No. 19-1170

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CENTER FOR INVESTIGATIVE REPORTING,

Appellant,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

***Appellee*.**

On Appeal from the United States District Court for the Eastern District of Pennsylvania,
No. 18-cv-1839

BRIEF OF APPELLANT AND JOINT APPENDIX VOLUME I

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant The Center for Investigative Reporting represents that it is an unincorporated entity that does not have any parent entities and does not issue stock.

/s/ Molly Tack-Hooper

Molly Tack-Hooper

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STATEMENT OF JURISDICTION

The Center for Investigative Reporting ("CIR") filed this federal civil rights suit against the Southeastern Pennsylvania Transportation Authority ("SEPTA") in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 1331 and § 1343. By Memorandum Opinion dated November 28, 2018, and Final Judgment and Decree dated December 20, 2018, the District Court entered partial judgment for CIR and partial judgment for SEPTA. CIR timely filed its Notice of Appeal on January 18, 2019. A1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves SEPTA's rejection of proposed advertisements promoting CIR's journalism about racial disparities in mortgage lending pursuant to two broad provisions of SEPTA's advertising restrictions banning advertisements that are "political in nature" (hereinafter the "political" provision) and advertisements "expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical, or social issues" (hereinafter, the "public debate" provision). The District Court held these provisions unconstitutional on their face, but *sua sponte* rewrote the restrictions and then upheld SEPTA's rejection of CIR's advertisements.

(1) After correctly concluding that SEPTA's "political" and "public debate" provisions were facially unconstitutional because they are incapable of reasoned application, did the District Court err by rewriting the restrictions—without curing their constitutional flaws—instead of invalidating them in their entirety?

Suggested answer: Yes.

The District Court ruled on this issue in its Memorandum Opinion at A67–70.

(2) After invalidating the only two provisions that SEPTA relied on to reject CIR's advertisements, did the District Court err by failing to order SEPTA to run CIR's proposed advertisements?

Suggested answer: Yes.

The District Court addressed this issue in its Final Judgment and Decree at A3–4 and its Memorandum Opinion at A71–97.

(3) Did the District Court err in deciding that SEPTA's advertising space is a nonpublic forum and not a designated public forum, and declining to apply strict scrutiny?

Suggested answer: Yes.

The District Court ruled on this issue in its Memorandum Opinion at A63–66.

(4) Did the District Court err in holding that SEPTA did not engage in viewpoint discrimination by allowing banks to advertise that they are equal opportunity mortgage lenders but prohibiting CIR's advertisements?

Suggested answer: Yes.

The District Court ruled on this issue in its Memorandum Opinion at A93–96.

STATEMENT OF THE CASE

I. INTRODUCTION

This case arises out of SEPTA's rejection of proposed advertisements by The Center for Investigative Reporting ("CIR"), the nation's oldest nonprofit investigative journalism organization, promoting CIR's reporting on its outlet Reveal about racial disparities in the home mortgage market, including in Philadelphia. SEPTA based the rejection on two capacious and elastic provisions of its advertising policy prohibiting:

> (a) Advertisements promoting or opposing a political party, or promoting or opposing the election of any candidate or group of candidates for federal, state, judicial or local government offices . . . . In addition, advertisements that are political in nature or contain political messages, including advertisements involving political or judicial figures and/or advertisements involving an issue that is political in nature in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity.

> (b) Advertisements expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical or social issues.

A635.[1]

When called upon to explain how these restrictions applied to other advertisements, including "Vote on Election Day," "Join the Military," "ACLU: Defending Freedom," "Don't Litter," or the text of the First Amendment, SEPTA's designee was unable to do so. A1105; A1110–12; A370–71.

SEPTA's designee described the process for determining whether a particular proposed advertisement violates these restrictions as involving "look[ing] at the ad," "just kind of absorb[ing] it," and "Googl[ing] various phrases" related to the advertisement to "see if there's a meaningful debate about the issue that the advertisement is promoting." A1104.

The District Court correctly determined that these two provisions were vague and not "capable of reasoned application" within the meaning of the recent Supreme Court decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1892 (2018), and invalidated them on their face. SEPTA has not cross-appealed this ruling.

[1] The second sentence of (a) shall be referred to herein as the "political" provision, and (b) shall be referred to as the "public debate" provision.

But the District Court then erred by *sua sponte* rewriting the restrictions without curing their constitutional flaws, upholding the constitutionality of the new restrictions, and upholding SEPTA's rejection of CIR's proposed advertisements, despite having invalidated the only bases for SEPTA's rejection of CIR's advertisements.

For the reasons below, the Court should reverse the District Court and remand the case with instructions to enter judgment for CIR alone and grant CIR all of the relief sought in the Complaint.

II. FACTS

A. The Center for Investigative Reporting

The Center for Investigative Reporting is the nation's oldest nonprofit investigative journalism organization. A10. Its mission statement stresses the importance of "the availability of credible information" and "verifiable, nonpartisan facts[.]" *Id.*; A587. CIR's reporting is published on its news website Reveal, as well as through its national radio show, podcast, video, and live events. *Id.*

On February 15, 2018, CIR published the results of a yearlong investigation into mortgage lending trends throughout the country. A11; A484; *see also* Aaron Glantz and Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, Reveal (Feb. 15, 2018),

https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/. Reveal employed a data team with extensive training in statistical analysis to analyze 31 million public records made available through the Home Mortgage Disclosure Act. A1168; A1186. Their analysis showed that people of color continue to be routinely denied conventional mortgage loans at rates far higher than their white counterparts in 61 cities across America, including Philadelphia. A11; A484. Reveal's analysis was confirmed by the Associated Press. A497; A1186.

CIR also used the information from this investigation to create a 10-panel comic strip entitled "A Stacked Deck," describing the data that Reveal had collected and analyzed. A11; A532; Gabriel Hongsdusit and Cristina Kim, *A Stacked Deck: A visual look at discriminatory lending in the U.S.*, Reveal (Feb. 21, 2018), https://www.revealnews.org/article/a-stacked-deck-a-visual-look-at-discriminatory-lending-in-the-u-s/.

B. Advertising on SEPTA

SEPTA operates the nation's sixth largest transit system by ridership, with 325 million annual riders. SEPTA is one of only two United States transit agencies that operate all five major types of transit vehicles: subway and elevated rail lines, commuter trains, light rail lines, electric trolleys, and buses. *See* A112; A137. It

serves Philadelphia, Delaware, Montgomery, Bucks, and Chester counties, with some train service to Wilmington, Delaware, and Trenton, New Jersey. A10.

To generate revenue, SEPTA leases advertising space on its more than 2,500 vehicles (including buses and trains) and in more than 200 stations and facilities. A1082–83; A631; A332. According to its own website, SEPTA provides "unique marketing opportunities" including "various ways for advertisers to effectively communicate with the approximately 1 million commuters that ride SEPTA each day." A631; *see also* A56.

SEPTA contracts with Intersection (formerly Titan Outdoor LLC) to sell advertising space on SEPTA's behalf. A1083. During the period in which SEPTA applied the restrictions at issue, SEPTA and Intersection accepted more than 2,700 advertisements and rejected approximately eleven proposals, including CIR's advertisements. A265.[2]

In addition to conventional print advertising spaces on the exterior and interior of SEPTA vehicles and in SEPTA stations, the available advertising spaces include digital displays on many SEPTA vehicles. A737; A1083–85; A1087; A338–41. These digital displays intersperse paid advertisements with transit route

[2] Although SEPTA represented that it had rejected 13 advertisements (A265; A814–17), SEPTA's designee clarified that two of the supposedly rejected advertisements may in fact have run: a "Safe Sleep" advertisement by the Philadelphia Department of Health and an anti-sex trafficking campaign. A820; A822; A1145; A1146; A353–54.

information and, until after trial, also displayed "infotainment" consisting of news headlines from the Associated Press and Reuters. A1086–87; A399. The news headlines could include anything that appears on the front page of a newspaper, including news about current events and political figures. A1086–87. The record contains photographs of the digital displays showing two representative headlines: "U.S. Navy now allowing ponytails and other hairstyles for women, reversing policy that long forbade them to let their hair down" and "First Lady [Melania Trump] mingles with spouses of U.S. allies during two-day NATO summit in Brussels." A740–41; A1087–88. The parties stipulated that SEPTA had control over whether any newsfeeds run in SEPTA's digital displays, that SEPTA had the ability to pre-approve news items and to remove specific news items from its digital displays, and that SEPTA never exercised its authority to preview content or to take down or refuse to run any particular news item. A265; *see also* A1078; A1163; A1086–87; A1090; A1113; A344. At trial, SEPTA conceded that running the newsfeeds in SEPTA's vehicles may be "incompatible with the forum being closed to political speech and speech on matters of public debate."[3] A345.

[3] The District Court's quotation of this trial testimony contains a typo, quoting SEPTA's designee as saying "compatible" instead of "incompatible." A22. The trial transcript accurately transcribes the testimony.

C. Rationale for SEPTA's Advertising Restrictions

The restrictions SEPTA invoked against CIR were not designed to raise revenue, and SEPTA never analyzed whether they would or did affect SEPTA's revenue or ridership. A1092; A1153–54; A333–34.

Rather, SEPTA adopted the 2015 Advertising Standards in response to a ruling in *AFDI v. SEPTA*, 92 F. Supp. 3d 314 (E.D. Pa. 2015). A13. That case involved SEPTA's rejection of an advertisement by the American Freedom Defense Initiative that said, "Islamic Jew-Hatred: It's in the Quran. . . End All Aid to Islamic Countries." *AFDI*, 92 F. Supp. 3d at 320. The district court ruled that SEPTA's advertising space was a designated public forum, and that its restrictions violated the First Amendment. *Id.* at 326–29. It ordered SEPTA to allow AFDI's advertisement to run on SEPTA buses. *Id*. at 331.

SEPTA's designee and General Counsel, Mr. Gino Benedetti, testified that running the AFDI advertisement prompted "outcry" and "concern" from the public, customers, and employees, and media inquiries. A1092; A311–12. He also testified that the AFDI advertisement was vandalized. A1118; A312.[4]

[4] The AFDI advertisement is the only advertisement SEPTA could identify as having been vandalized due to the advertisement's content, although SEPTA conceded that its vehicles are often vandalized with graffiti, including on advertisements. A1118–19; A361–62.

Rather than appealing the *AFDI* decision, SEPTA revised its advertising policy. SEPTA's 2015 Advertising Standards included new prefatory language stating SEPTA's intent to "maintain its advertising space strictly as a non-public forum." A634; *see also* A1090. They also contained new prohibitions on "political" advertisements and advertisements on "matters of public debate," which were not in SEPTA's previous rules. A635; A365–66. SEPTA's General Counsel testified that SEPTA hoped these edits would turn its advertising spaces into a nonpublic forum, subject to lesser judicial scrutiny, and that it could thereby avoid having to run other controversial advertisements like AFDI's that might prompt a negative response.[5]

D. SEPTA's Application of Its Advertising Rules

SEPTA applies the same advertising restrictions to all of its advertising spaces. A330. SEPTA's rules contain twenty-two provisions setting forth certain types of advertisements that are prohibited. A1135; A633–38. Any person or group may seek to advertise on SEPTA's advertising spaces, and SEPTA accepts both commercial and non-commercial advertisements, without distinguishing between them. A1083; A1135; A335.

[5] A1092; A109; A310–12; A333–34.

1. Interpretation of the "Political" Provision

SEPTA interprets the terms "political in nature," "political message," and "an issue that is political in nature" as having the same meaning. A1105. SEPTA's designee testified that these terms mean:

> Of politics. It could mean—it does mean anything that deals with things that are political in nature. . . . Anything that one party may support and another doesn't. I don't mean any political party, but I mean individuals or groups. You know, things that are subject to debate; elections of officials, those kinds of things . . . .

A1103–04. At trial, SEPTA's designee reiterated that an advertisement is "political in nature" if it "concerns or is about politics," but also testified that something could "involve politics" and not violate SEPTA's rules. A322; A325.

When asked where he gets his understanding of the term "political," SEPTA's designee responded, "I'm 56 years old. I've had some schooling. I've had some experience. Practiced law for a long time. Try to stay up to date on things, talking to other people, you know, seeing what they think, getting their opinions. Any number of those kinds of things." A1108. He testified that other SEPTA and Intersection employees would interpret the term "political" in light of their own common sense, backgrounds, training, and discussions. A1104; A355–56.

Subparagraph (a) as drafted by SEPTA specifies that "political" advertisements include—but are not limited to—advertisements that "directly or indirectly implicate[] the action, inaction, prospective action, or policies of a government entity." A635. SEPTA interprets this language as referring to advertisements advocating for a government entity to take some action or change its policy (or refrain from taking some action or changing its policy). A1106; A350; A353.

2. Interpretation of the "Public Debate" Provision

Subparagraph (b) also refers to "political … issues." SEPTA testified that this term has the same meaning as it does in the "political" provision. A1109.

It is far from clear how SEPTA determines whether an issue is an "economic, political, religious, historical or social issue." SEPTA's designee testified that a "social issue" is anything that "involves society or the people in society" or "impacts society at large." A1110. SEPTA's designee could not decide, however, whether every advertisement that expressed an opinion or viewpoint on a matter that involves society at large would violate subsection (b). A1110. He also could not provide any clarity about how SEPTA determines whether something is a "historical" issue, and testified that SEPTA did not interpret the "religious" provision to preclude religious entities from advertising. A1109–10; A1144.

Nor could SEPTA explain clearly when a topic counts as a "matter of public debate," testifying only that this refers to "something that's being debated about in the public arena," or "something that's sort of got society's attention." A1108; A356–57.

3. SEPTA's Review Process

SEPTA has never promulgated any written guidance to aid Intersection and SEPTA employees in interpreting and applying its advertising restrictions. A1095; A1104; A1107.

All proposed advertisements are reviewed by Intersection and at least one SEPTA employee. A1093–94. Advertisements that Intersection and the reviewing SEPTA employee believe fall in a "gray area" and may not comply with SEPTA's restrictions are elevated to SEPTA's General Counsel for further review. A1120. SEPTA's General Counsel is the final arbiter regarding whether an advertisement complies with SEPTA's advertising rules. A1098; A346.

As SEPTA's General Counsel explained his decision-making process:

> What I do, generally speaking, is I look at the ad first, and I just kind of absorb it, for lack of a better word. I think about it.
>
> And then I go on the internet and I Google various phrases about, you know, what the advertisement is projecting, what message it is, and I see what comes up, and I see if there's a meaningful debate about the issue that the advertisement is promoting.

A1104.

SEPTA's General Counsel testified that, in determining whether an advertisement complies with the "political" and "public debate" provisions, he also discusses this question with other SEPTA and Intersection employees and in-house and outside counsel and reviews case law. *E.g.*, A1104; A1110; A1124–25; A1148; A320; A335–36; A354.

SEPTA's General Counsel testified that he cannot tell whether any advertisement concept or specific advertisement violates the "political" or "public debate" provisions without first engaging in this process of research and discussion.[6] SEPTA could not say whether any hypothetical advertisements—including advertisements stating "Vote on Election Day," "Join the Military," "ACLU: Defending Freedom," "Don't Litter," or the text of the First Amendment—would violate the "political" or "public debate" provisions. A1105; A1110–12; A370–71.

4. Other Accepted and Rejected Ads

From the time that SEPTA implemented its 2015 Advertising Standards through the time of trial, Intersection accepted at least 2,736 unique proposals to advertise in SEPTA's advertising spaces. A265. These included:

- Numerous advertisements promoting government programs and policy—notwithstanding SEPTA's prohibition on any advertisement

[6] A1105–07; A1110.

"that directly or indirectly implicates the action, inaction, prospective action or policies of a government entity" (see A1137–38), including:

- a Philadelphia Department of Labor advertisement stating "Employee or Contractor," "Knowing the difference benefits you" (A799)
- a Montgomery County Health Department "Break Time for Nursing Mothers" advertisement (A801)
- a state-sponsored "Safe Return" advertisement, stating "Wanted by law enforcement?" "Surrender & receive favorable considerations." (A803)
- a Philadelphia Department of Health advertisement urging people to carry Naloxone (Narcan) to prevent opioid overdose (A806)
- an advertisement urging people to "join the millions" who signed up for health insurance through the Affordable Care Act at HealthCare.gov (A791)
- an advertisement urging people to "Learn What You're Made Of" by joining the National Guard (A973)

- A Facebook ad campaign warning against "Fake news" and "Clickbait" (A1161–62)

- An advertisement for the American Friends Service Committee describing AFSC's work as "Waging Peace: 100 Years of Action," asking "What will you do for peace?," and displaying quotes from civil rights leaders whom SEPTA described as "controversial" (A757; A1124)

- A series of ads for Fusion media with the phrase "As American As" and photographs of people of many races, ethnicities, and religions, challenging the viewer's pre-conceived notions of American-ness. For example, the series featured a young African-American child wearing a T-shirt that says "MY LIFE MATTERS", a split-screen image of a woman who appears to be Muslim and a soldier in fatigues, and a split-screen image of a Latina woman in boxing gear in front of an American flag on half the screen and draped in the Mexican flag on the other half. (A758–74; A1125)

- Ads welcoming members of the Democratic National Committee to the 2016 Democratic National Convention (A752–56; A1121–22)

- Numerous advertisements for financial institutions that included the message that they do not discriminate based on race, including in mortgage lending (*e.g.*, A776–82)

SEPTA rejected only a handful of advertisements—approximately eleven—under the 2015 Advertising Standards. The advertisements SEPTA rejected included:

- An advertisement calling on art museums to pay a living wage (A818)
- A Bethany Christian Services advertisement saying "unplanned pregnancy? NOW WHAT? Consider adoption as an option" (A819)
- An advertisement calling on "big tobacco" to stop advertising to children (A823)
- A health department advertisement urging Philadelphians to wear condoms to stop the spread of the Zika virus (A827)—notwithstanding SEPTA's acceptance of a similar health department advertisement advocating measles vaccination (A792)
- A series of proposed advertisements by Planned Parenthood stating "Everybody deserves expert care," "Talk to the Birth Control Experts," or "Ask the Women's Health Experts – Birth Control at Planned Parenthood" (A831–34)—notwithstanding SEPTA's acceptance of other women's health care advertisements (*e.g.*, A874)
- An advertisement designed to get SEPTA riders to pray for a sick child, stating "Fight for Bean, #STORMTHEHEAVENS" (A839–41)—notwithstanding SEPTA's acceptance of myriad advertisements promoting medicine (*see* A873)
- An advertisement for XQ The Super School Project, stating "Education Isn't a Problem. It's a Solution." (A842)—notwithstanding SEPTA's acceptance of similar education-related advertisements (*e.g.*, A875–82)

- An advertisement for the Housing Equality Center, advising that "Housing Discrimination Is Illegal" (A843–48)—notwithstanding SEPTA's acceptance of a similar advertisement about tenants' legal rights, advising that landlords are required to "ensure your home is safe" (A793)

SEPTA also ordered Intersection to remove two advertisements it had accepted after SEPTA's General Counsel saw them while riding on SEPTA and determined that they violated the "public debate" provision. A265. One advertisement for the Philadelphia Water Department and Delaware Estuary featured students' drawings and said "Philadelphia Students Support Cleaner Water!" *See* A811. Another advertised opportunities to be paid to become a sperm donor. *See* A835.

E. SEPTA's Rejection of CIR's Proposed Advertisements

In January 2018, CIR emailed Intersection to inquire about displaying advertisements based on the "A Stacked Deck" comic on the interior of SEPTA buses. A11; A574. CIR's email included a link to "A Stacked Deck" to demonstrate the advertising concept. A1174.

Intersection informed CIR that SEPTA would not accept CIR's proposed advertisements because, according to SEPTA's legal department, "[d]isparate lending is a matter of public debate and litigation." A576; A744; A13. During an exchange of letters between CIR and SEPTA (*see* A609–23), SEPTA reiterated its position that CIR's proposal was prohibited by SEPTA's restrictions because it "takes a position on issues that are matters of political, economic, and social

debate" and "indirectly implicates the action, inaction, prospective action or policies of a government entity." A622. SEPTA stated that it was rejecting CIR's advertisements pursuant to subparagraphs (a) and (b) of the 2015 Advertising Standards. *Id.*

SEPTA's General Counsel testified that, in deciding to reject CIR's proposed advertisements, he thought about the AFDI advertisement, and was concerned that the public might find CIR's advertisements controversial or offensive. A1100–01. During his deliberation, he reviewed the Reveal website, read a document explaining CIR's research underlying its reporting, read an article by the American Bankers Association questioning CIR's reporting, and read web search results indicating that there was some litigation against financial institutions for discriminatory lending practices. A1114; *see also* A1081–82. SEPTA decided that CIR was taking a side on a matter of public debate because the American Bankers Association had criticized CIR's methodology and conclusions. A1115; A1119.

During litigation, SEPTA's General Counsel also testified that aspects of the illustrations in two panels of CIR's proposed ad were of "particular concern." A14; A1117–18. CIR drafted an additional set of proposed advertisements that removed the design elements SEPTA objected to:

Reveal
from The Center for Investigative Reporting

A STACKED DECK

with Al Letson

People of color have struggled for equal access to loans for decades.

Today in America, people of color are regularly being

DENIED

the dream of home ownership

Reveal from The Center for Investigative Reporting analyzed **31 MILLION** mortgage records and found **61** U.S. metro areas where people of color are far more likely to be turned down than whites when applying for a conventional home loan.

IN PHILADELPHIA

BLACK applicants are **2.7x** as likely to be denied a conventional mortgage compared to white applicants.

WHITES received **10x** as many conventional mortgage loans in 2015 and 2016.

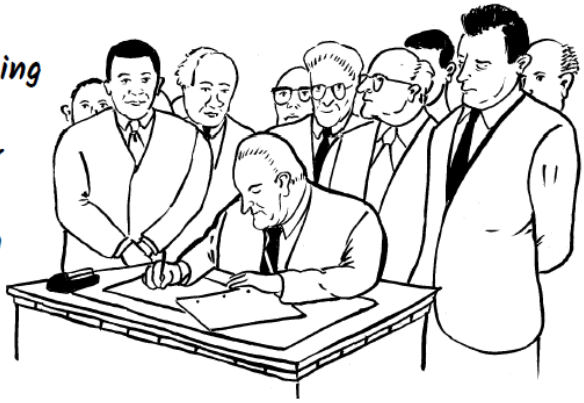
Want to find out if there are lending disparities in your neighborhood and get more updates? Text "LOAN" to Reveal and its partners at 202-873-8325.

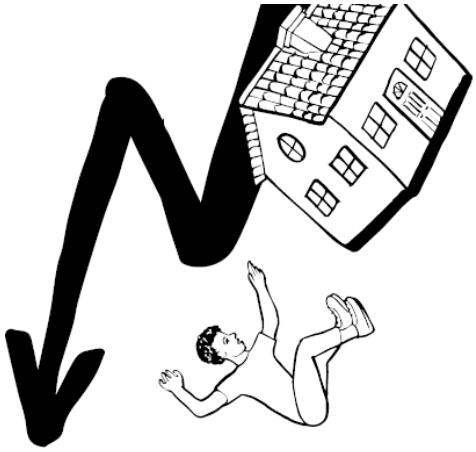
(Text STOP or HELP to end or get assistance. Standard rates apply.)

This is just the latest in the United States' SORDID HISTORY of unequal access to owning a home.

In the 1930s, the federal government actually made housing discrimination a state-sponsored enterprise by drawing up maps that strangled investment in areas where immigrants and African Americans lived. This practice is called redlining.

The 1968 Fair Housing Act made redlining illegal, but discriminatory practices continued through predatory lending or "reverse redlining." Lenders flooded communities of color with inferior loan products AND limited access to conventional lines of credit.





Aimed at borrowers who lenders perceive as risky, subprime loans have higher interest rates and are more costly in the long run.

Unsurprisingly, when the subprime mortgage crisis crippled the economy in 2007, people of color were disproportionately affected by the fallout.

A913–35. SEPTA rejected the revised advertisements as being "barred by the same advertising standards as the first." A14; ECF 32, Exh. A, at 1.

SEPTA disclaimed any basis for rejecting CIR's proposed advertisements other than the "political" and "public debate" provisions of the 2015 Advertising Standards. A646–48; A1099; A1103.

III. PROCEDURAL HISTORY

CIR filed suit against SEPTA asserting a single count for violation of CIR's First Amendment rights. A117–18. The Complaint sought a declaration that SEPTA's rejection of CIR's proposed advertisements for its reporting violated the First Amendment, an injunction requiring SEPTA to accept CIR's advertisements, an injunction prohibiting SEPTA from enforcing the "political" and "public debate" provisions of its rules, and reasonable attorneys' fees and costs. A118.

After a limited discovery period, CIR moved for a preliminary injunction to enjoin SEPTA from continuing to exclude CIR's proposed advertisements. At oral

argument, CIR clarified that it was not challenging the first sentence of subsection (a) because discovery had revealed that SEPTA did not rely upon that specific sentence to reject CIR's advertisements. A167–69; A171–72; A214.

Six days before trial, the District Court denied the motion for preliminary injunction without prejudice. A262; A263. The District Court noted in denying the motion that "SEPTA's purposes for and administration of its amended standards deserve, or require, additional explanation." A250. The Court added that "the reasoning SEPTA employed to reject CIR's advertisement and the process it employs generally to accept or reject advertisements remain unclear," and that, in particular, "it remains unclear whether SEPTA's policy is in fact targeted toward controversial speech and, if not, how SEPTA could explain the difference between controversial speech and matters of public debate." A251–52. The Court concluded:

> In light of the record evidence, in particular the lack of clarity surrounding SEPTA's reasons for and procedures in implementing the 2015 Advertising Standards, we are unable to make a determination about whether SEPTA can meet its burden. . . . Without more evidence, we cannot say whether SEPTA's 2015 Advertising Standards are reasonable, and thus cannot say whether CIR has shown a likelihood of success on the merits.

A259–60.

At trial, the parties presented live testimony from SEPTA's General Counsel, as well as exhibits (including full copies of all deposition transcripts) and stipulated facts. After trial, the parties submitted proposed findings of fact and conclusions of law and the Court held oral argument.

The District Court issued the Memorandum Opinion at issue in this appeal on November 28, 2018. A6.

The District Court held that the relevant forum was the advertising space on the inside of SEPTA's buses. *See* A10; A58. It concluded that this was a nonpublic forum because SEPTA's rules stated, and SEPTA's General Counsel testified, that SEPTA intended to close the forum and because SEPTA has an advertising review process. A63–66.

In a section of the opinion entitled "Language That Must be Stricken as Incapable of Reasoned Application," the Court held that the "political" and "public debate" provisions as written were facially unreasonable and held that, "in light of *Mansky*, SEPTA has not met its burden of justifying the continuation of the entirety of its advertising restrictions." A68–69. The Court directed SEPTA to revise the "political" and "public debate" provisions as follows:

> (a) Advertisements promoting or opposing a political party, or promoting or opposing the election of any candidate or group of candidates for federal, state, judicial or local government offices are prohibited. In addition, advertisements that ~~are political in nature or~~ contain political messages, including advertisements

> involving political or judicial figures ~~and/or advertisements involving an issue that is political in nature in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity~~.
>
> (b) Advertisements expressing or advocating an opinion, position or viewpoint on ~~matters of public debate about~~ economic, political, religious, historical, or social issues.

A69. Notably, while the Court invalidated the language in subsection (a) prohibiting advertisements that are "political in nature," it did not invalidate the language in (a) prohibiting "political messages" nor the language in (b) prohibiting "political" issues. The District Court described the rewritten restrictions as "effectively permitting advertisements that are commercial or that promote public services, but rejecting ads on political, economic, historical, religious, or social issues," although the revisions contain no requirement that advertisements be either "commercial" or "promoting public services." A97; A3.[7]

The Court stated that, in light of its order to revise the rules, it did not need to reach CIR's argument that the provisions as drafted by SEPTA were facially viewpoint discriminatory. A88. The Court noted that CIR had not had an opportunity to address whether the new restrictions as revised by the Court were

[7] The Court also directed SEPTA to implement "a formalized meet-and-confer program" and to post its advertising rules on SEPTA's website. A70.

viewpoint discriminatory, but nonetheless went on to hold that they were not. A87–90.

The Court also analyzed the reasonableness of the new rules written by the Court—although the parties had not briefed the issue—in a section entitled "CIR's Facial Attack on the Restrictions (as to be Amended)." A72–84. The Court determined that the purpose of SEPTA's advertising space was to "raise revenue" without jeopardizing the "safety, efficiency, and comfort" of its customers. A82. The Court emphasized the evidence in the record that SEPTA was inconvenienced by the reaction of some of its customers and employees to AFDI's advertisement, and concluded that the new restrictions were reasonable "[i]n light of the 'captive' nature of passengers on a public bus and the narrow body of First Amendment jurisprudence specific to transit authorities[.]" A83–84.

Finally, the Court rejected CIR's argument that SEPTA had applied its rules in a viewpoint discriminatory way by permitting mortgage lenders to advertise that they were equal opportunity lenders while prohibiting CIR from advertising that there were racial disparities in the home mortgage market. A89–90. The Court held that the banks advertisements' inclusion of an "equal opportunity lender" logotype did not mean that the advertisements expressed a viewpoint on discriminatory lending because they were "commercial." A93; *see also* A89; A90; A94.

After reviewing proposed judgments from the parties,[8] on December 20, 2018, the Court entered a Final Judgment and Decree granting judgment for CIR in part and for SEPTA in part on CIR's "facial" challenge to the "political" and "public debate" provisions, and entering judgment for SEPTA on CIR's "as-applied" challenge. A4. The Court declared that portions of SEPTA's restrictions "must be stricken to nullify the threat of unfettered discretion on the part of SEPTA," and ordered SEPTA to adopt the Court's revised rules. *Id.*

The Court did not order SEPTA to accept CIR's proposed advertisements. Instead, the Final Judgment and Decree stated that SEPTA "acted reasonably" in rejecting CIR's advertisements. A3. It is not clear whether the Court ruled that SEPTA acted constitutionally when it rejected CIR's advertisements under the facially unconstitutional rules drafted by SEPTA or that SEPTA could constitutionally apply the revised restrictions to exclude CIR's advertisements.

SUMMARY OF ARGUMENT

The District Court correctly determined that the "political" and "public debate" provisions of SEPTA's 2015 Advertising Standards were vague and not "capable of reasoned application," and thus unconstitutional even in a nonpublic forum. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018). SEPTA

[8] A455–62.

did not cross-appeal the District Court's invalidation of the "political" and "public debate" provisions, so this ruling is final and not subject to this appeal.

Having concluded that the provisions SEPTA applied to exclude CIR's advertisements were facially unconstitutional, the District Court should have ordered SEPTA to accept CIR's advertisements, and entered judgment for CIR only. Instead, the District Court rewrote SEPTA's rules, and went on to conclude that the new restrictions drafted by the Court were viewpoint neutral and reasonable in light of the purpose of the forum, and that it was "reasonable" for SEPTA to reject CIR's advertisements. The District Court exceeded its authority and erred by rewriting SEPTA's rules and upholding the rejection of CIR's advertisements. Furthermore, the Court's redrafting failed to cure the constitutional flaws with the provisions.

Because the "political" and "public debate" provisions are "not capable of reasoned application" and thus unreasonable, they are unconstitutional no matter how the Court characterizes the forum. But the District Court nonetheless ruled—incorrectly—that the relevant forum was the advertising space inside SEPTA buses, which was a nonpublic forum. Although the Court need not undertake a forum analysis to resolve this appeal, if it chooses to do so, it should reject the District Court's analysis and conclusions. The relevant forum is all of SEPTA's advertising space, and it remains a designated public forum, as this Court ruled in

Christ's Bride Ministries v. SEPTA, 148 F.3d 242 (3d Cir. 1998). SEPTA cannot justify its advertising standards under the strict scrutiny that applies to content-based restrictions on speech in a designated public forum, and made no meaningful effort to carry this burden in the District Court.

Finally, the District Court erred by rejecting CIR's argument that, even if the "political" and "public debate" provisions were facially constitutional, SEPTA nonetheless must accept CIR's proposed advertisements because it has accepted bank advertisements expressing that they do not discriminate based on race in making loans. The Court's "commercial speech" exception to viewpoint discrimination has no basis in the record or First Amendment law.

The Court should reverse the portion of the District Court's Order entering partial judgment for SEPTA. The Court should direct the District Court to enter judgment for CIR alone and grant CIR all of the relief sought in the Complaint.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews determinations of law by the District Court, and mixed questions of law and fact, *de novo*. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Although appellate courts normally review factual findings for clear error, because this is a First Amendment case, the Court has a

constitutional duty to conduct a "searching" and "independent" factual review of the record. *Fulton v. City of Philadelphia*, --- F.3d ----, 2019 U.S. App. LEXIS 11711, *21–22 (3d Cir. Apr. 22, 2019); *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008) (citing *Bose*, 466 U.S. at 499; *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001)). In addition, the Court must draw its own inferences from the factual evidence presented. *Christ's Bride Ministries*, 148 F.3d at 247.

II. FORUM ANALYSIS STANDARDS

The government bears the burden of justifying its restrictions on speech. *NAACP v. City of Philadelphia*, 834 F.3d 435, 443 (3d Cir. 2016) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). When the government opens its property for expressive purposes, the amount of flexibility the government has to enact content-based restrictions on speech on that property depends on whether the property at issue is a "traditional public forum" (such as sidewalks and parks), a "designated public forum," or a "nonpublic" forum (also known as a "limited public forum").[9] *E.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 295–96 (3d Cir. 2011).

[9] The meaning of the phrase "limited public forum" has evolved significantly. In some older cases, "limited public forums" were treated like "designated public forums." *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 427 (1992); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 796, 800–04 (1985). The modern practice, however, has been to use "limited public forum" as synonymous with "nonpublic forum." *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011)

In order to justify a content-based restriction on speech in a traditional or designated public forum, the government must satisfy "strict scrutiny" by showing that the restrictions are "narrowly tailored" to a "compelling governmental interest." *E.g.*, *id.* at 295 (citation omitted).

In a nonpublic forum, government restrictions on speech must be "reasonable" and viewpoint neutral. *E.g.*, *Mansky*, 138 S. Ct. at 1885; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A content-based restriction on speech is not "reasonable" if it is not designed to preserve the forum for its intended purpose. *NAACP*, 834 F.3d at 445. A restriction on speech is also not "reasonable" if it is not "capable of reasoned application," meaning that it is so vague that it vests officials with unbridled discretion to censor speech. *Mansky*, 138 S. Ct. at 1891. A restriction on speech is not viewpoint neutral if it allows only some views on particular topics. *Pittsburgh League of Young Voters*, 653 F.3d at 296, 298–99. Excluding speakers because some may take issue with their viewpoint is another form of viewpoint discrimination. *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (citing *Cornelius*, 473 U.S. at 812).

(citations omitted). CIR has followed the modern convention throughout this litigation, using "limited public forum" and "nonpublic forum" interchangeably.

The Court need not decide whether government property is a designated public forum or a nonpublic forum if the regulation of speech at issue would be unconstitutional in any forum. *NAACP*, 834 F.3d at 442; *Pittsburgh League of Young Voters*, 653 F.3d at 296.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE "POLITICAL" AND "PUBLIC DEBATE" PROVISIONS ARE FACIALLY UNCONSTITUTIONAL.

The District Court erred in its ultimate decision to enter partial judgment for SEPTA, but correctly found that SEPTA's advertising restrictions were incapable of reasoned application, and thus facially unconstitutional. A68–70. In light of the Court's facial invalidation of the provisions, the Court did not reach CIR's arguments that these provisions (as drafted by SEPTA) were also facially viewpoint discriminatory and unreasonable in light of the purpose of the forum.

In order to contextualize the District Court's errors in rewriting SEPTA's restrictions and in upholding SEPTA's rejection of CIR's advertisements, CIR briefly reviews the basis for the District Court's conclusion that the "political" and "public debate" provisions as drafted by SEPTA were unreasonable.

A. Reasonableness After *Mansky*

The "reasonableness" standard in First Amendment jurisprudence involves a "more exacting review" of the government's justification for its actions than the rational basis review of economic regulations applied in equal protection or

substantive due process challenges. *NAACP*, 834 F.3d at 443; *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 966–67 (9th Cir. 2002) (reasonableness requires "more of a showing" than rational basis review), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Multimedia Pub. Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993) (under reasonableness review, it is not enough to show that the regulation of speech is rationally related to a legitimate governmental objective).

For a content-based restriction on speech in a nonpublic forum to be "reasonable," it must be "designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004) (quoting *Rosenberger*, 515 U.S. at 829). To assess whether the government has met its burden of justifying its restrictions, the court must identify the forum at issue, determine the purpose to which the government has devoted the forum, and analyze whether the record evidence or commonsense inferences therefrom "provide a way of tying the limitation on speech to the forum's purpose." *NAACP*, 834 F.3d at 441–42, 445.

In *Minnesota Voters Alliance v. Mansky*, the Supreme Court held that a restriction on wearing "political" apparel in a polling place on Election Day—a

nonpublic forum—was not "reasonable" because it was so vague as to be not "capable of reasoned application." 138 S. Ct. at 1886, 1892.

Courts have long held that vague rules vesting official decisionmakers with unbridled discretion over opportunities to speak are anathema to First Amendment principles.[10] The Supreme Court has thus struck down government restrictions on speech the application of which involves "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); *Se. Promotions, Ltd.*, 420 U.S. at 553). *Mansky* made clear that vagueness should be part of the analysis of whether a prohibition on speech in a nonpublic forum is "reasonable." *Mansky*, 138 S. Ct. at 1886, 1892. The Court

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[10] *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 537–38 (1981) (Brennan, J., concurring) (observing that "[a]ccording such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases") (collecting cases); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) (noting that the Supreme Court has consistently struck down rules that give government officials "unbridled discretion" to censor speech because "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use"); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (indeterminate, content-based regulation of speech "'may authorize and even encourage arbitrary and discriminatory enforcement' by failing to 'establish minimal guidelines to govern . . . enforcement'" (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983))).

explained that the government "must draw a reasonable line," and that a rule is unreasonable if it fails to "articulate some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. Although application of virtually any rule requires some degree of interpretation and discretion, "that discretion must be guided by objective, workable standards. Without them, an [official's] own politics may shape his views" as to what is prohibited. *Id*. at 1891.

As the Supreme Court cautioned in *Mansky*, vague prohibitions on speech pose a risk of viewpoint discrimination. "It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'" *Id*. at 1891 (quoting *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)).

In determining that Minnesota's polling apparel statute conferred too much discretion on officials, the *Mansky* Court looked to the text of the statute, additional written guidance that the government promulgated in an effort to help officials interpret the statute, and the government attorneys' answers to hypothetical questions during oral argument about the meaning of the statute. *Id.* at 1889–91. Another court has observed that evidence about how a provision has been applied is also relevant to whether the provision is capable of reasoned application under *Mansky*. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 373 (D.C. Cir. 2018).

B. The "Political" and "Public Debate" Provisions Are Incapable of Reasoned Application.

The "political" and "public debate" provisions of SEPTA's rules are not "capable of reasoned application" within the meaning of *Mansky*. Thus, the District Court correctly concluded that they are facially "unreasonable" and unconstitutional. The language of the "political" and "public debate" provisions is strikingly similar to the statute and guidance struck down in *Mansky*.

The *Mansky* Court analyzed various definitions of the term "political," determining which definitions were sufficiently clear to survive constitutional scrutiny and which were not. *Mansky*, 138 S. Ct. at 1876. The Court held that definitions of "political" that were tied to electoral campaign speech were "clear enough,"[11] but that neither the dictionary definitions of "political" nor the other examples of "political" content offered by the government provided officials with enough guidance as to what was acceptable and what was prohibited. *Id.* at 1884–85, 1888–91. The Court determined that the following definitions of "political" were too vague, not capable of reasoned application, and vested unbridled discretion in the government:

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[11] These included "[a]ny item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties," *id.* at 1884 (quoting Minnesota official policy); "[a]ny item including the name of a candidate at any election," *id.*; and "[a]ny item in support of or opposition to a ballot question at any election," *id.*

- The statutory language: "[P]olitical badge, political button, or other political insignia," *id.* at 1883 (quoting Minn. Stat. § 211B.11(1) (2017)).

- The Webster's dictionary definition of "political": "[A]nything 'of or relating to government, a government, or the conduct of governmental affairs,'" *id.* at 1888 (quoting Webster's Third New International Dictionary 1755 (2002)).

- The American Heritage Dictionary definition of "political": "[A]nything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,'" *id.* (quoting American Heritage Dictionary 1401 (3d ed. 1996)).

- The government's written guidance explaining what the statute prohibited:

  - "Issue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons)," *id.* at 1884 (quoting Minnesota official policy).

  - "Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)," *id.*

The second sentence of SEPTA's subsection (a) is no clearer than the dictionary definitions of the word "political" that the Court deemed too "expansive" in *Mansky*. *See* A635. The challenged portion of the "political" provision uses the undefined phrases "political messages" and "political in nature." SEPTA's designee testified that "political," "political messages," and "political in nature" all mean the same thing, and defined them as something that "concerns or is about politics." A1105; A322.

And SEPTA's ban on "matters of public debate" likewise uses the undefined term "political." Perhaps more significantly, it is also cognate with—but even broader and even more amorphous than—Minnesota's prohibition on "[i]ssue-oriented material." Whereas the statute struck down in *Mansky* dealt only with political issues, SEPTA's subsection (b) extends to "matters of public debate about economic, political, religious, historical or social issues." A635. As in *Mansky*, SEPTA's designated witness could not provide any clarity about what qualifies as an "issue," nor could he explain when a topic rises to the level of being a "matter of public debate." *See* A1108; A1110; A356–57.[12]

SEPTA's "public debate" provision also tracks prohibitions on "controversial" advertisements that courts have likewise struck down as unconstitutionally vague. The Sixth Circuit struck down a prohibition on "controversial public issues," reasoning that what constituted a "controversial public issue" was inherently subjective. *AFDI v. SMART*, 698 F.3d 885, 893 (6th

[12] The requirement in subsection (b) that the advertisement express a "viewpoint" does not help to narrow or define the "public debate" provision. The Third Circuit, in striking down a restriction on "all speech that promotes any point of view, whether 'religious, commercial or secular,'" observed that "[a]ll community-group speech promotes a point of view. All of the specifically approved groups, including such familiar and well-regarded groups as the PTA and the 4-H Club, have a point of view. Thus, this criterion is devoid of meaning." *Child Evangelism Fellowship*, 386 F.3d at 528. Indeed, SEPTA conceded that every possible viewpoint one could hold is debated by someone, and that every advertisement offers a viewpoint. A1110.

Cir. 2012). The Sixth Circuit "found unbridled discretion had been vested in the decisionmakers because there was no articulated definitive standard to determine what was 'controversial.' This discretion allowed for the arbitrary rejection of advertisements based on viewpoint." 698 F.3d at 894 (discussing *United Food & Comm'l Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 352 (6th Cir. 1998)); *see also United Food & Comm'l Workers*, 163 F.3d at 359 ("We have no doubt that standing alone, the term 'controversial' vests the decision-maker with an impermissible degree of discretion.").

The result of all of this ambiguity is that the practical application of the "political" and "public debate" provisions "poses riddles that even the State's top lawyers struggle to solve." *Mansky*, 138 S. Ct. at 1891. SEPTA simply could not say whether these provisions would apply to any hypothetical advertisement, no matter how simple the message. *See, e.g.*, A1105–07; A1110–12; A1123; A370–71; A383. Rather, SEPTA's designee testified that he made these determinations subjectively based on his own personal experience and an amorphous Internet research process involving "absorb[ing]" and "Googl[ing]" the advertisement. A1104.

Without a clear statement of what is prohibited, as in *Mansky*, how an official applies the "political" and "public debate" provisions "may turn in significant part on the background knowledge and media consumption of the

particular [person] applying it." *Mansky*, 138 S. Ct. at 1890; A1104; A1108; A355–56. In order to apply the "political" or "public debate" prohibitions, a person would have to keep a mental index of everything any government could regulate as well as all economic, political, religious, historical, and social issues that have been discussed publicly. *See Planned Parenthood Ass'n v. Chicago Transit Authority*, 767 F.2d 1225, 1230 (7th Cir. 1985) (describing as "whimsical" the CTA's process of determining which advertisements constitute "controversial public-issue advertising" and ruling that CTA violated the First Amendment by rejecting Planned Parenthood's advertisement on this basis).

SEPTA has not cross-appealed the portions of the Memorandum Opinion and Final Decree and Judgment holding the "political" and "public debate" provisions "not capable of reasoned application" and facially unconstitutional, nor has it appealed the Court's entry of partial judgment for CIR. Accordingly, these rulings are final and unreviewable. *E.g.*, *Lamberson v. Pennsylvania*, 561 F. App'x 201, 205 n.9 (3d Cir. 2014) (declining to consider defendant-appellee's arguments that the district court erred because it had not filed a cross-appeal, and "[i]t is axiomatic that any party contesting an unfavorable order or judgment below must file an appeal" (citing *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1048 (3d Cir. 1993))); *David v. City of Scranton*, 633 F.2d 676, 677 n.1 (3d Cir. 1980) (holding that defendant-appellee's argument that the judgment below

incorrectly awarded attorneys' fees to the plaintiff-appellant is "foreclosed by the failure to cross-appeal").

C. SEPTA's "Political" and "Public Debate" Provisions Are Also Facially Viewpoint Discriminatory.

Although the Court did not reach this issue, the Court's facial invalidation of the "political" and "public debate" provisions drafted by SEPTA was correct for the additional reason that these provisions are facially viewpoint discriminatory.

The portion of the "political" provision prohibiting advertisements that "directly or indirectly implicate[] the action, inaction, prospective action or policies of a government entity" as interpreted by SEPTA is viewpoint discriminatory. SEPTA reads this language as allowing advertisements promoting government policies, but prohibiting advertisements that seek any changes to government policies. A1106; A350; A353. It is a form of viewpoint discrimination to allow advertisements promoting government actions and policies, while banning advertisements opposing those government actions and policies. The Supreme Court has held that it is viewpoint discrimination to prohibit speech because it is critical or "disparaging." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). This is equally true when the object of the prohibited disparagement is the government. *See, e.g., id.* at 1766 (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 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.").

The "public debate" provision is also viewpoint discriminatory. Speech "expressing or advocating an opinion, position or viewpoint on matters of public debate" is simply another way of describing speech that is controversial; "controversy" literally means "a matter of public debate." *See* A1005 (Dictionary.com definition of "controversy" as a "prolonged *public* dispute, *debate*, or contention; disputation concerning a matter of opinion") (emphasis added). As the Third Circuit has explained, speech "is controversial or divisive because some take issue with its viewpoint," and censoring speech because some people may take issue with the viewpoint is viewpoint discrimination. *Child Evangelism Fellowship*, 386 F.3d at 527; *see also United Food & Comm'l Workers*, 163 F.3d at 361 ("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 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.").

This problem is hardly academic. SEPTA's designee testified that he determined that CIR's reporting was a "matter of public debate" because his

internet research revealed that it had been criticized by the banking industry. A1115; A1119.

IV. AFTER HOLDING THAT THE RESTRICTIONS SEPTA APPLIED TO EXCLUDE CIR'S ADVERTISEMENTS ARE UNCONSTITUTIONAL, THE COURT SHOULD HAVE ENTERED JUDGMENT FOR CIR ONLY.

After concluding that the provisions that SEPTA applied to exclude CIR's proposed advertisements were "incapable of reasoned application" and thus facially invalid, the Court should have entered judgment for CIR alone and granted CIR all of the relief specified in the Complaint.[13] Although the Court effectively enjoined SEPTA from enforcing the "political" and "public debate" provisions as drafted by SEPTA, the Court erred by rewriting SEPTA's restrictions and holding that SEPTA's rejection of CIR's advertisements was "reasonable."

It is not entirely clear whether the Court held that the newly rewritten restrictions could be constitutionally applied to exclude CIR's advertisements or that SEPTA had reasonably applied the unconstitutional old rules to exclude CIR's advertisements. *Compare* A71; A84; A97 (explicitly analyzing the reasonableness of the amended rules), *with* A3 (stating that SEPTA acted reasonably in rejecting

[13] Specifically, the District Court should have declared that SEPTA's rejection of CIR's advertisements violated the First Amendment, entered an injunction requiring SEPTA to accept CIR's proposed advertisements for its reporting on racial disparities in mortgage lending and prohibiting SEPTA from enforcing the "political" and "public debate" provisions, and awarded attorneys' fees and costs. *See* A118.

CIR's advertisements). As explained below, either conclusion constitutes legal error.

A. SEPTA Did Not Act "Reasonably" In Excluding CIR's Advertisements Pursuant to Provisions That Are "Incapable of Reasoned Application."

To the extent that the District Court concluded that SEPTA acted reasonably when it rejected CIR's proposed advertisements pursuant to the "political" and "public debate" provisions of SEPTA's rules, this is logically inconsistent with the Court's holding that these provisions are facially unreasonable. Since the only restrictions that SEPTA invoked as a basis for excluding CIR's advertisements are not "capable of reasoned application," it necessarily follows that SEPTA could not have reasonably applied those restrictions in rejecting CIR's advertisements.

In *Mansky*, after concluding that the Minnesota statute prohibiting "political" apparel in polling places on Election Day was "incapable of reasoned application," the Court struck it down. *See Mansky*, 138 S. Ct. at 1893 (Sotomayor, J., dissenting) (describing the majority's ruling as "declar[ing] Minnesota's political apparel ban unconstitutional on its face"). The Court did not separately look at the plaintiff's speech and determine whether, notwithstanding the statute's facial invalidity, the statute was clear in its application to the plaintiff's particular speech such that the government could reasonably prohibit the plaintiff's particular speech.

In fact, there was no question that the statute prohibited the plaintiff's speech because Minnesota had issued guidance explicitly stating that the statute prohibited the "Please I.D. Me" button worn by the plaintiffs. *Mansky*, 138 S. Ct. at 1884. And the Court observed in a footnote that, although the state could conceivably ban speech like the "Please I.D. Me" buttons through a properly drafted statute targeted at speech intended to mislead voters, the state's prohibition on "political" apparel as written was not so narrowly targeted and was unconstitutional. *Id.* at 1889 & n.4. Because the statute that Minnesota had applied to exclude the buttons was vague and the state's guidance did not provide enough clarity about its application generally, the Court struck down the entire statutory provision on its face and reversed the entry of summary judgment for the government. *Id.* at 1892.

Likewise, the District Court here should have entered judgment for CIR rather than considering whether some other prohibition could be created to constitutionally exclude CIR's advertisements.

B. The District Court Erred By Rewriting SEPTA's Restrictions.

In addition, the District Court should not have rewritten SEPTA's unconstitutional rules. Courts have no warrant to undertake the business of legislative drafting. *E.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.") (citation omitted); *United States v. Stevens*, 559 U.S. 460,

481 (courts should not "rewrite" a law "to conform it to constitutional requirements") (citations omitted); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (acknowledging courts' "obligation to avoid judicial legislation" and declining to "redraft" a provision). This principle applies with equal force to government policies restricting speech. *E.g.*, *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002); *see also United Food & Comm'l Workers*, 163 F.3d at 362–63. In analyzing whether a restriction on speech violates the First Amendment, courts may construe the policy language narrowly, if possible, to avoid constitutional problems, but they cannot "rewrite a . . . law to conform it to constitutional requirements." *Sypniewski*, 307 F.3d at 259 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997)); *see also United Food & Comm'l Workers*, 163 F.3d at 362–63 (Courts may not "rewrite the guidelines to cure their substantial infirmities.").

If the provision at issue is unconstitutional, the district court's power is limited to enjoining the enforcement of the provision; it does not encompass the power to direct the government to adopt new language drafted by the court that the court advises would be constitutional. To help the government achieve its policy interests in a constitutional manner, the tool available to courts is the option to write opinions explaining First Amendment principles in a helpful way that can

inform government decision-making. *See, e.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 299 (3d Cir. 2011) (holding that the government violated the First Amendment by rejecting the plaintiff's advertisement, but observing that, "[i]f 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").

Moreover, in order to analyze the constitutionality of a restriction on speech, it is necessary to know the government's purpose in enacting it. But the record is clear that SEPTA never intended to limit the universe of acceptable advertisements to only "commercial" and "public service" advertisements, as the District Court said its revised restrictions did. A366–68. Indeed, SEPTA explicitly objected to the Court's revision of the "political" provision. *See* ECF 63-1 (Exh. 4) (Question 6, asking SEPTA whether it would object to deleting the phrase "in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity" from the "political" provision); A430–31 (SEPTA responding that it would object to the proposed revision to the "political" provision). The Court's determination that its revised restrictions were constitutional on their

face—and, possibly, as applied to CIR's advertisements[14]—was thus not based on record evidence. Nor did the Court have the benefit of briefing by the parties on this legal issue.[15] In sum, the Court's error in rewriting SEPTA's restrictions was compounded by the fact that it required passing judgment upon the constitutionality of a new set of restrictions that is not at issue in this litigation. *See, e.g.*, *City of Philadelphia v. Attorney Gen.*, 916 F.3d 276, 292–93 (3d Cir. 2019) (reversing the portion of District Court judgment that went beyond the controversy between the parties laid out in the complaint).

C. The Court's Revisions to SEPTA's Advertising Rules Failed to Cure their Vagueness and Unconstitutionality.

The Court's revision of the "political" and "public debate" provisions was error for the additional reason that the rewritten restrictions fail to cure the

[14] It is not clear whether the District Court held that SEPTA had reasonably rejected CIR's advertisements under the old, unconstitutional rules, or that SEPTA could reasonably reject CIR's advertisements under the new restrictions drafted by the Court. Indeed, it is not clear whether the revised restrictions even apply to CIR's advertisements.

[15] The Court acknowledged that the parties had not briefed whether the new rules revised by the Court were viewpoint discriminatory, but nonetheless went on to conclude, without the benefit of briefing, that they were not. A87. The Court did not acknowledge that its determination that the revised restrictions were capable of reasoned application, and that they were reasonably connected to the purpose of the forum, was likewise done without the benefit of briefing.

vagueness that rendered the original rules incapable of reasoned application and facially unconstitutional.[16]

The "political" provision appears effectively unchanged.[17] Although the court invalidated the language in (a) prohibiting advertisements that are "political in nature," including advertisements that "directly or indirectly implicate[] the action, inaction, prospective action or policies of a government entity," the Court left intact a prohibition on advertisements that "contain political messages." A69. The record is clear that SEPTA interpreted "political messages" to have an identical meaning to the phrase "political in nature" that the District Court struck down as incapable of reasoned application. A1105. Moreover, the phrase "political messages" suffers from the same vagueness that led to the invalidation of the "political" prohibition at issue in *Mansky*.

Likewise, as revised by the District Court, subsection (b) prohibits advertisements that express a viewpoint on "political . . . issues" without offering any definition of "political" that would serve to distinguish it from the

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[16] After rewriting the unconstitutional rules, the District Court also ruled that the revised restrictions were "reasonable" in light of the purpose of the forum. A81–84. This Court need not reach this other reasonableness holding because it is plain that the new restrictions remain "incapable of reasoned application" within the meaning of *Mansky*.

[17] To the extent the District Court intended for the revised "political" provision to have a narrower scope than the original version drafted by SEPTA, it is not clear whether the revised provision would even apply to CIR's advertisements.

unconstitutional language struck by the District Court or from the unconstitutional provision at issue in *Mansky*. *Id.*

Even more troublingly, the District Court also left intact the same vague and undefined reference in subsection (b) to "economic," "religious," "historical," and "social" "issues" but substantially broadened the potential applicability of subsection (b) by striking the narrowing term "matters of public debate." *See* A69.

Without guidance to constrain officials' whimsical or viewpoint-discriminatory determinations of what constitutes a "political message" or an "economic, political, religious, historical or social issue[]," the revised subsections (a) and (b) leave ample opportunity for SEPTA officials to inject their own subjective beliefs into their interpretation of the new restrictions. *See Mansky*, 138 S. Ct. at 1889–91. Indeed, it is unclear whether advertisements that SEPTA previously accepted would now be banned by the revised rules—or, for that matter, whether CIR's proposed advertisements would. Some of the advertisements SEPTA previously accepted seem to fall more squarely within the new prohibitions than CIR's advertisements. For example, if CIR's advertisements are prohibited by the revised restrictions, it is hard to imagine how the AFSC "Waging Peace" advertisement, the Fusion "As American As" advertisements, or the Facebook "Fake News" advertisements that SEPTA accepted do not likewise express a viewpoint on "political," "historical," "religious" or "social" issues, or contain a

"political message." *See* A757. It is also hard to fathom what the "political" provision could mean if it does not encompass advertisements directed to the Democratic National Committee (A752–56), advertisements advancing government policy positions and programs by encouraging people to vaccinate their children, surrender to law enforcement, carry Narcan, or sign up for Obamacare (A791; A792; A803; A806), or advertisements advising people of their legal rights (A793–802; A843–48).

V. THE DISTRICT COURT'S RULING THAT SEPTA'S ADVERTISING SPACE IS NO LONGER A DESIGNATED PUBLIC FORUM IS BOTH INCORRECT AND UNNECESSARY.

Because the District Court correctly decided that the "political" and "public debate" provisions are incapable of reasoned application, and thus unconstitutional in any forum, this Court need not determine whether the District Court erred in its forum analysis. *E.g.*, *NAACP v. City of Philadelphia*, 834 F.3d 435, 442 (3d Cir. 2016); *Pittsburgh League of Young Voters*, 653 F.3d at 296 (noting that courts "need not tackle the forum-selection question" when the regulation would be invalid in any type of forum).

However, SEPTA's advertising space is properly analyzed as a designated public forum, as this Court previously determined.

A. The Relevant Forum is SEPTA's Advertising Space.

The District Court erred at the outset of its forum analysis by treating the relevant forum as only the inside of SEPTA's buses. *See* A10; A58.

This Court previously ruled that, in a challenge to SEPTA's application of its advertising rules, the relevant forum is all of SEPTA's advertising space that is governed by those rules, rather than the specific location where the plaintiff sought to advertise. *Christ's Bride Ministries v. SEPTA*, 148 F.3d 242, 248 & n.2 (3d Cir. 1998). Because SEPTA's rules govern all of SEPTA's advertising space, A330, under *Christ's Bride*, the relevant forum is all SEPTA advertising space, not just the interior bus spaces where CIR proposed to advertise.

B. SEPTA's Advertising Space Is a Designated Public Forum.

Prior to this litigation, the last two courts to consider whether SEPTA's advertising space was a designated public forum ruled that it was. *See Christ's Bride*, 148 F.3d at 255; *AFDI v. SEPTA*, 92 F. Supp. 3d at 326. In both cases, SEPTA had argued that it did not intend to create a public forum, only to have courts conclude that it in fact had done so. *Christ's Bride*, 148 F.3d at 249–55; *AFDI*, 92 F. Supp. 3d at 325–26.

SEPTA's advertising space remains a designated public forum. SEPTA still accepts the vast majority of proposed advertisements, including ads from both commercial and non-commercial entities on a wide range of topics. In fact,

SEPTA chose not to restrict its advertising space to only certain types of advertisements, like commercial advertisements or "public service announcements." *E.g.*, A366–68. SEPTA could have closed the forum, but it opted not to. The policy still allows all advertisements that are not explicitly prohibited.[18]

Moreover, SEPTA's claim that it "closed the forum" to advertising such as CIR's is undermined by the fact that, beginning before this suit commenced and continuing through the time of trial, SEPTA chose to intentionally expose its riders to "infotainment" containing news headlines from the Associated Press and Reuters—precisely the same kind of content that SEPTA purports to prohibit in advertisements—on the same screens where SEPTA displays digital advertisements. Indeed, because the reporting that CIR sought to advertise was confirmed and covered by the Associated Press,[19] one of the outlets that supplied

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[18] Indeed, even after the District Court rewrote SEPTA's restrictions in a manner that the District Court viewed as allowing only "commercial" advertisements or advertisements that "promote public services," SEPTA has continued to accept advertisements that are neither commercial nor promoting public services. For example, SEPTA recently approved the installation of an art exhibit in the advertising spaces at the Walnut-Locust subway station. Transforming SEPTA's Walnut-Locust Station into an Underground Art Gallery: Announcing #TrackTakeover, Streets Dept (Feb. 12, 2019), https://streetsdept.com/2019/02/12/track-takeover/.

[19] *See* A497; A1186; Aaron Glantz and Emmanual Martinez of Reveal, *Kept out: How banks block people of color from homeownership*, AP News (Feb. 15, 2018), https://apnews.com/ae4b40a720b74ad8a9b0bfe65f7a9c29.

content for the newsfeeds, the identical reporting could have appeared on SEPTA digital displays as part of a newsfeed.

The newsfeeds are equivalent to the program of providing free advertising to promote social issues that SEPTA's licensee operated when this Court decided *Christ's Bride Ministries v. SEPTA*. 148 F.3d at 249. The plaintiff in *Christ's Bride* wasn't demanding access to the free advertising program, but this Court nonetheless found the program relevant to its analysis because it undermined SEPTA's contention that it had closed its advertising space to paid ads on similar issues and underscored that the forum was "suitable for speech concerning social problems and issues." *Id.* at 249 & n.4. Likewise, SEPTA's subscription to a newsfeed that pumped news headings onto the very screens where SEPTA displays paid advertisements demonstrates that the forum is quite suitable for news content like that contained in CIR's advertisements. Indeed, SEPTA conceded that its decision to display newsfeeds in SEPTA's vehicles could be viewed as "incompatible" with its claim that the forum was closed to political speech and speech on matters of public debate. A345.

C. SEPTA Did Not—And Cannot—Justify Its Advertising Rules Under Strict Scrutiny.

Because SEPTA's advertising spaces remain a designated public forum, to survive strict scrutiny, SEPTA has to prove that its restrictions are "narrowly

tailored" to a compelling government interest that could not be achieved through a less restrictive alternative. *E.g.*, *NAACP*, 834 F.3d at 441 (strict scrutiny requires narrow tailoring and the absence of less restrictive alternatives). In the District Court, SEPTA never meaningfully attempted to justify the "political" and "public debate" provisions under strict scrutiny. This apparent concession that SEPTA cannot meet its burden is reason alone to reverse the judgment below. In *Christ's Bride Ministries*, this Court concluded that the same failure justified entering judgment against SEPTA. *See Christ's Bride*, 148 F.3d at 255 ("SEPTA has not argued that its action survive strict scrutiny. Accordingly, we conclude that CBM's First Amendment rights were violated when SEPTA removed CBM's ads.").

Moreover, it is clear that the "political" and "public debate" provisions are not narrowly tailored to a compelling government interest. A "compelling governmental interest" is an interest "of the highest order," which is "unusually important" and weightier than a "significant" or "substantial" interest. *United States v. Marcavage*, 609 F.3d 264, 286–87 (3d Cir. 2010) (collecting cases). SEPTA's interest in generating advertising revenue while avoiding exposing its

riders to advertisements that SEPTA believes might offend them does not rise to this level.[20]

Furthermore, a restriction on speech is not "narrowly tailored" if it is not necessary to achieve the government's claimed interest, *see Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 609–10 (1982); if it is over- or under-inclusive, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793–95 (1978); or if it is not the least restrictive means of achieving the government's asserted

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[20] The fact that the "political" and "public debate" provisions were motivated by SEPTA's desire to exclude advertisements like AFDI's that SEPTA believed would be offensive (*see* A1100–01) is yet another basis on which to invalidate them. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 812–13 (1985) (holding that facially neutral justifications "cannot save an exclusion that is in fact based on the desire to suppress a particular point of view" and remanding for a determination of whether the government was motivated by a desire to suppress a viewpoint); *see also id.* at 833 (Stevens, J., dissenting) ("Everyone on the Court agrees that [a restriction] is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (stating that a facially neutral restriction on speech would be unconstitutional if its purpose were to suppress speech because of disagreement with the message it conveys) (citations omitted); *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 703–04 (2010) (Kennedy, J., concurring) (observing that the case would come out differently if there were evidence that the "design or purpose" of the rule was to discriminate based on viewpoint). *Compare NAACP v. City of Philadelphia*, 834 F.3d 435, 449 n.7 (3d Cir. 2016) (noting that it is an "open question" whether discriminatory motive is enough to invalidate a restriction on speech absent evidence that the restriction is being implemented in a discriminatory way) (citations omitted), *with Eagle Point Educ. Ass'n v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1106–07 (9th Cir. 2018) ("The purpose behind a challenged restriction is the 'threshold consideration' in deciding whether a policy is appropriately [viewpoint] neutral.") (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994)).

interest, *see Sable Commc'ns v. FCC*, 492 U.S. 115, 126–31 (1989). There is at best a speculative and remote relationship between SEPTA's "political" and "public debate" provisions and the interests they purportedly serve. SEPTA has offered no basis for the Court to conclude that these provisions are actually designed to further the overarching revenue-generating purpose of SEPTA's advertising spaces. SEPTA never analyzed whether the provisions would have any impact on revenue. A1092; A1153–54; A333–34. Rather, the record indicates that the provisions are aimed at the unrelated goal of suppressing speech that may be offensive to SEPTA riders, and still have only a tenuous connection to that goal. More accurately, the provisions empower SEPTA officials to suppress speech that they project SEPTA riders might find offensive. *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive.").

Accordingly, these provisions are not even "reasonable" in light of the purposes of the forum.[21] Restrictions on speech that are not "reasonable" are, *a fortiori*, not narrowly tailored. And the "political" and "public debate" provisions are plainly over- and under-inclusive. Like any censorship scheme based on a guess about what will offend a large, diverse group of people, it is unavoidable that the "political" and "public debate" provisions will prohibit many advertisements that are unlikely to be offensive to any SEPTA rider, while allowing some advertisements that are. The First Amendment generally prohibits the government from justifying restrictions on speech by pointing to the possibility that the audience might take offense.

[21] Even in a nonpublic forum, to ban speech based on prospective harm, the threatened harm has to be real, not just speculative. *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 501 & n.4 (9th Cir. 2015) (citing *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959 (9th Cir. 2002); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 810 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 n.12 (1983)); *see also Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1231 (7th Cir. 1985) (rejecting government argument that ban on "controversial public-issue advertising" was justified by "entirely speculative" concern that advertisements might cause "administrative disruption, discomfort to riders, protests, loss of revenues and other adverse effects," noting that similar advertisements had not caused any adverse effects in other transit systems).

VI. SEPTA ENGAGED IN VIEWPOINT DISCRIMINATION BY REJECTING CIR'S ADVERTISEMENTS AFTER ACCEPTING NUMEROUS ADVERTISEMENTS FOR MORTGAGE LENDERS REPRESENTING THAT THEY DO NOT DISCRIMINATE BASED ON RACE.

The District Court also erred in granting judgment for SEPTA on CIR's "as-applied First Amendment challenge." A4. Even if the "political" and "public debate" provision were not facially unconstitutional (rendering it unnecessary to rule on CIR's alternative legal theories), SEPTA applied them in a viewpoint-discriminatory manner by rejecting CIR's advertisements.

SEPTA has accepted numerous advertisements for home loans and other banking services identifying the advertiser as an "Equal Opportunity Lender" or "Equal Housing Lender." *See, e.g.*, A775; A776; A781; A782. These shorthand terms represent that the financial institution "makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status." 12 C.F.R. § 338.3(a) ("Nondiscriminatory advertising"). As the District Court noted, many of these advertisements feature African-American models, and appear to target borrowers of color. *E.g.*, A53, A93–96. For example, an advertisement from Tompkins VIST Bank shows an image of an African-American couple and child in front of a stack of moving boxes and says "Making your dream of home ownership a reality," and bears the Equal Housing Lender language and logo. *See* A781; A1128. This advertisement is a near perfect inverse of the panel in CIR's proposal

stating, "Today in America, people of color are regularly being denied the dream of home ownership." A532; A915; A927. Yet, SEPTA accepted Tompkins VIST Bank's advertisement while rejecting CIR's.

A Wells Fargo advertisement that SEPTA accepted proclaims the virtues of Wells Fargo's "NeighborhoodLIFT program," which provides down payment assistance and financial education to low-income homebuyers. A782–88. Both the advertisement and the website prominently featured in the advertisement show various African-American individuals. *Id*. Notably, Wells Fargo is the lead defendant in litigation regarding alleged discriminatory lending practices, including reverse redlining.[22] This fact did not lead SEPTA to reject Wells Fargo's proposed advertisement about "lifting up" disadvantaged neighborhoods, but the existence of such litigation did lead SEPTA to reject CIR's advertisements, noting that "[t]he subject of the proposed advertisement is disputed in class action litigation pending in the courts." A622.

The Court's suggestion that these advertisements did not express the viewpoint that home loans are available to people of color because they are "commercial" advertisements has no support in the law or the record. Indeed, SEPTA conceded that every advertisement has a viewpoint. A1110. But the

[22] *City of Philadelphia v. Wells Fargo & Co.*, Civ. A. No. 17-02203 (E.D. Pa. 2017).

record makes clear that SEPTA scrutinizes some viewpoints more closely than others.

In sum, regardless of whether SEPTA could constitutionally have excluded all advertisements regarding the subject of "discriminatory lending," SEPTA has in fact allowed numerous mortgage lenders and other financial institutions to advertise that they do not discriminate based on race, while rejecting CIR's advertisements because CIR's reporting has been the target of criticism by the same industry SEPTA has permitted to speak on the topic. This is viewpoint discrimination. *See Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment) (essence of viewpoint discrimination is censoring a "subset of messages" on a topic because of the view they express); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–32 (1995) (holding that refusing to fund a student periodical offering "a Christian perspective on both personal and community issues" while funding student periodicals discussing such issues from a secular perspective was unconstitutional viewpoint discrimination); *Pittsburgh League of Young Voters*, 653 F.3d at 297–98 (fact that advertising policy treats similarly situated advertisements differently is evidence of viewpoint discrimination).

The Court therefore should have ordered SEPTA to run CIR's proposed advertisements. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*,

2009 U.S. Dist. LEXIS 65885, *37, *50 (W.D. Pa. July 30, 2009) (concluding that defendants engaged in viewpoint discrimination by rejecting plaintiffs' proposed advertisement, and enjoining defendants from refusing to accept plaintiffs' proposed advertisement), *aff'd*, 653 F.3d 290 (3d Cir. 2011).

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1. At least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court, as required by Local Rule 28.3(d).

2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,954 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14 font.

4. The text of the electronic versions of this Brief and Joint Appendix filed on ECF are identical to the text of the paper copies filed with the Court.

5. The electronic versions of the Brief and Joint Appendix filed on ECF were virus checked using Webroot SecureAnywhere, and no virus was detected.

Dated: May 7, 2019

/s/ Molly Tack-Hooper

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