No. 20-1379

In The Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

THE CENTER FOR INVESTIGATIVE REPORTING,

Respondent.

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

AMICUS BRIEF OF GREATER RICHMOND TRANSIT AUTHORITY IN SUPPORT OF PETITIONER

RICHARD E. HILL, JR.
SENIOR ASSISTANT CITY ATTORNEY
Counsel of Record
OFFICE OF THE CITY ATTORNEY
900 EAST BROAD STREET, SUITE 400
Richmond, VA 23219
(804) 646-7946
richard.e.hill@richmondgov.com

Counsel for Amicus

May 3, 2021

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF THE AMICUS[1]

Greater Richmond Transit Company ("GRTC") is a private, public service corporation, organized under the laws of the Commonwealth of Virginia. GRTC and its predecessors have provided public transportation in the Richmond, Virginia Metropolitan Area since the mid-19th Century. Like many transit agencies in Virginia, GRTC's stock is owned by governmental entities. Prior to 2021, governmental units in Virginia were not specifically authorized to engage in collective bargaining. *See Commonwealth v. Cty. Bd.*, 217 Va. 558, 232 S.E.2d 30 (1977); Va. Code Ann. § 40.1-57.2 (as amended effective May 1, 2021). GRTC – like similar entities throughout Virginia – was formed in the 1970s as a private public service company to allow GRTC to receive federal transportation funds. *See, e.g., Appalachian Power Co. v. Greater Lynchburg Transit Co.*, 236 Va. 292, 294, 374 S.E.2d 10, 11 (1988). Under federal law, entities that receive federal transportation grants must preserve their employees' collective bargaining rights. *See, e.g.,* Urban Mass Transportation Act of 1964, Section 13(c), as amended, 42 U.S.C. § 5333(b).

GRTC has prohibited political advertising since 1973, shortly after its incorporation. GRTC's

---

[1] Amicus states that it provided notice to Counsel for Petitioner and Respondent of its intention to file this brief on April 23, 2021. Both Petitioner and Respondent have consented to its filing. Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

board adopted a written advertising policy in 2013, and amended that policy in 2018. These written policies retained GRTC's longstanding blanket prohibition against political advertising. Nevertheless, GRTC faces legal action for rejecting a political advertisement. That case addresses two issues, one of which is not relevant to SEPTA's appeal: First, is GRTC a governmental actor subject to 42 U.S.C. §1983? Second, did GRTC violate the First Amendment when it rejected the advertisement at issue? Both questions are currently on appeal in the United States Court of Appeals for the Fourth Circuit. *White Coat Waste Project v. Greater Richmond Transit Co.*, No. 20-1740, *on appeal from* 463 F. Supp. 3d 661 (E.D. Va. 2020).

GRTC contends that it is not a governmental entity that is subject to §1983. The United States District Court for the Eastern District of Virginia held to the contrary, *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661, 685-692 (E.D. Va. 2020) (appeal pending), and GRTC awaits argument and a ruling on that issue from the Fourth Circuit. As such, GRTC – like similar transit agencies throughout the Commonwealth of Virginia – has an interest in preserving the precedent that this Court set in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), and in maintaining almost half a century of guidance from this Court that transit buses are undertaking a commercial venture and that the advertising space is a nonpublic forum in which political advertising can be categorically prohibited.

SUMMARY OF ARGUMENT

In 1974 in *Lehman*, this Court determined that a ban on political advertising on public transit buses did not offend the First Amendment. 418 U. S. 298. Some courts throughout the United States have determined, however, that *Lehman* is no longer good law. They base this conclusion largely on this Court's decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018). *See, e.g*. *Center for Investigative Reporting v. SEPTA*, 975 F.3d 300, 315-16 (3rd Cir. 2020)(the case at issue in this petition) and *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 492-94 (6th Cir. 2020). But this Court did not overturn *Lehman* in *Mansky*, focusing rather on one specific type of forum (polling places) and the fit between that specific forum and the restriction at issue using the test articulated in *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806, 105 S. Ct. 3439, 3451 (1985). *Mansky*, 138 S. Ct. 1876, 1885-86 (2018). With respect to transit buses, however, the question of that fit was conclusively established in *Lehman* and has not been questioned by this Court ever since. *See, e.g., Cornelius*, 473 U.S. at 806.

Not only did this Court not overturn *Lehman* in *Mansky*, it cited to *Lehman* as establishing a permissible restriction on political and advocacy "speech in nonpublic forums." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018). Thus, *Mansky* does not affect the longstanding ability of public transit systems to enforce categorical prohibitions on political advertisements.

There exists, however, both a growing resistance to *Lehman* as well as an emerging circuit

split in the Courts of Appeals as to whether or not *Lehman* remains good law in light of *Mansky*. Public transit companies throughout the United States need clarity on whether they can continue to enforce categorical bans on political advertising (or any restrictions on advertising). This Court should grant certiorari in this case to decide that critical question.

ARGUMENT

I. *LEHMAN* ESTABLISHED A *PER SE* RULE.

The issue in *Lehman* was straight-forward. Harry J. Lehman, a candidate for state representative, wanted to promote his candidacy through ads placed on the Shaker Heights Rapid Transit System. 418 U.S. at 299. Metromedia, the company that managed the system's advertising, rejected the proposed advertisement because it violated the system's prohibition on "political advertising." *Id.* at 299-300. *Lehman* sued and this Court ultimately held that the transit system's decision did not run afoul of the First Amendment.

The plurality decision focused on forum analysis. It determined that the advertising spaces on transit buses are what this Court now calls a "nonpublic" forum. *Id.* at 303-304. With respect to the bus advertising space, this Court stated that "we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare." *Id.* at 303. Instead, Shaker Heights was "engaged in commerce," and the advertising space "although incidental to the provision of public transportation, is a part of the commercial venture." *Id.* As such, this Court adopted a highly deferential test grounded in

reasonableness, where the decision cannot be "arbitrary, capricious, or invidious." *Id.*

This Court likened a transit system's decision over which advertisements to accept as akin to the system's decisions regarding what fares to charge, which schedules to adopt or where to locate bus stops, and concluded that "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising" was not a First Amendment violation. *Id.* at 304. To hold otherwise, this Court stated, would transform "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities" into "Hyde Parks open to every would-be pamphleteer and politician." *Id.*

Justice Douglas' concurring opinion focused on Shaker Heights acting in a proprietary capacity, placing particular emphasis on passengers as a captive audience, a concern which was also at the foundation of the plurality's conclusion. *Id.* at 302. He stated that Lehman did not have a "constitutional right to spread his message before this captive audience." *Id.* at 308.

Together, the majority opinions in Lehman establish a *per se* rule that a public transit system may establish a categorical prohibition on political advertising. And the decision does not distinguish between issue or advocacy content and content that specifically identifies a political candidate. Neither the "pamphleteer," nor the "politician" have a First Amendment right to advertise on transit buses, *id.* at 304, and the City of Shaker Heights was not required to transform its buses "into forums for the dissemination of ideas upon this captive audience."

Id. at 307. The "dissemination of ideas" is broad and encompasses advocacy as much as candidate identification.

II. THIS COURT HAS NEVER QUESTIONED *LEHMAN*

Since 1974, this Court has never questioned the validity of the central holdings in *Lehman.* Likewise, this Court continues to recognize that in certain scenarios – such as running transit buses – the government acts in a commercial, proprietary capacity. S*ee, e.g., Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992)(citing *Lehman,* 418 U.S. at 298). In such circumstances, restrictions on speech must only be reasonable, where reasonableness is defined as not "arbitrary, capricious or invidious." *United States v. Kokinda*, 497 U.S. 720, 726 (1990); *see also Int'l Soc'y for Krishna Consciousness,* 505 U.S. at 678 ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.")

This Court has repeatedly recognized that advertising on public transit buses is a nonpublic forum, *R. A. V.* v. *St. Paul*, 505 U.S. 377, 390, n. 6, (1992); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 218 (2015), and acknowledged that political advertising in those forum can be categorically prohibited. *Int'l Soc'y for Krishna Consciousness,* 505 U.S. at 678; *see also Am. Freedom Def. Initiative v. King County*, 136 S. Ct. 1022, 1022-23 (2016)(Thomas, J., joined by Alito, J., dissenting from denial of

certiorari)(recognizing *Lehman* as holding that "a public transit authority that categorically prohibits advertising involving political speech does not create a designated public forum.")

Moreover, since *Lehman*, this Court has considered bus advertising to be a unique "form of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). As with other such unique forms, "at times First Amendment values must yield to other societal interests." *Id.* at 501. In these contexts, this Court has considered the nexus between the topic of speech and the purpose of the forum and concluded that "a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)(citing *Lehman, supra*). As this Court noted in *Cornelius*, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800.

III. *MINNESOTA VOTERS ALLIANCE V. MANSKY* DOES NOT OVERRULE *LEHMAN* AND DOES NOT IMPACT CATEGORICAL PROHIBITIONS ON POLITICAL ADVERTISING ON PUBLIC TRANSIT BUSES.

In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), this Court considered an altogether different forum – polling places – with a different purpose. That case grappled with the

difficulty of reconciling "the accommodation of the right to engage in political discourse with the right to vote." *Id.* at 1892 (quoting *Burson v. Freeman*, 504 U.S. 191, 198 (1992)). The opinion frames the issue in *Mansky* as "whether Minnesota's ban on political apparel is `reasonable in light of the purpose served by the forum': voting." *Id.* at 1886 (quoting *Cornelius*, 473 U. S., at 806); *see also Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 55 (1983) ("[O]n government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used."). So while this Court looked in *Mansky* with a critical eye on prohibitions against political expressions on clothing in the context of a polling place, the nexus there between the restriction on speech and the purpose of the forum are altogether different than those in *Lehman*.

This Court's determination in *Lehman* that public transit authorities can prohibit all political advertising survived *Mansky* fully intact. One need look no further than the fact that *Mansky* cites to *Lehman* for the proposition that "our decisions have long recognized 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." 138 S. Ct. at 1885-86 (citing *Lehman*, 418 U.S. at 303-304).

This could not possibly be clearer. Not only does *Mansky* recognize that the "government may impose some content-based restrictions on speech in nonpublic forums," but it specifically cites to *Lehman*

as an example of a case in which such a restriction was permitted. At the same time, *Mansky* – like *Lehman* – does not distinguish between speech from or about a "political advocate" and speech that consists more broadly of "political advocacy." 138 S.Ct. at 1886. It implicitly recognizes that transit companies may exclude advertisements that contain speech falling in either category.

Despite almost fifty years of history, and despite plain language to the contrary, courts throughout the United States have instead concluded that *Mansky* does something that it does not do. Those courts assert that *Mansky* actually overrules *Lehman*.

The Petitioner characterizes the tension as Circuit Courts disregarding *Lehman*, which is certainly true. Pet. 17-23. At the same time, there appears to be an emerging circuit split, which is only likely to deepen as time progresses.

The Third and Sixth Circuits have questioned the continuing validity of *Lehman* and all but declared it over-ruled.[2] In *Center for Investigative Reporting v. SEPTA*, 975 F.3d 300, 315-16 (3rd Cir. 2020), the case that is the subject of the Petition here, the Third Circuit mentions *Lehman*, but essentially ignores it and goes on to discuss how *Mansky* is really the appropriate standard. In *Northeastern Pennsylvania Freethought Society v. City of Lackawanna Transit System,* 938 F.3d 424,

[2] As SEPTA notes in their Petition, Pet. 23, the Ninth Circuit appears to be headed in the same direction. *See Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643 (9th Cir. 2019).

439-40 (3d Cir. 2019), the Third Circuit distinguishes *Lehman* by suggesting that it doesn't apply to advertising on the exterior of buses, and that it predates "modern public forum analysis." 938 F.3d at 439 n.3. Both of these cases disagree directly with *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314 (2018), certiorari denied by *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 140 S. Ct. 1198 (U.S., Apr. 6, 2020), though *Freethought* discusses the dispute extensively. *Freethought* disagrees with *Archdiocese* preferring not to engage in a forum analysis at all, which would of course bring *Lehman* to the fore. 938 F.3d at 435-37. The Sixth Circuit likewise ignores *Lehman* by refusing to engage in a forum analysis and instead analyzing the restriction solely under *Mansky*. *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 492-94 (6th Cir. 2020).

Though *Archdiocese of Washington* involves a restriction on religious advertising, the D.C. Circuit upheld the restriction because *Lehman* remains good law and this Court denied review of that decision. 897 F.3d 314 (2018), certiorari denied, 140 S. Ct. 1198. A companion case that addresses WMATA's restriction on political advertising was also decided in 2018. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356 (2018), certiorari denied by *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 139 S. Ct. 2665 (U.S., June 3, 2019). Although SEPTA states that this case also signals tension with *Lehman*, amicus suggests that this case actually continues the circuit split signaled in *Archdiocese* in that the D.C. Circuit explicitly recognized that *Lehman* is good law and governed the outcome of the facial challenge to the

policy at issue there. Noting that AFDI was arguing that "the ban on issue-oriented advertising is facially unconstitutional," the D.C. Circuit had "no trouble rejecting" that claim in light of "Supreme Court precedent almost directly on point," namely *Lehman*. 901 F.3d at 368. While the D.C. Circuit remanded the case for consideration in light of Mansky, the case remains pending with a limited factual record, and the court has not arrived at any conclusion on that issue. *See Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, Civil Action No. 15-1038 (JDB) (D.D.C.).

Petitioner explains well the reasons why the Third and Sixth Circuit decisions are untenable in light of *Lehman*. Pet. 17-23. Irrespective of whether this case presents a genuine disagreement among circuits or a failure to honor this Court's precedents, it is an ideal vehicle for this Court to resolve an issue of critical importance. The heightened scrutiny that now appears to exist for restrictions on advertisements in public transit in some circuits ignores *Lehman*, turns forum analysis on its head, and requires a level of precision that – short of not accepting any advertisements – is all but impossible for any transit agency to meet. The different approaches in the circuits also lead to differing results. "Materially similar public transit advertising programs should not face such different First Amendment constraints based on geographical happenstance." *Am. Freedom Def. Initiative,* 136 S. Ct. at 1025.

Public transit companies need clarity and guidance on whether they can or cannot prohibit political advertising. Indeed, if *Lehman* has been

overruled, and advertising rules are now governed by *Mansky*, it may be that transit companies cannot meaningfully enforce their advertising policies. If that is the case, then the sooner this Court clarifies the issue the better as public transit companies and agencies will need to make important decisions as to whether they wish to continue to run advertisements at all – or under what conditions – under the new rules. Those decisions are significant and should be informed with as much clarity as possible.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

RICHARD E. HILL, JR.
SENIOR ASSISTANT CITY ATTORNEY
Counsel of Record
OFFICE OF THE CITY ATTORNEY
900 EAST BROAD STREET, SUITE 400
Richmond, VA 23219
(804) 646-7946
richard.e.hill@richmondgov.com

May 3, 2021