No. 19-1170

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CENTER FOR INVESTIGATIVE REPORTING,

Plaintiff-Appellant,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
THE HONORABLE MICHAEL M. BAYLSON

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 20 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

Metro Corp. is a wholly owned subsidiary of Metro Corp. Holdings, Inc., which is 100 percent privately owned.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Californians Aware, Courthouse News Service, The E.W. Scripps Company, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, Metro Corp. d/b/a Philadelphia Magazine, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, Online News Association, Society of Environmental Journalists, Society of Professional Journalists, Student Press Law Center, and Tully Center for Free Speech. A supplemental statement of identity and interest of *amici* is included below as Appendix A.

Amici are members of the news media or organizations who advocate on behalf of the First Amendment rights of news organizations and journalists. *Amici* file this brief in support of Plaintiff-Appellant the Center for Investigative Reporting ("Appellant") because *amici* have an interest in ensuring that the First Amendment rights of those who advertise on public transit systems—which can and does include members of the news media like Appellant—are protected. News organizations use advertisements to reach their audiences, both to remind them of

the importance of a free press, generally, and to capture the public's attention for specific news outlets or stories. The advertising policy of the Southeastern Pennsylvania Transportation Authority at issue in this case unconstitutionally bans certain advertisements on the basis that they may be "political" or "expressing . . . an opinion, position or viewpoint on matters of public debate[.]" This ban affects not only Appellant, but also other members of the news media and the public, which will be less informed if the advertising policy is upheld.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellant and Defendant-Appellee have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns a policy of the Southeastern Pennsylvania Transportation Authority ("SEPTA") that bans certain advertisements on the Philadelphia-area transit system based on their content (the "SEPTA policy").[1] *See* JA at A73. After SEPTA prohibited Appellant, a news organization, from placing an advertisement about one of its stories on the transit system pursuant to the SEPTA policy, Appellant filed suit seeking a declaration that the SEPTA policy violates the First Amendment and a permanent injunction prohibiting SEPTA from enforcing it.

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[1] The SEPTA policy includes two provisions that Appellant has designated the "political" provision and the "public debate" provision, respectively. Br. of Appellant 1. The "political" provision provides:

> (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 [are prohibited].

The "public debate" provision provides:

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

The district court found that SEPTA advertising space is a closed forum and that SEPTA officials have wide latitude to exclude advertisements that they think may upset some customers. *Id*. at A65. The district court also determined that the "political" and "public debate" provisions of the SEPTA policy were incapable of reasoned application and therefore facially unconstitutional. *Id*. at A59–60. It directed SEPTA to make specific changes to its policy in order to make it constitutional. *Id*. at A3–4, A78–79.[2] However, in ordering these changes, the district court created an amended policy that is just as constitutionally problematic as the original.

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[2] The amended policy created by the district court provides:

> (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 contain political messages, including advertisements involving political or judicial figures [are prohibited].
>
> (b) Advertisements expressing or advocating an opinion, position or viewpoint on economic, political, religious, historical or social issues [are prohibited].

Amici agree with Appellant that because SEPTA did not cross-appeal the district court's invalidation of the original SEPTA policy, this ruling is final and not subject to this appeal. *See* Br. of Appellant 40–41. *Amici* also agree with Appellant that the district court exceeded its authority in rewriting the SEPTA policy. *Id.* at 45–48. Given the similarities between the SEPTA policy and the district court's amended policy, *amici*'s arguments concern both the constitutionality of both policies, neither of which this Court should uphold.

The district court's decision, if affirmed, will impact not only Appellant but also other potential advertisers, including other news organizations. Many news organizations seek to engage with readers and viewers through advertisements. Indeed, in the face of increasing anti-press rhetoric by politicians and others, some news outlets have begun ad campaigns emphasizing the importance of a free and independent press. Other advertisements by news organizations promote specific stories in order to encourage readers to stay informed. Because the news necessarily focuses on "economic, political, religious, historical [and] social issues" of the day—topics specifically prohibited by both the SEPTA policy and the amended policy—these advertisements remain at risk of being banned.

This Court should hold that the SEPTA policy, both in its original and amended forms, is unreasonable, incapable of reasoned application, and unconstitutional.[3] The very purpose of the First Amendment is to encourage public

[3] The district court concluded that the advertising space on SEPTA buses is a non-public forum and that the SEPTA policy is not viewpoint discriminatory on its face or as applied to Appellant's advertisement. JA at A63–66, A84–85. Appellant argues that SEPTA's advertising space is a designated public forum and that the SEPTA policy is viewpoint discriminatory. *See* Br. of Appellant Sections V & VI. By focusing their brief on the standard this Court must apply if it determines that the SEPTA advertising space is a nonpublic forum and the SEPTA policy is viewpoint neutral, *amici* do not intend to suggest that Appellant's argument that that SEPTA's advertising space is a designated public forum the SEPTA policy is viewpoint discriminatory are without merit. Those grounds for reversal of the district court's opinion are addressed at length in Appellant's brief. *See id.*

discussion and debate about issues of public importance. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Stifling those discussions because of fear that some transit riders may be unhappy with certain messages is not a "reasonable" purpose for restricting speech, as it is contrary to the purpose of the First Amendment. Moreover, the SEPTA policy, and the policy as amended, are unreasonable because it is tantamount to a "heckler's veto," which under the First Amendment cannot serve as the foundation for restrictions on speech.

Finally, the imprecise terms used in both the original and amended SEPTA policies vests too much authority in the hands of government officials to determine which ads are forbidden or permitted. The district court correctly concluded that SEPTA policy is unconstitutionally vague and not capable of reasoned application; the amended policy should be rejected for the same reasons.

ARGUMENT

I. The SEPTA policy could prohibit advertisements that news organizations increasingly rely on to reach the public.

A. The SEPTA policy may ban advertising that promotes press freedom and accountability journalism.

In the last decade, the news media has seen public trust in the news diminish and attacks on the press increase. Jeffrey M. Jones, *U.S. Media Trust Continues to Recover from 2016 Low*, Gallup (Oct. 12, 2018), https://perma.cc/7F23-GVWM (stating that while 68% of American adults in 1972 said they trusted mass media a great deal or a fair amount, in 2016 only 32% said the same, and in 2018 only 45% said the same); *Attacks on the Record: The State of Global Press Freedom, 2017-18*, Freedom House, https://perma.cc/UV9E-QLJD (last visited Nov. 20, 2018) (discussing an increase in criticism of the news media in the United States). At the same time, the circulation of many publications has decreased. *See Newspapers Fact Sheet*, Pew Research Center (June 13, 2018), https://perma.cc/67ND-5L6L (showing that while U.S. daily newspapers had a total weekday circulation of 62.1 million in 1970, they had a total weekday circulation of 30.9 million in 2017). Both of these trends have encouraged news media to use advertisements to impress upon the public the importance of freedom of the press, counter anti-press sentiment, and increase their readership and viewership.

For example, *The New York Times* aired its first-ever advertisement during the Academy Awards in 2017, heralding the message, "The truth is hard." *See* Ann-Christine Diaz, *'The truth is hard,' says the New York Times' first-ever Oscars ad*, AdAge (Feb. 23, 2017), https://perma.cc/JA4A-BZLL. This advertisement debuted a month-long campaign that included both television and digital ads. *See* Sarah Steimer, *The New York Times 'Truth' Campaign Drives Digital Subscriptions*, American Marketing Association (Sept. 18, 2018), https://perma.cc/2WDA-Y8VT. The purpose of the campaign was to counteract anti-press rhetoric while increasing subscriptions. *Id*.

Soon after *The New York Times* campaign began, *The Wall Street Journal* debuted its own advertising campaign, "The Face of News." Ann-Christine Diaz, *The Wall Street Journal puts a 'Face' on real news*, AdAge (March 7, 2017), https://perma.cc/JDY6-GWC4. The *Journal*'s chief marketing officer called the campaign "the perfect antidote to 'fake news.'" *Id*.

Yet the SEPTA policy could proscribe ad campaigns like those run by *The New York Times* or *Wall Street Journal*.[4] The stated goal of both campaigns is to counteract the anti-press rhetoric that has infected American politics. *See id.*; Steimer, *supra*. This purpose could be considered "political in nature" or aimed at

[4] This concern applies equally to the SEPTA policy and the amended policy, which also bans advertisements "that contain political messages" and that "express[] . . . an opinion . . . on . . . political . . . or social issues." *See* JA at A3–4.

"advocating an opinion, position or viewpoint on [a] matter[] of public debate about . . . political . . . or social issues." *See* JA at A635. This means even a message as innocuous as "The truth is hard" could be swept into the broad categories of speech prohibited by the SEPTA policy. Even under the revised policy, these campaigns could be considered to "advocate an opinion, position or viewpoint on . . . political . . . or social issues." *See* JA at A69.

B. The SEPTA policy may prohibit advertisements about specific news stories.

News, by definition, reports on "economic, political, religious, historical [and] social issues" of the day—the very kinds of issues that SEPTA seeks to prohibit in advertisements. JA at A635. These issues, however, are also the most important for the public to understand and discuss and the most important for the news media to bring to light. By prohibiting advertisements "that are political in nature or contain political messages," those "involving an issue that is political in nature[,]" and those that "express[] or advocat[e] an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical or social issues," *id*., the SEPTA policy potentially prohibits advertisements about specific news stories.[5]

[5] Although the amended policy struck the prohibition on advertisements that "are political in nature," it continues to prohibit advertisements that "express or advocate an opinion, position or viewpoint on economic, political, religious,

The news media frequently covers economic, political, religious and historical topics. For example, news organizations often report on labor department reports on unemployment rates and job growth. *See, e.g.*, Avie Schneider, *U.S. Economy Loses Steam, Adding only 20,000 Jobs Last Month*, NPR (March 8, 2019), https://perma.cc/U39R-3449; John T. Harvey, *Why the Just-Released February Jobs Numbers are Disappointing – And Why it Matters*, Forbes (March 8, 2019), https://perma.cc/898K-46VC. Aside from everyday reporting on empirical evidence of health of the economy, news organizations also take deeper dives into economic issues. For example, in December 2018, ProPublica published an in-depth analysis of age discrimination in U.S. workplaces. Peter Gosselin, *If You're Over 50, Chances Are the Decision to Leave a Job Won't be Yours*, ProPublica (Dec. 28, 2018), https://perma.cc/K9P4-RK69.

Similarly, politics are part of daily reporting for news agencies. *See, e.g.*, Maggie Astor, et al., *Who's in the Democratic Debates, and Who's in Danger of Missing Them*, N.Y. Times (Apr. 29, 2019), https://perma.cc/4MWN-BVG6; Kylie Atwood and Rebecca Buck, *Mike Pompeo's domestic travel fuels speculation about his political future*, CNN (March 11, 2019), https://perma.cc/HX3N-GMJJ;

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historical or social issues." JA at A69. Accordingly, this concern applies equally to the SEPTA policy and the policy as amended by the district court.

William Cummings, *President Trump's Approval Rating Continues to Climb*, USA Today (March 4, 2019), https://perma.cc/Q3BE-3SSP.

The news media also often covers religion and related topics. For example, in 2002, *The Boston Globe*'s Spotlight team reported a series of investigative stories unveiling the decades-long, systemic sexual abuse and assault of children within the Catholic Church in Boston and elsewhere. Matt Carroll, et al., *Church allowed abuse by priest for years*, Boston Globe (Jan. 6, 2002), https://perma.cc/Q3BE-3SSPhttps://perma.cc/665Y-RNLK. The series earned the *Globe* the 2003 Pulitzer Prize for Public Service Journalism and inspired the Oscar-winning film *Spotlight*. *See 2003 Pulitzer Prizes*, Pulitzer, https://perma.cc/6Q7N-AMSX (last visited Nov. 20, 2018); Spotlight, http://spotlightthefilm.com/about (last visited Nov. 20, 2018). This summer, *The Philadelphia Enquirer* published a story about data demonstrating an increase in anti-Muslim bullying in Philadelphia schools. Kelly Brennan, *Data show cases of anti-Muslim bullying in schools on the rise*, Philadelphia Enquirer (July 22, 2018), https://perma.cc/9ZL4-B86D. More recently, the *Pittsburgh Post-Gazette* covered the shooting at the Tree of Life Synagogue in Pittsburgh in which eleven people were murdered, winning the Pulitzer Prize for breaking news reporting. *See, e.g.*, *Squirrel Hill Synagogue massacre: Remembering the victims*, Pittsburgh Post-Gazette, https://perma.cc/YYJ6-2PM4 (last visited Nov. 20, 2018); *Staff of the*

Pittsburgh Post-Gazette, The Pulitzer Prizes, https://perma.cc/J83R-4GG4 (last visited Apr. 30, 2019).

Because news organizations often disseminate information about hotly debated topics of the utmost public importance, policies such as SEPTA's place a heavy burden on news organizations. Controversial topics such as religion, economics, and politics are often at the center of hard-hitting press coverage and, thus, likely to be featured in news organizations' potential advertisements regarding their work. If the news outlets cited above had sought to advertise their stories about economics, politics, or religion, they could have been prohibited from doing so under the SEPTA policy, which broadly prohibits advertising that communicates a "viewpoint on matters of public debate about economic, political, religious, historical or social issues."[6] JA at 635. Affirming the district court's ruling may allow SEPTA to prevent the news media from advertising on public transit simply because their business is to inform the public of important and sometimes controversial matters of public concern.

[6] Again, this concern remains with the amended policy, which continues to prohibit advertisements that communicate a "viewpoint on economic, political, religious, historical or social issues." JA at 69.

II. The SEPTA policy is unreasonable and it is tantamount to an unconstitutional heckler's veto.

When restricting speech in a limited public forum, the government must act in a fashion that is both viewpoint-neutral and reasonable in light of the purpose of the forum. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829–30 (1995); *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1886 (2018). SEPTA argues that the purpose of its policy is to prevent debate on its transit system by preventing rider from being offended, thereby ensuring that the system does not lose riders. *See* JA at A40. But even assuming, *arguendo*, that SEPTA's policy in its original form or as amended is viewpoint-neutral, discouraging discussion of matters of public concern is an unreasonable and therefore unconstitutional purpose for restricting private speech in a limited forum designated for revenue generation through advertisements. Finally, by relying on the potential reactions of third parties to justify restricting wide swathes of private speech on matters of public concern, the SEPTA policy codifies an unconstitutional heckler's veto.

A. Discouraging debate about controversial issues is not a reasonable basis for restricting advertising on the transit system.

Avoidance of controversy is a constitutionally suspect goal under the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 728 (2012) ("Society has

the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."). The very purpose of the First Amendment is to encourage public discussion and debate about issues of public importance—including and especially controversial topics such as economics, religion, history, and politics. *See Sullivan*, 376 U.S. at 269 (describing the First Amendment as a reflection of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"); *see also Alvarez*, 567 U.S. at 728 (reiterating that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market'" (quoting *Abrams v. United States*, 250 U.S. 616, 630–31 (Holmes, J., dissenting) (1919)); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties.").

Stifling such discussion and debate to avoid offense to certain members of society cannot be considered a "reasonable" purpose for restricting speech. The district court concluded that the purpose of the SEPTA policy was to "refrain[]

from offending customers" and tied that purpose SEPTA's goal of "increasing ridership[,]" JA at A40, as well as ensuring "customer safety." *Id*. at A88. Yet SEPTA offered no evidence that advertisements that may stir debate will cause a decrease in ridership or safety issues. While SEPTA did present testimony about vandalism and staff issues that occurred after it ran ads from the anti-Islam group American Freedom Defense Initiative in 2014, SEPTA did not present evidence that these advertisements caused a decline in ridership or safety issues among its riders. *Id*. at 39–40. Vandalism and staff protests do not have the potential to directly cause physical injury to riders, and there is no evidence they cause declining ridership.

Given the First Amendment's protections for controversial speech and public debate, and the lack of evidence that advertisements prohibited by the SEPTA policy will impede SEPTA's ability to either generate revenue or maintain safety, the goal of avoiding controversy cannot be considered reasonable.

B. The SEPTA policy is tantamount to a codified heckler's veto.

A heckler's veto occurs when First Amendment-protected speech is restricted or banned because of a feared reaction from third parties. *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 200 (3d Cir. 2008); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (discussing speech restrictions based upon third-party reaction). The Supreme Court has held

that a heckler's veto cannot serve as the foundation for restrictions on speech. *See Forsyth County*, 505 U.S. at 134–35 (finding that speech cannot "be punished or banned, simply because it might offend a hostile mob"); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

The Supreme Court discussed this principle in *Cohen v. California*, determining that California could not prohibit a man from wearing a jacket bearing the phrase "Fuck the Draft" in a Los Angeles courthouse on the basis of its purported offensiveness to the public and possible third-party violence. 403 U.S. 15, 23 (1971). The Court recognized that to proscribe offensive and controversial speech is a "self-defeating proposition that to avoid [third-party] physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." *Id*.

Numerous federal courts of appeals have applied heckler's veto precedent to hold that the First Amendment prohibits restrictions on speech in limited fora based on potential third-party reactions to that speech. For example, in *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, the United States Court of Appeals for the Seventh Circuit determined that the Chicago Pier could not charge

lower facilities rental fees to groups the Pier expected to bring positive publicity to the Pier, as this would be tantamount to a heckler's veto. 150 F.3d 695, 700–01 (7th Cir. 1998); *see also Sammartano v. First Judicial District Court*, 303 F.3d 959, 969–70 (9th Cir. 2002) (citing *Cohen* to hold that restrictions on what individuals may wear to court based upon anticipated offensiveness to third-parties, who then may cause a disruption, is an unreasonable purpose for a restriction on speech in a nonpublic forum).

Similarly, in *Robb v. Hungerbeeler*, the United States Court of Appeals for the Eighth Circuit held that the participation by members of the Ku Klux Klan in Missouri's Adopt-a-Highway program—which the Eighth Circuit concluded is a nonpublic forum—could not be restricted based upon a group's history of violence for the purpose of preventing driver "road rage." 370 F.3d 735 (8th Cir. 2004). The program was essentially an advertising program that allowed organizations to clean up trash along portions of highway in exchange for installation of highway-side signs bearing the organizations' names. *Id.* The appeals court determined that "the State's desire to exclude controversial organizations in order to prevent . . . public backlash . . . is simply not a legitimate governmental interest that would support the enactment of speech-abridging regulations." *Id.*

The SEPTA policy seeks to ban even broader categories of speech than the aforementioned cases, based on the fear that they may be offensive in the eyes of

some transit riders. This justification for the SEPTA policy is contrary to the bedrock principle that avoidance of potential adverse reactions by third parties is not a reasonable or legitimate reason for the government to restrict speech.

1. Criticism of reporting is not a reasonable basis for restricting advertising on the transit system.

In this particular instance, SEPTA relied upon an article from the American Bankers Association that "criticized the research upon which the ad CIR proposed was based" for the proposition that the contents of the advertisement were on a subject of "public debate" and therefore barred. JA at A635. However, this is further demonstration that the SEPTA policy is tantamount to a heckler's veto—not only is the policy in place for the purported purpose of preventing third-party offense, but SEPTA also relies on the criticisms of third-party institutions to determine whether proposed advertisements violate the policy in the first instance.

This reliance on third-party condemnation of news reporting to determine if advertisement of the news violates SEPTA's policy is especially concerning in an era of rampant allegations of "fake news." *See, e.g.*, Jeremy W. Peters, *Wielding Claims of 'Fake News,' Conservatives Take Aim at Mainstream Media*, N.Y. Times (Dec. 25, 2016), https://perma.cc/3MPL-TTZJ (discussing rising allegations that the mainstream media is "fake news"). Given this climate of increasing attacks on news stories by the subjects of news reports or others, an official policy

such as SEPTA's should not be permitted to rely on unfounded criticism to decide whether to ban advertisements by news agencies.

III. Policies that seek to avoid controversial speech often suffer imprecision rendering them unconstitutionally vague, and the SEPTA policy is no exception.

As recently reaffirmed by the Supreme Court, while restrictions on speech in nonpublic fora need not be narrowly tailored, the government must "articulate some sensible basis for distinguishing what may come in from what may stay out[.]" *Mansky*, 138 S.Ct. at 1888. In *Mansky*, the Supreme Court held that while restrictions on speech in nonpublic or limited fora are not required to be narrowly tailored, restrictions that are so broad as to "carry with [them] '[t]he opportunity for abuse[,]'" *id.* at 1891 (quoting *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987)), cannot be tolerated, even in nonpublic fora.

Mansky concerned a Minnesota statute that proscribed, among other things, the distribution or wearing of a "political" badge, button, or other insignia at a polling place, which the Court concluded was a nonpublic forum. *Id*. at 1883, 1886. Although the Court held that Minnesota could choose to prohibit certain apparel at polling places because of the message it conveys, "so that voters may focus on the important decisions immediately at hand," *id.* at 1888, it nevertheless struck down the statute for failing to adequately define "political." *Id.* at 1891. Even in light of an "Election Day Policy" that provided guidance on the

enforcement of the political apparel ban,[7] the Court found that the word "political," can be "expansive," encompassing "anything 'of or relating to government, a government, or the conduct of governmental affairs,' . . . or anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state[.]'" *Id*. at 1888. Accordingly, the Court determined that the statute left too much authority in the hands of individual election judges to determine exactly what apparel was prohibited. *Id*. at 1890–91.

The SEPTA policy, even as amended, suffers similar lack of precision. Like the political apparel policy in *Mansky*, the SEPTA policy could prohibit advertisements for "the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's," all of which "have stated positions on matters

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[7] The Election Day Policy specified that examples of apparel falling within the ban include, but are not limited to:

> • Any item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties.
> • Any item including the name of a candidate at any election.
> • Any item in support of or opposition to a ballot question at any election.
> • Issue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons).
> • Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

Id. at 1884 (internal quotations omitted) (quoting App. to Pet. for Cert. I–1 to I–2).

of public concern" *Id.* at 1890; *compare* JA at A23 (stating that the SEPTA policy prohibits advertisements that "directly or indirectly implicate the action, inaction, prospective action or policies of a government entity"). And it is clear that the SEPTA policy is intended to prohibit essentially "anything 'of or relating to government, a government, or the conduct of governmental affairs,' . . . or anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state[.]'" *Mansky*, 138 S.Ct. at 1888.

The SEPTA policy suffers from the same fatal flaw as the statute found unconstitutional in *Mansky*: its vague language vests too much authority in the hands of individual government officials to determine which ads are political or religious and which ads are not. As the Supreme Court noted in *City of Lakewood v. Plain Dealer Pub. Co.*, the danger of censorship "is at its zenith when the determination of who may speak and who may not [speak] is left to the unbridled discretion of a government official." 486 U.S. 750, 763 (1988). Here, what is considered "political" or "religious" is left to the broad discretion of SEPTA officials. Indeed, under some interpretations, the SEPTA policy could bar advertisements that state "Read about election results in today's newspaper." *See* JA at A23 (stating that the SEPTA's policy prohibits advertisements "*involving* political figures or judicial figures" (emphasis added)). The SEPTA policy is unconstitutionally vague, and may be struck down on that basis alone.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

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Dated: May 14, 2019
Washington, D.C.

CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Bruce D. Brown

Bruce D. Brown
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: May 14, 2019
Washington, D.C.

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse

network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

The E.W. Scripps Company serves audiences and businesses through local television, with 52 television stations in 36 markets. Scripps also owns Newsy, the

next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

The International Documentary Association ("IDA") is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Program ("IRP") at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as *Mother Jones*, *The New York*

Times, *Los Angeles Times*, *Time* magazine and the *San Francisco Chronicle*, among others.

The Investigative Reporting Workshop, a project of the School of Communication ("SOC") at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer*, The (Raleigh) News and Observer, and the (Fort Worth) *Star-Telegram*. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry,

and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Metro Corp. is the publisher of *Philadelphia* magazine, a regional monthly print magazine and accompanying website that cover the city of Philadelphia and surrounding counties. The magazine provides topical, in-depth reports on crucial and controversial issues confronting the region, including law enforcement, sociological and business trends, and political analysis, as well as critical reviews of the cultural, sports, and entertainment scene. It is one of the oldest magazines of its kind, first published as a quarterly in 1908 by the Trades League of Philadelphia.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still

photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta

Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

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COMBINED CERTIFICATIONS

I hereby certify that:

1. At least one of the attorneys whose names appear on the Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press and 20 Media Organizations in Support of Plaintiff-Appellant (the "*Amici* Brief"), including the undersigned, is a member of the bar of this Court, as required by Local Rule 28.3(d).

2. The text of the electronic version of the *Amici* Brief filed on ECF is identical to the text of the paper copies filed with the Court.

3. The electronic versions of the *Amici* Brief and this Certification filed on ECF were virus checked using Avast Security, and no virus was detected.

4. I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on May 14, 2019.

Dated: May 14, 2019

/s/ Bruce D. Brown

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