IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY, Plaintiff, v. COUNTY OF LACKAWANNA TRANSIT SYSTEM, Defendant.	Civil Action No. 3:15-CV-00833-MEM

ORDER

AND NOW, this ____ day of _____, 2015 upon consideration of Defendant County of Lackawanna Transit System's Motion to Dismiss for Failure to State a Claim and Plaintiff Northeastern Pennsylvania Freethought Society's response thereto, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

_____
Malachy E. Mannion, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY, Plaintiff, v. COUNTY OF LACKAWANNA TRANSIT SYSTEM, Defendant.	Civil Action No. 3:15-CV-00833-MEM

PLAINTIFF NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY'S RESPONSE IN OPPOSITION TO DEFENDANT COUNTY OF LACKAWANNA TRANSIT SYSTEM'S MOTION TO DISMISS

Plaintiff, Northeastern Pennsylvania Freethought Society ("NEPA Freethought Society"), submits this response to Defendant County of Lackawanna Transit System's ("COLTS") Motion to Dismiss. The Court should deny COLTS' motion because NEPA Freethought Society has sufficiently alleged violations of the First Amendment. In support of this response, NEPA Freethought Society submits and incorporates the accompanying Memorandum of Law in Opposition to

Defendant County of Lackawanna Transit System's Motion to Dismiss and responds to Defendant's Motion as follows:

1. Admitted.

2. Admitted.

3. Admitted. By way of further response, the policy adopted on September 17, 2013 was adopted in reaction to Plaintiff's attempts to place an advertisement with which Defendant disagreed, and was adopted solely to prevent Plaintiff from advertising.

4. Denied. By way of further response and as set forth in the accompanying brief, COLTS, through its policies and practices, has opened its advertising space as a public forum, and therefore any restrictions on speech must be narrowly tailored to serve a compelling government interest.

5. Denied. By way of further response, Plaintiff has sufficiently alleged facts that, taken as true, show that COLTS' policies and practices of rejecting certain advertising are neither narrowly tailored to serve a compelling government interest nor even reasonable and viewpoint neutral. COLTS' motion to dismiss should be denied.

WHEREFORE, for the foregoing reasons and those set forth in the accompanying memorandum of law, which Plaintiff incorporates by reference herein, NEPA Freethought Society respectfully requests that the Court deny COLTS' motion to dismiss.

Respectfully submitted,

Dated: July 27, 2015

/s/ Monica Clarke Platt

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT COUNTY OF LACKAWANNA TRANSIT SYSTEM'S MOTION TO DISMISS

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I. PROCEDURAL BACKGROUND

On April 28, 2015, Plaintiff filed a Complaint asserting both facial and as-applied challenges to the advertising policy of Defendant County of Lackawanna Transit System ("COLTS"). NEPA Freethought Society asserted that COLTS violated its First Amendment rights by refusing to lease advertising space on its busses to Plaintiff due to the content of the proposed advertisements and the viewpoint that COLTS inferred that NEPA Freethought Society had expressed in the ads. Compl. ¶ 1.

On June 25, 2015, Defendant filed a motion to dismiss NEPA Freethought Society's claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

II. COUNTER-STATEMENT OF FACTUAL ALLEGATIONS

Defendant COLTS is a public transit authority that accepts advertising on its vehicles, printed materials, bus shelters, and other property. Compl. ¶¶ 5, 8. NEPA Freethought Society has sought, since early 2012, to advertise on COLTS' busses. *Id.* ¶ 11. The first ad that NEPA Freethought Society sought to place stated simply, "Atheists. NEPAfreethought.org." *Id.* ¶ 11. COLTS rejected that ad, claiming that it violated COLTS' policy against advertising "that is deemed in COLTS[']sole discretion to be derogatory to any . . . religion," or "that [is] objectionable, controversial or would generally be offensive to COLTS' ridership

based solely on the discretion of COLTS," and further stated that "it is COLTS' declared intent **not** to allow its transit vehicles or property to become a public forum for dissemination, debate, or discussion of public issues." *Id.* ¶ 13 (emphasis in original). COLTS' solicitor at the time stated, "We don't accept ads promoting any certain religion or religion in general, so we don't want to accept an ad attacking religion."[1] *Id.* ¶ 14.

COLTS had a longstanding practice of accepting all advertising submitted to it. In fact, for at least a decade before NEPA Freethought Society's first attempts to advertise, COLTS had never rejected an ad, and had accepted several ads from religious organizations. *Id.* ¶ 16, 18. Indeed, some of the ads COLTS accepted violated the express prohibitions in the written policy in place at the time. *See id.* ¶ 16, Ex. F. Prior to NEPA Freethought Society's attempt to advertise, COLTS also displayed the message "God Bless America" on an electric sign on the front of one COLTS bus. *Id.* ¶ 17. These advertisements and messages were run without complaint and without any loss of ridership. *See id.* ¶ 23. COLTS only began rejecting religious ads or other ads that violated its policy *after* NEPA Freethought Society sought to advertise. *Id.* ¶ 18.

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[1] While COLTS appears to have inferred that Plaintiff's "atheists" ads were "attacking religion," in fact, none of its ads took any position on religion, either against or in favor of it, nor attacked religion. The content of these ads consisted entirely of the organization's name and URL and the single word sentence "Atheists." *See* Compl. Exs. A, D, G.

On August 29, 2013, NEPA Freethought Society again submitted an advertisement for placement on COLTS busses. *Id.* ¶19. The ad stated only, "Atheists. NEPA Freethought Society. NEPAfreethought.org." *Id.* On September 9, 2013, COLTS rejected that ad. *Id.* ¶ 20. Eight days later, COLTS adopted a new policy (the "2013 Policy") "in order to clarify and set forth the types of advertisements it will and will not accept[.]" *Id.* ¶ 21, Ex. F. The 2013 Policy stated that COLTS would not accept advertising that "promote[s] the existence or non-existence of a supreme deity. . .; that address[es], promote[s], criticize[s] or attack[s] a religion or religions, religious beliefs or lack of religious beliefs; . . . or [that] are otherwise religious in nature." *Id.* Ex. F.

On July 21, 2014, NEPA Freethought Society submitted a new ad for consideration under the 2013 Policy. *Id.* ¶ 26. That ad was identical to those previously rejected but with an updated web address, stating "Atheists. NEPA Freethought Society. meetup.com/nepafreethoughtsociety." *Id.* Ex G. COLTS rejected that ad as well, citing its prohibition on ads that are "religious in nature" and its intent not to allow the "dissemination, debate, or discussion of public issues or issues that are political or religious in nature." *Id.* ¶¶ 27-28. COLTS has applied this policy to reject not only the NEPA Freethought Society ad containing the word "atheists," but also an ad for Lutheran Home Care and Hospice, presumably because it contained the word "Lutheran." *Id. ¶¶* 25, 27.

In July 2014, COLTS accepted an ad that only stated "NEPA Freethought Society. meetup.com/nepafreethoughtsociety," but did not contain the word "atheists." *Id.* ¶ 29. However, NEPA Freethought Society is unable to clearly and effectively convey the nature of its organization without being able to use the word "atheists" and therefore still seeks to run an ad containing the word "Atheists," of the type that COLTS has several times rejected. *Id.* ¶¶ 31-32.

III. COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Should the Court deny Defendant's motion to dismiss Plaintiff's First Amendment claim where Plaintiff has sufficiently alleged that Defendant, through its policies and practices, created a designated public forum, and where the policy in place is not narrowly tailored to serve a compelling governmental interest?

Suggested answer: Yes.

2. Should the Court deny Defendant's motion to dismiss where Plaintiff has alleged facts that demonstrate that even if Defendant has created a limited public forum, its restrictions on speech are neither reasonable nor viewpoint neutral?

Suggested answer: Yes.

3. Should the Court deny Defendant's motion to dismiss where Plaintiff has alleged facts that demonstrate that Defendant's decision to exclude Plaintiff's ad was motivated by opposition to Plaintiff's views rather than the content of the advertisement and therefore violates the First Amendment under any standard of review?

Suggested answer: Yes.

IV. ARGUMENT

In assessing the sufficiency of a complaint on a motion to dismiss, the court "must accept all of the complaint's well-pleaded facts as true." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Furthermore, the complaint "need only set forth sufficient facts to support plausible claims." *Id.* at 212 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 n.8 (2007)). This is not a high bar. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To decide whether the government's restriction of speech violates the First Amendment, a court first must determine what property is at issue, *i.e.*, define the relevant "forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). The Court must then determine whether the forum is a "public," "designated public," or "limited public" (or to use older terminology, "nonpublic")

forum. *See id.* The forum's classification determines the degree of scrutiny to be applied to the speech restriction. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 295-96 (3d Cir. 2011) (listing varying degrees of scrutiny to be applied to restrictions in different fora).

To define the relevant forum, a court is to focus on "the access sought by the speaker." *Cornelius*, 473 U.S. at 801. To classify the forum, the Court must examine the government's "policies and practices in using the space and also the nature of the property and its compatibility with expressive activity." *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 249 (3d Cir. 1998) (emphasis added).

A. COLTS Created a Designated Public Forum in Its Ad Space and Cannot Show that Its Policy Is Narrowly Tailored to Serve a Compelling Government Interest.

1. The COLTS advertising space is a designated public forum.

Neither party disputes that the forum at issue is the advertising space on COLTS' busses, literature, and stops, or that the space is not a traditional public forum. *See* COLTS Br. at 6; *Christ's Bride Ministries*, 148 F.3d at 248. However, COLTS argues that "transit bus advertisement is considered a nontraditional forum subject to a lighter standard" than a traditional or designated public forum. COLTS Br. at 4. This is incorrect.

Whether an advertising space that the government has created is a designated public forum or a limited public forum turns on a factual inquiry that looks at whether the government has "clearly and deliberately opened its advertising space to the public." *Christ's Bride Ministries*, 148 F.3d at 248 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269-70 (1988)). *See also Am. Freedom Defense Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5355, 2015 U.S. Dist. LEXIS 29571, *18 (E.D. Pa. Mar. 11, 2015) (collecting cases finding that where transit authorities historically opened their property to a wide variety of advertising, they had created a public forum) (attached hereto as Exhibit A). To determine whether the government agency clearly and deliberately opened its advertising space to the public, courts must examine not only the agency's policies, but also its practices in using the space, and the nature of the space and its compatibility with expressive activity. *Christ's Bride Ministries*, 148 F.3d at 249. Merely placing "[r]estrictions on the use of the forum . . . do[es] not necessarily mean that [the agency] has not created a public forum." *Id.* Thus, the court must look beyond COLTS' written policies to determine whether COLTS has created a designated public forum. If there is any factual dispute concerning the past use of the forum, naturally that cannot be decided until after discovery, and the Court should deny COLTS' motion on that basis alone. *See NAACP v. City of Phila.*,

No. 11-6533, 2013 U.S. Dist. LEXIS 71332, *12-13 (E.D. Pa. May 20, 2013) (attached as Exhibit B).

Plaintiff's allegations concerning COLTS' use of the forum describe a designated public forum. Up until NEPA Freethought Society sought to advertise, COLTS accepted every ad that was presented to it. Compl. ¶ 18. Indeed, COLTS even accepted ads that violated its written advertising policies. Compl. ¶¶ 16-18.

COLTS argues that its policies make clear that COLTS intended to maintain its ad space as a limited public forum, and not to allow its vehicles to become a forum for debate or discussion of political or religious issues. *See* COLTS Br. at 8. But, the fact that COLTS' written policies expressed an intent to maintain its ad space as a limited public forum raises, but does not decide, the factual determination of which type of forum COLTS actually created through its conduct. *See Christ's Bride Ministries*, 148 F.3d at 251 (citing *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990)). In *Christ's Bride Ministries*, the facts showed that SEPTA had historically accepted a broad range of advertisements, including ads related to the one it sought to exclude. *See id.* at 251-52. The same is true of COLTS, which has accepted ads of exactly the type it now seeks to exclude—ads that are minimally related to religion by the mere inclusion of the word "atheist" or the name of a religion. *See* Compl. ¶ 16.

COLTS has even accepted ads that should have been barred by the policy in place at the time. *See id.* ¶¶ 16, 18. Ex. F. "Consistency in granting or refusing access to the forum is also important to proper classification." *Gregoire*, 907 F.2d at 1371. COLTS has not been consistent in its application of its policies. Despite the language in COLTS' policies, until NEPA Freethought Society sought to advertise, COLTS had a longstanding practice of opening its space to any and all advertisers. *See* Compl. ¶ 18. In short, what COLTS said it would do and what COLTS actually did are two separate things. When the agency's actual practice is to open an advertising space broadly to the public, without restriction, the agency's written policy to restrict the forum is not dispositive. The practice belies a different intent, and it is the intent reflected in the agency's conduct, and not the intent written on paper, that controls. *See Christ's Bride Ministries*, 148 F.3d at 251-52. Therefore, Plaintiff has alleged facts that support the conclusion that COLTS has created a designated public forum.

2. The COLTS policy cannot satisfy the scrutiny applicable to a designated public forum.

Having created a designated public forum, COLTS' policy is only valid if it is narrowly tailored to serve a compelling government interest, and is the least restrictive means of achieving that interest. *See Am. Freedom Defense Initiative*, 2015 U.S. Dist. LEXIS 29571, at *20-21 (quoting *United States v. Marcavage*, 609 F.2d 264, 279 (3d Cir. 2010)). Defendant does not even attempt to argue in its

motion to dismiss that COLTS can satisfy this high burden.

Plaintiff has quite plainly pleaded facts sufficient to show that COLTS' advertising policy does not satisfy strict scrutiny. COLTS' stated "sole purpose" in accepting advertising is to "generat[e] revenue for COLTS while at the same time maintaining or increasing ridership," although the policy also professes COLTS' goal "not to allow its transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature." *See* Compl. Ex. F.

With respect to COLTS' goal of generating revenue and maintaining or increasing ridership, this is not the type of sufficiently weighty governmental interest that can suffice to justify the abridgement of the fundamental First Amendment freedom of speech. *See*, *e.g.*, *United States v. Stevens*, 533 F.3d 218, 227-28 (3d Cir. 2008) (holding that preventing animal cruelty is not a compelling government interest, and noting that the Supreme Court has recognized as "compelling" only select government interests that safeguard human health and well-being). Perhaps more importantly, even if these government interests were sufficiently compelling, Defendant has offered no reason to believe that running ads that refer in any manner, even indirectly, to the existence or non-existence of religion would in any way detract from or undermine that goal. *See id.* at 227 (noting that the Supreme Court has rarely found that a content-based speech

restriction actually furthers a compelling government interest). Revenue from religious organizations is indistinguishable from revenue from non-religious organizations. And while COLTS may wish to assert as a matter of fact that allowing ads about religion will decrease its ridership, those assertions cannot carry the day on a motion to dismiss, particularly where the complaint details the evidence that COLTS' past practice of accepting such ads did not harm COLTS' ridership.

With respect to COLTS' alternate goal of preventing discussion of politics or religion on transit vehicles, this is a wholly impermissible governmental objective. The government has no legitimate interest in reducing the kind of core speech that the First Amendment was designed to protect. *See*, *e.g.*, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984) (government has "no legitimate interest" in prohibiting discussion of public issues). It is well settled that the government may not exclude all religious discussion from a "generally open forum." *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

In sum, COLTS' 2013 Policy is not narrowly tailored to a compelling government interest. COLTS' exclusion of all references to religion in its advertisements cannot survive strict scrutiny on the facts pled, and COLTS' motion to dismiss should be denied.

B. Even if COLTS Had Not, Through Its Conduct, Designated Its Advertising Space as a Public Forum, the Restrictions in the 2013 Policy Are Neither Reasonable Nor Viewpoint Neutral.

Even assuming that COLTS' advertising space did indeed constitute a limited public forum, which it does not,[2] COLTS has the right to impose some restrictions on speech, but to pass constitutional muster, those restrictions must be both reasonable and viewpoint neutral. *See Cornelius*, 473 U.S. at 809-11; *Christ's Bride Ministries*, 148 F.3d at 255; *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011); *Donovan ex rel. Donovan v. Punxsutawney Sch. Bd.*, 336 F.3d 211, 225 (3d Cir. 2003). The 2013 Policy is neither.

1. The 2013 Policy is not reasonable in light of the purposes of the forum.

A policy that restricts speech in a limited public forum violates the First Amendment if the policy is unreasonable "in the light of the purpose of the forum and *all the surrounding circumstances*." *Cornelius,* 473 U.S. at 809 (emphasis added). "The reasonableness of excluding a particular advertisement requires a determination of whether the proposed conduct would 'actually interfere' with the

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[2] While a government entity may usually change its policy to close off a space that previously functioned as a designated public forum, it must do so in good faith and cannot adopt a new policy simply as a pretext to reject an advertisement it does not like. *See Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004). Thus, even if the 2013 Policy could amount to a closing off of the designated forum that COLTS had previously created through its practices, this is impermissible in light of the clear history that shows COLTS only altered its policy to prevent NEPA Freethought Society from placing its "atheists" ad. *See* Compl. ¶¶ 18, 21.

forum's stated purposes, as set forth in the advertising policy." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 358 (6th Cir. 1998).

COLTS' policy also is not reasonable in light of the purpose served by the forum. When a restriction is only tenuously connected to the purposes identified, it is not reasonable. *NAACP v. City of Phila.*, 39 F. Supp. 3d 611, 628 (E.D. Pa. 2014).

As an initial matter, of course, the exclusion of ads that discuss or refer to religion or that are placed by entities with identifiable religious views has nothing at all to do with maximizing revenue. A church's dollar is as green as a roofer's.

COLTS argues that it is nonetheless reasonable to reject all ads about religion because of COLTS' goal to provide a safe and welcoming environment for the public and because it is entitled to restrict speech that will result in harm to, disruption of, or interference with the transportation system. COLTS Br. at 16. But none of the previous ads or messages related to religion (which would presumably be banned by the current policy) had any negative effect on COLTS' ability to achieve these goals. *Id.* ¶ 23.

In fact, as asserted in the complaint, the change to the 2013 Policy had nothing to do with any perception that allowing religious ads was depressing ridership or that excluding such ads would increase ridership. The complaint

alleges, with significant evidence, that the sole purpose of the change to the 2013 Policy was to exclude ads by Plaintiff. Given those allegations, the 2013 Policy cannot be found to bear a reasonable relation to the purpose of the forum. Nor is the 2013 Policy viewpoint neutral.

2. The 2013 Policy is not viewpoint neutral.

"Viewpoint discrimination occurs when the government 'targets . . . particular views taken by speakers on a subject.'" *Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 296 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.* , 515 U.S. 819, 829 (1995)). The following is evidence of viewpoint discrimination:

1. statements by government officials demonstrating an improper motive;
2. rejection of speech based on a certain characteristic, but acceptance of other speech with the same characteristics; and
3. a loose or nonexistent fit between the viewpoint-neutral ground provided for rejection and the speech actually rejected.

Id.. at 297 (citations omitted). *See also Christ's Bride Ministries*, 148 F.3d at 252 n.5 ("our consideration of the similarity of the speech in question to speech permitted in the past is related to a determination of whether the limitation constitutes viewpoint discrimination.").

In addition, when a new policy is adopted shortly after submission of an ad that the government seeks to suppress, this is "highly suggestive" of viewpoint discrimination. *NAACP*, 39 F. Supp. 3d at 627-28; *see also Ridley*, 390 F.3d at 77 ("if [the agency] revised a guideline merely as a ruse for impermissible viewpoint discrimination, that would be found unconstitutional regardless of the type of forum created.").

All of these factors evidencing viewpoint discrimination are alleged in the complaint here. Unquestionably, Plaintiff has alleged sufficient facts to allow a finding that the 2013 Policy is not viewpoint neutral.

a. Statements by COLTS officials evidence an improper motive.

The complaint alleges that COLTS representatives have not been consistent in articulating the reason for rejecting Plaintiff's "atheists" ad, which raises the specter that the asserted viewpoint neutral grounds for rejecting the speech are actually a cover-up for improper viewpoint discrimination. *See Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 297. Statements from COLTS' representatives demonstrate conflicting reasoning behind the initial rejection of the atheist ad, stating both that COLTS does not accept ads attacking religion (which the ad did not) and that COLTS believed the ad's purpose was to promote debate. Compl. ¶¶ 14-15. Later, COLTS stated that it rejected the atheist ad because COLTS does not accept ads promoting the belief that there is no God and because

COLTS "[did] not wish to become embroiled in a debate over *your group's viewpoints*." *Id.* ¶ 20, Ex. E (emphasis added). In rejecting the ad under the 2013 Policy, COLTS cited its policy against accepting ads promoting the nonexistence of a supreme deity, attacking religion, or that are "otherwise religious." *Id.* ¶ 27. Because "the government rarely flatly admits it is engaging in viewpoint discrimination," *Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 297 (quoting *Ridley*, 390 F.3d at 86), this kind of indirect evidence is more than sufficient to support Plaintiff's claim that COLTS is engaging in viewpoint discrimination.

b. COLTS treated ads related to religion inconsistently.

Before it first rejected NEPA Freethought Society's "atheists" ad in 2012, COLTS accepted advertising from religious organizations that referred to the existence of religion and COLTS displayed its own message attesting to the existence of God on an electric sign on the front of one COLTS bus. Compl. ¶¶ 16-17. Although COLTS' 2013 Policy purported merely to "clarify" its 2011 policy by making more explicit the kinds of ads COLTS prohibited, *see* Compl. Ex. F, COLTS' own actions in accepting ads from St. Mary's Byzantine Catholic Church, St. Matthew's Lutheran Church, Christian Women's Devotional Alliance, and Hope Church belie the interpretation that COLTS sought to ascribe to the 2011 policy as a basis for rejecting Plaintiff's ad in February 2012. The inconsistency

between COLTS' allowance of ads from Christian organizations and its own "God Bless America" messages and interpretation of its policies when deciding whether to run Plaintiff's ad suggests that COLTS was not truly interested in banning all words references to the existence or non-existence of a deity; rather, it was interested in excluding one side of that debate from the forum. *See Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 297-98.

c. Plaintiff's "atheists" ad did not fit into any category of prohibited speech.

Further, the "atheists" ad at issue does not fit very well into any of the categories of prohibited speech that COLTS has pointed to as the justification for banning the ad. COLTS pointed to provisions in its 2011 Policy prohibiting advertising "that is deemed in COLTS[']s sole discretion to be derogatory to any . . . religion" as well as ads "that are objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS." Compl. Ex. B. It later pointed to provisions in the 2013 Policy that "promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; . . . or are otherwise religious in nature." Compl. Ex. H. Nothing in any of the NEPA Freethought Society ads contained any kind of profane or inflammatory language nor disparaged, attacked, or in any way even commented on religion. Nor did the ads even promote atheism. The "atheists" ad

at most can be construed as a statement that atheists exist, or an explanation that the NEPA Freethought Society consists of atheists. The ad containing Plaintiff's name and URL and the one-word sentence "Atheists." does not promote atheism any more than an ad that says "Addicts." and contains the name and URL of a narcotics anonymous group promotes addiction. *See* Compl. Ex. A, D, G The poor fit between the original categories of prohibited speech and Plaintiff's ad that COLTS rejected leads to the conclusion that COLTS banned the ad not because of the content of the ad, but because of the views of the speaker.

d. COLTS changed its policy in direct response to NEPA Freethought Society's submission of an advertisement.

Finally, the facts alleged in the complaint amply support a finding that COLTS adopted the 2013 Policy in reaction to NEPA Freethought Society's attempts to advertise. COLTS adopted the 2013 Policy eight days after rejecting yet another of NEPA Freethought Society's attempts to advertise. Compl. ¶ 21. The policy itself states that it is an attempt to "clarify" the prior policy, rather than reflecting any decision to use its advertising space in a different manner. Compl. Ex. F. Moreover, prior to the institution of the 2013 Policy, COLTS had allowed the message "God Bless America" to be displayed on an electric sign on the front of one COLTS bus and had accepted and run several ads that contained the name of a religion. *Id.* ¶¶ 16-17. COLTS only ceased these practices after NEPA

Freethought Society sought to place an advertisement that contained the word "atheist."

In sum, Plaintiff has alleged more than enough facts to state a plausible claim that COLTS' 2013 Policy is not viewpoint neutral, but was adopted for the purpose of excluding the viewpoint of the NEPA Freethought Society. The Court should reject COLTS' suggestion that its restrictions are viewpoint neutral simply because, on its face, the current policy does not target any particular views taken on a subject. COLTS Br. at 14. On a motion to dismiss, the Court must accept as true Plaintiff's allegations that COLTS offered inconsistent and shifting reasons for rejecting the ad, that prior to NEPA Freethought Society's attempts to advertise, COLTS had run "God Bless America" messages and accepted ads from religious organizations and only began enforcing its policy after NEPA Freethought Society sought to advertise, and that COLTS revised its policy in response to NEPA Freethought Society's proposed ads. The 2013 Policy is a reactionary policy enacted for a discriminatory purpose. It is clear that the 2013 Policy is not viewpoint neutral.

COLTS' policy is neither reasonable nor viewpoint neutral, and COLTS motion should be denied.

C. COLTS' Decision to Exclude Plaintiff's Advertisement Cannot Satisfy the Scrutiny Applicable to any Type of Forum.

Plaintiff also brings an as-applied challenge,[3] asserting that COLTS' decision to reject its advertisement has nothing to do with COLTS' policies and everything to do with COLTS' disapproval of Plaintiff's message. Plaintiff's allegations of viewpoint discrimination are specific and supported by COLTS' own words. They are more than sufficient to state a claim and survive COLTS' motion to dismiss.

Plaintiff has consistently sought to advertise with a single word that COLTS finds objectionable: the word "atheists." COLTS has variously claimed that the use of this word in advertising "disparages" religion or presents a "discussion" about religion or is itself a religious statement. The word "atheists" is none of those things. It is a description of the members of the Northeastern Pennsylvania Freethought Society. The statement that atheists exist does not "disparage" or "discuss" religion and certainly is not a statement of religious views. As explained above, the poor fit between Plaintiff's ad and the categories of prohibited speech that COLTS invoked as the basis for rejecting the ad supports the conclusion that

[3] Although COLTS notes that Plaintiff brought both facial and as-applied challenged to COLTS' advertising policy, COLTS' motion ignores entirely the as-applied challenge, offering no response to NEPA Freethought Society's claim that COLTS' rejection of its ad is based on viewpoint discrimination.

COLTS banned the ad not because of the content of the ad, but because of the views of the speaker.

This conclusion is further supported by the fact that, before Plaintiff sought to advertise, COLTS saw nothing negative in allowing references to religion on its busses. The sole purpose of COLTS' shifting policy positions has been to exclude Plaintiff from identifying itself as an organization of atheists. Any other justification offered by COLTS is pretext.

CONCLUSION

For these reasons, NEPA Freethought Society respectfully requests that the Court deny the Motion to Dismiss.

Respectfully submitted,

Dated: July 27, 2015

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Certificate of Compliance

I hereby certify that this Memorandum of Law in Opposition to Defendant's Motion to Dismiss is in compliance with Local Rule 7.8(b), as it contains 4,773 words, exclusive of the table of contents and table of authorities, based on the word count of the word-processing system used to prepare the brief.

/s/ *Monica Clarke Platt*
Monica Clarke Platt (I.D. No. 311445)

EXHIBIT A

1 of 2 DOCUMENTS

Analysis
As of: Jul 17, 2015

AMERICAN FREEDOM DEFENSE INITIATIVE ("AFDI"), et al., Plaintiffs, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"), et al., Defendants.

CIVIL ACTION No. 2:14-cv-5335

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2015 U.S. Dist. LEXIS 29571

March 11, 2015, Decided
March 11, 2015, Filed

PRIOR HISTORY: *Am. Freedom Def. Initiative v. Southeastern Pa. Transp. Auth. ("SEPTA"), 2014 U.S. Dist. LEXIS 164575 (E.D. Pa., Nov. 25, 2014)*

COUNSEL: [*1] For AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER, ROBERT SPENCER, Plaintiffs: DAVID YERUSHALMI, LEAD ATTORNEY, PRO HAC VICE, AMERICAN FREEDOM LAW CENTER, WASHINGTON, DC; JASON P. GOSSELIN, LEAD ATTORNEY, BRYNNE MADWAY, DRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA; ROBERT JOSEPH MUISE, LEAD ATTORNEY, PRO HAC VICE, ANN ARBOR, MI.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, ("SEPTA"), JOSEPH M. CASEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GENERAL MANAGER OF SEPTA, Defendants: DAVID A. SCHUMACHER, PAUL C. MADDEN, BUCHANAN INGERSOLL & ROONEY PC, PHILADELPHIA, PA.

JUDGES: MITCHELL S. GOLDBERG, J.

OPINION BY: MITCHELL S. GOLDBERG

OPINION

MEMORANDUM OPINION

The American Freedom Defense Initiative ("AFDI") claims that the Southeastern Pennsylvania Transportation Authority ("SEPTA") has violated its *First Amendment* rights by refusing to post an advertisement on buses that SEPTA asserts is "patently false" and offends "minimal civility standards." Currently before me is Plaintiffs' motion for a preliminary injunction.[1] Because I find that SEPTA's refusal violates the *First Amendment* and that Plaintiffs have satisfied all elements necessary to obtain

an injunction, I will grant Plaintiffs' motion.

1 Individual Plaintiffs, Pamela Geller [*2] and Robert Spencer, have also sought injunctive relief.

I. FACTUAL AND PROCEDURAL HISTORY[2]

2 Unless otherwise noted, these facts are taken from the parties' joint "Stipulated Facts for Purposes of Plaintiffs' Motion for Preliminary Injunction." (Doc. No. 34.)

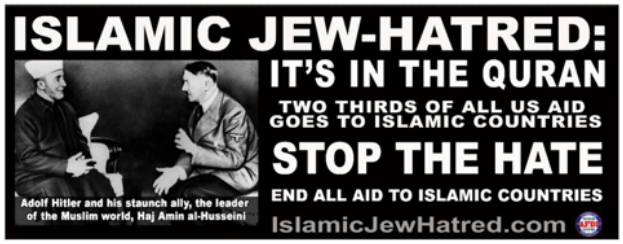
Plaintiff AFDI is a nonprofit organization "dedicated to freedom of speech, freedom of conscience, freedom of religion and individual rights." It pursues these objectives, in part, by purchasing advertising space on transit authority property around the country.

Titan Outdoor LLC ("Titan") is an advertising company that solicits and displays advertising on behalf of transit authorities. In 2005, Titan entered into a contract with SEPTA to solicit and display advertising on SEPTA stations, vehicles and products. The contract contains thirteen advertising standards which prohibit certain categories of advertising from display on SEPTA property. The standard at issue, section 9(b)(xi) ("the anti-disparagement standard"), prohibits:

> Advertising that tends to disparage or ridicule any person or group of persons on the basis of race, religious belief, age, sex, alienage, national origin, sickness or disability.

In connection with the SEPTA contract, Titan's [*3] solicitation program focuses on commercial and non-profit institutions. Titan does not solicit "public issue" advertisements. However, it is undisputed that from January 1, 2011 to December 1, 2014, 41 of the 5,318 advertisements SEPTA ran involved public issues. (Defs.' Br. p. 6.) These "public issue" advertisements covered a diverse range of topics including animal cruelty, teacher seniority, birth control, religion, fracking and sexual harassment.

On May 27, 2014, Plaintiffs submitted the advertisement in question to Titan with a request that it be displayed on SEPTA buses. The advertisement states, in relevant part, "Islamic Jew-Hatred: It's in the Quran. Two Thirds of All US Aid Goes to Islamic Countries. Stop the Hate. End All Aid to Islamic Countries." The advertisement also contains a picture of Adolf Hitler meeting with Haj Amin al-Husseini,[3] with the caption, "Adolf Hitler and his staunch ally, the leader of the Muslim world, Haj Amin al-Husseini." The advertisement appears as follows:



3 According to Plaintiffs, Haj Amin Al-Husseini was "the leader of the entire pan-Arab movement and later the undisputed leader of the Palestinian national movement." (Mot. to Exclude p. 9.) SEPTA [*4] disagrees with this characterization and asserts that "for a period of time Mr. Al-Husseini held titles and offices given to him by the British Empire [ ]. To call him 'the leader of the Muslim world' is manifestly false." (Defs.' Resp. to Mot. to Exclude p. 4.)

After receiving the advertisement, Titan contacted SEPTA's advertising department raising concerns that the advertisement violated SEPTA's advertising standards. Uncertain as to how to proceed, SEPTA's advertising department notified SEPTA's general counsel's office. Following a meeting with other members of the general counsel's office, Gino J. Benedetti, General Counsel for SEPTA and SEPTA's final decision maker, rejected the advertisement. (Tr. 25-26, 28-30.)

On June 3, 2014, Titan notified Plaintiffs that SEPTA had rejected the advertisement on the basis that it did not comply with "the anti-disparagement standard." Plaintiffs then filed this civil rights action alleging claims under the *First* and *Fourteenth Amendments of the United States Constitution* and *42 U.S.C. § 1983*. Plaintiffs also filed a motion for a preliminary injunction requesting that I immediately enjoin enforcement of the anti-disparagement standard and order SEPTA to display the advertisement in question.

At a subsequent pre-hearing [*5] conference, SEPTA advised that they intended to present expert

testimony from Dr. Jamal J. Elias, Walter H. Annenberg Professor of Humanities at the University of Pennsylvania to offer two opinions, both of which pertain to alleged factual inaccuracies in the advertisement. SEPTA argued that Dr. Elias' opinions were relevant to show that the advertisement contains false factual statements that are not entitled to *First Amendment* protection. Plaintiffs countered that Dr. Elias' testimony should be excluded because public issue speech does not lose its *First Amendment* protection based on a claim of falsity. In light of long standing United States Supreme Court precedent, I held that *First Amendment* principles apply to the advertisement in question regardless of its alleged falsity and excluded Dr. Elias' conclusions from the preliminary injunction hearing. See *Am. Freedom Def. Initiative v. SEPTA, 2014 U.S. Dist. LEXIS 164575, 2014 WL 6676517 (E.D. Pa. Nov. 25, 2014)*.

A hearing on the preliminary injunction was held on December 17, 2014. There, Mr. Benedetti generally described SEPTA's advertising practices as well as the particular process that led to the rejection of Plaintiffs' advertisement. SEPTA's written policy states that "[a]ll advertising shall be submitted to SEPTA for review and approval prior to display." However, Mr. Benedetti [*6] testified that SEPTA does not follow this policy. (Tr. 24) ("That's what this says, but that was not what was done in practice.") Mr. Benedetti further testified there are no written procedures for when Titan believes that an advertisement may violate the standards or for how SEPTA then resolves those concerns.

According to Mr. Benedetti, in practice, Titan alerts SEPTA's advertising department and if that department is unsure of what to do with the advertisement, the general counsel's office is contacted. Mr. Benedetti stated that the general counsel's office then reviews the advertisement and makes a determination regarding its compliance with the advertising standards. Mr. Benedetti testified that there are no written procedures for appealing such a determination. (Tr. 20-37.)

Mr. Benedetti explained that he rejected the advertisement because he believed that the "ad disparaged Muslims because it portrayed them in a way that I believe was untrue and incorrect and false" and "put every single Muslim in the same category being a Jew hater, and it informed the reader that Hosh Amin al-Hussein [sic] is the leader of the Muslim world." Mr. Benedetti acknowledged that SEPTA does not have [*7] any written guidelines defining the words "disparage" or "demean" as used in the anti-disparagement standard. (Tr. 39-47.)

II. LEGAL STANDARD -- PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy. *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989)*. As such, the granting of preliminary injunctive relief is restricted to limited circumstances. Id. In order to obtain a preliminary injunction, a plaintiff must establish four elements:

> (1) the likelihood that the plaintiff will prevail on the merits at final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.

A.T.&T. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994). A preliminary injunction "should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." Id. Additionally, "when the preliminary injunction is directed not merely at preserving the status quo but . . . at providing mandatory relief, the burden on the moving party is particularly heavy." *Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)*.

III. LEGAL ANALYSIS

Plaintiffs argue that SEPTA's anti-disparagement standard is unconstitutional and the rejection [*8] of their advertisement for non-compliance with that standard violated their *First Amendment* free speech rights. Plaintiffs' request for injunctive relief must therefore be analyzed under relevant *First Amendment* precedent.

A. Likelihood of Success on the Merits

The United States Court of Appeals for the Third Circuit precedent instructs that in order to demonstrate a likelihood of success on the merits "[i]t is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a Prima [sic] facie case

showing a reasonable probability that it will prevail on the merits." *Oburn v. Shapp, 521 F.2d 142, 148 (3d Cir. 1975)*.

The Supreme Court has outlined a three-step analysis regarding a prima facie case of alleged *First Amendment* violations. See *Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)*. The first step is to determine whether the advertisement in question constitutes speech protected by the *First Amendment*. Thereafter, the nature of the forum created by SEPTA's advertising space must be determined because the appropriate level of scrutiny depends on the categorization of the forum. Lastly, an examination of whether the anti-disparagement standard at issue survives the applicable level of scrutiny must be undertaken.

The proposition that the *First Amendment* strongly [*9] protects the right to express opinions on public questions has "long been settled" by Supreme Court precedent. *New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*. This enduring proposition reflects the belief "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id. at 270* (quoting *United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))*. Therefore, Plaintiffs' claims must be analyzed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co., 376 U.S. at 270*.

i. Protected Speech

The advertisement contains statements about foreign aid and references to the Quran. This content squarely involves political expression and reflects Plaintiffs' interpretation of a religious text, both of which are protected speech. This type of public issue expression lies at the very heart of the *First Amendment's* protections. Indeed, speech concerning public issues "has always rested on the highest rung of the hierarchy of *First Amendment* values." *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)*.

ii. Forum Analysis

Having concluded that the advertisement falls within the scope of the *First Amendment's* protection, I will next assess the nature of the forum created by SEPTA's advertising space.

The *First Amendment* guarantees freedom of expression against infringement by the [*10] state, not by private actors. *Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)*. It is undisputed that SEPTA is a state actor. *Ford v. SEPTA, 374 F. App'x 325, 326 (3d Cir. 2010)*.

The government is not required to "grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius, 473 U.S. at 799-800*. As such, the Supreme Court has developed a "forum analysis" to determine whether the governmental interest in limiting use of certain public property outweighs the interest of those wishing to use the property for expressive activity. *Id. at 800*. When the government limits speech by restricting access to its own property, the level of scrutiny applied depends on how the property is categorized. The Supreme Court's forum analysis doctrine recognizes three types of fora -- the traditional public forum, the designated public forum and the non-public forum. *Christian Legal Soc. Chapter of the Univ. of California v. Martinez, 561 U.S. 661, 679 n.11, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010)*.

The traditional public forum includes spaces which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)*. Streets and parks are "archetypal" examples of public [*11] fora. *Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 248 (3d Cir. 1998)*. In the traditional public forum, content-based speech restrictions are subject to strict scrutiny and only pass constitutional muster if they are necessary to achieve a compelling government interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)*. On the other hand, content-neutral restrictions which merely regulate the time, place, and manner of expression in a public forum are permissible if "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id.

A designated public forum is public property "'that has not traditionally been regarded as a public forum' but that the government has intentionally opened up for use by the public as a place for expressive activity." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth., 653 F.3d 290, 296 (3d Cir. 2011)* (quoting *Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009))*. Like the traditional public forum, content-based speech restrictions in a designated public forum are subject to strict scrutiny. *Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 296*.

Finally, public property that "is not by tradition or designation a forum for public communication" constitutes a non-public forum. *Perry Educ. Ass'n, 460 U.S. at 46*. Restrictions on speech in a non-public forum are permissible so long as they are reasonable and viewpoint neutral. Id.

Importantly, regardless of the forum's classification, viewpoint based restrictions are unconstitutional. [*12] *Pittsburgh League of Young Voters Educ., 653 F.3d at 296* ("Viewpoint discrimination is anathema to free expression and is impermissible in both public and non-public fora.") A viewpoint restriction "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*. In other words, if the government allows speech on a certain subject in any forum, it must accept all viewpoints on the subject, even those that it disfavors or finds unpopular. *Pittsburgh League of Young Voters Educ., 653 F.3d at 296*

In conducting the forum analysis, courts "look to the authority's intent with regard to the forum in question and ask whether [the authority] clearly and deliberately opened its advertising space to the public." *Christ's Bride Ministries, 148 F.3d at 248-49*. "The authority's own statement of its intent, however, does not resolve the public forum question." *Id. at 251*. Rather, intent is gauged by examining the authority's "policies and practices in using the space and also the nature of the property and its compatibility with expressive activity." *Id. at 249*. Restrictions on the use of the forum "do not necessarily mean that [the authority] has not created a public forum. They may demonstrate instead that [the authority] intended to create a limited public forum, open only to certain kinds of expression." Id.

Plaintiffs argue that SEPTA's advertising [*13] space constitutes a designated public forum requiring application of strict scrutiny to the anti-disparagement standard. Although a non-public forum case, Plaintiffs contend that the analysis set forth in *Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974)* is instructive. In Lehman, the Supreme Court held that "card car" space on transit authority vehicles was a non-public forum because the City of Shaker Heights had a policy which prohibited political and public issue advertising and had consistently enforced that ban for twenty-six years. *Id. at 300-304*. Plaintiffs assert that Lehman stands for the proposition that a consistently enforced ban on political and public issue advertising demonstrates a transportation authority's intent to maintain its advertising space as a non-public forum. Plaintiffs note that other courts have adopted this reading of Lehman when analyzing whether a particular transportation authority's advertising space is a public or non-public forum.

Relying on Lehman, Plaintiffs note that in contrast, SEPTA's advertising practices do not restrict advertisements to only commercial speech. Plaintiffs urge that SEPTA's acceptance of a wide range of controversial public issue advertisements indicates a willingness to open up its [*14] property to expressive conduct, and thus the advertising space in question is a designated public forum.

In further support, Plaintiffs cite to Christ's Bride Ministries where the Third Circuit previously held that SEPTA's advertising space was a designated public forum. There, the Third Circuit concluded:

> [B]ased on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads, based on SEPTA's goals of generating revenues through the sale of ad space, and based on SEPTA's practice of permitting virtually unlimited access to the forum, that SEPTA created a designated public forum. Moreover, it created a forum that is suitable for the speech in question.

Christ's Bride Ministries, 148 F.3d at 252 (1998). Plaintiffs contend that not much has changed since Christ's Bride Ministries was decided as SEPTA's current policies and practices demonstrate that the forum remains

open to and suitable for speech concerning public issues.

SEPTA counters that its advertising space constitutes a non-public forum because it has maintained "tight control" over the kinds of advertisements that have appeared on its buses since 2005. SEPTA points to Mr. Benedetti's testimony that it was never SEPTA's intention to create [*15] a public forum. According to SEPTA, the advertising standards are consistent with this intention as they contain "detailed substantive and procedural limitations" on the public's access to the forum. SEPTA notes that pursuant to these limitations, Titan does not solicit public issue advertisements and, as a result, less than one percent of all advertisements run on SEPTA buses over the past four years involved issues of public concern.

SEPTA also argues that Plaintiffs' reliance on Christ's Bride Ministries is misplaced because that case involved SEPTA's practices as they existed sixteen years ago. In particular, SEPTA notes that at the time Christ's Bride Ministries was decided it only had a limited number of advertising restrictions and maintained a program that affirmatively encouraged advertisements on matters of public concern. According to SEPTA, its current policies, which do not affirmatively encourage advertisements on matters of public concern and require adherence to a more detailed set of standards, dictate a different result.

SEPTA further asserts that its current policies and practices are akin to those of the King County Department of Transportation which were considered [*16] in *Am. Freedom Def. Initiative v. King County, No. 13-1804, 2014 U.S. Dist. LEXIS 11982, 2014 WL 345245, at *1 (W.D. Wash. Jan. 30, 2014)*. According to SEPTA, King County employs advertising standards and practices similar to SEPTA's standards and practices. SEPTA notes that the court concluded that King County's policies and practices evidenced an intention to create a limited forum (i.e. non-public forum)[4] and that this conclusion compels a finding that SEPTA's advertising space is a non-public forum.[5]

> 4 The United States Court of Appeals for the Ninth Circuit uses the term "limited public forum" to "refer to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001)*. According to the Ninth Circuit, "in a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible." *Id. at 1074-75*. As such, the Ninth Circuit applies the same level of scrutiny to restrictions in its "limited public forum" that the Third Circuit applies to restrictions in a "non-public forum."
>
> 5 Contrary to SEPTA's assertion, King County does not support the argument that its advertising space is a non-public forum. Pursuant to its policy, King County does not accept advertisements that would create substantial controversy or that contain [*17] political campaign speech. *King County, 2014 U.S. Dist. LEXIS 11982, 2014 WL 345245, at *4*. The policies and practices at issue in *King County* are markedly different from SEPTA's policies and practices in several material respects. Most importantly, SEPTA's standards do not prohibit all political campaigns or controversial speech.

For the following reasons, and after considering the evidence presented at the preliminary injunction hearing, I find that SEPTA's advertising space constitutes a designated public forum.

First, as a threshold matter, the testimony of Mr. Benedetti that SEPTA intended to create a non-public forum is not dispositive of the forum analysis inquiry. See *Christ's Bride Ministries, 148 F.3d at 251*. The focus of my inquiry remains on the evidence of SEPTA's actual policies and practices.

Second, SEPTA does not have an official policy which prohibits political or public issue advertising from appearing on its property. None of SEPTA's advertising standards limit the range of acceptable advertisements to those which contain only commercial or uncontroversial speech. Nor is SEPTA's practice limited to only accepting commercial advertisements. Importantly, over the past four years, SEPTA has accepted a number of concededly public issue advertisements on such topics as teacher [*18] seniority, fracking and contraceptive use. (Stipulated Facts, Ex. 1-1-A.)

Third, Lehman and subsequent cases applying its teachings make clear that SEPTA's acceptance of political and public issue speech demonstrates a general intent to open the forum for expression. See *Lehman, 418 U.S. at 300-04*; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 966 (9th Cir. 1999)* ("where

the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora"); *Lebron v. Washington Metropolitan Area Transit Auth. ("WMATA"), 749 F.2d 893, 896, 242 U.S. App. D.C. 215 (D.C. Cir. 1984)* ("There is no doubt . . . that WMATA has converted its subway stations into public fora by accepting . . . political advertising"); *Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985)* (finding transit authority advertising space to be a public forum because the space had been "used for a wide variety of commercial, public-service, public-issue, and political ads"); *New York Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998)* ("The district court thus correctly found that the advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising.") Unlike the blanket political speech prohibition in *Lehman*, SEPTA's policies and practices indicate that the forum is open to and suitable for [*19] public issue speech.

Finally, my conclusion that SEPTA's current practices and policies evidence an intention to open the forum to expressive activity is also consistent with Christ's Bride Ministries. At the time that Christ's Bride Ministries was decided, SEPTA's policies 1) prohibited libelous and obscene advertising, 2) expressed a preference that the agency which managed its advertising space, TDI, "concentrate" on advertising unrelated to tobacco and alcohol products and 3) retained for SEPTA the sole discretion to reject any advertisement that it deemed objectionable. *Christ's Bride Ministries, 148 F.3d at 249-51*. Under the prior contract before the court in Christ's Bride Ministries, SEPTA also participated in a program called "TDI Cares" in which SEPTA could elect to donate unused advertising space to an "issue of public concern" selected jointly by SEPTA and TDI. Id.[6]

> 6 The Third Circuit noted that "[t]here is no evidence on the record of which ads actually ran [pursuant to the TDI Cares program] or of how much advertising space SEPTA and/or TDI actually donated to those campaigns. Considered with the other evidence in the record, the brochure demonstrates, however, that the forum in question is suitable for speech concerning social [*20] problems and issues." *Christ's Bride Ministries, 148 F.3d at 249 n.4*.

SEPTA accurately notes that its current policies and practices are different than those at issue in Christ's Bride Ministries. SEPTA no longer participates in a program to donate unused advertising space to an "issue of public concern." SEPTA's current policies also prohibit additional categories of advertising that were not prohibited under its previous contract. Despite these differences, neither set of policies prohibits political, public issue or controversial advertisements. Thus, although the standards are more numerous than they were at the time *Christ's Bride Ministries* was decided, SEPTA's current policies and practices demonstrate that the forum in question remains open to and suitable for speech concerning public issues.

iii. Constitutional Scrutiny

Having determined that SEPTA's advertising space constitutes a designated public forum, I now turn to whether the anti-disparagement standard survives the applicable level of scrutiny. To determine whether speech restrictions in a designated public forum are constitutional, courts apply "the time, place, and manner doctrine." See *Brown v. City of Pittsburgh, 586 F.3d 263, 271 (3d Cir. 2009)*. Under that doctrine, a time, place and manner restriction "is constitutionally [*21] permissible if it is narrowly tailored to serve the government's legitimate, content-neutral interests and leaves open ample alternative channels for communication." Id. (citations omitted). However, if restrictions are content-based, the test is "whether they were necessary to serve a compelling government interest, were narrowly drawn to achieve that interest, and were the least restrictive means of achieving that interest." *United States v. Marcavage, 609 F.3d 264, 279 (3d Cir. 2010)*.

Thus, the first issue is whether SEPTA's anti-disparagement standard is content-based. To determine whether a restriction is content-based, courts look at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y., 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980)*. In *R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)*, the Supreme Court considered whether the following municipal ordinance was content-based:

> Whoever places on public or private property a symbol, object, appellation,

> characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

Minnesota state courts [*22] interpreting this ordinance had narrowly construed the ordinance to apply only to fighting words. *Id. at 381*. Although fighting words are generally excluded from the scope of *First Amendment* protection, the Supreme Court, nonetheless, held that the ordinance ran afoul of the *First Amendment* as a content-based restriction. *Id. at 387, 391*. The Court reasoned that:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered.

Id. at 391. The Court concluded that the ordinance was an unconstitutional content-based restriction because "[t]he *First Amendment* does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Id.

In light of the Supreme Court's holding in *R.A.V.*, I find that SEPTA's anti-disparagement standard is a content-based restriction. Like the ordinance in R.A.V., the anti-disparagement standard permits disparaging advertisements so long as they are not addressed to one of the disfavored topics which are specifically [*23] enumerated. In fact, outside of these specified topics, SEPTA's standards could permit advertisements which disparage, for example, political affiliation or union membership. Thus, in selectively prohibiting speech based upon the subject addressed, SEPTA's anti-disparagement standard constitutes a content-based restriction.

Such content-based regulations are presumptively invalid in traditional and designated public forums. *Id. at 382*. As such, in these forums, content-based restrictions only survive constitutional scrutiny if they are actually necessary to serve a compelling state interest. *Marcavage, 609 F.3d at 279*.

SEPTA has not argued that the anti-disparagement standard survives strict scrutiny. However, even if SEPTA had claimed a compelling state interest in shielding the specifically identified groups from abuse, the restriction would still likely fail as not actually necessary to achieve that interest. This conclusion finds support in R.A.V., where the Supreme Court concluded the "fighting words" ordinance was not necessary to achieve the government's stated interest in "ensuring the basic human rights of members of groups that have historically been subjected to discrimination." *505 U.S. at 395*. The Court reasoned that " [*24] [a]n ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the *First Amendment* forbids." *Id. at 396*.

Like the fighting words ordinance in R.A.V., SEPTA's anti-disparagement standard would have the same "beneficial effect" even if its prohibition was not limited to the specific enumerated groups. Therefore, the anti-disparagement standard's content-based restriction is not actually necessary to achieve whatever compelling state interest SEPTA may claim as justification. As such, the anti-disparagement standard does not survive strict scrutiny and Plaintiffs are likely to succeed on the merits of their *First Amendment* claim.

Plaintiffs are also correct in asserting that the anti-disparagement standard goes beyond content discrimination to actual viewpoint discrimination. Plaintiffs argue that this conclusion is compelled by R.A.V., which states:

> Displays containing some words--odious racial epithets, for example--would be prohibited to proponents of all views. But "fighting words" [*25] that do not themselves invoke race, color, creed, religion, or gender--aspersions upon a person's mother, for example--would

> seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

505 U.S. at 391-92. Relying on this reasoning, Plaintiffs note that had their advertisement stated "Islamic love of Jews . . . It's in the Quran," it would not have been rejected for violating the anti-disparagement standard. Plaintiffs contend that the anti-disparagement standard, therefore, constitutes viewpoint discrimination.

SEPTA counters that the anti-disparagement standard "is viewpoint neutral inasmuch as it applies regardless of point of view." In support of their position, SEPTA contends that the standard does not suppress expression on one side of the debate [*26] because "neither side could flaunt the standard."

In light of R.A.V., I agree with Plaintiffs that the anti-disparagement standard is viewpoint based and, therefore, impermissible regardless of the forum categorization. The plain language of the restriction only prohibits expression which disparages certain groups. Under the anti-disparagement standard, speech which praises those same groups is clearly permissible. Therefore, the restriction is viewpoint based and unconstitutional regardless of the nature of the forum. See *Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 296* ("Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination.")

B. Irreparable Harm to Plaintiffs

The second prong of the preliminary injunction standard requires that I next consider the extent to which Plaintiffs will suffer irreparable harm absent the requested relief. See *Clean Ocean Action v. York, 57 F.3d 328, 331 (3d Cir. 1995)*. Plaintiffs assert that it is well established that "[t]he loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)*.

SEPTA counters that the Third Circuit has "retreated from the automatic presumption of irreparable harm" established in Elrod. In support [*27] of this position, SEPTA relies on the non-precedential opinion in *Conchatta, Inc. v. Evanko, 83 F. App'x 437 (3d Cir. 2003)*, which states, "[w]hile other circuits relax the irreparable harm requirement in *First Amendment* cases, our Court requires a *First Amendment* plaintiff seeking a preliminary injunction to prove irreparable harm." *Id. at 442 n.3*. SEPTA further notes that the Third Circuit indicated that "[t]he statement in Elrod that 'the loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' addresses the requisite *duration* of a deprivation of *First Amendment* rights, but does not suggest that a real or threatened deprivation need not occur." Id. (emphasis in original).

SEPTA correctly notes that Conchatta held that the plaintiffs in that case had not demonstrated irreparable harm. However, Conchatta involved a pre-enforcement facial challenge to a statute prohibiting "lewd, immoral, or improper entertainment" in facilities holding liquor licenses. *Id. at 438-39, 442-43*. The Third Circuit agreed with the district court that the plaintiffs had not met their burden of demonstrating irreparable harm because "[s]o far as the record discloses, the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action." *Id. at 443*. This fact specific [*28] holding does not mark a retreat from the automatic presumption principle enounced in Elrod and the Third Circuit has since reaffirmed the principle's continued validity. See *B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 323 (3d Cir. 2013)* (holding that pursuant to Elrod a restriction which prevents the exercise of the right to freedom of speech "unquestionably constitutes irreparable injury.")

Plaintiffs have alleged a real and actual deprivation of their *First Amendment* rights. Therefore, I find that Plaintiffs have adequately demonstrated irreparable harm because "[t]he loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod, 427 U.S. at 373*.

C. Irreparable Harm to Defendants

The third prong of the preliminary injunction standard requires me to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999)*.

Plaintiffs assert that no legitimate interest claimed by SEPTA can be harmed by the exercise of their constitutionally protected rights. Plaintiffs also note that the advertisement in question has run on transit authority advertising space in other major cities without incident. SEPTA counters they will suffer irreparable harm if the preliminary injunction is granted because running the advertisement [*29] will result in decreased ridership and adversely affect SEPTA's relationship with its Muslim employees.

Although SEPTA's concerns are not immaterial, it cannot properly claim a legitimate interest in enforcing an unconstitutional law. See *ACLU v. Ashcroft, 322 F.3d 240, 251 n.11 (3d Cir. 2003)* ("Neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.") Therefore, I find that the interest in vindicating *First Amendment* freedoms outweighs any harm that may befall SEPTA in granting the preliminary injunction.

D. Public Interest

The fourth prong requires me to assess whether granting injunctive relief is in the public interest. *Winback & Conserve Program, 42 F.3d at 1427 n.8*. The Third Circuit has recognized that "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." Id.

Additionally, many courts have held that there is a significant public interest in upholding *First Amendment* principles. See *Ramsey v. City of Pittsburgh, 764 F. Supp. 2d 728, 735 (W.D. Pa. 2011)* (citing *Homans v. Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001)* ("We believe that the public interest is better served by following binding Supreme Court precedent and protecting the core *First Amendment* right of political expression"); *Iowa Right to Life Comm'e, Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999)* ("the potential harm to independent expression and certainty [*30] in public discussion of issues is great and the public interest favors protecting core *First Amendment* freedoms"); *Elam Constr., Inc. v. Regional Transp. Dist., 129 F.3d 1343, 1347 (10th Cir. 1997)* ("the public interest [ ] favors plaintiffs' assertion of their *First Amendment* rights"); *G & V Lounge, Inc. v. Mich. Liquor Control Com'n, 23 F.3d 1071, 1079 (6th Cir. 1994)* ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *Cate v. Oldham, 707 F.2d 1176, 1190 (11th Cir. 1983)* (noting the "strong public interest in protecting *First Amendment* values"). As such, I find that granting the requested injunctive relief is in the public interest.

IV. BOND REQUIREMENT

Federal Rule of Civil Procedure 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." *Fed. R. Civ. P. 65(c)*.

Although "the amount of the bond is left to the discretion of the court, the posting requirement is much less discretionary." *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 103 (3d Cir. 1988)* ("While there are exceptions, the instances in which a bond may not be required are so rare that the requirement is almost mandatory.") In other words, *Rule 65(c)* "mandates that a court when issuing an injunction must require the successful applicant to post adequate security." Id.

Neither party has addressed the bond requirement. However, Plaintiffs seek injunctive [*31] relief to protect their *First Amendment* rights. SEPTA did not offer any evidence that they will suffer a financial loss as a result of the injunction. Therefore, I will require Plaintiffs to post a nominal bond of $100 before the preliminary injunction will issue.

V. CONCLUSION

I conclude that SEPTA's anti-disparagement standard violates the *First Amendment*. I reach this conclusion because I am compelled to do so under established *First Amendment* precedent. That said, based on the evidence presented at the preliminary injunction hearing, it is clear that the anti-disparagement standard promulgated by SEPTA was a principled attempt to limit hurtful, disparaging advertisements. While certainly laudable, such aspirations do not, unfortunately, cure *First*

Amendment violations.

For the reasons expressed herein, Plaintiffs' motion for a preliminary injunction is granted. An appropriate Order follows.

ORDER

AND NOW, this 11th day of March, 2015, upon consideration of "Plaintiffs' Motion for Preliminary Injunction" (Doc. No. 11), "Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction" (Doc. No. 18), "Defendants' Post-Hearing Brief on Plaintiffs' Motion for Preliminary Injunction" (Doc. No. 36), "Plaintiffs' Post-Hearing Brief in Support [*32] of Motion for Preliminary Injunction" (Doc. No. 37), and in accordance with the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

- "Plaintiffs' Motion for Preliminary Injunction" (Doc. No. 11) is **GRANTED**.

- Defendants are **ENJOINED** from restricting Plaintiffs' speech and are thus **ORDERED** to permit the display of Plaintiffs' advertisement on SEPTA's advertising space.

- The preliminary injunction shall not issue until Plaintiffs post a bond in the amount of $100.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

EXHIBIT B

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, v. CITY OF PHILADELPHIA, Defendant.

CIVIL ACTION NO. 11-6533

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2013 U.S. Dist. LEXIS 71332

May 20, 2013, Decided
May 20, 2013, Filed

SUBSEQUENT HISTORY: Summary judgment granted by, Summary judgment denied by, Motion denied by *NAACP v. City of Philadelphia, 2014 U.S. Dist. LEXIS 105239 (E.D. Pa., Aug. 1, 2014)*
Judgment entered by, Injunction granted at *NAACP v. City of Philadelphia, 2014 U.S. Dist. LEXIS 175965 (E.D. Pa., Dec. 19, 2014)*

COUNSEL: [*1] For NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff: ALEXANDER BILUS, CATHERINE VERA WIGGLESWORTH, DECHERT LLP, PHILADELPHIA, PA; FRED T. MAGAZINER, DECHERT, PRICE & RHOADS, PHILA, PA; MARY CATHERINE ROPER, ACLU OF PA, PHILADELPHIA, PA.

For CITY OF PHILADELPHIA, Defendant: AMANDA C SHOFFEL, CRAIG M. STRAW, LEAD ATTORNEYS, ELISE BRUHL, CITY OF PHILADELPHIA LAW DEPARTMENT, PHILDELPHIA, PA.

JUDGES: CYNTHIA M. RUFE, J.

OPINION BY: CYNTHIA M. RUFE

OPINION

MEMORANDUM OPINION

RUFE, J.

Plaintiff, the National Association for the Advancement of Colored People ("NAACP"), brings this action against Defendant the City of Philadelphia, alleging that the City's policy regarding advertising at the Philadelphia International Airport is an unconstitutional infringement on freedom of speech under the *First* and *Fourteenth Amendments to the United States Constitution* and *Article I, Section 7 of the Pennsylvania Constitution*. The City has moved to dismiss the Amended Complaint. Following the April 26, 2013 oral argument on the Motion, the matter is now ripe for disposition.

I. BACKGROUND[1]

1 The facts alleged in the Amended Complaint (Doc. No. 34) are accepted as true, and all reasonable inferences are drawn in favor [*2] of Plaintiff. *ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994)*; *Fay v. Muhlenberg Coll., No. 07-4516, 2008 U.S. Dist. LEXIS 5063, 2008 WL 205227, at *2 (E.D. Pa. Jan. 24, 2008)*.

On April 7, 2011, the NAACP released a report, titled "Misplaced Priorities," which takes the position that the United States overspends on incarceration at the

expense of education. The report outlines specific reforms that, if implemented, could reverse this trend. The NAACP planned a public awareness campaign to accompany the release of this report and as part of that campaign, prepared a series of advertisements to display at airports across the country. The NAACP selected Philadelphia International Airport as an airport where it sought to display one of these advertisements. In January 2011, the NAACP submitted the following advertisement to Defendant, the City of Philadelphia's Division of Aviation for approval for placement at the Airport:

> Welcome to America, home to 5% of the world's people & 25% of the world's prisoners
>
> Let's build a better America together. NAACP.org/smartandsafe

The City rejected the advertisement. The NAACP alleges that the City rejected the advertisement because of its content or viewpoint in violation [*3] of the *First* and *Fourteenth Amendments to the United States Constitution* and *Section 7, Article 1 of the Pennsylvania Constitution*. After the initial complaint was filed in this matter, the City, pursuant to the parties' stipulation, agreed to post the advertisement at the Airport for a limited time. [2]

> 2 See Doc. No. 31. The initial complaint also named Clear Channel Holdings (which serves as the advertising agent for the Airport) as a defendant. Clear Channel was dismissed by stipulation of the parties and is not named as a defendant in the Amended Complaint.

Despite the City's agreement to allow the advertisement to be posted for a limited time, in March 2012, the City adopted a written policy regarding advertising at the Airport, under which the NAACP's advertisement would not be allowed. The Policy provides in relevant part:

ADVERTISEMENTS

> 1. No person shall post, distribute, or display any Advertisement at the Airport without the express written consent of the CEO and in such manner as may be prescribed by the CEO.
>
> 2. The CEO will not accept or approve any of the following Advertisements:
>
> a) Advertisements that **do not** propose a commercial transaction;
>
> b) Advertisements relating to the [*4] sale or use of alcohol or tobacco products;
>
> c) Advertisements that contain sexually explicit representations and/or relate to sexually oriented businesses or products; and/or
>
> d) Advertisements relating to political campaigns.
>
> 3. The City shall have the right to post or cause to be posted its own advertising promoting:
>
> a) Air Service;
>
> b) The use of Airport related services;
>
> c) The greater Philadelphia area and economy;
>
> d) Philadelphia tourism initiatives; and
>
> e) Other City initiatives or purposes. [3]

3 Philadelphia International Airport Rules and Regulations Manual at 2-4 (Ex. B to Def.'s Mot.

to Dismiss).

Pursuant to the parties' stipulation, the NAACP filed an Amended Complaint challenging this policy as an unconstitutional infringement of speech. The NAACP alleges that before March 2012, the City did not have a written policy regarding Airport advertising and it, in fact, accepted a wide variety of advertising, including non-commercial advertisements that could be considered controversial. For example, according to the NAACP, advertisements on display at the Airport shortly after the NAACP's advertisement was refused included the following:

> (a) an advertisement for the World Wildlife Federation [*5] ("WWF"), captioned "Protecting the Future of Nature," and stating that the WWF "works around the world developing responsible fishing practices";
>
> (b) a similar WWF advertisement with a picture of two overheated polar bears, stating how "WWF is developing global solutions to reduce carbon emissions and helping vulnerable communities, species and habitats adapt to a changing climate";
>
> (c) another WWF advertisement discussion the organization's efforts to preserve habitats for panda bears in China and the need for doing so;
>
> (d) an advertisement by the Foundation For A Better Life with a picture of Bishop Desmond Tutu, stating, "His moral compass points to equality. PEACE. Pass It On."
>
> (e) a similar advertisement about racial equality from the Foundation for a Better Life, stating "Here's to you, Mr. Robinson," featuring a picture of Jackie Robinson, . . . ;
>
> (f) an advertisement by the National PTA, captioned, "The School's Janitor Knows Where Your Kid's Desk Is. Do You?" and advocating for parents to "know about your kid's school" and to "know about your kid";
>
> (g) an advertisement by the National Center for Missing & Exploited Children focusing on places where sexual predators can be found, [*6] and discussing the dangers posed by the Internet for children; and
>
> (h) an advertisement by the USO saying "Support *Our* Troops."

The NAACP alleges that none of these non-commercial advertisements caused harm to the City, Airport, or Airport patrons, and that based on the City's own statements that it previously allowed non-commercial advertisements to ensure that all advertising spaces were filled, permitting the display of non-commercial advertisements would not cause the City to lose revenue. Additionally, the NAACP alleges that the City has permitted the display of noncommercial advertisements honoring the Red Cross and other non-profit groups under the new policy.

The City in moving to dismiss argues, *inter alia*, that the NAACP's claims fail because Airport advertising policy is a viewpoint neutral, reasonable regulation of private advertising in a nonpublic forum. In response, the NAACP argues that to determine whether the policy is unconstitutional, the Court must first determine whether airport advertising space is a "private forum" or a "designated public forum." Because this determination requires a developed factual record, which this Court does not have before it at this stage [*7] of the proceedings, the NAACP asserts that the City's argument is premature.

II. STANDARD OF REVIEW

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate where a plaintiff's "plain statement" lacks enough substance to show that he is entitled to relief. [4] In determining whether a motion to dismiss should be granted, the court must consider only those facts alleged in the complaint, accepting the allegations as true and drawing all logical inferences in favor of the non-moving party. [5] Courts are not, however, bound to accept as true legal conclusions couched as factual allegations. [6] Something more than a mere *possibility* of a claim must be alleged; rather plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [7] The complaint must set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." [8] The court has no duty to "conjure up unpleaded facts that might turn a

frivolous . . . action into a substantial one." [9] Legal questions that depend upon a developed factual [*8] record are not properly the subject of a motion to dismiss. [10]

4 *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).*

5 *ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994)*; *Fay v. Muhlenberg Coll., No. 07-4516, 2008 U.S. Dist. LEXIS 5063, 2008 WL 205227, at *2 (E.D. Pa. Jan. 24, 2008).*

6 *Twombly, 550 U.S. at 555, 564.*

7 *Id. at 570.*

8 *Id. at 562* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))* (internal quotation marks omitted).

9 *Id.* (quoting *McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39, 42-43 (6th Cir. 1988)).*

10 See, e.g., *TriState HVAC Equip., LLP v. Big Belly Solar, Inc., 836 F. Supp. 2d 274 (E.D. Pa. 2011).*

III. DISCUSSION

It is well established that, as a general rule, the government may "limit speech that takes place on its own property without running afoul of the *First Amendment*." [11] Where a government forum has not been opened to the type of expression at issue in a given case, government restrictions on speech need only be reasonable and viewpoint neutral, with reasonableness judged by the purpose served by the relevant forum. [12] "Where, however, the property in question is either a traditional public forum or a forum designated as public by the government, the [*9] government's ability to limit speech is impinged upon by the *First Amendment*." [13] Where the government-owned property is a "public" forum, strict scrutiny applies and speech restrictions are constitutional only if they are narrowly tailored to achieve a compelling government interest. [14] Thus, whether a government's limitation on speech is constitutional depends on the proper classification of the forum at issue.

11 *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 247 (3d Cir. 1998)* (considering an appeal by Christ's Bride Ministries, an antiabortion group that sought to have its advertisement stating that women who choose abortion suffer more and deadlier breast cancer displayed in Southwestern Pennsylvania Transportation Authority's (SEPTA) subway and commuter rail stations. Following a bench trial, the district court entered judgment in favor of SEPTA. The Third Circuit reversed on appeal, addressing, among other things, the forum classification issue).

12 *Id.*

13 *Id.*

14 *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty., 653 F.3d 290, 295-96 (3d Cir. 2011)* (affirming the district court's decision to enter judgment, after a bench trial, in [*10] favor of Plaintiffs, public interest organizations who sought to have their advertisements [stating that ex-prisoners had a right to vote and encouraging them to do so] posted on Port Authority buses).

To determine the proper classification of the forum at issue, the Court must first define the forum itself. [15] A forum is defined "in terms of the access sought by the plaintiff." [16] Here, it is undisputed that the forum at issue is Airport advertising space. [17]

15 *Christ's Bride Ministries, 148 F.3d at 247-48.*

16 *Id. at 248.*

17 See id. ("[Plaintiff] did not seek to leaflet, demonstrate, or solicit in the rail and subway stations as a whole. Instead, it sought access only to the advertising space leased out by [defendant] SEPTA, through [defendant] TDI. . . . We conclude, therefore, that the forum at issue is SEPTA's advertising space.").

While the parties agree on the *definition* of the forum at issue, they disagree about the proper *classification* of that forum. There are three classifications of fora. [18] The first, "traditional public fora," are areas which "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating [*11] thoughts between citizens, and discussing public questions.'" [19] "[A]rchetypal examples [of these fora] include streets and parks." [20] Here it is clear, and the parties do not argue otherwise, that Airport advertising space is not a traditional public forum.

18 *Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 295.*

19 Id. (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948,*

74 L. Ed. 2d 794 (1983)).

20 *Christ's Bride Ministries, 148 F.3d at 248*.

On the other end of the spectrum from traditional public fora are nonpublic fora. [21] "[P]ublic property that 'is not by tradition or designation a forum for public communication' constitutes a nonpublic forum. Access to [such a] forum can be restricted so long as the restrictions are reasonable and viewpoint neutral." [22] The City asserts that Airport Advertising space should be classified as a nonpublic forum.

21 *Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 296*.

22 *Id*. (quoting *Perry, 460 U.S. at 46*).

Finally, "public property 'that has not traditionally been regarded as a public forum' but that the government has intentionally opened up for use by the public as a place for expressive activity," is a "designated public forum." [23] [*12] As with a traditional public forum, speech restrictions in a designated public forum are subject to strict scrutiny. [24] The NAACP argues that Airport advertising space should be classified as a designated public forum.

23 *Id. at 295* (quoting *Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009))*.

24 Id.

To determine whether Airport advertising space is a designated public forum, the Court must engage in a fact-specific analysis of the forum itself, [25] as the Third Circuit has described the analysis:

> A designated public forum is created because the government so intends. . . . We accordingly look to the authority's intent with regard to the forum in question and ask whether [the defendant] clearly and deliberately opened its advertising space to the public. To gauge [a defendant's] intent, we examine its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity. Restrictions on the use of the forum, however, do not necessarily mean that [defendant] has not created a public forum. They may demonstrate instead that [defendant] intended to create a limited public forum, open only to certain kinds of expression. [26]

To discern intent, [*13] a court must look at the purpose for which the defendant uses the space in question as well as defendant's policy and past practice in using the space.

25 See generally *Christ's Bride Ministries, 148 F.3d at 248-52*.

26 *Christ's Bride Ministries, 148 F.3d at 248-49* (internal citations omitted).

Given the nature of this inquiry and the lack of a developed factual record, the Court finds that it is premature to classify the forum at this time. In the absence of a forum classification, the Court is unable to determine whether the policy is constitutional. The City does not argue in the motion that their policy is narrowly-tailored to achieve a compelling government interest as would be necessary to render a policy implemented in a designated public forum constitutional. Therefore, the Motion to Dismiss will be denied with respect to the NAACP's claim that Section 2 of the Airport advertising policy is unconstitutional. [27]

27 The City cites *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority* and *Pittsburgh League of Young Voters Educational Fund v. Port Authority of Allegheny County*, for the proposition that the City's past practice regarding Airport advertising [*14] is not alone sufficient to establish that Airport advertising space is a designated public forum and also for the proposition that even if the forum was a designated public forum prior to adopting the new Policy, the City is permitted to close such a forum, as it did in adopting this new policy. Although the City is correct as to both propositions and while these decisions are instructive as to the use of evidence of the City's past practices in this case, these principles do not alter the Court's decision on the Motion. *Christ's Bride Ministries* and *Port Authority* stand not only for the above-cited propositions, but also for the proposition that to determine the proper forum classification, the Court must engage in a fact-specific analysis of the forum itself. See *Christ's Bride Ministries, 148 F.3d at 248-52*. In both *Christ's Bride Ministries* and *Port Authority*,

the court considered the issue based on a full record developed during a bench trial. See footnotes 11 and 14 *supra.* At oral argument the City conceded that the Court must determine the proper classification of the forum at issue to find that the Policy is constitutional as a matter of law and was unable to point to a single [*15] case where a court has determined the issue on a motion to dismiss. *Christ's Bride Ministries* and *Port Authority* support the Court's decision not to reach the forum classification issue at this time.

The City also argues that the Court should dismiss the NAACP's claim that the policy violates *Article I, § 7 of the Pennsylvania Constitution* because "[a]ny such claim fails for the same reasons that Plaintiff's *First Amendment* claim fail[s]." [28] Because the Motion is denied as to the *First Amendment* claim, it will also be denied as to the Pennsylvania Constitutional claim. [29]

28 Doc. No. 41 at 15.

29 The City also argues that the Court should dismiss the NAACP's claim that the Airport advertising policy is unconstitutionally vague because the Supreme Court has held that the test for identifying commercial speech is whether an advertisement "proposes a commercial transaction," and Airport advertising policy restricts speech to advertisements that "propose a commercial transaction." Doc. No. 41 at 13 (citing *Board of Trustees State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)).* However, simply because the Supreme Court has defined commercial speech as speech that "proposed a commercial [*16] transaction," does not necessarily mean that this phrase, when used in the content of the City's Airport advertising policy, is not vague as a matter of law. But see *Children of the Rosary v. City of Phoenix, 154 F.3d 972, 983 (9th Cir. 1998)*; *Major Media of the Se., Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir.1986).* Accordingly, the City's argument alone does not provide a basis for dismissal.

Additionally, while the City is correct that a facial challenge to Section 3 of the Airport advertising policy would necessarily fail because Section 3 applies to City advertisements which are government speech "exempt from *First Amendment* Scrutiny," [Doc. No. 41 at 15 (quoting *Pleasant Grove City v. Summum, 555 U.S. 460, 468, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2008))* (internal quotation marks omitted)], the Court does not read the Complaint as asserting a facial challenge to Section 3 of the Policy and the NAACP has stated that this was not its intent in including the language of Section 3 in the Amended Complaint. Thus, this argument does not provide a basis for dismissal.

Finally, in response to the Court's questioning at oral argument, the City suggested that the June 21, 2012 stipulation, by which the City agreed [*17] to post the NAACP's advertisement for a limited period of time, prohibits the NAACP from raising claims regarding the City's initial rejection of the NAACP's advertisement. See Doc. No. 31. The City, however, did not provide a complete response to this question, which had not been fully addressed in briefing, instead stating simply that the parties settled those claims and that past practice alone does not establish the nature of the forum.

The stipulation, which is the only record of the parties' agreement before the Court, provides:

> It is hereby stipulated and agreed by and between Defendant City of Philadelphia and Plaintiff National Association For The Advancement of Colored People ("NAACP"):
>
> 1. During the months of August, September and October, Defendant City will provide NAACP with two advertising spaces free of charge at the Philadelphia International Airport, one in the International Arrivals terminal and one in wither terminal B or C, for the display of the advertisement previously submitted by the NAACP which reads "Welcome to America, home to 5% of the world's people & 25% of the world's prisoners."
>
> 2. After July 15, 2012, Defendant City of Philadelphia will pay counsel for [*18] NAACP the

amount of $8800.00 in attorney fees.

3. No later than June 15, 2012, Plaintiff will file an amended complaint to challenge the current advertising policy at the Philadelphia International Airport.

4. The parties will stipulate to the dismissal of Defendant Clear Channel Holdings, Inc. d/b/a Clear Channel Airports.

The stipulation does not explicitly limit the assertion of claims in the Amended Complaint and it is not clear whether the agreement operates as a release of claims regarding the initial denial of the NAACP's request to advertise. Without additional information, the Court cannot deduce whether and what claims are barred by operation of the stipulation.

IV. CONCLUSION

For the foregoing reasons, the City's Motion to Dismiss will be denied. An appropriate Order follows.

ORDER

AND NOW, this 20th day of May 2013, upon consideration of Defendant's Motion to Dismiss (Doc. No. 41), Plaintiff's response in opposition thereto, and Defendant's reply, and after the April 26, 2013 oral argument on the Motion, and for the reasons stated in the Opinion filed this day, it is hereby **ORDERED** that the Motion is **DENIED.** Defendant shall file an answer to the Amended Complaint **within 14** days [*19] of the date of this Order.

It is further **ORDERED** that the stay on discovery imposed by the Court's April 26, 2013 Order (Doc. No. 66) is hereby lifted. Discovery shall be completed **by July 22, 2013.** Dispositive motions shall be filed on or before **August 22, 2013.**

It is so **ORDERED.**

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2015, a true and correct copy of the foregoing Plaintiff Northeastern Pennsylvania Freethought Society's Opposition to Defendant's Motion to Dismiss and corresponding Memorandum of Law were served upon the following counsel of record by the CM/ECF electronic filing system:

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