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 (Judge Mannion)

PLAINTIFF NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY'S POST-TRIAL SUPPLEMENT TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with this Court's instructions from the bench at the conclusion of trial, the Plaintiff, Northeastern Pennsylvania Freethought Society, hereby submits this post-trial supplement to its proposed findings of fact and conclusions of law (ECF No. 69-2).

The originally filed Proposed Findings of Fact (numbers 1 through 102) and Proposed Conclusions of Law (numbers 1 through 73) have been updated to include citations to the trial record. Proposed Findings of Fact numbers 103

through 105 are additional findings of fact based on the evidence presented at trial. Proposed Conclusions of Law numbers 74 through 83 reflect additional propositions of law based on specific issues that arose at trial.

PROPOSED FINDINGS OF FACT

A. **The Parties.**

1. The NEPA Freethought Society is an unincorporated association, with its principal office in Wilkes-Barre, Pennsylvania. *See* Statement of Undisputed Fact, included in Plaintiff's Pretrial Memorandum ("Stipulated Facts") ¶ 1.

2. The NEPA Freethought Society is an organization of atheists, agnostics, secularists, and skeptics. *Id*. ¶ 2.

3. The NEPA Freethought Society engages in social, educational, and activist activities, including building a supportive community for atheists, agnostics, secularists, and skeptics; promoting critical thinking; and upholding the separation of church and state. *Id*. ¶ 3.

4. Justin Vacula is the co-organizer and the spokesperson for the NEPA Freethought Society. *Id*. ¶ 4.

5. The NEPA Freethought Society has struggled to attract members over the years. *See* Trial Tr. 18:2-7.

6. A minority of Americans identify as atheists or agnostics. Pew Research Center, Religious Landscape Study (2014), http://www.pewforum.org/religious-landscape-study/.

7. The NEPA Freethought Society and its members have often found themselves to be the subject of backlash and hostility because of their views or perceived views. Trial Tr. 30:23-32:14; *see also* Ex. 66.

8. The County of Lackawanna Transit System ("COLTS") runs the transit system in Scranton, Pennsylvania. Stipulated Facts ¶ 5.

9. Robert Fiume has served as COLTS' Executive Director since June 2008. *Id*. ¶ 6.

10. As Executive Director, Mr. Fiume is responsible for overseeing the whole transportation system. *Id*. ¶ 7.

11. Mr. Fiume delegated responsibility for deciding whether to accept a proposed advertisement to the Advertising Manager, Jim Smith, and later to the Communications Director, Gretchen Wintermantel. *Id*. ¶ 8.

12. Gretchen Wintermantel has served as COLTS' Communications Director since 2009. *Id*. ¶ 9.

13. As COLTS' Communications Director, Ms. Wintermantel is responsible for interpreting COLTS' advertising policies in order to determine whether or not to accept particular advertisements. *Id*. ¶ 10.

14. Ms. Wintermantel and Mr. Fiume each possess final policymaking authority with respect to COLTS' enforcement of its advertising policies. *Id*. ¶ 12.

B. **COLTS' History of Allowing Advertisements on its Buses.**

15. COLTS has leased advertising space on the inside and outside of its vehicles since at least 1993. *Id*. ¶ 13.

16. COLTS opened its advertising space to the public for the purpose of raising revenue, and not to further any other organizational policy or goal. *Id*. ¶ 14.

17. Traditionally, advertising revenue has comprised less than two percent of COLTS' yearly revenue. *Id*. ¶ 15; *see also* Trial Tr. 109:9-21 (advertising represents approximately 0.4% of COLTS' budget, generating approximately $50,000 per year out of a $12 million budget)

18. Prior to June 21, 2011, COLTS did not have any advertising policy restricting the types of advertisements it would run. Trial Tr. 46:11-16.

19. For at least a decade dating back to at least 2003, COLTS ran many advertisements for religious organizations, including the Diocese of Scranton, Hope Church, Mercy Health Care, AmeriHealth Mercy, St. Matthew's Lutheran Church, Evangelist Beverly Benton, Goodwill Industries, the Office of Catholic Schools, St. Mary's Byzantine Catholic Church, and the St. Stanislaus

School. *Id*. at 47:20-48:4 (Hope Church), 48:5-49:5 (St. Matthew's Lutheran Church), 49:6-18 (Evangelist Beverly Benton), 49:19-25 (St. Mary's Byzantine Church), 50:1-52:3 (Office of Catholic Schools), 52:4-25 (Diocese of Scranton's Adoption for Life) 53:1-17 (St. Stanislaus School), 85:22-86:5 (Mercy Health Care); Exs. 1, 7, 26-30, 39, 40, 42.

20. COLTS has run many advertisements for newspapers and educational institutions where people engage in debate or discussion, including the Times Leader newspaper, the Scranton Times newspaper, the Commonwealth Medical College, the Pennsylvania District Attorneys Institute, and the Penn State Worthington Campus. Trial Tr. 62:12-63:25; Exs. 34, 37, 41, 46-47.

21. COLTS has run many years' worth of advertisements for a beer distributor called "Brewer's Outlet." Trial Tr. 66:14-20; Ex. 4.

22. In 2009, COLTS displayed an advertisement on its buses for a website called "The Old Forge Times News." Trial Tr. 54:18-25; Ex. 2.

23. The advertisement for The Old Forge Times News contained the URL address for an internet blog that, among other things, contained links to anti-Semitic websites, holocaust denial websites, and white supremacist websites. Trial Tr. 55:1-56:1; Ex. 2.

24. COLTS has run several advertisements for school board candidate and current Lackawanna County Commissioner Patrick O'Malley. Trial Tr. 58:10-60:21; Exs. 9-12.

C. **COLTS' First Rejection of a Proposed Advertisement.**

25. COLTS did not reject any advertisement proposal until May 2011. Stipulated Facts ¶¶ 16-19.

26. In May 2011, Jim Smith, who at the time, served as COLTS' Advertising Manager, received a phone call from a local man who wanted to run an advertisement on a COLTS bus that said "Judgment Day is Coming in May." *Id*. ¶ 16.

27. Mr. Smith and Ms. Wintermantel were alarmed by the proposed "Judgment Day" advertisement because it seemed religious. Ms. Wintermantel reviewed the website affiliated with the advertiser's campaign and confirmed that it was, in fact, religious. *Id*. ¶ 17.

28. Mr. Smith and Ms. Wintermantel, along with Mr. Fiume, decided that the Judgment Day advertisement could be controversial because it was religious. They agreed to censor it because advertisements that are religious in nature can cause heated debates and arguments, and COLTS did not want debates or arguments inside of its buses. *Id*. ¶ 18.

29. Accordingly, COLTS informed the potential customer that COLTS would not accept the "Judgment Day" advertisement. *Id*. ¶ 19.

30. Prior to rejecting the "Judgment Day" advertisement, COLTS had never rejected an advertisement in the 18+ years it had been soliciting bus advertisements. *Id*.

31. COLTS based its denial of the "Judgment Day" advertisement on the fact that COLTS felt it was "pro-religion" and didn't want religion being discussed on the buses because that might cause heated debates and arguments. *Id*. ¶ 20.

D. **COLTS' 2011 Advertising Policy.**

32. In response to the proposed Judgment Day advertisement, Ms. Wintermantel drafted COLTS' first formal advertising policy (the "2011 Policy"), which was approved by the COLTS Board of Directors on June 21, 2011. *Id*. ¶ 21; Trial Tr. 68:4-9.

33. The 2011 Policy states that:

> COLTS will **not** accept advertising:
>
> - for tobacco products, alcohol, and political candidates
> - that is deemed in COLTS [sic] sole discretion to be derogatory to any race, color, gender, religion, ethnic background, age group, disability, marital or parental status, or sexual preference
> - that promotes the use of firearms or firearm-related products
> - that are obscene or pornographic
> - that promotes violence or sexual conduct

- that are deemed defamatory, libelous or fraudulent based solely on the discretion of COLTS
- that are objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS

Ex. 51.

34. The 2011 Policy further stated, "Finally, 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*.

35. The 2011 Policy was not designed to increase COLTS' ridership nor was it prompted by any revenue-related goals or concerns. Stipulated Facts ¶ 22.

36. The 2011 Policy had no effect on COLTS' ridership. *Id*. ¶ 23.

37. The 2011 Policy was enacted because COLTS wanted to suppress debate among passengers inside its buses concerning controversial topics or public issues. *Id*. ¶ 24; Ex. 51; Trial Tr. 106:14-21.

38. The goal of COLTS' advertising policy was to prevent debate inside of COLTS' buses. Stipulated Facts ¶ 24.

E. **"God Bless America" Signage on COLTS' Buses.**

39. In late 2011 or early 2012, Justin Vacula noticed a scrolling message that said, "GOD BLESS AMERICA" on the electric head sign on one of the COLTS buses. Trial Tr. 34:21-35:22.

40. Mr. Vacula was concerned by the scrolling message because he believed it to be a government endorsement of religion. *Id*. at 41:16-42:3.

41. Mr. Vacula called COLTS to complain about the message, and the COLTS official he spoke to acknowledged knowing that this message appears on the scrolling electronic head signs. Stipulated Facts ¶ 54; Trial Tr. 36:15-18.

42. On March 1, 2012, the Vice President of the union that represents COLTS bus drivers gave a radio interview, Trial Tr. 42:8-18, in which he said that COLTS buses had been displaying the "God Bless America" message for "years," with the practice dating back as long as COLTS buses had had electronic head signs. Ex. 74 (Vacula Dep. at 67:16-68-7).

43. On March 15, 2012, Mr. Vacula noticed a magnet that said "God Bless the USA" displayed inside a COLTS bus near the driver. Trial Tr. 37:25 – 38:6.

44. On March 31, 2012, a COLTS bus driver published a letter to the editor in the Times-Tribune in which he stated that "COLTS drivers. . . have been proudly advertising this ["God Bless America" message on head signs] for years[.]" Ex. 67.

F. The NEPA Freethought Society's Attempts to Advertise Under the 2011 Policy.

45. On January 30, 2012, Justin Vacula sent an email to Mr. Smith on behalf of the NEPA Freethought Society seeking to display an advertisement on

a COLTS bus containing an image of clouds and the word "Atheists" in large font above the URL address of the NEPA Freethought Society's webpage (WWW.NEPAFREETHOUGHT.ORG) in smaller font. Upon receipt, Mr. Smith showed the email to Ms. Wintermantel. Stipulated Facts ¶ 25.

46. The NEPA Freethought Society wanted to place the advertisement on COLTS' buses in order to recruit potential members to the Society. *Id*. ¶ 57.

47. COLTS examined the NEPA Freethought Society's website, Trial Tr. 80:17-23, and concluded from the website that the NEPA Freethought Society wanted to advertise so that they could spark a debate on COLTS buses.

48. COLTS rejected the NEPA Freethought Society's proposed advertisement. Stipulated Facts ¶ 26.

49. A few days after COLTS received the NEPA Freethought Society's advertisement proposal, Mr. Smith telephoned Mr. Vacula to inform him that COLTS would not run the proposed advertisement. *Id*. ¶ 28.

50. On August 29, 2013, the NEPA Freethought Society again submitted an advertisement for placement on COLTS' buses. The proposed advertisement stated "Atheists. NEPA Freethought Society. NEPAfreethought.org." *Id*. ¶ 29.

51. On September 9, 2013, Ms. Wintermantel, writing on behalf of COLTS, sent a letter to Mr. Vacula stating that COLTS would not display the NEPA Freethought Society's proposed advertisement. *Id*. ¶ 31.

G. COLTS' 2012 Rejection of the NEPA Freethought Society's Proposed Advertisement.

52. COLTS rejected the NEPA Freethought Society's proposed advertisements based in part on its belief that the word "Atheists" would likely cause passengers to engage in debates about atheism aboard COLTS' buses. *Id*. ¶¶ 26, 30.

53. COLTS believed that the words "Atheist," "Agnostics," "Catholic," "Jews," "Muslims," or "Hindu"—or any word referring to a religion or lack of religion—could spark debate on a bus and create controversy regardless of the context in which the word was used. *Id*. ¶ 27.

54. COLTS believed that controversial messages might make riders feel uncomfortable. *Id*. ¶ 30; Trial Tr. 92:6-20, 106:19-21.

55. COLTS also rejected the NEPA Freethought Society's proposed advertisement based in part on a concern that the advertisement would offend or alienate elderly bus riders. Stipulated Facts ¶ 30.

56. Ms. Wintermantel, who made the decision to reject the [Wilkes-Barre Scranton Night Out] advertisement, testified that COLTS would probably

not reject the proposed [Wilkes-Barre Scranton Night Out] advertisement if it were submitted again. *Id*. ¶ 35.

H. **COLTS' 2013 Clarification of its Advertising Policy.**

57. On September 17, 2013—eight days after it sent a letter to Justin Vacula, denying the NEPA Freethought Society's second advertisement proposal—the COLTS Board of Directors enacted a new policy (the "2013 Policy"), drafted by COLTS' attorneys, to clarify the 2011 Policy as COLTS understood it and to more clearly set forth the types of advertisements COLTS will and will not accept. *Id*. ¶ 36.

58. The 2013 Policy serves the primary goal of suppressing debate on controversial topics or public issues on COLTS' buses. *See* Ex. 52 ("It is COLTS' declared intent . . . 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"); Stipulated Facts ¶¶ 39 ("the 2013 Policy was enacted because COLTS wants to prevent debates or argument on its buses"), 40 ("in creating the 2013 Policy, COLTS specifically sought to preclude issues that are political or religious in nature because COLTS believes that politics and religion are topics that people feel strongly about").

59. Currently, the 2013 Policy is still in effect. Stipulated Facts ¶ 37.

60. The 2013 Policy states:

> **It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and 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**.

Ex. 52.

61. COLTS understands this provision to mean that the intent of the policy is to prevent people from debating or arguing on COLTS buses. Stipulated Facts ¶ 39.

62. Under the 2013 Policy, COLTS retains the authority that was explicitly included in the 2011 Policy to reject any advertisements that COLTS officials deemed to be controversial or likely to provoke debate. Ex. 75 (Wintermantel Dep. at 96:25-98:8, 99:20-25, 118:15-119:24, 126:1-25).

63. The 2013 Policy states that:

> COLTS will **not** accept advertising:
> - for tobacco or alcohol or for businesses that primarily traffic in such goods;
> - that promotes the use of firearms or firearm-related products or for businesses that primarily traffic in such goods;
> - that are obscene, pornographic, or promotes or depict sexually-oriented goods or services or for businesses that primarily traffic in such goods or services or that appeal to prurient interests;
> - that promotes violence or sexual conduct:
> - that are deemed defamatory, illegal, fraudulent, misleading or false;

- that proposes a transaction or activity that is prohibited by federal, state or local law;
- that exploit the likeness, picture, image or name of any person, and/or trademark, trade name, copyrighted materials or other intellectual property of a third party, without adequate proof of express written authorization to do so;
- that contain, employ or imply profane or vulgar words;
- that demean or disparage a person, group of persons, business or group of businesses;
- that, if permitted, could reasonably subject COLTS to civil or criminal liability;
- that are political in nature or contain political messages, including advertisements involving political figures or candidates for public office, advertisements involving political parties or political affiliations, and/or advertisements involving an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity.
- 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; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature.

Ex. 52.

64. COLTS specifically sought to preclude issues that are "political or religious in nature" because politics and religion are topics that COLTS identified as being subjects that people feel strongly about. Stipulated Facts ¶ 40.

65. The 2011 Policy and 2013 Policy both applied to advertisements on both the outside and inside of COLTS buses, and do not distinguish between proposals for advertisements on the inside and outside of the

bus. COLTS has never distinguished between advertisements on the interior and exterior of the bus for the purpose of approving an advertisement. Exs. 51, 52; Trial Tr. 78:21-24.

66. COLTS' passengers do discuss and debate public issues during their rides. Trial Tr. 43:18-44:4.

67. COLTS does not have—and has never had—any rules with respect to what people on COLTS buses can discuss or debate. *Id*. at 78:6-20.

I. COLTS Has Never Received Complaints or Reports of any Problems Related to Advertisements or Debates on its Buses.

68. COLTS has never received a complaint about any of the advertisements that it has displayed on its buses. *Id*. at 67:10-15.

69. COLTS has never received a complaint about debates arising due to the advertisements it has displayed. *Id*. at 67:18-21.

70. There has never been a disruption of any sort on a COLTS bus related to or arising from an advertisement displayed on a COLTS' bus. *Id*. at 67:22-24.

71. COLTS is not aware of there ever being a fight or any problem on a COLTS bus arising from a debate among the bus's passengers. *Id*. at 67:10-24.

72. COLTS is not aware of discussions or debates ever affecting a COLTS bus driver's ability to do his or her job in a safe and efficient manner. *Id*. at 67:25-68:3.

J. The NEPA Freethought Society's Attempts to Advertise on COLTS' Buses in 2014.

73. On July 21, 2014, the NEPA Freethought Society submitted a new advertisement proposal to COLTS, that stated:

Atheists.
NEPA Freethought Society
meetup.com/nepafreethoughtsociety

Stipulated Facts ¶ 43; Ex. 79.

74. That same day, COLTS sent a letter to Mr. Vacula, denying the NEPA Freethought Society's advertisement proposal. Stipulated Facts ¶ 44.

75. COLTS' denial of the NEPA Freethought Society's advertisement was based on the fact that the proposed advertisement "addressed" the non-existence of a deity and that the word "Atheists" on the advertisement would "promote debate over a public issue," and thus violated COLTS' advertising policy. *Id*. ¶¶ 45, 46.

76. On July 21, 2014, the same day that COLTS rejected the NEPA Freethought Society's third advertisement proposal, Mr. Vacula submitted an additional advertisement proposal. *Id*. ¶ 47.

77. The NEPA Freethought Society's fourth advertisement proposal was identical to the advertisement proposal rejected earlier that day, except that it did not include the word "Atheists." Rather, it only contained the following text:

NEPA Freethought Society
meetup.com/nepafreethoughtsociety

Id. ¶ 48; Ex. 80.

78. On July 22, 2014, Ms. Wintermantel sent an email to Mr. Vacula indicating COLTS' agreement to run the NEPA Freethought Society's proposed advertisement. Stipulated Facts ¶ 49.

79. COLTS agreed to run the NEPA Freethought Society's fourth advertisement proposal because the word "atheist" had been taken out. *Id.* ¶ 50.

80. The NEPA Freethought Society's fourth advertisement proposal was displayed on the outside of a COLTS bus in October or November of 2014. *Id.* ¶ 51.

81. COLTS did not receive any complaints about the NEPA Freethought Society's advertisement or reports of passengers on COLTS' buses debating the advertisement. Trial Tr. 67:13-24.

K. **The Uneven Application of COLTS' Disclaimer Requirement.**

82. The 2013 Policy states that "[a]ll third party advertisements appearing on COLTS property must contain the following disclaimer: 'The views and/or opinions expressed by the advertiser are not necessarily those of COLTS.' The disclaimer shall appear in a consistent form and manner on all third party advertisements." Ex. 52.

83. Before agreeing to run the NEPA Freethought Society's advertisement, COLTS contracts did not contain this requirement, and COLTS had never enforced the requirement. *See*, *e.g.*, Exs. 1-2, 4, 7, 9, 10, 26-48 (contracts signed before January 31, 2012 that do not mention a required disclosure); Trial Tr. 82:5-85:13 (even after running the plaintiff's advertisement with a required disclaimer, COLTS did not consistently require all advertisements to have a disclaimer).

84. COLTS aggressively enforced the disclaimer requirement against the NEPA Freethought Society. Trial Tr. 81:23-25; Exs. 62-63 (emails repeatedly reminding Justin about the disclaimer requirement).

L. **The Uneven Application of COLTS' Advertising Policy.**

85. Since 2011, the implementation of COLTS' advertising policies has led to many arbitrary outcomes. *Infra* ¶¶ 86-102 (Section L, The Uneven Application of COLTS' Advertising Policy).

86. In April 2012, COLTS displayed an advertisement for "National Infant Immunization Week" on its buses. The advertisement contained a picture of a baby and text that said "Love Them, Protect Them, Immunize Them." COLTS interpreted this advertisement as an advertisement "encouraging people to vaccinate their children." Ex. 6.

87. COLTS has testified that if the same "National Infant Immunization Week" advertisement were proposed today, COLTS would reject it as too controversial. COLTS' changed view about whether the advertisement is prohibited or not stems from the fact that COLTS officials are now aware that there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad, but in 2012, were unware of the public debate concerning immunization. Trial Tr. 61:10-24.

88. COLTS is unaware of any debates among its bus riders or problems on its buses related to the "National Infant Immunization Week" advertisement. *Id*. at 61:10-24, 67:10-68:3.

89. In 2011, COLTS' buses displayed an advertisement from the Diocese of Scranton's "Adoption for Life" campaign that said "Consider Adoption . . . It Works!" Ex. 7; Trial Tr. 52:4-25.

90. COLTS takes the position in this litigation that religion is an inherently controversial issue. Stipulated Facts ¶¶ 27, 40; Trial Tr. 79:20-80:1.

91. However, COLTS chose not to construe a Catholic church's pro-adoption advertisement as a religious message or an anti-abortion message and Ms. Wintermantel has testified that if the Catholic Diocese sought to run its pro-life advertisement again, she would recommend that this advertisement be accepted. Trial Tr. 52:4-25.

92. COLTS testified that, with respect to proposed advertisements submitted by the Catholic Diocese, it does not matter to COLTS whether the pro-adoption advertisement was paid for by a religious organization. *Id*.

93. COLTS testified that, with respect to proposed advertisements submitted by the Catholic Diocese, it does not matter whether the content of the religious advertiser's website might offend anyone. *Id*.

94. COLTS runs many advertisements for health care service providers. *Id*. at 85:14-21.

95. In February 2014, however, COLTS rejected advertisement proposals concerning home health care and hospice services that were submitted by Lutheran Home Care & Hospice, Inc. "because of the cross in the logo and the word Lutheran." *Id*. at 87:8-88:2.

96. COLTS testified that under the 2013 Policy, COLTS would reject an advertisement—which it previously ran—for "St. Stanislaus Polish Food Festival" that contained a reference to "St. Stanislaus Elementary School," a

parochial school, because it was "religious in nature and could possibly cause debate." *Id*. at 53:1-11.

97. COLTS claims that the campaign advertisements that it previously ran for school board candidate (and current Lackawanna County Commissioner) Patrick O'Malley would not be permitted under the 2013 Policy's prohibition on "political" advertisements. *Id*. at 58:24-59:4.

98. Every year since 2013, however, COLTS has agreed to display advertisements on its buses paid for by Commissioner Patrick O'Malley for "Patrick O'Malley's . . . Annual Free Children's Halloween Party" because the advertisements did not mention Commissioner O'Malley's elected position or candidacy (only his name), and because COLTS believes that a Halloween party paid for and thrown by an elected official less than one month before election day has "no relation to politics[.]". Exs. 10, 11, 12, 82; Trial Tr. 59:5-60:21, 101:11-102:7.

99. At the time the 2011 Policy was enacted, COLTS was running an advertisement for a beer distributor called "Brewers Outlet." Ex. 4; Trial Tr. 66:14-20.

100. Despite the 2011 Policy's ban on advertisements for alcohol, COLTS continued to run advertisements for Brewer's Outlet until its contract expired in April 2012, because "[Brewer's Outlet sell[s] other things besides beer.

They sell snacks, they sell lottery tickets, soda, hoagies, things like that." Ex. 75 (Wintermantel Dep. at 56:15-24).

101. One month later, however, in May 2012, COLTS rejected a facially unobjectionable advertisement for the "Wilkes-Barre Scranton Night Out" based on the fact that the website listed on the proposed advertisement contained advertisements for bars. Ex. 5; Trial Tr. 81:8-12.

102. Aside from the NEPA Freethought Society's proposed advertisements, the "Wilkes-Barre Scranton Night Out" advertisement is the only proposed advertisement COLTS rejected under the 2011 Policy. However, COLTS has testified that if this advertisement were submitted again today, COLTS would likely accept it. Trial Tr. 81:8-12.

Additional Proposed Findings of Fact

103. COLTS' Advertising Policy does not help COLTS generate revenue. Rather, by restricting the types of advertisements it will accept, COLTS' Advertising Policy diminishes the amount of revenue that COLTS could generate from its advertising spaces. Trial Tr. 109:25-110:8.

104. COLTS' adoption of an Advertising Policy was not prompted by any concern about losing riders. Trial Tr. 110:12-16.

105. COLTS has never lost a rider because of an advertisement that ran on a COLTS bus. Trial Tr. 111:11-13.

PROPOSED CONCLUSIONS OF LAW

1. COLTS' advertising policy violates the First Amendment for several independent reasons.

2. When the government restricts speech, it bears the burden of proving the constitutionality of its actions. *NAACP v. City of Philadelphia*, 834 F.3d 435, 443 (3d Cir. 2016) (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981)).

3. Regardless of whether COLTS' advertising spaces are analyzed as a designated public forum or a nonpublic forum, COLTS cannot satisfy its burden of justifying the restrictions on speech it has imposed through its advertising policy.

A. The Government Cannot Censor Speech—in Any Forum—in Order to Prevent Debate of Public Issues or Avoid Discomfort.

4. "Debate on public issues" is the core activity that the First Amendment is designed to protect. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment[]"); *Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest,

creates dissatisfaction with conditions as they are, or even stirs people to anger.") (citation omitted).

5. Debate on public issues "is more than self-expression; it is the essence of self-government." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

6. Debate on public issues therefore occupies "the highest rung of the hierarchy of First Amendment values" and is "entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

7. Government censorship aimed at suppressing debate by prohibiting speech that may spark a discussion or cause disagreement—or even offense—is anathema to the First Amendment's robust protection for debate on public issues.

8. There is no legitimate state interest in protecting the sensibilities of recipients of the speech or avoiding disagreement. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted). The Supreme Court recently rejected—again—the notion that "[t]he government has an interest in preventing speech expressing ideas that offend," describing this as an idea that "strikes at the heart of the First Amendment." *Matal v. Tam*, No. 15-1293, 2017 WL 2621315, *3 (U.S. June 19, 2017).

9. "Verbal tumult" and "discord" are "necessary side effects" of the positive ends that society can accomplish through open debate. *Cohen v. California*, 403 U.S. 15, 24–25 (1971).

10. The First Amendment was designed to ensure that the government cannot "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

11. As the Supreme Court recently observed, it is a "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, No. 15-1293, 2017 WL 2621315, *5 (U.S. June 19, 2017); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). As the Supreme Court has "said time and again[,]" "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal v. Tam*, No. 15-1293, 2017 WL 2621315, *18 (U.S. June 19, 2017) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969).

12. Even "hateful" speech that "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is protected

by the First Amendment, because "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, No. 15-1293, 2017 WL 2621315, *19 (U.S. June 19, 2017) (quoting *United States v. Schwimmer*, 279 U.S. 644 (1929) (Holmes, J., dissenting)).

13. If the government has no legitimate interest in censoring speech that is far more likely to cause offense, discomfort, and debate than the NEPA Freethought Society's rather anodyne proposed "Atheists" advertisement, as the Supreme Court recently ruled in an 8-0 decision, then it is plain that the government has no legitimate interest in securing whatever marginal measure of pleasantness COLTS thinks it may achieve by excluding all mention of religion, atheism, or the other forbidden topics outlawed by its advertising policy. *See Matal v. Tam*, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017). Relatedly, banning speech because of how others might react to the speech is known as a "heckler's veto," which is anathema to the First Amendment's protection for unpopular ideas. "[T]he Supreme Court and the courts of appeals have consistently held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity." *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010).

14. These basic, well-settled First Amendment principles mean that, no matter what kind of "forum" for speech is at issue, the government may

not censor certain content based on a bare desire to suppress debate or to protect the public from the discomfort of being confronted with unpopular or offensive ideas or sensitive topics.

15. To put the point another way, the suppression of debate and avoidance of uncomfortable discussion topics are not legitimate government interests that can ever justify a speech restriction. For a government interest to be "legitimate" within the meaning of the First Amendment, it must be unrelated to the suppression of speech. *See*, *e.g.*, *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring) (where an impermissible "censorial justification" is not "apparent from the face of a regulation which draws distinctions based on content," the government must "tender a plausible justification unrelated to the suppression of speech or ideas.").

B. **COLTS' Advertising Spaces are a "Designated Public Forum."**

16. COLTS' policy violates the NEPA Freethought Society's First Amendment rights because the policy cannot survive the strict scrutiny that applies to restrictions on speech in a designated public forum.

17. The legalistic, conclusory statement in COLTS' policy that COLTS did not intend to create a public forum does not resolve the question of what legal standard applies to COLTS' speech policy. *Christ's Bride Ministries*, 148 F.3d at 251 (noting that government's "own statement of its intent . . . does not

resolve the public forum question"). Courts have not hesitated to reject similar boilerplate in other government policies. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 352 (6th Cir. 1998) (finding that transit agency had created a designated public forum despite policy's statement that "It is SORTA's policy that its buses, bus shelters, and billboards are not public forums"); *AIDS Action Committee of Mass., Inc. v. MBTA*, 42 F.3d 1, 10 (1st Cir. 1994) (observing that, in determining whether transit agency has created a designated public forum, "actual practice speaks louder than words"); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990).

18. Notwithstanding COLTS' professed desire for its speech policy to be analyzed under the most permissive possible legal standard, COLTS did create a designated public forum by soliciting advertisements from the general public and accepting virtually every proposed advertisement for years. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 2004) (finding advertising space within SEPTA stations to be designated public forum); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074–81 (9th Cir. 2001) (finding city hall advertising space to be designated public forum); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (finding city bus advertising space to be designated public forum).

19. A "designated public forum" is government-owned property that the government has "opened up for use by the public as a place for expressive activity." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011).

20. Government-owned advertising spaces in public transit stations, city hall, and city buses have been found to be designated public forums. *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 249–55 (3d Cir. 1998); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074–81 (9th Cir. 2001); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985).

21. In contrast, a nonpublic forum is a venue that has never been opened to speech by the public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

22. The government's "own statement of its intent . . . does not resolve the public forum question." *Christ's Bride Ministries*, 148 F.3d at 251; *see Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) ("To allow . . . the government's statements of intent to end rather than begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine;

the scope of [F]irst [A]mendment rights would be determined by the government rather than by the Constitution.").

23. To properly 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*, 148 F.3d 242, 249 (3d Cir. 1998).

24. In similar circumstances to this case, the Third Circuit conducted a forum analysis and concluded that a transit authority created a "designated public forum" by soliciting advertisements. In *Christ's Bride Ministries*, the Court concluded that SEPTA had created a designated public forum with its advertising spaces because (1) SEPTA's policies excluded "only a very narrow category of ads," (2) SEPTA's goal was to generate revenue through advertisement sales, which "suggests that the forum may be open to those who pay the requisite fee[,]" (3) SEPTA's practice was to permit "virtually unlimited access to the forum," and (4) SEPTA had offered no basis on which to conclude that the speech in question would interfere with the accepted revenue-generation purpose of the advertising space. 148 F.3d at 252, 256.

25. For the same reasons, COLTS' advertising spaces constitute a designated public forum.

i. Like SEPTA in *Christ's Bride Ministries*, COLTS chose to open space on the inside and outside of its buses to advertisements for the sole purpose of generating revenue.

ii. Like SEPTA in *Christ's Bride Ministries*, for years, COLTS did not impose any restrictions on the advertisements it accepted, and for at least a decade, accepted virtually all advertisements submitted.

iii. Even after COLTS first imposed restrictions on the advertisements it accepted, COLTS rejected advertisements by only two proposed advertisers, including the NEPA Freethought Society.

iv. Like SEPTA in *Christ's Bride Ministries*, COLTS has not offered any evidence to show that the NEPA Freethought Society's proposed advertisement is inherently incompatible with the revenue-generating purpose of advertising spaces on COLTS buses.

v. The fact that, prior to 2011, COLTS permitted all of the categories of advertisements prohibited by the 2011 and 2013 policies on its buses demonstrates that these advertisements are not "incompatible" with the nature of the

advertising space on COLTS buses or the revenue-generating purpose of leasing advertising space to the public.

vi. As in *Christ's Bride Ministries*, the fact that COLTS' policy contains a statement concerning COLTS' desire for its advertising space to be analyzed as a nonpublic forum does not affect the legal analysis.

26. COLTS cannot effectively "close" the designated public forum it created simply by adopting an advertising policy that allows COLTS to reject certain advertisements. *See Am. Freedom Defense Initiative v. SEPTA*, 92 F. Supp. 3d 314, 325–26 (E.D. Pa. 2015) (holding that SEPTA's attempt to close the forum by updating its advertising policy to prohibit more categories of speech was ineffective, and the advertising space remained a designated public forum).

27. Although COLTS' advertising policy contains numerous prohibitions, it still leaves COLTS advertising spaces open to a wide variety of commercial and non-commercial advertisements on almost every imaginable topic. Thus, this is not a case where the government has created a nonpublic forum for discussion of only a few particular topics. *See Am. Freedom Defense Initiative v. SEPTA*, 92 F. Supp. 3d 314, 326—27 (E.D. Pa. 2015).

C. **COLTS' Advertising Policy Does Not Survive Strict Scrutiny.**

28. Because COLTS' advertising spaces constitute a designated public forum, any content-based restriction on speech is subject to strict scrutiny. *See Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

29. It is indisputable that COLTS' advertising policies are content-based rather than content-neutral because COLTS must look to a proposed advertisement's topic, message, and words in order to determine its permissibility. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the *topic discussed* or the idea or message expressed . . . . Some facial distinctions based on message are obvious, defining regulated speech by particular subject matter[.]") (emphasis added).

30. To survive strict scrutiny, COLTS must show that its restriction on speech is narrowly tailored to achieve a compelling state interest. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty*, 653 F.3d 290, 295 (3d Cir. 2011) (citation omitted).

31. A restriction on speech is not "narrowly tailored" if it is not necessary to achieve the government's claimed interest. *See Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 609–10 (1982).

32. A restriction on speech is not "narrowly tailored" if it is over- or under-inclusive. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793–95 (1978).

33. A restriction on speech is not "narrowly tailored" if it is not the least restrictive means of achieving the government's asserted interest. *See Sable Communications v. FCC*, 492 U.S. 115, 126–31 (1989).

34. Even assuming that COLTS has a "compelling interest" in raising a small percentage of its revenue each year through advertising sales without compromising ridership, COLTS' advertising policy is not "narrowly tailored" to this goal.

35. There is no evidence that excluding advertisements, such as those submitted by the NEPA Freethought Society, advances the goal of increasing revenue while maintaining ridership. *Supra*, Pl.'s Proposed Findings of Fact ¶ 16 (citing Stipulated Facts ¶ 14) (COLTS goal in leasing ad space was to raise revenue, and not any other purpose); Pl.'s Proposed Findings of Fact ¶¶ 35, 36 (citing Stipulated Facts ¶¶ 22-23) (COLTS' ad policy was not prompted by any revenue- or ridership-related goals or concerns, and had no effect on COLTS' ridership);.Pl.'s Proposed Findings of Fact ¶¶ 104, 105 (COLTS' ad policy was not prompted by any concern about losing rider) (citing Trial Tr. 110:12-16). Rather, by restricting the types of advertisements it will accept and rejecting would-be

advertisers, COLTS actually diminished the amount of advertising revenue that it could generate. *Supra*, Pl.'s Proposed Findings of Fact ¶ 103 (citing Trial Tr. 109:25-110:8).

36. Likewise, there is no evidence that banning advertisements that might spark debate aboard COLTS buses is necessary to maintain ridership, or that COLTS considered less restrictive alternatives to advance its interests. *Supra*, Pl.'s Proposed Findings of Fact ¶¶ 35, 104 (COLTS' ad policy was not prompted by concerns about losing riders or revenue).

37. Because COLTS' restrictions are neither necessary nor narrowly tailored to achieve a compelling state interest, the policy cannot survive strict scrutiny.

D. Even if COLTS' Advertising Space is Analyzed as a Nonpublic Forum, COLTS' Policy is Unconstitutional.

38. Even in a nonpublic forum, the First Amendment prohibits restrictions on speech that are either (a) "unreasonable" because they are not connected to preserving the forum for its intended purpose or (b) viewpoint discriminatory.

39. The relevant "forum" for purpose of this analysis is COLTS' advertising spaces. Thus, the relevant purpose is the purpose of the advertising space, not the purpose of the entire bus system.

40. COLTS' policy is both unreasonable and viewpoint discriminatory, each of which provides an independent reason that the 2013 Policy is unconstitutional.

41. When the government creates a forum for speech dedicated to certain narrow purposes, it may restrict speech in order to "preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828 (1976)); *see, e.g. Rosenberger v. Record & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (government could create student activities fund as a nonpublic forum restricted to student groups meeting certain criteria); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004) (township could create nonpublic "citizen's forum" at town government meeting and restrict comment to only issues germane to town government); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 225 (3d Cir. 2003) (government creates a nonpublic forum when it provides for "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects"); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992) (government could restrict use of public library as a nonpublic forum for "reading, writing, and quiet contemplation" but not for "oral and interactive" First Amendment activities).

42. Content-based restrictions are permitted in a nonpublic forum only if "they are designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

43. Whether a content-based restriction is "reasonable" has a specific, legal meaning: restrictions on speech that are not connected to the purpose served by the forum are not "reasonable" within the meaning of First Amendment doctrine and are not permissible, even in a nonpublic forum.

44. The "reasonableness" standard in First Amendment jurisprudence is a higher bar than ordinary rational basis review. *NAACP v. City of Philadelphia*, 834 F.3d 435, 443 (3d Cir. 2016). Rather than simply deferring the government's legislative judgments so long as they are rational, when analyzing a government policy that restricts speech, the court must conduct a "more exacting review." *Id.*

45. The government bears the burden to justify its restriction on speech by "record evidence" or "common-sense inferences" demonstrating that the restriction is connected to the purpose to which the government has devoted the forum. *NAACP v. City of Philadelphia*, 834 F.3d 435, 445 (3d Cir. 2016).

46. As the Supreme Court has made clear, courts should be skeptical of any claim that censorship is justified by the goal of avoiding controversy; this argument is frequently pretext for viewpoint discrimination. *NAACP v. City of Philadelphia*, 834 F.3d 435, 446 (3d Cir. 2016) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981)).

47. Thus, even if COLTS' advertising spaces are characterized as a nonpublic forum, COLTS' advertising policy violates the First Amendment because the policy's restrictions on speech are not a "reasonable" attempt to preserve the forum for the purpose of generating revenue.

48. COLTS cannot demonstrate that its advertising policy is connected to the purpose to which the advertising spaces are devoted.

49. The record evidence makes clear that the restrictions in COLTS' advertising policy have nothing to do with preserving the forum for the purpose of generating revenue (the "sole purpose" to which COLTS claims the advertising space is dedicated), but rather, are aimed at the unrelated and illegitimate goal of suppressing debate and discussion. *Supra*, Pl.'s Proposed Findings of Fact ¶¶ 35, 38, 104.

50. COLTS cannot meet its burden of demonstrating "reasonableness." By limiting the universe of permissible advertisements and

advertisers, COLTS' advertising policy actually serves to reduce COLTS' advertising revenue, while doing nothing to increase COLTS' ridership or otherwise offset the lost advertising revenue. *Supra*, Pl.'s Proposed Findings of Fact ¶ 103.

E. COLTS' Broad Bans on Speech That References a Religion or Atheism and Speech That Is in Any Way "Controversial," Discriminate Based On Viewpoint.

51. No matter how the court characterizes the "forum" for speech at issue in this case, COLTS' advertising policy violates the NEPA Freethought Society's First Amendment rights because it discriminates on its face based on viewpoint—both by favoring non-religious speakers over religious speakers, and by favoring speech that is not controversial or divisive.

i. Prohibiting religious speakers or religious speech while allowing secular speakers and speech is viewpoint discrimination.

52. COLTS' advertising policy discriminates based on viewpoint by favoring the speech of non-religious speakers over nearly identical speech by religious speakers. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993) (holding that where the government allowed a nonpublic forum to be used for discussion of certain subjects, it could not deny access to those wishing to discuss the subjects from a religious standpoint); *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527–28 (3d Cir.

2004) (striking down school policy that allowed secular groups to distribute literature on school property but prohibited religious groups from doing the same, holding that excluding "speech on 'religion as a subject or category of speech' flies in the face of Supreme Court precedent" and constitutes viewpoint discrimination).

53. COLTS' differential treatment of similar speech is evident from a simple comparison of the many healthcare-related advertisements that COLTS has accepted with the similar healthcare advertisement that COLTS rejected because it contained the word "Lutheran."[1] *See, e.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297–98 (3d Cir. 2011) (fact that advertising policy treats similarly situated advertisements differently is evidence of viewpoint discrimination).

ii. Prohibiting controversial speech is viewpoint discrimination.

54. COLTS' advertising policy is viewpoint discriminatory for the additional reason that it is designed to prohibit speech that will spark debate, which is another way of describing speech that is controversial.

---

[1] *Compare* Ex. 8 (rejected advertisement for Lutheran Home Care & Hospice) *with* Exs. 13, 21, 23, 32, 35, 39 (accepted advertisements for health care services by secular providers); *see also* Pl.'s Proposed Findings of Fact ¶ 95 (COLTS rejected the advertisement for Lutheran Home Care & Hospice because of the word "Lutheran" and cross in the logo).

55. "[T]o exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004).

56. As the Supreme Court recently explained, censoring speakers on both sides of controversial issues can still be viewpoint discrimination. *Matal v. Tam*, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017) (striking down disparagement clause that "evenhandedly prohibits disparagement of all groups").

57. Indeed, even a ban on *offensive* speech constitutes viewpoint discrimination because "[g]iving offense is a viewpoint." *Matal v. Tam*, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017).

58. This doctrine reflects the basic First Amendment proposition that government restrictions on speech in any forum are unconstitutional if the government was motivated by "the nature of the message rather than the limitations of the forum." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 970–71 (9th Cir. 2002).

F. **COLTS' Advertising Policy is Unconstitutionally Vague.**

59. A restriction on speech violates the First Amendment if it is so vague that government officials can enforce it in an arbitrary and discriminatory

way. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 666 (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004).

60. This is because "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

61. "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (citation omitted).

62. A policy is unconstitutional when a public official's "decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons.'" *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (quoting *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)).

63. COLTS' policy violates the NEPA Freethought Society's First Amendment rights because the vagueness of several of the policy's terms invites subjective, arbitrary, and discriminatory enforcement of the policy—particularly

against unpopular speakers. *See, e.g., Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 666 (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004).

64. The "no debate" provision of the 2013 Policy, which declares COLTS' "intent . . . not to allow its transit vehicles . . . to become a public forum for the dissemination, debate, or discussion of public issues," is void-for-vagueness because any prohibition that turns on a subjective prediction about whether an advertisement is likely to promote debate or discussion of public issues invites discriminatory and arbitrary enforcement. *See United Food & Commercial Workers Union*, 163 F.3d 341, 349, 359–60 (6th Cir. 1998) (striking down transit agency's ban on "[a]dvertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership," holding that the prohibition "vests the decision-maker with an impermissible degree of discretion").

65. The arbitrary and inconsistent outcomes produced by COLTS' attempts to enforce the vague "no debate" provision is evident from COLTS' changing view on whether a "National Infant Immunization Week" advertisement was permissible under the policy. COLTS displayed the immunization advertisement on its buses in April 2012, and it did not spark any debates. *Supra*, Pl.'s Proposed Findings of Fact ¶¶ 86-87. But COLTS testified that if the same advertisement were submitted again under the 2013 Policy, COLTS would reject it

as likely to spark debate based on the fact that COLTS officials are now aware that "there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad" but in 2012, were unaware "of the large debate concerning immunization in this country." *Supra*, Pl.'s Proposed Findings of Fact ¶ 87.

66. The "religious and atheist" provision of the 2013 Policy is also void-for-vagueness, and its broad language has led to arbitrary and subjective enforcement.

67. With respect to some proposed advertisements—particularly those that COLTS officials believed would spark debate—COLTS took an extremely broad reading of the prohibition, interpreting it as prohibiting all advertisements containing words that *refer* to religion or a lack of religion—including "atheist," "Catholic," etc.—regardless of whether the advertisement's message had any religious content. *Supra*, Pl.'s Proposed Findings of Fact ¶ 53; *see also* Pl.'s Proposed Findings of Fact ¶ 95 (home care and hospice ad rejected because of the word "Lutheran"); Pl.'s Proposed Findings of Fact ¶¶ 75, 77, 79 (plaintiff's ad rejected because of the word "Atheists" and accepted when the word was removed).

68. COLTS officials invoked this provision as one basis for rejecting Plaintiff's "Atheists" advertisement. *Supra*, Pl.'s Proposed Findings of

Fact ¶¶ 75, 77, 79. COLTS officials also invoked this provision as a basis for rejecting an proposed advertisement from Lutheran Home Care & Hospice, Inc. And COLTS testified that this provision would provide a basis for rejecting an advertisement that COLTS Formerly ran for "St. Stanislaus Polish Food Festival" that contained a reference to "St. Stanislaus Elementary School," a parochial school, because the reference to the school was "religious in nature." *Supra*, Pl.'s Proposed Findings of Fact ¶ 96.

69. However, with respect to other proposed advertisements—particularly advertisements that COLTS officials believed would *not* spark debate—COLTS officials read the text of the "religious and atheist" provision very narrowly.

70. COLTS testified that an advertisement it previously ran for the Diocese of Scranton's "Adoption for Life" campaign, which said "Consider Adoption . . . It Works!", would not violate the prohibition on advertisements that "address [or] promote . . . religious beliefs" because COLTS officials did not believe the advertisement promoted the Diocese's pro-life religious belief nor view the advertisement as addressing the abortion debate. *Supra*, Pl.'s Proposed Findings of Fact ¶¶ 89-93.

71. The "political" provision of the 2013 Policy, which purports to ban advertisements "involving political figures or candidates for public office," is

also void-for-vagueness. *See Air Line Pilots Ass'n Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1155 (7th Cir. 1995) (interpretation of the word "political" is not immediately obvious).

72. COLTS' interpretation of what advertisements "involve" political figures or candidates for public office has been highly subjective, and the prohibition has been set aside with respect to advertisements promoting a popular local political figure.

73. For years, including both prior to and after the adoption of the 2011 and 2013 policies, COLTS ran advertisements for County Commissioner and former School Board candidate Patrick O'Malley that mentioned him by name, including both campaign advertisements and advertisements for annual events he hosts—in spite of the express and broadly-worded prohibition on advertisements "involving political figures or candidates for public office." *Supra*, Pl.'s Proposed Findings of Fact ¶¶ 24, 97-98.

ADDITIONAL PROPOSED CONCLUSIONS OF LAW

Solicitor Hinton

74. The testimony of COLTS Solicitor Timothy Hinton on the topics covered by COLTS' 30(b)(6) designees is entitled to no weight.

75. Plaintiff took a 30(b)(6) deposition of COLTS on every single topic that Solicitor Hinton addressed in his trial testimony, including the "God Bless America" head signs displayed on COLTS buses;[2] when, how, and why COLTS developed the 2011 advertising policy;[3] the 2013 revisions to the policy;[4] the effect of advertisements and the ad policies on ridership;[5] and the basis for COLTS' contention that the prohibited ads might harm, disrupt, or interfere with COLTS' operations or affect COLTS' ability to provide a safe or welcoming environment.[6]

---

2 *See* Exs. 75, 76 (Schedule A, Topics 12-15); Trial Tr. 121:2-23.

3 *See* Exs. 75, 76 (Schedule A, Topic 2); Trial Tr. 118:13-120:20.

4 *See* Exs. 75, 76 (Schedule A, Topic 5); Trial Tr. 120:21-125:6.

5 *See* Exs. 75, 76 (Schedule A, Topics 4, 7, 11); Trial Tr.119:4-23, 124:17-125:8.

6 *See* Exs. 75, 76 (Schedule A, Topics 16, 17, 18); Trial Tr. 119:4-23, 123:5-125:8.

76. COLTS designated Gretchen Wintermantel and Robert Fiume to speak for the corporation on all of the noticed topics. Solicitor Hinton was not designated to speak for COLTS on any issue. Trial Tr. 127:13-14; *see also* Exs. 75, 76 (30(b)(6) depositions of Ms. Wintermantel and Mr. Fiume).

77. COLTS is bound by the testimony of its corporate designees and cannot argue a theory of facts that differ from those articulated by the designated corporate representative. *Kansky v. Showman*, No. 09-CIV-1863, 2011 U.S. Dist. LEXIS 38814, *10 (M.D. Pa. Apr. 11, 2011) (citing *Diamond Triumph Auto Glass, Inc. v. Safelite,* 441 F. Supp. 2d 695, 723 n.17 (M.D. Pa. 2006)).

78. Furthermore, given that a corporate designee's testimony is binding, COLTS cannot call another witness to contradict the testimony of its designated representative as to the same issue. *Id.* (precluding defendant from offering testimony of a company employee that contradicted the testimony previously offered by the company's corporate designee concerning the meaning of the term "preventable" in the context of an automobile accident, because the company was bound by the testimony of its corporate designee as to that issue). Thus, the court must disregard Solicitor Hinton's testimony.

"God Bless America" COLTS sign

79. The "God Bless America" scrolling message on the COLTS electronic head sign, which was discussed by several witnesses at trial, was a form

of government speech, not an advertisement. *Supra,* Proposed Finding of Fact ¶ 39, 41-44. Government messages that appear to endorse religion can create problems under the Establishment Clause. *See supra,* Proposed Finding of Fact ¶ 40. But whether government officials may make religious pronouncements is a distinct legal issue from the question of whether a government entity must allow religious and atheist speakers access to government-run ad spaces. This case concerns the latter issue, and not the former. If the plaintiff prevails in this suit and the religious and atheist exclusions are struck down as unconstitutional, anyone would be able to run a "God Bless America" ad on a COLTS bus.

History of Accepting Ads that Are Now Prohibited

80. The ads COLTS ran for years that are now prohibited by COLTS' Advertising Policy—such as the many ads for religious institutions and ads on controversial topics—are significant for several reasons.

81. First, these prior ads demonstrate that COLTS' advertising space is perfectly compatible with those types of ads. This suggests that the ad spaces are a designated public forum, rather than a nonpublic forum. *Christ's Bride Ministries*, 148 F.3d 242, 248-55 (3d Cir. 1998).

82. Second, they demonstrate that COLTS knew that it could run these ads without any negative impact on ridership, revenue, rider well-being, or safety. *Supra,* Proposed Findings of Fact ¶ 105 (COLTS never lost a rider because

of an advertisement that ran on COLTS buses). This experience casts doubt on the sincerity of any professed belief that COLTS was concerned about ads' effects on ridership, revenue, well-being, or safety.

New York Times Article

83. Ms. Wintermantel testified that a New York Times article caused COLTS to fear the consequences of passengers debating controversial advertisements inside buses. Trial Tr. 95:11-25. But the article said nothing about the effects of controversial advertisements on bus riders or about debate inside buses. *See* Ex. 68. The New York Times article does not provide any support for COLTS' unfounded concerns about the potentially dire consequences of debate on buses.

Dated: December 29, 2017

/s/ *Benjamin D. Wanger*

Theresa E. Loscalzo (Pa. I.D. No. 52031)
Stephen J. Shapiro (Pa. I.D. No. 83961)
Benjamin D. Wanger (Pa. I.D. No. 209317)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000
Fax: (215) 751-2205

Mary Catherine Roper (Pa. I.D. No. 71107)
Molly Tack-Hooper (Pa. I.D. No. 307828)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102

mroper@aclupa.org
mtack-hooper@aclupa.org
(215) 592-1513 x 113
Fax: (215) 592-1343
Attorneys for Plaintiff, Northeastern Pennsylvania Freethought Society

CERTIFICATE OF SERVICE

I, Benjamin D. Wanger, Esquire, do hereby certify that I caused to be served a true and correct copy of the foregoing Post-Trial Supplement to Plaintiff Northeastern Pennsylvania Freethought Society's Proposed Findings of Fact and Conclusions of Law upon the following counsel of record by ECF on the 29th day of December, 2017 at the following address:

William J. McPartland
MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, P.C.
50 Glenmaura National Boulevard
Moosic, PA 18507
WJMCPARTLAND@MDWCG.COM

Attorney for Defendant, County of Lackawanna Transit System

/s/ Benjamin D. Wanger
Benjamin D. Wanger