

No. 21-900

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**In the Supreme Court of the United States**

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CITY OF CINCINNATI, OHIO, ET AL., PETITIONERS

*v.*

LAMAR ADVANTAGE GP COMPANY, LLC, ET AL.

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

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**SUPPLEMENTAL BRIEF FOR THE RESPONDENTS**

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In the earlier briefing in this case, respondent and petitioner agreed that the Court’s decision in *City of Austin v. Reagan National Advertising*, No. 20-1029, would have no bearing on the correct resolution of the question presented here. See Resp. Br. 21 n.\*; Reply Br. 10-12. That remains true. If anything, the Court’s decision underscores the need for further review on that question. In *City of Austin*, the Court held that a distinction between on-premises and off-premises signs is content neutral and thus not subject to strict scrutiny. See slip op. 6. But the Court had no occasion to address whether the targeted taxation of a small group of billboard owners—separate

and apart from any on-premises/off-premises distinction—triggers strict scrutiny. That is the question on which the lower courts are divided, and it warrants the Court’s review.

In the decision below, the Ohio Supreme Court invalidated a Cincinnati tax on “outdoor advertising signs” that falls predominantly on respondents. See Pet. App. 2a-3a; Resp. Br. 7-11. The Ohio Supreme Court held that the tax was subject to strict scrutiny because it “targeted a small group of speakers.” Pet. App. 22a. And the court concluded that, because the city’s only stated interest was in raising revenue, the tax was unconstitutional under the First Amendment. See *id.* at 24a.

In so holding, the Ohio Supreme Court expressly disagreed with the Maryland Court of Appeals’ earlier decision upholding Baltimore’s tax on “outdoor advertising displays”—a tax that is materially identical to Cincinnati’s tax, except that it distinguishes between on-premises and off-premises signs. See Pet. App. 24a-25a (discussing *Clear Channel Outdoor, Inc. v. Director, Department of Finance*, 247 A.3d 740 (Md. 2021), petition for cert. pending, No. 21-219 (filed Aug. 12, 2021)). In that case, the billboard company argued that the tax must be subject to heightened scrutiny under the First Amendment because it singled out a speech platform, targeted a small group of speakers, and discriminated on the basis of a billboard’s content. See *Clear Channel*, 247 A.3d at 759-760. The Maryland Court of Appeals rejected each of those arguments and upheld the tax, holding that neither the targeted nature of the tax nor the distinction between on-premises and off-premises signs required the application of heightened scrutiny. See *ibid.*

There is therefore an unambiguous conflict between state courts of last resort on an important question of First Amendment law. If anything, by holding that the

on-premises/off-premises distinction does not trigger strict scrutiny on its own, the Court's decision in *City of Austin* removes the only potential basis for distinguishing between the appropriate constitutional treatment of the Cincinnati and Baltimore taxes. Both taxes target a protected speech platform and a small number of speakers. Yet the Ohio and Maryland courts of last resort reached opposite results after applying different levels of scrutiny to the taxes at issue, with the Ohio court accepting the targeted-taxation rationale for heightened scrutiny and the Maryland court rejecting it. The Court's decision in *City of Austin* thereby clarifies the conflict between the lower courts and highlights the need for further review.

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There is no reason to delay resolution of this important question of constitutional law. All of the parties here have urged this Court to grant review on the question, which has broad ramifications not just for the billboard industry but beyond. The existence of a split is indisputable in the wake of the Court's decision in *City of Austin*. This case is now an obvious candidate for the Court's review. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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