No. 20-___

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

CENTER FOR INVESTIGATIVE REPORTING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court long ago determined that public transit authorities have the discretion to prohibit all "political" advertising in their vehicles. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-301 (1974). Under *Lehman*, a transit authority that "categorically prohibits advertising involving political speech" does not violate the First Amendment. *AFDI v. King Cnty., Wash.*, 136 S. Ct. 1022, 1023 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari).

In *Minnesota Voters Alliance v. Mansky*, this Court found that a state law banning "political" apparel in polling places was not "capable of reasoned application." 138 S. Ct. 1876, 92 (2018). But that decision did not find all categorical bans on "political" speech incapable of reasoned application. Indeed, that decision cited *Lehman* as one example of a restriction on political speech this Court has "long recognized that the government may impose." *Id.* at 1885-86 (citing *Lehman*, 418 U.S. at 303-304 (plurality opinion); *id*. at 307-308 (Douglas, J., concurring in judgment)). Two courts of appeals, including the Third Circuit in the decision below, have now disregarded *Lehman* and held that, under *Mansky*, transit authorities no longer have the discretionto categorically prohibit political advertisements. The question presented is:

1. Whether this Court's decision in *Mansky* overruled or abrogated the Court's holding in *Lehman* that transit authorities have the discretion to categorically prohibit political advertisements.

PARTIES TO THE PROCEEDING

Petitioner is Southeastern Pennsylvania Transportation Authority, defendant-appellee in the court below.

Respondent is the Center for Investigative Reporting, plaintiff-appellant in the court below.

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GLOSSARY OF ABBREVIATIONS

AATA	Ann Arbor Transportation Authority
AFDI	American Freedom Defense Initiative
CIR	Respondent, Center for Investigative Reporting
CTA	Chicago Transit Authority
MBTA	Massachusetts Bay Transportation Authority (Boston)
MTA	Metropolitan Transportation Authority (New York)
SMART	Suburban Mobility Authority for Regional Transport (Detroit)
SMART I	*AFDI v. SMART*, 698 F.3d 885 (6th Cir. 2012)
SMART II	*AFDI v. SMART*, 978 F.3d 481 (6th Cir. 2020)
SEPTA	Petitioner, Southeastern Pennsylvania Transportation Authority
STA	Spokane Transit Authority
WMATA	Washington Metropolitan Area Transit Authority (Washington D.C.)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Southeastern Pennsylvania Transportation Authority ("SEPTA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in appeal No. 19-1170.

OPINIONS BELOW

The opinion of the Third Circuit was published at 975 F.3d 300 and is reproduced at App.1-30. The Third Circuit's order denying rehearing is reproduced at App.171-72. The opinion of the district court granting in part judgment for Petitioner was published at 337 F. Supp. 3d 562 and is reproduced at App.33-141. The district court's opinion denying Respondent's petition for preliminary injunction was published at 344 F. Supp. 3d 791 and is reproduced at App.146-70.

JURISDICTION

The Third Circuit issued its opinion reversing the judgment of the district court on September 14, 2020 (App.1) and denied a timely petition for rehearing en banc on October 30, 2020 (App.171). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

INTRODUCTION

SEPTA's mission is to provide safe, comfortable, and efficient transportation to millions of people. Like many large transit agencies that raise revenue by leasing advertising space, SEPTA adopted an advertising policy prohibiting political advertising in its vehicles. SEPTA reasonably believes that policy serves its mission, and decades of precedent from this Court and others support SEPTA's right to act on that reasonable belief.

In this case, SEPTA determined that a 10-panel political cartoon about systemic racism in the mortgage market violated SEPTA's prohibition on political ads. The district court agreed and upheld SEPTA's refusal to run the ad under this Court's decision in *Lehman*. The Third Circuit reversed, holding that SEPTA's political advertising prohibition was not "capable of reasoned application" under this Court's decision in *Mansky*.

The notion that SEPTA's advertising policy is not "capable of reasoned application" strains credulity. SEPTA has applied its policy to thousands of advertisements. The number of (real) advertisements that raise any close question under the policy is vanishingly small. The reason is simple. Most advertisements SEPTA receives simply are not "political" in any commonly understood meaning of that term. And most of the tiny number of advertisements SEPTA has rejected for violating its political ad prohibition—including the Center for Investigative Reporting's ("CIR") advertisement here—are obviously political. Sophisticated litigants with access to thousands of transit agency advertising decisions and an inventive battery of hypotheticals will always succeed in identifying gray areas, and even occasional mistakes. But that does not

render a transit agency's decisions unreasonable or an advertising policy incapable of reasoned application.

Since handing down its opinion in *Lehman* more than 40 years ago, this Court has afforded transit authorities the discretion they require to make reasonable decisions about the advertisements they permit in their vehicles. Until now, courts have agreed that this discretion includes the ability to categorically prohibit "political" advertisements, and that such a prohibition is reasonable, workable, and constitutional. Indeed, in many circuits, including the Third, banning all political advertisements has for years been regarded as *mandatory* for any transit authority seeking to establish a nonpublic (or "limited public") forum.

The Third Circuit's opinion below and a recent decision by the Sixth Circuit sharply depart from this Court's longstanding precedent. And for no reason, since this Court's recent decision about polling places in *Mansky*, on which the Third and Sixth Circuits rely, did not overrule *Lehman* and the decades of transit caselaw applying it. The Court should act now to protect SEPTA's right, and the rights of transit authorities across the country, to exercise the reasonable discretion they need to keep their passengers safe and comfortable and their transit systems as financially viable as possible in these extremely challenging times.

STATEMENT OF THE CASE

A. SEPTA's Advertising Program

SEPTA operates the Philadelphia region's public transit system, which typically carries about one million passengers each day. App.75. Many of those

passengers have no other accessible or affordable option for daily transportation, making the viability of SEPTA's transit system a matter "of critical importance" to one of America's largest cities. App.38.

SEPTA leases advertising space on its vehicles and facilities. App.75. When SEPTA first began leasing advertising space, it did not have a formal advertising policy restricting access to that space. In 1996, SEPTA faced complaints after accepting an advertisement contending that abortion causes breast cancer. App.97-98. When, in response to a request from the U.S. Department of Health and Human Services, SEPTA sought to remove that advertisement, the Third Circuit held that it could not do so, since SEPTA's lack of a policy prohibiting certain categories of advertising made SEPTA's advertising space a designated public forum. *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 245-52 (3d Cir. 1998).

SEPTA attempted to close the forum by adopting a written policy prohibiting several categories of advertising. But, in a subsequent challenge to that policy, the Eastern District of Pennsylvania held that SEPTA had failed to close the forum because its policy did not categorically prohibit political ads. *AFDI v. SEPTA*, 92 F. Supp. 3d 314, 324-26 (E.D. Pa. 2015). As a result, SEPTA was required to accept an advertisement picturing Adolf Hitler beside the text "ISLAMIC JEW-HATRED: IT'S IN THE QURAN." *Id*. Vandalism, labor issues, and many more complaints ensued. App.47, 79, 124-25, 151.

In 2015, SEPTA again attempted to close the forum, this time by adopting, among other things, a prohibition on advertisements containing "political messages" or advocacy on "political" issues. App.42-43. When this lawsuit began, SEPTA had received

more than 2,736 ads under the new policy and rejected fewer than 15 for noncompliance. App.102.

B. CIR's Advertisement

In 2018, CIR sought to fill the interior advertising space in SEPTA buses with a 10-panel political cartoon protesting systemic racism in the mortgage market. App.40-41.

The advertisement is obviously political. Indeed, as the district court noted, CIR itself described the advertisement as an "animation including facts and statistics on a political issue." App.54.

As with all advertisements that appear to violate or raise a close question under its advertising policy, SEPTA elevated the advertisement to its General Counsel for review. App.45, 80-81. After carefully reviewing the advertisement and conferring with outside counsel, SEPTA's General Counsel determined that the CIR advertisement violated SEPTA's policy, including its prohibitions on advertisements containing political messages and political advocacy. App.91.

CIR sued in the Eastern District of Pennsylvania, asserting facial and as-applied challenges to SEPTA's advertising policy under the First Amendment. Subject matter jurisdiction was proper under 28 U.S.C. §§ 1331(a) & 1343(a)(3)-(4).

C. Proceedings Below

After hearings and briefing, the district court struck a few phrases in SEPTA's advertising policy as unconstitutional (App.106-109) but upheld the prohibitions on ads containing "political" messages and advocacy under *Lehman* (App.114-16, 122-26). It concluded that

SEPTA reasonably applied those prohibitions to CIR's ad. App.129-140.

The district court engaged in a well-established First Amendment analysis. First, it analyzed the nature of the forum and held that SEPTA's advertising policy "closed the forum to public speech and debate." App.103. Next, it analyzed CIR's facial challenges and found that a few phrases in the policy were unconstitutional under this Court's decision in *Mansky*. App.106-108. Thus, it ordered SEPTA to revise the challenged prohibitions as follows:

> (a) Advertisements . . . that ~~are political in nature or~~ contain political messages, including advertisements involving political or judicial figures ~~and/or advertisements involving an issue that is political in nature in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity.~~
>
> (b) Advertisements expressing or advocating an opinion, position or viewpoint ~~on matters of public debate about~~ economic, political, religious, historical or social issues.

App.108. What remained were SEPTA's categorical prohibitions on "political messages" and advocacy on "political" issues. The district court found these prohibitions "facially valid, reasonable, and constitutional." App.123.

In doing so, the district court followed *Lehman*, observing that "*Lehman* is the only instance of the Supreme Court addressing advertising restrictions on public transit vehicles" and that *Lehman* "continues to be oft-cited authority on speech restrictions on buses." App.115. The district court also noted,

"[i]mportantly," that "*Lehman* is cited in *Mansky* with approval." App.116.

CIR appealed, and the Third Circuit reversed. The court held that SEPTA's prohibition on "political" messages and advocacy is "incapable of reasoned application" under *Mansky* because it categorically bans "political" advertisements without "cabining SEPTA's [] discretion in determining what constitutes a political advertisement." App.27.

The court construed *Mansky* as creating a new "baseline requirement" and "core" condition that allowed the court to "avoid wading into First Amendment issues." App.21, 22 & n.4. The court thus dispensed with the usual First Amendment analysis of the forum (public or non-public), the restriction (viewpoint or subject matter), and the restriction's reasonableness in light of the forum. App.20-23.

The court's analysis ignored *Lehman* entirely. That authority received only one passing mention in a summary of SEPTA's argument:

> As a threshold matter, SEPTA questions CIR's broad reading of *Mansky* because of the Supreme Court's earlier plurality decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in which the Court upheld a prohibition on political advertisements on city buses. SEPTA argues that the continued vitality of *Lehman*, which the Supreme Court cites favorably in *Mansky*, *see* 138 S. Ct. at 1885–86, means that not all bans on political advertisements are unconstitutional.

App.25.[1]

Instead, the court found that SEPTA's prohibition on political advertisements, which left the term "political" undefined, was "susceptible to 'erratic application,'" and therefore unconstitutional under *Mansky*. App.24 (quoting *Mansky*, 138 S. Ct. at 1889, 1890).

As proof of "erratic application," the court relied on a few fanciful and borderline cases. Specifically, the court pointed to SEPTA's counsel's response to two hypothetical advertisements that the court proposed at oral argument. App.26-27. The court also pointed to two of the 2,736 real advertisements SEPTA accepted since 2015 and suggested that those two advertisements should have been rejected as "political." App.27-28, 83. The court took these four examples as "a few occasions" on which SEPTA "arbitrarily applied" its policy, and, on this basis, concluded that SEPTA's policy was not "capable of reasoned application." App.28.

The court suggested in a footnote that SEPTA "is free to revise its [advertising policy] again to cabin the decisionmaker's discretion in applying the ban on 'political' advertisements." App.29 n.5. But the court offered no example definitions or other guidance that it believed would eliminate close questions in even a tiny number of real or hypothetical examples.

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[1] This passage misstates SEPTA's position. SEPTA did not argue merely that *Lehman* "means that not all bans on political advertisements are unconstitutional" (App.25), but rather that *Lehman* "is exactly like this case," upheld a "nearly identical" advertising policy, and thus "directly controls." SEPTA C.A. Br. 20, 21, 45; *see also id.* at 1 (issue 1), 15-16, 18, 28-29, 32-33, 37-42. The court did not address this argument.

REASONS FOR GRANTING THE PETITION

In the decision below, the Third Circuit misconstrued this Court's decision in *Mansky*, 138 S. Ct. 1876, as overruling by implication this Court's earlier holding in *Lehman* that public transit authorities have discretion under the First Amendment to categorically prohibit political advertising in their vehicles, 418 U.S. at 303-304 (plurality opinion); *id.* at 307-308 (Douglas, J., concurring in judgment). By discarding *Lehman* and supplanting it with a new capable-of-reasoned-application analysis under *Mansky*, the Third Circuit's decision contradicts this Court's precedents and disrupts decades of First Amendment case law governing transit authorities.

This is not an isolated problem. The Sixth Circuit recently made the same error. *See AFDI v. SMART*, 978 F.3d 481, 493 (6th Cir. 2020) ("*SMART II*"), *reversing AFDI v. SMART*, 698 F.3d 885 (6th Cir. 2012) ("*SMART I*"). Other circuits appear poised to follow suit. The D.C. Circuit has suggested, without deciding, that transit authorities' reliance on *Lehman* for political advertising restrictions "might be unavailing in light of *Mansky*." *AFDI v. WMATA*, 901 F.3d 356, 372 (D.C. Cir. 2018). The Ninth Circuit recently voiced skepticism about the facial validity of a similar advertising restriction. *See Amalgamated Transit Union Local 1015 v. STA*, 929 F.3d 643 (9th Cir. 2019). And this issue is also pending before the Fourth Circuit. *See White Coat Waste Project v. Greater Richmond Transit Co.*, No. 20-1740, *on appeal from* 463 F. Supp. 3d 661 (E.D. Va. 2020).

Nothing in *Mansky* suggests this result. On the contrary, this Court's decision in *Mansky* affirmatively preserved transit authorities' rights to prohibit political advertising under *Lehman*. The Third Circuit and

Sixth Circuit opinions holding otherwise contradict *Lehman*, misconstrue *Mansky*, and usurp this Court's exclusive power to determine the validity of its precedents. The Court should intervene to reverse the Third Circuit's decision and reaffirm that transit authorities retain the discretion to categorically prohibit political advertising under *Lehman*.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH DECISIONS FROM THIS COURT HOLDING THAT TRANSIT AUTHORITIES MAY CATEGORICALLY PROHIBIT POLITICAL ADVERTISING.

A. This Court's Precedents Afford Transit Authorities the Discretion to Categorically Prohibit Political Advertising.

In *Lehman*, this Court determined that a transit agency advertising policy that categorically prohibited "political advertising" in city buses did not violate the First Amendment. 418 U.S. at 299-306 (plurality opinion); *id.* at 307-08 (Douglas, J., concurring in judgment).[2] In reaching that decision, the Court closely examined the nature of the forum. The Court observed that transit passengers are a "captive audience." *Id.* at 302. The Court also observed that transit authorities are "engaged in commerce" and "must provide rapid, convenient, pleasant, and inexpensive service" to commuters, *id.* at 303, discerning that advertising space on transit vehicles "is a part of [this] commercial venture," *id*. Thus, the Court

[2] The advertising policy at issue in *Lehman* stated that the transit authority "shall not place political advertising in or upon any of the" City's streetcars or buses. *Id.* at 299. It did not define the word "political" or include any other guidelines about how the prohibition was to be applied.

explained, transit authorities have considerable discretion in deciding what advertisements to allow:

> [i]n much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303. Because transit agency advertising restrictions implicate state action, the Court held that they "must not be arbitrary, capricious, or invidious." *Id*. But the Court found nothing arbitrary, capricious, or invidious about a transit authority categorically excluding "political advertising." On the contrary, the Court found it would be reasonable for transit authorities to decide that political and "issue-oriented advertisements" could jeopardize revenue earned from long-term commercial advertising. *Id.* at 304. The Court also found it reasonable for transit authorities to choose not to subject passengers to "the blare of political propaganda" and instead "to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising." *Id.*

In his concurrence, Justice Douglas also emphasized the nature of the forum, observing that a "bus is plainly not a park or sidewalk or other meeting place for discussion," but is instead "only a way to get to work or back home." *Id.* at 306. He noted that buses are "a practical necessity for millions in our urban centers." *Id.* at 307. And, although he doubted whether advertising space in a bus could even be properly regarded as any type of First Amendment forum, Justice Douglas noted that, "[i]f a bus is a

forum, it is more akin to a newspaper than to a park. Yet if a bus is treated as a newspaper, . . . the owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors." *Id.* at 306 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)). "And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners." *Id.* at 306-07. Justice Douglas therefore concurred in holding that the transit authority may exclude "any political message" from its buses, but wrote separately to further express that he "d[id] not believe that" a prospective advertiser "has any constitutional right to spread his message before this captive audience." *Id.* at 308.

The plurality—as well as Justice Douglas's concurrence—focused on whether it was reasonable for the government, as proprietor, to prohibit all political advertisements from the advertising space in its buses. Except when considering viewpoint discrimination, this Court did not focus on how Shaker Heights defined (or did not define) the word "political." Indeed, as befits a "reasonableness" analysis for subject-matter restrictions in a nonpublic forum like advertising space in city buses, the Court did not parse each word of the policy, nor did it require the City to explain how exactly it defined "political." This makes sense, as "common sense . . . is sufficient . . . to uphold a regulation under a reasonableness review." *United States v. Kokinda*, 497 U.S. 720, 734-35 (1990).

Lehman has become a foundational part of this Court's First Amendment jurisprudence. And this Court repeatedly cited it as an example of a consti-

tutional subject-matter-based restriction on speech. *See, e.g.*, *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 539 (1980). The Court has especially relied on *Lehman*'s "arbitrary, capricious, or invidious" standard when analyzing speech restrictions in forums where the government holds a proprietary interest. *See Kokinda*, 497 U.S. at 725-26. The recurring lesson of *Lehman* is that the government has great flexibility in restricting speech in these forums. *See U.S. Postal Serv. v. Council of Greenburgh Civic Assoc.*, 453 U.S. 114, 130 (1981).[3]

In the transit context, this Court has described *Lehman* as allowing transit authorities to "categorically prohibit advertising involving political speech." *AFDI v. King Cnty.*, 136 S. Ct. at 1022-23; *see also Kokinda*, 497 U.S. at 725-26 (reading *Lehman* as allowing a "ban on political advertisements"); *Cornelius*, 473 U.S. at 801. In other words, this Court has interpreted *Lehman* as affording transit authorities the discretion to prohibit all advertising they regard as "political" from their vehicles.

Until now, lower courts analyzing transit advertising policies have universally interpreted *Lehman* the same way, relying on it in upholding broadly worded

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[3] In analyzing these forums, this Court has frequently cited *Lehman* in tandem with *Greer v. Spock*, 424 U.S. 828 (1976), a case upholding the government's right to prohibit partisan political speech on a military base. *Mansky*, 138 S. Ct. at 1885-86; *Consolidated Edson Co. of N.Y.*, 447 U.S. at 539; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985); *Council of Greenburgh Civic Assoc.*, 453 U.S. at 129; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-01 (1981). Thus, this Court has viewed transit authorities' control over speech in its buses as akin to the military's authority over speech at its facilities.

advertising restrictions. *See, e.g.*, *SMART I*, 698 F.3d at 889, *rev'd*, *SMART II*, 978 F.3d 481; *Ridley v. MBTA*, 390 F.3d 65, 78-79 (1st Cir. 2004); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978-79 (9th Cir. 1998); *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 654 (2d Cir. 1995), *op. amended on denial of reh'g*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996); *ACLU Found. v. WMATA*, 303 F. Supp. 3d 11, 27 (D.D.C. 2018); *Archdiocese of Washington v. WMATA*, 281 F. Supp. 3d 88, 101, 107 (D.D.C. 2017), *aff'd* 897 F.3d 314 (D.C. Cir. 2018), *cert. denied*, 140 S. Ct. 1198 (2020); *AFDI v. MTA*, 109 F. Supp. 3d 626, 632-34 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016); *Vaguely Qualified Productions LLC v. MTA*, 2015 WL 5916699, at *7 (S.D.N.Y. Oct. 7, 2015), *app. dismissed*, No. 15-3695 (2d Cir. Feb. 18, 2016); *Coleman v. AATA*, 947 F. Supp. 2d 777, 782-85 (E.D. Mich. 2013) (relying on *SMART I*); *see also Planned Parenthood v. CTA*, 767 F.2d 1225, 1233 (7th Cir. 1985) (noting that *Lehman* upheld a "blanket exclusion of an entire class of potentially controversial speech"); *Lebron v. WMATA*, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984) (noting *Lehman* involved a ban on all political advertising).

Indeed, lower courts have repeatedly remarked on the consistency with which they have applied *Lehman* as standing for this proposition. *See, e.g.*, *White Coat Waste Project*, 463 F. Supp. 3d at 710-11 (appeal pending); *AFDI v. WMATA*, 901 F.3d at 368.

And transit systems have relied on that consistency. Today, transit authorities across the country—including those in Albuquerque, Atlanta, Boise, Boston, Chicago, Denver, Los Angeles, Nashville, New York City, Pittsburgh, Richmond, San Francisco, Seattle,

and many other major cities—continue to enforce policies prohibiting "political" advertising.[4]

Notably, many cases have relied on *Lehman* to reject the argument that broadly worded bans left transit authorities with too much discretion. To the contrary, the courts observed that "*Lehman* demands that fine lines be drawn." *SMART I*, 698 F.3d at 893; *see also Lebron*, 69 F.3d at 658 (noting a broad political ad ban could not be "void for vagueness in light of . . . *Lehman*"); *AFDI v. MTA*, 109 F. Supp. 3d at 634 ("Courts have found that such a categorical ban against political advertising, even when inartfully phrased, provides sufficient guidance to restrict the discretion of the government actor and survive facial challenges." (internal quotation omitted)). This is a

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[4] *See* City of Albuquerque, NM, ABQ RIDE Bus Advertising Policy <tinyurl.com/ABQPolicy> (last visited Mar. 25, 2021); Atlanta, GA, MARTA Advertising Policy and Regulations § 1(1) (Rev. Jan. 2019) <tinyurl.com/AtlantaPolicy>; Boise, ID, Valley Regional Transit Fleet Media Advertising Policy p. 3 (Sept. 23, 2019) <tinyurl.com/BoisePolicy>; Boston, MA, Guidelines Regulating MBTA Advertising §§ (x)-(xi) (Nov. 20, 2017) <tinyurl.com/BostonPolicy>; Chicago Ordinance No. 013-63, Ex. A at § II.B.1 (May 8, 2013) <tinyurl.com/ChicagoPolicy>; Denver, CO, RTD Advertising Policy and Objective <tinyurl.com/DenverPolicy> (last visited Mar. 25, 2021); Los Angeles County, CA, Metro Advertising Content Guidelines § 2.1.3 <tinyurl.com/LAMetroPolicy> (last visited Mar. 25, 2021); Nashville, TN, MTA Advertising Policy § 2 (Oct. 17, 2013) <tinyurl.com/NashvillePolicy>; New York, NY, MTA Advertising Policy § IV.B.2 (Dec. 12, 2018) <tinyurl.com/NY-MTA-Policy>; Pittsburgh, PA, Port Authority of Allegheny County Advertising Policy <tinyurl.com/PGHPolicy> (last visited Mar. 25, 2021); Richmond, VA, GRTC Advertising Policy § 11 (Apr. 16, 2018) <tinyurl.com/RichmondPolicy>; San Francisco, CA, BART Advertising Content Guidelines § B.1 <tinyurl.com/SFPolicy> (last visited Mar. 25, 2021); Seattle, WA, King County Transit Advertising Policy § III.B.1 (Feb. 9, 2021) <tinyurl.com/SeattlePolicy>.

logical result of *Lehman*'s holding: "Otherwise, as a practical matter, a nonpublic forum could never categorically exclude political speech." *SMART I*, 698 F.3d at 893.

In 2018, this Court decided *Mansky*, striking down a Minnesota law banning "political" apparel in polling places. The Court held that the law failed a "forgiving test"—namely, it was not "capable of reasoned application." *Mansky*, 138 S. Ct. at 1891.

But *Mansky* did not upend 40 years of transit authority law. That decision turned on this Court's close analysis of the manner in which the Minnesota law was to be applied. The Court noted that the law required "election judges—temporary government employees working the polls on election day," *id.* at 1883, to "decide what is political when screening individuals at the entrance to the polls," *id.* at 1891. The law didnot define "political," but the state issued written guidance containing examples of prohibited apparel. The Court found that written guidance unworkable for two reasons. First, the guidance banned messages about any issue "staked out" by any candidate in the election, such that "fair enforcement" would have required election judges to "maintain a mental index of the platforms and positions of every candidate and party on the ballot." *Id.* at 1889. Second, the guidance banned apparel promoting any group with "well known" "political views," which, the Court found, encouraged arbitrary enforcement, since whether an election judge considered a group's views "well-known" would turn on "the background knowledge and media consumption of the particular election judge applying it." *Id.* at 1890. As a result, the law's "unmoored use of the term 'political' . . . , *combined with* haphazard interpretations the State has provided

in official guidance" made the law incapable of reasoned application, and thus unconstitutional. *Id.* at 1880, 1888 (emphasis added).

The peculiar facts of *Mansky* should have made *Mansky* an unlikely vehicle for holding that transit authority bans on "political" advertisements are unreasonable or incapable of reasoned application. On the contrary, *Mansky* affirmatively cited *Lehman* as one example of a speech-restriction excluding "political advocates and forms of political advocacy" that this Court has "long recognized that the government may impose." 138 S. Ct. at 1885-86 (citing *Lehman*, 418 U.S. at 303-304 (plurality); *id*. at 307-308 (Douglas, J., concurring)).

Unlike *Mansky*—which raised novel questions about whether a state could reasonably restrict political speech in polling places by directing hundreds of temporary workers to make split-second decisions about what counts as "political" under internally incoherent guidelines—there are no novel questions about whether it is reasonable for public transit authorities to have broad discretion to prohibit all "political" advertising. This Court resolved that precise question in *Lehman* more than 40 years ago and held that such a restriction is reasonable.

B. The Decision Below, and Other Recent Circuit Decisions, Cannot be Reconciled With This Court's Precedents.

SEPTA's advertising policy is indistinguishable from the policy upheld in *Lehman*. Yet the Third Circuit ignored *Lehman* in its analysis. The court's one passing reference to that case makes no effort to distinguish *Lehman* or to explain why that squarely on-point decision did not control. App.25. Instead,

the court confined its analysis to *Mansky*, which it construed as holding "that the term 'political' as used in the Minnesota statute was unconstitutional." App.24. Attempting to apply that proposition here, the Third Circuit held that the term "political" as used in SEPTA's advertising policy is likewise unconstitutional because it (1) is "left undefined" and is therefore "indeterminate"; and (2) is "susceptible to 'erratic application.'" App.24 (quoting *Mansky*, 138 S. Ct. at 1889, 1890). In support of its finding of "erratic" application, the Court relied on only four examples—two real ads, and two ads hypothesized at oral argument—out of the more than 2,700 ads SEPTA received since 2015. App.26-28.

Assuming *Lehman* remains good law, the ruling below is plainly wrong. As explained above, this Court in *Lehman* analyzed a facial challenge to a transit authority's policy that imposed a categorical ban on political ads. 418 U.S. at 299, 306; *see King Cnty.*, 136 S. Ct. at 1023. Five Justices upheld that policy as a facially constitutional content-based restriction on political speech. *Lehman*, 418 U.S. at 303-304 (plurality); *id.* at 307-308 (Douglas, J., concurring). After closely analyzing the nature of the forum, the Court determined that a transit authority "has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles," so long as its decisions are not "arbitrary, capricious, or invidious." *Id.* at 303. *Lehman* concluded that transit policies banning all "political" ads pass this test.

SEPTA's policy is indistinguishable from the policy in *Lehman* because both governed advertisements in public buses, both required a transit agency to determine whether an advertisement is "political,"

and neither defined that term. *Lehman*, 418 U.S. at 299-30; App.144-45. Both authorized, and did not "cabin," the transit authority's discretion to make that determination. *Id.* Because this Court has not overturned or abrogated *Lehman*, the Third Circuit should have applied *Lehman* (and its progeny) and held that SEPTA's policy prohibiting political ads is a constitutional exercise of SEPTA's discretion as proprietor of its ad space.

In ignoring the teaching of *Lehman*, the Third Circuit usurped this Court's authority. As this Court has long held, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The district court complied with this admonition (App.115-16) ("*Lehman* is the only instance of the Supreme Court addressing advertising restrictions on public transit vehicles"), but the Third Circuit did not. Instead, the Third Circuit found that a precedent of this Court with direct application (*Lehman*) appeared to rest on reasons (the propriety of bans on "political" speech) that the Third Circuit believed this Court rejected in a different line of decisions (*Mansky*). On that basis, the circuit court declined to follow the case that directly controls (*Lehman*), and usurped for itself the prerogative of overruling this Court's decision.

To make matters worse, the Third Circuit's reasoning fails on its own terms, because *Mansky* did not reject the reasons on which *Lehman* rests. That is because *Mansky* did not, as the Third Circuit suggests, hold that "*the term 'political'*" was inherently

unconstitutional or incapable of reasoned application. App.24. To be sure, *Mansky* noted that the Minnesota law did not define the term "political" and that the word's dictionary definitions "can be expansive." *Mansky*, 138 S. Ct. at 1888. But the Court never suggested that this, by itself, rendered the statute unconstitutional. Instead, *Mansky* held that the state's attempt to interpret its written guidance as replacing the normal meaning of "political" with a narrower and more idiosyncratic interpretation—namely, messages relating to issues raised by any candidate in a specific election and messages promoting groups with "well known" views about those issues—made the law impossible for the temporary election judges to apply consistently. *Id.* at 1889-91. Thus it was the undefined term political "*combined with* haphazard interpretations the State has provided in official guidance," not the undefined use of "political" by itself, that "cause[d] Minnesota's restriction to fail even" *Mansky*'s "forgiving test." *Id.* at 1888 (emphasis added).

Properly understood, this holding does not reject *Lehman*. Because nothing in *Lehman*, or in this case, required applying any analogous "haphazard interpretations" under circumstances that would make the advertising policies impossible to apply consistently. Unlike Minnesota, SEPTA has not promulgated internally inconsistent guidance and relies instead on the normal meaning of "political." Nor does SEPTA's policy require multiple decisionmakers to make split-second decisions on close questions of application. Rather, under SEPTA's process for applying its policy, each "close call" receives a careful, deliberate review, by a single decision maker, aided both by legal counsel and by access to SEPTA's records of the authority's decision in every other instance in which the policy has

been applied. App.80-83. The results speak for themselves: SEPTA has applied its policy to more than 2,700 ads since 2015, yet the Third Circuit's decision found fault with only a small handful of borderline cases. This Court was quite clear that such marginal difficulties are insufficient to hold a restriction facially unconstitutional, *Mansky*, 138 S. Ct. at 1891, but the Third Circuit disagreed.

The Third Circuit is not alone in this unauthorized misapplication of *Mansky*. The Sixth Circuit has made explicit what the Third Circuit left unsaid, stating in no uncertain terms that it believes *Mansky* fundamentally disrupts *Lehman*'s holding. The court did so by disavowing its previous holding in the same case that a transit agency's categorical political ad ban was constitutional. *See SMART II*, 978 F.3d 481 (6th Cir. 2020).

SMART, like SEPTA and the City of Shaker Heights, imposed a ban on "political or political campaign advertising" without further defining these terms. The Sixth Circuit initially upheld the policy as a reasonable restriction on the transit authority's discretion under *Lehman*. *SMART I*, 698 F.3d at 893. The court acknowledged that transit authorities may struggle to apply broadly written policies, because "it is sometimes unclear whether an ad is political." *Id.* That did not mean, however, that the policy was unreasonable. *Id.* To the contrary, the court declared, "*Lehman demands* that fine lines be drawn. Otherwise, as a practical matter, a nonpublic forum *could never categorically exclude political speech*." *Id.* (emphasis added).

Now, however, the Sixth Circuit believes that this "logic conflicts with *Mansky*." *SMART II*, 978 F.3d at 497. Reversing its prior holding, the court held that

Mansky "found a similarly 'unmoored use of the term 'political,' 138 S. Ct. at 1888, to be '[in]capable of reasoned application,' *id*. at 1892, because of its 'indeterminate scope,' *id*. at 1889." *SMART*, 978 F.3d at 497. This, in the court's estimation, changed things:

> At bottom, our earlier opinion interpreted the Supreme Court's prior cases about nonpublic forums as allowing the government to draw 'fine lines' on a case-by-case basis. *AFDI*, 698 F.3d at 893. But *Mansky* now clarifies that this reasonableness requirement for nonpublic forums has greater teeth and compels states to adopt 'a more discernible approach.' 138 S. Ct. at 1891.

Id.

The Sixth Circuit did not merely reverse itself; it pitted the holdings of *Lehman* and *Mansky* against each other. After all, *SMART I* tied a transit authority's ability "to draw 'fine lines' on a case-by-case basis," *SMART II*, 978 F.3d at 497, to *Lehman*'s "*demands*." 698 F.3d at 893 (emphasis added). Read side by side with *SMART I*, it is clear that *SMART II* interpreted *Mansky* as implicitly overruling *Lehman*. Like the Third Circuit, it lacked the authority to do so.

Similar reversals are pending in the D.C. and Ninth Circuits. The D.C. Circuit, in *AFDI v. WMATA*, 901 F.3d 356, was the first circuit court to review a transit agency's advertising ban in *Mansky*'s wake. Indeed, the appeal had already been briefed when *Mansky* was handed down. In *WMATA*, the D.C. Circuit acknowledged that, "[g]iven the holding in *Lehman*, it is no surprise that other circuits have turned away first amendment challenges to bans on political or noncommercial advertising." 901 F.3d at 368

(citing *SMART I*). Nevertheless, the panel remanded the case to reconsider WMATA's ban on "'political' speech" *Id.* at 372-73. The court reasoned that *Mansky* introduced a new "inquiry," so reliance on *Lehman* "might [now] be unavailing." *Id.* at 372.

The Ninth Circuit recently signaled a similar change in approach. In *Amalgamated Transit Union Local 1015 v. STA*, the court vindicated an as-applied challenge to STA's "public issue" advertising ban, holding that the decision to block a labor union ad was unreasonable. 929 F.3d 643, 655 (9th Cir. 2019). Even though the issue was not before it, the court stated that it was "skeptical" that STA's public issue ban "would survive a facial challenge," as it "provides no written guidance on how to assess whether an ad might express or advocate an opinion, position, or viewpoint on matters of public debate about economic, political, religious, or social issues." *Id.* at 654. The panel's concern over an unmoored application of a broad policy clearly echoes *Mansky*'s reasoning, invoking a principle that was not relevant in its pre-*Mansky* applications of *Lehman*. *Cf. Children of the Rosary*, 154 F.3d at979 (relying on *Lehman* to hold that a transit agency's broad ban on noncommercial ads was constitutional).

C. The Court Should Grant Review to Reaffirm *Lehman*.

This Court has often granted certiorari to decide whether one of its decisions remains valid in light of more recent precedent. *See, e.g.*, *Hurst v. Florida*, 577 U.S. 92, 96-97, 101-02 (2016) (assessing the validity of older decisions upholding a state's capital sentencing scheme in light of more recent Sixth Amendment cases); *McDonald v. City of Chicago*, 561 U.S. 742, 758-59 (2010) (assessing the validity of nineteenth-century

decisions regarding the applicability of the Second Amendment to the states in light of more recent cases adopting a "selective incorporation" theory); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877, 887-89 (2007) (assessing the validity of an older decision establishing a per se rule of antitrust liability in light of more recent cases); *Bowles v. Russell*, 551 U.S. 205, 213-14 (2007) (assessing the validity of an older decision excusing the untimely filing of a notice of appeal in light of more recent cases).

Allowing this issue to work its way through the remaining circuit courts serves little purpose, especially as, thus far, all of the circuits (the Third and Sixth Circuits in holdings, the Ninth and D.C. Circuits in dicta) have reached the same conclusion. Moreover, permitting other courts to come to their own conclusions without guidance will only cause more litigation on this already heavily litigated issue, which transit agencies can ill-afford in the best of times, much less now. *See* Kennedy Rose, *SEPTA, Losing $1M in Revenue a Day, Faces Uncertain Financial Future*, NBC10 Philadelphia (Nov. 24, 2020), <tinyurl.com/5bb67ufh>. The Court should spare the country's transit systems years of additional litigation and act now to clarify that *Mansky* does not overrule *Lehman*.

II. THE DECISION BELOW HAS FAR-REACHING CONSEQUENCES ON ISSUES OF EXCEPTIONAL IMPORTANCE.

The Third Circuit's decision and the issue it raises are "important" because they effect "what speech millions of Americans will—or will not—encounter during their commutes." *King Cnty.*, 136 S. Ct. at 1023. That is particularly true here, because many major transit authorities in the United States have

adopted similarly worded advertising policies prohibiting "political" ads. *See* supra, 14 n.4. This Court's guidance will directly affect all of them.

This case presents an ideal opportunity to decide an important and recurring issue concerning the validity and scope of political advertising prohibitions. SEPTA pressed the issue below. *See* SEPTA C.A. Br. 1, 15-16, 18, 20-21, 28-29, 32-33, 45, 37-42. The district court squarely decided that *Lehman* controlled, App.115, and the court of appeals squarely decided that *Mansky* not only controlled but also compelled a decision that SEPTA's political advertising prohibition was unconstitutional. App.21-26. And the issue is outcome-determinative: If *Lehman* remains good law, then SEPTA's policy banning political ads is constitutional. This petition, which presents a case that cannot be distinguished from *Lehman* in any material way, is thus an ideal vehicle for deciding the question.

Moreover, the Court's timely intervention is necessary because this area of law has already "prompted especially stark divisions among federal courts of appeal." *King Cnty.*, 136 S. Ct. at 1022-23. Part of that is due to the complicated forum analysis required—which has led to disagreements among the circuits—but it is also driven by the fact that these issues are so heavily litigated by repeat players looking for legal loopholes.[5]

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[5] Indeed, challenging transit agencies' advertising policies has become a cottage industry for at least a few organizations: *See, e.g., AFDI v. King Cnty.*, 136 S. Ct. 1022, 1025 (2016) (Thomas, J., joined by Alito, J. dissenting from denial of certiorari); *AFDI v. MBTA*, 781 F.3d 571, 593 (1st Cir. 2015); *AFDI v. SMART*, 978 F.3d 481 (6th Cir. 2020); *AFDI v. WMATA*, 898 F. Supp. 2d 73,

SEPTA is now particularly vulnerable to such tactics. After all, the Third Circuit concluded that SEPTA's ad policy was incapable of reasoned application, and therefore facially unconstitutional, after highlighting just four close-call ads (two real, two hypothetical). So, rather than relying on *Lehman*'s broad authorization of transit authority discretion, the Third Circuit's opinion suggests that a SEPTA advertising restriction will only withstand constitutional scrutiny if SEPTA can show that that restriction raises close questions in fewer than four real or hypothetical applications.

No ad policy, no matter how specifically defined, can withstand such scrutiny. Sophisticated parties (and talented lawyers) can and will devise ads or hypotheticals that identify gray areas of any policy, just as the panel did at oral argument. The Third Circuit's opinion invites those parties to mount facial challenges to every transit authority speech restriction and guarantees that SEPTA (and the rest of the transit authorities in Pennsylvania, New Jersey, Delaware, and the Virgin Islands) will face endless litigation in a Sisyphean pursuit of a "perfectly clear" ad policy.

To be sure, the Third Circuit's analysis is irreconcilable with *Mansky* itself, which requires a plaintiff to show more than "close calls on borderline or fanciful cases." *Mansky*, 138 S. Ct. at 1891. But the Third Circuit's holding, which all but ensures SEPTA will no longer be able to enforce a political ad ban, is also

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78-79 (D.D.C. 2012); *AFDI v. MTA*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012); *AFDI v. SEPTA*, 92 F. Supp. 3d 314 (E.D. Pa. Mar. 11, 2015); *see also ACLU Found. v WMATA*, 303 F. Supp. 11 (D.D.C. 2018).

diametrically opposed to the spirit and law established by *Lehman*.

Last, the Court's guidance is needed here because the issue presented by this case will have far-reaching impact in this already fractured area of law. For one, both the Third Circuit and Sixth Circuit have used *Mansky* to avoid a forum analysis, even though *Mansky* itself defined the forum. Neither court felt that it needed to define the forum, because each believed "*Mansky* sets a baseline requirement that all forms of content-based restrictions must be capable of reasoned application." App.21-22; *see also SMART II*, 978 F.3d at 493. Thus, it appears that circuit courts now believe the question of whether an ad policy is "incapable of reasoned application" replaces the question of whether an ad policy is "arbitrary, capricious, or invidious"—or should be analyzed under this "reasonableness" test at all. That is a big deal.

The circuit courts' opinions will only lead to further fracturing in this area of law. After all, *Lehman*'s holding (that categorical bans on political ads are constitutional) and subsequent application (that political ad bans establish a nonpublic forum) served as universally accepted premises underlying the circuit split Justice Thomas identified: whether transit authorities *must* categorically prohibit political ads to close their advertising space and create a nonpublic (or "limited public") forum. *King Cnty.*, 136 S. Ct. at 1022-23; *see AFDI v. MBTA*, 781 F.3d 571, 579 (1st Cir. 2015) (affirming *Lehman*); *CTA*, 767 F.2d at 1233 (same).

In the Third and Sixth Circuits, that premise no longer exists. Now, even the decision to block political ads must itself come under a highly fact-specific

constitutional scrutiny, one that will undoubtedly lead to further fracturing.

Indeed, what the scrutiny entails already differs in these jurisdictions. As noted, the Third Circuit's holding rested on a brief analysis that examined a handful of applications with which it disagreed and the absence of internal "guidelines." App.26-28. By contrast, the Sixth Circuit looked at whether SMART's evaluation of ads was subject to a consistent, uniform process. *SMART II*, 978 F.3d at 494-95. And although the Sixth Circuit also examined specific and hypothetical applications of SMART's policy, the court used this for a different ultimate end: namely, to prove that SMART was not, in fact, enforcing a *political* ad ban at all, but an issue-oriented ad ban. *Id.* at 496-97.

This list of relevant considerations required to satisfy *Mansky's* test—like the list of questions posed by the interplay between the Third and Sixth Circuit's decisions and the pre-existing Circuit split this Court has already identified—will grow, not consolidate, over time. The Court should weigh-in now before this legal Pandora's Box is opened further.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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