No. 20-1379

In the
Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSIT AUTHORITY,
Petitioner,

v.

CENTER FOR INVESTIGATIVE REPORTING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* PORT AUTHORITY OF ALLEGHENY COUNTY IN SUPPORT OF PETITIONER

GREGORY J. KROCK
Counsel of Record
MCGUIREWOODS LLP
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222-3142
(412) 667-6042
gkrock@mcguirewoods.com

Counsel for Amicus Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

Port Authority of Allegheny County ("Port Authority") is a state–created entity that owns and operates buses and rail passenger transportation in southwestern Pennsylvania. Port Authority maintains a written advertising policy that its Board of Directors adopted on April 27, 2012. Like the advertising standards that Petitioner Southeastern Pennsylvania Transportation Authority ("SEPTA") maintains, Port Authority's written advertising policy expressly prohibits it from accepting (among other subject matters) advertisements that are "political" in nature.

The issue before the Court in this appeal — a transit agency's ability to impose a blanket prohibition of "political" advertisements on its vehicles — has the potential to uniquely affect transit agencies like Port Authority. Because Port Authority has decades worth of experience in administering and applying its advertising policy in the Commonwealth of Pennsylvania. Port Authority is also uniquely qualified to provide the Court with insight as to the practical implications of the Third Circuit's ruling that SEPTA must accept an admittedly–political advertisement submitted by Respondent Center for Investigative Research ("CIR") because SEPTA's advertising

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than Port Authority, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Both parties consented to the filing of this amicus brief, in e–mails from their counsel of record, after receiving timely notice of Port Authority's intention to file an amicus brief.

standards are purportedly so vague that they are not "capable of reasoned application."

SUMMARY OF ARGUMENT

This case presents an important question regarding a public transit agency's right to preclude political speech in its vehicles. Nearly 50 years ago, this Court recognized that transit vehicles are different from other public and designated public fora. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court recognized that transit riders constitute a "captive audience" who often have no choice but to utilize the transit agency's vehicles as their mode of transportation. The Court concluded that transit agencies have a legitimate interest in prohibiting political advertisements in their vehicles to avoid imposing political propaganda upon their captive customers. Accordingly, the Court upheld the constitutionality of a transit policy that included a blanket prohibition of "political" advertisements.

The Court has never abrogated *Lehman*, which remains good law. Nevertheless, in reliance upon the Court's ruling in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1886 (2018) — in which the Court favorably cited *Lehman* as an example of a lawful prohibition on political speech — several courts have recently refused to apply *Lehman* to disputes involving political advertisements on transit vehicles. The Third Circuit refused to do so in this case. In particular, the Third Circuit concluded that SEPTA's advertising guidelines are incapable of reasoned application under *Mansky* because they do not contain a detailed written

description of the "political" advertisements that SEPTA prohibits.

The dispute in *Mansky* did not involve advertisements thrust upon a captive audience in a transit vehicle: it involved the prohibition of political apparel at a polling place during an election. The dispute in *Mansky* did not involve a blanket ban of all political apparel: it involved a partial ban, which only prohibited political apparel that addressed the specific candidates or issues involved in that particular election. Because the state could not provide a logical and consistent explanation of the manner in which it identified the subset of political apparel that was prohibited, the Court struck down the statute as incapable of reasoned application. Despite the significant differences in the nature of the forum, and the manner in which transit agencies (like SEPTA) administer their policies, certain courts (like the Third Circuit in this case) have started to apply *Mansky* — and not *Lehman* — to transit agencies and their ability (or lack thereof due to this misapplication of *Mansky*) to prohibit political advertisements on their transit vehicles.

While advertising revenue customarily constitutes a small fraction of a transit agency's revenue, that revenue is important. A sizable portion of transit riders are lower income, elderly, and/or individuals with disabilities who have no other means of getting from point A to point B. Advertising revenue is critical to enable transit agencies to provide cost–effective services that those individuals require. At the same time, because transit riders constitute a captive

audience, it is important that transit agencies avoid bombarding them with advertisements that are reasonably likely to make a portion of the customers feel uncomfortable or unwelcome. Transit agencies must be afforded reasonable discretion to draft and apply manageable advertising polices (that do not contain pages of detailed definitions of all categories of prohibited advertisements).

Re–affirming *Lehman* will provide transit agencies with the certainty that they require to balance their need to generate advertising revenue without interfering with their primary function of providing reliable and welcoming transportation services to all of their captive customers. Re–affirming *Lehman* will also serve to recognize the explosion of the internet, social media, and other alternative fora available to individuals and groups to efficiently and inexpensively convey their political messages when a transit agency lawfully rejects their proposed political messages to protect those captive customers.

ARGUMENT

A. This Court Has Permitted Transit Agencies to Impose Blanket Prohibitions on Political Advertisements for Nearly Fifty Years

In *Lehman*, the Court concluded that it is reasonable for transit agencies to prohibit all political advertising within their vehicles. *Lehman*, 418 U.S. at 303–04, 307. The transit agency's advertising policy at issue in *Lehman* did not define the term "political," but instead, succinctly stated "[p]olitical advertisements will not be accepted." *Id.* at 300. In upholding the

exclusion of political advertisements, a plurality of the Court explained: "The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity." *Id.* at 304. While Justice Douglas agreed that it is reasonable for transit agencies to preclude political advertisements, he did not believe that the transit agency's policy needed to satisfy a reasonableness standard. *Id.* at 307 ("I do not view the content of the message as relevant to either petitioner's right to express it or to the commuters' right to be free from it. . . . Since I do not believe that petitioner has any constitutional rights to spread his message before this captive audience, I concur in the Court's judgment.").

It is not surprising that the Court did not require the transit agency to define the term "political" in its advertising policy. Just one year earlier, the Court had concluded that terms such as "partisan" and "political" are not impermissibly vague:

> Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in §818 such as "partisan," or "take part in," or "affairs of" political parties. But . . . there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any costs, they are set out in terms that the

> ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Broadrick v. Okla., 413 U.S. 601, 608 (1973); *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL–CIO*, 413 U.S. 548, 578–79 (1973) (a liberal standard is necessary because "there are limitations in the English language with respect to being both specific and manageably brief."). For this reason, a restriction on speech is only unconstitutionally vague if individuals "of common intelligence must necessarily guess at its meaning." *Broadrick*, 413 U.S. at 607 (internal citation omitted).

1. The Court's Ruling in *Mansky* Did Not Abrogate *Lehman*

In its opinion, the Third Circuit suggests that this Court's ruling in *Mansky* stands for the proposition that the term "political" — if not expressly defined in a policy or statute restricting speech — is necessarily incapable of reasoned application. *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 315–16 (3d Cir. 2020). This suggestion overstates the Supreme Court's ruling in *Mansky*.

Although the statute at issue in *Mansky* appeared to prohibit all political buttons and insignias from a polling place, the state argued the statute was not intended (and should not be interpreted) to prohibit all political apparel from a polling location. *Mansky*, 138 S. Ct. at 1888–89. Instead, the state argued that the statute only prohibited words and symbols that a reasonable person would understand to convey a

message about matters that voters were being called to address on that particular election day, which the state referred to the "electoral choices at issue." *Id.*

The Court concluded that the written guidelines for determining the electoral choices at issue in the election, and the state's explanation of those guidelines, were not just vague but also inherently inconsistent. *Id.* at 1889–90. The Court also noted that, because the standard turned upon whether a typical observer would perceive the apparel to address an electoral choice at issue in that election, the decision "may turn in significant part on the background knowledge and media consumption of the particular election judge applying it." *Id.* at 1890.[2] Accordingly, the Court rejected the "electoral choices at issue" standard as not capable of reasoned application because "[a] rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every a candidate and party on the ballot is not reasonable." *Id.* at 1889, 1891–92.

Importantly, the Court favorably cited *Lehman* to demonstrate situation in which a government agency can lawfully include a blanket ban on political speech (namely, in transit vehicles). *Id.* at 1885–86. The Court clearly did not abrogate *Lehman*. Instead, the Court expressly noted that it was the "unmoored" use of term political in the Minnesota statute in combination with "the haphazard interpretations the

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[2] Although they were referred to as "election judges," the individuals called upon to enforce the statute were temporary government employees who worked the polls. *Id.* at 1883.

State has provided in official guidance and representations to this Court" that caused the Court to conclude that the "electoral choices at issue" standard was not capable of reasoned application. *Id.* at 1888.

2. Some Courts Have Mistakenly Misinterpreted *Mansky* to Abrogate *Lehman*

The impact of *Mansky* on transit agencies, and their right to preclude political advertisements under *Lehman*, has caused considerable confusion. For example, in *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 978 F.3d 481 (6th Cir. 2019), both the district court and the Sixth Circuit refused to enjoin a transit agency's prohibition of all "political or political campaign advertising" on the basis that a person of ordinary intelligence could reasonably understand the word "political." *Id.* at 489. At the summary judgment stage, however, the Sixth Circuit concluded that this Court's intervening ruling in *Mansky* required a different conclusion. *Id.* at 485–86. The Sixth Circuit interpreted *Mansky* to require a finding that, absent written guidance regarding the definition of "political," a transit agency's policy prohibiting all "political advertisements" is necessarily incapable of reasoned application. *Id.* at 494–97.

In *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 901 F.23 356 (D.C. Cir. 2018), the D.C. Circuit similarly concluded that *Mansky* now requires transit agencies to provide a written definition of the term "political" in order to implement a constitutional policy prohibiting

political advertisements. *Id.* at 372. The policy at issue prohibited advertisements (1) that support or oppose a political party or candidate and (2) intended to influence the public on a particular issue. *Id.* at 361. The district court granted the transit agency's motion for summary judgment on the basis that its policy was reasonable and viewpoint neutral as a matter of law. *Id.* Following *Mansky*, however, the D.C. Circuit reversed and remanded the case for further proceedings. *Id.* at 372–73. The D.C. Court emphasized that transit agencies must now demonstrate that their officials are "guided by objective, workable standards" to identify the prohibited political advertisements. *Id.* at 372 (citing *Mansky*).[3]

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[3] Although it did not involve a transit agency, the rulings in *Zukerman v. U.S. Postal Service*, 384 F. Supp. 3d 44 (D.D.C. 2019), are instructive. When the United States Postal Service enacted a policy that allowed customers to create customized postage stamps, it prohibited them from including "political, religious, violent or sexual content." *Id.* at 52. In distinguishing *Mansky* and upholding restriction, the district court noted that (1) the state in *Mansky* did not interpret the statute to prohibit all political apparel and (2) the state could not coherently explain the manner in which it identified the prohibited political apparel from the permitted political apparel. *Id.* at 64–65, 67 ("Unlike the political–apparel ban in *Mansky*, the Regulations are not fatally indeterminate; rather, as a categorical ban on political speech, they provide sufficiently clear guidance on what can come in and what must stay out."). However, the D.C. Circuit reversed. *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431 (D.C. Cir. 2020). The D.C. Circuit interpreted *Mansky* to stand for the proposition that, absent a written definition of political (in either the policy itself or guidelines provided to the employees administering the policy), a blanket position of political speech is always incapable of reasoned application. *Id.* at 448–49.

In contrast, the district court in *White Coat Waste Project v. Greater Richmond Transit Company*, 463 F. Supp. 3d 661 (E.D. Va. 2020), rejected the contention that *Mansky* abrogated *Lehman* in the context of a transit vehicle. The district court recognized that other courts had interpreted *Mansky* to require a transit agency's advertising policy to define the term "political" in order to pass the First Amendment's reasonableness test. *Id.* at 711–12. Nevertheless, the district court concluded that *Lehman* still applies in the transit context such that a transit agency can lawfully include a blanket ban on "political" advertisements:

> The consistent application of *Lehman* to First Amendment review of advertising in public transportation systems — finding a ban on political advertising facially constitutional — delivers an incontrovertible circumstance (or set of instances examined in a line of cases) under which GRTC's Advertising Policy "would be valid." With *Lehman* and its progeny intact, the Court cannot deem GRTC's policy facially unconstitutional on vagueness grounds. Simply put, a significant number of courts continue to interpret *Lehman* as allowing bans on political advertisements in busses or mass transit forums. Such a ban, then, becomes facially valid under the law.

Id. at 710–11.

As a result of these divergent rulings, one district court recently noted the need for guidance as whether (and, if so, the extent to which) this Court's opinion in *Mansky* affects the longstanding *Lehman* ruling.

People for the Ethical Treatment of Animals v. Hinckley, Civil Action No. H–20–3681, 2021 WL 982262, at *9 (S.D. Ohio Mar. 16, 2021). In its motion to dismiss, the transit agency in *PETA* argued that (1) its blanket ban on political advertisements is reasonable as a matter of law under *Lehman* and (2) *Mansky* did not abrogate *Lehman*, which remains the law with respect to the transit vehicles. *Id.* at *1–2. The district court acknowledged that the *Mansky* court did not overrule *Lehman*, but nevertheless denied the motion to dismiss, stating that *Mansky* "expanded on what is needed for a 'reasonable' restriction on bans of 'political' speech." *Id.* at *7, 12. The district court noted that the *Mansky* opinion "does not provide clear guidance on how to reconcile its holding with its older public transit cases." *Id.* at *9.

B. The Ability to Prohibit Political Speech on Their Vehicles is Critically Important to Transit Agencies Like Port Authority

Port Authority owns and operates a passenger transportation system in southwestern Pennsylvania. At this time, roughly 2,700 employees operate, maintain, and support Port Authority's bus, light rail, incline, and paratransit services. While those services are available to anyone traveling in Allegheny County, a significant portion of Port Authority's customer base includes disabled, elderly, and lower income individuals. Port Authority also contracts with Pittsburgh Public Schools to provide passes for children to use Port Authority vehicles to travel to and from school on a daily basis (in lieu of a traditional yellow school bus).

Port Authority's mission is to provide reliable, safe, welcoming, and cost–effective transportation services to all of its customers. This Court has recognized these important aspects of public transportation. *Lehman*, 404 U.S. at 303 (noting that the city "must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights"). Port Authority's ability to raise revenue by selling advertising space on its vehicles is helpful in satisfying its mission. While Port Authority's advertising revenues constitute only a small portion of its annual revenues, those additional revenues nevertheless contribute to Port Authority's ability to provide cost effective transportation to individuals who cannot afford other means of transportation.

The ability to prohibit political and certain other issue–oriented advertisements is of critical importance to Port Authority. As the Court recognized almost 50 years ago, Port Authority's customers are unique in that they constitute a captive audience. *Lehman*, 418 U.S. at 302 ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice."). As one justice noted, "Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used at holidays for such a purpose; they are a practical necessity for millions in our urban centers." *Id.* at 307 (Douglas, J., concurring); *see also Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1170 (9th Cir. 2015) ("Public transit riders are, by necessity, a 'captive audience.'") (citation omitted); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 72 (1st Cir. 2004) ("For many riders, the MBTA is the only transportation option.").

Like other transit agencies, Port Authority has long prohibited political advertisements in order to minimize the "risk of imposing upon a captive audience" and subjecting those captive customers to the "blare of political propaganda." *See Lehman*, 418 U.S. at 304. Port Authority therefore strives to balance its desire to raise supplemental revenue with its primary function of providing reliable, safe, and welcoming transportation services to its customers.

1. Like SEPTA, Port Authority Has Faced Litigation Associated with Political and Social Speech on Its Vehicles

Like SEPTA, Port Authority has periodically been forced to defend its decision to prohibit certain speech on its vehicles. In 2006, a prospective advertiser sued Port Authority for refusing to accept an advertisement regarding the voting rights of ex–felons. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, No. 2:06–cv–1064, 2009 WL 2366455 (W.D. Pa. July 30, 2009). Port Authority's then–existing advertising policy permitted it to accept only commercial advertisements (and expressly prohibited political advertisements). *Id.* at *2. Although the voting advertisement was admittedly non–commercial, the trial court required Port Authority to accept that advertisement. *Id.* at *18. The trial court emphasized in its ruling that Port Authority did not define the term "political" in its advertising policy. *Id.* at *13, 17 (noting that "the Advertising Policy fails to define the term 'political' or 'offensive' or provide any guidance to potential advertisers or Port Authority employees about how to

apply those terms"). On appeal, and despite *Lehman*, the Third Circuit relied upon the fact that Port Authority's policy did not define the term "political" as a basis for upholding the trial court's decision. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 299 (3d Cir. 2011) (suggesting that it could reject similar advertisements in the future if "Port Authority were to develop more precisely phrased written guidance on the ads for which it will sell advertising space").

As a result of the voting litigation, Port Authority amended its advertising policy effective April 27, 2012. Port Authority elected to remove the restriction on non–commercial advertisements, but retained the prohibition on political advertisements. In order to alleviate concerns that the trial court had raised, Port Authority provided written guidance in the new policy to clarify that political advertisements include:

> advertisements involving political figures or candidates for public office, advertisements involving political parties or political affiliations, and/or advertisements involving an issued reasonably deemed by the Authority to be political in nature in that it directly implicates the action, inaction, prospective action, or policies of a government entity (such as advertising involving abortion, gun control, gay marriage, or Marcellus Shale drilling).

It is Port Authority's understanding that SEPTA thereafter updated its advertising guideless to include similar (albeit not identical) language to provide guidance regarding SEPTA's interpretation of the term

"political." *See Ctr. for Investigative Reporting v. SEPTA*, 337 F. Supp.3d 562, 573 (E.D. Pa. 2018). However, in this lawsuit, the United States District Court for the Eastern District of Pennsylvania rejected and struck certain of the language that SEPTA had included to provide guidance as to the advertisements that it considered to be "political." *Id.* at 604–05.

Transit agencies are therefore in a conundrum. On one hand, despite this Court's longstanding ruling in *Lehman*, some courts have recently concluded that advertising policies that succinctly prohibit "political" advertisements are not capable of reasoned application. On the other hand, other courts have rejected (and stricken) language intended to provide guidance as to the interpretation of the term "political" in an advertising policy, suggesting that such guidance impermissibly affords the transit agency with greater (and not less) discretion to unlawfully reject disfavored advertisements.

In addition, Port Authority is currently facing litigation in which the trial court departed from *Lehman* regarding the reasonableness of protecting captive transit customers from potentially uncomfortable subject matters. In *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County*, 2:20–cv–1471–NR, 2021 WL 164315 (W.D. Pa. Jan. 19, 2021), certain Port Authority employees (and their union) challenged the constitutionality of Port Authority's uniform policy. That policy prohibits Port Authority employees from wearing masks or face coverings of their choice while on duty, including masks containing political or social protest messages.

Id. at *1. The trial court granted the union's motion for preliminary injunction, and thereby forced Port Authority to allow its on–duty employees to wear facemasks supporting the Black Lives Matter social protest movement. *Id.* at *23.[4] In its opinion, the trial court suggested that Port Authority's uniform policy is deficient because it does not define the term "political." *Id.* at *8 n.5 (citing *Mansky* for the proposition that any policy that bans speech defined as "political" is unconstitutionally vague).

More disturbingly, the trial court disregarded the long–established principle set forth in *Lehman* that it is reasonable to shield captive transit customers — who ride the vehicles out of necessity, rather than choice — from exposure to political or social protest messages. The trial court concluded the exact opposite. The trial court concluded that Port Authority employees have a First Amendment right, while on duty and acting as Port Authority's representative, to thrust their political and protest messages upon Port Authority's captive customers. *Id.* at 814–20. Nowhere in its lengthy opinion did the trial court even mention Port Authority's significant interest (as recognized in *Lehman*) in protecting the interests of its captive customers.

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[4] The matter is currently on appeal to the United States Court of Appeals for the Third Circuit at Docket No. 21–1256.

2. Absent Clarity From the Court, Transit Agencies Might Reluctantly Close Their Vehicles to More Categories of Advertising

Port Authority is not the only transit agency that relies upon advertising revenues to defray the costs of its services. To the contrary, most transit agencies have a significant need to supplement their revenues by permitting some (but not all) advertisements on their vehicles. In order to continue to rely upon advertising revenue, it is important to transit agencies that the Court reaffirm the conclusion set forth in *Lehman* that transit agencies (1) are unique in light of their captive customers and (2) can lawfully adopt policies that prohibit "political" advertisements or speech on their vehicles, without providing a detailed written definition of advertisements that are "political."

Absent such guidance, transit agencies might reluctantly impose further restrictions on the advertisements that they will accept. For example, Port Authority may have to consider returning to a more restrictive policy that permits only commercial advertisements. But doing so would prohibit important public service announcements and appropriate non–commercial messages on subject matters that Port Authority does not consider to be problematic. This Court has long recognized that deferring to the government's reasonable discretion in determining the subject matters to permit on its property serves to promote — rather than frustrate — First Amendment principles. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998). As the Court has explained:

> [W]e encourage the government to open its property to some expressive activity in cases where, if it faced an all–or–nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Id.

Like Port Authority, SEPTA's advertising standards demonstrate its intent to prohibit all political advertisements. If a transit agency's intent is not honored, and it is exposed to the possibility that it will be forced to accept certain political advertisements unless it prepares a detailed written explanation of the precise political advertisements that are prohibited, transit agencies may be forced to further close the forum and limit even more types of speech. It is critical that the Court weigh in to provide transit agencies, prospective litigants, and the circuit and district courts with clear guidance as to the current state of U.S. Supreme Court law regarding the ability of transit agencies to prohibit political advertisements on their vehicles.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

GREGORY J. KROCK
Counsel of Record
MCGUIREWOODS LLP
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222-3142
(412) 667-6042
gkrock@mcguirewoods.com