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

REPLY BRIEF FOR PETITIONER

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Until a few years ago, the Third Circuit's conclusion that SEPTA's categorical ban on political ads was unconstitutionally worded would have been unfathomable. After all, this Court upheld an indistinguishable ban on "political advertising" in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 304 (1974). That opinion safeguarded the decisions transit authorities make over their advertising space, clarifying that these are commercial decisions made in a "proprietary capacity." *Id.* at 303-04; *id.* at 306 (Douglas, J., concurring). *Lehman* specifically concluded that transit authorities may develop "policies and practices governing access" to their ad space that categorically exclude "issue oriented advertisements," so long as their decisions are not "arbitrary, capricious, or invidious." *Id.* at 303-04.

For over four decades, *Lehman*'s holding was well-understood and affirmed. As this Court has repeatedly noted, *Lehman* allowed transit authorities to "exclude political advocates and forms of political advocacy," *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018), and to "categorically prohibit[] advertising involving political speech," *AFDI v. King Cnty., Wash.*, 136 S. Ct. 1022, 1023 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari). *See also, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990). Lower courts consistently interpreted *Lehman* the same way, expressly relying on *Lehman* when upholding categorical bans on "political" ads—even against vagueness challenges. *See* Pet. 14-16 (citing cases). Transit authorities across the country shared this understanding and adopted ad policies like SEPTA's that broadly ban "political" ads. *See id.* at 14-15 & n.4.

In light of this unified precedent, the district court correctly held that SEPTA's advertising ban on "political" messages and advocacy falls under *Lehman*'s protection. App.126. The district court also correctly held that CIR's proposed ad—filled with politically charged commentary and images about America's racist mortgage practices, *see, e.g.*, Opp. 18-19—unquestionably qualifies as "political," a point that CIR's general counsel conceded, *see* App.54, and CIR's opposition does not contest now.

Before *Mansky*, no court would have questioned the district court's ruling. But the Third Circuit reversed it, misinterpreting *Mansky* as having overturned or abrogated *Lehman*. Supplanting the business discretion *Lehman* gives transit authorities over advertising displays (indeed, ignoring *Lehman* altogether), the Third Circuit held that SEPTA's application of the policy was unconstitutionally "erratic" under *Mansky* based on just two real ads and two borderline hypotheticals posed at oral argument. App.26-28. But *Mansky* neither permits nor requires this result. Instead, *Mansky* expressly affirmed *Lehman* and struck down an internally incoherent ban on "political" apparel enforced at Minnesota polling places that led to problematic applications far beyond "close calls on borderline or fanciful cases." 138 S. Ct. at 1889-91.

The Third Circuit's interpretation and application of *Mansky*—its only basis for rejecting SEPTA's ad policy—not only got the law wrong, it usurped this Court's "prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This error has now been repeated in the Sixth Circuit, as well as in dicta in the Ninth and D.C. Circuits. *See* Pet. 21-23. And without this Court's timely intervention, it will have widespread

impact on transit authorities across the country and the speech they allow in their transit vehicles.

In sum, this case presents an important issue squarely teed up for this Court's review. Nothing that CIR says in its opposition presents a credible argument to the contrary.

I. THE DECISION BELOW WRONGLY OVERTURNED *LEHMAN* AND ITS PROGENY—AN ERROR THAT ONLY THIS COURT CAN CORRECT.

When the Third Circuit held that SEPTA's categorical ban on political advertising violated *Mansky*'s "incapable of reasoned application" standard, the panel ignored and contradicted *Lehman*'s clear and time-honored holding authorizing transit authorities to enforce such policies. It also implicitly misunderstood *Mansky* as abrogating *Lehman*, when in fact *Mansky* affirmed it. 138 S. Ct. at 1886.

The only way that CIR can defend the Third Circuit's analysis against these errors is by artificially narrowing *Lehman*'s holding. So CIR argues that *Lehman* merely decided whether election campaign ads—not all political ads—could be banned. Opp. 30. But that interpretation makes no sense.

After all, *Lehman* upheld the facial constitutionality of a policy that banned all "political advertising" without defining what "political" meant. 418 U.S. at 299. Its analysis barely referenced campaign ads—or, indeed, any specific type of political speech. Instead, the Court's discussion was (appropriately) expansive, affirming transit authorities' broad discretion to protect their "proprietary" interests when deciding what ads should be displayed. *See id.* at 302-04. That discretion, the Court concluded, entailed the authority to protect

passengers from "issue-oriented advertisements" or the "blare of political propaganda"—not simply "short-term candidacy" ads. *Id.* at 304. CIR's reading is irreconcilable with this analysis.

CIR's reading also contradicts four decades of this Court's and lower courts' interpretation of *Lehman*. *See* Pet. 13-16. CIR "responds" to this history by avoiding it. For example, CIR notes the absence of a circuit split without mentioning the pre-*Mansky* case law (including this Court's precedent) contradicting the recent circuit-court holdings. Indeed, CIR fails even to mention that the Sixth Circuit's opinion in *AFDI v. SMART*, 978 F.3d 481 (6th Cir. 2020) ("*SMART II*") explicitly acknowledged the conflict between *Lehman* and the plaintiff's interpretation of *Mansky*, and literally reversed its prior reliance on *Lehman* in the same case, *AFDI v. SMART*, 698 F.3d 885 (6th Cir. 2012) ("*SMART I*"). *Compare SMART I*, 698 F.3d at 893 (*Lehman* authorizes "broadly written policies" because it "demands that fine lines be drawn."); *with SMART II*, 978 F.3d at 497 (noting "this logic conflicts with *Mansky*").

Notably, CIR concedes that "before *Mansky* was decided, courts upheld some public transit systems' open-ended bans on 'political' advertising under a more lenient standard than *Mansky* allows." Opp. 29. CIR then adds that "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.'" *Id.*

But this is exactly the point. The pre-*Mansky* case law upheld "open-ended bans" *by explicitly relying on Lehman.* Now, *Lehman* has been rejected because two circuit courts have erroneously decided *Mansky* abrogated it. Only this Court can decide to abrogate its

precedents, and only this Court can correct the circuit courts' erroneous conclusion that it did so in *Mansky*. That is why this Court must hear this appeal.

II. THE ISSUE IS WELL FRAMED TO RESOLVE THIS EXCEPTIONALLY IMPORTANT QUESTION.

This is the case to decide whether *Mansky* overruled or abrogated *Lehman,* four-decades of precedent, and the established expectation of transit authorities across the country.

The issue is teed up perfectly. CIR proposed an advertisement that plainly contained a political message and advocated a position on a political issue. SEPTA rejected the ad for violating its sub-provisions prohibiting political messages and advocacy. App.11. The district court ruled that SEPTA's prohibitions on "political messages" and advocacy on "political . . . issues" were "facially valid, reasonable, and constitutional," correctly relying on *Lehman* and the discretion it afforded transit authorities throughout its opinion. *See, e.g.*, App.115-16, 122-23. The Third Circuit then reversed, holding that SEPTA's ban on "political" messages and advocacy was facially "incapable of reasoned application" under *Mansky*. In reaching this decision, the Third Circuit contradicted—indeed, ignored—*Lehman*, concluding that SEPTA's policy was unconstitutional because it lacked written guidelines and because the panel disagreed with SEPTA's decision on just two advertisements and SEPTA's response to two hypotheticals posed at oral argument. App.26-28.

In short, the analyses and holdings of the courts below squarely raise (in particularly stark terms) the question presented for this Court's review. CIR throws out a number of thinly developed arguments designed

to undermine the Court's confidence in this case as a proper vehicle. None offers a serious challenge.

A. SEPTA's Decision Not to Cross-Appeal the District Court's Order Only Focuses the Issue Before This Court.

CIR first tries to muddy the waters by challenging SEPTA's decision not to cross-appeal the district court's order. But, if anything, SEPTA's decision only narrowed the issues before the Third Circuit and, accordingly, now before this Court. For example, because SEPTA did not appeal the district court's decision to strike the terms "political in nature" and "matters of public debate," neither party is asking this Court to analyze the facial validity of those terms.

CIR's contention that the district court "rewrote" SEPTA's policy is a red herring. The district court did not create a new policy out of whole cloth, one that application to ads like CIR's is utterly mysterious. To the contrary, it merely struck two phrases and a clause, and—importantly—left in place the provisions that matter here: the ban on "political messages" and advocacy on "political . . . issues." App.108-09, 122-23. Although, as CIR notes, SEPTA cited the two subprovisions in its policy concerning political ads *en toto* when initially rejecting CIR's ad, Opp. 20, the district court's strikes in no way changed the policy's application here. CIR's ad still expressed a political message, and CIR does not argue to the contrary (because it conceded that point long ago, App.54, and it would be absurd to do so regardless). The district court properly found that SEPTA reasonably "rejected CIR's ad because it was related to an impermissible topic" even after it removed a few phrases. *See* App.132. And, notably, the Third Circuit had no difficulty in reviewing the

provisions "as revised," reversing the district court. *See* App.20. The Court can now review these provisions if it wishes.

B. CIR's Review of SEPTA's Procedures and Ad Choices Rests on Misleading Representations and Should Not Distract This Court From the Legal Question at Issue in This Case.

CIR argues that, even if this Court held that SEPTA's policy is facially constitutional, SEPTA arbitrarily applied its policy under *Lehman* here, providing an "independent" factual basis to affirm. Opp. 34. But the panel's entire analysis hinged on the facial validity of the policy under *Mansky*. *See* App.20 ("we need only address whether [SEPTA's political ad restrictions] are capable of reasoned application"). Thus, if this Court rules that SEPTA's ad policy is facially constitutional, it will have resolved the critical legal issue presented by this appeal, and will have reversed the sole holding of the Third Circuit's opinion.

Moreover, CIR did not even raise below this as-applied challenge under *Lehman*, where its only as-applied challenge was viewpoint discrimination. App.20. Nor does CIR seriously raise the argument now. Instead, CIR simply highlights SEPTA's ad-review process and decisions in a manner that mirrors *Mansky*'s analysis. Really, then, this argument does not so much attempt to provide an alternative basis for affirmance as to support—and supplement—the Third Circuit's reasoning. That is a merits argument not relevant to this petition.

In any event, CIR's argument that SEPTA acted arbitrarily, capriciously, or invidiously under *Lehman* fails on its own terms. CIR points to several passages of testimony that CIR contends show that SEPTA "struggled to articulate" the meaning of the term "political in nature" and how SEPTA determined whether something was a "matter of public debate." Opp. 1-2, 34. But this testimony all involves language that the district court struck and therefore is no longer at issue in this appeal. Accordingly, any alleged "confusion" regarding these terms is moot.

The Court also should reject CIR's disparaging description of SEPTA's general counsel's review process, which involved careful review and research into the ad itself, the law, and SEPTA's prior decisions; careful reflection; and conversations with other in-house and outside counsel, as well as the advertiser itself. *See* App.82-83. This is hardly a "haphazard" process. *See* Opp. 34. And CIR's label contradicts the district court, which heard SEPTA's general counsel testify at trial, was "impressed" with his efforts, and made a factual finding that SEPTA's general counsel "[took] his corporate responsibilities, as the decision maker on advertisements on behalf of SEPTA, very seriously." App.88.

CIR's discussion of cherry-picked decisions on actual ads is similarly misleading. That CIR points to fewer than 15, Opp. 13-14, out of more than 2,700 ads SEPTA considered, App.102, itself undermines its argument that SEPTA's policy led to arbitrary decisions in a significant number of cases. Even within CIR's list, however, many of the identified ads are irrelevant to the issue here, either because they involved government speech to which the First Amendment does not apply, App.84-85 (listing ads by "govern-

mental entities promoting governmental programs and policy," including CDC ads), or because they were rejected on grounds other than SEPTA's ban on "political" ads, App.61 n.11. And of the very small number of relevant decisions CIR identifies, several were obviously correct, *e.g.*, SEPTA's decisions to accept commercial bank ads and to reject an ad protesting a museum's alleged failure to pay employees a "living wage." It is perhaps no surprise, then, that the Third Circuit's opinion turned on disagreements about only two real ads.

To be sure, CIR highlights a couple of ads that arguably raise close question under SEPTA's ban on "political" messages and advocacy. For example, both CIR and the Third Circuit highlight an ad that SEPTA accepted from a television channel, which contained several images of people, including a child wearing a shirt that says "my life matters." Opp. 12. SEPTA carefully reviewed this ad, determining that its message was commercial and that the ad as a whole did not advocate a position on a political issue. App.55, 63 n.15. CIR also points to SEPTA's response at oral argument concerning a hypothetical ad showing children of different races with the text "this is how racism ends." Opp. 25. SEPTA's counsel suggested that SEPTA would not necessarily regard this hypothetical ad as containing a "political" message or advocacy. *Id.* Reasonable minds may disagree over the proper interpretation of these ads, but CIR has not shown that SEPTA's considerations were *arbitrary*, *capricious, or invidious*. Indeed, the discretion that *Lehman* affords transit authorities (which *Mansky* upheld) applies with particular force in such contexts. If discretion means anything, it grants authority to make calls in close cases. Such decisions cannot be deemed arbitrary. *Cf. Kokinda*, 497 U.S. at 730 ("The Government's decision

to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." (internal quotation omitted)).

Rules of reason anticipate occasional gray areas. The district court observed that although CIR had "shown a number of arguably inconsistent decisions," the validity of which "[r]easonable individuals" might "disagree on," such "arguable inconsistencies from time to time do not warrant a finding that SEPTA is unreasonable." App.88. This is exactly what *Lehman* held. The Third Circuit's failure to grasp this point highlights why its application of *Mansky* is problematic and requires this Court's intervention.

C. The Third Circuit's Decision Not to Address Unrelated Arguments CIR Raised Should Not Preclude This Court's Review of the Question That the Third Circuit Did Address.

CIR also tries to weaken this Court's confidence in the case by briefly rearguing points that the district court rejected and the Third Circuit ignored: namely, that SEPTA's advertising space is a designated public forum and that SEPTA engaged in viewpoint discrimination against CIR. In effect, CIR argues that this Court should ignore the Third Circuit's actual holding and overturn the district court on legal theories that the Third Circuit did not consider. This Court should decline to make merits determinations on issues not considered below based solely on a few paragraphs in an opposition to a petition for certiorari. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 201 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below." (internal quotation omitted)).

In any event, neither of these arguments is persuasive. Finding that SEPTA engaged in viewpoint discrimination requires the Court to agree with CIR's position equating its own ad—rife with political images and partisan rhetoric—with a commercial bank ad noting in logotype it is an "Equal Opportunity Lender" in compliance with federal regulations. Describing these ads side-by-side only highlights their contrast. CIR simply cannot plausibly argue it was arbitrary or unreasonable for SEPTA to conclude that the commercial bank ads did not advocate a political message or issue but CIR's political cartoon did.

There is, similarly, no serious question that SEPTA has created a nonpublic forum for advertising space inside its vehicles. SEPTA did so by adopting policies drafted in response to court decisions in *Christ's Bride Ministries*, *Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1998), and *AFDI v. SEPTA*, 92 F. Supp. 3d 314 (E.D. Pa. 2015). Pet. 4. Its policy not only banned "political" ads, but declared SEPTA's intention to create a nonpublic forum, *see* App.101. The district court properly explained that the temporary appearance of news headlines in some of SEPTA's vehicles did not open the forum, and, even if it had, the issue is moot because SEPTA discontinued those headlines to ensure the forum is closed. App.79, 104. The record amply reflects that SEPTA adopted and enforced policies with the intention of closing and controlling the forum. App.100-104. Nothing more is required. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

In short, neither of CIR's merits arguments regarding the forum or viewpoint discrimination is persuasive, and the district court rightly rejected both. App.104, 136-140. More importantly, neither provides an

appropriate basis for refusing to review the important legal question now before the Court—the only question the Third Circuit resolved.

CONCLUSION

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

Respectfully submitted,

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