

Daily Tax Report: State

Billboard Tax Cases Teed Up After High Court Free Speech Ruling

By Perry Cooper

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- Ruling clears path for decision on tax petitions
 - Remaining questions could warrant review
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A recent First Amendment ruling from the U.S. Supreme Court paves the way for the court to rule on two petitions about the constitutionality of billboard taxes in Baltimore and Cincinnati.

The court held off on deciding whether to take the cases—*Clear Channel v. Raymond*, filed in August, and *Cincinnati v. Lamar Advantage*, filed in December—while it considered *Austin v. Reagan National*.

Thursday the court issued its opinion in that case, upholding an Austin, Texas, ordinance banning businesses from advertising on digital billboards or signs off their property. The 5-4 court found the ban doesn't impermissibly restrict speech because it is location-based and content-neutral.

Billboard advertising companies challenged the Baltimore and Cincinnati taxes, alleging they violated the First Amendment. The Maryland Court of Appeals, the state's highest court, upheld Baltimore's tax, finding advertisers aren't afforded the same free speech protections as the press. The Ohio Supreme Court struck down Cincinnati's tax, saying it impermissibly singled out a small group of speakers.

Land use attorney Sophia R. Holley, who isn't involved in any of the cases, said there are still open questions that may lead to the Supreme Court agreeing to review the tax cases.

"Notably, the *Lamar* case raises specific First Amendment issues relating to the taxation on free press that were not addressed in the *Austin v. Reagan* decision," Holley, a partner at Keating Muething & Klekamp PLL based in Cincinnati, said in an email. "It will be interesting to see how this case law develops based upon the court's decision."

'To Be Continued'

Counsel for Norton Outdoor Advertising Inc., one of the companies challenging the Cincinnati tax, said the *Austin* ruling supports the Ohio Supreme Court's decision.

"In the context of the Cincinnati and Baltimore cases, the *Austin* decision is more notable for what is absent: a holding that billboards are afforded lesser free speech protections than other forms of media," Robbins, Kelly, Patterson & Tucker partner Michael A. Galasso said in an email. The cities argued that the tax burdened only economic activity, not speech.

"The Cincinnati case involves selective taxation of speech which is different from the *Austin* case," Galasso said. "I don't see today's opinion as affecting whether the court will accept the Cincinnati or Baltimore cases."

The Supreme Court's ruling "only solves part of the equation," Holley said. It sent the case back to the appeals court to decide whether *Austin*'s regulation is narrowly-tailored to meet the stated purposes of protecting the aesthetic value of the city and public safety, she said.

"The constitutionality of the on-/off-premises sign distinction is still unclear for the City of Austin, and indeed for the other municipalities nationwide that are impacted by today's decision," she said. "In short, this is a 'to be continued...' decision from SCOTUS."

The cases are *Clear Channel Outdoor LLC v. Raymond*, U.S., No. 21-219, petition for review filed 8/12/21; and *Cincinnati v. Lamar Advantage GP Co.*, U.S., No. 21-900, petition for review filed 12/14/21.

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