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'S RESPONSE TO DEFENDANT'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. RESPONSE TO DEF.'S PROPOSED FINDINGS OF FACT

A. Ads "Discussing the Existence or Non-Existence of God"

COLTS urges the court to make a finding that "[t]here has never been an ad run on a COLTS bus which discussed the existence [or] non[-]existence of God." Def.'s Post-Trial Br., ECF 81 (hereinafter "Def.'s Br.") at 8 (citing Trial Tr. 93). This proposed finding is a red herring. There is no dispute that COLTS' ad policy

goes far beyond banning ads that "discuss the existence or non-existence of God."[1] The Court should reject COLTS' attempt to recast all of the ads rejected under the religious provision of COLTS' restrictive speech policy—including Plaintiff's "Atheists" ad—as ads "discussing the existence or non-existence of God."[2]

Ads that simply refer to the existence of atheists or religions cannot fairly be said to "discuss the existence or non-existence of God."[3] The rejected "Atheists" ads—as well as the rejected Lutheran Home Care & Hospice ad—are on par with the many ads for religious institutions that COLTS previously accepted. The relevant aspect of COLTS' advertising history is that, for decades, COLTS ran

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[1] *See* Ex. 52 (2013 Policy, banning ads that "address . . . religion . . . , religious beliefs or lack of religious beliefs; . . . quote or cite . . . religious text . . . or are otherwise religious in nature.").

[2] *See* Ex. 57 (Sept. 9, 2013 letter from COLTS to Justin Vacula, refusing to run the NEPA Freethought Society's ad because COLTS believed the ad discussed "the existence or non-existence of a supreme deity"); Trial Tr. 50:12-51:6 (COLTS testifying that the reference to a saint in the name "Saint Stanislaus Elementary School"—an ad that COLTS previously ran—was "concerning" because COLTS doesn't want "any ads that talk about the existence or non-existence of a supreme deity or a belief in religion or lack of belief in religion.").

[3] As the Plaintiff explained at trial, the word "atheists" does not take a position on the existence of God; atheists are people who lack a belief in the existence of God or any deities, rather than people who hold the belief that there is no God. Trial Tr. 40:9-41:2. The plaintiff also explained that the ad with the single word "Atheists." in large print was intended to convey that "most members of the NEPA Freethought Society are atheists." Trial Tr. 41:3-11; *see also id*. 22:25-23:17 (Plaintiff wants to run the rejected version of the ad containing the word "Atheists" because the version of the ad that was accepted "just had a name of the organization, but people might not know what the organization is about, who are the members.").

many ads that are now prohibited under COLTS' advertising policy, without incident.[4]

B. Purported Economic Concerns

COLTS asks the Court to find that COLTS' decision to censor certain content was motivated by a concern that "controversies" would "affect revenue at COLTS," presumably by leading riders who disagreed with the ads to boycott the buses. Def.'s Br. 8 (citing Trial Tr. 123). Indeed, COLTS officials even suggested at trial that their decision to ban a wide range of speech was influenced by a New York Times article about atheist ads on the Fort Worth, Texas bus system. Trial Tr. 95:11-22. That article mentioned that some ministers had responded to the atheist ads by attempting to organize a boycott of the buses "with limited success." Ex. 68.

The Court must reject COLTS' proposed finding that the censorship policy was motivated by economic concerns.

COLTS' designated officials testified at 30(b)(6) depositions and again at trial that COLTS' decision to prohibit a wide range of ad content had nothing to do with ridership or revenue concerns. Trial Tr. 105:13-106:2. (Ms. Wintermantel, when asked to clarify whether a concern over ridership was one of the motivating

[4] *See* Plaintiff's Post-Trial Supplemental Proposed Findings, ECF 81 (hereinafter "Pl.'s Br.") at pp. 4-5 ¶ 19, pp. 15-16 ¶¶ 68-72.

factors behind the advertising policy, testifying, "I don't think the goal of the advertising policy has to do with ridership, no."); *id.* 109:25-110:16 (Mr. Fiume testifying that COLTS' adoption of an ad policy "wasn't prompted by concerns about revenue"); Ex. 75 at 51:20-52:1 (Ms. Wintermantel testifying as 30(b)(6) designee that she did not believe that "increasing ridership" or "revenue related goals" or "revenue concerns" motivated COLTS to adopt the policy); Ex. 76 at 20:14-22, 48:21-24 (Mr. Fiume testifying as 30(b)(6) designee that COLTS has never attempted to expand its revenues through advertising, and that its ad policy had no effect on revenue). In fact, the parties have **stipulated** that the policy was **not** prompted by any revenue-related goals or concerns. Stipulated Facts, ECF 69, ¶ 22.

As a matter of law, COLTS cannot now back out of this stipulation and these admissions through the testimony of its lawyers. *See* Pl.'s Br. 47-48. Even if COLTS were not bound by those admissions, these concerns make little sense, given that restricting the types of ads that COLTS will run is virtually certain to cause COLTS to *lose* ad revenue. Trial Tr. 110:3-8.

For these reasons, the Court should decline to credit COLTS' post-hoc attempt to justify its censorship by economic concerns.

C. Purported Concerns About Graffiti

Although COLTS' proposed findings of fact do not include any proposed findings regarding the possible defacement of COLTS buses, COLTS' proposed conclusions of law refer to COLTS' concern that allowing atheist ads "would lead to the issues which took place in other transit authorities, including . . . vandalism[.]" Def.'s Br. 14.

Several COLTS witnesses did make passing references at trial to the defacement of advertisements on other transit systems' buses. *E.g.*, Trial Tr. 95:11-22 ("In Detroit there were bus ads that were actually defaced"); *id.* 96:8-17 ("I later read about Little Rock, Arkansas actually requiring an atheist organization to have insurance for its ads because of the vandalism and graffiti it had seen in other areas. . . I didn't want that to be an issue here."); Ex. 68 (New York Times article noting that "Vandals destroyed two bus ads in Detroit, ruined a billboard in Tampa, Fla., and defaced 10 billboards in Sacramento.").

None of COLTS' evidence describes the ads that were defaced, and COLTS does not attempt to compare the ads banned under its 2013 Policy to the ads that were defaced in other cities.

COLTS also offered no testimony or evidence to explain the nature of its concerns about graffiti. To the extent that COLTS was concerned about the cost of cleaning or repairing damage to vandalized buses, the Court should decline to

credit COLTS' post-hoc attempt to justify its censorship by economic concerns, for the same reasons explained above. *See supra* § I(B).

D. Purported Safety Concerns

COLTS urges the Court to find that its policy was also motivated by concerns that "arguments" might "cause disruption" or "distract passengers and drivers," which "would be a safety issue." Def.'s Br. 8 (citing Trial Tr. 97, 124-25).

It is not clear exactly what kind of "safety issue" COLTS thinks could occur as a result of debates or arguments aboard buses.[5] But no matter what COLTS' precise concerns were and no matter how sincere those concerns were, nothing in the record provides any basis for COLTS to fear that passengers engaging in debate would compromise the safety of the buses. Indeed, COLTS' attorney conceded as much. *See* Trial Tr. 124:17-125:3 (Solicitor Hinton testifying, in response to question about safety concerns, that "[w]e don't have any studies or examples of it.").

There is no evidence in the record that atheist or religious ads ever compromised rider safety either in Lackawanna County *or any other transit*

[5] To the extent that COLTS was concerned not that the controversial advertisements would provoke violent reactions but that they would lead to interesting debates that might be distracting to the driver, it is worth noting that COLTS conceded at trial that it cannot control what bus riders discuss and does not have any rules prohibiting passengers from engaging in debates while they are on the bus. Trial Tr. 78:3-20. There is also no evidence in the record that COLTS in any way attempted to regulate the volume of discussions aboard COLTS buses.

system. On the contrary, the record is replete with evidence that the people of Northeastern Pennsylvania are capable of interacting with people with whom they disagree—and confronting ideas that offend them—without resorting to violence or otherwise creating an unsafe environment for those around them.

For years, COLTS ran the ads that it now prohibits, without incident. *See supra* n.4. Mr. Vacula's uncontroverted testimony at trial was that "Discussions on [COLTS buses] are quite commonplace. People. . . discuss matters of current events, politics, religion even, sex, many different topics." Trial Tr. 43:18-44:4. Mr. Vacula also testified that he had never been concerned about anyone's safety because of a discussion on a bus or a debate about religion, and that no discussions or debates ever led to violence. Trial Tr. 44:5-21.

Mr. Vacula further testified that the Northeast Pennsylvania Freethought Society has publicly protested government involvement in religion and participated in live debates about whether God exists, and that even though atheists are a small and unpopular minority in Northeastern Pennsylvania,[6] all of these in-person interactions were cordial, peaceful, and no one was threatened or harmed.[7]

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[6] Trial Tr. 16:15-23 ("In the Northeastern Pennsylvania area, which is very religious, I find that matters of religion at least from a non-religious perspective aren't often heard . . . non-religious people in the area don't have many resources compared to religious individuals."); *see also* Trial Tr. 33:3-18 (describing "a lot [of] negative backlash" after the plaintiff protested a government-placed Nativity scene).

[7] *E.g.*, Trial Tr. 16:10-12 (describing public discussion panel with a pastor in Wilkes-Barre, testifying that "The discussion was quite cordial, was face-to-face, and I

COLTS urges the Court to rely on the fact that, after several journalists published stories about COLTS rejecting the Plaintiff's ads, there were internet debates about all manner of topics, including whether COLTS should run the ads and whether God exists. Def.'s Br. 7. But the fact that people engage in debate on the internet does not substantiate COLTS' fears that controversial ads might impair the safety of its buses.

Moreover, the evidence is clear that COLTS' concern about debate on its buses was primarily a concern about offending or alienating riders or making them uncomfortable, rather than a concern about physical safety. Time and again, COLTS officials confirmed that it was concerned about a "war of words" rather than actual fisticuffs:

> Q: COLTS restricts the advertisements that it will run because COLTS does not want to offend or alienate anyone who sees the advertisements, correct?
> A: Well, we want the content to be neutral, yes. We don't want to offend anyone.
> Q: So COLTS restricts the kinds of advertisements that it will display because COLTS does not want to offend or alienate anyone who sees the advertisement, correct?
> A: Correct.

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received a lot of positive feedback concerning it."); *id.* 31:1-16 (contrasting tenor of online discussions that included "off topic," "badgering," and "inflammatory" comments about Mr. Vacula's appearance, with face-to-face interactions where he did not receive "any of that tenor of discussion" and instead had discussions "that were very cordial"); *id.* 42:23-43:4 (testifying that face-to-face interactions and discussions were quite different" from the negative comments he received in online posts).

Q: The topics that are banned under the advertising policy are topics that people might feel strongly about; is that correct?
A: Correct.

Trial Tr. 77:5-78:2.

Q: You said, you know, I'm certainly not going to send my 73-year-old mom on a bus where there's people fighting over anything.
A: Correct.
Q: Why is that?
A: First of all, it would be a safety issue, and I don't – I wouldn't want my – again, she's 74 now. I don't want her on a bus where there's arguments and things heated about politics or religion or any other issues we prohibit on our ads just because it would make her uncomfortable.
Q: Was that consideration – not necessarily towards your mom but riders in general – was that a consideration in 2011 when the policy was developed?
A: Yes.

Trial Tr. 90:11-24.

Q: What was COLTS[']' concern with regard to opening up its advertising space for religious advertisers?
A: The concern [was] that we [would open the door to] a war of words, various religion, various organizations could start advertising, and it could get – as it has in other areas of the country, it could get ugly and heated. And we didn't want to turn everything into a war of words.

Trial Tr. 97:21-98:3.

Q: Did you see those comments [online in response to stories about COLTS' rejection of Plaintiff's ad]? Mr. Vacula discussed them earlier?
A: Yes, there were many comments on – couple of different stories that ran that were derogatory towards atheist[s], derogatory towards

> Catholicism or any other religion saying COLTS was right, saying Mr. Vacula's organization was right. It turned into again – well, a war of words, online war of words.

Trial Tr. 99:10-17.

> Q: So based upon COLTS' rejection of the ad, this debate starts online whether the ad should be run?
> A: Right. It was online at first, yeah.
> Q: And after that did the debate then evolve into the discussion of existence or non-existence of God?
> A: Right, in the comments.
> Q: Yes?
> A: Yes.
> Q: Does COLTS have a concern that a similar situation could arise within a COLTS bus?
> Q: Absolutely.

Trial Tr. 99:24-100:9.

> Q: And the reason that you didn't want debate was you didn't want riders to be uncomfortable, correct?
> A: Correct.
> Q: You testified that you wouldn't want your mother to hear people arguing over issues like the existence of God?
> A: Yes.
> Q: It's COLTS' position that if a – if a religious advertisement was displayed on a bus that would cause debate on the buses?
> A: Correct.
> Q: And that would not be a good thing?
> A: Correct.

Trial Tr. 106:19-107:5.

> Q: [I]t was not until the judgment day advertisement and then the atheist advertisement COLTS decided religious ads were dangerous, correct?

> A: No, I think in drafting – honestly drafting policy it's not we think religious ads are dangerous by any means. It's that we looked at what was happening in other transit agencies and problems that were going on there. We frankly didn't want them to go on here in Lackawanna County in our small transit system.

Trial Tr. 107:18-108:1.

In sum, the Court should not credit COLTS' purported concerns that the censored ads would impair the safety of COLTS buses.

II. RESPONSE TO DEF.'S PROPOSED CONCLUSIONS OF LAW

A. COLTS Created a Designated Public Forum

COLTS argues that the fact that it has never run an ad that discussed the existence or non-existence of God shows that COLTS created only a nonpublic forum. Def.'s Br. 8 (citing Trial Tr. 93), 10. This fact about COLTS' advertising history is misleading. *See supra* § I(A). It is undisputed that COLTS, for nearly two decades, ran all kinds of ads, including ads for religious institutions, religious speakers, and ads on controversial topics—ads that are now prohibited. This history shows that the forum is perfectly compatible with the prohibited advertisements, and that COLTS generally opened the forum up to all speech, on all topics, by all speakers. In other words, COLTS created a designated public forum. *See* Pl.'s Br. 27-32.

In light of this history, COLTS retreats to the position that COLTS' enactment of a censorial policy in 2011 and/or its revision of that policy in 2013 effectively "closed" the forum. But not one of the cases COLTS cites for this proposition supports this conclusion. The Ninth Circuit in *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) concluded that the ad spaces at issue there were a nonpublic forum because the transit system had "consistently restricted political and religious advertising" even before switching to a commercial-only policy, and the court contrasted the record with cases where the

transit system had a history of accepting a wide variety of public-issue, political, and non-commercial ads. *Id.* at 976. As Plaintiff has explained at length, *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1998) supports the conclusion that COLTS has **not** effectively closed the forum. Pl.'s Br. 27-30. Further, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290 (3d Cir. 2011) did not even resolve the question of whether the Port Authority's ad spaces constituted a designated public forum or a nonpublic forum.[8]

B. COLTS' 2011 and 2013 Policies Are Not "Reasonable" or "Viewpoint Neutral" as a Matter of First Amendment Law

Even assuming COLTS "closed" the forum in either 2011 or 2013, the government may only restrict speech in a nonpublic forum if the restrictions are related to preserving the forum for its intended purpose.[9]

COLTS again ignores the significant fact that the forum—COLTS' ad space—was created to serve one purpose only: raising revenue. Stipulated Facts,

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[8] *Id*. at 296 ("The [plaintiff] argues that the space is a designated public forum because the Port Authority's practice has been to accept virtually all ads from advertisers. The Port Authority disagrees, asserting that the space is a nonpublic forum because it has consistently refused to accept, for example, political ads. . . [W]e need not tackle the forum-selection question. Regardless of whether the advertising space is a public or nonpublic forum, the [plaintiff] is entitled to relief [.]").

[9] The restrictions must also be viewpoint-neutral. Although COLTS recites boilerplate about the viewpoint neutrality, *see* Def.'s Br. 11-15, it does not engage with Plaintiff's specific arguments about why COLTS' policy is viewpoint-discriminatory, even though Plaintiff has explained these arguments in numerous briefs. *E.g.*, Pl.'s Br. 39-41; Pl.'s Pre-Trial Mem., ECF 69, at 15-16; Pl.'s Summary Judgment Br., ECF 36 (hereinafter "Pl.'s Summ. J. Br.") at 8-9.

ECF 69, ¶ 14; Trial Tr. 46:5-10. COLTS' designees, however, have testified repeatedly that the policy had **nothing** to do with raising revenue. *See supra* § I(B). The Court should not place any weight on COLTS' attorneys' claims that its censorship policy was motivated by economic concerns.[10] Because the ad restrictions had nothing to do with COLTS' goal of generating revenue, the policy is not "reasonable" within the meaning of the First Amendment. *See*, *e.g.*, Pl.'s Br. 35-39.

Instead, COLTS invents a new legal standard for "reasonableness," suggesting that its policy is "reasonable" because it was intended to prevent debate, which COLTS believed would help keep riders safe, prevent defacement of the buses, and prevent riders from feeling uncomfortable. Def.'s Br. 12-14.

However, as Plaintiff has explained at length, a desire to avoid unpleasantness is not a legally permissible justification for censorship. Pl.'s Br. 23-27.

Nor are baseless concerns about violence or graffiti. *See supra* §§ I(C), (D). As a general rule, the government cannot censor unpopular speech because of how other people might react to it. As the Third Circuit has explained, a "heckler's

[10] *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3 290, 296 (3d Cir. 2011) ("The 'political' ground [for rejecting the ad] can be quickly dismissed. Because the Port Authority did not mention this basis until after the lawsuit had been filed, the District Court permissibly found that it was not a real basis for rejecting the ad but was, instead, a post hoc rationalization.").

veto" is "an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience." *Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (citing *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992)). Only in extremely rare circumstances can the government censor speech because it incites others to commit crimes.[11] Moreover, for the government to censor speech based on a concern about others' negative reactions to the speech, that concern must be grounded in fact. Baseless fears that others might respond with violence or commit crimes are never sufficient to overcome the right to free speech.[12]

C. COLTS' 2011 and 2013 Policies Are Unconstitutionally Vague

COLTS' brief notably does not address Plaintiff's arguments that COLTS' ad policy is unconstitutionally vague. *See* Pl.'s Br. 18-22; Pl.'s Summ. J. Br. 16-

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[11] *United States v. Fulmer*, 584 F.3d 132, 154 (3d Cir. 2009) (holding that "incitement" is only unprotected if it invites others to commit *imminent* lawless action that is actually likely to occur) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. Bell*, 414 F.3d 474, 483 n.9 (3d Cir. 2005)).

[12] *Texas v. Johnson*, 491 U.S. 397, 409 (1989) ("we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression"); *Cohen v. California*, 403 U.S. 15, 23 (1971) (explaining that California could not, consistent with the First Amendment, censor "Fuck the Draft" message displayed on a jacket worn into a courthouse because of a fear that the message would cause a violent reaction); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508 (1969) ("In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

22. The evidence presented at trial underscored that COLTS' policy is so vague that COLTS has difficulty interpreting the policy and believes the policy confers discretion to reject controversial ads. COLTS admitted that it struggled to determine whether an ad that simply said "NEPA Freethought Society" with the organization's website[13] and an ad for "Lutheran Home Care & Hospice"[14] were prohibited by the policy. COLTS also testified that it might reject ads for the Susan G. Komen Foundation because of recent controversy surrounding the foundation,[15] and has gone back and forth on whether content on an advertiser's website is relevant to COLTS' decision about whether an ad violates its policy.[16]

In sum, the Court should enter judgment in favor of the Plaintiff.

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[13] Ex. 81 (email deliberating whether to accept Plaintiff's ad that omitted the word "Atheists," saying, "We have to research this. The ad itself might not be political, religious, etc. I think it comes down to how a reasonable person would view the ad. Justin is being tricky."); Trial Tr. 89:2-90:2.

[14] Ex. 91 (email deliberating whether to accept Lutheran Home Care & Hospice ad, saying "There is not a black and white answer to this question. . . Is somebody going to claim we are supporting religion by allowing an ad with a cross in it when we wouldn't allow an ad with the word "atheist" in it? To be safe, I would reject the ad."); Trial Tr. 90:3-91:11.

[15] Trial Tr. 103:10-104:15; *see also id.* 112:14-24 (Ms. Wintermantel is the COLTS official responsible for interpreting and applying the ad policy and has the discretion to reject ads without consulting anyone else).

[16] *Compare* Trial Tr. 52:4-25 (COLTS' decision to run the Diocese of Scranton's "Adoption for Life" campaign not affected by content on Diocese's website) *and id.* 56:2-22, 57:14-58:9 (COLTS would run Old Forge Times ad notwithstanding controversial content on website and previous deposition testimony that the ad would be rejected) *with id.* 80:13-25 (COLTS checked Plaintiff's website before deciding whether to accept its ad) *and id.* 81:1-4 (COLTS now checks every prospective advertiser's website even though the websites are not relevant).

Dated: January 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT'S POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW was filed electronically and served on all counsel of record via the ECF system of the United States District Court for the Middle District of Pennsylvania.

Dated: January 19, 2018 /s/ *Benjamin D. Wanger*