No. 20-1379

IN THE
Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION 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 THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AND THE NATIONAL RAILROAD PASSENGER CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AND THE NATIONAL RAILROAD PASSENGER CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The undersigned respectfully submit this amici curiae brief in support of granting the petition for writ of certiorari.[1]

INTERESTS OF AMICI CURIAE

The American Public Transportation Association ("APTA") is a nonprofit international association of more than 1,500 public and private sector member organizations. APTA is the only association in North America that represents all modes of public transportation, including bus, paratransit, light rail, commuter rail, subways, waterborne services, and intercity and high-speed passenger rail. More than 90 percent of the people using public transportation in the United States and Canada ride APTA member systems.

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner is a member of amicus the American Public Transportation Association, but Petitioner did not contribute to the preparation of this brief or make any monetary contribution intended to fund the submission of this brief. Amici notified the parties of their intention to file this brief more than ten days before the due date, and all parties provided consent to the filing of this brief.

APTA advocates for its members to increase funding for public transportation and for the adoption of pro-transit policies. It gathers and provides information about, and for, the public transportation industry. It furnishes such information to government entities as well as its own members.

To supplement revenue to cover the billions of dollars in operating expenses that public transit entities incur, many of APTA's members accept commercial advertisements on transit vehicles and facilities that serve their customers. They have relied on this Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in categorically prohibiting "political" ads. Before *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), those policies largely withstood First Amendment challenge. Concerns about security, vandalism, and complaints from customers and employees justified the restrictions on political ads.

The National Railroad Passenger Corporation ("Amtrak"), America's intercity passenger railroad, operates at approximately 500 stations across 46 states and the District of Columbia. Congress created Amtrak as a for-profit corporation and, by statute, Amtrak is not considered a government agency in most contexts. 49 U.S.C. § 24301(a). But this Court has held that Amtrak should be treated as a government actor for First Amendment purposes. *Lebron v. NRPC*, 513 U.S. 374, 394 (1995).

Amtrak is a business member of APTA. Like many of APTA's other members, Amtrak accepts commercial advertisements on its passenger trains and in

its stations. Amtrak has relied on this Court's decision in *Lehman* in categorically prohibiting "political" ads, which in Amtrak's experience create risks concerning security, vandalism, and complaints from customers and employees.

The Third Circuit's opinion below, like decisions of the Sixth and D.C. Circuits, creates substantial uncertainty about those policies. APTA's members, including Amtrak, now face frequent risk of litigation over rejected ads—litigation that is both costly to defend and could result in significant legal fees to plaintiffs' counsel should courts find their advertising policies and decisions violate the First Amendment. APTA and its members would directly benefit from this Court granting certiorari to clarify if *Lehman* remains good law or, if it does not, for this Court to provide guidance about what APTA members must do to have advertising restrictions "capable of reasoned application" under *Mansky*, 138 S. Ct. at 1892.

SUMMARY OF ARGUMENT

For more than four decades, *Lehman* established that public transit agencies can categorically prohibit "political" advertisements. Recognizing that transit systems are not public spaces and the legitimate interest in protecting a "captive audience" of bus and streetcar riders from "political propaganda," this Court held that a ban on "political" advertisements does not violate the First Amendment. *Lehman*, 418 U.S. at 304 (plurality opinion); *id*. at 307-08 (Douglas, J., concurring in judgment).

If *Mansky* is applicable to such advertising, it casts doubt on *Lehman*'s continued viability and suggests a

different test may apply to transit agencies' advertising policies. Striking down a law prohibiting political apparel in polling places, this Court held that such a law must be capable of "reasoned application." *Mansky*, 138 S. Ct. at 1891-92. Yet at the same time, *Mansky* did not elaborate on what would satisfy that test, let alone indicate if that test applies in the very different circumstances that led *Lehman* to uphold a categorical ban on "political" advertisements.

Those circumstances warrant consideration. APTA members, including Amtrak, and other public transportation operators have come to depend on advertising revenue to supplement their budgets. They, unlike polling places, serve customers who may spend hours each day in view of ads. Politically controversial ads in public buses, trains, and stations may flood public transit authorities with complaints and force them to replace ads that are vandalized. Some ads, like an anti-Islam ad depicting a cartoon image of the Prophet Mohammad rejected by APTA member the Washington Metropolitan Area Transit Authority ("WMATA") may even pose a danger to customers and employees.

None of these considerations were raised in *Mansky*, but post-*Mansky* decisions involving public transit advertising policies have applied its capable of reasoned application test. They, like *Mansky*, have largely ignored whether differences between polling places and public transit justify the different test set out in *Lehman*. Because public transit authorities throughout the nation face pending or threatened legal actions over their advertising policies, and have little, if any, guidance from this Court as to how their

policies may be amended to satisfy *Mansky*, amici respectfully urge this Court to grant certiorari and review the Third Circuit's opinion below.

ARGUMENT

I. *Lehman* upheld a ban on "political" ads on public buses and streetcars.

In *Lehman*, this Court upheld an advertising policy that prohibited "political advertising in or upon any of the" defendant city's buses and streetcars. 418 U.S. at 299-300 (plurality op.); *id.* at 306-08 (Douglas, J., concurring in judgment). It rejected a claim by the petitioner, a candidate for public office, that the city violated his First Amendment rights by rejecting campaign advertisements because they violated the advertising policy.

A plurality of this Court reasoned that a city transit system "need not accept every proffer of advertising from the general public," but "has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id.* at 303 (plurality op.). Those choices were the conscious result of the city "limit[ing] 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." *Id.* at 304. Because those were "reasonable legislative objectives[,]" the policy did not violate the First Amendment. *Id.*

In his concurrence, Justice Douglas agreed that the policy was constitutional. Even more than the plurality, he emphasized the role of public transportation, distinguishing it from public spaces like parks

and sidewalks. *Id.* at 306-07 (Douglas, J., concurring in judgment). Treating buses and streetcars like parks would "take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners." *Id.*

Justice Douglas added: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it." *Id.* at 307. "[T]he right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." *Id.*

II. *Mansky* rejected a ban on "political" apparel in polling places, holding the law is incapable of "reasoned application."

Mansky considered Minnesota law prohibiting political apparel at a polling pace. *Mansky*, 138 S. Ct. at 1886. Citing *Lehman* among other authorities, this Court acknowledged that the government "may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy." *Id.* at 1885-86. However, it held the law failed "to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. "[T]he unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test." *Id.* Thus, the

law was incapable of "reasoned application." *Id.* at 1892.

Because *Mansky* involved polling places, not public transit, this Court did not squarely address whether its holding limited or otherwise modified *Lehman*. It also did not confront some of the factors *Lehman* cited to support restrictions on public transit advertising, such as the appearance of favoritism and the captive audience. Therefore, it is unclear whether *Mansky* limits *Lehman* or if factors unique to public transit justify a different standard for challenges to advertising policies than employed in *Mansky*.

III. Certiorari should be granted to resolve the uncertainty about whether *Lehman* continues to control public transit advertising or, if not, what guidelines must public transit authorities adopt to show that policies prohibiting political ads are capable of reasoned application.

Mansky creates substantial uncertainty about advertising policies adopted by numerous APTA members that ban political advertising. Lower courts applying *Mansky* to public transit advertising have failed to reconcile it with the need for the unique circumstances faced by public transit authorities. Certiorari should be granted to address the differences between public transportation and polling places and reconcile the apparent conflict between *Lehman* and *Mansky* so that the public transit authorities have reasonable guidance as to whether their advertising policies are constitutional.

As the petition for certiorari recognizes, many transit authorities prohibit "political" ads using language consistent with the policy that *Lehman* upheld. Pet. at 15 & n.4. These include:

- "[A]dvertisements that . . . [p]rominently or predominately advocate or express a political message, including but not limited to an opinion, position, or viewpoint regarding disputed economic, political, moral, religious or social issues or related matters, or support for or opposition to disputed issues or causes." New York, NY, Metropolitan Transportation Authority Advertising Policy § IV.B.2 (Dec. 12, 2018), *available at* https://new.mta.info/document/5101.

- "Advertisements promoting or opposing a political party, or promoting or opposing the election of any candidate or group of candidates for federal, state, judicial or local government offices are prohibited. In addition, 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 governmental entity" and "[a]dvertisements expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious or social issues[.]" Chicago, Ill., Ordinance 013-63, Ex. A at § II.B.1-2 (May 8, 2013), *available at* http://www.transitchicago.com/assets/1/6/013-63_Advertising_Policy_and_Ordinance.pdf.

- "Advertising that promotes, or opposes: (a) a political party; (b) any person or group of persons holding federal, state or local government elected office; (c) the election of any candidate or group of candidates for federal, state or local government offices; or (d) initiatives, referendums or other ballot measures" and "[a]dvertising that primarily expresses or advocates an opinion, position or viewpoint on a matter of public debate about economic, political, public safety, religious or social issues." King County, Wash., Transit Advertising Policy § III.B (Feb. 9, 2021), *available at* https://kingcounty.gov/~/media/depts/metro/about/advertising/transit-advertising-policy.

- Advertisements "intended to influence members of the public regarding an issue on which there are varying opinions"; "that support or oppose any political party or candidate"; and "that are intended to influence public policy[.]" Washington Metropolitan Area Transit Authority, Guidelines Governing Commercial Advertising ¶¶ 9, 11, 14 (last amended Nov. 19, 2015), *available at* https://www.wmata.com/about/records/public_docs/upload/Advertising_Guidelines.pdf.

- Advertisements that "contain[] political campaign speech[,]" which is defined as speech "that (1) refers to a specific ballot question, initiative petition, or referendum, (2) promotes or opposes a political party for local, state, or federal election, or (3) promotes or opposes a candidate or group of candidates," and advertisements that "concern[] political issues or express[] or advocate[] an opinion, position or viewpoint on a matter of public debate about economic, political, moral, religious or social

issues." Guidelines Regulating Massachusetts Bay Transportation Authority Advertising, at 3-4, § (b)(x)-(xi) (amended Nov. 20, 2017), *available at* https://cdn.mbta.com/sites/default/files/business-center/2017-11-20-mbta-advertising-guidelines.pdf.

- "[P]olitical advertis[ing]" which is defined to include any advertisement "that takes a position, either expressly or implicitly, on a matter which is a subject of discernible controversy or debate. An advertisement need not involve a question of politics in the narrow sense of the term to be 'political' under this Policy. For example, advertisements that address matters of government, legislation, public policy, morality, religion, philosophy, science or the arts may be 'political' under this Policy. The determinative consideration is whether the advertisement takes, implicitly or explicitly, a position on a matter of discernible disagreement or debate. Under no circumstances will an advertisement be rejected because of disagreement with the viewpoint expressed." Amtrak Advertising Policy ¶ 4 (Jan. 31, 2020), *available at* https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/real-estate/Amtrak-Advertising-Policy.pdf.

Despite differences in wording, as a general matter, these policies rely on terms like "political," "public policy," or "public debate." These policies appear, on their face, to be constitutional under *Lehman*, but if *Mansky* extends to public transit advertising, its analysis of the ban on "political" apparel in polling places casts doubt on the constitutionality of these policies.

That has been the case in the majority of decisions to consider transit ads since *Mansky*. The Third Circuit in this case, as well as the Sixth Circuit, has struck down advertising decisions based on policies that seemingly complied with *Lehman*, but were found to violate *Mansky*. *Center for Investigative Reporting v. SEPTA*, 975 F.3d 300, 313-17 (3d Cir. 2020); *AFDI v. SMART*, 978 F.3d 481, 492-98 (6th Cir. 2020). The D.C. Circuit also has questioned without deciding whether advertising policies that broadly prohibit political ads remain valid under *Mansky*. *AFDI v. WMATA*, 901 F.3d 356, 371-73 (D.C. Cir. 2018) (remanding for proceedings to determine if advertising policy satisfied *Mansky*).

Other challenges to advertising policies have been decided by or are pending in district courts. *E.g.*, *People for Ethical Treatment of Animals v. Hinckley*, No. H-20-3681, 2021 WL 982262, at *5-12 (S.D. Tex. Mar. 16, 2021) (denying motion to dismiss, holding the plaintiff pled a plausible claim that transit authority's ban on political ads "is not capable of reasoned application" under *Mansky*). *White Coat Waste Project v. Greater Richmond Transit Co.* appears to be the only case that has held "*Mansky* did not change the standard for facial viewpoint discrimination claims in the public transportation context[,]" holding instead that *Lehman* controls. 463 F. Supp. 3d 661, 704-07 (E.D. Va. 2020), *appeal pending* No. 20-1740 (4th Cir.).[2]

[2] Despite finding that *Lehman* foreclosed a facial challenge to the advertising policy, the court found that the transit authority engaged in viewpoint discrimination in rejecting the plaintiff's ads protesting animal cruelty, because the transit authority

In addition to these post-*Mansky* cases, a survey of APTA members indicates that they face threatened litigation over their policies when they reject ads on the grounds that are impermissible political ads. The costs of defending these lawsuits are prohibitive and losing a case may result in liability for attorneys' fees.

Other transit agencies have expressed difficulty in attempting to craft new policies in light of the uncertainty about what prohibitions are permissible if *Mansky*, not *Lehman*, controls. One such post-*Mansky* advertising policy defines "[p]olitical or [p]ublic [i]ssue" ads by identifying 16 subcategories of prohibited "political" ads.[3] Bay Area Rapid Transit Advertising Content Guidelines ("BART Guidelines") § B.1,

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had accepted other anti-animal cruelty and political ads. *White Coat Waste Project*, 463 F. Supp. 3d at 699-702.

[3] These subcategories are:

a. Supporting or opposing a political party;

b. Supporting or opposing any political or judicial office holder;

c. Supporting or opposing a proposed ballot measure;

d. Supporting or opposing a law, ordinance, regulation, or proposed legislation;

e. Supporting or opposing a constitutional amendment or amendments;

f. Supporting or opposing an active governmental investigation;

g. Supporting or opposing ongoing civil litigation;

h. Supporting or opposing ongoing criminal prosecution;

i. Supporting or opposing a judicial ruling or rulings;

available at https://www.bart.gov/sites/default/files/docs/BART%20Advertising%20Guidelines-Adopted%2012062018%20Final.pdf; San Francisco Bay Area Rapid Transit District, Board Meeting Agenda Packet, at 4, 80-84 (Dec. 6, 2018), *available at* https://www.bart.gov/sites/default/files/docs/agendas/12-06-18%20Board%20Packet_0.pdf.

Notably, despite its effort to craft specific, detailed categories, the BART Guidelines do not appear to prohibit political ads concerning political issues that are not tied to a specific piece of legislation, candidate, office holder, or government proceeding. For instance, ads promoting or condemning white supremacist

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> j. Supporting or opposing a strike, walkout, boycott, protest, divestment, embargo, or groupings thereof;
>
> k. Supporting or opposing the election of any candidate or group of candidates;
>
> l. Supporting or opposing a policy or policies of a named or identified governmental, business, or nonprofit entity other than the policies of the advertiser itself;
>
> m. Supporting or opposing any foreign nation or group of nations or any policy of a foreign nation or group of nations other than the policies of the advertiser itself;
>
> n. Depicting an image or images of one or more living political or judicial figures or depicting an image of one or more political or judicial figures that have died within the last five (5) years;
>
> o. Referring to one or more living political or judicial figures or referring to one or more political or judicial figures that have died within the last five (5) years; or
>
> p. Using a slogan, symbol, slogans, or symbols associated with any prohibited category of this section[.]

BART Guidelines § B.1.

views or espousing opposing competing views on abortion do not appear to fall into any of the categories BART prohibits.

This uncertainty has real, practical implications for transit authorities. Offended customers are likely to complain to the transit authority, forcing it to incur time and expense of fielding and responding to complaints. Pet. at 4 (describing complaints to SEPTA about anti-Islam ad that displayed a picture of Adolf Hitler, which SEPTA was forced to run); *see also AFDI v. WMATA*, 901 F.3d at 371 (describing how problems like complaints (from riders, community leaders, and employees) and vandalism were factors that led WMATA to prohibit political ads).

Beyond those concerns, some ads risk public safety. For instance, the ads at issue in *AFDI v. WMATA* called for supporting free speech by depicting a cartoon image of the Islamic Prophet Muhammad:

AFDI v. WMATA, 245 F. Supp. 3d 205, 209 (D.D.C. 2017), *aff'd in part*, *reversed in part*, 901 F.3d 356. As the record in the case reflected, before the ad was submitted to WMATA, there had been a shooting in Garland, Texas linked to the ads. *AFDI v. WMATA*, 901

F.3d at 360.[4] Cartoons of the Prophet Muhammad also have triggered violence elsewhere in the world.[5]

Although this ad squarely fits within the scope of prohibited ads under WMATA's policy and what *Lehman* held constitutional, the D.C. Circuit partially reversed summary judgment and remanded the case to

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[4] Two gunmen were shot and killed outside the location where AFDI hosted the contest that resulted in the ad it submitted to WMATA. The contest "offered a $10,000 prize for cartoons of the Islamic prophet—depictions that are considered blasphemous by many Muslims around the world." Alastair Jamieson, *'Draw Muhammad' Shooting in Garland: What We Know About Texas Attack*, NBC News (May 4, 2015, 5:41 PM), https://www.nbcnews.com/news/us-news/draw-muhammad-shooting-who-was-behind-cartoon-contest-n353081. The terrorist group ISIS subsequently claimed responsibility for the attack. Nick Allen et al., *Texas Shooting: Islamic State Claims Responsibility for First US Attack as Gunmen Named*, The Telegraph (May 4, 2015, 8:11 PM), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11581345/Islamic-State-supporters-claim-responsibility-for-Texas-attack.html.

[5] In 2015, gunmen killed 12 people in an attack at the office of the French satirical magazine *Charlie Hebdo*, which a former director of the CIA said was motivated by its lampooning of the Prophet Muhammad. Dan Bilefsky & Maïa de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, The New York Times (Jan. 7, 2015), https://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html?_r=0. The offices of *Charlie Hebdo* had previously been firebombed for a spoof that satirized the Prophet. *Id.* In 2005, a Danish cartoon purportedly depicting the Prophet led to protests and the destruction of the Danish Embassy in Damascus. David Batty, *Somali Charged with Murder Attempt on Muhammad Cartoonist*, The Guardian (Jan. 2, 2010, 10:27 AM), https://www.theguardian.com/world/2010/jan/02/kurt-westergaard-muhammad-cartoon-somali. The cartoonist received death threats and was later attacked in his home by a man armed with an axe and a knife. *Id.*

the district court to decide if WMATA's policy was capable of a reasoned application under *Mansky*. *AFDI v. WMATA*, 901 F.3d at 371-73.

Unlike a polling place, where voters would confront political apparel for a few minutes and may only do so once or twice a year, bus riders and commuters may spend hours each day having to view the content of such ads. Imagine being a Jewish bus rider who is confronted with a photo of Adolph Hitler every day? Or a Muslim rider who must sit near a deeply offensive cartoon-version of a revered religious figure every day for a month? Not to mention the potential risk of that ad triggering violence from religious extremists.

Those are the types of considerations that underlie *Lehman* and inform the policies that APTA members, including Amtrak, have adopted. Applying *Mansky*, a case that did not consider captive audiences or security, to public transit threatens the ability of APTA members to protect and serve the millions of people who use public transit on a daily basis. Certiorari should be granted so that this Court can decide if *Mansky* limits *Lehman* and provide guidance to public transit authorities like APTA's members as to how they can enact advertising policies that will survive constitutional challenge.

CONCLUSION

For all these reasons and those set out in the petition, the Court should grant certiorari to review the decision of the Third Circuit below.

Respectfully submitted,

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