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

BRIEF IN OPPOSITION

John S. Stapleton
LEVAN MUHIC STAPLETON LLC
One Liberty Place
1650 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 561-1500

Robert A. Wiygul
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103

D. Victoria Baranetsky
Alexandra Gutierrez
THE CENTER FOR INVESTIGATIVE REPORTING
1400 65th Street, Suite 200
Emeryville, CA 94608

Brian M. Hauss
Counsel of Record
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Witold J. Walczak
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222

Seth F. Kreimer
3501 Sansom Street
Philadelphia, PA 19104

QUESTION PRESENTED

Whether a public transit system's policy banning advertisements that contain "political messages" or that address "political . . . issues" is incapable of reasoned application, and therefore violates the First Amendment, where: the policy is not limited to electoral campaign advertisements; the term "political" is otherwise not defined; the public transit system has not issued any guidance to cabin the discretion of enforcement officials; and the record contains numerous examples of arbitrary application.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioner Southeastern Pennsylvania Transportation Authority (SEPTA) rejected proposed advertisements submitted by Respondent The Center for Investigative Reporting (CIR) to promote CIR's award-winning news investigation, which used computational data to identify substantial racial disparities in American banks' mortgage lending practices across the country, including in Philadelphia. At the same time, SEPTA accepted advertisements from Philadelphia area banks professing their adherence to laws prohibiting racial discrimination.

Although CIR's proposed advertisements merely sought to inform the public about the empirical findings of CIR's investigation, SEPTA rejected the advertisements pursuant to two provisions of SEPTA's advertising policy (the "Challenged Provisions") prohibiting advertisements that are "political in nature" or that express "an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical or social issues." SEPTA has not issued any written guidance clarifying what these provisions mean or how they should be applied.

SEPTA's General Counsel, the final arbiter of whether SEPTA's advertising restrictions apply to any proposed advertisement, struggled to articulate what the Challenged Provisions mean. He testified that the terms "political" and "political in nature" were "essentially the same," before testifying on cross-examination that the terms have distinct and separate meanings. Pet. App. 14a. He testified that the phrase "political in nature" means "directly or

indirectly implicates the action, inaction, prospective action or policies of a government entity," but he also testified that an advertisement could be political in nature without "directly or indirectly implicating the action, inaction, prospective action or policies of a government entity." Pet. App. 14a, 15a. And he testified that, to determine whether an issue is a "matter of public debate," he performs a personal analysis—including Google searches—"to see what is being argued, debated in society in general." Pet. App. 14a, 82a.

> What I do, generally speaking, is I look at the ad first, and I just kind of absorb it, for lack of a better word. I think about it.
>
> And then I go on the internet and I Google various phrases about, you know, what the advertisement is projecting, what message it is, and I see what comes up, and I see if there's a meaningful debate about the issue that the advertisement is promoting.

Pet. App. 82a.

The Challenged Provisions' open-ended language, together with the lack of structure or guidance governing SEPTA's application of the Challenged Provisions, has engendered arbitrary decision-making. SEPTA applied the Challenged Provisions to reject advertisements calling on art museums to pay their workers a living wage, promoting adoption as a response to unplanned pregnancies, and seeking to raise awareness about

human trafficking. Pet. App. 16a. Meanwhile, SEPTA accepted advertisements welcoming the Democratic National Committee, warning about "Fake news," and displaying quotes from Martin Luther King, Jr., Cesar Chavez, and Lucretia Mott to promote the peace movement. Pet. App. 16a–17a, 86a, 87a. Indeed, SEPTA's haphazard application of the Challenged Provisions extends to the circumstances at issue here: SEPTA accepted several advertisements from financial institutions professing that they do not discriminate on the basis of race, including in mortgage lending, Pet. App. 17a, even as it rejected CIR's advertisement promoting its empirical findings about widespread racial discrimination in the mortgage market.

The district court held that the Challenged Provisions were unconstitutional because they were "incapable of reasoned application." Pet. App. 17a–19a, 105a–08a. In so holding, the district court applied this Court's recent decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), which struck down a similarly indeterminate prohibition on "political" apparel in polling places. Having determined that the challenged provisions were unconstitutional, the district court then *sua sponte* redrafted the restrictions, directing SEPTA to revise the "political" and "public debate" provisions to read:

> (a) 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 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.

Pet. App. 18a n.2, 108a. The court then upheld SEPTA's rejection of CIR's advertisements under the judicially revised policy, even though SEPTA had never applied this standard to CIR (or anyone else). Pet. App. 19a, 143a.

The Third Circuit reversed, holding that the revised Challenged Provisions are also incapable of reasoned application. The court observed that: (i) SEPTA did not cross-appeal the district court's decision invalidating the original Challenged Provisions, but failed to explain how the revised provisions—which are in some respects broader than the originals—are any more workable; (ii) SEPTA has not issued any guidance constraining enforcement officials' discretion in applying the Challenged Provisions; and (iii) the record contains numerous examples of SEPTA's arbitrary application of the Challenged Provisions. The court also noted that SEPTA remains free to revise the Challenged

Provisions to appropriately cabin enforcement officials' discretion. Pet. App. 26a–27a, 29a.

This Court should deny SEPTA's petition for a writ of certiorari. First, as SEPTA itself concedes, there is no circuit split regarding the application of *Mansky* to public transit systems' advertising policies. To the contrary, in addition to the Third Circuit's unanimous decision applying *Mansky* in this case, the Sixth Circuit has also unanimously held that a public transit system's poorly defined restriction on "political" advertisements was unconstitutional under *Mansky*, and the Ninth and D.C. Circuits have suggested without holding that they would likely reach a similar conclusion. Not a single federal court of appeals—or even a single circuit court judge—has suggested that *Mansky* does not or should not apply to the advertising policies of public transit systems.

Second, SEPTA's argument that the decision below contradicts this Court's ruling in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), is misplaced. In *Lehman*, this Court held that the First Amendment does not require a public transit system, or any other nonpublic forum, to accept a political candidate's campaign advertisements. The *Lehman* Court confronted a decision to refuse candidate advertising that was indisputably political; it did not address the application of a "political" speech ban to expression wholly outside the electoral context. *Mansky* clarified that—whereas restrictions on electoral campaign speech are relatively "lucid"—ill-defined restrictions on "political" expression that potentially encompass speech on any number of topics violate the First Amendment because they are incapable of reasoned application.

SEPTA is also wrong to suggest that *Lehman* established an independent body of First Amendment doctrine for speech on public transit systems. To the contrary, *Lehman* expressly acknowledged that the rules laid down in that case apply to nonpublic forums generally, and, among other things, prohibit speech restrictions that are arbitrary, capricious, or invidious. *Mansky* established that, even in a nonpublic forum, ill-defined restrictions on "political" speech (such as the Challenged Provisions) give rise to precisely the sort of arbitrary or selective applications that *Lehman* forbids. *Lehman* is entirely consistent with both *Mansky* and the decision below.

Third, even if there were some tension between *Lehman* and *Mansky*, this case would not be a good vehicle for resolving it. This appeal comes to the Court in a highly unusual posture: SEPTA did not cross-appeal the district court's decision striking down the original Challenged Provisions, so this Court would be required to assess the constitutionality of the district court's revisions, rather than SEPTA's original policy. Moreover, there is no evidence in the record concerning SEPTA's interpretation or implementation of the revised provisions, and no reason to believe the revised provisions will be implemented any less arbitrarily. There are also several alternative grounds for affirmance that were not reached by the court of appeals, including: SEPTA's arbitrary application of the Challenged Provisions; SEPTA's failure to convert its advertising space from a designated public forum to a nonpublic forum; and SEPTA's viewpoint-discriminatory decision to exclude CIR's advertisement asserting discrimination by mortgage lenders while allowing

financial institutions to advertise that they are equal-opportunity lenders.

Finally, the court of appeals' judgment was correct. In evaluating SEPTA's ban on "political" advertisements, the Third Circuit looked to the same factors *Mansky* considered in striking down Minnesota's ban on "political" apparel, namely: the official definition of the challenged term, the absence of guidance documents providing workable standards to cabin the discretion of enforcement officials, and evidence regarding the transit system's inconsistent implementation of the policy. All of these factors support the conclusion that the Challenged Provisions are incapable of reasoned application. SEPTA's policy does not define what constitutes a "political" advertisement; SEPTA has not provided any relevant guidance to aid enforcement officials; and the record contains multiple examples of arbitrary application. SEPTA also remains free to clarify the Challenged Provisions in order to bring them into compliance with *Mansky*. For all these reasons, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

A. Advertising on SEPTA

The Southeastern Pennsylvania Transportation Authority operates a transit system that serves Pennsylvania, Delaware, and New Jersey. Pet. App. 38a. To raise revenue, it leases advertising space on its more than 2,500 vehicles (including buses and trains) and in more than 200 stations and facilities. Pet. App. 75a. It accepts both commercial

and non-commercial advertisements, without distinguishing between them. Pet. App. 15a. During the period in which SEPTA applied the restrictions at issue, it accepted more than 2,700 advertisements and rejected fewer than 15 proposals, including CIR's advertisements. Pet. App. 83a.

In addition to conventional print advertising spaces on the exterior and interior of SEPTA vehicles and in SEPTA stations, the available advertising spaces included digital displays on many SEPTA vehicles. Pet. App. 52a. These digital displays interspersed paid advertisements with transit route information. *Id.* The digital displays also included "infotainment" consisting of news headlines from the Associated Press and Reuters. *Id.* SEPTA did not review, and was not even informed about, the content on the new feeds featured in the digital displays. *Id.*[1]

B. SEPTA's Advertising Rules

SEPTA's 2015 Advertising Standards contain twenty-two provisions prohibiting certain types of advertisements. Pet. App. 76a. Two of those provisions are at issue here: subsection (a), which prohibits advertisements that are "political in nature," and subsection (b), which prohibits speech that addresses "political . . . issues."

As originally drafted, subsection (a) of SEPTA's Advertising Standards provided:

---

[1] After trial, SEPTA stopped including newsfeeds in its digital displays. Pet. App. 149a–50a n.2. However, it did not change the Challenged Provisions before the district court issued its decision.

> 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 government entity.

Pet. App. 11a.

As originally drafted, subsection (b) of SEPTA's Advertising Policy prohibited "[a]dvertisements expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical or social issues." *Id.*

The Advertising Standards themselves are the only written guidance SEPTA has published regarding what advertising content is acceptable on its system. Pet. App. 25a, 81a.

All proposed advertisements are reviewed by SEPTA's third-party vendor, Intersection, and at least one SEPTA employee. Pet. App. 80a. Advertisements that Intersection and the reviewing SEPTA employee believe fall in a "gray area" are elevated to SEPTA's General Counsel, Gino Benedetti, for further review to assess whether they comply with SEPTA's advertising restrictions. Pet. App. 81a. Benedetti is

the final arbiter for determining whether an advertisement violates SEPTA's advertising standards. *Id.*

Benedetti struggled to articulate what the Challenged Provisions mean. He testified on direct examination that the terms "political" and "political in nature" were "essentially the same to [him]," then testified on cross-examination that the terms have distinct and separate meanings. Pet. App. 14a. He testified that the phrase "political in nature" means "directly or indirectly implicates the action, inaction, prospective action or policies of a government entity," *id.*, but he also testified that an advertisement could be political in nature without "directly or indirectly implicating the action, inaction, prospective action or policies of a government entity," Pet. App. 15a. During his deposition, he testified that "political in nature" means: "Anything that one party may support and another doesn't. I don't mean any political party, but I mean individuals or groups." Pet. App. 152a n.3.

Benedetti also testified that, in determining whether an advertisement addresses a matter of public debate, he performs "a mechanical type of analysis that . . . look[s] to see what is being argued, debated in society in general." Pet. App. 14a. He elaborated that he evaluates "holistically . . . the subject matter of that ad being debated in society at large." *Id.* He stated that he uses "common sense" and discussions with others to determine whether a particular subject is a matter of public debate. *Id.* He also "Google[s] various phrases about . . . what the advertisement is projecting, what message it is," and that he reviews the results to "see if there's a meaningful debate about the issue that the

advertisement is promoting." Pet. App. 82a. Benedetti testified that he cannot tell whether any advertisement concept or specific advertisement violates the Challenged Provisions without first engaging in this process of research and discussion. Joint Appendix (JA) 1105–07, 1110. He could not say whether any hypothetical advertisements—including advertisements stating "Vote on Election Day," "Join the Military," "ACLU: Defending Freedom," "Don't Litter," or the text of the First Amendment—would violate the Challenged Provisions. JA 1105, 1110–12, 370–71.

The lack of any formal guidance or structure governing SEPTA's application of the Challenged Provisions has led to arbitrary decision-making. From the time that SEPTA implemented its 2015 Advertising Standards through trial, it accepted at least 2,736 unique proposals to advertise in SEPTA's advertising spaces. Pet. App. 83a. These included:

- An advertisement from the Philadelphia Host Committee for the 2016 Democratic National Convention that stated: "Welcome [Democratic National Committee]. We are Philadelphia's: union, middle class jobs, office cleaners, community, neighbors, building service workers, window washers, security officers, families, school district workers. Road out of poverty." Pet. App. 16a; JA 756.

- A Facebook advertising campaign warning against "Fake news" and "Clickbait." Pet. App. 17a; JA 971–72.

- An advertisement for an event at the African American Museum that featured quotes from and pictures of Martin Luther King, Jr., Cesar Chavez, and Lucretia Mott (all of whom SEPTA described as "controversial") and asked readers "What will you do for Peace?" Pet. App. 16a–17a; JA 757.

- A series of advertisements for Fusion media with the phrase "As American As" and photographs of people of many races, ethnicities, and religions, including a photograph of a Black child wearing a T-shirt that says "MY LIFE MATTERS." Pet. App. 15a, 28a; JA 761–74.

- Several bank advertisements regarding home loans that included Equal Housing Lender and/or Member FDIC logos. Pet. App. 17a; JA 775–76, 778, 781–82.

- Numerous advertisements promoting government programs and policy, such as: (1) a Centers for Disease Control and Prevention advertisement stating "Help him fight measles with the most powerful defense. Vaccines."; and (2) a Philadelphia FIGHT Community Health Center advertisement stating, "Have you or someone you know been impacted by mass incarceration? Find out how to fight for your rights, and for the rights of your family, friends and community members." Pet. App. 84a–85a; JA 792, 807–10.

SEPTA rejected fewer than 15 advertisements under the 2015 Advertising Standards. In addition to CIR's advertisement, SEPTA rejected all of the following advertisements under the Challenged Provisions:

- An advertisement stating "Dear Art Museum: Art is Expensive! So is constructing new buildings! We totally get why you can't pay all your employees a living wage!" Pet. App. 16a; JA 818.

- A Bethany Christian Services advertisement stating "Unplanned Pregnancy? NOW WHAT? Consider adoption as an option. You don't have to make your decision alone." Pet. App. 16a; JA 819.

- An advertisement calling on "big tobacco" to stop advertising to children. Pet. App. 59a–60a; JA 823–26.

- A health department advertisement urging Philadelphians to wear condoms to stop the spread of the Zika virus. Pet. App. 60a; JA 827–30.

- A series of proposed advertisements by Planned Parenthood stating "Everybody deserves expert care," "Talk to the Birth Control Experts," or "Ask the Women's Health Care Experts – Birth Control at Planned Parenthood." Pet. App. 60a–61a; JA 831–34.

- An advertisement designed to get SEPTA riders to pray for a sick child, stating "Fight for Bean" and "#STORMTHEHEAVENS." Pet. App. 61a; JA 839–40.

- An advertisement for XQ The Super School Project, stating "Education Isn't a Problem. It's a Solution." Pet. App. 62a; JA 842.

SEPTA also ordered the removal of two advertisements it had accepted, including an advertisement promoting opportunities to become a sperm donor, after Benedetti saw them while riding on SEPTA and determined that they violated the "public debate" provision. Pet. App. 61a. Benedetti testified that he determined the sperm donor advertisement should be removed because "[p]eople are on both sides" of whether sperm donation is "something we should be doing as a society." Pet. App. 61a n.10.

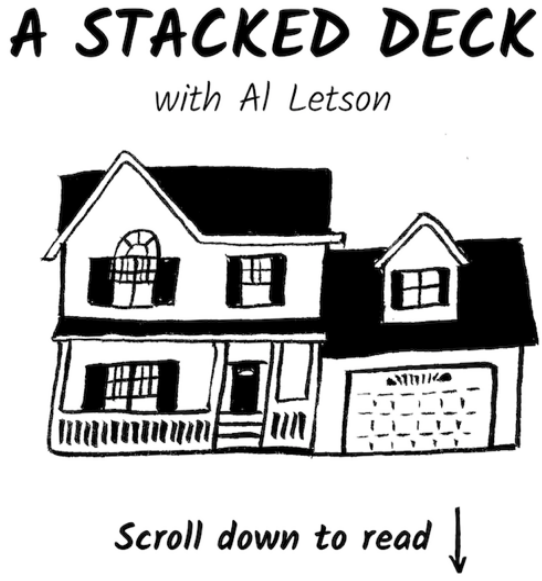
C. SEPTA's Rejection of CIR's Proposed Advertisements

The Center for Investigative Reporting is a California-based, nonprofit, investigative journalism organization. Pet. App. 5a. Its mission is to advance social justice through the dissemination of "verifiable, nonpartisan facts[.]" *Id.* CIR publishes its news on its "Reveal"-branded platforms, including on its website, national radio show, and podcast. *Id.*

In January 2018, CIR submitted a proposed advertisement for display on the interior of SEPTA buses. *Id.* The proposed advertisement consisted of a

graphic illustration entitled "A Stacked Deck," which summarized the findings of a then-forthcoming CIR report regarding discrimination in mortgage lending throughout the United States. *Id.* The report, which was based on a multi-year investigation, indicated that applicants of color in 61 metropolitan areas were more likely than white applicants to be denied conventional home purchase mortgages. *Id.*

The advertisement was as follows:



Today in America, people of color are regularly being

DENIED

the dream of home ownership

Reveal from The Center for Investigative Reporting analyzed **31 MILLION** mortgage records and found **61** U.S. metro areas where people of color are far more likely to be turned down than whites when applying for a conventional home loan.

The nation's capital is the ONE METRO AREA where Native Americans, African Americans, Latinos, and Asians are ALL more likely to be denied a conventional home loan.

IN D.C.

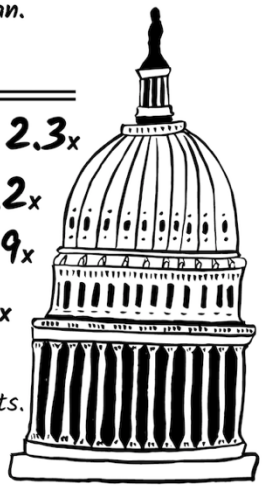
Native American applicants are **2.3x**

Black applicants are **2.2x**

Latino applicants are **1.9x**

Asian applicants are **1.6x**

as likely to be denied than comparable **WHITE** applicants.

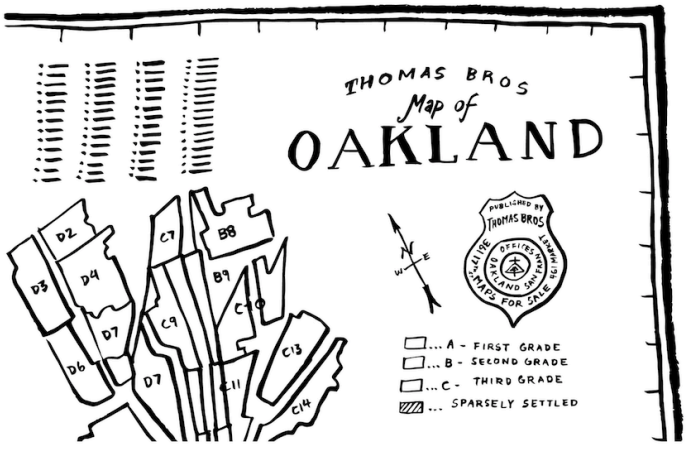


Want to find out if there are lending disparities in your neighborhood and get more updates? Text "LOAN" to Reveal and its partners at 202-873-8325.

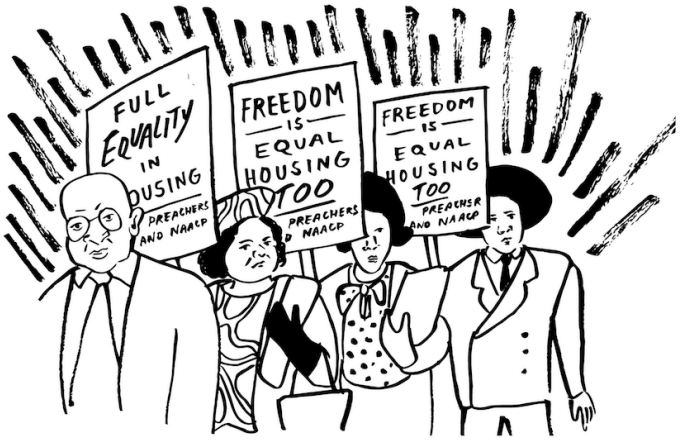
(Text STOP or HELP to end or get assistance. Standard rates apply.)

*This is just the latest in the United States' **SORDID HISTORY** of unequal access to owning a home.*

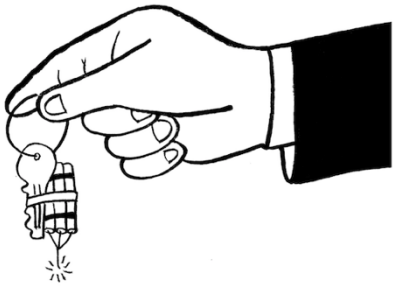
In the 1930s, the federal government actually made housing discrimination a state-sponsored enterprise by drawing up maps that strangled investment in areas where immigrants and African Americans lived. This practice is called redlining.

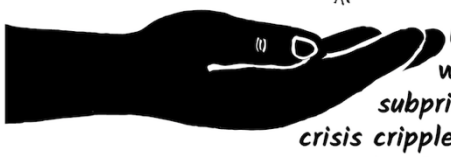


The 1968 Fair Housing Act made redlining illegal, but discriminatory practices continued through predatory lending or "reverse redlining." Lenders flooded communities of color with inferior loan products AND limited access to conventional lines of credit.

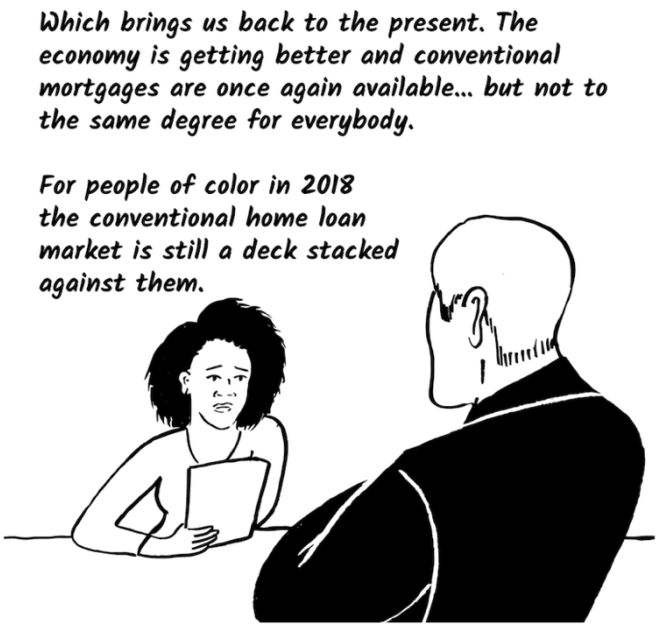


Aimed at borrowers who lenders perceive as risky, subprime loans have higher interest rates and are more costly in the long run.





Unsurprisingly, when the subprime mortgage crisis crippled the economy in 2007, people of color were disproportionately affected by the fallout.



Pet. App. 5a–10a.

SEPTA rejected CIR's advertisement because "[d]isparate lending is a matter of public debate and litigation." Pet. App. 11a. SEPTA later stated that it rejected CIR's proposed advertisement pursuant to subparagraphs (a) and (b) of the 2015 Advertising Standards. *Id.*

Benedetti testified that, as part of his deliberation over CIR's proposed advertisement, he reviewed: CIR's website, an article by the American Bankers Association disputing CIR's reporting, an editorial in the New York Times, and lawsuits and settlements regarding discriminatory lending. Pet. App. 50a. He stated that he found the American Bankers Association article "important . . . because it criticized the research upon which the ad CIR

proposed was based." *Id.* Benedetti's personal research led him to the conclusion that there was a "real live debate" between CIR and the American Bankers Association about discriminatory lending, Pet. App. 50a, even though CIR's reporting has been verified by numerous specialists and academics.[2]

During litigation, Benedetti also testified that aspects of the illustrations in two panels of CIR's proposed advertisement were of "particular concern"—one showing "a white hand handing keys and stick of dynamite to a black hand," and one that displayed "African-Americans holding signs protesting . . . and a white guy not part of the protest." Pet. App. 43a. CIR drafted an additional set of proposed advertisements that removed the design elements to which SEPTA objected. *Id*. SEPTA rejected the revised advertisements as being "barred by the same advertising standards as the first." *Id*.

II. PROCEEDINGS BELOW

A. District Court Proceedings

CIR filed suit against SEPTA, alleging that SEPTA had violated CIR's First and Fourteenth Amendment rights by rejecting its proposed advertisement. Pet. App. 12a. The Complaint sought a declaration that the Challenged Provisions are unconstitutional and a permanent injunction prohibiting SEPTA from enforcing the Challenged

[2] *See* Emmanuel Martinez & Aaron Glantz, *How Reveal Identified Lending Disparities in Federal Mortgage Data*, Reveal (Feb. 15, 2018), https://bit.ly/2SWvWee. This reporting resulted in CIR being named a finalist for the Pulitzer Prize.

Provisions to exclude CIR's proposed advertisement. Pet. App. 12a–13a.

After holding a bench trial, the district court issued a Memorandum Opinion on November 28, 2018. Pet. App. 17a, 33a–141a. The court held that the "political" and "public debate" provisions as implemented by SEPTA were "incapable of reasoned application," and were therefore invalid under *Mansky*. Pet. App. 107a–08a. Over SEPTA's objection, the court directed SEPTA to revise the "political" and "public debate" provisions as follows:

> (a) 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 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.

Pet. App. 108a.[3] Notably, while the court invalidated the language prohibiting advertisements that are "political in nature," it did not invalidate the language prohibiting "political messages" or speech about "political" issues. The court concluded that the rules, as it had unilaterally revised them, were reasonable and not viewpoint discriminatory. Pet. App. 122a–40a.

On December 20, 2018, the district court entered a Final Judgment and Decree granting judgment for CIR in part and for SEPTA in part. Pet. App. 143a–45a. The court declared that portions of SEPTA's restrictions "must be stricken to nullify the threat of unfettered discretion on the part of SEPTA," and ordered SEPTA to adopt the Court's revised rules. Pet. App. 143a. Even though SEPTA had rejected CIR's advertisement under provisions the district court concluded were unconstitutional, and had never reviewed CIR's advertisement under the district court's rewritten standards, the court nonetheless concluded that SEPTA had "acted reasonably" in rejecting CIR's advertisements. *Id.*

On January 18, 2019, CIR appealed. Notice of Appeal, D. Ct. ECF No. 61. SEPTA did not cross-appeal the determination that the challenged provisions were inconsistent with *Mansky*.

B. Court of Appeals Proceedings

The Third Circuit unanimously reversed the denial of relief to CIR, holding that the revised

[3] The court also ordered SEPTA to implement a meet-and-confer program for advertisements that SEPTA deems to be in violation of its Advertising Standards. Pet. App. 109a–10a.

Challenged Provisions also violate the rule laid down in *Mansky*. In *Mansky*, the court of appeals explained, this Court held that a ban on political apparel inside polling places was incapable of reasoned application because the term "political" "was not defined in the statute" and "had been interpreted in various ways in the State's official guidance documents." Pet. App. 24a. The court of appeals concluded that the Challenged Provisions' "ill-defined" restriction on advertisements that (in SEPTA's view) contain "political messages" or address "political issues" is likewise incapable of reasoned application, given "the absence of guidelines cabining SEPTA's General Counsel's discretion in determining what constitutes a political advertisement" and the "virtually open-ended interpretation" the policy has received in practice. Pet. App. 26a, 27a.

SEPTA attempted to distinguish *Mansky* in three ways, none of which the court of appeals found persuasive.

First, the court rejected SEPTA's argument that *Mansky*'s holding should be limited to polling places. Pet. App. 26a. It observed that *Mansky* itself contained no such limitation. And it noted that "SEPTA does not challenge the District Court's holding that portions of the Challenged Provisions were overbroad, but it fails to offer any reason why the lingering references to advertisements that 'contain political messages' and those that address 'political issues' are any more capable of reasoned application than those that were struck down." *Id.*

Second, the court rejected SEPTA's argument that its ban was distinguishable from the Minnesota

statute in *Mansky* because, whereas Minnesota had "issued contradictory implementing guidelines" for its law, Pet. App. 25a (quoting Appellee Br. 48), SEPTA had not issued *any* guidelines. "[F]ar from helping SEPTA's case," the court reasoned, "the absence of guidelines cabining SEPTA's General Counsel's discretion in determining what constitutes a political advertisement actually suggests that, like the Minnesota statute in *Mansky*, the lack of objective, workable standards may allow SEPTA's General Counsel's own politics to shape his views on what counts as political." Pet. App. 27a (cleaned up) (quoting *Mansky*, 138 S. Ct. at 1891).

Finally, the court rejected SEPTA's contention that its review process is more robust than the review process in *Mansky* because SEPTA "requires its General Counsel, and sometimes other lawyers, to determine whether an advertisement falls within a prohibition." Pet. App. 26a. The court pointed out that SEPTA's responses to the permissibility of hypothetical advertisements posed at oral argument "highlight[] the arbitrariness of the decision-making process." Pet. App. 26a. "For example, when we asked whether an advertisement that depicted three girls of different races holding hands with a message that says, 'This is how racism ends,' would be political, counsel for SEPTA responded 'no, I don't think so.'" *Id.* (citation omitted). Then, "[w]hen the Court adjusted the hypothetical to include the same picture with a message that says, 'This is what America looks like,' counsel for SEPTA responded by asking, 'Who's putting the ad on?'" Pet. App. 27a (citation omitted).

The court concluded that the "lack of structure and clear policies governing the decision-making

process creates a real risk that [SEPTA's policy] may be arbitrarily applied," and that CIR "has amply demonstrated that at least on a few occasions that risk has become a reality." Pet. App. 28a. For example, "in its post-trial brief, SEPTA conceded that it should have rejected a union advertisement supporting the DNC." Pet. App. 27a–28a. The court also noted that SEPTA had accepted an advertisement that "clearly allude[d] to the Black Lives Matter movement, which campaigns against violence aimed at Black people and which has become a lightning rod in the media." Pet. App. 28a. "To many," the court observed, "such an advertisement would clearly be prohibited under the Advertising Standards, even as revised by the District Court. Yet Benedetti determined that it was not." *Id.*

Having concluded that the district court's amendments failed to cure the Challenged Provisions' constitutional defects, the court of appeals held the district court "erred in failing to order SEPTA to run CIR's proposed advertisements." *Id.* It accordingly reversed the district court's judgment and remanded the case to the district court with instructions to grant declaratory relief and issue an injunction barring enforcement of the Challenged Provisions of the current Advertising Standards against CIR. Pet. App. 30a. It noted that "SEPTA, of course, is free to revise its Advertising Standards again to cabin the decisionmaker's discretion in applying the ban on 'political' advertisements." Pet. App. 29a n.5. It did not address whether SEPTA's advertising space is a designated public forum or whether the Challenged Provisions are viewpoint discriminatory. Pet. App. 22a–23a.

On October 30, 2020, the Third Circuit denied SEPTA's petition for rehearing and rehearing en banc, without dissent. Order, 3d Cir. ECF No. 95.

REASONS FOR DENYING CERTIORARI

I. There Is No Circuit Split Regarding the Application of *Mansky* to Public Transit Systems.

Petitioner concedes that there is no circuit split regarding the application of *Mansky* to public transit systems' advertising policies. *See* Pet. 21–23. In addition to the Third Circuit's unanimous decision in this case, a Sixth Circuit panel unanimously held in *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation* (*AFDI v. SMART II*), 978 F.3d 481 (6th Cir. 2020), that a transit system's restriction on so-called "political" advertisements was unconstitutional because it was incapable of reasoned application.

Like SEPTA, SMART implemented advertising guidelines that prohibited, *inter alia*, "political" advertisements. *Id.* at 486. The Sixth Circuit held that these guidelines "contain the same basic problems that *Mansky* identified: They adopt an amorphous ban on 'political' speech that cannot be objectively applied." *Id.* at 498. The court noted that SMART "has not written down 'objective, workable standards' to define the word 'political' and guide officials on the steps to take when deciding if specific ads qualify," and that "the subjective enforcement of an 'indeterminate prohibition' increases the 'opportunity for abuse' in its application." *Id.* at 497 (citing *Mansky*, 138 S. Ct. at 1891).

The Sixth Circuit's conclusion was "reinforced by the way that other circuits have interpreted *Mansky*." *See id.* In addition to the Third Circuit's decision in this case, the Sixth Circuit cited decisions from the Ninth and D.C. Circuits strongly suggesting that *Mansky* prohibits public transit systems from imposing indeterminate restrictions on "political" advertisements without workable standards to guide and constrain the discretion of enforcement officials.

In *Amalgamated Transit Union Local 1015 v. Spokane Transit Authority*, 929 F.3d 643 (9th Cir. 2019), the Ninth Circuit upheld an as-applied First Amendment challenge against the Spokane Transit Authority's (STA) rejection of a labor union's advertisement, pursuant to its ban on "public issue" advertising—which STA's CEO characterized "as a prohibition on ads that would generate 'public interest around issues about which there could be an economic, social or political debate," *id.* at 653. The court did not invalidate the prohibition on its face, because the union did "not challenge the trial court's conclusion that STA's policy is definite and objective." *Id.* at 654. But it expressed skepticism that STA's "public issue" standard would survive facial review, reasoning that the "standard lacks objective criteria to provide guideposts for determining what constitutes prohibited 'public issue' advertising." *Id.* at 655.

To the same effect, in *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority* (*AFDI v. WMATA*), 901 F.3d 356 (D.C. Cir. 2018), the D.C. Circuit reversed a district court decision upholding WMATA's ban on "[a]dvertisements intended to influence members of the public regarding an issue on which there are

varying opinions," *id.* at 361, 373. The D.C. Circuit explained that *Mansky*, which was handed down after the appeal was fully briefed, "invites arguments about whether [WMATA's policy] is capable of reasoned application." *Id.* at 372. It concluded that, on remand, "AFDI should be given an opportunity to refine its argument and to supplement the record" with information about "how [the restriction] has been applied," which in turn would inform the analysis "as to whether it is capable of reasoned application." *Id.* at 373. *Cf. Zukerman v. United States Postal Serv.*, 961 F.3d 431, 449–50 (D.C. Cir. 2020) (holding that the Postal Service's 2018 rule banning depictions of "political" content in custom postage products was incapable of reasoned application).

Thus, no federal court of appeals with the benefit of this Court's guidance in *Mansky* has taken a position that conflicts with the decision below. Indeed, no federal appellate judge has taken a contrary position. To be sure, before *Mansky* was decided, courts upheld some public transit systems' open-ended bans on "political" advertising under a more lenient standard than *Mansky* allows; however, not a single court of appeals has done so since *Mansky* made clear that such prohibitions are unconstitutional where they are "incapable of reasoned application."

II. The Decision Below Does Not Conflict with *Lehman*.

Lacking any disagreement in the courts of appeals, SEPTA argues that the decision below is at odds with this Court's decision in *Lehman*. According to SEPTA, *Lehman* "afford[s] transit authorities the discretion to prohibit all advertising they regard as

'political' from their vehicles," Pet. 13, regardless of whether they have any guidelines or can articulate a logical and consistent rationale for their decisions. If *Lehman* truly stands for this all-encompassing position, its import has eluded the judges on the circuit courts, none of whom has suggested—even in dissent—that *Lehman* is in tension with *Mansky*.

Lehman is not what SEPTA makes it out to be. In that case, an Ohio General Assembly candidate sought to place campaign advertisements on the Shaker Heights Rapid Transit System, and was informed that the city transit system did not accept such political advertisements on its vehicles. *Lehman*, 418 U.S. at 300. Justice Blackmun's plurality opinion stated the question presented as "whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept *paid political advertising on behalf of a candidate for public office*." *Id.* at 299 (emphasis added).

The plurality opinion focused on Lehman's contention that public transit systems' advertising spaces "constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication 'regardless of the primary purpose for which the area is dedicated.'" *Id.* at 301. The Court rejected this argument, holding that the Shaker Heights transit system's advertising space, "although incidental to the provision of public transportation, is a part of the commercial venture," and that "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.

At the same time, the *Lehman* Court recognized that, even in a nonpublic forum, "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious." *Id.* If Shaker Heights opened up the limited advertising space available in its transit system to "short-term" electoral campaign advertisements, the Court reasoned, "[t]here could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians." *Id.* at 304.

Two points stand out from the plurality's decision. First, in upholding the transit system's restriction on political advertisements, the Court emphasized that the policy of denying "political" content could not be applied in an arbitrary or invidious manner. There was simply no dispute in *Lehman* that the electoral campaign advertisements were political, nor any suggestion that the prohibition had been inconsistently applied. The Court thus had no occasion to address whether a prohibition on "political" speech, applied far beyond the "paid political advertising on behalf of a candidate for public office" at issue in *Lehman*, could be incapable of reasoned application.

To similar effect, the Court in *Mansky* reasoned that polling-place restrictions on apparel "relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election" were "more lucid" than Minnesota's undefined restriction on "political" apparel. *Mansky*, 138 S. Ct. at 1891

(citation omitted); *see also Zukerman*, 961 F.3d at 451 (distinguishing *Lehman* on the ground that it upheld a "more precise, objective, and workable" restriction against "political advertising on behalf of a candidate for public office," as opposed to the Postal Service's "*blanket* ban on 'political' content").

Second, the plurality in *Lehman* did not suggest that public transit systems' advertising spaces are unique. To the contrary, it stated that its decision would have implications for "display cases" in all manner of "public facilities." *Lehman*, 418 U.S. at 304. *Lehman* did not purport to establish a discrete category of "public transit authority law" analytically distinct from other precedents concerning speech restrictions on government property. *See* Pet. 16. Thus, there is no reason that the First Amendment principles that governed in *Mansky* should not apply to public transit advertising spaces.

III. This Case Is a Poor Vehicle for Resolving Any Questions About *Mansky*'s Application to the Advertising Policies of Public Transit Systems.

If there were any tension between *Lehman* and *Mansky*, this case would be a poor vehicle to address it. SEPTA did not appeal the district court's determination that the Challenged Provisions were unconstitutional under *Mansky* or the district court's *sua sponte* decision to redraft SEPTA's advertising standards. As a result, the standard at issue on appeal was not the standard used to reject CIR's advertisement, and has never in fact been applied to CIR's advertisement. In addition, there are several alternative grounds for affirmance not reached by the

court of appeals, making a grant of certiorari improvident.

A. SEPTA Did Not Appeal the District Court's Holding that Portions of the Challenged Provisions Were Unconstitutional, and Therefore the Standard at Issue Is Not the Standard Applied to CIR.

This case comes before the Court in a highly unusual posture. Because SEPTA did not cross-appeal the district court's decision to invalidate the original provisions and rewrite them, it is now barred from asserting the constitutionality of the original Challenged Provisions. *See Jennings v. Stephens*, 574 U.S. 271, 276 (2015). Yet the revised provisions have never been applied to CIR's advertisement. The odd posture here would complicate this Court's review in several ways.

First, even if SEPTA were correct that the policy as revised by the district court is constitutionally valid, it was still plain error for the district court to uphold the rejection of CIR's advertisement under a policy that has been finally determined to be unconstitutional. This provides an alternative ground for affirmance.

Second, SEPTA asks this Court to resolve the validity of public transit systems' restrictions on "political" advertisements in an appeal concerning a judicially rewritten advertising policy that was imposed over SEPTA's objection and that has never been applied to CIR's advertisement.

Third, there is no evidence in the record concerning SEPTA's application of the judicially revised policy. The absence of record evidence concerning the actual policy under review would impair this Court's ability to assess the question presented.

B. SEPTA's Application of the Challenged Provisions Was Arbitrary.

This case is also a poor vehicle for review of the broad question SEPTA presents because SEPTA's arbitrary application of its policy provides an independent, and fact-specific, basis for affirmance, regardless of the provisions' facial validity.

SEPTA's General Counsel offered an utterly incoherent understanding of the Challenged Provisions, and his process for applying them was haphazard at best. As noted above, he testified that he conducts Google searches, uses "common sense," and has "discussions [with colleagues] to determine what is a matter of public debate." *See* Statement of the Case I.B, *supra*. He "testified on direct examination that the terms 'political' and 'political in nature' were 'essentially the same to [him],'" but then testified on cross-examination "that the terms have . . . distinct and separate meanings." Pet. App. 14a. "He testified that mentioning a law or regulation could be considered political in nature, but he also testified that an advertisement could be political in nature without 'directly or indirectly implicating the action, inaction, prospective action or policies of a government entity.'" Pet. App. 15a. And he also testified "that an advertisement can involve politics and not violate either provision." Pet. App. 14a.

This testimony led the court of appeals to conclude that "the lack of structure and clear policies governing the decision-making process creates a real risk that [the Challenged Provisions] may be arbitrarily applied." Pet. App. 28a. The court also found that "CIR has amply demonstrated that at least on a few occasions that risk has become a reality," citing, *inter alia*, SEPTA's decision to accept a union advertisement welcoming the Democratic National Committee. Pet. App. at 27a–28a. Although SEPTA complains that the Third Circuit "relied on only four examples" of arbitrary application, Pet. 18, the record discloses numerous other instances of arbitrary application. For instance, SEPTA's General Counsel rejected an advertisement calling on art museums to pay a living wage, and another promoting adoption as a response to unplanned pregnancy, because he considered these topics to be matters of public debate. Pet. App. 16a. He also could not explain why he rejected a United States Department of Homeland Security advertisement that referenced human trafficking. *Id.* Meanwhile, SEPTA accepted advertisements promoting the peace movement and warning readers against "Fake News." Pet. App. 16a–17a. There is simply no rational way to reconcile the advertisements SEPTA has accepted and those it has denied under the Challenged Provisions. *See* Statement of the Case I.B, *supra*.

This record provides an alternative ground for affirmance. Even if this Court were to conclude that the revised Challenged Provisions are facially capable of reasoned application, the record demonstrates that SEPTA's application was in fact so arbitrary and inconsistent that its rejection of CIR's proposed advertisement violated the First Amendment as

applied here. *See Lehman*, 418 U.S. at 303 ("[T]he policies *and practices* governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious." (emphasis added)).

C. SEPTA's Advertising Space Is a Designated Public Forum.

The court of appeals' decision can also be affirmed on the alternative ground that SEPTA's content-based restriction on "political" advertisements is impermissible in a designated public forum.

Prior to this litigation, the last two courts to consider whether SEPTA's advertising space was a designated public forum ruled that it was. *See Christ's Bride Ministries v. SEPTA*, 148 F.3d 242, 255 (3d Cir. 1998); *AFDI v. SEPTA*, 92 F. Supp. 3d 314, 326 (E.D. Pa. 2015). CIR argued below that SEPTA's advertising space remains a designated public forum because SEPTA continues to accept the vast majority of proposed advertisements, including advertisements from both commercial and non-commercial entities on a wide range of topics that touch on matters of public debate. Pet. App. 20a–21a; Appellant's Opening Br. 51–58.

SEPTA's claim that it "closed the forum" to advertising such as CIR's is further undermined by the fact that, beginning before this suit commenced and continuing through the time of trial, SEPTA chose to intentionally expose its riders to news headlines on political issues and matters of public debate—the same content that SEPTA purports to prohibit in advertisements—in its digital displays. *See* Pet. App. 52a–53a.

Because SEPTA's advertising space is a designated public forum, SETPA's content-based restriction on "political" speech must survive strict scrutiny. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009). The Challenged Provisions plainly cannot satisfy that "most rigorous and exacting standard of constitutional review." *See Miller v. Johnson*, 515 U.S. 900, 920 (1995).

D. SEPTA's Application of the Challenged Provisions to CIR Was Viewpoint Discriminatory.

Finally, the Third Circuit's decision can also be affirmed on the ground that SEPTA's application of the Challenged Provisions to CIR was viewpoint discriminatory. As noted above, SEPTA has accepted numerous advertisements for home loans and other banking services asserting that the advertiser is an "Equal Opportunity Lender" or "Equal Housing Lender." *See* Pet. App. 88a. These assertions represent that the financial institution "makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status." 12 C.F.R. § 338.3(a) (2021) ("Nondiscriminatory advertising"). As the district court noted, many of these advertisements feature non-white models and appear to target borrowers of color. *See* Pet. App. 89a–90a.

For example, an advertisement from Tompkins VIST Bank shows an image of a Black couple and child in front of a stack of moving boxes. It is captioned "Making your dream of home ownership a reality," and bears the Equal Housing Lender language and logo. Pet. App. 90a. This advertisement is a near-perfect inverse of the panel in CIR's advertisement, which states: "Today in America, people of color are

regularly being denied the dream of home ownership." Yet SEPTA accepted Tompkins VIST Bank's advertisement while rejecting CIR's. This is textbook viewpoint discrimination. *See Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–32 (1995).

In sum, because SEPTA is not even seeking to defend the Challenged Provisions that were applied to CIR, and because there are numerous alternative grounds for affirmance, this case is an exceedingly poor vehicle for resolving any confusion that might exist regarding *Mansky*'s application public transit systems' advertising policies.

IV. The Judgment Below Is Correct.

The court of appeals correctly applied *Mansky* to the facts of this case. As the decision below recognized, the Challenged Provisions are so poorly defined that they are incapable of reasoned application, and they are thus constitutionally deficient.

Restrictions on speech in a nonpublic forum are generally permissible if they are viewpoint neutral and reasonably related to the purposes served by the forum. *Mansky*, 138 S. Ct. at 1886. To be reasonable, a restriction must be capable of reasoned application by enforcement officials. This is a "forgiving test"—after all, "there is no requirement of narrow tailoring in a nonpublic forum"—but "the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888.

Mansky held that a Minnesota statute restricting "political" apparel at polling places violated the First Amendment—even though the polling place was a nonpublic forum, *id.* at 1886; the plaintiff did not claim that the restriction was facially viewpoint discriminatory, *id.*; and the restriction was otherwise reasonably related to Minnesota's interest in preventing partisan discord from contaminating the voting booth, *id.* at 1888. The Court found that the "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," made the provision incapable of reasoned application. *Id.*

In determining that Minnesota's polling apparel statute conferred too much discretion on officials, this Court looked to the text of the statute, additional written guidance, and the government attorneys' answers to hypothetical questions during oral argument about the meaning of the statute. *Id.* at 1889–91. *See also AFDI v. WMATA*, 901 F.3d at 373 (observing that evidence about how a provision has been applied also is relevant to whether the provision is capable of reasoned application under *Mansky*).

All of these factors support the conclusion that SEPTA's restriction on "political" advertisements is similarly incapable of reasoned application. First, like the Minnesota statute at issue in *Mansky*, both the original and revised versions of the Challenged Provisions prohibit advertisements that "contain political messages" and that address "political . . . issues," without any definition of the term "political." As *Mansky* noted, "the word can be expansive," *Mansky*, 138 S. Ct. at 1888, potentially encompassing

speech on any number of subjects. And just as Minnesota did not limit its restriction to the more clearly defined category of electoral campaign apparel, *id.* at 1889, SEPTA expressly does not limit its prohibition to electoral campaign advertisements.

Second, like Minnesota, SEPTA has failed to clarify the "indeterminate scope" of the Challenged Provisions through administrative guidance. *Id.* While Minnesota's "haphazard interpretations" caused confusion among enforcement officials, here SEPTA has issued *no* guidance whatsoever. The fundamental problem with Minnesota's law was that the absence of "objective, workable standards" gave rise to an intolerable risk that "an election judge's own politics may shape his views on what counts as 'political.'" *Id.* at 1891. The same risk presents itself here, as Benedetti's testimony about how he interprets and applies the Challenged Provisions demonstrates. Pet. App. 27a–28a.

Third, SEPTA's responses to the hypothetical scenarios posed by the panel at oral argument, as well as the record of actual applications recited above, further demonstrate that the provisions invite arbitrary or invidious enforcement. *See Mansky*, 138 S. Ct. at 1891 (detailing realistic hypotheticals that "even the State's top lawyers struggle to solve"). "For example, when asked whether an advertisement that depicted three girls of different races holding hands with a message that says, 'This is how racism ends,' would be political, counsel for SEPTA responded 'no, I don't think so.'" Pet. App. 26a (citation omitted). But "[w]hen the Court adjusted the hypothetical to include the same picture with a message that says, "This is what America looks like," counsel for SEPTA

responded by asking, 'Who's putting the ad on?'" Pet. App. 27a (citation omitted). These responses "highlight[] the extent to which [the Challenged Provisions] are susceptible to erratic application." *Id.*

And, as the court of appeals determined, "that risk has become a reality." Pet. App. 28. The record contains numerous perplexing examples of accepted and rejected advertisements, such as an accepted advertisement welcoming members of the Democratic National Committee to the 2016 Democratic National Convention and a rejected advertisement urging readers to consider adoption as a response to unplanned pregnancy. Pet. App. 16a. Even when it comes to advertisements addressing similar issues, such as public health, SEPTA has failed to produce consistent results. It accepted an advertisement encouraging readers to get vaccinated for Measles, Pet. App. 84a, but rejected an advertisement encouraging the use of condoms to prevent the spread of the Zika virus, Pet. App. 60a. The record does not evince any ascertainable rationale for determining what goes in and what stays out under the Challenged Provisions.

Finally, there is no reason to believe that the court of appeals' straightforward application of *Mansky* here makes it impossible for SEPTA, or any public transit system, to have a constitutional advertising policy. Where a public transit system has established that its advertising constitutes a nonpublic forum, it remains free to impose content-based restrictions on speech, so long as those restrictions are reasonable (including being capable of reasoned application) and viewpoint neutral. Indeed, the court of appeals expressly noted that SEPTA

remains "free to revise its Advertising Standards again to cabin the decisionmaker's discretion in applying the ban on 'political' advertisements." Pet. App. 29a n.5. To the extent other transit systems are concerned about the constitutionality of their policies, they also retain the ability to clarify their restrictions in order to bring them into line with what the First Amendment requires.

SEPTA's prediction that any restriction on political advertisements would fail judicial review, Pet. 26, is refuted by *Mansky* itself. There, this Court noted that many states have enacted laws proscribing political displays in polling locations "in more lucid terms" than Minnesota did, such as prohibitions on the display of political apparel specifically relating to a candidate, ballot measure, or political party appearing on the ballot. *Mansky*, 138 S. Ct. at 1891. Such restrictions are strikingly similar to the exclusion of electoral campaign advertisements this Court upheld in *Lehman*.[4]

Mansky and *Lehman* thus complement each other. *Lehman* stands for the proposition that the government may impose viewpoint-neutral restrictions on electoral campaign speech in nonpublic forums; *Mansky* stands for the proposition that the government may not impose ill-defined restrictions on "political" expression that potentially encompass speech on all sorts of topics, subject only to enforcement officials' whims and prejudices about what topics are "political." The court of appeals

[4] CIR does not argue that SEPTA's restriction on campaign material is incapable of reasoned application. *See* Pet. App. 43a n.1.

correctly concluded that the Challenged Provisions' restriction on "political" advertisements violates *Mansky*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John S. Stapleton
LEVAN MUHIC STAPLETON LLC
One Liberty Place
1650 Market Street,
Suite 3600
Philadelphia, PA 19103
(215) 561-1500

Robert A. Wiygul
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square,
27th Floor
Philadelphia, PA 19103

D. Victoria Baranetsky
Alexandra Gutierrez
THE CENTER FOR
INVESTIGATIVE REPORTING
1400 65th Street, Suite 200
Emeryville, CA 94608

Date: July 2, 2021

Brian M. Hauss
Counsel of Record
Ben Wizner
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Witold J. Walczak
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222

Seth F. Kreimer
3501 Sansom Street
Philadelphia, PA 19104