No. 21-900

In the Supreme Court of the United States

CITY OF CINCINNATI, OHIO, ET AL., PETITIONERS

v.

LAMAR ADVANTAGE GP COMPANY, LLC, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a tax singling out certain billboards is subject to heightened scrutiny under the First Amendment.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are 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 Karen Alder, Finance Director for the City of Cincinnati.

Respondents are Lamar Advantage GP Company, LLC, and Norton Outdoor Advertising, Inc.

Respondent Lamar Advantage GP Company, LLC, is a wholly owned subsidiary of Lamar Advertising Company. Lamar Advertising Company has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondent Norton Outdoor Advertising, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Ohio Supreme Court (Pet. App. 1a-27a) is not yet published in the North Eastern Reporter but is available at 2021 WL 4201656. The opinion of the Ohio First District Court of Appeals (Pet. App. 28a-51a) is reported at 155 N.E.3d 245. The order of the Ohio Court of Common Pleas converting the preliminary injunction into a permanent injunction (Pet. App. 52a-61a) is reported at 114 N.E.3d 831. The order of the Court of Common Pleas granting respondents' motions for a preliminary injunction (Pet. App. 62a-112a) is reported at 114 N.E.3d 805.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on September 16, 2021. The petition for a writ of certiorari was filed on December 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

In the decision below, the Ohio Supreme Court correctly applied this Court's precedents and invalidated a municipal tax singling out billboards that falls predominantly on two companies—respondents here. As the court recognized, the First Amendment's protections require the application of heightened scrutiny to a tax targeting a single speech platform or a small group of speakers, and the city's sole stated interest in raising revenue cannot justify such a tax. As the court also recognized, however, another state court of last resort has reached a conflicting result in upholding a materially identical tax. That conflict on an important question of constitutional law warrants this Court's review.

The City of Cincinnati imposes a tax on "outdoor advertising signs" within city limits. An "outdoor advertising sign," in turn, is defined as a sign that is made available for paid, third-party speech. The tax does not fall on any other sign publishers, other forms of media, or other businesses. The city purportedly adopted the tax for the sole purpose of raising general revenues.

Respondents, who own the vast majority of the billboards in Cincinnati, challenged the tax under the First Amendment. In the decision below, the Ohio Supreme Court invalidated the tax, recognizing that this Court's precedents require application of heightened scrutiny to a targeted tax on First Amendment activities. As this Court's decisions establish, the threats of censorship,

chilled expression, and viewpoint discrimination are present when the government singles out *any* publication medium for a special burden, whether or not the medium is part of the traditional press.

The Ohio Supreme Court correctly rejected the Maryland Court of Appeals' contrary conclusion. The Maryland court's conclusion was based on an incorrect reading of this Court's precedents that would limit the First Amendment's protections to the institutional press and would require a showing that the city specifically intended to interfere with protected speech. The Maryland court's erroneous decision sets a dangerous precedent not only for "old media" publishers but also for increasingly prevalent "new media" platforms—including social media—that have replaced more traditional news sources for many Americans. Allowing that decision to stand would unduly constrain the protections of the First Amendment. The Court should grant review to provide much-needed guidance to the lower courts on the recurring and far-reaching issues of First Amendment law implicated here.

This case comes to the Court as municipalities are constantly searching for new sources of revenue. That reality, combined with an increasing intolerance of free speech, has led municipalities to seek to impose crippling financial burdens on speech platforms that disseminate highly visible and politically unpopular speech. The question presented is thus important and timely—both within the billboard industry and beyond. The petition for a writ of certiorari should be granted and the decision below affirmed.

A. Background

1. In 2018, Cincinnati enacted a tax on "outdoor advertising signs in the City of Cincinnati." Cincinnati Mun. Code ch. 313 (Pet. App. 116a; see *id.* at 113a-123a). That

tax was modeled on similar billboard taxes adopted in Philadelphia and Baltimore. Pet. App. 88a n.10. As enacted, the Cincinnati tax defined an "outdoor advertising sign" to mean an "off-site sign." *Id.* at 3a. During the course of the proceedings in this case, however, the city amended the definition of "outdoor advertising sign" to mean either (1) "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 (2) "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." Cincinnati Mun. Code 895-1-O (Pet. App. 126a).

The tax is levied on the "advertising host"—defined as "any person who owns or controls an outdoor advertising sign." Cincinnati Mun. Code 313-1-A1 (Pet. App. 113a-114a). The advertising host must pay a tax that is the greater of (1) "seven percent of the gross receipts generated by or attributable to" its sign or (2) an annual amount based upon the size and type of display ($10 per square foot for an electronic display within 660 feet of a highway, $5 per square foot for a non-electronic sign within 660 feet of a highway, or $2 per square foot for any other display). Cincinnati Mun. Code 313-3 (Pet. App. 116a-117a).

The tax thus applies equally to commercial and noncommercial speech and does not depend on the number of advertisements on a given display or an advertisement's duration. And because the tax may be based on square footage, it applies as long as a sign is made available for third-party speech, regardless of whether any third party actually purchases use of the sign face. The tax advances a single purpose: raising revenue to "help balance the

city's budget" and "fund special projects designated by city council." Pet. App. 3a.

The billboard tax is imposed only on billboard owners; it does not fall on any other sign publishers, other forms of media, or other businesses. The tax excludes, *inter alia*, signs that are not made available for third-party speech; signs displayed in the public right-of-way; signs approved by the city for special events; signs erected or displayed on city-owned property; and signs smaller than 36 square feet. Pet. App. 22a. And the tax is independent of, and in addition to, all other taxes and fees imposed by the state and local governments, including property taxes, sales taxes, and fees for sign permits.

Along with the billboard tax, the city also enacted a provision prohibiting billboard owners from stating "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." Pet. App. 45a-46a (quoting Cincinnati Mun. Code 313-7(b)). The city repealed that provision after the lower courts in this litigation held it unconstitutional under the First Amendment. *Id.* at 7a-8a.

2. "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (internal quotation marks and citation omitted). Though often associated with commercial speech (advertising products, services, and attractions), billboards also display news, political speech, and issue advocacy. As technology has advanced, various entities have increasingly turned to billboards—especially digital billboards, which can be updated in real time—to convey their messages. Newspapers use digital billboards to publish breaking news; local television stations broadcast weather forecasts and give real-time

sports updates; and governments transmit urgent public-safety notices. Pet. App. 5a, 76a n.6. As with publishers of any other form of mass media, billboard publishers make editorial determinations with respect to the content of every message displayed. *Id.* at 6a.

While performing many of the same functions, billboards have certain advantages over other speech platforms. Their affordability provides a forum for ideas that might not otherwise have one, and their visibility allows those ideas to reach a vast swath of the population that might not otherwise receive them. Billboards thus play a critical role in expanding the marketplace of ideas, particularly given that consumers increasingly seek information from a small number of curated sources. See Out of Home Advertising Association of America Br. at 4-28, *Clear Channel Outdoor, LLC* v. *Raymond*, petition for cert. pending, No. 21-219 (filed Aug. 12, 2021).

3. It is settled law that billboards are entitled to First Amendment protection. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 48-49 (1994); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 807, 817 (1984); *Metromedia*, 453 U.S. at 500-501 (plurality opinion); *id.* at 524 (Brennan, J., concurring in the judgment). This Court has recognized that billboards are a "well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (plurality opinion) *id.* at 524 (Brennan, J., concurring in the judgment). And it has recognized that there may be legitimate governmental interests in regulating the physical characteristics of billboards—in particular, a safety interest in eliminating potential traffic hazards and an aesthetic interest in improving the appearance of cities. See *Taxpayers for Vincent*, 466 U.S. at 807, 817; *Metromedia*, 453 U.S. at 507-508 (plurality opinion). But those ration-

ales will not withstand scrutiny if an ordinance's other features diminish their credibility. See *Ladue*, 512 U.S. at 52, 54-55; *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410, 418-419 (1993).

B. Facts And Procedural History

1. Respondents are two outdoor advertising companies that operate the majority of the billboard space in Cincinnati, owning "approximately 450 and 415 billboards." Pet. App. 4a-5a. It is undisputed that Cincinnati's billboard tax falls "predominantly" on respondents. *Id.* at 2a. Respondents are unable to pass the tax on to their customers because of competition between one another and with other advertising mediums. *Id.* at 5a. By making respondents' "less profitable billboards unsustainable," the tax "might cause them to remove a total of 70 to 80 billboards." *Ibid.*

Respondents display a variety of commercial and noncommercial, paid and unpaid messages on those billboards. Approximately 70% to 75% of the messages are paid advertisements, which include commercial messages as well as messages for political candidates and nonprofit organizations, including religious, political, and social views. Pet. App. 5a. The remaining messages consist of respondents' own speech, or space that respondents donate to "display the noncommercial speech of charities and nonprofit organizations, public-service announcements, AMBER alerts, and public-health-and-safety messages." *Ibid.*

Respondents "exercise editorial control over the messages displayed on their billboards" in a variety of ways. Pet. App. 6a. They review the messages to ensure they are "effective," "accurate," and "meet[] community and the companies' standards." *Ibid.* Respondents have also

received requests from members of city council for "donation of billboard space" or "removal of messages with which they disagree." *Ibid.* Respondents have acceded to such requests, recognizing that members of the city council hold respondents' "fate in their hands" and "might increase taxes in retaliation" for messages they do not like. *Ibid.*

2. In 2018, each respondent separately brought suit against petitioners, the City of Cincinnati and various city officials, in the Ohio Court of Common Pleas, contending that Cincinnati's targeted billboard tax imposed an unconstitutional tax on commercial and noncommercial speech in violation of the First Amendment. The trial court consolidated the cases and, after briefing and argument, granted respondents a temporary restraining order precluding petitioners from implementing or enforcing the ordinance. Pet. App. 70a. After several days of testimony and additional argument by counsel, the trial court granted respondents' motions for a preliminary injunction against enforcement of the billboard tax. *Id.* at 74a-91a.

In holding that respondents had shown a likelihood of success on the merits, the trial court reasoned that petitioners had "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." Pet. App. 77a. Citing this Court's decisions in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987); and *Leathers* v. *Medlock*, 499 U.S. 439 (1991), the trial court concluded that strict scrutiny applied and determined that

petitioners had failed to "demonstrate[] a compelling interest for the imposition of the selective and targeted billboard tax to the exclusion of other alternatives for the raising of revenue." Pet. App. 87a-88a. The trial court thereafter converted the preliminary injunction into a permanent injunction. *Id.* at 52a-61a.

3. The Ohio First District Court of Appeals reversed in relevant part. Pet. App. 28a-51a. Relying heavily on the then-recent decision from the Maryland Court of Special Appeals in *Clear Channel Outdoor, Inc.* v. *Director, Department of Finance*, 223 A.3d 1050 (2020), aff'd, 247 A.3d 740 (2021), petition for cert. pending, No. 21-219 (filed Aug. 12, 2021), the appellate court concluded that Cincinnati's tax was "content neutral"; that it did not "threaten to suppress the expression of certain viewpoints"; and that it did not "single out a particular group of billboard operators." Pet. App. 43a. The appellate court rejected the trial court's determination that the tax targeted a small group of speakers, reasoning that its narrow applicability was due to Cincinnati's "market restrictions on billboards." *Id.* at 44a. And the appellate court observed that treating billboard operators differently from other forms of media was "not constitutionally suspect" because "[b]illboard operators are different from more traditional press mediums like news organizations," as billboard operators "seldom display their own content." *Ibid.*

4. The Ohio Supreme Court unanimously reversed, reinstating the trial court's order permanently enjoining enforcement of the billboard tax. Pet. App. 1a-27a.

a. The Ohio Supreme Court first concluded that the billboard companies were "protected by the rights to freedom of speech and of the press" under the First Amendment. Pet. App. 10a. The court recognized that respondents "use printing technology for mass communication

and exercise editorial discretion over the messages that they publish," and it noted that this Court has "consistently rejected the proposition" that the First Amendment applies only to a narrower "institutional press." *Id.* at 9a (citation omitted).

Turning to this Court's precedents—and relying on the same decisions cited by the trial court—the Ohio Supreme Court distilled several fundamental principles, two of particular significance. Pet. App. 13a-21a. *First*, the court observed that "a tax that selectively singles out the press or targets a small group of speakers creates the danger that the tax will be used to censor speech." *Id.* at 20a. *Second*, the court noted that "it is not necessary to prove that the purpose of a tax is to suppress or punish speech to establish that the tax violates the First Amendment," because "a selective tax creates * * * a potent tool for censorship." *Id.* at 20a-21a.

Applying those principles, the Ohio Supreme Court held that Cincinnati's billboard tax violated the First Amendment. Pet. App. 21a-25a. The court rejected petitioners' claim that the tax was on the "noncommunicative aspects of billboards." *Id.* at 21a. Rather, the court explained that liability attaches not simply because "a sign is built or already exists," but because it is "leased or offered for lease" by its owner. *Ibid.* Nor could the tax be treated as a standard tax on a commercial transaction, because it targeted "advertising revenue" and the "means of communication"—just like other taxes this Court had invalidated under the First Amendment. *Id.* at 21a-22a.

The Ohio Supreme Court further reasoned that the tax applied only to a limited category of signs and thereby "targeted a small group of speakers to bear most of the burden of [the] tax." Pet. App. 22a. As such, the tax was "structured in a way that burdens activities protected by

the First Amendment." *Id.* at 23a. Indeed, the "undisputed evidence" showed that the tax would require respondents to "remove almost 10 percent of their billboards, limiting the dissemination of protected content." *Ibid.* The court then concluded that petitioners' interest in raising revenue "cannot justify the special treatment of the press." *Id.* at 24a (citation omitted).

b. The Ohio Supreme Court directly addressed the decision from the Maryland Court of Appeals upholding a materially identical tax, and it "d[id] not find [the Maryland court's] analysis to be persuasive." Pet. App. 24a. The Ohio Supreme Court first rejected the conclusion that a tax such as Cincinnati's did not single out the press because it was not intended to "interfere with protected speech." *Ibid.* The court reasoned that "a purpose to censor is not required for a tax to violate the First Amendment." *Id.* at 25a (citing *Minneapolis Star*, 460 U.S. at 592). The court then rejected the conclusion that such a tax "did not target a small number of speakers." *Ibid.* The court explained that the Maryland court improperly "excluded from its analysis other commercial signs that were not subject to the Baltimore tax," and it added that the tax "applies to only a small number of speakers that overwhelmingly bear the burden." *Ibid.* For those reasons, the Ohio Supreme Court "decline[d] to adopt the Maryland high court's analysis." *Ibid.*

DISCUSSION

A. The Decision Below Is Correct

The Ohio Supreme Court correctly concluded that Cincinnati's tax is subject to strict scrutiny because it singles out a small group of publishers for a special burden, for no purpose other than to raise general revenues. The

court reached that conclusion through a faithful application of this Court's precedents governing selective taxation of the press.

1. For nearly a century, this Court has recognized that the "liberty of the press is not confined to newspapers and periodicals" and that the press includes "every sort of publication which affords a vehicle for information and opinion." *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938); see also Pet. App. 9a (citing *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Board*, 502 U.S. 105 (1991); and *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986)). As Justice Gorsuch recently explained, the Bill of Rights "protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas." *Berisha* v. *Lawson*, 141 S. Ct. 2424, 2425 (2021) (opinion dissenting from denial of certiorari). Accordingly, lower courts have read this Court's decisions to protect against the targeted burdening of a wide variety of speakers and speech platforms. See, *e.g.*, *Vermont Society of Association Executives* v. *Milne*, 779 A.2d 20, 31 (Vt. 2001).

Applying those well-settled principles, the Ohio Supreme Court properly concluded that respondents are "protected by the rights to freedom of speech and of the press enshrined in the First Amendment." Pet. App. 10a. Respondents fit comfortably within this Court's expansive conception of the press because they "use printing technology for mass communication and exercise editorial discretion over the messages that they publish." *Id.* at 9a; see *Preferred Communications*, 476 U.S. at 494. The record contains several examples of the exercise of such discretion. See Pet. App. 5a-6a.

2. The Ohio Supreme Court correctly applied this Court's decisions governing selective taxation of the press in holding that Cincinnati's tax violates the First Amendment.

a. This Court has held that the government may subject speech platforms to generally applicable taxes without running afoul of the First Amendment. See *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991); *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). But just as "clearly established" is the principle that targeted taxation of speech platforms, unless justified by some special characteristic of the platform, raises concerns that strike at the heart of the First Amendment. *Arkansas Writers' Project Inc.* v. *Ragland*, 481 U.S. 221, 227-228 (1987); see, *e.g.*, *Leathers*, 499 U.S. at 447; *Minneapolis Star*, 460 U.S. at 581; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

Targeted taxation of a speech platform poses the triple threat of censorship, chilled expression, and viewpoint discrimination. This Court has explained that the Framers crafted the First Amendment's speech and press clauses against the backdrop of the Crown's "persistent effort"—first through prior restraint, then through taxes on newspapers and advertisers—to limit the "free expression of any opinion which seemed to criticize" the British government. *Grosjean*, 297 U.S. at 245-248. In light of that history, the core First Amendment problem with selective taxation of a speech platform is the limitation of free expression and flow of information vital to an "informed public opinion." *Id.* at 250.

The Court has further explained that a tax that singles out publishers carries a latent threat of abuse by virtue of its "structure." See *Minneapolis Star*, 460 U.S. at 580. Accordingly, "[i]llicit legislative intent is not the *sine qua non* of a violation." *Id.* at 592; see *Leathers*, 499 U.S. at

445; *Arkansas Writers' Project*, 481 U.S. at 228. As the Court has put it, "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star*, 460 U.S. at 585. That weapon can "operate as effectively as a censor to check critical comments," suppress particular viewpoints, and, in the process, distort the public discourse. *Ibid.*; see *Leathers*, 499 U.S. at 447. In short, "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." *Minneapolis Star*, 460 U.S. at 592-593.

Applying the foregoing principles in *Minneapolis Star*, this Court invalidated a state use tax on newspaper ink and paper, both because it singled out the press and because it targeted a small group of speakers (namely, newspapers with a large circulation) for a special financial burden. See 460 U.S. at 586-592. Those features "present[ed] such a potential for abuse that no interest suggested by Minnesota c[ould] justify the scheme." *Id.* at 592. A few years later, in *Arkansas Writers' Project*, the Court struck down a sales tax on general-interest magazines that exempted newspapers, religious, professional, trade, and sports journals. See 481 U.S. at 229. That tax similarly targeted a small group of magazines, and it did so based on the magazines' content. See *id.* at 229-230.

In later decisions, the Court reaffirmed that a tax that singles out the press is unconstitutional. In *Leathers*, for example, the Court reiterated that, because the press "will often serve as a restraint on government," targeted taxation of the press "could operate 'as effectively as a censor to check critical comment.'" 499 U.S. at 446 (quoting *Minneapolis Star*, 460 U.S. at 585). Surveying its previous decisions, the Court identified three distinct charac-

teristics of a tax, each of which triggers heightened scrutiny: (1) when a tax "single[s] out the press"; (2) when it "targets a small group of speakers"; and (3) when it "discriminates on the basis of the content of taxpayer speech." *Id.* at 447. The Court went on to hold that the tax at issue—a statewide, generally applicable sales tax that treated different forms of media differently—was not unconstitutional. See *id.* at 447-448. The Court emphasized that the generally applicable tax in *Leathers* was unlike the tax in *Minneapolis Star*, which "selected a narrow group to bear fully [its] burden." *Id.* at 448.

b. The Ohio Supreme Court correctly concluded that Cincinnati's billboard tax was unconstitutional under those precedents because it singled out protected speakers and speech publishers for a special burden without an adequate justification.

At the outset, the Ohio Supreme Court properly disposed of petitioners' argument that the tax did not implicate First Amendment interests because it merely taxed a commercial transaction or the "noncommunicative aspects of billboards." Pet. App. 21a. Cincinnati's billboard tax targets the means of communication—just like the tax in *Minneapolis Star*, which applied to ink and paper. *Id.* at 21a-22a. The tax is also akin to the tax in *Grosjean*, which targeted advertising revenues of just a few large newspapers. *Id.* at 13a, 21a.

Both features of the tax implicate vital First Amendment interests. Taxes that single out the press "create[] the danger that the tax will be used to censor speech." Pet. App. 20a (citing *Minneapolis Star*, 460 U.S. at 591). And "taxes that curtail the amount of revenue raised by the press through advertisements" "tend to directly restrict the circulation of protected expression." *Id.* at 23a. Here, the record is clear that respondents would have to remove billboards that would be rendered less profitable

by the city's tax, eliminating protected speech from the public sphere. See pp. 7, 11, *supra*.

The Ohio Supreme Court also properly concluded that the tax applied only to a limited category of signs and thereby "targeted a small group of speakers to bear most of the burden of [the] tax." Pet. App. 22a. A tax structured in this manner creates a threat of censorship, thereby "burden[ing] activities protected by the First Amendment," because "the political process may not alleviate the potential that the tax might be used to suppress, control, or punish speech." *Id.* at 22a-23a. As this Court held in *Minneapolis Star*, such a tax cannot be justified merely by an interest in raising revenue. See 460 U.S. at 586.

3. Petitioners' criticisms of the Ohio Supreme Court's analysis are meritless.

a. Petitioners principally argue that the tax here is generally applicable and thus subject only to rational-basis review. See Pet. 20-22 (citing *Leathers*, 499 U.S. at 447). Petitioners suggest that, because Cincinnati subjects many industries to excise taxes, the tax here, which applies predominantly to two billboard operators, is generally applicable. See Pet. 22. In petitioners' view, the fact that only two billboard operators bear the burden of the tax is merely a matter of "form." See Pet. 21-22.

That argument flies in the face of this Court's precedents. Petitioners do not dispute—because they cannot—that the tax is imposed predominantly on respondents. Pet. App. 22a-23a. The tax thus provides the city with the means to adjust tax burdens in response to respondents' speech without affecting many other industries or speakers. As this Court has recognized, a law that "targets a small number of speakers" poses the "danger of censorship" and allows the government to "distort the market for ideas"—the same concerns posed by content-based

regulations. *Leathers*, 499 U.S. at 448. And it is precisely when a tax is tailored to target such a "narrowly defined group" that the tax "begins to resemble more a penalty for a few" large enterprises than a constitutionally legitimate exercise of state power. *Minneapolis Star*, 460 U.S. at 592.

The record here confirms that the targeted nature of the tax gives rise to exactly the risks of censorship and chilling that offend the First Amendment. As the Ohio Supreme Court observed, "[t]he evidence shows that the city's council members had not been shy in asking [respondents] to donate billboard space for their projects or in seeking the removal of messages with which they disagreed." Pet. App. 23a. And respondents testified that they were well aware of the consequences they risked in failing to comply. See *id.* at 6a. This type of governmental interference with respondents' editorial decisions creates—at a bare minimum—a "threat of sanctions" that "may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." *Minneapolis Star*, 460 U.S. at 588 (alterations and citation omitted). As a result, petitioners' insistence that the tax here does not "present[] the danger of suppressing, particular ideas," Pet. 23 (quoting *Leathers*, 499 U.S. at 453), rings hollow.

b. Petitioners also disregard this Court's precedents when they assert that billboard operators "are not members of the press, they are purveyors of real estate." Pet. 23. In fact, the "press" includes "every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452. And this Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United* v. *FEC*, 558 U.S. 310, 352 (2010) (citation omitted). A publisher, moreover, engages in First

Amendment-protected activity when it "exercis[es] editorial discretion" over which messages to "include in its repertoire," as respondents do here. *Preferred Communications*, 476 U.S. at 494; see pp. 7-8, *supra*. Conspicuously absent from petitioners' discussion of the merits is any citation of *Lovell* or other decisions in which this Court has evinced an expansive understanding of the "press." See, *e.g.*, *Mills*, 384 U.S. at 219.

Petitioners suggest that billboards cannot be part of the "press" because they can be "heavily regulated—even to the point of being regulated out of existence." Pet. 14 (citing *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981)); but see *Norton Outdoor Advertising, Inc.* v. *Village of Arlington Heights*, 433 N.E.2d 198, 200 (Ohio 1982). That argument also lacks merit. Billboards' special characteristics may justify zoning regulations that are appropriately tailored to serve the governmental interests in traffic safety and aesthetics. See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507-508 (1981) (plurality opinion); see also *Minneapolis Star*, 460 U.S. at 581. But neither of those interests is implicated by a tax designed solely to raise revenue by targeting a medium of the press or a small group of speakers.

In any event, in the First Amendment context, this Court has squarely rejected the type of greater-includes-the-lesser reasoning that petitioners advance here. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 762-768 (1988). And rightly so. Such reasoning is "blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions." *Id.* at 762-763. In the case of an outright ban, "the danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech," and the Court "ask[s] whether some interest unrelated to speech justifies this silence." *Id.* at 763. "In contrast, a

law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship." *Ibid.* The purportedly "lesser" restriction here—an excise tax that falls overwhelmingly on two billboard companies—creates exactly the risks of self-censorship and chilled speech that the First Amendment guards against. *Id.* at 762-763.

c. Petitioners also argue that, even if the tax targets just a few billboard operators, that reality stems from a combination of market conditions and historic regulations. See Pet. 17-18. Under such circumstances, petitioners suggest that what "should matter" more than the size of the targeted group is whether the "group was improperly targeted or capable of being selectively targeted." Pet. 18. That argument is profoundly flawed.

A tax that targets a small number of speakers suffers from the same First Amendment defect regardless of the competitiveness of the market: the tax's narrow targeting removes the political check on the taxing authority, thereby creating opportunities for abuse. See, *e.g.*, *Arkansas Writers' Project*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 585. On the record here, that threat of abuse is far from abstract. See pp. 7-8, 17, *supra*. To the extent petitioners suggest that a selective-taxation regime must be motivated by an improper legislative intent in order to be invalid, this Court has repeatedly and definitively rejected that contention as well. See *Leathers*, 499 U.S. at 445; *Arkansas Writers' Project*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 592.

Petitioners also significantly understate the extent to which the tax here targets a narrow group of speakers and thus is susceptible to abuse. Petitioners assert that "[t]he Cincinnati tax applies to all billboard operators." Pet. 18. But the tax "does not apply to all advertisers—or even to all advertising signs." Pet. App. 22a. Among other things,

it excludes signs that are not made available for third-party speech; signs smaller than 36 square feet; signs "displayed in the public right-of-way (including marquees, projecting signs, and signs relating to sponsorships)"; "signs approved by the city for special events"; and "signs erected or displayed on city-owned property, including public-transit stops and streetcar stations." *Ibid.* (citations omitted). The result is that petitioners have targeted a small group of speakers—primarily two billboard companies—to bear the burden of a tax whose sole purpose is to raise revenue. Under this Court's precedents, the First Amendment does not tolerate such differential treatment of protected speakers and speech publishers.

B. The Question Presented Is Important And Warrants This Court's Review

Although the Ohio Supreme Court's decision is correct, the question presented warrants this Court's review. As petitioners correctly note, there is now an unambiguous conflict between state courts of last resort on an important question of First Amendment law. If left unresolved, other municipalities facing budget deficits may choose to implement similar taxes, significantly increasing the substantial risk that governments will censor and chill expression—particularly of unpopular speech—under the guise of raising revenue. The participation of the Out of Home Advertising Association of America (OAAA) and the Chamber of Commerce as amici supporting the pending petition in *Clear Channel* confirms the important

and far-reaching implications for discrete groups of publishers, in a variety of platforms, if such targeted taxes are permitted to stand.*

1. In singling out a specific speech platform and a small group of speakers, the taxes enacted by Cincinnati and Baltimore mark a dangerous departure from bedrock First Amendment principles. As technological innovation spawns ever more varied speech platforms, municipalities may well use such taxation to target those platforms and other non-traditional speakers. Americans increasingly consume information through non-traditional media. And individuals and small organizations play an ever more prominent role in disseminating news and other protected speech through social media. In 2020, over half of American adults reported consuming news "often" or "sometimes" from social media. See Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in 2020*, Pew Research Center (Jan. 12, 2021) <tinyurl.com/socialmedianews2020>. Indeed, among young Americans, social media is the most popular news platform, beating out print, television, radio, and broadcast media. See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, Pew Research Center (Dec. 10, 2018) <tinyurl.com/newssources2018>. Like billboards, social media and other alternative publishing platforms actively expand the marketplace of ideas

* It appears that the Court is holding the petition in *Clear Channel* pending its decision in *City of Austin* v. *Reagan National Advertising*, No. 20-1029 (argued Nov. 10, 2021). Because Cincinnati amended its definition of "outdoor advertising sign" to eliminate any on-premise/off-premises distinction, see p. 4, *supra*, this case unambiguously does not implicate the on-premises/off-premises distinction at issue in *City of Austin*. The Court may nevertheless wish to consider the petition in this case together with the *Clear Channel* petition.

without the barriers to access associated with more traditional media.

New and evolving platforms will continue to be a key component of how Americans learn about events and issues in the news, especially given that technological advances already have enabled "virtually anyone in this country [to] publish virtually anything for immediate consumption virtually anywhere in the world." *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting from denial of certiorari) (citations omitted). The Court has consistently recognized that the press includes "every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452. As Chief Justice Burger explained, "[i]t is not strange that 'press,' the word for what was [at the Framing] the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 800 n.5 (1978) (concurring opinion); see David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2014 Cato S. Ct. Rev. 15, 30-34.

That expansive conception of the "press" is especially important now as the lower courts navigate the contours of free-speech protections for new media. Allowing some lower courts to adopt a narrow interpretation of the "press" that excludes even platforms with strong historical roots, such as billboards, would cabin the First Amendment and deprive non-traditional publishers of the protection from government censorship rightfully afforded under the Constitution.

2. The Court should address the question presented now. That question is particularly significant because it arises at a time when municipalities are searching for additional sources of needed revenue. See Pet. App. 87a (describing billboard tax on as part of the "solution" to make

up a projected budget shortfall of $2.5 million). This quest for revenue, combined with an increasing hostility toward free-speech principles, creates a heightened risk of state censorship and chilled expression. Because of their lower barriers to entry, billboards and new-media platforms provide unique opportunities for sharing unpopular or provocative messages outside the mainstream. Those speech platforms thus play an important role in expanding the marketplace of ideas.

Declining to address the question would effectively permit some municipalities to impose targeted taxes on speech platforms at little political cost, resulting in crippling financial burdens on those platforms. Indeed, if such taxes were permitted under the First Amendment, there would be no obvious limit on the amount of the tax that could be imposed. Municipalities could raise the tax levels to rates that would make it untenable to publish any speech at all. That possibility would place billboard operators and other media platforms that disseminate highly visible (and at times politically unpopular) speech at a significant risk of censorship, jeopardizing free-speech rights for a wide variety of forums.

3. The importance of the question presented is confirmed by the amicus support for the *Clear Channel* petition. That OAAA—the trade association for the billboard industry—supports a grant of certiorari underscores the issue's significance to the industry. As OAAA's brief explains, billboards are one of the few mediums that allow speakers cheaply and efficiently to reach a broad and unfiltered audience, and are frequently a forum for non-commercial speech on matters of public concern. See OAAA Br. at 6-24, *Clear Channel*, *supra*. That is especially true as technological advances have allowed digital billboards to display a greater number of messages in a more timely

manner. See *id.* at 24-28. Allowing municipalities to target that unique and valuable speech platform for taxation is inconsistent with the First Amendment and risks great harm to the billboard industry.

As the Chamber of Commerce's amicus brief indicates, moreover, the risk of harm is not "confined to billboards." Chamber Br. at 13, *Clear Channel*, *supra*. Rather, under the reasoning petitioners would have this Court adopt, "nearly any platform that American companies, associations, and individuals use to speak to one another outside of the institutional press would be susceptible to targeted taxation," which "may be calculated to burden, chill and silence disfavored speakers and speech." *Id.* at 18.

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The question presented has divided state courts of last resort on a significant issue of First Amendment law with far-reaching implications. This Court should grant review and uphold the Ohio Supreme Court's decision, which protects speech platforms and small groups of speakers from targeted taxation that chills and censors speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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