factual determination — whether an interlocutory appeal is consistent with the interests of sound judicial administration, i.e., whether it leads to judicial economy. Trial judges are granted the discretion to make such a determination because they stand in an unmatched position to determine whether an appeal of a final order dealing with [multiple-claim or multiple-party actions] is most efficiently heard prior to trial on the merits. The trial court can best determine how the court's and the parties' resources may most effectively be utilized. The trial court is most capable of ascertaining whether not granting a final order might result in the case being tried twice. The trial court has seen the development of the case, is familiar with much of

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instruments utilized in exercising First Amendment rights or whether a tax has targeted a small narrow group to bear the burden of the tax. That is precisely what the CITY OF CINCINNATI has done in the case *sub judice* and, in so doing, the CITY OF CINCINNATI has clearly run afoul of the First Amendment.

> the evidence, is most familiar with the trial court calendar, and can best determine any likely detrimental effect of piecemeal litigation.

*Chef Italian Corp. v. Kent State Univ.*, 44 Ohio St. 3d 86, 541 N.E.2d 64 (1989).

The CITY OF CINCINNATI objects to the inclusion of Rule 54(B) language "at this point" of the proceedings, maintaining that the inclusion of such language would bifurcate the issues sub judice and preclude appellate review of all issues at one time. While "Rule 54(B)'s general purpose is to accommodate the strong policy against piecemeal litigation with the possible injustice of delayed appeals in special situations," *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381, the raison d'être for Ohio R Civ. P. 54(B) supports allowing, inter alia, separate and discrete claims to proceed forward on appeal apart from unrelated claims even when all claims are against the same parties.

"In the ordinary case, Civ.R. 54(B) certification demonstrates that the trial court has determined that an order, albeit interlocutory, should be immediately appealable, in order to further the efficient administration of justice and to avoid piecemeal litigation or injustice attributable to delayed appeals." *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 909 N.E.2d 88, 2009-Ohio-1971 ¶11. In the case sub judice, two ordinances passed by the Cincinnati City Council are at issue, viz., Ordinance No. 167-2018 (involving the billboard tax and the no-stating-the-tax provisions) and Ordinance No. 163-2018 (involving the fees associated with billboard permits and the renewal

period for such permits). And while the budgetary process in the City of Cincinnati brought about the passage of both ordinances, the factual and legal issues involved between the two are separate and distinct. Furthermore, legal issues dominate with respect to Ordinance No. 167, i.e., the target of the forthcoming permanent injunction. And finally, the interest of justice militates in minimizing the period that implementation of Ordinance No. 167 is enjoined by this Court should appellate review ultimately uphold its constitutionality. Thus, the Court finds, in its discretion, that the issuance of a permanent injunction should include language declaring that there is no just reason for delay.

For the foregoing reason, a permanent injunction will issue consistent with the foregoing, as well as the analysis set forth in the Entry Granting in Part and Denying in Part Motion for Preliminary Injunction.

SO ORDERED.

/s/ Curt C. Hartman

Curt C. Hartman, Judge

Hamilton County Common Pleas Court

**APPENDIX D**

IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

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No. A-1804105 (consolidated with A-1804125)

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LAMAR ADVANTAGE GP CO., LLC, et al.,

v.

CITY OF CINCINNATI

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Entry Granting in Part and Denying in Part Motions for Preliminary Injunction

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Issued: October 17, 2018

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Hartman, J.

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Following receipt of testimonial and documentary evidence over the course of several days, this matter is now before the Court on the *Motions for Preliminary Injunction* filed by Plaintiff LAMAR ADVANTAGE GP CO., LLC, dba LAMAR ADVERTISING OF CINCINNATI, OH, and Plaintiff NORTON OUTDOOR ADVERTISING, INC., wherein both parties seek the issuance of a preliminary injunction so as to restrain Defendants CITY OF CINCINNATI and its officials from implementing or enforcing: (1) Chapter 313 of the Cincinnati Municipal Code as recently enacted through Ordinance No. 167-2018 which imposed an Outdoor Advertising Sign Excise Tax on all outdoor advertising signs, *i.e.*, a billboard tax, throughout the City of Cincinnati; and (ii) certain provisions of Chapter 895 of the Cincinnati Municipal Code as recently amended through Ordinance No. 163-2018 whereby, *inter alia*, certain fees associated with permits concerning billboards were increased and the renewal period for such permits was changed from a biennial requirement to an annual requirement.

Because: (i) the newly-enacted billboard tax directly and unequivocally isolates and targets for taxation a small group that owns and controls the means or instruments used exclusively for the exercise of First Amendment rights; and (ii) the tax constitutes a discriminatory tax upon those means or instruments, the billboard tax clearly violates the First Amendment consistent with *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936), *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.

Ct. 1365, 75 L. Ed. 2d 295 (1983), and *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991). Furthermore, because the billboard tax is the *sine qua non* for the entirety of Chapter 313 of the Cincinnati Municipal Code, as well as in light of another provision of Chapter 313 also violating the First Amendment, severing the billboard tax would not be consistent with nor advance the clear intention of the Cincinnati City Council through its adoption of Ordinance No. 167. Accordingly, a preliminary injunction against implementation or enforcement of any provision of Chapter 313 is warranted.

With respect to the recently-amended provisions of Chapter 895 of the Cincinnati Municipal Code, because, following commencement of this action, the Cincinnati City Council passed Ordinance No. 323-2018 whereby it effectively reinstated the *status quo ante* passage of Ordinance No. 163 as it related to both the fees associated with billboard permits and the renewal period for such permits as contained in Chapter 895 of the Cincinnati Municipal Code, the claim for preliminary injunctive relief with respect to Chapter 895 as amended by Ordinance No. 163 has become moot.

I.

A.

On June 27, 2018, the Cincinnati City Council passed, as an emergency measure, Ordinance No. 167-2018. Ordinance No. 167 enacted, *inter alia*, a new Chapter 313 to the Cincinnati Municipal Code through which the CITY OF CINCINNATI "levied an

excise tax on the privilege of installing, placing, and maintaining" outdoor advertising signs, *i.e.*, billboards, in the City of Cincinnati. *Cincinnati Municipal Code § 313-3(a).* The amount of the billboard tax is the greater of: (i) seven percent of the gross receipts generated by or attributable to any billboard located in the City of Cincinnati; or (ii) an annual minimum tax which varies based upon the type of billboard (electronic versus non-electronic) and the location of the billboard (in close proximity to an interstate or primary highway versus all other locations).[1] *Cincinnati Municipal Code § 313-3(b).*

Generally speaking, the billboard tax is imposed against all signs in the City of Cincinnati greater than 36 square feet in total face area, regardless of whether the sign is advocating a commercial message *vel non* and whether any commercial message is directed to the premises where the sign is located *vel non. See Cincinnati Municipal Code § 313-5 (a)(iii); Cincinnati Municipal Code § 313-1-O.* The only other exceptions to the imposition of the billboard tax are for: (1) signs "owned, controlled, leased, licensed, or otherwise used by the United States, the State of Ohio, or the city of Cincinnati"; and (ii) signs otherwise declared exempt from regulation pursuant to Cincinnati Municipal Code § 895-2 and Cincinnati Municipal Code § 1427-

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[1] The specific amount of the minimum annual tax on each billboard is $2 per square foot of sign face area if the billboard is not located within 660 feet of an interstate or primary highway system and, if located within 660 feet of an interstate or primary highway system, then $5 per square foot of sign face area if the billboard is non-electronic or $10 per square foot of sign face area if the billboard is electronic.

07.[2] *Cincinnati Municipal Code § 313-5 (a)(i) & 313-5 (a)(ii).*

All persons owning or controlling any billboard within the City of Cincinnati are required to register all billboards subject to the billboard tax. *Cincinnati Municipal Code § 313-9.*[3] And those persons are also

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[2] The same four categories of signs are exempt from: (a) the regulation of outdoor advertising signs (under Cincinnati Municipal Code § 895-2); and (b) the zoning regulations (under Cincinnati Municipal Code § 1427-07), *viz.*: (i) signs erected or displayed in the public right-of-way: (ii) signs erected or displayed on Fountain Square pursuant to rules and regulations for the use of Fountain Square; (iii) signs approved by the City for a special event or other event authorized under park board rules; and (iv) on-site signs erected or displayed on public property by the City of Cincinnati.

[3] All obligations under Chapter 313 of the Cincinnati Municipal Code — from registration to payment of the billboard tax — are actually imposed upon the "advertising host". The term "advertising host" is broadly defined to mean "any person who owns or controls an outdoor advertising sign, including the person's agent, affiliate, employee, or other representative who acts on the person's behalf or in the interests of the person with regard to an outdoor advertising sign in the city of Cincinnati." *Cincinnati Municipal Code § 313-1-A1.* Additionally, "[w]here an advertising host performs its functions through an agent of any type or character other than an employee, the agent shall also be deemed an advertising host for purposes of [Chapter 313] and shall have the same duties and liabilities as its principal." *Cincinnati Municipal Code § 313-13(a).* Additionally, the fiscal officer of any advertising host is also subject to personal liability for the failure to make requisite tax return filings or the payment of the billboard tax. *Cincinnati Municipal Code § 313-13(b).* Thus, under the broad definition utilized in Chapter 313 of the Cincinnati Municipal Code, the sundry obligations and liabilities relative to the billboard tax may very easily be imposed upon attorneys, lobbyists, et al., of any outdoor advertising company.

mandated to file quarterly and annual tax returns, with the latter requiring disclosure of the gross receipts for each billboard. *Cincinnati Municipal Code § 313-11(b) & 313-11(c).* Furthermore, without the issuance of a warrant or the opportunity for pre-compliance review before a neutral decision maker, those subject to the billboard tax (or even suspected of being subject to it) are mandated to afford the city treasurer or his designee "access to all records and evidence at all reasonable times" as well as to provide them "the means, facilities and opportunity to conduct any examination or investigation upon reasonable notice". *Cincinnati Municipal Code § 313-15(e)(i) & 313-15(e)(ii).*

While the owners of billboards may pass the cost of the billboard tax onto an advertiser who leases a billboard, *Cincinnati Municipal Code § 313-7(c)(i)*, the owners may not, by express prohibition, "state in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by an advertiser, or that it will be added to the rent or other charge." *Cincinnati Municipal Code § 313-7(b).* Also, the billboard tax may not "be stated or charged separately from the rent or other consideration paid by an advertiser... or shown separately on any record thereof, or otherwise reflected upon any bill, statement or charge made for the sign's use...." *Cincinnati Municipal Code § 313-7(a).*

In passing Ordinance No. 167 as an emergency ordinance, the Cincinnati City Council invoked the talismanic language that it was "necessary for the preservation of the public peace, healthy [sic], safety, and general welfare." *Ordinance No. 167-2018, sec. 7.*

Specifically, the City Council indicated the immediate implementation of the billboard tax was necessary so that city officials and departments could establish the necessary regulations and procedures, put in place the appropriate staffing, and reach out to owners of billboards so that the City could begin to collect the tax no later than October 15, 2018, when the first quarterly tax returns and associated payments would be due. *Ordinance No. 167-2018, sec. 5 & 7.*

B.

On the same day it passed Ordinance No. 167, *i.e.*, on June 27, 2018, the Cincinnati City Council passed, also as an emergency measure, Ordinance No. 163-2018. Part of the budget proposal originally presented by the Mayor of Cincinnati, Ordinance No. 163 amended, *inter alia*, certain provisions of Chapter 895 of the Cincinnati Municipal Code so as to significantly increase certain permit fees associated with billboards.

Before constructing any billboard in the City of Cincinnati, a person must obtain an outdoor advertising construction permit in addition to any required building permit or other permit or license. *Cincinnati Municipal Code § 895-13.* Pursuant to Ordinance No. 163, the cost for the outdoor advertising construction permit increased from $70 to $280. *Ordinance No. 167-2018, sec. 5.* Additionally, the City's director of buildings and inspections "has the duty to inspect the construction of outdoor advertising signs" to ensure "the construction has been completed in accordance with all applicable codes." *Cincinnati Municipal Code § 895-13.*

Thereupon, the director issues a permit number for the individual billboard which must be displayed, together with the owner's name, on the billboard or accompanying structure so that it is visible from the public right-of-way. *Cincinnati Municipal Code § 895-13*.

Ordinance No. 163 also increased the frequency by which owners of billboards must renew an outdoor advertising permit, as well as increasing the fees associated with each renewal application. While owners of billboards previously renewed such permits on a biennial basis, Ordinance No. 163 now mandates annual renewals. And in terms of the fee structure for a renewal permit, if the owner of a billboard filed a verified certification that each billboard was being displayed and maintained in accordance with Chapter 895 of the Cincinnati Municipal Code, the fee increased, pursuant to Ordinance No. 163, from $20 to $160 for each billboard face, *see Cincinnati Municipal Code § 895-19(a)*; if the owner simply applied to the City's director of building and inspections for the City to conduct inspection of a billboard to ensure compliance with the requirements of Chapter 895, the fee increased, pursuant to Ordinance No. 163, from $40 to $160 for each billboard face, *see Cincinnati Municipal Code § 895-19(b)*; but if an owner failed to undertake either of the two foregoing options, then the City still inspected the billboard but, in such a scenario, the fee for the renewal permit increased, pursuant to Ordinance No. 163, from $50 to $400 for each billboard face, *see Cincinnati Municipal Code § 895-19(c)*.

C.

LAMAR and NORTON are long-established owners of billboards within the City of Cincinnati. With approximately 450 and 415 billboards within the City, respectively, LAMAR and NORTON own the bulk of the billboards within the City. In previous years, LAMAR and NORTON would undertake the biennial process of renewing the permits for their billboards through the self-certification process pursuant to Cincinnati Municipal Code § 895-19(b) and paying the $20 fee for each billboard face.

Following enactment of Ordinance Nos. 167 & 163, LAMAR and NORTON commenced separate lawsuits challenging the constitutionality of the provisions related to the newly-enacted billboard tax and the increase in the costs and frequency of new construction or renewal permits for billboards. Following extensive oral argument by counsel for all parties on July 30, 2018, and with an adequate showing having been made, the Court issued a *Temporary Restraining Order* precluding the CITY OF CINCINNATI and various City officials from undertaking actions to implement or otherwise enforce either of the Ordinances as they relate to billboards. Pursuant to agreement of all parties, the *Temporary Restraining Order* remained in place and in effect beyond the 14-day limit provided for in Ohio R. Civ. P. 65.

A hearing on the *Motions for Preliminary Injunction* commenced on September 7, 2018, and continued in progress to subsequent days during the ensuing month. The parties tendered testimonial and documentary evidence addressing, generally

speaking, the communicative nature of billboards, the impact of the billboard tax and the impact which increased fees will have on LAMAR and NORTON (as well as on billboard advertising in general), and the actions taken or anticipated to be taken by the City under the newly enacted provisions. Following closing arguments, the matter is now before the Court for consideration of the *Motions for Preliminary Injunction*.

D.

After commencement of this action and submission of the *Motions for Preliminary Injunction*, the Cincinnati City Council passed Ordinance 323-2018 as an emergency measure without any discussion or debate. *See Notice of Additional Authority*.[4] Declaring that passage was necessary "to restore fees for certain

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[4] Through the *Notice of Additional Authority*, the CITY OF CINCINNATI put before the Court a certified copy of Ordinance No. 323. The Court has further reviewed the governmental website of the CITY OF CINCINNATI and the publication thereon of hyperlinks to audiovisual recordings of meetings of the Cincinnati City Council (www.cincinnati-oh.gov/council/council-rneeting-videos/ ), as well as the link to the particular meeting wherein it adopted Ordinance No. 323 ( https://archive.org/details/1018101000UN ). As such publication is from a governmental website and the audiovisual recording of the meeting is not subject to reasonable dispute, the Court has taken judicial notice of those proceedings (and, in particular, the audio visual recording starting at 1:14:55 when Ordinance No. 323 was considered during the course of the meeting). See *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 47 N.E.3d 124, 2015-Ohio-5056 ¶18 (taking judicial notice from governmental website). This review confirmed Ordinance No. 323 was passed as an emergency matter with no debate or discussion.

outdoor advertising sign permits and renewals to pre-existing levels to ensure fees assessed and charged by the City of Cincinnati are reasonably related to the costs impacts of the services giving rise to liability for those fees", *Ordinance 2018-323, sec. 5*, Ordinance No. 323 returned the fee for the outdoor advertising construction permit to that which it was prior to adoption of Ordinance No. 163,[5] as well as doing the same for the fees for a renewal permit and restoring the biennial renewal period.

"The purpose of a preliminary injunction is to preserve the *status quo* of the parties pending final adjudication of the case upon the merits." *Yudin v. Knight Industries Corp.*, 109 Ohio App.3d 437, 439, 672 N.E.2d 265 (6th Dist. 1996). "The *status quo* to be preserved by a preliminary injunction is the last, actual, peaceable, uncontested status which preceded the pending controversy." *Obringer v. Wheeling & Lake Erie Ry. Co.*, 2010-Ohio-601 ¶19 (3d Dist.) (quoting *Postma v. Jack Brown Buick, Inc.*, 157 Ill.2d 391, 193 Ill. Dec. 166, 626 N.E.2d 199, 202 (1993)); *accord Neamonitis v. Gilmour Academy*, 2009-Ohio-2023 ¶¶11-12 (8th Dist.)(trial court maintained *status*

[5] Ordinance No. 163 also increased the fee for a building permit. Ordinance No. 323 did not change the increased fee for building permits nor did it negate the requirement that, in addition to obtaining an outdoor advertising construction permit, a person desiring to construct a new billboard must also obtain a building permit. Thus, notwithstanding Ordinance No. 323, the CITY OF CINCINNATI has still increased the costs associated with obtaining an outdoor advertising construction permit.

*quo* by ordering a school, via temporary restraining order, to reinstate a student it had expelled).

Thus, notwithstanding the fact that Ordinance Nos. 167 & 163 became effective on July 1, 2018, the Court considers the *status quo* to possibly be maintained through the issuance of a preliminary injunction as the *status quo ante* adoption of the Ordinances. Such consideration is further appropriate in light of the quick nature by which both Ordinances were passed by the Cincinnati City Council as emergency measures with minimal advance public notice.

"Whether to grant or deny an injunction is a matter within the discretion of the trial court." *Electronic Classroom of Tomorrow v. Ohio Dep't of Ed.*, 92 N.E.3d 1269, 2017-Ohio-5607 ¶33 (10th Dist.). "In deciding whether a preliminary injunction should issue, a court should consider (1) the likelihood of success on the merits; (2) whether the party seeking the injunction will be irreparably harmed absent an injunction; (3) the harm to others if the injunction is granted; and (4) the public's interest in granting an injunction." *Aero Fulfillment Servs., Inc. v. Tartar*, 2007-Ohio-174 ¶22 (1st Dist.). But "[i]n determining whether to grant injunctive relief, courts have recognized that no one factor is dispositive. The four factors must be balanced, moreover, with the 'flexibility which traditionally has characterized the law of equity.'" *Cleveland v. Cleveland Elec. Blum. Co.*, 115 Ohio App. 3d 1, 14, 684 N.E.2d 343 (8th Dist.) (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)). Accordingly, "[w]hen there is a strong likelihood of success on the merits,

preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. In other words, what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits." *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (1996).

A.

"When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014)(quoting *Obatna for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)(quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009))); *accord Sindicato Puertorriqueno de Trabajadores v. Fortuna*, 699 F.3d 1, 10 (1st Cir. 2012)("[i]n the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis"). Thus, in balancing the four preliminary-injunction factors in a case involving potential constitutional violations such as that *sub judice*, nearly dispositive significance must be afforded to the likelihood-of-success analysis.

1.

With respect to the billboard tax imposed pursuant to Ordinance No. 167, LAMAR and NORTON make various constitutional challenges under both the United States Constitution and the Ohio Constitution. Because the Court ultimately concludes a sufficient

showing of entitlement to the issuance of preliminary injunction has been made based upon one of these constitutional bases, *i.e.*, the challenge based upon the First Amendment, the Court need not consider other alternative bases that might also support the issuance of a preliminary injunction.

a.

LAMAR and NORTON challenge the billboard tax imposed by Ordinance No. 167 as violating the First Amendment and the comparable provision of the Ohio Constitution. Generally speaking, they maintain, *inter alia*, that the tax impermissibly targets a select segment of speakers and singles out a distinct form of speech, *i.e.*, billboard advertising, for the imposition of the tax. *See Lamar Complaint ¶¶90-103; Norton Complaint ¶¶54-70.*

In considering this issue, the Court is mindful that the Supreme Court "has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981). As a result, the Supreme Court has appropriately recognized that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Id.* at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S. Ct. 448, 93 L. Ed. 513 (1949)(Jackson, J., concurring); *accord Cafe Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1285 (11th Cir. 2004)("'the law of billboards' is 'a taw unto itself'"). Nonetheless, "[b]illboards are a well-established medium of

communication, used to convey a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501. Thus, it is beyond cavil that billboards enjoy protection under the First Amendment as a direct means of disseminating speech, both commercial and non-commercia1.[6] *Id.* at 524 ("billboards are a medium of communication warranting First Amendment protection")(Brennan, J., concurring); *see Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir. 2005).

Yet, notwithstanding the First Amendment interests involved in the context of billboards, certain governmental regulation is permissible of the medium. Governments have a legitimate interest in controlling certain non-communicative aspects of billboards. *Metromedia*, 453 U.S. at 502; *accord View Outdoor Advertising, LLC v. Town of Schererville Bd. of Zoning Appeals*, 86 F.Supp.3d 891, 894-95 (N.D. Ind. 2015). And, thus, generally speaking, content-

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[6] Evidence at the hearing on the *Motions for Preliminary Injunction* established the broad scope of messages communicated through the medium of billboards. Such messages range from commercial speech to political speech to public service messages for charities or in support of law enforcement efforts. Furthermore, while most advertising appearing on billboards relay messages for the customers of LAMAR and NORTON, LAMAR and NORTON also transmit a sufficient number of their own messages on their billboards.

Additionally, because of changes in technology (especially through the use of digital billboards), the scope of messages conveyed through billboards appears to be trending to having more non-commercial messages contained on billboards in comparison to the situation decades ago when the messages on billboards were static and in place for several months.

neutral time, place or manner regulations of billboards are permissible to advance aesthetics and traffic safety. *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988)("[u]nder *Metromedia*, the City's interests in traffic safety and aesthetics are sufficient to justify continued content-neutral regulation of the noncommunicative aspects of billboards, such as size, spacing and design"); *RTM Media, L.L.C. v. City of Houston*, 518 F.Supp.2d 866, 875 (S.D. Tex. 2007) ("[t]he City can impose content neutral restrictions on time, place, and manner without reference to the content of the regulated speech and that are directly related to their goals, *e.g.*, restricting the overall number of billboards it permits, their location, size, *etc.*").

But the billboard tax imposed by Ordinance No. 167 is not an effort by the Cincinnati City Council to regulate the time, place or manner of billboards nor does the Ordinance seek to advance governmental interests of aesthetics or public safety. Instead, through the adoption of Ordinance No. 167, the Cincinnati City Council has directly and unequivocally isolated and targeted for taxation a small group that owns and controls the means or instruments used exclusively for the exercise of First Amendment rights, as well as imposing the tax upon those means or instruments, *i.e.*, the billboards themselves. Thus, case law addressing the noncommunicative aspects of billboard regulations, *e.g.*, size, spacing, location, *etc.*, are inapposite to the issue *sub judice*. Instead, the case *sub judice* must be considered in the context of efforts by governments to impose direct taxes upon the exercise of constitutional

rights or upon the means or instruments by which such rights are exercised, as well as in situations of targeting such a tax to a small or narrow group owning such means or instruments.

Generally speaking, First Amendment activities are not immunized from "any of the ordinary forms of taxation for support of the government." *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 80 L. Ed. 660 (1936). However, "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendments is as obnoxious as the imposition of a censorship or a previous restraint." *Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 577, 64 S. Ct. 717, 88 L. Ed. 938 (1944). In fact, the history and circumstances which antedated and attended the adoption of the First Amendment confirm an appropriate hostility should attend any effort by a government to target deliberately and directly for taxation the means or instruments of exercising First Amendment rights. *See generally Grosjean*, 297 U.S. at 245-49 (providing overview of colonial history of efforts by the English to tax the means of speech and of the press through imposition of stamp taxes and how such efforts served as the basis for advancement of the First Amendment); *Jones v. City of Opelika*, 316 U.S. 584, 616 n.10, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942)(Murphy, J., dissenting) ("[s]tamp taxes for purely revenue purposes were successfully resisted in Massachusetts in 1757 and again in 1785 on the ground that they interfered with freedom of the press"), *judgment vacated*, 319 U.S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1943).

Thus, "[the Supreme Court] [has] kept faith with the Founders' tradition by prohibiting the selective taxation of the press. And [it has] done so whether the tax was the product of illicit motive or not.... A tax on a newspaper's advertising revenue does not prohibit anyone from saying anything Yet it is unquestionably a violation of the First Amendment." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 253, 124 S. Ct. 619, 157 L. Ed. 2d 491 (Scalia, J., concurring in part, dissenting in part), *overruled, Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310, 365-66, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). And "[t]he language of the First Amendment does not place any greater emphasis on freedom of the press than it does on freedom of speech." *Rimmer v. Colt Industries Operating Corp.*, 495 F.Supp. 1217, 1224 (W.D. Mo. 1980), *rev'd on other grds.*, 656 F.2d 323 (8th Cir. 1981); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)(Burger, CJ., concurring)("[b]ecause the First Amendment was meant to guarantee freedom to express and communicate ideas, [there is] no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination"). Thus, that which Justice Scalia characterized in *McConnell* as clearly being unconstitutional, *i. e.*, to impose a tax on a newspaper's advertising revenue through a selective taxation of the press, applies *a fortiori* to a tax directed towards and imposed selectively upon similar means by which First Amendment rights are exercised.

"An unlimited power to tax involves, necessarily, a power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 327, 4 L. Ed. 579 (1819); *accord Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) ("the power to tax the exercise of a [constitutional] privilege is the power to control or suppress its enjoyment").[7]And "[a] power to tax differentially, as opposed to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). Thus, any effort by a government to impose a tax upon the means or

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[7] LAMAR and NORTON take exception to the characterization by the CITY OF CINCINNATI that the billboard tax is being imposed upon "the *privilege* of installing, placing, and maintaining outdoor advertising signs". *Ordinance No. 167-2018* (emphasis added). While, on occasions, courts have concededly characterize as a privilege the exercise of one's First Amendment rights, "First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed with or withheld because [a court] or [a legislative body] thinks the person or group is unworthy." *United States v. UAW-CIO*, 352 U.S. 567, 597, 77 S. Ct. 529, 1 L. Ed. 2d 563 (1957)(Douglas, J., dissenting). Contrary to the proposition or perspective of the CITY OF CINCINNATI, free speech is not a privilege that the government may parse out at its whim through *noblesse oblige. See United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)("the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*"). Thus, notwithstanding the occasional characterization by courts or others of the exercise First Amendment rights as involving a privilege, the Court proceeds with a full appreciation that fundamental constitutional rights are involved in the case *sub judice* and the great importance that attend them.

instruments used to engage exclusively in First Amendment rights, as well as doing so by targeting a small segment of the population, presents a very real potential to destroy, *i.e.*, to stifle, the meaningful and effective exercise of such rights. Nonetheless, precedent dictates that "a tax that discriminates among speakers is constitutionally suspect only in certain circumstances." *Leathers v. Medlock*, 499 U.S. 439, 444, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991). In assessing the distinction between permissible taxes versus unconstitutional taxes upon the means or instruments of exercising such fundamental rights and in the context of the billboard tax *sub judice*, this Court must be guided by various decisions of the United States Supreme Court, *viz., Grosjean; Minneapolis Star*; and the analysis and distinguishment of these cases in *Leathers*.

In *Grosjean*, the Court found unconstitutional a 2% tax on gross receipts from advertising imposed against publications with weekly circulations above 20,000 — a tax that fell exclusively on 13 newspapers while not taxing four daily newspapers and 120 weekly publications. Similar to the contentions of the CITY OF CINCINNATI in the case *sub judice*, the challenged tax in *Grosjean* specifically targeted and assessed the tax against publications, *i.e.*, a means used to exercise First Amendment rights, and was "designated a 'license tax for the privilege of engaging in such business,' that is to say, the business of selling, or making any charge for, advertising." *Grosjean*, 297 U.S. at 244. Additionally, comparable to the billboard tax *sub judice*, the tax in *Grosjean* was assessed against the gross revenues of the newspapers. *Id.* In

finding such a targeted tax to violate the First Amendment, the Court declared that "[t]he tax here involved is bad not because it takes money from the pockets of the [newspapers engaging in advertising]. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250.

Concededly, there is no indication that the Cincinnati City Council adopted the billboard tax *sub judice* as a deliberate or calculated device to restrict the circulation of information. But Supreme Court precedent has "consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)(quoting *Minneapolis Star*, 460 U.S. at 592). Thus, an improper censorial motive is not required in order for a directed or targeted tax to be invalidated on the basis of the First Amendment. *See Minneapolis Star*, 460 U.S. at 592.

Following *Grosjean*, the Supreme Court next considered in *Minneapolis Star* the constitutionality of "a special tax that applie[d] only to certain publications protected by the First Amendment." *Minneapolis Star*, 460 U.S. at 581. The particular tax at issue in *Minneapolis Star* specifically targeted and was imposed only upon the costs of paper and ink products consumed in the production of a publication,

*id.* at 578, an activity the Court's ensuing analysis clearly recognized as implicating the protections of the First Amendment. While acknowledging that "the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems," *id.* at 581, the Court rejected the claim by the government that the tax at issue was simply part of the general scheme of taxation. Instead, the Court aptly characterized the tax as "facially discriminatory, singling out publications for treatment." *Id.* Accordingly, the Supreme Court held that such a tax, targeted towards a narrow and selected medium directly involved the exercise of First Amendment rights, was unconstitutional.

But in response to *Grosjean* and *Minneapolis Star*, the CITY OF CINCINNATI attempts to find solace in the subsequent decision of the Court in *Leathers*. *Leathers* involved a constitutional challenge by cable television operators to a sales tax that excluded or exempted sales made by certain segments of the media, *i.e.*, over-the-counter newspaper sales and subscription magazine sales, but not other sales, including, the sale of cable television services. But unlike the tax scheme involved in *Grosjean* and *Minneapolis Star*, the tax in *Leathers* was "a tax 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. Among the services on which the tax [was] imposed [were] 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.

*Leathers*, 499 U.S. at 447. Thus, the tax in *Leathers* did not violate the First Amendment because it was "a generally applicable tax" that simply "exclude[d] or exempt[ed] certain media from a generally applicable tax", *id.* at 447 & 453, and was "[u]nlike the taxes involved in *Grosjean* and *Minneapolis Star*" wherein the government "selected a narrow group to bear fully the burden of the tax." *Id.* at 448.

Succinctly stated, the proposition leading from *Grosjean, Minneapolis Star*, and *Leathers* is that, in the exercise of its taxing powers, the government may not single out and direct or target a tax solely at the exercise of First Amendment rights or at the means or instruments utilized in exercising First Amendment rights nor may the government impose a tax that targets a small narrow group to bear the burden of the tax.[8] *Leathers*, 499 U.S. at 447. Yet, that is precisely

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[8] The Court also considered *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987), which involved a First Amendment challenge to a tax imposed upon the sales of tangible personal property, though exempted numerous items from the tax, including "[g]ross receipts or gross

what the CITY OF CINCINNATI has done through enactment of Ordinance No. 167, *i.e.*, targeted for taxation a small group that owns and controls the means or instruments used exclusively in the exercise of First Amendment rights and, then, imposing a discriminatory tax upon those means or instruments.

While the Supreme Court found the tax at issue in *Grosjean* unconstitutional without subjecting it to any further analysis, the Court in *Minneapolis Star* set forth a variation of strict scrutiny analysis to be applied:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

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proceeds derived from the sale of newspapers" and from the sale of "religious, professional, trade, or sports periodical." Because the tax in *Arkansas Writers' Project* treated some magazines less favorably than others and made that determination based upon the content of the magazines, the content-based nature of the exemption at issue was of particular note in that case. See *id*. at 229 ("this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content"). As the billboard tax *sub judice* is not content-based, *Arkansas Writers' Project* is distinguishable on that account, though it still is instructive in the overall assessment of the billboard tax *sub judice*.

*Minneapolis Star*, 460 U.S. at 585. While recognizing that the raising of revenue is critical to any government, the Court still found in *Minneapolis Star* such a proposition inadequate to allow the imposition of a differential tax upon a small group that owns and controls the means or instruments used exclusively for the exercise of First Amendment rights or the imposition of a tax upon those means or instruments. Raising revenue for the government alone "cannot justify the special treatment of [First Amendment rights], for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally." *Id.* at 586. In fact, the Cincinnati Budget Director testified that the City has significant alternatives under state law to make up for any revenue shortfalls other than a tax on billboards.

Furthermore, with respect to the billboard tax *sub judice*, its adoption by the Cincinnati City Council was not precipitated by the need to fund core or basic governmental services of a large municipality, such as police, fire, water, sewers, roads, bridges, *etc. See Foley v. Connelie*, 435 U.S. 291, 297, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978)("[a] discussion of the police function is essentially a description of one of the basic functions of government... The police function fulfills a most fundamental obligation of government to its constituency"); *see also Heck v. City of Freeport*, 985 F.2d 305, 309 (7th Cir. 1993)(identifying the "basic services" of government as "police and fire protection as well as 'quasi-utility functions' like water, garbage, and sewage services"). The Office of the Mayor had

submitted a balanced budget to the Cincinnati City Council that addressed such matters; but once individual members of Cincinnati City Council had the opportunity to add their own pet projects into the budget, the once-balanced budget proposal faced a projected shortfall of $2.5 million; the billboard tax *sub judice* was part of the solution to make up that deficit, though several other options existed to address the shortfall.[9]

While the CITY OF CINCINNATI may have the legal authority *arguendo* to undertake and support such pet projects, they are not of the nature of being core or basic governmental functions or services. Thus, while the raising of revenue is critical to any government, "the persistent search for new subjects of taxation" in order to address government beyond its fundamental functions cannot be the fountainhead for the imposition of taxes against a small group that owns and controls the means or instruments used exclusively for the exercise of First Amendment rights or against those means or instruments. *See Grosjean*, 297 U.S. at 250. The CITY OF CINCINNATI has not demonstrated a compelling interest for the imposition of the selective and targeted billboard tax to the

[9] At the oral argument on the hearing on the *Motions for Temporary Restraining Order*, counsel for the CITY OF CINCINNATI referenced Ordinance No. 168-2017 and a laundry list of projects contained therein the funding of which was being provided by Ordinance No. 167. Through the testimony of the Cincinnati Budget Director and the explanation of the budgetary process, such projects are those that were advanced at the behest of individual members of the Cincinnati City Council which then caused the previously-balanced budget proposed by the Mayor to run a deficit, necessitating the generation of additional revenues.

exclusion of other alternatives for the raising of revenue.[10]

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[10] The CITY OF CINCINNATI sought to find support for the billboard tax *sub judice* in court decisions upholding similar billboard taxes adopted in the City of Philadelphia and the City of Baltimore. While the CITY OF CINCINNATI acknowledges that the billboard tax *sub judice* was developed by merging the billboard taxes from those two cities (utilizing the minimum billboard tax from one city coupled with the tax imposed on gross revenues as imposed by the other city), the court decisions upholding the billboard taxes in those cities do not mandate this Court reach a similar conclusion on the billboard tax *sub judice*.

In *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966 (Pa. Cmwith. 2005), the court affirmed the denial of a preliminary injunction against Philadelphia's billboard tax; it was not a final dispositive decision on the merits. Furthermore, the bulk of the decision focused on the Equal Protection and Uniformity Clauses of the United States and Pennsylvania Constitutions. *See id.* at 971-72. And with respect to the First Amendment issue, the Court in *Free Speech* engaged in minimal substantive analysis, relying, instead, upon its earlier decision in *Adams Outdoor Advertising v. Borough of Stroudsburg*, 667 A.2d 21 (Pa. CmwIth. 1995).

While the court in *Adams* engaged in an analysis of Supreme Court decisions on the subject, specifically mentioning *Minneapolis Star* and *Arkansas Writers' Project*, it found its reading of *Leathers* to be dispositive. However, its analysis of *Leathers* proceeded from the misleading proposition that "sales tax [in *Leathers*] was imposed only upon cable television and no other media." *Id.* at 26. But as developed *supra*, the tax in Leathers was "a tax of general applicability" that applied to a broad range of sales (with only certain exemptions), *Leathers*, 499 U.S. at 447; the tax was not "only upon cable television" as the court in Adams incorrectly characterized it. Furthermore, the court in Adams afforded no significance to earlier Supreme Court decisions, such as Minneapolis Star. Instead of attempting to find the consistencies and distinctions in all decisions by the Supreme Court on taxes implicating the First Amendment, the court in

*Adams* implicitly treated those earlier decisions as effectively overruled by *Leathers*. But *Leathers* did not implicitly overrule *Grosjean* or *Minneapolis Star*. Thus, this Court finds no support in the analysis in either *Free Speech* or *Adams*.

And with respect to the billboard tax in Baltimore, in *Clear Channel Outdoor, Inc. v. Department of Finance of Baltimore City*, 2018 Md. Tax LEXIS 1, 2018 WL 1178952 (Md. Tax Feb. 27, 2018), the court affirmed the denial of a refund to a billboard company that had paid the tax. While recognizing a constitutional challenge was being made, the court in *Clear Channel* failed to even consider, let alone analyze, the Supreme Court precedent of *Grosjean*, *Minneapolis Star* or *Leathers*. Thus, it did not apply such precedent in the context of a tax being imposed upon a small group that owns and controls the means or instruments used exclusively for the exercise of First Amendment rights or a tax upon those means or instruments. Instead, the court in *Clear Channel* minimized any First Amendment interest whatsoever. *See* 2018 Md. Tax LEXIS 1, [WL] at *3 ("Petitioner's conduct does not possess 'sufficient communicative elements' for the First Amendment to come.... First Amendment protection extends only to conduct that is inherently expressive and displaying a third party's message on an outdoor advertising billboard in exchange for financial compensation lacks any significant expressive element"). But such a proposition is repudiated by the Supreme Court's decision in *Metromedia*:

> we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers — often those with the highest interest and the largest stake in a First Amendment controversy — would not be able to challenge government limitations on speech as substantially overbroad.

*Metromedia*, 453 U.S. at 504 n.11; accord id. at 544 (Stevens, 3., dissenting in part)(billboard owners "have standing to challenge the ordinance because of its impact on their own commercial

"[C]ourts must be wary that taxes, regulatory laws, and other laws that impose financial burdens are not used to undermine freedom of the press and freedom of speech. Government can attempt to cow the media in general by singling it out for special financial burdens. Government can also seek to control, weaken, or destroy a disfavored segment of the media by targeting that segment." *Pitt News v. Pappert*, 379 F.3d 96, 110-11 (3d Cir. 2004). LAMAR and NORTON have adequately demonstrated that the billboard tax *sub judice* singles out privately-owned billboards for a unique financial burden unrelated to the intrinsic aspects of such billboards that might warrant a certain level of regulation or the imposition of a financial burden.

The deliberate and directed imposition of the billboard tax *sub judice* upon a targeted means or instrument of engaging in speech such that the tax is imposed against a small and narrow group which must bear the entire burden of the tax is sufficiently akin to the taxes found unconstitutional in *Grosjean* and *Minneapolis Star & Tribune*. As such, the Court finds that LAMAR and NORTON have adequately demonstrated a substantial likelihood of success on the merits that the billboard tax *sub judice* violates

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operations. Because this challenge is predicated in part on the First Amendment...they also have standing to argue that the ordinance is invalid because of its impact on their customers — the persons who use their billboards to communicate with the public"). Thus, the effort of the court in *Clear Channel* to minimize the First Amendment interests involved and, with it, avoid any substantive analysis of *Grosjean* and the ensuing cases negates any significance to the decision.

the First Amendment consistent with the legal precedent from the Supreme Court.[11]

b.

Independent of whether the billboard tax itself satisfies constitutional muster under the First Amendment, *etc.*, LAMAR and NORTON also contend that the explicit prohibition against disclosure or identification of the tax to its customers, *see Cincinnati Municipal Code § 313-7(a) & Cincinnati Municipal Code § 313-7(b)*, constitutes a content-based restriction of its free speech rights in violation of the First Amendment and the comparable provision of the Ohio Constitution. *See Lamar Complaint ¶125-32; Norton Complaint ¶¶27-37.* Conceding such prohibitions directly implicate First Amendment rights, the CITY OF CINCINNATI maintains such prohibitions are constitutionally permissible as protecting against false or misleading commercial speech. *City's Memorandum in Opposition to Motion for Preliminary Injunction, at 26-28.*

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[11] LAMAR and NORTON raise other constitutional challenges to the billboard tax *sub judice, viz.*, a violation of the Equal Protection Clause, *see Lamar Complaint* ¶¶104-111 & 113-16; *Norton Complaint* ¶¶71-82; a violation of the state constitutional requirement of uniformity on the taxation of real property and the improvements thereon, *see Lamar Complaint* ¶112-16; and, a violation of the dormant Commerce Clause, *see Lamar Complaint* ¶¶133-43; *Norton Complaint* ¶83-92. Additionally, LAMAR has sought a writ of mandamus. *Lamar Complaint* ¶¶143-58. In light of the disposition of the *Motions for Preliminary Injunction* on a different constitutional basis, i.e., the First Amendment, the Court need not address, at this stage, those other constitutional challenges.

In *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008), the Sixth Circuit considered, similar to that *sub judice*, a challenge by telecommunications providers to a prohibition precluding them from identifying a "new tax [on their gross revenues] as a line item on all customer invoices to explain why [the providers] have raised prices." *Id.* at 500. The no-stating-the-tax provision in *BellSouth* simply, though broadly, precluded the providers from "separately stag[ing] the tax on the bill", *id.* (quoting Ky. Rev. Stat. Ann. § 136.616(3)); though less succinct, the no-stating-the-tax provision *sub judice* is similarly stated:

> The tax shall not be stated or charged separately from the rent or other consideration paid by an advertiser for use or occupancy of an outdoor advertising sign or shown separately on any record thereof, or otherwise reflected upon any bill, statement, or charge made for the sign's use or occupancy issued or delivered by the advertising host.

*Cincinnati Municipal Code § 313-7(a).* And an additional prohibition is imposed upon what outdoor advertisers, such as LAMAR and NORTON, may advise their customers:

> No advertising host shall state in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by an advertiser, or that it will be added to the rent or other charge.

*Cincinnati Municipal Code § 313-7(b).*

The CITY OF CINCINNATI maintains such restrictions (or, more accurately, prohibitions) are simply a regulation of commercial speech and, thus, subject to lesser constitutional protection under the analysis provided for in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). But the ease with which the CITY OF CINCINNATI categorizes the no-stating-the-tax provisions *sub judice* as commercial speech is belied by *BellSouth*:

> While the no-stating-the-tax clause by its terms restricts speech, the question is what kind: Does it regulate commercial speech or other protected speech? Should we thus apply the four-part, commercial-speech test, or the more rigorous scrutiny that applies to content-based regulations of other types of protected speech?
>
> In one sense, the law looks like it regulates commercial speech, which the Court variously has defined as "expression related solely to the economic interests of the speaker and its audience." The [government] does not wish to regulate the providers' speech about the new tax in any venue but one: a commercial invoice....
>
> In another sense, the law looks like a ban on core political speech. Just because an "economic motivation" underlies speech, we know, does not "by itself" convert it into "commercial speech." And what is going on here is more than just a debate

> about how best to sell toothpaste or, as here, telephone services. It is about announcing who bears political responsibility for a new tax and about doing so in the forum most likely to capture voters' attention: an invoice that displays a predictable consequence of the tax. At the same time that the law limits the providers' efforts to duck economic responsibility for a price increase, it permits legislators to duck political responsibility for the new tax....
>
> Perhaps our difficulty in placing a label on the law suggests it is a hybrid, one that implicates commercial and political speech, that implicates the interests of consumers and voters and that draws its heritage as much from protests over the Townshend Acts as from the *Wealth of Nations*. If that is the case, we presumably would apply the more rigorous scrutiny....
>
> While it may often be the case that a "'commonsense' distinction" will divide commercial speech from other speech, this is not one of those cases. It remains difficult to pin down where the political nature of these speech restrictions ends and the commercial nature of the restrictions begins....

*BellSouth*, 542 F.3d at 504-05 (internal citations omitted); *cf. Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)(discussing whether "pure speech and commercial speech" were inextricably intertwined, so

that "the entirety must ... be classified as noncommercial").[12]

In *BellSouth*, the Sixth Circuit did not need to resolve the nature of the speech involved, *i. e.*, commercial versus political speech, because the no-stating-the-tax provision therein failed to satisfy the lesser constitutional standard applicable to commercial speech under *Central Hudson*. *Id.* at 500 ("[w]hether the no-stating-the-tax provision is more akin to a price-advertising ban (governed by the commercial-speech doctrine) or to a ban on protesting a new tax in the forum most likely to get consumers' attention (governed by the political-speech doctrine) need not detain us. For it fails to satisfy even the intermediate scrutiny that applies to restrictions on commercial speech").

In applying *Central Hudson* in *BellSouth*, the Sixth Circuit readily found the no-stating-the-tax provision as a regulation of speech; the CITY OF CINCINNATI also acknowledges its comparable provisions are content-based regulations of speech. *City's Memorandum in Opposition to Motion for Preliminary Injunction*, at 26. But in defending the no-stating-the-tax provision *sub judice*, the CITY OF

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[12] The Sixth Circuit in *BellSouth* appropriately recognized that in those hybrid situations, i.e., when the divide between commercial speech and political speech is not readily apparent or ascertainable, the presumption should always be made in favor of finding the speech as being political. To do the opposite, *i.e.*, make the presumption that such speech is commercial, runs the impermissible risk that some political speech would be afforded less protection as commercial speech. Far better to err in affording speech greater protection to which it might actually be entitled under the First Amendment.

CINCINNATI maintains that the provision is directed at false and misleading commercial speech subject to lesser protection under *Central Hudson* whereas, in *BellSouth*, "the government... 'nowhere argue[d] that the providers['] speech is false' nor could it." *City's Memorandum in Opposition to Motion for Preliminary Injunction, at 26* (quoting *BellSouth*, 542 F.3d at 506).

In claiming the no-stating-the-tax provision *sub judice* guards against false or misleading commercial speech, the CITY OF CINCINNATI argues that such provisions "prevent[] [billboard owners] from misleading advertisers in the belief that the tax on [the owners] is a transactional tax [imposed on the advertising customer]." *City's Memorandum in Opposition to Motion for Preliminary Injunction, at 26; see id. at 27* (claiming the no-stating-the-tax provision advances the compelling interest of "ensuring that the tax functions as an excise tax, which falls on the exercise of a business privilege and not on transactions with customers"). But such an argument by the CITY OF CINCINNATI actually focuses on the political nature of the debate on the billboard tax, especially when it declares that, if billboard owners could present information to their customers suggesting that the billboard tax is actually a tax on the customer's transaction, then "[i]t could lead to the tax being inappropriately characterized as a tax that the City may not levy." *City's Memorandum in Opposition to Motion for Preliminary Injunction, at 27*.

How a tax may be characterized amongst the citizenry and whether a government has the legal authority to levy such a tax does not go to proposing a commercial transaction but, instead, advances debate

concerning the actions of the government and its officials which falls clearly within the ambit of political speech. *Bloom v. O'Brien*, 841 F.Supp. 277, 281 (D. Minn. 1993)("[t]he itemized bill is indisputably part of a commercial transaction, but it does not propose a transaction as such. A bill is not a proposal that the patient pay for services already rendered, it is a demand for payment. Itemizing the specific dollar amount of the gross revenue tax being passed along to a patient would simply inform consumers that, in addition to charges for the medical service provided, they were also paying a share of the tax imposed on the health care provider"); *compare Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473-74, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)( "the test for identifying commercial speech" is whether the speech proposes a commercial transaction) *with Meyer v. Grant*, 486 U.S. 414, 422, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)(core political speech is "interactive communication concerning political change") *and Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)(political speech includes "discussion of public issues"); *see also United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005)("[t]o determine whether speech is commercial, courts should consider whether: (1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech. An affirmative answer to each question indicates 'strong support' for the conclusion that the speech is commercial"). By prohibiting disclosure of the billboard tax and the additional costs resulting to the customer by the tax — be it on a bill, statement or

otherwise - the CITY OF CINCINNATI is not seeking to prevent the disclosure of false or deceptive information in a commercial transaction; instead, the prohibition is nothing more than an attempt to compel silence and force the billboard owners to suffer the retribution of its customers (or loss of customers) because of increased costs when the real culprit or villain for such increased costs is the government. When governmental action causes increased costs, public officials cannot avoid accountability or responsibility for such actions by precluding the dissemination of information identifying the true source of such increased costs. Yet, that is precisely what the CITY OF CINCINNATI has done through the no-stating-the-tax provision *sub judice*.

The no-stating-the-tax provision *sub judice* ("[t]he tax shall not be stated or charged separately from the rent or other consideration paid by an advertiser...or shown separately on any record thereof, or otherwise reflected upon any bill, statement, or charge") is a content-based prohibition on non-commercial speech and, as such, is subject to strict scrutiny analysis. *North Olmsted Chamber of Commerce v. City of N. Olmsted*, 86 F.Supp.2d 755, 767 (N.D. Ohio 2000)( "content-based restrictions on noncommercial speech receive strict scrutiny"). Relying upon its contention that such prohibition is simply a regulation of commercial speech, the CITY OF CINCINNATI has failed to posit any putative compelling interest to justify the prohibition, let alone how it is narrowly tailored so as to be the least restrictive means to achieve such interest. *See Bible Believers v. Wayne County, Mick*, 805 F.3d 228, 248 (6th Cir. 2015)("[n]o

state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest"). Accordingly, LAMAR and NORTON have demonstrated a substantial likelihood of success on the merits that the no-stating-the-tax provision *sub judice* is unconstitutional as being violative of the First Amendment.

Concededly, part of the prohibition on speech imposed by Cincinnati Municipal Code § 313-7(b), *i.e.*, precluding billboard owners from "stat[ing] in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by an advertiser" is, in a certain sense, less political in nature than the no-stating-the-tax provision *sub judice*. However, the ensuing part of the prohibition, *i.e.*, precluding billboard owners from "stat[ing] in any manner, whether directly or indirectly, that [the tax] will be added to the rent or other charge" reverts back to being more political in nature as the prohibition tends to direct responsibility and criticism for the increased costs away from the government that actually caused the increase costs. But in considering the First Amendment implications of the prohibition in Cincinnati Municipal Code § 313-7(b), the Court need not definitely resolve whether the appropriate analysis to be undertaken is pursuant to the commercial speech rubric versus being a content-based regulation of political speech.

"Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our

most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)(internal citations omitted). And this principle is true even in the context of regulations of commercial speech. *See Edenfield v. Fane*, 507 U.S. 761, 777, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). At the hearing on the *Motions for Preliminary Injunction*, the representative of the CITY OF CINCINNATI could not provide any clear and definitive indication as to what language a billboard owner could utilize without running afoul of the prohibition in Cincinnati Municipal Code § 313-7(b) while still desiring to indicate clearly to a customer that increased costs were the result of the imposition of the billboard tax by the government. Instead, it quickly became apparent that a billboard owner would need to engage in linguistic gymnastics in order to avoid (or, more accurately, hopefully avoid) running afoul of the prohibition.

"Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A certain amount of "flexibility and reasonable breadth, rather than meticulous specificity" is in order. *Id.* (quoting' *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.)). But when an absolute prohibition on speech is under taken through the use of broad all-encompassing language, such as the use in Cincinnati Municipal Code § 313-7(b) of "in any manner" or "directly or indirectly", the real and imminent threat exists that protected speech will be chilled.

> A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. The overbreadth doctrine exists "to prevent the chilling of future protected expression." Therefore, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down.

*Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 274 F.3d 377, 387 (6th Cir. 2001)(quoting *New York v. Ferber*, 458 U.S. 747, 771, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), and *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir. 2001), respectively).

If we are dealing with commercial speech, then an explicit restriction on billboard owners stating that the billboard tax "will be assumed by an advertiser" may *arguendo* satisfy constitutional muster under *Central Hudson* (as the tax liability is that of the billboard owners not the customers). But when tire CITY OF CINCINNATI expands such a prohibition so as to include it being done "in any manner" or done "directly or indirectly", then the precision of regulation required under the First Amendment no longer exists, especially when considered with the other prohibitions contained within Cincinnati Municipal Code § 313-7(b).[13] The testimony of the City's own representative

[13] The constitutional validity of a prohibition precluding billboard owners from indicating that the billboard tax "will be absorbed by an advertiser" appears more doubtful, as that statement alone tends to be more political in nature. The increase costs resulting from the billboard tax will be passed along to

raised more questions and indefiniteness with respect to these prohibitions than they answered.

When "[m]en of common intelligence must necessarily guess at [a statute's or ordinance's] meaning and differ as to its application", the requisite precision of regulation is absent and the statute or ordinance cannot satisfy constitutional muster. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Whether couched as a vagueness issue or an overbroad issue, the Court concludes that there exists a substantial likelihood that the prohibition in Cincinnati Municipal Code § 313-7(b) does not satisfy constitutional muster.

2.

With respect to the increased fees assessed for billboard permits (and the more frequent period in which such fees are charged), LAMAR and NORTON contend such fees go beyond the reasonable and legitimate expenses to administer the billboard-licensing process so as to constitute a tax. *See Lamar Complaint ¶117-24; Norton Complaint ¶¶93-97.* The CITY OF CINCINNATI concedes that if such fees are, in fact, a tax, then such the fees are impermissible and

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customers; and in that sense, any indication that the increase costs as a result of the tax is being absorbed by a customer is essentially a true statement that identifies the source of the increased costs, *i.e.*, the government that imposed the tax.

Similarly, when billboard owners desire to indicate to their customers that the billboard tax will be added to the rent or other charge, they again are stating a substantively accurate fact, i.e., the increase costs is because of the billboard tax.

must be enjoined. *See City of Cincinnati v. Criterion Advertising Co.*, 32 Ohio App. 472, 168 N.E. 227 (1st Dist. 1929)( "[i]f the fee charged for the permit is largely in excess of the sum reasonably necessary to cover the cost of granting the permit, and of exercising proper police regulation, the fee is a tax, and the ordinance cannot stand"); *City of Richmond Heights v. LoConli*, 19 Ohio App.2d 100, 250 N.E.2d 84 (8th Dist. 1969)(syllabus ¶¶1, 3 & 4)("[a] law or ordinance which requires the obtaining of a license as a prerequisite to engaging in a particular business or activity may be a proper exercise of the police power, but it ... may not interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions thereon.... A license fee may be required of one required to obtain a license, but the amount of such fee must bear a reasonable relation to the burdens imposed, by the activity being licensed and by the licensing process itself, upon the governmental entity involved. Where a license fee is significantly in excess of the amount needed to support such burdens, such fee is unreasonable and therefore unconstitutional").

LAMAR and NORTON challenge four distinct billboard permit provisions in Chapter 895 of the Cincinnati Municipal Code and, in particular, the increase of the respective fees pursuant to Ordinance No. 163, *viz.*, (i) the increase of the fee from $70 to $280 for the outdoor advertising construction permit as provided for in Cincinnati Municipal Code § 895-13; (ii) the increase of the fee from $20 to $160 for an outdoor advertising renewal permit obtained through self-certification as provided for in Cincinnati

Municipal Code § 895-19(a); (iii) the increase of the fee from $40 to $160 for an outdoor advertising renewal permit obtained through inspection by the CITY as provided for in Cincinnati Municipal Code § 895-19(b); and (iv) the increase of the fee from $50 to $400 for an outdoor advertising renewal permit through inspection by the CITY when no owner, *et al.*, of the billboard seeks the renewal permit as provided for in Cincinnati Municipal Code § 895-19(c). And as part of the challenge to the last three fee increases, LAMAR and NORTON also take issue with the increased period by which the outdoor advertising renewal permit must be renewed, *i.e.*, from a biennial basis to an annual basis.

Prior to the adoption of Ordinance No. 163, LAMAR and NORTON obtained the biennial renewal permits through the self-certification process provided for within Cincinnati Municipal Code § 895-19(a). However, during this time, the CITY OF CINCINNATI undertook no action whatsoever with respect to renewal permits obtained through the self-certification process; instead, the CITY OF CINCINNATI simply accepted the biennial payments from LAMAR and NORTON for every billboard they owned, and then deposited the money into the fisc. However, the validity *vel non* of such action is not presently before the Court as the consideration is presently limited to the *Motions for Preliminary Injunction. But see City of East Liverpool v. Staffilino*, 1983 Ohio App. LEXIS 14141, 19S3 WL6731 (7th Dist. Jan. 10, 1983) (judgment in favor of billboard-advertising companies against assessment for unpaid billboard license fees where "City admitted they have

not been inspecting or in any manner servicing the signs. In short, they are charging but not giving any service to justify the charge").

Instead, the issues raised by the *Motions for Preliminary Injunction* go to the increased fees and the more frequent renewal period implemented through Ordinance No. 163. But, as noted above, following the commencement of this action and while the *Motions* were pending, the Cincinnati City Council passed Ordinance No. 323 whereby it effectively reinstated the *status quo ante* passage of Ordinance No. 163 as it related to both the fees associated with billboard permits and the renewal period for such permits. Thus, in light of the current status of such provisions, *i.e.*, effectively being the *statue quo ante* Ordinance No. 163, the need for issuance of extraordinary relief in the form of a preliminary injunction no longer exists.[14] Accordingly, no

[14] "[T]he repeal of a challenged ordinance will moot a plaintiff's request for injunctive relief in the absence of some evidence that the ordinance has been or is reasonably likely to be reenacted." *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1331 n.9 (11th Cir. 2004). While the enactment of Ordinance No. 323 clearly negates the present need for issuance of a preliminary injunction, in light of its passage as an emergency matter with no debate or discussion whatsoever by members of the Cincinnati City Council, whether such passage was simply an interim effort or a more permanent position is not readily apparent. *See Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003)(where there is no reasonable expectation the city will reenact the challenged legislation, the "repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief").

preliminary injunction will issue with respect to Chapter 895 of the Cincinnati Municipal Code.

B.

While, as noted above, the likelihood of success on the merits analysis is often determinative on the issuance *vel non* of a preliminary injunction on the basis of a potential constitutional violation, consideration must still be afforded to the other

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Additionally, "[s]tate courts more typically find it their duty to resolve constitutional questions that federal courts would consider moot, elaborating constitutional norms as 'a matter of public interest'." Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1860 (2001). And Ohio courts do apply this principle. *See Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St.3d 28, 31, 30 Ohio B. 33, 505 N.E.2d 966 (1987)("we believe that although the instant matter is technically moot with respect to the plaintiffs, there still remains a debatable constitutional question for this court to resolve. In addition, we believe that the cause *sub judice* involves matters of great public interest, thereby vesting this court with jurisdiction to entertain this appeal, even though the controversy is moot with respect to the plaintiffs. Thus, we proceed to resolve this matter under the standard that although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest").

However, whether any permanent relief, injunctive or otherwise, on the merits with respect to Ordinance No. 163 is warranted or needed, is not presently before the Court. The Court is simply considering the *Motions for Preliminary Injunction* and, in light of Ordinance No. 323, the Courts finds preliminary injunctive relief with respect to Chapter 895 of the Cincinnati Municipal Code is not warranted.

preliminary-injunction factors, *viz.*, whether movant will suffer irreparable injury absent an injunction, the harm others will suffer if the injunction is granted, and the public's interest. In the present context, these three factors tend to overlap and, thus, will be considered collectively.

The Supreme Court has made unequivocally clear that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). And while the public interest is served through the collection of taxes properly due and owing, the clear indication that the billboard tax *subjudice* violates the First Amendment consistent with precedent of the Supreme Court minimizes the validity of such public interest. In such a context, a greater public interest exists in ensuring governments and governmental officials operate within the confines of constitutional restrictions and prohibitions. Additionally, "it is always in the public interest to prevent violation of a party's constitutional rights." *Miller v. City of Cincinnati*, 709 F.Supp.2d 605, 627 (S.D. Ohio 2008) (quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) and *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)(quoting *G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994))), *aff'd* 622 F.3d 524 (6th Cir. 2010).

Thus, while certain considerations may, to a limited degree, militate against the issuance of a preliminary injunction, the balance of the other preliminary-injunction factors weigh strongly in favor of the issuance of one. Based upon the testimony

offered, the Court finds that the real and imminent threat exists that communications through the use of billboard would be sufficiently diminished should the billboard tax *sub judice* remain in place. Commercial advertisers would be confronted with realigning their advertising dollars to more efficient media of communications; charitable and public interest messages on billboards would be impacted as the *gratis* of LAMAR and NORTON becomes more limited; and certain billboard locations would disappear altogether as the tax would make such locations no longer economically viable. The evidence sufficiently demonstrated that, if the billboard tax *subjudice* remains in place, the result would be fewer voices and messages in the marketplace of ideas being transmitted to the broad general public through billboards.

III.

"[The] rule, as to the severability of statutes and the elimination of unconstitutional provisions, applies to municipal ordinances." *Frecker v. City of Dayton*, 153 Ohio St. 14, 26, 90 N.E.2d 851 (1950)(Taft, J., dissenting). "In order to sever a portion of a statute, [a court] must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 523, 1994-Ohio-496, 644 N.E.2d 369.

To that end, Ohio law establishes a three-part test to determine whether an invalid portion of a statute or ordinance can be severed or the entire statute or ordinance must be struck down:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

*Geiger v. Geiger*, 117 Ohio St. 451, 466, 5 Ohio Law Abs. 829, 160 N.E. 28 (1927)(quoting *State v. Bickford*, 147 N.W. 407, 409, 28 N.D. 36 (1913)); *accord State ex rel Sunset Estate Properties, LLC. v. Lodi*, 142 Ohio St.3d 351, 30 N.E.3d 934, 2015-Ohio-790 ¶17. "A portion of a statute [or ordinance] can be excised only when the answer to the first question is yes and the answers to the second and third questions are no." *State v. Noling*, 149 Ohio St.3d 327, 75 N.E.3d 141, 2016-Ohio-8252 ¶35.

It is clear and the CITY OF CINCINNATI has acknowledged that the imposition of the billboard tax is the *sine qua non* for the entirety of the newly-enacted Chapter 313 to the Cincinnati Municipal Code; stated otherwise, the billboard tax is so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Cincinnati City Council if the tax is stricken out while keeping the remaining provisions of Chapter 313 in placed. And if that were not sufficient, the no-stating the tax provision contained in

Cincinnati Municipal Code § 313-7(a) and the other prohibition on mentioning the tax contained in Cincinnati Municipal Code § 313-7(b) sufficiently appear to suffer from constitutional infirmity as well.[15] To sever the billboard tax from other provisions of Chapter 313 would not be in harmony with the goals and intent of the Cincinnati City Council in passing Ordinance No. 167.

The billboard tax imposed by Ordinance No. 167 is the linchpin of the entirety the newly enacted Chapter 313 of the Cincinnati Municipal Code; the billboard tax or other constitutionally infirm provisions therein cannot be severed from any of the remaining provisions that satisfy constitutional muster.

IV.

Having balanced the four factors applicable to be considered with respect to the issuance *vel non* of a preliminary injunction, the Court finds a sufficient showing has been made demonstrating a substantial likelihood of success on the merits with respect to the First Amendment challenged to Chapter 313 of the

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[15] Another potential constitutional infirmity within Chapter 313 also arose during the course of the hearing on the *Motions for Preliminary Injunction* though it is not presently within the pleadings. Cincinnati Municipal Code § 313-15(e) mandates that the books and records of a billboard owner, *i.e.*, an "advertising host", or even a person suspected of being one, are subject to warrantless inspections and examinations by officials with the CITY OF CINCINNATI. At a minimum, such provisions appear constitutionally suspect pursuant to *City of Los Angeles, Calif. v. Patel*, 576 U.S. , 135 S.Ct. 2443, 192 L. Ed. 2d 435 (2015), and *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018).

Cincinnati Municipal Code. And while that factor is often determinative in cases, such as this, involving fundamental constitutional rights, the other factors to consider also militate sufficiently in favor of LAMAR and NORTAN *qua* movants to warrant the issuance of a preliminary injunction precluding the CITY OF CINCINNATI and its officials from undertaking any activities to implement or enforce any and all provisions of Chapter 313 of the Cincinnati Municipal Code. However, because the substantive aspects of the changes to Chapter 895 of the Cincinnati Municipal Code effectuated by Ordinance No. 163 have, for the most part, been repealed by the Cincinnati City Council, no injunctive relief is warranted at this stage with respect to those changes.

While Ohio R. Civ. P. 65(C) appears to require the fixing of a bond in order to effectuate a preliminary injunction, state courts have followed the lead of federal courts holding that the setting of the amount of an injunctive bond is within the discretion of the court and this includes the discretion to require no bond at all. *Vanguard Tramp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786, 793, 673 N.E.2d 182 (10th Dist. 1996); *Connor Group v. Raney*, 2016-Ohio-2959 ¶¶64-66 (2d Dist.); *Colquett v. Byrd*, 59 Ohio Misc. 45, 49, 392 N.E.2d 1328 (Mansfield Muni. 1979); *see, e.g., Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009)("Rule 65(C) invests the district court with discretion as to the amount of security required, if any"). In light of the analysis and assessment on the issuance *vel non* of a preliminary injunction together with the overall equities of the case, including the fact

that the injunction seeks to protect fundamental constitutional rights, the Court will exercise its discretion and not require the posting of an injunctive bond or, alternatively, set such bond at zero dollars ($0.00). *See Baca v. Moreno Valley Unified School Dist.*, 936 F.Supp. 719, 738 (CD. Cal. 1996) (waiving the bond requirement because "to require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected by the policy"); *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009)("[d]espite the mandatory nature of [Rule 65(C)'s] language, federal courts have come to recognize that the district court possesses discretion over whether to require the posting of security. Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.")

For the foregoing reasons, the *Motions for Preliminary Injunction* are GRANTED IN PART and DENIED IN PART. An injunction will issue forthwith consistent with the foregoing decision.

SO ORDERED.

OCT 17 2018

/s/ Curt C. Hartman

Curt C. Hartman, Judge

Hamilton County Common Pleas Court

# APPENDIX E

## CINCINNATI MUNICIPAL CODE

## CHAPTER 313 – OUTDOOR ADVERTISING SIGN EXCISE TAX

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*Sec. 313-1. - Definitions.*

For the purpose of this chapter the words and phrases defined in this section shall have the meanings respectively ascribed to them, unless a different meaning is clearly indicated by the context. Unless given a different meaning herein, all terms defined in Chapter 895 of the Cincinnati Municipal Code shall have the meanings as defined in that chapter.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-A. - Advertiser.*

"Advertiser" means any person who pays an advertising host for the installation, placement, or maintenance of, or for a license or other legal right to install, place, or maintain, an advertisement, message, or other content on an outdoor advertising sign.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-A1. - Advertising Host.*

"Advertising Host" means any person who owns or controls an outdoor advertising sign, including the

person's agent, affiliate, employee, or other representative who acts on the person's behalf or in the interests of the person with regard to an outdoor advertising sign in the city of Cincinnati.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-D. - Daily Interest Rate.*

"Daily interest rate" means the annual interest rate specified in section 313-31(b) divided by 360 and rounded to the nearest millionth.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-G. - Gross Receipts.*

"Gross receipts" means the total consideration paid, delivered, or promised to be paid by an advertiser to an advertising host for the installation, placement, or maintenance of, or license or other legal right to install, place, or maintain, an advertisement, message, or other content on an outdoor advertising sign.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-O. - Outdoor Advertising Sign.*

"Outdoor Advertising Sign" shall mean an outdoor advertising sign as that term is defined in Cincinnati Municipal Code section 895-1-O, "Outdoor Advertising Sign."

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018; a. Emer. Ord. No. 0380-2020, §§ 1, 2, eff. Nov. 12, 2020)

*Sec. 313-1-P. - Person.*

"Person" means any natural person, partnership, joint venture, joint stock company, corporation, estate, trust, business trust, receiver, administrator, executor, assignee, trustee in bankruptcy, firm, company, association, club, syndicate, society, municipal corporation, the state of Ohio, political subdivision of the state of Ohio, the United States, instrumentality of the United States, or any group or combination acting as a unit, whether mutual, cooperative, fraternal, nonprofit or otherwise.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-R. - Responsible party.*

"Responsible party" means any person who is jointly and severally liable with the advertising host for the payment of any tax, interest, or penalties, or the performance of any duty imposed by this chapter.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-T1. - Tax.*

"Tax" means the outdoor advertising sign excise tax imposed under section 313-3.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-1-T2. - Treasurer.*

"Treasurer" shall mean the city treasurer of the city of Cincinnati.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-3. - Outdoor Advertising Sign Tax.*

(a)

There is hereby levied an excise tax on the privilege of installing, placing, and maintaining outdoor advertising signs in the city of Cincinnati. The tax shall equal the greater of seven percent of the gross receipts generated by or attributable to any outdoor advertising sign located in the city of Cincinnati or the annual minimum amount specified in subsection (b). The tax constitutes a debt owed by the advertising host who owns or controls an outdoor advertising sign, which debt is extinguished only by payment of the tax to the city.

(b)

An annual minimum tax is hereby imposed on the privilege of installing, placing, and maintaining outdoor advertising signs in the city of Cincinnati. The annual minimum tax shall be calculated at the following rates per square foot of sign face area of each outdoor advertising sign located in the city of Cincinnati:

(i)

$10 per square foot of sign face area for electronic outdoor advertising signs located within 660 feet of the nearest edge of interstate and primary highway system rights-of-way and visible from the main traveled way;

(ii)

$5 per square foot of sign face area for non-electronic outdoor advertising signs located within 660 feet of the nearest edge of interstate and primary highway system rights-of-way and visible from the main traveled way; and

(iii)

$2 per square foot of sign face area for all other outdoor advertising signs.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-5. - Exemptions.*

(a)

The tax shall not apply to the installation, placement, or maintenance of the following outdoor advertising signs:

(i)

Those signs that are not offered or made available by an advertising host for use by an advertiser in exchange for rent or other consideration within the applicable tax year, and for which signs the

advertising host does not receive, or accrue the right to receive, rent or other consideration from an advertiser in exchange for the use of the sign within the same tax year;

(ii)

Those signs exempt from outdoor advertising sign regulations pursuant to Cincinnati Municipal Code section 895-2, "Applicability"; or

(iii)

Those signs not exceeding 36 square feet in total sign face area.

(b)

No exemption claimed under paragraph (a)(i) of this section shall be granted except upon a claim made, under penalty of perjury, at the time a return is filed pursuant to section 313-11.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018; a. Emer. Ord. No. 0380-2020, §§ 1, 2, eff. Nov. 12, 2020)

*Sec. 313-7. - Repealed.*

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018; r. by Emer. Ord. No. 0380-2020, § 3, eff. Nov. 12, 2020)

*Sec. 313-9. - Registration.*

In addition to the permitting requirements contained in Cincinnati Municipal Code chapter 895, "Outdoor Advertising Signs," each advertising host shall

register all outdoor advertising signs under its ownership or control with the treasurer within 30 days after the effective date of this chapter, and each advertising host shall have an ongoing duty to register with the treasurer those outdoor advertising signs that come under its ownership or control within 30 days of assuming ownership or control of an existing outdoor advertising sign or within 30 days of being issued a construction permit for a new outdoor advertising sign, as the case may be.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-11. - Reporting and Remitting.*

(a)

Each advertising host shall report the annual minimum tax payment, gross receipts, and total amounts of tax due for those outdoor advertising signs under its ownership or control in the city of Cincinnati upon return forms furnished by the treasurer and in the manner herein provided.

(b)

On or before the 15th day of each quarter in a calendar year, each advertising host shall submit a return and remit one quarter of the annual minimum tax imposed under section 313-3(b) to the treasurer for the quarter preceding the month in which the return is made, which return shall report the amount of tax due from the advertising host for the foregoing quarter and

other information that the treasurer may require to ensure accurate calculation and collection of the tax.

(c)

On or before the 30th day of each April, each advertising host shall submit a return and remit the tax imposed under section 313-3(a) to the treasurer for the calendar year preceding the year in which the return is made, which return shall report the gross receipts received for transactions during the year for which the return is made, the amount of quarterly payments made pursuant to subsection (b), the amount of tax due from the advertising host for that year, and other information that the treasurer may require to ensure accurate calculation and collection of the tax.

(d)

At the time a return is filed, the advertising host shall remit to the treasurer the taxes shown as due on the return for the period for which the return is made.

(e)

An advertising host shall file a return and remit all accrued tax immediately upon cessation of business for any reason.

(f)

All tax owed by advertising hosts pursuant to this chapter shall be held in trust for the account of the city until payment thereof is made to the treasurer.

(g)

It shall be the duty of every advertising host liable for the payment to the city of the tax imposed by this chapter to keep and preserve, for a period of six years, all records as may be necessary to determine the amount of the tax for which the advertising host may have been liable to the city.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

*Sec. 313-13. - Responsible Parties.*

(a)

Where an advertising host performs its functions through an agent of any type or character other than an employee, the agent shall also be deemed an advertising host for purposes of this chapter and shall have the same duties and liabilities as its principal. Where the agent collects or receives gross receipts on behalf of its principal, the principal shall be jointly responsible for reporting and remitting the tax to the city. Compliance with the provisions of this chapter by either the principal or the agent shall be compliance by both.

(b)

Joint and Several Liabilities for Tax, Interest, and Penalties.

(i)

The advertising host shall be liable for the payment of all taxes imposed under this chapter, including interest and penalties thereon.

(ii)

Any fiscal officer of an advertising host who willfully fails to file required returns or make tax payments when due to the treasurer shall be jointly and severally liable with the advertising host for all taxes due under this chapter, including interest and penalties thereon. This personal liability of the fiscal officer shall survive the merger, acquisition, liquidation, bankruptcy, or dissolution of the advertising host.

(iii)

Any person who owns or controls an outdoor advertising sign who knowingly permits its outdoor advertising sign to be used by an advertising host in the ordinary course of the advertising host's business shall be jointly and severally liable with the advertising host for all taxes due under this chapter, including interest and penalties thereon. Any amounts due hereunder shall be reduced to a lien on the outdoor advertising sign.

(Ordained by Emer. Ord. No. 167-2018, § 1, eff. July 1, 2018)

## APPENDIX F

CINCINNATI MUNICIPAL CODE

CHAPTER 895 - OUTDOOR ADVERTISING SIGNS

---

*Sec. 895-1. - Definitions.*

For the purpose of this chapter the words and phrases defined in this section shall have the meanings respectively ascribed to them, unless a different meaning is clearly indicated by the context.

(C.M.C. 895-1; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-B. - Back-to-Back Sign.*

"Back-to-Back Sign" means a structure with two parallel and directly opposite outdoor advertising signs with their faces oriented in opposite directions located not more than 15 feet apart at the nearest point between two faces.

(C.M.C. 895-1-B; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-C. - Construct.*

"Construct" means to construct an outdoor advertising sign, or to increase the face area of an existing sign, but shall not include any activity when performed as an incident to the change of advertising message or normal maintenance of a sign or sign structure.

(C.M.C. 895-1-C; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-D. - Double-Faced Sign.*

"Double-Faced Sign" means two adjacent outdoor advertising signs on a single structure or separate structures with both faces oriented in the same direction and not more than 10 feet apart at the nearest point between the two faces. A "double-faced sign" may also be referred to herein as a "side-by-side," "stacked," or "decked" sign.

(C.M.C. 895-1-D; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-F. - Face Area.*

"Face area" means the area of the polygon of minimum area with no interior angle greater than 180 degrees that completely encloses the entire sign face. Provided, however, any cutout (an irregularly shaped temporary addition to a sign face displayed no more than 120 consecutive days appurtenant to a particular advertising message) that adds no more than 5 feet, 6 inches to the vertical measure or no more than 2 feet to the horizontal measure of the sign face, or is equal to or less than 25% of the face area of the sign face as measured without including the cutout, whichever is more restrictive, may be disregarded in the calculation of the face area.

(C.M.C. 895-1-F; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-G. - Ground Sign.*

"Ground Sign" means any outdoor advertising sign supported by a freestanding framework affixed to one or more uprights or braces in or upon the ground.

(C.M.C. 895-1-G; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-1-O. - Outdoor Advertising Sign.*

"Outdoor Advertising Sign" means either of the following: (i) 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 (ii) 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.

(C.M.C. 895-1-O; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; a. Ord. No. 0226-2007, § 1, eff. July 6, 2007; a. Ord. No. 372-2017, § 1, eff. Jan. 20, 2018; a. Emer. Ord. No. 380-2020, §§ 4, 5, eff. Nov. 12, 2020)

*Sec. 895-1-P. - Place of Worship.*

"Place of Worship" means a building primarily used as a place of assembly for worship or other religious services, with a maximum number of occupants permitted on the premises under the Cincinnati Building Code greater than 50.

(Ordained by Ord. No. 386-1995, eff. Jan 5, 1996)

*Sec. 895-1-R. - Residential District.*

"Residential District" means a residential zoning district denoted by the letters SF or RMX.

(Ordained by Ord. No. 0226-2007, § 2, eff. July 6, 2007)

*Sec. 895-1-R1. - Roof Sign.*

"Roof sign" means an outdoor advertising sign attached to a building with more than one-half the face area of the sign above the highest occupied floor of the building.

(C.M.C. 895-1-R; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; reordained by Ord. No. 0226-2007, § 3, eff. July 6, 2007)

*Sec. 895-1-S. - School.*

"School" means a public or private elementary or high school chartered by the state of Ohio board of education.

(C.M.C. 895-1-S; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-2. - Applicability.*

The provisions of this Chapter apply to all outdoor advertising signs except as otherwise provided by law. Signs not governed by this Chapter include:

(a)

Signs erected or displayed in the public right-of-way and authorized under Chapter 723 of the Municipal Code; and

(b)

Signs erected or displayed on Fountain Square pursuant to Rules and Regulations for the Use of Fountain Square as authorized by Chapter 713 of the Municipal Code; and

(c)

Signs approved by the City for a special event authorized under chapter 765 of the Municipal Code or other event authorized under Park Board rules; and

(d)

Signs erected or displayed on city-owned property by the City of Cincinnati or by a third-party pursuant to a contract with the city subject to reasonable, uniform, viewpoint-neutral limitations that ensure the signs do not undermine the city's interests, including its interests in aesthetics and traffic safety; and

(e)

Signs erected or displayed on property owned by a governmental entity pursuant to a contract with the city subject to reasonable limitations that ensure the signs do not undermine the city's interests, including its interests in aesthetics and traffic safety.

(Ordained by Ord. No. 372-2017, § 3, eff. Jan. 20, 2018; a. Ord. No. 295-2019(Emer.), §§ 3, 4, eff. June 26, 2019; a. Emer. Ord. No. 380-2020, §§ 4, 5, eff. Nov. 12, 2020)

*Sec. 895-3. - General Requirements.*

Every outdoor advertising sign shall:

(a)

Be securely affixed to a substantial structure, and in the case of wall signs, securely affixed to a building.

(b)

Be maintained, clean and in good repair, and the painted portions of such signs shall be periodically repainted and kept in good condition.

(c)

Be constructed in accordance with the Cincinnati Building Code, except for advertising benches, and the Cincinnati Zoning Code.

(d)

Not be maintained or affixed to any building that has been declared by the director of buildings and inspections as dangerous and unsafe and a public nuisance or that has been ordered vacated and barricaded and that has been found open to trespassers by reason of the failure of the owner to maintain the building securely barricaded. The holder of the outdoor advertising sign permit for such sign shall be given 30 days notice of the order of the

director of buildings and inspections prior to any action to enforce this provision.

(C.M.C. 895-3; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; a. Ord. No. 186-1996, eff. June 12, 1996; a. Ord. No. 0226-2007, § 4, eff. July 6, 2007)

*Sec. 895-5. - Construction of Signs.*

No person shall construct an outdoor advertising sign:

(a)

As a roof sign.

(b)

Within 200 feet in any direction of any school or hospital.

(c)

Within 100 feet in any direction of a residential district boundary line.

(d)

In any park, parkway, or playground under the jurisdiction of the board of park commissioners or the recreation commission, the establishment of which has been authorized by council, or within 200 feet in any direction of the boundary of any such park, parkway or playground.

(e)

As a double-faced, side-by-side, stacked, or decked sign, with a combined sign face area of more than 150 square feet.

(f)

With a face area greater than 672 square feet inclusive of any border and trim, but excluding the base or apron, cutouts, supports and other structural members.

(g)

Closer to the street than the building set-back line, and no portion of any outdoor advertising sign may be placed on, or extend over the right- of-way line of any street or highway.

(h)

On any publicly-owned real property without permission.

(i)

As a ground sign more than 40 feet above the grade of the lot or location being occupied by such sign, or the average natural grade at the sign location, if higher. Provided, however, in the instance of a street or highway which is higher than the grade of the lot or location to be occupied by the sign, the height shall be measured from the center line of the pavement at such location, but in no event shall the maximum height exceed 40 feet.

(j)

On any property located within an Urban Design Overlay District established pursuant to Title XIV, Chapter 1437 of the Cincinnati Municipal Code, except as noted below for Preexisting Lawful Signs.

(k)

On any property located within a Historic District or Historic Landmark established pursuant to Title XIV, Chapter 1435 of the Cincinnati Municipal Code, except as noted below for Preexisting Lawful Signs.

(l)

The provisions of subsections (j) and (k) above shall not apply to signs lawfully constructed or erected prior to March 25, 1989 ("Preexisting Lawful Sign"). In the event a Preexisting Lawful Sign is removed by the City for any reason, the sign may be relocated to, or a new sign of equal or lesser sign face area and height may be constructed or erected in, an alternative location within the same Urban Design Overlay District or Historic District upon the review and approval by the applicable reviewing authority for new construction in the Urban Design Overlay District or Historic District. Any new sign constructed or erected in accordance with this subsection (l) shall comply with all of the prohibitions of this Section 895-5 except for subsections (f) and (i) above as the new sign may have an equal or lesser sign face area and height as the removed sign.

(C.M.C. 895-5; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; a.

Ord. No. 186-1996, eff. June 12, 1996; a. Ord. No. 0226-2007, § 5, eff. July 6, 2007; a. Ord. No. 020-2013, § 1, eff. March 1, 2013)

*Sec. 895-7. - Spacing of Outdoor Advertising Signs.*

(a)

On the interstate and primary systems, spacing shall be in accordance with the agreement entered into by the State of Ohio and the United States secretary of transportation, and shall be pursuant to state regulation.

(b)

On all other streets and highways within the City of Cincinnati, no outdoor advertising sign may be constructed within 500 feet of any other outdoor advertising sign, located on the same side of the street right-of-way and facing the same traffic flow.

(c)

The minimum distance between structures for purposes of complying with this section shall be measured along the nearest edge of the pavement between points directly opposite the center of the signs along the same side of the street or highway on which the sign is to be located.

(C.M.C. 895-7; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 186-1996, eff. June 12, 1996; a. Ord. No. 0226-2007, § 6, eff. June 6, 2007)

Sec. 895-9. - Lighting Requirements for Outdoor Advertising Signs.

Lighting shall not be used in any way in connection with any outdoor advertising sign unless it is so effectively shielded as to prevent beams or rays of light from being directly cast on any portion of the street or highway, or is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle or to otherwise interfere with any driver's operation of a motor vehicle. Illuminated off-premise signs shall not produce more than one foot candle of illumination four feet from the sign, when measured from the base of the sign.

(C.M.C. 895-9; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989)

*Sec. 895-10. - Repealed.*

(Ordained by Ord. No. 372-2017, § 3, eff. Jan. 20, 2018; r. by Emer. Ord. No. 380-2020, § 6, eff. Nov. 12, 2020)

*Sec. 895-11. - Prohibited Advertising.*

A person may not display on an outdoor advertising sign:

(a)

An advertisement for an alcoholic beverage if the outdoor advertising sign is located within 500 feet of any school or hospital.

(b)

An advertisement for a tobacco product that can be viewed from a primary school, secondary school, public park, or public playground, located within 1,000 feet of the sign, or if the advertising message can be viewed from a place of worship or a hospital, located within 500 feet of the sign.

(c)

An advertisement for a tobacco product unless the outdoor advertising sign is located within a the CG-A Commercial General-Auto-Oriented Zoning District or the RF-M Riverfront Manufacturing District, and the sign is primarily intended for view by persons traveling on an expressway or a state arterial route, or is located in a MG Manufacturing General or ME Manufacturing Exclusive Zoning District. The Districts are shown on the Zoning Map of the Cincinnati Zoning Code, Title XIV of the Cincinnati Municipal Code. Expressways and state arterial routes are the Class 1 and Class 2 streets listed in the City of Cincinnati 1994 Official Through Street System, dated May 16, 1995, a copy of which is on file with the Clerk of Council.

(C.M.C. 895-11; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 192-1994, eff. 6-2-94; a. Ord. No. 383-1995, eff. Nov. 29, 1995; a. Ord. No. 386-1995, eff. Jan. 5, 1996; a. Ord. No. 372-2017, § 1, eff. Jan. 20, 2018)

*Sec. 895-13. - Outdoor Advertising Sign Construction Permit.*

A person may not construct an outdoor advertising sign without first obtaining an outdoor advertising construction permit from the director of buildings and inspections. Application for an outdoor advertising construction permit must be made on a form provided by the director. The outdoor advertising construction permit is required in addition to a building permit and any other permit or license required by law or ordinance. The fee for an outdoor advertising construction permit is $70.00 for each outdoor advertising sign face. An outdoor advertising construction permit may not be issued unless approved by the director as conforming to this chapter and all other applicable codes.

The director has the duty to inspect the construction of outdoor advertising signs. On determining that the construction has been completed in accordance with all applicable codes, the director has the duty to assign an outdoor advertising permit number to each outdoor advertising sign face. The owner of the outdoor advertising sign must permanently display the permit number and the owner's name on the sign or accompanying structure so that the name and number are clearly visible from the public right-of-way.

If the person displaying the sign is not the owner of record of the real property on which the sign is displayed, the person shall keep on file and make available for inspection on demand by the director, the name and address of the property owner or tenant in

possession and documentation executed by the property owner or tenant in possession establishing the right of the applicant to display the sign.

If a holder of an outdoor advertising sign permit transfers ownership of an outdoor advertising sign, the person to whom ownership has been transferred must notify the director in writing of the transfer within 90 days of the transfer and provide the director with the name, address and telephone number of the person responsible for maintaining the sign in compliance with this chapter.

(C.M.C. 895-13; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 115-1993, eff. Mar. 24, 1993; a. Ord. No. 186-1996, eff. June 12, 1996; a. Ord. No. 247-2002, eff. July 25, 2002; a. Ord. No. 0226-2007, § 7, eff. July 6, 2007; Emer. Ord. No. 163-2018, § 5, eff. July 1, 2018; a. Emer. Ord. No. 323-2018, § 2, eff. Oct. 10, 2018)

*Sec. 895-15. - Cap and Replace.*

In order that the total face area and number of faces of all lawful outdoor advertising signs within the business districts and the city not be increased, no person shall construct an outdoor advertising sign without first removing outdoor advertising signs equal in face area and number of faces. In order to administer this provision, the director of buildings and inspections shall issue a replacement permit to any person who permanently removes a lawfully existing outdoor advertising sign and any supporting structure that has been inspected pursuant to this chapter and found to be fully complying with this chapter and all

other applicable codes. The director shall note on the replacement permit the number of faces and face area, up to a maximum of 672 square feet, and the zone district in which the sign was located for every sign face removed. Replacement permits may be transferred. No outdoor advertising sign construction permit shall be issued unless the applicant tenders for cancellation replacement permits with a total face area and number of faces noted of at least the area and number of the sign or signs to be constructed.

(C.M.C. 895-15; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 115-1993, eff. Mar. 24, 1993; a. Ord. No. 372-2017, § 1, eff. Jan. 20, 2018)

*Sec. 895-17. - Reconstruction of Nonconforming Signs Prohibited.*

The structural support of outdoor advertising signs deemed nonconforming uses under the zoning code may not be reconstructed, rebuilt, or replaced nor the face area of such signs increased. Any nonconforming sign damaged or destroyed to the extent of 51 percent or more of its estimated replacement cost at the time of its damage or destruction may not be repaired, rebuilt, or reconstructed except in conformity with this chapter.

(C.M.C. 895-17; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989)

*Sec. 895-18. - Repealed.*

(Ordained by Ord. No. 186-1996, eff. June 12, 1996; r. Ord. No. 247-2002, eff. July 25, 2002)

*Sec. 895-19. - Annual Outdoor Advertising Sign Permit Renewal.*

By December 31 of every other year beginning in 2002, every person displaying an outdoor advertising sign must apply to the director of buildings and inspections for renewal of every outdoor advertising permit for each outdoor advertising sign being displayed. Renewal may be based on an owner's certification of compliance filed with the director in accordance with paragraph (a) of this section or inspection by the director in accordance with paragraph (b) of this section.

(a)

A person displaying an outdoor advertising sign may file with the director a verified certification that each sign displayed by the person is being displayed and maintained in accordance with the provisions of this chapter. The certification must be made on a form prescribed by the director and filed with the director by December 31. The certification must be based on inspection of each sign by the applicant made within 30 days of the certification. The person displaying an outdoor advertising sign must keep on file and make available for inspection on demand by the director a written record of each inspection made. The fee for renewal of an outdoor advertising sign permit based on an owner's certification of compliance is $20.00 for each sign face.

(b)

A person displaying an outdoor advertising sign may apply to the director for inspection of the sign. Application must be made on a form prescribed by the director and timely filed. The director has the duty to inspect each sign and determine if it is being displayed and maintained in accordance with the provisions of this chapter. The fee for renewal of an outdoor advertising sign permit based on inspection by the director is $40.00 for each sign face.

(c)

In the event a person displaying an outdoor advertising sign fails to apply for renewal and either file a certification pursuant to paragraph (a) or apply to the director for inspection pursuant to paragraph (b) in a timely manner, the director has the duty to inspect each sign and determine if it is being displayed and maintained in accordance with the provisions of this chapter. The fee for renewal of an outdoor advertising sign permit based on inspection by the director made pursuant to this paragraph is $50.00 for each sign face. If the person displaying an outdoor advertising sign fails to pay the inspection fee and correct any violations within the time provided by the director that person is subject to penalty as provided in § 895-99.

(d)

If the director finds that a person has falsely certified that signs displayed by the person are being displayed and maintained in accordance with the provisions of

this chapter, the director has the duty to reject the certification, require the applicant to file for renewal pursuant to paragraph (b) of this section and disqualify that person from renewing permits based on filing an owner's certification of compliance. A person so disqualified will remain disqualified for five years unless reinstated pursuant to paragraph (e) of this section.

(e)

A person disqualified pursuant to paragraph (b) of this section may request a hearing before the director to present evidence that the certification was correct or that the false statements were inadvertent or the result of careless error. If the director finds that the certification was correct or that the false statements were inadvertent or the result of careless error, the director has the duty to issue permits based on the owner's certification as it may be amended to correct any misstatement and to remove the disqualification; provided, however, on a second finding within a five-year period that an owner has filed a false certification, whether through inadvertence, careless error or otherwise, the director has the duty to reject the certification, require the applicant to file for renewal pursuant to paragraph (b) of this section and disqualify that person from renewing permits based on filing an owner's certification of compliance for five years.

(C.M.C. 895-19; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; a. Ord. No. 115-1993, eff. Mar. 24, 1993; a. Ord. No.

21-1996, eff. Feb. 23, 1996; a. Ord. No. 186-1996, eff. June 12, 1996; a. Ord. No. 247-2002, eff. July 25, 2002; Emer. Ord. No. 163-2018, § 5, eff. July 1, 2018; a. Emer. Ord. No. 323-2018, § 2, eff. Oct. 10, 2018)

*Sec. 895-21. - Notice of Violation.*

Whenever the director of buildings and inspections finds an outdoor advertising sign displayed in violation of any provision of this chapter, the director has the duty to send a notice of violation to the holder of the outdoor advertising sign permit for the sign or, if an outdoor advertising sign permit for the sign has not been issued, to the owner of the property where the sign is being displayed.

If the director does not receive an application for renewal of every outdoor advertising permit within the time prescribed by § 895-19 from a person to whom an outdoor advertising permit has been issued for a outdoor advertising sign being maintained and displayed, the director has the duty to send a notice of violation to the permit holder.

(C.M.C. 895-21; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 115-1993, eff. Mar. 24, 1993; a. Ord. No. 247-2002, eff. July 25, 2002)

*Sec. 895-23. - Hearings.*

Any person denied a permit or who contests a notice of violation may request a hearing before a board comprised of the director of buildings and inspections, the city solicitor, and the city engineer or their designated representatives. The request shall be in writing and filed with the board within ten days of the

original denial or notice of violation determination. Notice of the hearing shall be published in the City Bulletin. The hearing shall be open to the public. The hearing may be informal but all testimony shall be sworn. The board shall issue a final determination within ten days of the close of the hearing.

(C.M.C. 895-23; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 384-1991, eff. Oct. 18, 1991; a. Ord. No. 115-1993, eff. Mar. 24, 1993)

*Sec. 895-25. - Regulations.*

The city manager is authorized to adopt and promulgate regulations necessary for the orderly and efficient administration of this chapter.

(C.M.C. 895-25; ordained by Ord. No. 384-1991, eff. Oct. 18, 1991)

*Sec. 895-27. - Outdoor Advertising Sign Excise Tax.*

Any person who owns or controls an outdoor advertising sign shall pay the outdoor advertising sign excise tax established in Cincinnati Municipal Code chapter 313, "Outdoor Advertising Sign Excise Tax," unless the person or the sign is exempted from taxation pursuant to the provisions of that chapter.

(Ordained by Emer. Ord. No. 167-2018, § 2, eff. July 1, 2018)

*Sec. 895-29. - Severability.*

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter or any part thereof is for any reason held to be unconstitutional,

such decision shall not affect the validity of the remaining portions of this chapter or any part thereof. The city council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional.

(Ordained by Emer. Ord. No. 380-2020, § 7, eff. Nov. 12, 2020)

*Sec. 895-99. - Penalties.*

Whoever violates any provision of this chapter commits a Class D Civil Offense as defined by Section 1501-9(a) of the Cincinnati Municipal Code. Display of an outdoor advertising sign in violation of this chapter within a different calendar month shall be a separate offense. Whoever displays the same outdoor advertising sign in violation of this chapter following a prior violation within the same calendar year commits a separate, additional Class D Civil Offense as defined by Section 1501-9(a) of the Cincinnati Municipal Code, and shall forfeit the outdoor advertising sign and cause it to be permanently removed.

(C.M.C. 895-99; ordained by Ord. No. 65-1989, eff. Mar. 25, 1989; a. Ord. No. 192-1994, eff. 6-2-94; Emer. Ord. No. 163-2018, § 5, eff. July 1, 2018; a. Emer. Ord. No. 323-2018, § 3, eff. Oct. 10, 2018)