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

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE CENTER FOR INVESTIGATIVE REPORTING'S MOTION FOR PRELIMINARY INJUNCTION, AS DIRECTED BY THE COURT (DKT. 26)

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CIR's Motion presents several independently sufficient reasons why CIR should prevail in this action. Of course, if the Court so directs, CIR will present its case at trial. But, the undisputed record already is sufficient for the Court to enter an injunction in favor of CIR now, which would end the immediate and irreparable harm CIR is experiencing.[1]

SEPTA does not have to allow anyone to post advertisements on its property. However, having chosen to open its advertising space to the public, the First Amendment limits SEPTA's ability to impose content-based restrictions on advertisements. Even in a nonpublic forum,[2] SEPTA cannot restrict speech using standards that are so vague and unworkable that they allow virtually unbridled discretion in interpreting and applying the standards. SEPTA also cannot adopt restrictions on speech that are not "reasonable" in light of the purposes of the forum, or that facially discriminate based on viewpoint, nor can it apply its restrictions on speech in a viewpoint discriminatory manner. But SEPTA has broken all of these First Amendment commands in adopting and enforcing the Challenged Provisions (the second sentence of substandard (a) and substandard (b)). CIR expands here on only a few of these legal theories.

I. The Challenged Provisions Are Facially Unconstitutional Because They Are Unworkable and Discriminate Against Controversial Speech.

The Supreme Court's line-by-line analysis of Minnesota's restrictions in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 (2018), is indistinguishable from

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[1] CIR seeks to have its advertisement run prior to (and after) October 1, 2018, which is the date of a panel discussion, "Unpacking the Trap," at "421 North 7th Street" (which is both the name of the location and the street address) in Philadelphia, from 5:30 p.m. to 8:30 p.m. Emmanuel Martinez, Data Reporter from CIR's Reveal, will serve as a panelist, along with Pennsylvania State Senator Vincent J. Hughes, and other individuals.

[2] At the Court's request, and to expedite proceedings, CIR agreed to limit its Motion to arguments assuming SEPTA is operating as a non-public forum. Hr'g Tr. 82:18-83:12. The Court can enter both preliminary and permanent relief without resolving the question of whether SEPTA's advertising space is a designated public forum or a nonpublic forum.

how this Court should analyze the text of the Challenged Provisions here. *See* CIR Br. 24-27; CIR Reply Br. 4 (chart showing textual symmetry of *Mansky* and the Challenged Provisions). Sidestepping *Mansky*, SEPTA argues that the physical forums are different. This distinction is irrelevant because the constitutional infirmities of Minnesota's bans were not related to the physical nature of the forum—the deficiencies arose from the text of the restrictions themselves. Indeed, the D.C. Circuit recently reversed and remanded a grant of summary judgment to determine whether a transit authority's "political" prohibition was unconstitutional in light of *Mansky*. *AFDI v. WMATA*, No. 17-7059, 2018 WL 4000492 (D.C. Cir. Aug. 17, 2018).

SEPTA also overstated the significance of *Mansky*'s citation to *Lehman*. Hr'g Tr. 31:7-14. *Mansky* observed that a "political" ban limited to campaign candidate and ballot initiative material might be "clear enough" to be constitutional. *Mansky*, 138 S. Ct. at 1889. Likewise, *Lehman* determined that a transit authority was not "required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974). Indeed, even prior to *Mansky*, the Third Circuit recognized that *Lehman* did not determine the propriety of a broad ban on "political" speech reaching beyond campaign material:

> And in any event it is less than obvious that the ad [regarding former prisoners' right to vote] could even be considered "political" in nature. It would not have called on citizens to, say, vote for a specific candidate or publicly support a certain cause. *Cf. Lehman*, 418 U.S. at 317, 94 S. Ct. 2714 (Brennan, J., dissenting) (suggesting that a "public service ad by the League of Women Voters . . . advertising the existence of an upcoming election and imploring citizens to "vote" would not qualify as a "political" ad in the ordinary sense of the word).

Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County, 653 F.3d 290, 296–97 (3d. Cir. 2011) (alterations original).[3]

As for SEPTA's claim that it bans only those "political" ads that "seek any changes" in government policies, *see, e.g.*, SEPTA Br. 27, 30, not only does this reading have no basis in the text of SEPTA's policy, it would also be yet another impermissibly vague term and a form of viewpoint discrimination. SEPTA allows extensive advertisements by governments, notwithstanding that such ads necessarily "directly or indirectly implicate[] the action, inaction, prospective action or policies of a government entity." Ex. 22, § II.A.9(b)(iv)(a).[4] It is a form of viewpoint discrimination to allow *other* government entities to advertise their actions and policies, while banning ads seeking changes to those government actions and policies. *E.g.*, *Kalman v. Cortes*, 723 F. Supp. 2d 766, 803 (E.D. Pa. 2010) (Baylson, J.) (invalidating blasphemy statute that allowed reverent, but disallowed irreverent, speech); *see also Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("The logic of the Government's rule is that a law would be viewpoint neutral even if

[3] SEPTA's argument that the Supreme Court must expressly overturn prior precedent is a red herring. Hr'g Tr. 31:1-6. *Mansky* did not have to overturn *Lehman* because *Lehman*'s holding that a transit authority is not "required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office," *Lehman*, 418 U.S. at 299, simply does not mean that sprawling, capacious restrictions on "political" speech are constitutional. *Lehman* does nothing to save the far more expansive Challenged Provisions.

[4] During oral argument, SEPTA's counsel called CIR's counsel's argument "novel" and "crazy," Hr'g Tr. 78:10-17, because CIR's Reply Brief (correctly) demonstrated that SEPTA cannot use the government speech doctrine to exclude from this Court's analysis ads sponsored by *other* governments. This case does not concern the federal CDC's invocation of the doctrine to protect the CDC's speech, and the doctrine plainly does not apply to exclude the CDC's and other non-SEPTA governments' speech from the Court's analysis in a case against SEPTA about SEPTA's forum and SEPTA's restrictions. For the reasons thoroughly explained in SEPTA's own cited authority, SEPTA is wildly off the mark in its attempt to use the government speech doctrine here. *See* CIR Reply Br. 9.

it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side.").

Substandard (b) is facially unconstitutional not only due to reasons articulated in *Mansky*, 123 S. Ct. at 1889 (holding that ban on "'issue oriented material designed to influence or impact voting'—raises more questions than it answers"), but also because the term "matters of public debate" is just a euphemism for a ban on speech that SEPTA deems "controversial." The very definition of "controversy" *is* a "matter of public debate." www.yourdictionary.com ("The definition of a controversy is a *public* disagreement with two sides openly *debating*.");[5] www.dictionary.com (defining "controversy" as a "prolonged *public* dispute, *debate*, or contention; disputation concerning a matter of opinion") (emphasis added). However, SEPTA's own cited authority clearly holds that banning speech because it is "controversial" is unconstitutionally vague and viewpoint discriminatory. *E.g.*, *AFDI v. SMART*, 698 F.3d 885, 893 (6th Cir. 2012) (restricting speech regarding "controversial public issues" is too inherently subjective) (cited in SEPTA Br. 23);[6] *see also United Food & Comm'l Workers Un., Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361 (6th Cir. 1998) ("We believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination. A controversy arises where there exists a 'disputation concerning a matter of opinion.'") (citations

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[5] SEPTA relied upon www.yourdictionary.com to interpret CIR's advertisement. *See* SEPTA Br. 43.

[6] Interpreting SEPTA's political ban as applying to only "debated" political speech is equally as vague and viewpoint discriminatory as the bans on "disfavored" political and "deceptive" political speech that SEPTA's own cited authorities have rejected. *E.g.*, *Lebron v. Amtrak*, 69 F.3d 650, 658 (2d Cir. 1995), *amended on denial of reh'g*, 89 F.3d 39 (2d Cir. 1995) ("Of course, if such a policy were used to screen out only controversial political advertisements—that is, political advertisements distasteful to the majority—it would be void for viewpoint bias.") (cited in SEPTA Br. 23); *see also Lebron v. WMATA*, 749 F.2d 893, 898-99 (D.C. Cir. 1984) ("deceptive political speech" ban is unconstitutional) (cited in SEPTA Br. 22).

omitted); *Matal*, 137 S. Ct. at 1764–65 ("The Government [argues that it] has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment.")

In response to the Court's invitation to suggest ways to rewrite substandard (a) and (b), *see* Dkt. 26, ¶ 7, the first sentence of substandard (a) would likely survive a constitutional challenge.[7] However, because the second sentence of substandard (a) and all of substandard (b) are patently unconstitutional on their face, they should be stricken. There is simply no obvious way to constitutionally save any of the broad, vague bans that SEPTA has attempted to enact in those sentences.[8] And courts regularly refuse to rewrite unconstitutional restrictions on speech.[9] Of course, SEPTA has other options at its disposal. By way of example only, SEPTA could respond to ads with SEPTA's own ads[10] or it could require that ads carry disclaimers making clear that SEPTA does not endorse them.[11]

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[7] *Mansky* indicates that limiting the definition of "political" to "items displaying the name of a political party, items displaying the name of a candidate" or concerning "a ballot question," is likely "clear enough" to survive constitutional scrutiny. *Mansky*, 138 S. Ct. at 1889.

[8] *See, e.g.*, *Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 299 ("If the Port Authority were to develop more precisely phrased written guidance on the ads for which it will sell advertising space and apply the guidance in a neutral and consistent manner, it may, in the future, be able to reject ads like the one at issue in this appeal.").

[9] *See, e.g.*, *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 362–63 ("[W]e must address whether a more limited or narrow construction of the policy would remove the threat to constitutionally protected speech. . . . We will not, however, rewrite the guidelines to cure their substantial infirmities.").

[10] *See, e.g.*, Ronnie Cohen, *San Francisco officials condemn group's bus ads as anti-Islamic*, Reuters, *available at* https://www.reuters.com/article/usa-islam-sanfrancisco-idUSL1N0C3G5120130312 (March 11, 2013) ("But rather than . . . risk a court fight over free speech rights, city officials said they would instead mount a public service campaign preaching tolerance and peace.").

[11] *See, e.g.*, *Lebron v. WMATA*, 749 F.2d at 895 (discussing disclaimer affixed to ad).

II. SEPTA's Supposedly Disputed Issues of Fact Are Either Not Facts or Not Relevant.

SEPTA identified the following supposedly disputed issues of fact at oral argument: (i) SEPTA's belief that CIR's ad concerns advocacy; (ii) SEPTA's belief that CIR is a quasi-advocacy organization; (iii) SEPTA's contention that it correctly applied the Challenged Provisions in accepting or rejecting various other advertisements; and (iv) that CIR unfairly characterized SEPTA's alleged governmental interests in some undefined manner. Hr'g Tr. 12:22-13:16. None of these are factual disputes that need to be resolved in order to rule on CIR's motion for preliminary injunction or even to enter a final order in this case.

SEPTA's subjective beliefs about supposed advocacy in CIR's ad, and that CIR otherwise engages in advocacy in its other activities, are irrelevant.[12] The question in this action is not whether the overly expansive, vague tent of the Challenged Provisions covers CIR's ad; the issue is whether the capacious provisions are constitutional. *See, e.g.*, *Kalman*, 723 F. Supp. 2d at 803 ("'[T]he success of a facial challenge [to a statute] on the grounds that [the statute] delegates overly broad discretion to the decisionmaker rests *not* on whether the administrator has exercised his discretion in a content-based manner, *but whether there is anything in the ordinance to prevent him from doing so*.'") (emphasis and alterations in *Kalman*; quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992)); *see also Mansky*, 123 S. Ct. at 1884 (mentioning plaintiff's speech but not discussing whether it was "political" within scope of Minnesota's expansive, vague restrictions).

With respect to the other ads in the record, there is no dispute as to which ads SEPTA accepted, and which it rejected under the Challenged Provisions. SEPTA's contention

[12] Although the issue is irrelevant, CIR vigorously disputes that it is an advocacy organization or that its thorough, evidence-based reporting based on journalistic best practices is properly characterized as a form of advocacy.

that it correctly applied the Challenged Provisions to these ads is a contention of law, not a disputed issue of fact. Neither party's arguments as to how SEPTA should have applied the Challenged Provisions to any particular advertisement is evidence. Indeed, SEPTA's Brief hardly cites to its designee's testimony in the seven pages it spends arguing about the other ads accepted by SEPTA. SEPTA Br. 28-34. For its part, CIR contends that SEPTA's acceptance or rejection of other advertisements illustrates what is obvious from the face of the Challenged Provisions: that the provisions are objectively unworkable and enable SEPTA to engage in viewpoint discrimination.[13] There are no factual issues that the Court must resolve before considering the two sides' legal arguments about the significance of these ads.

CIR does not understand what disputes, if any, SEPTA believes exist regarding SEPTA's supposed governmental interests. CIR's argument about SEPTA's justifications (or lack thereof) for the Challenged Provisions is based on the interests set forth in SEPTA's ad policy (Exhibit 22) and the testimony of SEPTA's 30(b)(6) witness. Any dispute with CIR's characterization of the government interests appears to be a legal dispute, not a factual one. More importantly, the onus is on SEPTA, not CIR, to prove the reasonableness of its restrictions in light of the governmental interests at stake. SEPTA has failed to carry that burden. *E.g.*, *NAACP v. City of Philadelphia*, 834 F.3d 435, 446 (3d Cir. 2016); *see* CIR Br. 39-45.

III. SEPTA's Newsfeeds.

Although some confusion developed during oral argument regarding SEPTA's newsfeeds, there are no material factual disputes regarding the newsfeeds. SEPTA did not dispute any of the facts set forth in CIR's Brief—which is based on the testimony of SEPTA's

[13] The ads SEPTA has accepted that appear to fall within the broad Challenged Provisions are relevant for the additional reason that such speech is perfectly compatible with the forum and SEPTA has not truly closed the forum to this kind of content. CIR Br. 42-48.

30(b)(6) designee—about the existence of the digital "infotainment" systems on SEPTA buses and trains that show news headlines from AP and Reuters interspersed with ads. SEPTA's designee testified that, among other things: (a) the digital displays show ads; (b) the digital displays show those ads alongside news items, running in 90- to 180-second loops; (c) the text of the news items are the same for SEPTA's trains and buses, with trains including images in addition to the text; (d) SEPTA physically does not review the news items before they appear; (e) the news items on SEPTA's screens come from the AP and Reuters and can include any content that one would ordinarily be seen on the front page of the newspaper; and (f) that Exhibit 28 is an appropriate representative of the type of news items that appear on the digital displays (subject to the caveat that buses' screens would include the text, but not the images). CIR Br. 7-8. CIR sought additional information regarding the newsfeeds through written discovery, but SEPTA objected and provided no meaningful information. Ex. 24 (Resp. to Interrog. No. 7; Resp. to RFP No. 8).

During oral argument, SEPTA's counsel stated that, at least in her opinion, the newsfeeds do not contain content that would violate the Challenged Provisions. Hr'g Tr. 53:18-54:9. This assertion is attorney argument, not evidence.[14] Moreover, the unrebutted fact in the record is that SEPTA's newsfeeds contain any content that would be front page news. The news items at Exhibit 28, which SEPTA concedes are representative, clearly "implicate" the policies of the government and concern matters of public debate. Ex. 22, §§ II.A.9(b)(iv)(a) & (b). Thus, the unrebutted facts in the record demonstrate that SEPTA allows news items in SEPTA's displays that would violate the Challenged Provisions if they were advertisements.

[14] Because SEPTA does not maintain records of the newsfeeds, *see* Benedetti Dep. 82:3–9, it is unclear what facts or evidence could possibly undergird that statement.

To be clear, the relevance of the news items is that they undermine SEPTA's justification for the Challenged Provisions.[15] Although SEPTA has the right to entertain its riders with whatever kind of "infotainment" it wishes, SEPTA's choice to intentionally expose riders to the news items undermines its claim that it has an interest in protecting its riders from "political" content and "matters of public debate." *See NAACP*, 834 F.3d at 447.

IV. The Relevant Physical Forum is All of SEPTA's Advertising Spaces.

In the Court's written questions prior to argument, the Court inquired: "What is the relevant 'forum' here? Is this a fact or legal issue or mixed issues of law and fact? Are the facts in dispute?" CIR did not specifically address these questions during oral argument. Aside from the legal question of whether the forum is a designated public forum or nonpublic forum, the relevant physical forum is all of SEPTA's advertising spaces. Determining the forum in any case generally may require resolving mixed questions of law and fact. There are no facts in dispute that are relevant to this issue here.

In *Christ's Bride*, the Third Circuit determined that the proper forum was all of SEPTA's advertising spaces, and not merely the specific location where the plaintiff wanted to advertise, because SEPTA applied the same standards to all of its spaces. *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 248 (3d Cir. 1998); *see also id.* at 251-52 & n.2 (considering SEPTA's acceptance of certain ads on buses despite the plaintiff having only sought access to post advertisements in SEPTA's Suburban Station and other stations). In this action, there is likewise no dispute that SEPTA applies the same standards to all of its advertising spaces. *See* Ex. 22, §§ II.9.b.(i) & (iv) (the standards "govern all advertisements on SEPTA's transit vehicles, products and facilities"). In addition, SEPTA's designee agreed that the same

[15] The content of SEPTA's digital displays is also relevant to demonstrate that SEPTA's advertising space is a designated public forum. CIR Br. 45-49.

standards "apply to all SEPTA vehicles and facilities," including "inside and outside buses," "[i]nside and outside trains," "digital displays" (which are part of the advertising space in buses and trains), "all physical facilities, loops, hubs and everything else" constituting "SEPTA advertising space." Benedetti Dep. 45:7-20.[16]

V. Conclusion.

For these reasons, and all others stated in CIR's prior submissions and at oral argument, CIR respectfully requests that the Court enter an injunction in favor of CIR now and end the immediate and irreparable harm CIR is experiencing.

Respectfully submitted,

September 21, 2018

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[16] The Court inquired of CIR's position regarding Pennsylvania's version of Minnesota's ban at issue in *Mansky*. Hr'g Tr. 50:1-22. CIR does not take a position concerning Pennsylvania's election laws. However, CIR notes that Pennsylvania's general prohibition against electioneering in polling places, 25 P.S. § 3060, does not apply to voters' apparel like Minnesota's law in *Mansky*. Pa. Dept. State, *Guidance on Rules in Effect at the Polling Place on Election Day*, at 4 (October 2016) ("[I]ndividual voters who appear at the polling place to exercise their right to vote are permitted to wear clothing, buttons or hats that demonstrate their support for particular candidates."), attached as Exhibit A.

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CERTIFICATE OF SERVICE

I, John S. Stapleton, hereby certify that on September 21, 2018, a true and correct copy of the foregoing document was served upon the individuals listed below via the Court's ECF system:

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