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.,
RESPONDENTS.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page:

Cases—continued:

Constitution and statutes:

INTRODUCTION

Respondents agree that certiorari should be granted to address the important First Amendment question presented in this case. Resp. Br. 20-24. That concession is correct. Whether a content-neutral excise tax on those engaged in the business of leasing billboards triggers heightened First Amendment scrutiny is a question that this Court should settle. And the conflict between the highest courts of Ohio and Maryland demonstrates that this Court's intervention is needed to ensure that similar taxation schemes receive consistent nationwide treatment. Pet. 8-9, 13-18; Resp. Br. 3, 11, 20.

This case presents the ideal vehicle for the Court to confirm that a content-neutral excise tax on billboard rentals does not violate the First Amendment and that the Court's jurisprudence addressing taxes on the press does not mandate strict scrutiny here. As an initial matter, billboard owners who rent their signs do not function as members of the traditional (or non-traditional) press, and Cincinnati's tax on those who engage in this commercial activity raises no speech-suppression concerns. And the tax here has none of the hallmark risk factors that that have animated this Court's press-taxation cases. Accordingly, respondents must make a showing that the City's tax evinces hostility and oppression against particular speakers—and they have not met that burden.

Review is particularly vital here to clarify the principles that govern state tax or regulatory schemes concerning billboards (and other non-traditional media of expression). As respondents suggest (Br. 21-

22), setting the general ground rules for such cases is of surpassing importance. And the petition here need not be held for *City of Austin v. Reagan National Advertising of Austin, Inc.*, No. 20-1029 (argued Nov. 10, 2021). Cincinnati's tax is not based on the on-premises/off-premises distinction among signs that is at issue in that case.

In sum, in order to resolve the conflict in the lower courts, clarify this significant area of First Amendment law, and confirm the validity of taxes like the one at issue here, the petition should be granted.

ARGUMENT

A. The Lower Courts Are In Direct Conflict On The Question Presented

As respondents acknowledge (Br. 11), the highest courts of Ohio and Maryland squarely disagree on the constitutionality of billboard excise taxes. The Maryland Court of Appeals addressed an excise tax imposed on billboards in Baltimore and rejected the billboard industry's claim to First Amendment protection. *See Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, 247 A.3d 740 (Md. 2021), petition for cert. pending, No. 21-219 (filed Aug. 12, 2021). The Ohio Supreme Court reached the opposition conclusion, specifically rejecting the Maryland court's analysis. Pet. App. 1a-27a. Respondents agree that the two decisions create an "unambiguous conflict." Resp. Br. 20.

B. The Question Presented Raises Important First Amendment Issues That Merit This Court's Review

Respondents also agree that the decision is important. Resp. Br. 3, 20. Whether jurisdictions have the traditional freedom to structure non-discriminatory, content-neutral tax schemes that fall on particular industries that profit from others' use of media to engage in expressive activities is a significant issue. This Court reaffirmed in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), that the government enjoys "especially broad latitude in creating classifications and distinctions in tax statutes," *id.* at 547, including when the taxes apply differently to different speakers, *id.* at 548. Yet the decision below posits that even businesses built around a medium, like billboards, that can be banned altogether enjoy the highest level of First Amendment protection based on the lower court's unjustified extension of this Court's press-tax cases.

This Court has recognized that "[e]ach method of communication of ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). Accordingly, the principles articulated for the traditional press cannot be mechanically transposed to billboards—or, for that matter, any other evolving form of media. Yet this Court's clarification of how to apply those principles is critical to states and localities that seek to impose fair taxes on profitable commercial enterprises; to the billboard industry that seeks to

resist those taxes; and to taxing authorities that may impose taxes on other industries that touch on expression.

C. The Decision Below Is Incorrect

Respondents devote the bulk of their brief to defending the merits of the Ohio Supreme Court's decision. Resp. Br. 11-20. The time for that defense is in a merits brief if and when this Court grants the petition. Nevertheless, the erroneous foundations of respondents' arguments underscore the reasons why this Court should grant review and confirm the constitutionality of Cincinnati's tax.

1. Respondents begin by seeking to equate their commercial advertising activities on billboards with the means of expression that this Court has traditionally protected. Resp. Br. 12. The content displayed on respondents' billboards undoubtedly enjoys First Amendment protection (which varies according to the nature of the communication). But respondents overlook two important considerations in classifying themselves as the "press" under the First Amendment.

First, billboards occupy a unique position in the spectrum of communications media. Billboards are large-scale advertising vehicles that largely serve commercial interests and rarely generate their own content. Pet. App. 44a. They are thus "in a class by themselves," *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (internal quotation marks omitted), and can be regulated based on their distinctive noncommunicative features. The ability of billboard owners who rent advertising space to raise significant

sums from outdoor advertising is one such feature. This Court's cases involving taxes on the traditional press therefore do not definitively answer the question presented in this case, which concerns taxation of those who exercise the privilege of renting signs for a profit.

Second, this Court has held that the government may legitimately regulate or even ban commercial billboards without triggering heightened First Amendment scrutiny. *Metromedia*, 453 U.S. at 502 & 508 (plurality opinion). That is unquestionably a regulatory measure that could not be imposed on newspapers, magazines, radio, television, or the internet. That in itself should raise a red flag about respondents' effort to cloak themselves in the highest level of First Amendment protection.

2. Respondents' claims are equally unfounded when evaluated under this Court's First Amendment cases about taxes on particular members of the media. *See* Resp. Br. 13-16.

a. As the Court explained in *Leathers v. Medlock*, 499 U.S. 439 (1991), this Court's "cases have held that a tax that discriminates among speakers is constitutionally suspect only in certain circumstances." *Id.* at 444. The Court has focused on three structural considerations that raise the concern that the tax "threatens to suppress the expression of particular ideas or viewpoints." *Id.* at 447. These features are (1) whether the tax "single[s] out the press"; (2) whether the tax "targets a small group of speakers"; and (3) whether it discriminates on the basis of the content of taxpayer speech." *Id.* If those features are present, the Court does not ask for "direct evidence of improper censorial motive." *Id.* at 445.

When they are absent, however, a taxpayer can overcome "the presumption of constitutionality" for tax classifications "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Id.* at 452 (internal quotation marks omitted).

b. Under those criteria, petitioners' tax raises no concern about suppressing protected speech—as opposed to raising revenue from profitable commercial activities of a unique industry. First, the tax falls on billboard operators whose business model consists of maximizing profits through renting outdoor advertising space. Whatever measure of protection might apply to billboards' messages, the tax's connection to speech is at best attenuated when it falls on revenues raised from these activities.

Second, the tax does not *target* a small number of speakers. The tax indiscriminately falls on billboard operators who earn revenue from renting space for advertising—a limited class because the City has chosen to limit the number of billboards within its city limits and the industry is concentrated. Pet. App. 44a (describing Cincinnati's "decades-old 'cap and replace' program"). But the "danger of censorship," *Leathers*, 499 U.S. at 448, is hard to see in a tax on commercial leasing activities where, as here, the City could ban the medium altogether. And unlike the targeted taxes that drew this Court's suspicion in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1963), petitioners' tax falls on all members of the class being taxed. It does not involve "selective taxation of the

press through the narrow targeting of individual members," *Leathers*, 499 U.S. at 446 (describing *Ragland*) or the "target[ing] [of] a small group of newspapers" within a broader class, *id.* (describing *Minneapolis Star*).

Finally, the tax does not discriminate on the basis of content. The tax applies not based on the messages communicated by those who use the sign, but on revenues earned by property owners that provide the vehicle for displaying the messages. Further, no tax is incurred when a sign owner donates billboard space or uses its sign to display its own message. Cincinnati Mun. Code (CMC) 313-5(a)(i) (Pet. App. 117-18a). The tax applies only to a sign owner's commercial act of charging others to display messages—a privilege it enjoys because of the City's authorization of that commercial activity. *See* CMC Chapter 313 (describing "the privilege of installing, placing, and maintaining outdoor advertising signs in the city of Cincinnati") (Pet. App. 113-123a).

3. Respondents' contrary arguments lack merit. Resp. Br. 15-20. Respondents make no effort to argue that the tax at issue is content or viewpoint based—the quintessential bases for strict scrutiny. And their arguments that the tax implicates the other *Leathers* factors are flawed.

a. Initially, respondents seek (Br. 15) to analogize the revenue-based tax here to the tax on ink and paper in *Minneapolis Star*. That argument misses the mark. That tax singled out the speaker's very means of publication; this tax targets business activity that generates revenue for a billboard's owner. And while *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), did involve a tax on advertising revenue, there, the tax

called to mind an "invidious form of censorship [that] was intended *to curtail the circulation of newspapers* and thereby prevent people from acquiring knowledge of government activities," *Leathers*, 499 U.S. at 444-45 (emphasis added). That specter finds no parallel with respect to a medium—billboards—that has never been a vital source of information about government and that can be banned altogether.[1]

b. Respondents also argue that the group of speakers targeted is "small." But as the Maryland Court of Appeals explained, this Court's targeted-tax cases addressed taxes that "affected a smaller group within a larger universe of similar members of the same media." 247 A.2d at 473. The relevant question is therefore whether the tax "distinguishes among members *within related types of media*, not simply when it applies to a specific form of media." *Id.* at 473-74 (emphasis added). Cincinnati's tax does not draw such distinctions.[2]

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[1] Respondents' reliance (Br. 18-19) on *City of Lakewood v. Plain Dealer Publishing Co*, 486 U.S. 750 (1988), to downplay the significance of a municipality's authority to ban billboards is refuted by the very language respondents' quote. *City of Lakewood* rejected greater-includes-the-lesser logic for "a law or policy permitting communication in a certain manner for some but not for others" because it "raises the specter of content and viewpoint censorship." 486 U.S. at 763. Cincinnati's tax does not "permit[]" communication differently for some speakers than others, and even respondents do not claim that an evenhanded tax on *all* advertising revenue earned by billboards involves "content and viewpoint censorship."

[2] Cincinnati's tax applies to anyone "who owns or controls an outdoor advertising sign" and then rents that sign to a third party, subject only to size and location-based criteria. CMC Chapter 313 (Pet. App. 113a-23a). Respondents, who have established an "oligopoly" within the Cincinnati billboard

This Court's cases make clear that strict scrutiny is not triggered solely because a law targets a distinctive media as a whole. *See Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994) (declining to apply strict scrutiny to a law requiring cable providers to broadcast others' programming because of the unique characteristics of the industry and the content neutrality of the law and its justifications). That is the case here, especially because respondents' ability to earn profits from renting billboard space flows from government limitations on the entry of competitors. *See New York Rapid Transit Corp. v. New York,* 303 U.S. 573, 580 (1938) ("[f]reedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden").

c. Because respondents cannot establish that Cincinnati's tax bears the structural features of taxes that raise heightened First Amendment concerns, they must overcome "the strong presumption in favor of duly enacted taxation schemes," which applies even when speech is at issue. *Leathers*, 499 U.S. at 451 (citing *Regan v. Taxation with Representation of Washington*, *supra*). Here, respondents strike out in their implausible suggestion (Br. 17) that Cincinnati "targeted [billboards] in a purposeful attempt to interfere with [the companies'] First Amendment activities." *Leathers*, 499 U.S. at 448. Respondents conjure up an imaginary risk of censorship based on isolated requests from individual city council

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market, own most of the rental signs within the City of Cincinnati. Pet. App. 44a. They therefore would pay most of the tax because they own most of the signs within the city, not because of discriminatory treatment.

members to donate billboard space. Br. 17 (citing Pet. App. 23a). But that meager evidence falls far short of "the most explicit demonstration that a [tax] classification is a hostile and oppressive discrimination against particular persons and classes." *Leathers*, 499 U.S. at 452 (quoting *Regan*, 461 U.S. at 548).

d. Stepping back from the analytical flaws in respondents' position, the assertion that strict scrutiny—the most rigorous form of First Amendment analysis—should apply to a routine, content-neutral, revenue-raising measure imposed on billboard leasing activities makes little sense. Respondents do not claim that the tax is ruinous; they provide no evidence that it was adopted to suppress or in reprisal for any particular type of speech; and they make scant effort to show the risk of censorship. Even when government directly regulates expressive conduct—thereby overtly limiting speech—this Court applies only intermediate First Amendment scrutiny. *See*, *e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). Where, as here, no restriction on speech is at issue, and a municipality imposes a tax only because a regulated commercial activity is profitable, the heavy artillery of a prophylactic prohibition on a tax is wholly out of place.

D. The Question Presented Will Not Be Answered By *City Of Austin*

Finally, there is no need to hold this case for *City of Austin v. Reagan National Advertising,* No. 20-1029 (argued Nov. 10, 2021). As respondents note, the Court appears to be holding the petition in *Clear*

Channel Outdoor, Inc. v. Director, Department of Finance, No. 21-219, which seeks review of the similar Baltimore billboard tax, for its decision in *City of Austin*. Resp. 21. But unlike *Clear Channel*, *City of Austin* has no bearing on the issue presented in the instant petition.

In *City of Austin*, the Court is considering whether a law distinguishing between on- and off-premises signs is facially content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (*see* 20-1029 Pet. i), and thus subject to intermediate scrutiny, rather than strict scrutiny as the Fifth Circuit held. The Court's resolution of that issue may affect part of the analysis in *Clear Channel* because Baltimore's tax relies upon such a distinction, and the Maryland Court of Appeals addressed it. *See Clear Channel*, 247 A.3d at 759 ("We join the many courts and commentators who have concluded that, even after the *Reed* decision, a distinction between on-premises signs and off-premises signs in a regulatory or tax law does not discriminate on the basis of content and therefore does not trigger heightened scrutiny under the First Amendment").

Cincinnati's tax originally included such an on-premises/off-premises distinction, but, as the Ohio Supreme Court recognized and respondents concede, that provision has since been removed. Pet. App. 4a, 8a; Resp. Br. 21 n.*. The tax now applies to an "outdoor advertising sign," which is defined to mean a sign that the owner offers for lease or leases to another for, among other purposes, placing a message "in exchange for rent or other consideration." CMC 895-1-O (Pet. App. 126a). Accordingly, regardless of the resolution of the question presented in *City of Austin*,

the question presented here will continue to warrant the Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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