

**No. 19-1170**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**THE CENTER FOR INVESTIGATIVE REPORTING,**

*Appellant,*

**v.**

**SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,**

*Appellee.*

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**On Appeal from the United States District Court for the  
Eastern District of Pennsylvania,  
No. 18-cv-1839, Hon. Michael M. Baylson**

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BRIEF OF *AMICUS CURIAE*  
HOUSING EQUALITY CENTER OF PENNSYLVANIA  
IN SUPPORT OF APPELLANT AND URGING REVERSAL

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### **Corporate Disclosure Statement**

The Housing Equality Center of Pennsylvania is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity stock.

/s/ James Davy

James Davy

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## **TABLE OF AUTHORITIES**

This brief cites solely to the appendix of this case, and includes this Table of Authorities page to comply with Local Rule 28.3.

**STATEMENT OF INTEREST OF *AMICUS CURIAE***

The Housing Equality Center of Pennsylvania (“HECP”) submits this brief in support of Plaintiff-Appellant The Center for Investigative Reporting (“CIR”).

Amicus HECP is a non-profit organization that fights housing discrimination in Philadelphia and surrounding suburban counties, including Bucks, Chester, Delaware, Lehigh, Montgomery, and Northampton. HECP pursues this mission in a variety of ways. Notably, a significant portion of HECP’s work involves educating the public about housing consumers’ rights under fair housing laws. This includes not only training for housing professionals, other nonprofit advocates, and government entities, but also substantial community education efforts for prospective tenants and home buyers who might face illegal discrimination.

HECP has a strong interest in this case because, as outlined in this brief, it has previously attempted to use SEPTA advertisements to reach its target populations with the simple message that housing discrimination is illegal, only to have SEPTA reject such ads because of the advertising rules previously invalidated in the District Court, and now before this Court. A ruling affirming the still-vague re-written regulations, and endorsing future application by SEPTA, will affirm ongoing impairment of HECP’s ability to place advertisements with noncontroversial, non-partisan statements of current law, including in the places most likely to be seen by its target audience. Such a ruling would increase the likelihood of housing

discrimination in the aggregate, by ensuring that ignorance of fair housing law goes uncorrected in both prospective renters and buyers, and in prospective landlords and sellers.

*Amicus Curiae* submits this brief Pursuant to Fed. Rule App. Proc. 29(a) and L.A.R. 29.0, and does not repeat arguments made by the parties. Neither party's counsel authored this brief, or any part of it. Neither party's counsel contributed money to fund any part of the preparation or filing of this brief. For that matter, no person at all contributed money to fund the preparation or submission of this brief. HECP files this brief with the consent of the Parties.

In this brief, *Amicus Curiae* HECP describes its own recent history of attempting, unsuccessfully, to place advertisements on SEPTA transit conveyances. In particular, HECP explains repeated rejections of prospective advertisements about fair housing that contain nothing more than brief, straightforward statements about current law. HECP contrasts these rejections specifically with similar advertisements including statements affirming individual rights against discrimination under the Fair Housing Act, which SEPTA nevertheless accepted. By doing so, *Amicus* HECP hopes to assist the Court in considering the serious constitutional problems posed even by the updated policy language, and the practical difficulties and inequities in SEPTA's application of vague language to potential advertisements touching on issues of public importance.

## SUMMARY OF ARGUMENT

In the matter before this Court, the Center for Investigative Reporting seeks vindication of its First Amendment rights to advertise on issues of public importance on public property.<sup>1</sup> The Center assuredly has the right to advertise in this manner, but they are not the only potential advertisers whose First Amendment rights even the updated policy language burdens. Because of the vague language that still defies easy application, nonprofit advocacy groups such as HECP will suffer similar obstruction to their constitutional rights.

Over the course of the last three years, *Amicus* HECP has made several unsuccessful attempts to place advertisements on SEPTA transit conveyances. These attempts included cordial communications with SEPTA's advertising agency, Intersection, and got to the stage of the process at which Intersection created proofs of potential advertisements. The sole reason those advertisements never actually ran was that SEPTA itself deemed those advertisements to run afoul of the then-operative policy language prohibiting "political" advertisements and advertisements expressing "an opinion, position, or viewpoint on matters of public debate." *See* A635 (subsections (a) and (b)). SEPTA's determination contrasted sharply with

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<sup>1</sup> To the extent that the District Court ruled that SEPTA's advertising spaces are a nonpublic forum, *Amicus* HECP disagrees, and supports Appellants' arguments about the standard that should be applied in this case. HECP, however, does not believe that the outcome of this appeal should turn on how the forum is characterized.

other advertisements with similar affirmances about the Fair Housing Act and the rights it protects, which SEPTA approved and ran. That contrast reflects the difficulty in applying the language of the updated policy.

Although Intersection offered *Amicus* HECP alternative placement for its advertisements on bus shelters in Center City Philadelphia not owned by SEPTA, the unsuitability of the alternative highlights the vital role that SEPTA advertising plays for nonprofit agencies like HECP, and corresponding stakes of this case. HECP sought advertisement opportunities with SEPTA because of the particular combination of the geographic coverage of SEPTA's transit area, and the population that uses SEPTA services and would therefore see advertisements placed on them. SEPTA's coverage area includes several inner-ring suburban counties of Philadelphia which had seen higher rates of housing discrimination, and where HECP had received grant funding from the United States Department of Housing and Urban Development, and funding from legal settlements, to educate potential renters and buyers about their rights. Moreover, the types of housing consumers most at risk of illegal discrimination use public transportation such as SEPTA at higher rates, making placement of advertisements on SEPTA conveyances particularly well-targeted to reach the desired audience.

For these reasons, *Amicus* HECP urges the Court to consider the impermissible burdens on protected First Amendment speech imposed even by the



updated policy language, reverse the District Court, and remand with instructions to enter judgment in favor of Plaintiff-Appellant CIR.

## ARGUMENT

### **I. SEPTA’s rejection of HECP’s uncontroversial advertisements, despite allowing other similar advertisements, reflects the difficulty in applying even the updated policy language.**

SEPTA has repeatedly rejected *Amicus* HECP’s proposed advertisements, based on its application of the policy purporting to ban advertisements containing political speech or speech on “matters of public debate.” *See* A635. These rejections have come despite HECP’s repeated attempts to place advertisements through SEPTA’s advertising agency, Intersection. Moreover, the rejections stand in stark contrast to SEPTA’s acceptance of advertisements with substantially similar messages from banks, lending agencies, and government agencies—including several that concern substantially similar subject matter.

#### **a. SEPTA rejects HECP’s advertisements in 2016.**

During 2016, HECP sought to place advertisements on SEPTA transit conveyances. SEPTA transit conveyances cover the particular areas in which HECP sought to advertise, including suburban Philadelphia counties outside of Philadelphia, and those areas do not have substantially similar advertising opportunities. *See* section II, *infra*. HECP initially reached out to Intersection, SEPTA’s ad agency, for price quotes, which it received on December 1, 2015, and February 2, 2016. Over the course of February, HECP worked with Intersection on producing proofs for advertisements as they would run. Intersection produced such

proofs on March 3, 2016. At this point, HECP and Intersection had collaborated cordially, and HECP believed that the advertisements would run on SEPTA conveyances.

The proposed advertisement—a proof of which is included below—read, in its entirety: “HOUSING DISCRIMINATION IS ILLEGAL. Housing Equality Center can help you understand your rights. The Fair Housing Act is a federal law that protects people from housing discrimination on the basis of: race, color, sex, religion, national origin, disability, familial status.” It also provided contact information for the Housing Equality Center, and, in fine print, noted that the advertisement had been funded through a grant from the U.S. Department of Housing and Urban Development.<sup>2</sup> *See* A843-47.

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<sup>2</sup> The Department of Housing and Urban Development funded the advertisements because of pervasive housing discrimination that had occurred in Montgomery County.



**HOUSING DISCRIMINATION IS ILLEGAL.**  
Housing Equality Center can help you understand your rights.

The Fair Housing Act is a federal law that protects people from housing discrimination on the basis of:

- Race
- Color
- Sex
- Religion
- National Origin
- Disability
- Familial Status\*

\*Familial status means the presence of children under 18 in a household, pregnant women or anyone in the process of adopting or securing legal custody of a child.

**REPORT DISCRIMINATION: (267) 419-8918 or [equalhousing.org](http://equalhousing.org)**

  This work was funded through a grant from the U.S. Department of Housing and Urban Development's Fair Housing Initiatives Program. 

Proofs for additional advertisements—one of which is also included below—that could have run as part of the same campaign included substantially similar text, such as one that would have led with the sentence: “Your ability to pay for housing is what counts. Not your race.” (Other versions of that advertisement swapped the word “race” for other bases on which landlords may not discriminate.) *See* A843-47.

YOUR ABILITY  
TO PAY FOR  
HOUSING  
IS WHAT  
COUNTS,  
**NOT YOUR  
RACE.**



It's illegal to deny a person housing based on their race.

Housing Equality Center can help you understand your rights.



This work was funded through a grant from the U.S. Department of Housing and Urban Development's Fair Housing Initiatives Program.

**REPORT DISCRIMINATION: (267) 419-8918 or [equalhousing.org](http://equalhousing.org)**



On March 23, 2016, Intersection informed HECP that SEPTA had rejected its advertisements under the then-operative policy against “political” advertisements and advertisements on “matters of public debate.” Although Intersection offered HECP alternative placement options outside of its SEPTA portfolio, those alternatives required HECP to revise its budget and the scope of its agreement with the Department of Housing and Urban Development in order to fulfill the terms of its grant. The Department’s grant monitor had to approve those changes, in a slow,

administratively-onerous process. HECP dealt with substantial burdens to advertise in less well-targeted places, given its purposes.

**b. SEPTA rejects HECP's advertisements in 2018.**

During 2018, HECP negotiated settlements in two housing discrimination cases that included funding for public education campaigns about illegal housing discrimination in Bucks and Delaware counties outside of Philadelphia. The settlement funding linked specifically to Bucks and Delaware Counties to counteract discriminatory conduct of housing providers there, stemming from the specific discrimination cases in those jurisdictions. As before, with particular advertising needs and geographically-limited funds, HECP hoped that SEPTA's application of the policy language might accommodate their advertisements.

As before, Intersection informed HECP that because of "the current state of the ad policy," they could not accommodate HECP's advertising requests. This, again, was because of SEPTA's internal application of the operative policy language. The rejected advertisements were substantially similar to the advertisements rejected in 2016.

**c. SEPTA contemporaneously accepted other advertisements with substantially similar language and messages.**

SEPTA's rejection of HECP's advertisements owed, apparently, to its determination that ads which straightforwardly state current anti-discrimination law run afoul of the regulations at issue in this case. SEPTA appears to believe that such

statements of law are “political” and amount to “an opinion, position, or viewpoint on matters of public debate about economic, political, religious, historical, or social issues.” While HECP disagrees with this assessment for a variety of substantive reasons—including that describing the right of potential renters and home buyers not to suffer discrimination on the basis of race, color, national origin, religion, or familial status is not “expressing or advocating an opinion, position, or viewpoint”—contemporaneous advertisements that the agency accepted demonstrate that SEPTA applying the policy language as written creates inequitable and unpredictable results.

SEPTA contemporaneously accepted advertisements that bore substantial similarities to HECP’s rejected advertisements in a variety of ways. First, SEPTA accepted advertisements advising individuals of their rights under existing law. Such qualifying advertisements included an advertisement in a similar geographic area, Montgomery County, advising breastfeeding mothers about their rights in the workplace; an advertisement from the Philadelphia Department of Labor advising workers about their rights to be properly classified as workers versus contractors; and an advertisement advising renters about their rights not to live in spaces with lead paint. *See* A801, A799, A793.

Second, and more importantly, SEPTA also accepted a number of advertisements touching on the issue of discrimination in housing, specifically. SEPTA ran advertisements from a series of banks seeking customers for their home

mortgage lending businesses, many of which noted specifically that they were a “Fair Housing Lender.” (These included advertisements from the First Bank of New Jersey, Tompkins VIST Bank, DNB First Bank, and Wells Fargo. *See* A775; A781; A776; A782.) SEPTA also accepted advertisements from the Pennsylvania Housing Finance Agency (“PHFA”) promoting homeownership, without any mention of individual rights against discrimination at all. *See* A987.

These decisions reflect the difficulty of applying the vague policy language concerning viewpoints touching on matters of public debate, regardless of whether the policy language in question is the former policy or the re-written policy language from the District Court. They also reveal the murky constitutional swamp that SEPTA wades into by determining what advertisements express a viewpoint on an issue of public debate at all. Leaving aside whether a statement of current law is an “opinion, position, or viewpoint,” SEPTA’s advertisement choices suggest that it regards only individual rights against discrimination to be a matter of public debate—not the role of mortgage lending in the American economy, not historical questions about inequitable practices in mortgage lending, nor, either, the implications of PHFA advertising *without* noting that it does not discriminate against members of protected classes. Put simply: deciding which advertisements concern a matter of public debate invites SEPTA to engage in viewpoint discrimination, and



implicitly weigh in on those issues by deciding which issues are amenable to public debate in the first place.

**II. The burden imposed by even the updated policy language is great, because of the nature of SEPTA advertisements and the needs of HECP and similarly-situated non-profit organizations.**

SEPTA's application of the policy language to the advertisements of *Amicus* HECP not only deprives HECP of a constitutional right, but impairs HECP's ability to reach its intended audience, because of the unique usefulness of SEPTA advertising for HECP's purposes. HECP sought advertisements on SEPTA because of both the geographical coverage of the SEPTA transit area, and because of the overlap between SEPTA's customer base and people most at risk of discrimination in housing. SEPTA's combination of the two—as it touts to potential advertisers—defies easy substitution, and that lack of ready alternative highlights the burden on those potential advertisers which SEPTA rejects.

**a. HECP sought out SEPTA advertisements for geographical reasons.**

HECP pursues public education campaigns in areas most in need of public education, and as part of projects for which it has funding. Typically, these criteria align. For example, as occurred here, areas that suffer greater rates of discrimination in violation of the Fair Housing Act may be sued, and as part of a settlement, have to fund a public education campaign about anti-discrimination law. Or, as also happened here, the U.S. Department of Housing and Urban Development may grant

funds to a group such as HECP to run a public education campaign in areas with higher rates of discrimination in the provision of housing. In such situations, HECP does not have discretion over where it runs the advertisements—they must be run in the areas to which grant funding or settlement funding is tied.

Accordingly, HECP pursued public education campaigns in Montgomery County, Bucks County, Delaware County, and other counties comprising the suburbs of Philadelphia. Those counties also comprise the majority of SEPTA's service area—Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties, in addition to some New Jersey suburbs of Philadelphia. Indeed, SEPTA's geographical footprint makes it a potentially perfect advertising partner for HECP's public education campaign needs, as it also tracks the commutes that HECP's target audience make for work, or short-distance travel they undertake for personal engagements.

**b. HECP sought out SEPTA advertisements for economic reasons.**

HECP also pursued advertising opportunities on SEPTA conveyances because of other demographic factors at play. As noted, HECP runs public advertising campaigns funded by grants or settlements that follow specific instances of housing discrimination. Housing discrimination occurs when landlords or home sellers or lenders discriminate against prospective renters or buyers on the basis of one or more of the enumerated classes protected by the Fair Housing Act—including

race, color, gender, religion, national origin, disability, or familial status. Accordingly, HECP's public education campaigns ideally reach the populations most at risk of discrimination on those bases.

SEPTA advertising, generally, offers HECP an opportunity to reach its target populations where they live. HECP's target audience comprises a significant share of SEPTA ridership. Because of historical factors not the subject of this brief, those target populations are more likely to have less wealth and lower incomes. And populations with less wealth and lower incomes are more likely to use public transit—like SEPTA—than more expensive options like rideshares, taxis, or personal cars. Accordingly, advertising on SEPTA presents HECP an opportunity to reach a ridership comprised disproportionately of the people who are most likely to face discrimination.

Moreover, the combination of geographical and demographic factors makes SEPTA advertising ideal for HECP, in a manner that is difficult to replicate. As noted, SEPTA's ad agency, Intersection, offered HECP other options from its non-SEPTA portfolio, including bus shelters in Center City Philadelphia. Such alternative options required renegotiation of a grant agreement and other changes for HECP to fulfill the terms of its funding, because the bus shelter advertisements did not reach the same population. And other alternatives in those jurisdictions would be less well-targeted at the populations most at risk of illegal housing discrimination.

Barring HECP from advertising to SEPTA's unique combination of geographic coverage and ridership impairs HECP's ability reach its target audience, beyond the initial indignity of having its speech restricted under SEPTA's confusing application of its advertising policy.

## CONCLUSION

For the foregoing reasons, in addition to reasons set for by Plaintiff-Appellants, *Amicus Curiae* HECP urges this Court to reverse the ruling of the District Court as to the updated policy language, and remand for entry of judgment in favor of The Center for Investigative Reporting.

Respectfully submitted,

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**CERTIFICATION OF BAR MEMBERSHIP**

I, Jim Davy, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit Court of Appeal.

Dated: May 14, 2019

/s/ James Davy

James Davy, Esq.

### CERTIFICATE OF COMPLIANCE

I, Jim Davy, hereby certify as follows:

(1) the Brief for Amicus Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman font;

(2) the Brief for Amicus Curiae complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,859 words, excluding those parts of the brief excluded by Fed. R. App. P.32(f), as calculated using the word count function on Microsoft Word software;

(3) the text of the electronic and hard copies of the Brief for Amicus Curiae is identical; and

(4) the electronic copy of the Brief for Amicus Curiae was scanned for electronic viruses on May 14, 2019, before transmission to this Court, and no viruses were detected.

Dated: May 14, 2019

/s/ James Davy

James Davy, Esq.

**CERTIFICATE OF SERVICE**

I, Jim Davy, certify that on May 14, 2019, I caused a copy of this Brief for Amicus Curiae to be filed with the Clerk of Court and served on all counsel of record using the *CM/ECF* system.

I also certify that within the time limits specified, I will have caused seven (7) hard copies of the instant brief to be hand-delivered to the Clerk of the Third Circuit Court of Appeals, in accordance with the Rules.

Dated: May 14, 2019

/s/ James Davy

James Davy, Esq.