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 MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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September 5, 2016

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QUESTIONS INVOLVED

1) Did COLTS create a designated public forum by opening its advertising spaces to the public?

Suggested answer: Yes.

2) Even assuming that COLTS' advertising space constitutes a nonpublic forum (which it does not), does the 2013 Policy nonetheless violate the First Amendment because there is no evidence in the record to support a finding that COLTS' restrictions on speech are a "reasonable" attempt to preserve the forum for its intended purpose of generating revenue?

Suggested answer: Yes.

3) Does COLTS' 2013 Policy also violate the First Amendment because it facially discriminates based on viewpoint by favoring the speech of non-religious and non-atheist speakers over nearly identical speech by religious or atheist speakers, and by favoring non-controversial speech over controversial speech?

Suggested answer: Yes.

INTRODUCTION

COLTS has asked the court to grant summary judgment in its favor, arguing that the undisputed facts show that its advertising space constitutes a nonpublic forum, and that its speech-restrictive 2013 Policy is both "reasonable" in light of

the purpose of the advertising space and viewpoint neutral. COLTS is wrong on all accounts. Because COLTS has failed to carry its burden of identifying facts sufficient to justify its restrictions on speech, the Court should deny Defendant's motion and instead grant Plaintiff's motion and enter summary judgment in favor of the Northeastern Pennsylvania Freethought Society.

As explained in Plaintiff's brief in support of its summary judgment motion, COLTS' advertising space constitutes a designated public forum, and the restrictive 2013 Policy is unconstitutional because it fails strict scrutiny. *See* Mem. Law Supp. Pl.'s Mot. for Summary Judgment, ECF No. 36 (hereinafter "Pl.'s Mem. Law"), at 10-16. Defendant's attempts to cast COLTS' advertising space as a nonpublic forum are unavailing.

However, even if COLTS' advertising space were analyzed as a nonpublic forum (which it should not be), the 2013 Policy would still violate the First Amendment for two independent reasons: 1) it is not "reasonable" because it is not tied to the asserted revenue-generating purpose of the forum, and 2) it is facially viewpoint discriminatory.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The factual background of this case is summarized at length in Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. *See* ECF No. 36 at 3-7.

On July 18, 2016, the parties filed cross-motions for summary judgment. *See* Pl.'s Mot. for Summary Judgment, ECF No. 32; Def.'s Mot. for Summary Judgment, ECF No. 30. Each party filed a brief in support of its motion on August 1, 2016. *See* Br. Supp. Def.'s Mot., ECF No. 34 (hereinafter "Def.'s Br."); Mem. Law Supp. Pl.'s Mot., ECF No. 36 ("Pl.'s Mem. Law"). On August 17, the Court extended the deadlines for opposition briefs and responsive 56.1 statements to September 5, 2016. *See* Order, ECF No. 38. Plaintiff hereby incorporates its Statement of Undisputed Facts in Support of its Motion for Summary Judgment, ECF No. 33 (hereinafter "Pl.'s Stmt. Facts") as well as its Response to the Statement of Material Facts Submitted by Defendant County of Lackawanna Transit System, which is being filed simultaneously herewith.

ARGUMENT

The parties seem to agree that the relevant forum in this case is COLTS' advertising space, as opposed to the transit system generally. Def.'s Br. at 6; *see also Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 248 (3d Cir. 1998) (holding that "the forum at issue is SEPTA's advertising space" rather than entire transit system). The parties disagree, however, as to whether that forum is properly analyzed as a designated public forum or a nonpublic forum, and whether

COLTS has carried its burden of justifying its speech-restrictive policy under the standards applicable in a nonpublic forum.[1]

Plaintiff's brief in support of its summary judgment motion explains why COLTS' advertising space constitutes a designated public forum, as well as the reasons why the 2013 Policy fails strict scrutiny. *See* ECF No. 36, at 8-10. Plaintiff hereby incorporates the arguments set forth in that brief in full. This brief will focus instead on explaining why Defendant's reliance on cases involving nonpublic forums is misplaced, and why, even assuming that COLTS' advertising space constitutes a nonpublic forum, the 2013 Policy is nonetheless unconstitutional.

I. COLTS' ADVERTISING SPACE CONSTITUTES A DESIGNATED PUBLIC FORUM, RATHER THAN A NONPUBLIC FORUM.

As previously explained, Third Circuit precedent makes clear that the advertising space on COLTS' buses is a "designated public forum." *See* Pl.'s Mem. Law at 10-13 (citing *Christ's Bride Ministries*, 148 F.3d 242). In arguing

[1] COLTS has not argued that it can meet its high burden of justifying the restrictions on speech contained in the 2013 Policy if the forum is analyzed as a designated public forum. COLTS' argument that it is entitled to summary judgment is apparently predicated entirely on the (mistaken) notion that COLTS' advertising space is properly viewed as a nonpublic forum.

that the advertising space on its buses constitutes a nonpublic forum, COLTS misconstrues the applicable legal standards and relevant case law.

A. COLTS' Conclusory Statement that it Intended to Create a Nonpublic Forum, Rather Than a Public Forum, Has No Legal Significance.

COLTS correctly states that in determining whether a forum is a designated public forum or a nonpublic forum, the relevant inquiry is "whether [COLTS] clearly and deliberately opened its advertising space to the public." Def.'s Br. at 7. However, COLTS incorrectly suggests that this inquiry is resolved by the fact that COLTS' 2011 and 2013 advertising policies each contained language to the effect that COLTS intended to create only a "nonpublic forum" and did not intend for its advertising spaces "to become a public forum" for speech. *See* Def.'s Br. at 8, 11. COLTS is mistaken about the significance of these legalistic, conclusory statements. As Plaintiff previously explained, COLTS cannot manufacture greater authority to restrict speech merely by including "magic words" in the speech-restrictive policy designed to protect the agency during litigation. *See* Pl.'s Mem. Law at 11-12. The Third Circuit has made clear that the government's "own statement of its intent . . . does not resolve the public forum question." *Christ's Bride Ministries*, 148 F.3d at 251. "To allow . . . the government's statements of intent to end rather than to 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." *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990).[2]

Rather, as COLTS concedes, it is COLTS' "policies and practices in using the space" and "the nature of the property and its compatibility with expressive activity" that are relevant to a determination of COLTS' intent. Def.'s Br. at 7; *Christ's Bride Ministries*, 148 F.3d at 249 ("To gauge SEPTA'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."). As Plaintiff previously explained, in this case, these factors support a finding that COLTS' advertising space is a designated public forum. *See* Pl.'s Mem. Law at 12-13. For over a decade, COLTS accepted all advertisements, with no restrictions whatsoever. Pl.'s Stmt. Facts ¶¶ 9, 12. Only in 2011 did COLTS decide to adopt a restrictive policy, which it "clarified" in 2013, aimed at the illegitimate goal of suppressing debate and discussion of public issues. *Id.* ¶¶ 26, 31, 53, 57. Plainly, the categories of advertisements prohibited under the 2013 Policy—all of which COLTS allowed prior to 2011—are not "incompatible" with the nature of the advertising space or

[2] *See also 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) (in determining whether transit agency has created a designated public forum, "actual practice speaks louder than words.").

the purpose of leasing it to the public, which is—and has always been—to raise revenue. *See id.* ¶¶ 10, 62.

B. COLTS Has Not "Closed the Forum."

COLTS also argues that, even if its advertising space constituted a designated public forum at its inception, COLTS "closed" the forum in 2011 when it first adopted a restrictive advertising policy. *See* Def.'s Br. at 10-11. COLTS is incorrect.

Christ's Bride Ministries, 148 F.3d 242 (3d Cir. 1998), the case COLTS relies upon for this argument,[3] does not stand for the proposition that a transit agency can effectively "close" a designated public forum by deciding to exclude content that it had once deemed permissible. If anything, it stands for the opposite proposition.

Christ's Bride Ministries arose out of SEPTA's decision to take down a controversial ad that it had previously run. *Id.* at 244-46. The Third Circuit held that SEPTA's advertising space was properly analyzed as a designated public

[3] COLTS also cites *Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County*, 653 F.3d 290, 296 (2011) in support of this argument, but it is not clear why. That case contains no discussion helpful to determining the nature of the forum in this case because the court found no need to address the issue in that case. *See id.* ("[W]e need not tackle the forum-selection question. Regardless of whether the advertising space is a public or nonpublic forum, the coalition is entitled to relief because it has established viewpoint discrimination.").

forum, notwithstanding SEPTA's pivot towards more exclusionary advertising practices. *Id.* at 252.

Significantly, after it lost *Christ's Bride Ministries*, SEPTA updated its advertising policies to prohibit more categories of speech in an effort to "close the forum," but that effort was held to have been ineffective last year in *American Freedom Defense Initiative v. SEPTA*, 92 F. Supp. 3d 314, 325-26 (E.D. Pa. 2015). In this more recent case, SEPTA rejected an advertisement it said violated its prohibition on ads that "disparage or ridicule any person or group of persons on the basis of race, religious belief, age, sex, alienage, national origin, sickness or disability." *Id.* SEPTA argued that its new, more detailed restrictions on advertising had changed the nature of the forum from a designated public forum to a nonpublic forum. *Id.* at 325. But the district court disagreed. The court reasoned that, even though SEPTA's policies contained "more numerous" restrictions than at the time *Christ's Bride* was decided, far from limiting the advertising spaces to only a narrowly defined type of expression, SEPTA's policies still left the advertising space open to a wide variety of speech. *Id.* at 327. In light of the character of SEPTA's advertising policy and the nature of the ad space, which was plainly suitable for a broad array of speech including speech on public issues, the court concluded that SEPTA's ad space remained a designated public forum. *Id.* at 327. For the same reasons, COLTS' advertising space likewise

remains a designated public forum under the 2013 Policy. *See generally* Pl.'s Mem. Law at 10-13.

II. EVEN IF COLTS' ADVERTISING SPACE IS ANALYZED AS A NONPUBLIC FORUM, COLTS' RESTRICTIONS ON SPEECH ARE UNCONSTITUTIONAL BECAUSE THEY ARE NEITHER REASONABLE NOR VIEWPOINT NEUTRAL.

Even in a nonpublic forum, the First Amendment prohibits restrictions on speech that are either unreasonable because they are not connected to preserving the forum for its intended purpose or viewpoint discriminatory. COLTS' policy is both unreasonable *and* viewpoint discriminatory, each of which provides an independent reason that the 2013 Policy is unconstitutional.

A. COLTS' Speech Restrictions Are Not "Reasonable" Because They Are Unrelated to Preserving the Forum for its Intended Revenue-Generating Purpose.

It is true that "[t]he government does not have '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.'" *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 295 (3d Cir. 2011) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985)). Accordingly, when the government creates a nonpublic forum dedicated to certain narrow purposes, the government has the power to restrict speech within that forum 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)). As COLTS acknowledges, the "reasonableness" of a restriction on speech in a nonpublic forum must be determined "in light of the purpose served by the forum[.]" Def.'s Br. at 12 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001)). In other words, 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." Def.'s Br. at 12 (quoting *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004)).

The recent Court of Appeals decision in *NAACP v. City of Philadelphia* clarifies what is required in order for a speech restriction in a nonpublic forum to be upheld as "reasonable." *See NAACP v. City of Philadelphia*, -- F.3d --, 2016 U.S. App. LEXIS 15431, at *16-29, 2016 WL 4435626, at *5-8 (3d Cir. Aug. 23, 2016).[4] The Court explained that because First Amendment freedoms are at issue whenever the government acts to restrict speech, the bar for "reasonableness" is higher than ordinary rational basis review. *Id.*, 2016 U.S. App. LEXIS 15431 at

[4] The Third Circuit did not decide in *NAACP* whether the advertising space in the Philadelphia airport constituted a nonpublic or designated public forum because it found that the City's advertising restrictions were unconstitutional even if the ad space was analyzed under the less stringent standards applicable to nonpublic forums. *NAACP*, 2016 U.S. App. LEXIS 15431 at *13; 2016 WL 4435626 at *5.

*17-18, 2016 WL 4435626 at *6. Under "reasonableness" review, the government bears the burden to justify its restriction on speech by "record evidence" or "common-sense inferences." *Id.*, 2016 U.S. App. LEXIS 15431 at *18, 2016 WL 4435626 at *7.

In this case, as is true of most advertising schemes, COLTS decided to sell advertising space for the "sole purpose" of generating revenue from ad sales.[5] *See also Christ's Bride Ministries*, 148 F.3d at 249 ("The main function of the advertising space at issue is to earn a profit for SEPTA.").

However, the 2013 Policy is plainly not aimed at preserving the forum for its intended revenue-generating purpose. The restrictions on speech it contains have nothing to do with the goal of raising revenue. And COLTS has not suggested otherwise. Indeed, by limiting the universe of permissible advertisements and advertisers, the 2013 Policy's restrictions actually serve to *reduce* COLTS' advertising revenue, while doing nothing to increase COLTS' ridership or otherwise offset the lost advertising revenue.

The record evidence makes clear that the speech restrictions adopted in 2011 and "clarified" in 2013 were aimed *not* at the goal of raising revenue, but rather, at

[5] Def.'s Br. at 11 ("COLTS has decided to sell space for advertising on its vehicles, route schedules and other literature, bus shelters or other property, for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership."); Pl.'s Stmt. Facts ¶ 10 (citing Fiume Dep. 19:1-20:13; Wintermantel Dep. 21:16-19); *id.* ¶ 62 (citing 2013 Policy).

the unrelated goal of suppressing debate and discussion. Pl.'s Stmt. Facts ¶ 29 ("The 2011 Policy was neither designed to increase COLTS' ridership nor prompted by any revenue-related goals or concerns.") (citing Wintermantel Dep. 51:17-52:1). As Plaintiff explained in its brief supporting Plaintiff's motion for summary judgment, courts should view with extreme skepticism any speech restrictions designed to further the goal of suppressing debate or the related goal of avoiding controversy. Pl.'s Mem. Law at 8-10. This is particularly true when this concern is unsupported by record evidence. As the Third Circuit observed recently, "Supreme Court guidance cautions against readily drawing inferences, in the absence of evidence, that controversy avoidance renders [a speech] ban constitutional." *NAACP*, 2016 U.S. App. LEXIS 15431 at *25, 2016 WL 4435626 at *9 (citing *Cornelius*, 473 U.S. at 812; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981)). Although COLTS' designee surmised during her deposition that allowing advertisements that might spark debate aboard buses *might* cause a decrease in ridership among the elderly, she conceded that there was no evidence to support this theory. Pl.'s Stmt. Facts ¶ 59.[6] Moreover, COLTS has conceded that it has never taken any steps to limit debate aboard its buses other

[6] The Third Circuit has made clear that when the government articulates a new reason for rejecting an ad after the commencement of litigation, district courts have the power to dismiss that rationale as a "post-hoc rationalization" rather than "a real basis for rejecting the ad[.]" *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011).

than adopting a restrictive advertising policy. *Id.* ¶ 19. It further conceded that many of the ads that are prohibited by the 2013 Policy previously ran on COLTS buses, and that COLTS was unaware of any disruption on a COLTS bus caused by an ad or by debate among passengers. *Id.* ¶ 18 (citing Wintermantel Dep. 28:6-14; Fiume Dep. 46:21-24).

Plaintiff in this case is not seeking to exercise its free speech rights "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 800. Accordingly, the cases Defendant relies on upholding "reasonable" restrictions on speech in nonpublic forums are distinguishable. This case is a far cry from the cases cited by Defendant that involved speakers who sought to use a forum for a type of expression that differed from—or interfered with—the forum's intended purpose. *See* Def.'s Br. at 9-10 (citing *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 (3d Cir. 1992) (public library constituted a nonpublic forum for "reading, writing and quiet contemplation" but not for "oral and interactive" First Amendment activities); *Rosenberger v. Record & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (student activities fund, available to student groups meeting certain criteria, constituted nonpublic forum); *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")).

Here, Plaintiff seeks to engage in *precisely* the type of speech for which the forum was created: general advertising. Plaintiff's proposed advertisement is not inconsistent with the nature of advertising space, and nothing in the record suggests that Plaintiff's speech would be disruptive or that Defendant even *thought* it would be disruptive. *See generally* Pl.'s Mem. Law at 10-13 (citations omitted).

Indeed, COLTS' brief makes no attempt whatsoever to even articulate any way in which the restrictions on speech contained in the 2013 Policy further the revenue-generating purpose of COLTS' advertising spaces, much less cite any evidence to support such a finding. Because COLTS has identified no record evidence that demonstrates a "legitimate explanation" for the restrictions that is tied to the forum's revenue-generating purpose, and has not even asked the Court to draw common-sense inferences that would support this conclusion, COLTS has not satisfied its burden of justifying its restrictions on speech.

Notably, the "captive audience" concern that partly motivated the City of Shaker Heights to restrict political advertising inside of buses—a restriction that the Supreme Court upheld in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)—does not apply in this case. Defendant's heavy reliance on *Lehman* is thus misplaced. Here, COLTS has never claimed that the restrictions contained in

the 2013 Policy are related to a desire not to "impos[e] upon a captive audience." *Cf. Lehman*, 418 U.S. at 304. Indeed, COLTS' speech restrictions apply not only to political ads but to a wide range of ads on all subjects, and not only to ads on the inside of its buses but also to ads on the outside of the buses, on route schedules and other COLTS literature, and on bus shelters and other COLTS property. *See* Def.'s Ex. D (2013 Policy). Although bus passengers could be considered a "captive audience" to interior bus ads, COLTS' 2013 Policy applies with equal force to many ads that are not directed at bus passengers, and that bus passengers may in fact never see. Indeed, in this case, Plaintiff sought to advertise on the *outside* of a COLTS bus, which would likely have been seen by bus passengers only if the ad was posted on the door-side of the bus rather than the driver's side, and only briefly while the passengers were entering or exiting the bus. Accordingly, *Lehman* does not save COLTS' restrictions from unconstitutionality. *See NAACP*, 2016 U.S. App. LEXIS 15431 at *30-32, 2016 WL 4435626 at *10 & n.6 (distinguishing *Lehman*).

B. COLTS' Restrictions Are Not Viewpoint Neutral.

The 2013 Policy is unconstitutional for the additional, independent reason that it discriminates based on viewpoint. Policies that treat religious speakers differently from non-religious speakers—or controversial speakers differently from non-controversial speakers—are facially viewpoint discriminatory. *See Child*

Evangelism Fellowship v. Stafford Twp Sch. Dist., 386 F.3d 514, 527-28 (3d Cir. 2004).

1. Prohibiting Religious Speakers or Religious Speech While Allowing Their Secular Counterparts Is Viewpoint Discrimination.

COLTS argues that the 2013 Policy cannot be viewpoint discriminatory because it prohibits both pro-religious and anti-religious speech, as well as pro-atheist and anti-atheist speech. Def.'s Br. at 14-19. This argument misses the point. The 2013 Policy discriminates based on viewpoint not by treating speech by religious groups differently from speech by atheist groups, but by treating them both differently from other secular speakers.

The Third Circuit has held that excluding "speech on 'religion as a subject or category of speech' flies in the face of Supreme Court precedent" and constitutes viewpoint discrimination. *Child Evangelism Fellowship*, 386 F.3d at 528. Accordingly, it struck down a school policy that allowed secular groups to distribute literature on school property but prohibited religious groups from doing the same. *Id*.; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (where government allowed 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). For the same reasons, COLTS' policy is unconstitutional.

Furthermore, COLTS' 2013 Policy goes beyond prohibiting speech on religious topics. COLTS' prohibition on ads that "address" religion or religious beliefs or lack of religious beliefs is drafted so broadly that it prohibits any ad that includes a word *related* to religion or atheism, whether or not the ad addresses a religious topic or even takes a religious point of view. This has the effect of prohibiting speech on all topics by identifiably religious or atheist *speakers*.

The result is that the 2013 Policy treats virtually identical speech differently depending on who the speaker is. For example, Lutheran Home & Hospice Services, Inc. cannot advertise on COLTS buses—*not* because of any prohibition on ads for hospice services, but because the company's name includes the word "Lutheran." Pl.'s Stmt. Facts ¶ 86 (citing Wintermantel Dep. 141:19-142:6). But nothing in the 2013 Policy would preclude COLTS from running a virtually identical ad submitted by a hospice service provider called "Joe's Home & Hospice Services, Inc." Similarly, although COLTS ultimately allowed Plaintiff to run an ad bearing the organization's name and URL, if Plaintiff's organization were named the "Northeastern Pennsylvania Atheist Society" rather than the "Northeastern Pennsylvania Freethought Society," it would be prohibited from running any ads at all that included the group's name. *See* Pl.'s Stmt. Facts ¶ 43 (*citing* Wintermantel Dep. 77:14-25, 88:6-11). The fact that the 2013 Policy draws distinctions between similarly situated ads is further evidence of viewpoint

discrimination. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297-98 (3d Cir. 2011).

2. Prohibiting Controversial Speech Is Viewpoint Discrimination.

The 2013 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. The Third Circuit has explained that "to 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) (citing *Cornelius*, 473 U.S. at 812).

As Plaintiff explained in its brief in support of Plaintiff's summary judgment motion, the government may not act to suppress ideas or debate simply because some people may find it unpleasant; rather, the First Amendment is designed to *protect* such speech and debate. Accordingly, restrictions on speech aimed at this illegitimate end are unconstitutional under any mode of First Amendment analysis. *See* Pl.'s Mem. Law at 8-9.

CONCLUSION

For all of the reasons articulated above, Defendant has failed to point to undisputed facts sufficient to demonstrate that the Defendant is entitled to

judgment as a matter of law. Rather, the undisputed factual record makes clear that COLTS' 2013 Policy is unconstitutional. Accordingly, the Court should deny Defendant's Motion for Summary Judgment and grant Plaintiff's Motion for Summary Judgment.

Dated: September 5, 2016

Respectfully Submitted,

/s/ Molly Tack-Hooper

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of Local Rule 7.8(b), in that it does not exceed 5,000 words, exclusive of tables and certifications. The body of this brief contains 4,707 words.

Dated: September 5, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS, and accompanying EXHIBITS and PROPOSED ORDER were 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: September 5, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper