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

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S RESPONSE TO QUESTIONS FROM THE COURT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Maryellen Madden
John J. Powell
MONTGOMERY MCCRACKEN WALKER & RHOADS LLP
1735 Market Street
Philadelphia, Pennsylvania 19103
(215) 772-1500

Attorneys for the Southeastern Pennsylvania Transportation Authority

TABLE OF CONTENTS

Southeastern Pennsylvania Transportation Authority ("SEPTA") respectfully submits this response to questions set forth in the Court's letter of October 3, 2018, followed by SEPTA's proposed findings of fact and conclusions of law.

I. SEPTA'S RESPONSE TO THE QUESTIONS POSED BY THE COURT

1. Does *Mansky* change the law, or is it just an application of settled principles to election sites?

Mansky did not change the law, and certainly not the law of transit authorities' right to restrict advertising in a public bus. In *Mansky*, The Court cited *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), and Justice Douglas' concurrence in *Lehman*, as part of the landscape of established First Amendment principles into which its ruling fit. *See Minnesota Voter's Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018). Had the Court intended to upset *Lehman* and the many cases which follow it, *see* SEPTA Opposition (ECF No. 23) at 15 (collecting cases), it would have said so. *Agostini v. Felton*, 521 U.S. 20, 207 (1997).

Mansky contains no hint that the Court intended to overrule or abrogate *Lehman*. Thus, the Middle District recently explained, *Mansky* does not bar a transit authority from adopting imperfect and imprecise restrictions on political ads in a public bus. On the contrary, it reaffirms the transit authority's right to impose those restrictions do so:

> COLTS revised their 2011 Policy and, in the 2013 Policy, took away COLTS' unfettered discretion to refuse advertisements. It is inevitable that there will be some degree of interpretation necessary where regulations are imposed. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." [*Mansky*, 138 S.Ct. 1876, 1891 (2018) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).] It is an indeterminate prohibition that carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Id. (citing Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 576, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987)). No policy can be so specific as to cover every conceivable situation and to disallow all discretion or

> interpretation in its application. See Ridley, 390 F.3d at 95. Although COLTS' advertising policy allows for limited leeway in its interpretation, it is not indeterminate. The court concludes, therefore, that COLTS' advertising policy is not unconstitutionally vague.

2. Do any cases you have cited determine the burden of proof? Are cases which require strict scrutiny and place the burden of proving "narrow tailoring" on a government agency, applicable to SEPTA? *See Free Speech Coalition, Inc., et al. v. Sessions*, 2018 WL 3730473 (Aug. 3, 2018).

Both parties cite one case that contains a notable discussion of the burden of proof, *NAACP v. City of Philadelphia*, 834 F.3d 435 (3d Cir. 2016), in which this Court noted that "Neither the Supreme Court nor our Court has expressly decided the allocation of the burden to establish reasonableness in a limited public or nonpublic forum." *Id.* at 443. The Court further explained: "This is not surprising. Reasonableness is a relatively low bar, and in most instances the technical question of who bears the burden will not be consequential because the law or regulation would survive either way. *Id.* The Court then placed the burden of showing reasonableness on the government, but noted it could be met using either record evidence or commonsense inferences. *Id.* at 443-444. Some courts go the other way and place the burden on the party seeking access *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 322 (D.C. Cir. 2018) ("The Archdiocese fails to show that the advertising space on WMATA's buses is not properly treated as a non-public forum).

SEPTA's restrictions are not subject to strict scrutiny. *See Mansky*, 138 S.Ct. at 1888 ("there is no requirement of narrow tailoring in a nonpublic forum"); *NAACP*, 834 F.3d at 441 ("narrow tailoring" not required in nonpublic forum) and at 443 ("the burden the City shoulders is much more limited than, for instance, than strict (or even intermediate) scrutiny"); *Pomicter v. Luzerne County Convention Center*, 3:16-CV-00632, 2018 WL 1733307, at *6 (M.D. Pa. April

10, 2018) (Unlike the strict scrutiny review required of public forum restrictions, the reasonableness review for nonpublic forum restrictions "does not require narrow tailoring or the absence of less restrictive alternatives").

3. As to the choice of forum, how much weight is the Court obliged to give to SEPTA's statement that the advertising space on its transit vehicles is a "non-public forum?" Must the Court give at least some weight to SEPTA's designation? Which applicable precedents address this issue?

SEPTA's written declaration that it intends to be a nonpublic forum is one of several factors courts take into account in determining the nature of the forum:

> . In distinguishing between a designated public forum and a non-public forum, we focus on whether the government intentionally opened the forum for public discourse. See United Food, 163 F.3d at 350. We are guided not only by the government's explicit statements, policy, and practice, id., but also by the "nature of the property and its compatibility with expressive activity to discern the government's intent." Cornelius, 473 U.S. at 802, 105 S.Ct. 3439.

AFDI v. Suburban Mobility Auth. for Reg'l Transp. (SMART), 698 F.3d 885, 890 (6th Cir. 2012); *Ridley v. MBTA*, 390 F.3d 65, 76 (1st Cir. 2004) ("courts look to the explicit expressions about intent as well as the actual practice"). Considerable deference is given to the considered opinion of a transit authority that acts to close the forum.

> WMATA's Board of Directors in 2015 made a considered decision based on experience to "close[ ]" its advertising space to specific subjects. Res. 2015-55. … Having plainly evidenced its intent in 2015 to close WMATA's advertising space to certain subjects, the Board of Directors converted that space into a non-public forum in the manner contemplated by the Supreme Court.

Archdiocese of Washington v. WMATA, 897 F.3d 314, 323 (D.C. Cir. 2018), *see Seattle Midwest Awareness Campaign v. King County*, 781 F.3d 489, 497-98 (9th Cir. 2015) (one of three factors).

4. Is SEPTA, in terms of its regulations for ads, similar to an administrative agency receiving deference from a court and, as long as its choice is within its power and is reasonable, must a court approve? Does this relate to SEPTA's argument that the Court should review its restrictions under an "arbitrary and capricious" standard?

Yes. *See Ridley v. MBTA*, 39 F.3d 65, 85 (1st Cir. 2004) (a grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is "reasonable in light of the characteristic nature and function" of that forum). *New England Reg. Council of Carpenters, v. Massachusetts Port Author.*, 115 F. Supp.2d 84, 94 (D. Mass. 2000) ("I am bound by a deferential standard of review which provides that a speech restriction in a nonpublic forum need not be the most reasonable or the only reasonable limitation in order to pass constitutional muster.)

5. Is the fact that most passengers on SEPTA vehicles have to pay a fare relevant to the choice of forum (seniors go free)?

No case has articulated a test that would make that fact relevant.

6. Are ads on the outside of buses relevant to this case at all?

No; that would be a separate forum. *See Children of Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998) (relevant forum is the exterior advertising spaces on the city's buses as that was the access sought); *New York Magazine v. MTA*, 136 F.3d 123, 130 (2d Cir. 1998) (advertising space on outside of bus the relevant forum).

7. What is your best case, either Supreme Court or within the Third Circuit, as to the definition of the forum? What is your best case as to whether the forum is public, or a "designated forum," or nonpublic?

Best case (Supreme Court/3d Cir.) *Cornelius v. NAACP* Legal *Def. and Ed. Fund*, 473 U.S. 788, 801 (1985).

Next-Best case overall: *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 248 (3d Cir.1998) (forum at issue was not the rail and subway stations as a whole, but rather the advertising space within the stations).

Courts do not disagree on this issue: *See, e.g., Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1151–52 (7th Cir.1995) (where speaker seeks access to diorama display cases in airport, public forum inquiry focuses on display cases rather than airport as a whole); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555–56 (8th Cir.) (where speaker seeks access to advertising space in sports arena, public forum inquiry focuses on advertising space rather than entire arena), *cert. denied*, 479 U.S. 986 (1986).

8. If the forum is non-public, is the only relevant test whether the regulation is "reasonable" in light of the purpose of the forum?

No. The existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983).

9. If an ad is rejected because it states a viewpoint, is that factor in determining whether the restriction is reasonable? If a restriction bans ads that state a viewpoint, does that require a different test than reasonableness?

No case has so held. To the contrary, most cases involving restrictions on speech in government-owned fora involve advocacy by the speaker, as for example in the cases cited in this Court's footnote 12 of its September 25 Memorandum Opinion (ECF 33 at 18). As Justice Roberts pointed out in *Mansky*, "our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and political advocacy." *Mansky*, 138 S.Ct. at 1885-86. Indeed, the complementary requirement that restraints on speech be viewpoint neutral is intended

to avoid the government taking sides opposite a protagonist on an issue and suggests that restraints on speech with a viewpoint are not by themselves violative of the First Amendment. *See United States v. Kokinda*, 497 U.S. 720, 736 (1990) ("[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another").

10. If SEPTA ad space is a "designated public forum," is Judge Goldberg's analysis the proper one for this Court to follow?

Judge Goldberg's approach to the issues was sound but applied to a different advertising standard no longer in use and could not serve as the template for decision in this case.

11. Does this Court have the power to require SEPTA to include the words "commercial" or "public service" as necessary for its regulations to be valid on accepted advertisements? Would the parties object to that?

SEPTA welcomes this Court's guidance, but respectfully suggests that the Supreme Court in *Lehman* vested discretion in transit authorities to regulate their advertising space. Trading SEPTA's current standards for, say, a commercial/noncommercial ad would merely change the nature of the dispute. Courts have found restrictions on advertising based on commercial content to be problematic. The government cannot discriminate against non-commercial advertising in favor of commercial advertising. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) ([i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages"). "Courts have routinely struck down ordinances granting commercial speech a greater degree of protection than noncommercial political speech." *Bella Vista United v. City of Philadelphia*, 2004 WL 825311 at *7 (E.D. Pa. 2004). And courts have found the concept vague. *See RCP Pubs., Inc. v. City of Chicago*, 304 F. Supp.3d 729, 746 (N.D. Ill. 2018) ("commercial advertising material" unconstitutionally vague).

Inasmuch as *Lehman* suggests that the exclusion of "political and public issue" advertising 418 U.S. at 300-01, results in advertising content consisting of "commercial and

service oriented advertising," 418 U.S. at 304, it shouldn't matter which standard is employed, except that it may be more sound to proceed on the premise that everything comes in except what's excluded. The Court's proposal leaves undefined what's excluded.

12. Is the phrase "public debate" in the SEPTA regulations too vague or improper under current legal standards?

The phrase is and has proven workable. Public debate is a mechanical component of the Advertising Standard that distinguishes between private disputes and those that have entered the public arena. Mr. Benedetti testified:

> Q What's a public debate?
>
> A That's something that's kind of a mechanical type of analysis that we do. We look to see what is being argued, debated in society in general

Tr. 57. One of the things SEPTA does to determine if an advertisement is part of a public debate is to look on the internet. Tr. 55. That is exactly the right place to look:

> In ancient Greece, and perhaps in early America, where the dominant social unit was the individual and power was distributed somewhat equally, autonomy might well have enhanced public debate and thus promoted democracy. "But in modern society, characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens, this assumption appears more problematic." The problem is basic. Today, public debate occurs on national television, radio, the press, and on the Internet. Effective public debate no longer takes place on street corners or in coffee houses.

I. P. Stotzkya1, Symposium, Fiss's Way: The Scholarship of Owen Fiss, III. The Judicial Power, 58 U. Miami L. Rev. 201 (October, 2003). CIR's ad was an example. It involved a set of conclusions on mortgage redlining reached by CIR on a topic that was already in discussion in published articles, radio and, if allowed, on SEPTA buses. A banking group issued a press

release by way of rebuttal and the New York Times wrote an editorial on it. The debate was clearly public. In other legal contexts the words are and have for years been common, especially at the SEC where such issues as Share Holder Proposals use it in assessing the content of proxy materials. See Division of Corporation Finance, Staff Legal Bulletin No. 14A, https://www.sec.gov/interps/legal/cfslb14a.htm ("the presence of widespread public debate regarding an issue is among the factors to be considered in determining whether proposals concerning that issue "transcend the day-to-day business matters)" and shown in the example below:

> There is nothing mysterious about a public debate; it is serious discussion of a problem taking place through public channels of communication such as the media and relevant policy makers. By citing accounts in national general media, a law review article, statements by President Trump and investor-focused publications, the Proposal's supporting statement illustrates the kinds of statements and activity that would be considered part of a public debate.

Amazon, Inc, 2018 WL 388139, *30 (S.E.C. No - Action Letter); *see also Timothy O'Grady Sprint Nextell*, 2012 WL 1078259 (S.E.C. No - Action Letter); James Marc Leas, 2004 WL 4444485 (S.E.C. No - Action Letter).

13. On what basis does CIR rely to contend that the relevant forum is all of SEPTA's advertising space, even though CIR only sought to run its advertisement on the interior of SEPTA buses? How should the Court's definition of the forum be impacted, if at all, by testimony that the 2015 Advertising Standards apply equally to all of SEPTA's spaces? Does it matter whether the public can tell the difference between SEPTA's advertising spaces and spaces owned by Amtrak or the City of Philadelphia?

The relevant forum is defined by focusing on the access sought by the speaker; only if a speaker seeks "general access" to an entire piece of public property is that property is the relevant forum. *See Air Line Pilots Ass'n, Intern. v. Dep't of Aviation of City of Chicago,* 45 F.3d 1144 (7th Cir. 1995) (forum is diorama showcase, not O'Hare concourse). An attempt to place a

single label on diverse fora diverse physical environment would render forum analysis meaningless. *Bloedorn v. Grube*, 631 F.3d 1218, 1232(11th Cir. 2011). Thus here SEPTA must show its standards are compatible with buses, not the conceptually different environs of terminals, platforms and trains. No court requires transit authorities to have multiple advertising guidelines, one for each advertising venue.

Amtrak has no ads on SEPTA buses so far as the record reflects.

14. In light of the two-step burden enunciated in NAACP, 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? Please include citations to the record or testimony to support your contentions.

A primary purpose of amending SEPTA's Advertising Standards as described by Mr. Benedetti was to make sure that the experience of the customer, safe efficient travel, was maintained and protected. Tr. 47:13-18; *see also* Tr. 49:7 ("happy customers"). By doing so Mr. Benedetti reasonably expected riders would be more satisfied, Tr. 69:1-2 ("it's our belief that that will keep our riders safe, happy and that SEPTA would thereby reap a positive revenue impact.") Tr. 52:8-12; R. 30(b)(6) Dep. at 54:12–55:12, 86:1-8.) SEPTA was entitled to limit access to its advertising space to avoid imposing on its captive audience and becoming a "Hyde Park" on wheels as the Supreme Court feared. *Lehman*, 418 U.S. at 304. This is a commonsense concern shared by most, if not all transit authorities. *See, e.g., Archdiocese of Washington v. WMATA*, 281 F. Supp. 3d 88, 106-07 (D.D.C. 2017), *aff'd*, 897 F.3d 314, 322 (D.C. Cir. 2018)(concerns over divisiveness and antagonism); *AFDI v. MTA*, 109 F. Supp. 3d 626, 635 (S.D.N.Y. 2015)(intention to "reduce the political controversy amidst the MTA's day-to-day operation of its public transit system.") SEPTA also amended its advertising standards to avoid vandalism such as occurred after it ran the AFDI ads, Tr. 96:19-97:2, and problems with

drivers, Tr. 48:6-11, and the administrative burden of dealing with public issue ads. Tr. 12-21. SEPTA shares these concerns with other transit authorities. *See, e.g.. Northeasterm Pa. Freethought Soc. v. County of Lackawana Trans. System,* No. 15-833, 2018 WL 3344910 (M.D. Pa. July 9, 2018)(COLTS officials were concerned that, if they continued to allow such controversial advertisements on public issues on their buses, they would become a place that could make riders feel unwelcome."); *AFDI v. WMATA,* 245 F. Supp.3d at 213; *ACLU v. WMATA,* 303 F. Supp.3d 11, 19 (D.D.C. 2018)).

15. Does the language in substandard (b) of the 2015 Advertising Standards, which prohibits ads that *express or advocate an opinion, position, or viewpoint* on matters of public debate serve to distinguish substandard (b) from the problematic guidelines in *Mansky*? Why or why not?

Yes, for at least two reasons. First, unlike the "electoral choices standard" and examples provided for guidance by the State of Minnesota that the Supreme Court found wanting in *Mansky* because they varied by candidate and referendum, 138 S.Ct. at 1891, SEPTA's standards provide a fixed, albeit broad, standard.

Second, the contexts are different. For instance, in context, *Mansky* involved a polling place with voters constantly rotating through, making the variable-by-candidate standard Minnesota suggested unworkable. But *Mansky* suggests that even the "unmoored" term "political" it found problematic as to the polling place is constitutionally permissible in the very different context of buses inasmuch as it embraced a ban of "political advocacy" ads as part of the continuing legal landscape. 138 S.Ct. at 1885-86. The language of SEPTA's subsection (b) should be permissible for similar reasons – in the more deliberative decision-making process of transit authorities, entities like SEPTA can not only compare advertising proposals against SEPTA's standards to see if they are compliant, but also assess whether SEPTA's decisions are consistent in practice. Mr. Benedetti testified he did just that. Tr. 55:18-24. He was not cross-

examined on this critical testimony. Because the constitutional test is whether the "policies and practices" of the transit authority are "arbitrary, capricious or invidious," *Lehman*, 418 U.S. at 303, SEPTA's undisputed attention to consistency is dispositive of this issue.

16. Is the CIR rejected ad "commercial" or "public service?" What is the proper legal analysis if a commercial or public service advertisement expresses or advocates an opinion, position, or viewpoint on matters of public debate about economic, political, religious, historical or social issues?

The CIR ad is not political because it seeks neither to sell or promote for sale a product or service. The notion that the CIR ad may be a public service ad evidences the difficulty of defining that category. SEPTA does not view it as a public service ad because it's primary purpose is to take a position on economic and political issues that are the subject of public debate. As to when an ad is a mixed message of political/public issue and commercial content, the line can be difficult to draw:

> The Court, therefore, must determine what standard applies to content-based speech that is both commercial and non-commercial. When speech contains "both commercial elements and political or social commentary, the line between commercial and noncommercial speech can be difficult to discern." Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin., 191 F.3d 429, 441 (4th Cir. 1999). "When these elements are intertwined, the commercial or noncommercial character of the speech is determined by 'the nature of the speech taken as a whole.' " Id. (citing Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988)). "Consideration of the full context of the speech is therefore critical." Id. (citing Bolger, 463 U.S. at 67–68). "Thus, if a communication, at bottom, proposes a commercial transaction, the fact that it contains some commentary about issues of public interest will not alter its nature." Id.

International Outdoor, Inc. v. City of Troy, 17-CV-103352017 WL 2831702, at *5 (June 30, 2017); *see also Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989) (holding "that the presence of some commercial activity does not change the standard of first amendment review" where the organization engaged in such activity had a clear political purpose).

II. PROPOSED FINDINGS OF FACT[1]

A. SEPTA Advertising Opportunities

Response to CIR 1. Revenue generation is "a consideration" in SEPTA's decision to lease space for advertisements in the first place, Tr. 48:18-49:8; 52:24, but neither revenue generation nor revenue maximization are the sole, or even the primary purpose of SEPTA's purpose in adopted the Advertising Standards that CIR challenges here. Tr. 43:10-12; 48:18-49:8. CIR's statements regarding ad space other than that available on the inside of SEPTA buses are irrelevant.

Advertising revenues make up a very small percentage of SEPTA's $1.2 billion operating budget. Tr. 52:7. SEPTA did not adopt the Advertising Standards at issue in this case for the sole or primary purpose of generating or maximize revenue. Tr. 43:10-12; 48:18-49:8.

SEPTA adopted and enforces the Advertising Standards for the reasons stated in SEPTA's contract with Intersection, which contains the Standards:

> It is the express intention of these Advertising Standards to further confirm SEPTA's intention that property allocated for advertising be a non-public forum. SEPTA's acceptance of transit advertising will not provide or create a general or designated public forum for expressive activities. In keeping with its proprietary function as a provider of public transportation, SEPTA does not intend its acceptance of transit advertising to permit its transit facilities, products or vehicles to be used as open public forums for public discourse and debate. Rather, SEPTA's fundamental purpose and intent is to accept such forms of advertising as will enhance the generation of revenues to support its transit operations without

[1] The transcript of the deposition of SEPTA's Rule 30(b)(6) designee, Mr. Gino Benedetti ("Benedetti Dep.") appears at Ex. 111; the transcript of the deposition of SEPTA's Rule 30(b)(6) designee, Mr. Thomas Kelly ("Kelly Dep.") appears at Ex. 112; and the transcript of the deposition of CIR's Rule 30(b)(6) designee, Ms. Victoria Baranetsky ("Baranetsky Dep.") appears at Ex. 115.

> adversely affecting the patronage of passengers. In furtherance of that discreet and limited objective, SEPTA will retain strict control over the nature of the advertisements accepted for posting on or in its transit facilities, products and vehicles and will maintain its advertising space strictly as a non-public forum.

Ex. 22 at 2; *see also* Tr. 45:6-49:8, Tr. 67:1-3.

Response to CIR 2. Admitted.

Response to CIR 3. Admitted.

Response to CIR 4. Denied as stated. The cited testimony states that a majority of the time, Intersection does not sell all of SEPTA's ad space. Kelly Dep. 16:1. The record not state that "at any given time" some SEPTA ad space is "empty" and contains no reason to suppose any unsold ad space is ad space inside a SEPTA buses, which is the relevant forum here.

B. SEPTA's Advertising Standards

Response to CIR 5. SEPTA agrees that its Advertising Standards apply to all proposed ads, Tr. 53:12, but objects that ad space other than that inside SEPTA buses is irrelevant.

Response to CIR 6. SEPTA agrees that any person or group may seek to advertise on SEPTA's vehicles, Benedetti Dep. 19:24-26, but SEPTA applies its Advertising Standards to all proposed ads, and those violating the standards are rejected. Tr. 53:12. SEPTA does not specifically consider whether a proposed ad is commercial or non-commercial. Tr. 70:6-7.

Response to CIR 7. Agreed.

Response to CIR 8. SEPTA agrees that the text of Advertising Standards 9(b)(iv)(a) & (b) (hereinafter, Standards "(iv)(a)" and "(iv)(b)") are at issue.

Response to CIR 9. Denied as stated, except that SEPTA admits that it interprets the terms "political" and "political in nature" in Standard (iv)(a) as having the same meaning, Tr. 57:8, and that an ad can "involve politics" without violating the standard, *see e.g.*, Tr. 60:16-17.

Response to CIR 10. SEPTA agrees that Standard (iv)(a) prohibits ads that directly or indirectly implicate the action, inaction, prospective action, or policies of a government entity. SEPTA agrees that it interprets this Standard as prohibiting ads that ask for or advocate for a government entity to take some action or refrain from some action. SEPTA denies the remainder of CIR 10.

SEPTA does not distinguish between the terms "political" or "political in nature" in Standard (iv)(a). Tr. 57:8. SEPTA interprets Standard (iv)(a) to prohibit ads seeking or advocating for or against government action or inaction. Tr. 46:20-22 (standard bars ads that "seek government action of some sort"); 57:13-14 (reading "political" and "political in nature" as defined by Standard's final clause regarding "action, inaction, prospective action or policies to the government entity"); 107:4-5 (ad problematic for "taking a side"); 120:3-4 (CIR ad barred for "trying to move the Government to take some action about discriminatory lending").

An ad can "involve politics" without being prohibited under Standard (iv)(a). *See* Tr. 60:13-61:3 (AT&T ad "simply welcoming the participants in the Democratic National Convention to Philadelphia" that does not "stake out" positions for or against government action are permissible); *cf.* Tr. 61:4-13 (union ad about DNC impermissibly "staking out positions").[2]

Response to CIR 11. Denied. In the cited portion of the deposition transcript, Mr. Benedetti testified that Standards (iv)(a) and (iv)(b) used the "same term," Benedetti Dep. 122:5-6, not that the terms or the two different Standards they appear in have the "same meaning"

[2] The law does not demand perfection of SEPTA, just a good faith intention to close the forum. *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 78 (1st Cir. 2004) ("erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum. By consistently limiting ads it saw as in violation of its policy, even if doing so imperfectly, the [transit authority] evidenced its intent not to create a designated public forum").

Response to CIR 12. SEPTA objects that this proposed finding of fact as irrelevant and appears to have been included solely to highlight an inartfully phrased answer by Mr. Benedetti nearly six hours into his deposition. CIR does not challenge SEPTA's use of the term "policy" in Standard (iv)(a). SEPTA's designee testified at length regarding SEPTA's interpretation and Standard (iv)(a) and the kinds of ads it prohibits, including those that ask for or advocate government action or inaction. *See* Response to CIR 10.

Response to CIR 13. SEPTA denies that the First Amendment prohibits it from using "common sense" to adopt Advertising Standards to protect the comfort and safety of its passengers. *See, e.g.*, *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 340 (D.C. Cir. 2018) ("common sense show[s] a 'sensible basis' for WMATA's conclusion that prohibiting religious or anti-religious advocacy advertisements avoids risks of vandalism, violence, passenger discomfort, and administrative burdens in a manner that serves the forum's stated purpose of providing "safe, equitable, and reliable transportation services").

Response to CIR 14. Denied. SEPTA's provided a clear explanation of its interpretation and application of Standard (iv)(b). *See* SEPTA explained in details the process it uses to determine whether an ad violates Standard (iv)(b). Tr. 57: 20-22; Benedetti Dep. 12:2-13:14. First, SEPTA, through Mr. Benedetti and another in-house attorney carefully review and consider the ad. Tr. 55:10-11; 100:4-5, 102:16-18; 119:1-2. SEPTA then conducts online research of the ad, such as visiting the advertiser's website, to determine what the ad is "about" and is "trying to accomplish." Tr. 119:1-2. SEPTA conducts additional research as necessary on the subject of the ad to determine if it is a subject of significant public debate. Tr. 119: 7-8; Benedetti Dep. 119:21-22; 102:22-23.

In assessing whether the issue is a matter of public debate, SEPTA relies on common sense and research. Tr. 90:20-25; 118: 1-2; 57:20-22; 118:22-25. Findings that may weigh in favor of "public debate" include: One or more newspaper op-eds advocating a side on a disputed issue (Tr. 119:9), a prevalence of articles in trade journals or other publications reflecting an active debate (Tr. 119: 8); and the existence of ongoing litigation (Tr. 119:9-22). SEPTA also considers other factors, like the timing of an apparent debate (since a public debate in the past may subsided or become resolved. Benedetti Dep. 253:3-4.

SEPTA objects to CIR's repeated contentions that SEPTA's analysis is defective because Mr. Benedetti is uncomfortable providing split-second answers about how the Standards apply to hypothetical advertisements he has never seen, with no opportunity for review, reflection, research, or discussion with in-house or outside counsel. This argument is patently unfair. SEPTA's normal policy for reviewing and researching ads takes time. Tr. 118:10. Split second determinations about hypotheticals are not part of SEPTA's process, and are not relevant here. CIR further asserts that "every ad has a viewpoint," Benedetti Dep. 126, but this too is immaterial. All ads may have a viewpoint, but rejecting an ad with a viewpoint does not, without much more, amount to viewpoint discrimination.

Response to CIR 15. Denied. See Response to CIR 14.

Response to CIR 16. Denied. 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, but SEPTA denies that it is required to apply the Advertising Standards to PSAs to preserve the non-public forum because PSAs are government speech that it not relevant to the Court's public forum analysis.

Response to CIR 17. Agreed. By way of further response, an advertiser whose ad is rejected is always free to submit a revised version of the ad attempting to come into compliance with SEPTA's Advertising Standards.

C. SEPTA'S Response to AFDI Ad

Response to CIR 18. Denied as stated. On March 11, 2015, Judge Goldberg issued a Memorandum and Order in *AFDI v. SEPTA*, 92 F. Supp. 3d 314 (E.D. Pa. 2015), ordering SEPTA to permit the plaintiff in that case to run a disparaging anti-Muslim advertisement on SEPTA buses.

The fallout from the AFDI ad was significant. After the AFDI ad ran on its buses, SEPTA faced was "a public outcry." Benedetti Dep. 54: 22-24. SEPTA also faced "an outcry from [its] employees who had to operate the buses" resulting in labor issues. *Id.* at 54: 23-24; Tr. 48:6. Moreover, after running the AFDI ad, SEPTA experience "vandalism [on] multiple SEPTA buses." Benedetti Dep. 54: 22-24; Tr. 47:18-19; 96:19-21. These issues were accompanied by "a barrage of reporters wanting to know what we were going to do." Benedetti Dep. 54: 22-24; Tr. 47:6-8.

On May 28, 2015, SEPTA and Intersection's (then known as Titan) executed a second amendment to their existing advertising agreement, adopting the Advertising Standards at issue in this case. Ex. 22. The primary purpose of the Advertising Standards was to close the forum so that SEPTA would have sufficient control of its advertising space that it would be able to "make sure that the experience of the customer and the experience of the employee, our core mission-- you know, safe efficient travel for the public, was maintained and protected." Tr. 47:15-17; 69:1-3 ("it's our belief that that will keep our riders safe, happy and not detract from our core mission of moving them around safely.").

Response to CIR 19. Denied. Mr. Benedetti testified that vandalism occurred on multiple buses after the AFDI decision. Tr. 47:18-19 ("We had vandalism on the busses that ran the AFDI."); *see also* Tr. 96:19-21 (describing a "report that identified that there was vandalism on the busses -- more than one bus").

Response to CIR 20. SEPTA's contract amendment with Intersection speaks for itself. SEPTA denies that the provisions of the amendment stating the purpose of the Advertising Guidelines are "prefatory." *See* Ex. 22 at 2.

Response to CIR 21. SEPTA admits that it adopted the Advertising Standards partly because SEPTA thought doing so would have a positive impact on SEPTA's passengers, Tr. 52:8-12, including by avoiding the issues of public outcry, employee and labor complaints, vandalism and unwanted media attention. *See* Response to CIR 18.[3]

Response to CIR 22. Denied as stated. SEPTA intended the Advertising Guidelines to close the public forum to ensure that the experience of its customer and the experience of the employees would be protected, along with SEPTA's core mission of providing safe and efficient, travel for the public. Tr . 47:15-17; 69:1-3. SEPTA denies the it was required to conduct elaborate analyses to determine whether avoiding vandalism, public, customer, and employee outcry, and unwanted media attention is good for ridership. It is common sense that these issues are disadvantageous for a transit authority. *Nat'l Ass'n for Advancement of Colored People v. City of Philadelphia*, 834 F.3d 435, 445 (3d Cir. 2016); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 810 (1985).

[3] SEPTA's response was a reasonable managerial decision that countless other transit authorities have undertaken. *See Lehman v. City of Shaker Heights*, 94 S. Ct. 2714, 2717 (1974).

Response to CIR 23. Admitted, except that SEPTA denies that the newest line of buses are currently "replacing" older buses. Currently there are only about 192 of the new busses in SEPTA's fleet of 1,455 busses. Benedetti Dep. 136:5-6.

Response to CIR 24. SEPTA admits that the screens on the approximately 192 New Flyer busses previously displayed news headlines from Reuters and the Associated Press, which appeared as a small strip of text along the bottom of the screen. Ex. 28. There were no photographs displayed with the headlines. Benedetti Dep. 135:23-136:4.

CIR's contentions concerning the newsfeed are moot. The newsfeeds were controlled by Intersection, not SEPTA. SEPTA's legal department did not become aware of the newsfeeds' existence until this lawsuit arose. Tr. 77:21-22. On September 21, 2018, SEPTA instructed Intersection to remove the newsfeeds. Supp. Stip. (ECF No. 41) ¶ 13. On September 23, 2018, Intersection advised SEPTA that the newsfeeds were "completely down" from Intersection's displays. *Id.* As of October 5, 2018, SEPTA has confirmed that all newsfeeds on SEPTA vehicles remained down. Because the newsfeeds are no longer operative—and because SEPTA there is no reasonable chance that SEPTA will reinstate them, see Tr. 77:21-25 (a previously scheduled system upgrade would have eliminated the newsfeeds even if SEPTA had not caused them to be taken down more quickly)—the issue now moot. *See AFDI v. MTA*, 815 F.3d 105, 110 (2d Cir. 2016).

Response to CIR 25. Denied. SEPTA denies that the news headlines shown to passengers could include anything that appears on the front page of a newspaper.[4] SEPTA

[4] According to its website, Screenfeed selects news included in its feed to ensure the content is "guaranteed public-friendly." https://www.screenfeed.com/browse/category/news (accessed Oct. 15, 2018); *see also* Exs. 110, 114.

further denies that the two news headlines identified are relevant. They both appeared in commuter trains, which is not the relevant forum in this dispute. *See* Decl. of John Stapleton (ECF No. 20-3) at 3 (describing Ex. 28). SEPTA further denies that either of the headlines violates the Advertising Standards. The headlines are merely statements of fact. They do not advocates or seeks any government action or inaction, nor do they advance a position on a matter of public debate.

Response to CIR 26. Admitted that some information about a customer pre-approval process appears on the website. SEPTA denies that it was a customer of Screenfeed. Tr. 80:12-14.

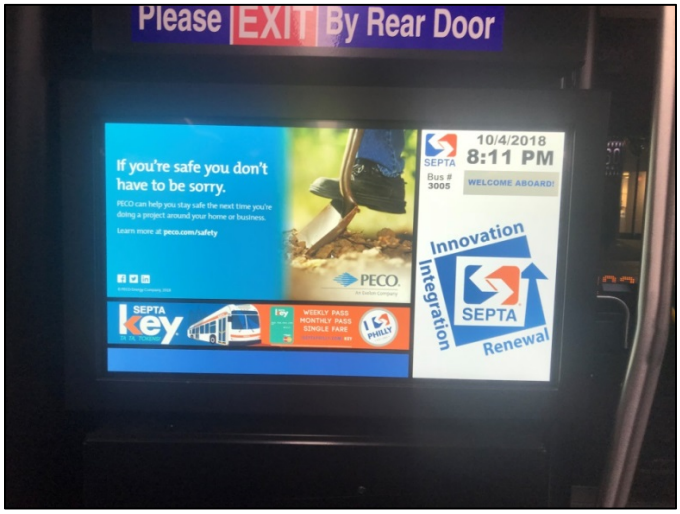
Response to CIR 27. SEPTA objects to this proposed finding of fact as argumentative. SEPTA did not review the content of the newsfeeds or take news items down because it was Intersection, not SEPTA that had contracted with Screenfeed. *Id.*

Response to CIR 28. Denied as stated. *See* Response to CIR 27.

Response to CIR 29. Denied as stated. Insofar as the newsfeed create a risk to SEPTA's ability to maintain a non-public forum, SEPTA does not regard the newsfeeds as a benefits to its passenger's comfort.

Response to CIR 30. SEPTA denies that Mr. Benedetti's testimony was "incorrect." When Mr. Benedetti stated that SEPTA had directed Intersection to remove the newsfeed, that statement was true. Supp. Stip. ¶ 13 (showing direction to Intersection). Likewise, Mr. Benedetti testified that "as I understand it, they are down." Tr. 64 13-14. That statement was a correct description of Mr. Benedetti's understanding at the time of his testimony, and there is no allegation or evidence suggesting otherwise.

Response to CIR 31. On October 2, 2018, CIR's counsel informed SEPTA that a newsfeed had been seen on a SEPTA bus that morning. SEPTA promptly worked to remove the feed from several remaining buses and agreed to a supplemental stipulation to advise the Court. (ECF No. 41.) October 3, SEPTA confirmed that the newsfeed had been permanently terminated from all SEPTA buses. On October 4, SEPTA's counsel informed CIR that SEPTA had confirmed that the newsfeed was terminated.[5] SEPTA proposed a second supplemental stipulation, but CIR refused. As of the evening of October 4, 2018, the screen on a SEPTA New Flyer bus appeared as follows:



Response to CIR 32. Denied. Mr. Benedetti testified that he though "*a* newsfeed" "could be" incompatible. Tr. 80: 21-22. He did not testify that the brief appearance of text-only, "public friendly" Associated Press headlines that were controlled by SEPTA's advertising partner and appeared for several months in small letters at the bottom of a small screen on a small percentage of SEPTA buses amounts to an intention by SEPTA to open its forum as venue for public discourse. Tr. 80:23.

[5] SEPTA proposed a stipulation to advise the Court that the issue had been resolved.

Response to CIR 33. SEPTA objects that this proposed finding of fact, which concerns a starkly different forum than inside a SEPTA bus, is irrelevant because CIR did not seek access to that forum. As this Court has previously explained, even the platform at a SEPTA station is considered a distinct forum from the publicly accessible portions of a station. *Storti v. SEPTA*, Civ. No. 99-2159, 1999 WL 729266, *7-*8 (E.D. Pa. 1999). Certainly the inside of a bus is a different forum than a newsstand in a station. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985) (the forum is what plaintiff seeks to access).

Response to CIR Footnote 3. Admitted. CIR's concession that the City of Philadelphia has agreed to run its advertisement on City-owned bus shelters proves that CIR has not and will not suffer any irreparable harm,, or any harm at all, by SEPTA's denial of its ad proposal.

Response to CIR 34. This proposed finding of fact concerns a plainly distinct forum and is therefore irrelevant. A city bus is a confined vehicle owned by the a transit authority as part of a voluntary participant in commerce that millions of people ride as a matter of necessity each day to get to work. *See Lehman*, 418 U.S. at 303-04. Rented retail space in a SEPTA station is something else entirely. *See* Response to CIR 33.

Response to CIR 35. SEPTA admits the first and second sentences. SEPTA denies the third sentence. The SEPTA employee is supposed to identify any ads that "may violate the standards," that employee would "send it to" Mr. Benedetti. Benedetti Dep. 63:10-15.

Response to CIR 36. Denied, except that SEPTA admits the first sentence. If either Intersection or the SEPTA employee who receives a copy receipt believe they ad may violate one of the Standards, they are to forward the ad to Mr. Benedetti. *Id.* at 63:10-15.

Response to CIR 37. SEPTA admits that Mr. Benedetti is the final decision maker with respect to whether an ad complies with SEPTA's standards.

Response to CIR 38. Denied as stated. SEPTA has not published guidelines because it intends for ads to be judged against the Advertising Standards. Tr. 55: 9-11. SEPTA objects to CIR's suggestion that SEPTA should have written guidance "after learning that ads had appeared on SEPTA vehicles" that violated the Advertising Standards. There is no evidence of record to support any allegation of negligence on SEPTA's parts. Nearly 2,750 ad proposals went through the system ince SEPTA adopted the Standards. Pre-trial Stip. (ECF No. 37) ¶ 5. The two ads CIR refers to were in fact identified by Mr. Benedetti soon after they were run. If anything, SEPTA's system has been admirably consistent.[6]

Response to CIR 39. Admitted. *See* Response to CIR 38.

Response to CIR 40. Admitted. SEPTA has no obligation to do so.

Response to CIR 41. Admitted. *See* also Response to CIR 14 (describing processs).

Response to CIR 42. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

Response to CIR 43. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

Response to CIR 44. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

Response to CIR 45. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

---

[6] CIR's suggestion that SEPTA should have drafted written guidance for its employees is in tension with claims that the SEPTA's Standards are hopelessly unworkable and its refusal to propose alternatively worded standards. In any event, as *Mansky* suggests, more guidance could mean less clarity. *See Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 340 (D.C. Cir. 2018) (there is no indication that WMATA has promulgated anything like conflicting or confusing guidance" at issue in *Mansky*).

Response to CIR 46. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

Response to CIR 47. SEPTA objects to this Response as argumentative. By way of further response, *see* Response to CIR 14.

Response to CIR 48. SEPTA objects to this Response, and the assertion that "Mr. Benedetti might change his mind" as argumentative and unsupported in the record. By way of further response, *see* Response to CIR 14.

Response to CIR 49. SEPTA admits the stipulated numbers. SEPTA denies that it "accepted" the two ads identified that were removed after they had already begun to run. SEPTA denies CIR's suggestion that Mr. Bendetti only "thought" they did not comply.

Response to CIR 50. SEPTA accepted the listed ads and denies CIR's characterization of them. CIR asserts in conclusory fashion that these ads "promote[] a government service." It is not obvious how they do so. Pursuant to the Court's October 1, 2018 Order, SEPTA refers the Court to its discussion of the public service ads set forth in SEPTA's Opposition to the Motion for Preliminary Injunction (ECF No. 23), at 29-31.

Response to CIR 51. Denied. As explained above, SEPTA interprets Standard (iv)(a) as prohibiting ads that advocate for or against government action or inaction. Under that standard, none of these ads—which, for example, warning of certain risks (lead paint, sex trafficking, safe sleep), identify products (vaccines, Narcan), or informing readers of existing rights (break time ad, employee/contractor ad) are not prohibited. Further, insofar as these ads are government speech, they do not raise first amendment concerns. SEPTA hereby incorporates its discussion of these ads from its Opposition at 29-31.

Response to CIR 52. Denied. SEPTA hereby incorporates its discussion of these ads from its Opposition, including at 29-31.

Response to CIR 53. Denied. SEPTA hereby incorporates its discussion of these ads from its Opposition, including at 19, 31-34.

Response to CIR 54. Denied. SEPTA hereby incorporates its discussion of these ads from its Opposition, including at 31-33.

Response to CIR 55-69. Denied. SEPTA hereby incorporates its discussion of these ads from its Opposition, including at 35-36.

III. PROPOSED CONCLUSIONS OF LAW

A. The Forum Is The Advertising Space on SEPTA Buses

1. The forum for purposes of testing the constitutionality of SEPTA advertising restrictions is the advertising space on SEPTA buses because that is "the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); *see NAACP v. City of Philadelphia*, 834 F.3d 435, 441-42 (3d Cir. 2016) ("Here the relevant forum is the Airport's advertising space (rather than the airport in its entirety) because that is the specific public property that the NAACP seeks to access").

2. Although CIR now contends all of SEPTA's advertising space should be the forum, it was CIR who determined that it would only seek access to the advertising space on SEPTA's buses. *Lebron v. AMTRAK*, 69 F.3d 650, 655 (2d Cir. 1995). *See* Ex. 10 (CIR 0000094), CIR's January 17, 2018 email to Intersection ("We're producing an informative comic about housing in Philly; we'd like to display that comic in the interior of SEPTA buses").

B. The Advertising Space on SEPTA Buses is a Non-Public Forum

3. The Supreme Court has identified three categories of government property for purposes of analyzing restraints on speech: (1) traditional public forums, which have "by long tradition or by government fiat" been devoted to assembly and debate; (2) designated, created or limited public forums, consisting of property "which the State has opened for use by the public as a place for expressive activity;" and (3) nonpublic forums, which consist of property "which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

4. The Supreme Court has determined that advertising on city buses is a nonpublic forum because bus advertisements are "located in a context (advertising space) that is traditionally available for private speech." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252 (2015) (explaining *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

5. A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Walker v. Texas Div., Sons of the Confed. Vets., Inc.*, 135 S. Ct. 2239, 2250 (2015), quoting *Cornelius*, 473 U.S. at 802. SEPTA has not done that.

6. The Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation [s]. . .." *United States v. Kokinda*, 497 U.S. 720, 725 (1990), quoting, *United*

States Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114, 129 (1981), and *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961).

7. Transit authorities, like SEPTA, that have combined written policies with practices that demonstrate an intention to limit a forum will generally avoid being found to have created a designated public forum. *Ridley v. Mass. Bay Transp. Auth. (MBTA)*, 390 F.3d 65, 76 (1st Cir. 2004). Courts therefore look to the policy and practices of transit authorities under their written policies to ascertain their intention as to the type of forum created by their facilities. *See, e.g., Northeastern Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys. (COLTS)*, Civ. No. 15-833, 2018 WL 3344910 (M.D. Pa. July 9, 2018) (court looks to any policy COLTS has enacted to govern access to the forum and if COLTS requires potential advertisers to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations, it will generally be found that COLTS intended to create a limited, rather than designated, public forum).

8. In this case, the amended 2015 Advertising Standards passed by SEPTA's board explicitly state SEPTA's intention to operate its advertising space as a non-public forum. *See* Ex. A ¶ 9. b.(ii) ("It is the express intention of these Standards to further confirm SEPTA's intention that property allocated for advertising be a non-public forum"). It is not disputed that SEPTA policed and enforced those standards.

9. Because SEPTA set forth its intention to close its advertising space on buses after deliberation by its board and thereafter operated such venue as a non-public forum requiring potential advertisers to adhere to SEPTA's Advertising Standards and policed those standards, the advertising space on SEPTA buses is a non-public forum

C. SEPTA Reasonably Decided to Amend Its Advertising Standards and Close the Forum

10. Implicit in the concept of a nonpublic forum is the government's right to make distinctions in access on the basis of subject matter and speaker identity so long as they are reasonable in light of the purpose the forum serves. *Perry Educ. Ass'n*, 460 U.S. at 49; *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998). Selectivity and discretionary access are defining characteristics of nonpublic forums. *AFDI v. MBTA*, 781 F.3d 571, 582 (1st Cir. 2015).

11. The courts may use their "common-sense" to uphold a regulation under reasonableness review. *See United States v. Kokinda*, 497 U.S. 720, 734-35 (1990); *NAACP v. City of Philadelphia*, 834 F.3d at 444-45. Reasonableness is a low bar and in most cases the regulation will survive scrutiny by the courts , but SEPTA must sill enable the court to grasp the purpose behind its regulations and tie the regulations to that purpose. *NAACP v. City of Philadelphia*, 834 F.3d at 443, 445. SEPTA need not show the banned speech would cause harm if permitted. *Id.*

12. Consistent with the practices of other transit authorities, SEPTA has a legitimate interest maintaining advertising standards that do not offend riders so that they stop their patronage and it acts reasonably if it maintains such standards. *See Lehman*, 418 U.S. at 303-04; *Ridley v. MBTA*, 390 F.3d 65, 85 (1st Cir. 2004); *SMART*, 698 F.3d at 892; *Southern Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (*en banc*); *Northeastern Pa. Freethought Soc.*, 2018 WL 3344910, at *11 (COLTS officials were concerned that, if they continued to allow such controversial advertisements on public issues on their buses, they would become a place that could make riders feel unwelcome). It was reasonable for SEPTA to adopt advertising

standards such as the Challenged Provisions that it believed would enhance patronage and passenger revenues. *Northeastern Pa. Freethought Soc'y*, 2018 WL 3344910, at *11.

13. It was also reasonable for SEPTA to ban political and public issue ads by enacting the 2015 Advertising Standards in order to avoid the recurrence of such negative business employee complaints, vandalism, and the administrative burden of dealing with controversial public issue advertising. *See Archdiocese of Washington v. WMATA*, 897 F.3d 314, 318 (D.C. Cir. 2018); *ACLU v. WMATA*, 303 F. Supp.3d 11, 19 (D.D.C. 2018); Northeastern *Pa. Freethought Soc'y*, 2018 WL 3344910, at *11-*12.

D. **SEPTA Has the Right to Close the Forum.**

14. SEPTA "is not required to indefinitely retain the open character of [its property]." *Perry Ed. Ass'n*, 460 U.S. at 46. Courts agree advertising space can be transformed from a public or designated public forum into a nonpublic forum. *See, e.g., Ark. Educ. Television Comm'n, v. Forbes*, 523 U.S. 666, 680(1998); *AFDI v. WMATA*, 245 F. Supp. 3d at 214; *Northeastern Pa. Freethought*, 2018 U.S. Dist. LEXIS 113617 at *25 n.10; *NAACP v. City of Philadelphia*, Civ. No. 11-6533, 2014 WL 4099327, at *5 (E.D. Pa. Dec. 19, 2014), *affirmed*, 834 F.3d 435 (3d Cir. 2016). SEPTA has done just that.

E. SEPTA's Advertising Standards Are Reasonable

15. In a nonpublic forum, the government may enforce content-based restrictions on speech so long as they are reasonable and not made to suppress the speaker's point of view. *Minn. Voters' Alliance*, 138 S. Ct. at 1885. Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. *Id.* at 1891.

16. The government's action when acting in a proprietary capacity is valid unless it is arbitrary, capricious, or invidious. *United States v. Kokinda*, 497 U.S. 720, 725-26 (1990);

Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974); *NAACP v. City of Philadelphia*, 834 F.3d at 453; *see also Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278 (11th Cir. 2003) (courts determine reasonableness by asking whether the state action was arbitrary, capricious, or invidious).

17. The Supreme Court has found buses to be a unique forum in which government has considerable discretion to control advertising in order to protect the "captive audience" of bus passengers.

> The radio can be turned off, but not so the billboard or street car placard. The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. In such situations, the legislature may recognize degrees of evil and adapt its legislation accordingly.

Lehman, 418 U.S. at 302 (internal citations and quotations omitted); *see also id.* at 308 (Douglas, J, concurring) (explaining that there is no constitutional right to address the "captive audience" on a bus). To protect "captive" bus passengers, the Supreme Court determined that transit systems may exercise managerial discretion to "make reasonable choices concerning the type of advertising that will be displayed on its vehicles." *Lehman*, 418 U.S. at 303. *See also Perry Educ. Ass'n*, 460 U.S. at 37 (explaining that *Lehman* involved an "unusual forum," buses);

18. When construing any advertising restrictions there will, of necessity, be an element of discretion and on the margins there may be difficult decisions. *See SMART*, 698 F.3d at 893; *Northeastern Pa. Freethought Soc'y*, 2018 U.S. Dist. LEXIS at *36.

19. Supreme Court precedent has long held that a bus system's ban on political advertisements is a permissible "managerial decision to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising," and therefore "does not rise to the dignity of a First Amendment violation." *Lehman*, 418 U.S. at 304.

20. The holding in *Lehman* has resulted in the Court's affording transit authorities' considerable latitude in controlling their advertising space on buses.

> Given the holding in *Lehman*, it is no surprise that other circuits have turned away first amendment challenges to bans on political or noncommercial advertising.

AFDI v. WMATA, No. 17-7059, 2018 WL 4000492, at *8 (D.C. Cir. Aug. 17, 2018). The Supreme Court's decision in *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) has not diminished the import of Lehman. *Mansky* embraced both the majority and concurring opinions in *Lehman. Id.* at 1885-86. Moreover, lower courts must follow the case which directly controls, leaving the Supreme Court the prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 20, 207 (1997); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

21. The prominent use of the term "political" in the SEPTA's Standards does not render them impermissibly vague. *See Lebron v. AMTRAK*, 69 F.3d 650, 658 (2d Cir. 1995)("Nor would a policy against "political" advertising on [the advertising forum] be void for vagueness in light of the Supreme Court's decision in *Lehman*.")

22. CIR contends that of the thousands of ads posted on SEPTA buses, ten ad proposals were political in nature and that some involve matters of public debate. CIR Findings 50, 51 and 541. Seven of the ten proposals that CIR deems political were sponsored by a governmental entity. Government speech, however, is not subject to First Amendment scrutiny. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833-834 (1995); *Planned Parenthood of South Carolina Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004). None of the seven ads can reasonably be deemed political without reading into them content they do not contain and virtually all either deal with such non-political topics as lead paint, vaccinations, healthcare and employment status.

23. One ad not government-sponsored that CIR deems political, proposed by Philadelphia Fights, says nothing political but uses a politically charged phrase, *mass incarceration*, in soliciting for a help line. SEPTA's decision not to treat that ad as political was a reasonable exercise of its discretion and was not inconsistent with other decisions made by SEPTA.

24. SEPTA's decisions to restrict access to a nonpublic forum need only be reasonable and not even the most reasonable in a range of possible decisions. *See Cornelius*, 473 U.S. at 808–09; *AFDI v. MBTA*, 781 F.3d at 581-582.

25. Two other ad proposals SEPTA accepted did no more than welcome conventioneers to the DNC held in Philadelphia in 2016. SEPTA concedes one of those ads, proposed by a union, was political and should not have been accepted. That a transit authority like SEPTA may at times make an incorrect determination in a close case does not invalidate its decision to exclude political ads. *SMART*, 698 F.3d at 893 (that a transit authority may at times make an incorrect determination in a close case does not invalidate regulations).

26. SEPTA's decision not to treat the non-union-sponsored DNC ad proposal as political was a reasonable exercise of its discretion and was not inconsistent with other decisions made by SEPTA. The fact that the proposal touched on politics or a political issue does not erase its nonpolitical purpose and render it political in nature. *See Vaguely Qualified Productions LLC v. Metropolitan Transp. Auth.*, No. 15 Civ. 04952, 2015 WL 5916699 at *9-*10 (S.D.N.Y. Oct. 07, 2015), *app. dismissed*, (2d Cir. Feb 18, 2016).

27. CIR also contends that SEPTA has accepted proposals that violate Section 9.b.(iv)(b) of the Standards. CIR Findings at 52, 53. CIR does not adequately demonstrate why those proposals violate the Standards (several are government-sponsored) and SEPTA's

decisions not to treat those proposals as expressing a viewpoint on matters of public debate on issues of economic, political, religious, historical or social issues was a reasonable exercise of its discretion and was not inconsistent with other decisions made by SEPTA.

28. Thus in practice, SEPTA has shown an ability to apply both Sections 9.b.(iv)(a) and (b) of its Advertising Standards in a consistent and reasonable manner.

29. 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. The Supreme Court's decision in *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) found Minnesota's regulations unmanageable in part because they could not reasonably be applied by election judges who would be in a similar hot seat of having to make on the spot decisions screening voters at the entrance to the polls as to voters as they passed through. *Id.* at 1890-91.

F. SEPTA Does Not Prohibit Ads Because They Are Controversial As Such

30. CIR contends that the Sixth Circuit *SMART* decision teaches that the reference to "public debate" in SEPTA's 9(b) Advertising Standard is constitutionally infirm. In *SMART*, The Sixth Circuit specifically "found unbridled discretion had been vested in the decision makers because there was no articulated definitive standard to determine what was "controversial." *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transp. (SMART),* 698 F.3d 885, 894 (6th Cir. 2012). SEPTA does not use the term "controversial" and does not prohibit ads for that reason. Nevertheless, there is nothing impermissible in banning political and public issue ads notwithstanding the fact that they are more controversial. *See Lehman,* 418 U.S. at 303-04)(permissible "managerial decision to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising"); *Student*

Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F.2d 431, 437 (3d Cir. 1985) (restraint based on "desire to avoid potentially disruptive political controversy" permissible).

G. Government Speech Is Not Subject to First Amendment Constraints

31. Government speech is free from First Amendment scrutiny.

> The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression")…..

Pleasant Grove City v. Summum, 555 U.S. 460, 467–468 (2009). It is also settled that government can use private speakers to carry its message, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995). But CIR suggests illogically that the rule is different if government uses the facilities of another government entity to carry its message. Courts have held otherwise. *See ANSWER Coalition v, Jewell*, 135 F. Supp. 3d 395, 410-11 (D.D.C. 2016) (speech and signage by Presidential Inaugural Committee in area set aside by National Park Service is government speech). CIR points to just one case for this remarkable proposition, *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County*, 2008 WL 4965855 (W.D. Pa. Aug. 14, 2008). After determining that two ads co-sponsored by the Port Authority with private entities and displayed in its facilities were not government speech, *id*. at *14, the court in that case then determined that two other ads that were co-sponsored by private entities and other government entities and displayed by the Port Authority were not government speech either. *Id.* at *15. The Court made no ruling as to the

situation before this court where one government entity carries the message of another. Confirming that interpretation, the private entities in the Port Authority case, Fair Housing Partnership and Just Harvest, and not the government co-sponsors were subsequently treated as the advertisers when the issues were appealed. *See Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County*, 653 F.3d 290, 297 (3d Cir. 2011).

H. SEPTA's Advertising Standards Are Viewpoint Neutral

32. There is no evidence that SEPTA has engaged in viewpoint discrimination. The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech, rather, it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic." *AFDI v. MBTA*, 781 F.3d at 586. CIR has not shown that SEPTA rejected its or other ads's in order to surpress a point of view. As such, there is no viewpoint discrimination. *Cornelius*, 473 U.S. at 806.

33. CIR points to SEPTA's acceptance of advertising proposals from banks, most from small community banks that, while innocuous in verbiage, contained a legally-required non-discrimination notice and some depicted persons of color. CIR imputes from those notices that the banks are asserting a viewpoint on the issue of discriminatory lending (mortgage redlining) raised in the CIR ad proposal. SEPTA did not read such content into the proposals which appeared only to serve the promotional objective of generating business from persons who read the ad. It was reasonable for SEPTA to conclude that none of these ads were addressing the subject matter of the CIR ad proposal. *See Archdiocese of Wash. v. WMATA*, 281 F. Supp.3d 88, 94-95 (D.D.C. 2017)(debate about a product is irrelevant where an advertisement of the product does not take a position in the debate). There is no reason to believe the ads would have been

different whether a debate on discriminatory lending were taking place or not inasmuch as the notice is required by law. *See* 12 C.F.R. § 338.

34. The bank ads do not acknowledge any debate on discriminatory lending, they do not present any data, and they do not address the loan applications and dispositions by race, neighborhood or on any other basis. In fact, all of these ads look forward, not back. The ads are designed to foster future borrowing; they do not address past lending practices.

I. SEPTA Riders Are Not Exposed To The Same or Similar Content As The Challenged Standards Prohibit.

35. CIR contends that the Challenged Standards serve no purpose because passengers are not spared from being assailed by the same or similar content from newsfeeds on the buses and from exposure at SEPTA terminals.

36. The newsfeeds were not violative of the Challenged Standards because they did no more than project bare headlines across a small percentage of SEPTA's buses. There was no accompanying story or detail. CIR, itself, distinguishes "hard news" from political and issue advertising. *See* March 21, 2018 Baransky letter, Ex. 18.

37. The issue of newsfeeds is moot. SEPTA ordered they cease, inasmuch as SEPTA received no economic advantage from them and the intention was always to replace the feed with real-time transit information.

38. The doctrine of voluntary cessation provides guidance for determining mootness of challenged conduct, although the newsfeed itself is not challenged by CIR. Where there is no reason to think the defendant will revert to the discontinued conduct and the plaintiff suffers no lingering harm from it, claim or issue is deemed moot. *See AFDI v. MTA*, 815 F.3d 105, 110 (2d Cir. 2016) (change in advertising standards renders claim of rejected advertiser moot).

39. Neither is there merit to CIR's contention that the possible exposure of bus passengers to the media displays at SEPTA terminals is relevant to this Court's determination. The forum is only buses.

40. *NAACP v. City of Philadelphia*, 834 F.3d 435 (2016), to which CIR points, does not teach otherwise. In that case, the Court looked outside the forum only because "the City sought to justify its regulation of the advertising space by reference to its goals for the entire airport." *Id.* at 447. SEPTA, on the other hand, justified its amendment to its advertising standards on the need to avoid a repetition of its bus experience with AFDI. *See generally* Tr. 46:23-48:21 (Bennedetti testimony, including this exchange on p. 48 – "Was the intention to avoid a recurrence of those kinds of episodes part of the decision making process in amending the

old standards to create the new? A Absolutely, we didn't want to redo that.")

J. SEPTA's Standards Are Valid As Applied to CIR

41. SEPTA's rejection of the CIR advertising proposal was not a marginal case. Under any reasonable interpretation of 9.b.(iv)(a) or (b) the proposal was prohibited (CIR does not contend otherwise) and SEPTA was entitled to reject it.

CONCLUSION

For the above reasons and those set forth at trial and in all of SEPTA's pre-trial briefing, the Court should enter judgment for SEPTA.

Respectfully submitted,

Dated: October 15, 2018

/s/ Maryellen Madden

Maryellen Madden (Pa. ID No. 15855)
John J. Powell (Pa. ID No. 312589)
MONTGOMERY MCCRACKEN WALKER & RHOADS LLP
1735 Market Street
Philadelphia, Pennsylvania 19103
Tel: (215) 772-1500
Fax: (215) 731-3742
mmadden@mmwr.com
jpowell@mmwr.com

Attorneys for Southeastern Pennsylvania Transportation Authority

CERTIFICATE OF SERVICE

I certify that on October 15, 2018, true and correct copies of the foregoing document were served upon the individuals listed below via electronic mail:

John S. Stapleton, Esq.
Dylan J. Steinberg, Esq.
Rebecca S. Melley, Esq.
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER PC
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
jzs@hangley.com
djs@hangley.com
rls@hangley.com

Mary Catherine Roper, Esq.
Molly Tack-Hooper, Esq.
ACLU OF PENNSYLVANIA
PO Box 60173
Philadelphia, PA 19102
mroper@aclupa.org
mtack-hooper@aclupa.org

Brian Hauss, Esq.
Jacob Hutt, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York NY 10004
bhauss@aclu.org
jhutt@aclu.org

Attorneys for The Center for Investigative Reporting

/s/ John J. Powell
John J. Powell