UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CENTER FOR INVESTIGATIVE REPORTING, Plaintiff, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	CIVIL ACTION NO. 18-cv-01839-MMB

CIR'S REPLY TO SEPTA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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In light of the extensive briefing already before the Court, this Reply responds to only certain of SEPTA's most egregious arguments and omissions in its Findings of Fact and Conclusions of Law ("SEPTA's FOF/COL"). The single most important takeaway from all of SEPTA's testimony and briefing is this: the record is devoid of any constitutionally sufficient explanation of what is allowed and what is disallowed under the Challenged Provisions. SEPTA's obfuscations and misrepresentations of the facts and law cannot change that.

Despite numerous opportunities to attempt to justify its restrictions on speech under both strict scrutiny and the standards applicable to a nonpublic forum, SEPTA has utterly failed its burden. No amount of additional argument can change that. The Court should now strike the Challenged Provisions because they violate the First Amendment.[1]

I. SEPTA Cannot Articulate What Is Covered by the Challenged Provisions.

After hundreds of pages of testimony and extensive pre-trial and post-trial briefing, SEPTA still cannot articulate what speech is allowed or disallowed under the Challenged Provisions with any clarity or objectivity. SEPTA's inability to explain its standards in clear, workable, and objective terms goes far beyond not being able to describe how they apply to marginal cases; SEPTA cannot describe even the very core of what is allowed and disallowed under the Challenged Provisions. SEPTA's repeated failures underscores the Challenged Provisions' vagueness and lack of reasoned application. The Challenged Provisions'

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[1] Images, including comic strips, are protected "speech" within the meaning of the First Amendment. SEPTA has no more discretion to censor graphics, such as the illustrations in comic strips, than it does to censor text. *See* Letter from J. Baylson to Counsel, Oct. 17, 2018 (Question #1). The First Amendment's protection for "speech" is not limited to words. *See*, *e.g.*, *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (noting that the First Amendment's protection applies to pictures, films, paintings, drawings, engravings, oral utterances, and printed words). Most of the ads in the record in this case contain images or graphics as well as text. *See* Exs. 31–39, 41–52, 54–66, 71–79, 88–96.

prohibitions against "political" issues and "public debate" are indistinguishable from the "political" and "issue-oriented" restrictions found unconstitutional in *Mansky*—which is controlling in this case. *See* CIR's FOF/COL at 29–33. Just like the restrictions struck down in *Mansky*, the Challenged Provisions are unmoored, undefined, and vest unbridled discretion in SEPTA. For that reason, they are facially unconstitutional.

A. It Was Not Unfair to Ask SEPTA's Designee and Final Decision-Maker How the Challenged Provisions Are to be Applied in Practice.

SEPTA contends that it was unfair to ask SEPTA's Rule 30(b)(6) designee and final decision-maker questions under oath and in the supposed "hot seat" about why various actual and hypothetical advertisements would be allowed or disallowed under the Challenged Provisions.[2] But the Constitution requires SEPTA's restrictions to be objective and capable of reasoned application. If Mr. Benedetti—SEPTA's chosen Rule 30(b)(6) designee and the final decision-maker with respect to the Advertising Standards—cannot make objective and reasoned determinations about whether particular advertisements are or are not prohibited by the Challenged Provisions, then the Challenged Provisions are not "workable." *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) ("the discretion election judges exercise in enforcing the ban must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'").

The questions posed to Mr. Benedetti by CIR's counsel and the Court regarding hypothetical advertisements were not unfair. They tested whether the Challenged Provisions can

[2] SEPTA's FOF/COL at 15–17 (Response to CIR FOF ¶ 14); *id.* at 33 (Response to CIR FOF ¶ 29, stating "SEPTA's reluctance to take a position on hypothetical advertisements while on the hot seat of questioning under oath in this proceeding has little if any bearing on the reasonableness of its policies and practices.").

be applied in an objective and consistent manner. In fact, the questions posed to Mr. Benedetti essentially tracked the framework of questions posed by the Supreme Court to Minnesota's counsel in *Mansky*.[3] Minnesota's inability to formulate cogent and consistent responses demonstrated the unworkability of the *Mansky* restrictions. Likewise, Mr. Benedetti's inability to answer similar questions underscores that the Challenged Provisions are so vague and unworkable that they cannot be applied in a reasoned matter.

Importantly, Mr. Benedetti was not subjected to mere "borderline" or "fanciful" questions. *See Mansky*, 138 S. Ct. at 1891 ("the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases."). He was asked numerous questions about both actual and hypothetical advertisements. He did not equivocate on just one or two marginal cases. He almost uniformly answered that he could not apply the text of the Challenged Provisions to the advertisement presented to him without additional research and consultation with counsel. *E.g.*, Ex. 111 (Benedetti Dep.) 177:4–178:11.

Nor have SEPTA's views been consistent over time. For example, SEPTA allowed several advertisements regarding the Democratic National Convention. Exs. 31, 32. In July, at his deposition, SEPTA's designee admitted that some of the DNC-related advertisements might violate the Challenged Provisions.[4] Ex. 111 (Benedetti Dep.) 176:7–177:18. Then, in August, in

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[3] For example, at oral argument in *Mansky*, the Supreme Court asked counsel for Minnesota to explain what qualifies as an "issue," how the state determines whether someone's views are sufficiently "well known," and whether the law would prohibit apparel stating "Support Our Troops," "#MeToo," "All Lives Matter," "National Rifle Association," the text of the Second Amendment, or the text of the First Amendment, or depicting a rainbow flag. *Mansky*, 138 S. Ct. at 1889–91. *Compare id. with* CIR's FOF/COL at 12 (FOF ¶ 46).

[4] SEPTA's argument that the other DNC-related advertisements merely "involve" politics and therefore do not violate section (a) is nonsensical. SEPTA's FOF/COL at 14 (Response to CIR ¶ 10). To violate subsection (a)—at least according to the text of the standard—an advertisement merely must be "political in nature." SEPTA has defined "political in nature"

pretrial briefing to this Court, SEPTA argued categorically that the DNC-related advertisements were compliant with the Challenged Provisions. SEPTA PI Opp. Br. (ECF No. 23) at 31–33. Now, at trial and in post-trial briefing, SEPTA has gone back to admitting that some of the DNC-related advertisements did not comply with the Challenged Provisions. Trial Tr. 60:13–61:20 (testifying that Ex. 32, a union ad stating "WELCOME DNC," "32BJ SEIU," "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" violates the Challenged Provisions because the ad staked out "political positions"); SEPTA's FOF/COL at 14 (Response to CIR FOF ¶ 10).

SEPTA also accepted an advertisement regarding mass incarceration (Ex. 51) that is "political in nature," "implicates . . . policies of a government entity," and expresses a "viewpoint on matters of public debate . . . about political, . . . historical, [and] social issues," as those terms are used by SEPTA. *See* Ex. 22. At deposition, SEPTA's designee conceded that he was unsure whether this advertisement was consistent with the Challenged Provisions. Ex. 111 (Benedetti Dep.) 255:11–257:4. But, in response to CIR's Motion for Preliminary Injunction and in its post-trial briefing, SEPTA has argued that CIR was correct to allow this advertisement, although it did so without a supporting affidavit or testimony. SEPTA PI Opp. Br. (ECF No. 23) at 33; SEPTA's FOF/COL at 32 (¶ 23).

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using a variety of nebulous concepts and most recently referred to it as "something that concerns or is about politics." Trial Tr. 57:9–10. How the DNC advertisement can "involve politics" but not "concern[] or [be] about politics" is anybody's guess. SEPTA completely fails to explain this supposed distinction, just as it completely fails its burden of demonstrating the constitutionality of the Challenged Provisions.

SEPTA also cannot seem to settle on a consistent position regarding the language at the end of subsection (a) prohibiting ads that "directly or indirectly implicate[] the action, inaction, prospective action or policies of a government entity." Ex. 22. SEPTA's current articulation—that the language prohibits ads that advocate "for or against" a government's action or inaction—is different from its pretrial briefs, which said the language pertained to ads that "seek any changes in public programs or policies," SEPTA PI Opp. Br. (ECF No. 23) at 30; *see also id.* at 27 ("all sought governmental or judicial changes")—and both versions offered in SEPTA's briefs are inconsistent with the plain text of subsection (a).

B. SEPTA Misstates the Facts and Law Regarding SEPTA's Acceptance of Government-Sponsored Advertisements in Violation of Section (a).

SEPTA's justification for allowing numerous government-sponsored advertisements despite the Challenged Provisions contravenes the facts and law. Under any fair reading of the text of the Challenged Provisions, the government-sponsored advertisements violate subsection (a). When asked by SEPTA's own counsel, at trial, Mr. Benedetti said the phrase "political in nature" under subsection (a) means "something that concerns or is about politics." Trial Tr. 57:10. And the dictionary definition of "politics" relied on by the Court in *Mansky* was "anything 'of or relating to government, a government, or the conduct of governmental affairs,'" or "anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,'" *Mansky*, 123 S.Ct. at 1888 (citations omitted).[5] Since government-sponsored ads are

[5] Mr. Benedetti testified that the Advertising Standards should be interpreted in light of the words' dictionary definitions and case law. Ex. 111 (Benedetti Dep.) 277:9–10; Trial Tr. 81:17–19 ("Q: Is it fair to assume that any undefined words in the standards have their ordinary dictionary definitions? A: I think there's case law that speaks to the meaning too.").

"of or relating to government" they necessarily are "something that concerns or is about politics," and therefore are "political in nature," under subsection (a).

Ads sponsored by government entities regarding their programs or policies[6] also necessarily "implicate . . . the action, inaction, prospective action or policies of a government entity," in violation of additional language in subsection (a). Ex. 22. To avoid this conclusion, SEPTA mischaracterizes that language as referring only to advertisements that "advocate for or against government action or inaction." SEPTA's FOL/COL at 24 (Response to CIR FOF ¶ 51); *see also id.* at 14 (Response to CIR FOF ¶ 10). Nothing in the text of subsection (a) limits its prohibition to advertisements that contain "advocacy" or are "for or against" government action; rather, it prohibits all advertisements that "directly or indirectly implicate[]" the government. Furthermore, the standard concerns not only "action or inaction" of a government, but also the "policies of a government entity." Ex. 22.

SEPTA also astonishingly continues to perpetuate the false argument that its allowance of advertising by non-SEPTA government entities is irrelevant to this Court's analysis because "[g]overnment speech is free from First Amendment scrutiny." SEPTA's FOF/COL at 34 (Response to CIR FOF ¶ 31). SEPTA's reliance upon the government speech doctrine is exceptionally misplaced and demonstrates a fundamental lack of understanding of what the

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[6] *See, e.g.*, Ex. 43 (CDC ad promoting vaccination as "the most powerful defense" against measles); Ex. 44 (ad for Philadelphia Department of Health explaining how to prevent lead poisoning); Ex. 45 (ad for Philadelphia Department of Labor explaining importance of understanding the difference between employees and contractors); Ex. 46 (ad for Montgomery County Health Department promoting breaks for nursing mothers); Ex. 47 (ad for Commonwealth of Pennsylvania "Safe Return" program); Ex. 49 (ad for Philadelphia Recycle promoting the City's recycling program); Ex. 50 (ad for Philadelphia Department of Health promoting availability of Narcan); Ex. 52 (ad for Philadelphia Water Department promoting cleaner water); Ex. 48 (ad for Philadelphia Department of Health promoting safe sleeping practices for infants); *see also* Ex. 42 (ad for Healthcare.gov promoting enrollment in Obamacare although the ad apparently was "Paid for by Intersection").

doctrine means or how it may even be applied to a case regarding a government's advertising restrictions. As set forth in CIR's FOF/COL, "The government speech doctrine stands for the uncontroversial proposition that, in certain circumstances, when the government is acting as a speaker, rather than as a censor, it has the same right to speak freely as private entities, and is not required to maintain viewpoint neutrality in its own speech." CIR FOF/COL at 33 (COL ¶ 38 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017)). All of the cases on which SEPTA relies stand for the same unremarkable proposition that a government entity may favor its own speech in certain circumstances. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.") (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–468 (2009)). But when a government entity censors the speech of *other* speakers—whether those speakers be individuals, private entities, or other government entities—it cannot favor the viewpoints of some of those speakers or speech over others.

Only one of the cases SEPTA has cited actually addresses SEPTA's argument: *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, No. 2:06-CV-1064, 2008 WL 4965855 (W.D. Pa. Aug. 14, 2008). In that case, the Port Authority contended, as SEPTA does here, that advertisements on its facilities by *other* government agencies should be ignored in the court's analysis of whether the Port Authority's restrictions on advertisements violated the First Amendment because of the "government speech" doctrine.[7] The court expressly rejected that argument. *Id.* at *15. That same reasoning applies here.

[7] Unlike in the Port Authority's case, SEPTA is not even a co-sponsor of the relevant ads. *Id.* at *14.

SEPTA's FOF/COL criticizes CIR for citing "just one case" on this issue. SEPTA's FOF/COL at 34 (¶ 31).[8] The criticism is absurd. SEPTA previously relied upon the district court opinion in *Pittsburgh League of Voters* as SEPTA's *lead* case when SEPTA first offered its through-the-looking-glass interpretation of the government speech doctrine. *E.g.*, SEPTA's PI Opp. Br. at 31.[9] CIR merely demonstrated that SEPTA's own cited case directly refutes the exact argument SEPTA makes to this Court. The government speech doctrine just has no bearing on the record before this Court.

C. SEPTA's "Process" Does Not and Cannot Make the Challenged Provisions Constitutional.

SEPTA essentially asks the Court to ignore the vagueness of the Challenged Provisions' text because SEPTA has a "process" for reviewing advertisements. SEPTA's FOF/COL at 15–16 (Response to CIR FOF ¶ 14). This argument fails completely.

First, as SEPTA's designee repeatedly testified, the Advertising Standards stand on their own. SEPTA has not produced any written guidance further elaborating on the meaning of the words used in the standards. *E.g.*, Ex. 111 (Benedetti Dep.) 69:1–18, 101:8–16, 116:2–6. No amount of "process" when reviewing a proposed advertisement can cure the vagueness of the standards and the lack of guidance as to what they mean.

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[8] At other times, SEPTA's counsel has referred to CIR's counsel as offering a "crazy" position when CIR pointed out the flaws in SEPTA's reliance upon the government speech doctrine. PI Hr'g Tr. 78:10-17.

[9] SEPTA's argument that the Court should view ads sponsored by government entities differently from ads sponsored by private entities is also squarely at odds with SEPTA's own testimony that it applies the Advertising Standards to government advertisements in exactly the same way as it applies them to private or commercial speech. SEPTA's FOF/COL at 16 (Response to CIR FOF ¶ 16) ("SEPTA agrees that the Advertising Standards do not have separate rules defining 'public service ads' and agrees that SEPTA reviews PSAs against the same Advertising Standards as other ads").

Second, SEPTA's apparent "absorb and Google" practice hardly is a "process," let alone a process that cures the vagueness of the standards. Mr. Benedetti's testimony that he absorbs each ad, then Googles terms related to the ad, then consults with his colleagues and with counsel[10] no more illuminates what the Advertising Standards mean and what they prohibit than if he had said that his "process" involved consulting the oracle at Delphi.[11]

Third, although SEPTA has claimed that it is "consistent" in its application of the standards to particular advertisements over time, the Court may not credit this conclusory and groundless statement, which is not supported by any evidence in the record. In fact, SEPTA repeatedly asserted privilege as to all communications regarding the application of the Advertising Standards, and refused to produce any documents in litigation explaining how SEPTA had applied the standards to other ads. *See, e.g.*, Ex. 111 (Benedetti Dep.) 71:6–12, 72:4–17.[12] Having invoked privilege to shield SEPTA's past application of the Advertising Standards from scrutiny during discovery, SEPTA cannot now try to fill in the gap in the record with its own self-serving representations about what that evidence would show.

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[10] "Q: So now let's suppose you've gotten involved and you see an ad proposal. What process do you follow? A: Well, the first thing I do is I look at the ad and I would -- depending on the nature of the ad, I may get counsel involved. I also more recently . . . would confide with one of my colleagues, Billy Smith, who's one of the lawyers that works in my office. We look at the ad, we bring out the standards – Exhibit 22, and we take a look at it against those standards. And then we may, depending on where that takes us, do an . . . internet search . . . to understand more about the subject matter of the ad and whether or not it violates either . . . the political standard or the public speech or public debate standard." Trial Tr. 55:3–17; *see also* Ex. 111 (Benedetti Dep.) 102:13–103:2.

[11] For this reason, even if SEPTA memorialized its "process" in its Advertising Standards, this would not change the Court's analysis of whether they are constitutional, and the outcome would be the same. *See* Letter from J. Baylson to Counsel, Oct. 17, 2018 (Question #3).

[12] In fact, there is ample evidence demonstrating that SEPTA is *not* consistent in its application of the standards. *See supra* § I(A).

D. SEPTA's Attempt to Factually Distinguish *Mansky* Fails Completely.

SEPTA's attempt to distinguish the polling places at issue in *Mansky* from SEPTA's advertising spaces is a red herring.

First, the holding in *Mansky* turned on the vagueness of the restrictions, not on any qualities specific to the physical forum. There is no language in the decision suggesting that other forums are distinguishable with respect to the vagueness of the standards. Instead, it was the *text* of the standards governing speech in that forum that was determinative. The vagueness of the language in the standards and the fact that they vested officials with unbridled discretion to censor speech rendered them unconstitutional on their face. Here, the Challenged Provisions are unconstitutionally vague on their face for the same reasons, regardless of any differences in the physical forum.

Second, even assuming that SEPTA has more time than Minnesota election officials had in which to deliberate and seek advice before applying the Challenged Provisions,[13] the additional time claimed to be used by SEPTA does not make a legal difference. Even having months to think about the standards during this litigation has not allowed SEPTA to articulate a clear delineation of what the Challenged Provisions do or do not prohibit. Additional time to apply the Challenged Provisions does not cure their fundamental vagueness. SEPTA can take

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[13] SEPTA's mere assumption that it takes more time to make a final decision in applying its restrictions than in Minnesota is not only irrelevant, but probably unwarranted. The Minnesota statute did not authorize prohibiting any voter from voting due to the wearing of political apparel, and the statute also provided for subsequent administrative proceedings to challenge any referral made on election day. *Mansky*, 123 S. Ct. at 1883. Therefore, if a Minnesota official made a wrong decision about what constituted "political" apparel on election day, the official's decision could be corrected later in time during administrative proceedings. But, more importantly, the Supreme Court was not concerned with the amount of time to make or correct a decision of what was "political" under Minnesota's standards because there was no amount of time that could cure the fact that Minnesota's standards were facially unconstitutional.

one minute, one day, or even one year to make a decision on any given ad, but the Challenged Provisions do not grow any clearer with the passage of time.

II. The Forum Is All of SEPTA's Advertising Space.

As we have explained in previous briefs, the relevant forum in this case is all of SEPTA's advertising space. SEPTA has persisted in misrepresenting the facts, analysis, and holdings of the cases it cites to contend that the relevant forum is only the advertising space on the inside of buses.

The Court need not separately analyze the constitutionality of the Advertising Standards with respect to each individual advertising space that they apply to. *See* Letter from J. Baylson to Counsel, Oct. 17, 2018 (Question #2). In asking the Court to ignore most of SEPTA's advertising space for the purpose of this case, SEPTA is essentially arguing that, even if its Advertising Standards were unconstitutional as applied to the inside or outside of subway cars, trolleys, regional rail trains, digital screens, ad space in SEPTA stations, and the ***outside*** of buses, the Court should conclude that the identical Advertising Standards are constitutional as applied to the ***inside*** of buses. This defies logic. SEPTA has not seen fit to promulgate different standards for each of its advertising spaces. Trial Tr. 65:19–23 (confirming that the same Advertising Standards apply to all of SEPTA's advertising space and there is no "special set of rules" for busses); *id.* 95:6–8; *see also* Ex. 111 (Benedetti Dep.) 45:7–20. And in rejecting CIR's ad, SEPTA did not suggest in any way that the rejection was tied to CIR's particular choice of advertising space. *See* Exs. 17, 19; Trial Tr. 95:9–21. SEPTA has not treated the inside of buses any differently from the rest of its advertising space, and neither should the Court.

III. SEPTA Erroneously Conflates The Purpose of the Forum With the Purpose of Its Speech Restrictions.

SEPTA repeatedly conflates the purpose of the ***forum***—that is, SEPTA's advertising space—with the purpose of the ***Advertising Standards***' restrictions on speech in that forum.[14] Reasonableness analysis turns on whether the restrictions on speech in a nonpublic forum advance the purpose ***of the forum—***not whether restrictions on speech are consistent with the purpose of the restrictions on speech.[15] This is because, in a nonpublic forum, "content-based restraints are permitted, so long as they are designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

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[14] SEPTA conflates these two issues even in describing the Third Circuit's articulation of the "reasonableness" standard, distorting what the court said in *NAACP*. *See* SEPTA's FOF/COL at 28 (¶ 11) (mis-citing *NAACP v. City of Phila.*, 834 F.3d at 443, 445). *NAACP* says that the court must be able to "grasp the purpose to which the City has devoted ***the forum***" and "the evidence or commonsense inferences also must provide a way of tying the limitation on speech to the forum's purpose." SEPTA grossly misstates this holding when it cites *NAACP* for the proposition that the court must be able to grasp "the purpose behind ***its regulations*** and tie the regulations to that purpose." SEPTA's FOF/COL at 28 (¶ 11) (emphasis added).

[15] The Court's Question #14 recognizes this and asks "what is the purpose (or what are the purposes) to which SEPTA has devoted its advertising space? Has SEPTA tied the 2015 Advertising Standards to its purpose(s) for the forum?" But SEPTA's response contains no statement about the purpose of SEPTA's ***advertising space***, focusing instead on the purpose of SEPTA's restrictions on speech. *See* SEPTA's FOF/COL at 9–10. Similarly, CIR's FOF ¶ 1 states that SEPTA's purpose in leasing advertising space on its property is "[t]o generate revenue," citing extensive evidence in support of this fact. SEPTA's response does not offer any basis for a contrary finding. *See* SEPTA's FOF/COL at 12 (Response to CIR FOF ¶ 1). Rather, SEPTA's response focuses on the purpose of SEPTA's ***Advertising Standards***. *See id.*

As explained in CIR's proposed findings of fact and conclusions of law, the purpose of SEPTA's forum (*i.e.*, its advertising space) is to generate revenue. *See* CIR's FOF/COL at 1 (FOF ¶ 1). SEPTA does not appear to disagree.

However, the Challenged Provisions' restrictions on speech are plainly ***not*** an effort to ensure that SEPTA's advertising space generates revenue. Rather, as SEPTA's FOF/COL makes clear, the Challenged Provisions are aimed primarily at a different goal: preventing the display of ads that may be offensive. SEPTA's FOF/COL offers various possible reasons for wanting to prevent the display of ads that may be offensive, including rider comfort, employee comfort, preventing vandalism, avoiding "public outcry" and media inquiries, and unspecified "safety" concerns. But none of those reasons are related to the purpose of the forum, generating revenue.[16]

SEPTA's FOF/COL concedes that generating revenue (the purpose of the advertising space) was ***not*** "the primary purpose" of SEPTA's restrictions on speech. SEPTA's FOF/COL at 12.[17] Although SEPTA half-heartedly attempts to draw some connection between the goals of

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[16] *See also* SEPTA's FOF/COL at 9 ("A primary purpose of amending SEPTA's Advertising Standards . . . was to make sure that the experience of the customer, safe efficient travel, was maintained and protected."); *id.* ("to avoid imposing on its captive audience and becoming a 'Hyde Park' on wheels"); *id.* at 9–10 (citing cases where restrictions on transit ads purportedly served the goals of "reduc[ing] . . . political controversy" and avoiding "becom[ing] a place that could make riders feel unwelcome"); *id.* at 17 (AFDI ad caused "public outcry," vandalism, and "a barrage of reporters," and SEPTA subsequently amended standards to protect the experience of the customer," and to "keep our riders safe, happy and not detract from our core mission of moving them around safely"); *id.* at 18 (Response to CIR 21, stating "SEPTA admits that it adopted the Advertising Standards partly because SEPTA thought doing so would have a positive impact on SEPTA's passengers . . . including by avoiding the issues of public outcry, employee and labor complaints, vandalism and unwanted media attention."); *id.* at 22 (Advertising Standards were aimed at protecting the "experience" of customers and employees and core mission of providing safe and efficient travel).

[17] SEPTA's FOF/COL at 12 ("neither revenue generation nor revenue maximization are the sole, ***or even the primary purpose***" of SEPTA's Advertising Standards, and "SEPTA did not

the restrictions and the revenue-generating purpose of the forum,[18] these arguments are inconsistent with the record as a whole. At trial, when asked directly by his own counsel whether SEPTA's Advertising Standards were aimed at revenue concerns, Mr. Benedetti made clear that the Advertising Standards were aimed at a countervailing concern that had to be ***balanced against*** SEPTA's competing goal of generating advertising revenue:

> Q: Was revenue a consideration [in amending the old standards]?
> A: Revenue was a consideration only in so much as this is a small percentage of the money that we raise, aside from the fare box and the taxpayer subsidies, but ***that revenue*** – and I think the standard states this – ***that was going to be balanced against the customer's experience***.
> Q: What do you mean by that?
> A: Well, we didn't want to just simply make money and ignore our core mission of providing safe and efficient transportation for our customers, so ***while we certainly consider this to be a source of revenue, not at the expense of happy customers and safe customers***.

Trial Tr. 48:22–49:8 (emphasis added). *See also id.* 69:8–11 (confirming testimony that, in adopting Advertising Standards, SEPTA was "balancing . . . revenue-generating goals for the ad space against the customer experience").

> Q: By improving the passenger experience, did you have an expectation in passing these standards, ***whether that would have a positive impact on passenger revenues***?
> A: Well, we passed it because it [sic] we thought it would have a positive impact ***on our passengers***.

Trial Tr. 52:8–12 (emphasis added).

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adopt the Advertising Standards at issue in this case for the sole ***or primary purpose*** of generating or maximiz[ing] revenue.") (emphasis added).

[18] *See, e.g.*, SEPTA's FOF/COL at 9 ("it's our belief that that will keep our riders safe, happy and that SEPTA would thereby reap a positive revenue impact"); *id.* at 28 ("SEPTA has a legitimate interest [in] maintaining advertising standards that do not offend riders so that they stop their patronage").

But this kind of vague, inferential link between the purpose of the forum and the imposition of speech restrictions that seek to avoid controversial speech is precisely what the Third Circuit warned against in *NAACP*. *See* 834 F.3d at 446 (finding that, because controversy avoidance is "nebulous and not susceptible to objective verification," the Supreme Court's First Amendment jurisprudence "cautions against readily drawing inferences, in the absence of evidence, that controversy avoidance renders the ban constitutional"). SEPTA asks the Court to make precisely such an inference here and, like the City of Philadelphia in *NAACP*, offers no evidence to support it.

IV. SEPTA Misstates the Significance of the Newsfeeds.

SEPTA argues that, because, on the eve of trial, it purportedly directed Intersection to terminate the newsfeeds on SEPTA's digital displays,[19] the newsfeeds are a "moot issue" and the Court should ignore them. This is incorrect.

SEPTA confuses the mootness doctrine, which pertains to claims, with relevance, which pertains to evidence. CIR's First Amendment claim—the sole claim at issue in this case—is not moot. This is not a case where factual developments during litigation mean that the Court can no

[19] SEPTA also asserts—based upon attorney statements, not record evidence—that the newsfeeds are no longer running on SEPTA vehicles. But SEPTA has already stipulated that as of trial, the newsfeeds were not terminated. More specifically, at trial, both SEPTA's trial counsel and Mr. Benedetti asserted that the news feeds had been terminated. However, when CIR's counsel presented SEPTA's counsel with a photograph showing that Mr. Benedetti's testimony that the newsfeeds were no longer running as of the date of trial was incorrect, SEPTA stipulated that the newsfeeds were still running on SEPTA vehicles after trial. ECF No. 41 ¶ 14. CIR provided SEPTA with the opportunity to correct the misleading record SEPTA had created regarding the facts as they existed as of the day of trial. But, statements by SEPTA's counsel in a post-trial brief that SEPTA supposedly finally terminated the newsfeeds days after trial is not evidence and is not part of the record.

longer grant effective relief.[20] The mootness doctrine and the related doctrine of voluntary cessation, on which SEPTA rests its argument, simply have no application here.

Nor have the newsfeeds ceased to be relevant to the issues before this Court just because they may have been terminated (after trial). Arguing that the newsfeeds are no longer relevant to the Court's analysis after they are taken down is like arguing that none of the ads SEPTA previously accepted or rejected are relevant because they are not currently running. This is plainly untrue and unsupported by case law.

Regardless of whether or not SEPTA vehicles currently display newsfeeds, the fact remains that, from at least the time that CIR first sought access to the forum through the very eve of trial, SEPTA intentionally exposed riders to news headlines on its digital displays—part of the very advertising space where CIR is prohibited from advertising its own reporting. This fact is unchanged by SEPTA's subsequent decision to terminate the newsfeeds. And this unchanged fact is relevant for two reasons. First, it undermines SEPTA's claimed interest in shielding riders from political content and matters of public debate—specifically, news, like CIR's reporting. It is SEPTA's burden to justify its restrictions on speech, and the newsfeeds undermine its justification for the Challenged Provisions. Second, it demonstrates that news headlines are compatible with the nature of SEPTA's advertising space, which includes the digital displays. *See Christ's Bride Ministries v. SEPTA*, 148 F.3d 242, 249 (3d Cir. 1998) (to determine whether SEPTA opened its advertising space to the public, courts examine "the nature of the property and its compatibility with expressive activity"). In fact, news reporting is so well suited to the forum

[20] *Cf.*, *e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48–49 (1997) (dismissing declaratory judgment action as moot where plaintiff had, during litigation, voluntarily left her job at the agency whose policy she was seeking to have declared unconstitutional).

that SEPTA, through its agent, Intersection,[21] entered into a contract to have this content delivered to SEPTA's digital displays. Indeed, at trial. Mr. Benedetti testified not that the newsfeeds were incompatible with the forum, but rather that the newsfeeds might be incompatible with SEPTA's attempt to *close* the forum. Trial Tr. 80:20–23 (testifying that the newsfeeds might be "incompatible with the forum being closed to political speech and speech on matters of public debate"). Thus, the presence of the newsfeeds, by SEPTA's own admission, reinforces that SEPTA's ad spaces are a designated public forum generally open to speech like CIR's, not a nonpublic forum that has been truly closed to content like CIR's ad.

V. SEPTA Does Not Offer Any Basis for Disputing Most of CIR's Proposed Findings of Fact.

SEPTA admits or agrees with many of the facts contained in CIR's proposed findings of fact. *See* SEPTA's FOF/COL at 13, 17–20, 22–24 (Responses to CIR FOF ¶¶ 2–3, 7–8, 17, 21, 23–24, 26, 33, 35–37, 39–41, 49–50). Only with respect to a few of CIR's proposed findings of fact does SEPTA offer even a colorable basis for characterizing the record differently from CIR's proposed finding. With respect to many of the facts that SEPTA denies (or "denies as stated"), many of SEPTA's denials consist of nothing more than disagreement about the legal significance of the fact. *See* SEPTA's FOF/COL at 13, 15–25 (Responses to CIR FOF ¶¶ 5, 12–13, 16, 18, 22, 24–25, 27–29, 32–34, 38, 42–48, 55–69). In other responses, SEPTA purports to

[21] SEPTA also argues that the Court should ignore the newsfeeds because it was SEPTA's agent, rather than SEPTA itself, that contracted with Screenfeed to display the newsfeeds on SEPTA vehicles. SEPTA has offered no authority for this proposition. There is no logical reason why the Court should ignore actions taken on SEPTA's behalf by the entity to which SEPTA has delegated responsibility for its advertising spaces. *See* Ex. 111 (Benedetti Dep.) 20:10-20 ("We are in a contract with Intersection, where we granted it a license to be our – to go out and get the advertising for us, to submit advertising to our advertising department, to – if approved, to install the advertising where it needs to be and interact with the customers that it's serving.").

deny CIR's proposed findings of fact but identifies no basis for rejecting the proposed finding of fact. *See* SEPTA's FOF/COL at 13–16, 18–21, 23–25 (Responses to CIR FOF ¶¶ 9–10, 14, 19, 20, 22–23, 25, 27–29, 31, 38, 42–48, 50, 53–69). But SEPTA's FOF/COL are not merely a pleading, in which SEPTA can simply deny facts. The Court has conducted a trial in this matter. If SEPTA sought to deny CIR's factual assertions, it was to point to record evidence demonstrating that they are incorrect.[22] It did not.

With respect to SEPTA's factual assertions where SEPTA has offered no argument with the evidence cited by CIR and identified no basis in the record for a contrary finding, the Court should deem the disputed findings of fact to be uncontroverted. *See* SEPTA's FOF/COL at 13–25 (Responses to CIR FOF ¶¶ 5, 9–10, 12–14, 16, 18–20, 22–25, 27–29, 31–34, 38, 42–48, 50, 53–69); *id.* at 27 (¶ 8); *id.* at 32 (¶ 23); *id.* at 36 (¶ 37).

Respectfully submitted,

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[22] SEPTA's proposed conclusions of law also contain several statements of fact that are unaccompanied by record citations or are accompanied by misleading or false characterizations of the record evidence. *See*, *e.g.*, SEPTA's FOF/COL at 27 (¶ 8); *id.* at 32 (¶ 23); *id.* at 36 (¶ 37) (*see* Trial Tr. 77:17–78:17).

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CERTIFICATE OF SERVICE

I, John S. Stapleton, hereby certify that on October 22, 2018, a true and correct copy of the foregoing CIR's Reply to SEPTA's Proposed Findings of Fact and Conclusions of Law was served upon the individuals listed below via the Court's ECF system:

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