In The United States Court Of Appeals For The Third Circuit

NO.: 18-2743

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,

PLAINTIFF/APPELLANT

v.

COUNTY OF LACKAWANNA TRANSIT SYSTEM,

DEFENDANT/APPELLEE

APPELLEE'S BRIEF

Appeal from the July 9, 2018 Order of the United States District Court for the Middle District of Pennsylvania, at No.: 3:15-cv-00833-MEM, that entered Judgment after a non-jury trial in favor of Defendant/Appellee, County of Lackawanna Transit System.

Marshall Dennehey Warner Coleman & Goggin
Counsel for Defendant/Appellee – County of Lackawanna Transit System
Thomas A. Specht
Pennsylvania I.D.No.: 78686
P.O. Box 3118
Scranton, PA 18505-3118
Ph: (570) 496-4612
Fax: (570) 496-0567
Email: taspecht@mdwcg.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Defendant/Appellee,

County of Lackawanna Transit System,

1) For non-governmental corporate parties please list all parent corporations:

N/A

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

Name: */s/Thomas A. Specht* Dated: 02/11/2019
(Signature of Counsel or Party)

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COUNTER-STATEMENT OF ISSUE(S) INVOLVED

I. Must this Honorable Court affirm the District Court's July 9, 2018 Judgment entered after a non-jury trial, in favor of Defendant/Appellee, County of Lackawanna Transportation System ("COLTS"), in this civil rights action brought pursuant to 42 U.S.C. § 1983 by Plaintiff/Appellant, Northeast PA Freethought Society ("Freethought"), when the District Court rightly concluded that COLTS' advertising policy pertaining to its buses, and, in particular, COLTS' refusal to run advertisements containing the word "atheists," did not violate Freethought's right to free speech under the First Amendment, as:

A. COLTS' advertising space is a limited (or nonpublic) forum;

B. COLTS' restrictions on its public transit advertising space contained in its 2013 advertising policy ("2013 Policy") are constitutional, as they comport with the prescribed level of scrutiny applicable to a limited forum, since any restrictions on speech are i.) reasonable, and ii.) viewpoint neutral; and

C. COLTS' 2013 Policy is not unconstitutionally vague and does not allow COLTS too much discretion in what to allow or not allow in its advertising spaces?

Suggested Answer: Yes.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

This case comes to this Court after a non-jury trial. This Court reviews a District Court's findings of fact for clear error and its conclusions of law de novo. *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 208 (3d Cir. 2001). Where this Court is confronted with mixed questions of fact and law, it should apply the clearly erroneous standard except that the District Court's choice and interpretation of legal precepts remain subject to plenary review. *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 641-642 (3d Cir. 1991).

The clearly erroneous standard of review is a deferential standard. A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been committed. *United States v. Igbonwa*, 120 F.3d 437, 440 (3d Cir. 1997). In practice, the clearly erroneous standard requires the appellate court to uphold any District Court determination that falls within a broad range of permissible conclusions. *See*, *e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985)("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

COUNTER-STATEMENT OF THE CASE

Procedural History

Freethought filed this action under 42 U.S.C. §1983. (JA 744-774). It alleged that COLTS' advertising policy on its buses violated Freethought's right to free speech. (JA 744). Specifically, Freethought alleged that COLTS' refusal to run advertisements containing the word "atheists" impermissibly violated its rights as an improper, content and viewpoint-based restriction. (JA 744, 751-752). Freethought sought a declaration that COLTS' rejection of its advertisements violated the First Amendment and that COLTS' 2013 Policy continues to violate the First Amendment. (JA 752). Freethought also sought a permanent injunction prohibiting COLTS from enforcing its 2013 Policy, (JA 752), and costs and attorney's fees. (JA 752).

A one-day, non-jury trial was held on November 13, 2017. *See gen.*, (JA 126-322). Based upon testimony, evidence of record and the applicable law, the court entered findings of fact and conclusions of law. (JA 6-39). The court held that COLTS' advertising space is a limited forum and that COLTS did not violate Freethought's First Amendment free speech rights when it refused to display advertisements containing the word "atheists" on COLTS' buses. (JA 22-39).

More particularly, the court determined that COLTS' advertising space is not a designated public forum but a limited public forum or nonpublic forum. (JA

23-31). The court opined that it had previously determined, on summary judgment, that COLTS' advertising space on its buses[1] was a limited public forum or nonpublic forum and that nothing at trial altered its determination. (JA 23-24).

The court engaged in a fact-specific analysis of the forum itself. (JA 24). The court provided that transit facilities that have combined written policies with practices that demonstrate an intent to limit a forum will generally avoid being found to have created a designated public forum. (JA 24). According to the court, even if prior to the enactment of COLTS' initial advertising policy in 2011, COLTS' advertising space was a designated public forum, the 2011 advertising policy specifically declared COLTS' intent "not to allow its transit vehicles or property to become a public forum for dissemination, debate, or discussion of public issues." (JA 25). It restricted a number of topics for advertisements that could be deemed controversial (including religious advertisements) to avoid heated arguments for the safety and comfort of passengers, who are essentially a captive audience, and for the safety of drivers. (JA 25-26).

The court found that the 2013 Policy was meant to make clearer the types of advertisements acceptable to COLTS, alleviate the "catch all" discretionary clause

[1] The District Court had determined on summary judgment that the advertising space on COLTS' buses was the relevant forum, and neither party challenged that determination at trial. (JA 23). The issue has also not been raised in Freethought's opening brief and is waived. *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994).

in the 2011 Policy, which would limit COLTS' discretion regarding the advertisements it would or would not display, and declare COLTS' intent "to maintain its advertising space on its property as a nonpublic forum . . . ." (JA 26). It noted that the 2013 Policy also provides that the sale of advertising space is "for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." (JA 27). The court stated that potential advertisers have to obtain permission from COLTS to access the space on its buses, and COLTS has a process to review all proposed advertisements, which demonstrates its intent to control access to its buses. (JA 27).

Concerning COLTS' practices, the District Court decided that the evidence of record demonstrated that COLTS has applied its advertising policy in a consistent manner and that COLTS has attempted to maintain strict controls over the types of advertisements it has permitted on its buses since the enactment of its advertising policy. (JA 27-28). It also determined that the record showed that enforcement of COLTS' 2013 Policy was consistent with its goals of excluding advertisements that would lead to debates and arguments on its buses and of transporting its riders safely to their destinations. (JA 27-28).

Given COLTS' 2013 policy that declares its intent not to become a public forum, provides for the exclusion of very specific types of advertisements, and that requires a review process prior to the placement of an advertisement, and based

upon COLTS' practice of permitting only limited access to the advertising spaces on its buses, the court held that COLTS' advertising space is not a designated public forum. (JA 28). It opined that, even if it was previously a designated public forum, such forum was closed by COLTS' advertising policy(ies). (JA 28).

The court also found that COLTS' 2013 Policy comports with the prescribed level of scrutiny applicable to a limited forum. (JA 31-35). In doing so, it held that COLTS' restrictions on speech in its limited forum are allowed because they are reasonable and viewpoint neutral. (JA 31-35).

It concluded that that generating revenue, while maintaining or increasing ridership, is the purpose of the forum. (JA 31-32). And that "[g]iven the decrease in civil tolerance and the increase in social unrest and violence in today's society, and even dating back to the time of the implementation of COLTS' policies, COLTS had a reasonable basis for its advertising restrictions," as continuation of public issue and controversial advertisements could have subjected it to dangerous situations on its buses resulting from heated arguments, controversy, and debates, which could have affected ridership and revenue. (JA 34-35). The court held that COLTS' advertising policy restrictions are reasonable, as the reason for the restrictions can be tied to the purpose of the forum. (JA 35).

Additionally, the court concluded that COLTS' restriction on speech was viewpoint neutral. (JA 35-37). The court found that the restriction on all speech

related to religion is a content, not viewpoint, based restriction, noting that, even Freethought had referred to the 2013 Policy as a content-based restriction. (JA 36).

The court stated: "COLTS is not targeting Freethought's particular views by way of its advertising policy. Instead, it is excluding the entire subject matter of religion from its advertising space. In fact, since the passage of COLTS' advertising policy, the record demonstrates that COLTS has not accepted any advertisements that are religious or that appear to promote either the existence or the non-existence of God." (JA 37). It held no evidence proved that COLTS rejected Freethought's advertisements to suppress a point of view it sought to espouse on an otherwise includible subject. (JA 37).

The court also rejected Freethought's argument that COLTS' 2013 Policy is unconstitutionally vague and allows COLTS too much discretion in what to allow or not allow in its advertising spaces. (JA 37-39). The court explained that merely because the policy might require some interpretation does not render it vague. (JA 37-39). The court stated that a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed by COLTS' policy, and that the 2013 Policy took away COLTS' unfettered discretion to refuse advertisements. (JA 38-39).

Judgment was, therefore, entered for COLTS on July 9, 2018. (JA 4, 39). Freethought timely appealed the Judgment. (JA 1-3).

On December 13, 2018, Freethought filed its opening brief. Two amicus briefs have also been filed.

On December 18, 2018, this Court permitted COLTS to file its brief on or before February 11, 2019. This brief is timely filed.

Statement of Facts

The Parties

Freethought is an unincorporated association based in Wilkes-Barre, Pennsylvania. (JA 54). Justin Vacula is the co-organizer and spokesperson. (JA 55). Freethought is an organization of atheists, agnostics, secularists, and skeptics. (JA 54). Freethought 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. (JA 54-55).[2] Freethought engages in debates over the existence or non-existence of God. (JA 123, 154). A typical consequence of appearance of Freethought at an event is discussion of whether or not God exists. (JA 153-154).

COLTS is a public transportation authority headquartered in Scranton, Pennsylvania. (JA 55). Robert Fiume has served as COLTS' Executive Director since June 2008. (JA 55). Mr. Fiume oversees the entire transportation system. (JA

[2] Mr. Vacula believes government should remain neutral on matters of religion, and states that Freethought tries to keep the government neutral on matters of religion. (JA 151).

55). Mr. Fiume delegated responsibility for deciding whether to accept a proposed advertisement to Advertising Manager, Jim Smith, and later to Communications Director, Gretchen Wintermantel. (JA 55).

Ms. Wintermantel has served as Communications Director since 2009. (JA 55). In that capacity, she is responsible for, among other things, increasing ridership and applying COLTS' advertising policies. (JA 55). At times, she consults with COLTS' management and solicitor to determine whether to accept or reject advertisements. (JA 55). She and Mr. Fiume each possess final policymaking authority with respect to COLTS' enforcement of its advertising policies. (JA 56).

Pre-2011 Practice

COLTS has leased advertising space on the inside and outside of its vehicles since at least 1993. (JA 56). Traditionally, COLTS has opened its advertising space to the public to raise revenue, and not to further any other organizational policy or goal. (JA 56, 171). Advertising revenue has comprised less than 2% of COLTS' yearly revenue. (JA 56, 234). Ticket sales from riders accounted for up to 10% of COLTS budget. (JA 235).

Prior to June 2011, COLTS did not have any advertising policy – merely a contract that permitted COLTS to deny ads. (JA 171-172). Dating back to at least 2003, COLTS ran religious and political advertisements, as well as advertisements

for newspapers, educational institutions and beer distributors. (JA 172-192). During this time, COLTS did not receive any complaints about any advertisement that ran on a COLTS bus; nor was COLTS aware of any disruption on its buses caused by the advertisements it displayed. (JA 192-193).

In May 2011, Jim Smith, COLTS' then-Advertising Manager, received a phone call from a local man who wanted to run an advertisement that said "Judgment Day is Coming in May." (JA 56). Mr. Smith and Ms. Wintermantel were alarmed by the proposed "Judgment Day" advertisement because it "seem[ed] religious." (JA 56). Wintermantel reviewed the website affiliated with the advertiser's campaign and confirmed it was religious. (JA 56). Smith and Wintermantel, along with Mr. Fiume, decided that the advertisement "could be controversial" because it was "religious." (JA 56). They agreed to reject it because "[a]ds that are religious in nature can cause heated debates and heated arguments on either side," and COLTS did not want debates or arguments inside buses. (JA 56-57).[3]

[3] Before Ms. Wintermantel, Mr. Smith would have been the one that decided what ads to run. (JA 237). After Wintermantel started, she applied COLTS' advertising policies. (JA 237). Both Smith and Wintermantel had the power to reject or accept an ad without getting approval from Mr. Fiume but, if they were going to reject something, they would come to Fiume. (JA 237). Prior to rejecting the atheist ads at issue, Wintermantel discussed the same with Fiume and COLTS' Solicitor, J. Timothy Hinton, Esquire. (JA 233, 238, 243).

Accordingly, although COLTS had never before informed a potential advertiser that it would not run its advertisement, COLTS informed it that it would not accept the "Judgment Day" advertisement. (JA 57). COLTS based its denial of the "Judgment Day" advertisement on the fact that COLTS "felt it was pro-religion" and did not want religion being discussed on the buses because that might "cause heated debates and heated arguments." (JA 57). Ms. Wintermantel testified that: "We want our buses, which are confined spaces, to be safe for our passengers and our drivers. It's not that we don't want debate or conversation at all. It's we don't want heated debate and arguing and anything that would cause disruption." (JA 194). COLTS was not censoring the inside of its buses. (JA 194).

2011 Policy

In response to the proposed "Judgment Day" advertisement, Ms. Wintermantel determined that COLTS should set forth an advertising policy clarifying the types of advertisements COLTS would and would not display. (JA 57, 193-194). She drafted COLTS' first formal advertising policy, which was approved on June 21, 2011. (JA 57, 195). *See also*, (JA 686). The 2011 Policy was not designed to increase COLTS' ridership nor was it prompted by any revenue-related goals or concerns. (JA 57). The 2011 Policy had no effect on COLTS' ridership. (JA 57). The goal of COLTS' advertising policy "was specifically to

prevent debate inside of COLTS' buses . . . and had nothing to do with debate outside the buses." (JA 57).

In developing the 2011 Policy, COLTS sought to stay out of the business of religion entirely. (JA 245). COLTS considered issues occurring at transit agencies throughout the country. (JA 219-221, 248-249). These issues included the boycotting of buses, vandalism of buses and "a war of words" on buses over controversial public issue advertisements, including the existence or non-existence of God. (JA 220-221, 248-250). COLTS officials were concerned that, if they continued to allow the same on their buses, they would become a place that could make riders feel unwelcome, affecting ridership and revenue. (JA 220-222, 248-250). They believed such advertisements could compromise riders' safety or cause vandalism of buses. (JA 220-222, 248-250). Ms. Wintermantel and Mr. Hinton testified that debate is a problem on buses because buses are small, confined areas in which COLTS must preserve the safety of passengers and drivers. (JA 221-222, 248-250). While unrelated to advertisements, Mr. Hinton testified that past incidents on the buses involved people arguing, which led to the driver becoming distracted and needing to intervene. (JA 249-250). Mr. Hinton further indicated that debates and arguments occurring on the buses due to controversial advertisements could affect ridership. (JA 249-250).

The 2011 Policy, which was adopted on June 21, 2011, provided:

> WHEREAS, COLTS may choose to sell space for advertising . . . as a source of revenue for the Authority; . . .
>
> COLTS will **not** accept advertising:
>
> · for tobacco products, alcohol, and political candidates
>
> · that is deemed in COLTS['] 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.

(JA 686). The 2011 Policy further provided that "it is COLTS' declared intent not to allow its transit vehicles or property to become a public forum for dissemination, debate, or discussion of public issues or issues that are political or religious in nature." (JA 688). It provided that COLTS would review the advertisement prior to its placement, stating that "COLTS shall maintain exclusive authority and control over where advertisements in general shall be displayed on its property." (JA 688).

While the 2011 Policy was being drafted, COLTS was approached by Northeast Firearms to run an advertisement. (JA 197). Although the 2011 Policy

was not yet in effect, it was going to contain a restriction on firearms advertisements, so COLTS did not accept the advertisement. (JA 197).

When the 2011 Policy was enacted, COLTS was running an advertisement for a beer distributor called "Brewer's Outlet." (JA 191, 355). Despite the 2011 Policy's ban on advertisements for alcohol, COLTS continued to run the advertisements until its contract expired on April 14, 2012. (JA 14, 355). Brewer's Outlet was informed that COLTS would not renew. (JA 14).

After the 2011 Policy was in place, COLTS ran an advertisement for the annual Halloween party of Patrick O'Malley, Lackawanna County Commissioner. (JA 183). The advertisement did not identify Mr. O'Malley as a County Commissioner, or in any political fashion, and contained no political statements. (JA 183-185, 406-414).

Also in 2011, after the passage of the 2011 Policy, COLTS ran an advertisement for the Diocese of Scranton, Pennsylvania, as part of its "Adoption for Life" campaign, as it had done since 2004. *See gen.*, (JA 177, 375-402). The adoption advertisement stated: "Consider ADOPTION . . . *IT WORKS!*" (JA 375-376). Paid for by the Diocese of Scranton, the adoption advertisement did not contain any religious references or any references to the Diocese of Scranton, and was neutral on its face. (JA 177, 375-376).

In addition, COLTS ran an advertisement for "National Infant Immunization Week" in 2012. (JA 186, 371-374). COLTS ran the immunization advertisement without a clear understanding of the controversial nature of the subject matter at the time (given the debate over the appropriateness of immunization), but COLTS indicated that, currently, the advertisement would not be displayed. (JA 186).

Finally, in 2011, COLTS ran an advertisement for the Saint Stanislaus Polish Food Festival & Fair. (JA 487-491). Testimony at trial was that the advertisement would not have been accepted under the 2013 Policy because it contained the words "Saint Stanislaus Elementary School," *See*, (JA 178, 491), referencing religion. (JA 178).

In late 2011 or early 2012, Mr. Vacula noticed a scrolling message that said, "GOD BLESS AMERICA" on the electric head sign on a COLTS bus. (JA 122, 159-161). After seeing this message, Mr. Vacula called COLTS to complain, and the message was taken down. (JA 122, 218-219, 246). Mr. Vacula later saw a "God Bless America" ribbon or magnet attached to the inside of a COLTS bus by the driver. (JA 162-163, 219). Again, Mr. Vacula complained, and it was removed. (JA 162-163, 219, 246). Neither the scrolling message nor the ribbon/magnet was an advertisement, and each was placed by the individual driver, not at the behest of COLTS. (JA 123, 159-164, 218-219, 246). COLTS issued a memorandum to its drivers prohibiting any such signage, (JA 743), and the

messages were no longer seen on COLTS' buses. (JA 122, 162-163). However, Mr. Vacula saw the signs as promoting a religious message, and he felt that COLTS, as a government entity, should not be promoting it. (JA 161, 166-167).

On January 30, 2012, Mr. Vacula contacted Mr. Smith for Freethought, seeking to display an advertisement on a COLTS bus that contained an image of clouds and the word "Atheists" in large font above the URL address of Freethought. Mr. Vacula submitted the proposed advertisement in response to the "God Bless America" messages on the COLTS buses, (JA 58, 123), and to recruit potential new members to Freethought. (JA 52, 86, 123). Mr. Vacula expressed his intent to challenge the COLTS advertising policy, although the "God Bless America" signs were not part of any advertisement, and he testified that he had no challenge to any advertisements that were run on COLTS buses. (JA 123, 159-161).

Mr. Smith consulted Ms. Wintermantel. (JA 58). COLTS rejected Freethought's proposed advertisement under the 2011 Policy based on its belief that the word "atheists" would likely cause passengers to engage in debates about atheism aboard COLTS' buses. (JA 58). COLTS believed that the word "atheist" or any word referring to a religion or lack of religion "could spark debate on a bus" and could "be a controversial issue," regardless of context. (JA 58). COLTS believed that such messages could make riders uncomfortable. (JA 58, 230-231). Mr. Vacula himself testified that the advertisement containing the word "atheists" could be

offensive to some people. (JA 164). Mr. Smith telephoned Mr. Vacula to inform him that COLTS would not run the advertisement. (JA 58).

After the refusal, an article ran in the Scranton Times-Tribune newspaper that discussed the rejection. (JA 124). Various comments were posted online that personally attacked Mr. Vacula and led to a controversial, contentious, and sometimes virulent discussion between those who supported the advertisement and those who opposed it. (JA 124, 726-728). In addition, there was contentious discussion in the comments regarding the existence or non-existence of God. (JA 124, 726-728).

There were several other bloggers and websites which posted articles about COLTS' rejection of Freethought's advertisement, all of which contained back and forth debate about the issue. (JA 124). Mr. Vacula agreed that as a result of COLTS rejecting Freethought's advertisement, a discussion occurred about the existence or nonexistence of God. (JA 124).

In May 2012, COLTS rejected another advertisement proposal under the 2011 Policy for the "Wilkes-Barre Scranton Night Out" because the website contained links to establishments that served alcohol. (JA 59, 124, 206). Ms. Wintermantel testified that COLTS would probably not reject the proposed advertisement if it were submitted again because, on its face, the advertisement did not violate the 2011 Policy. (JA 59, 206).

On August 29, 2013, Freethought submitted a second advertisement. (JA 58, 698-700). It stated: "Atheists. NEPA Freethought Society. NEPAfreethought.org." (JA 699-700). On September 9, 2013, Ms. Wintermantel stated that COLTS would not display Freethought's proposed advertisement. (JA 701). In her letter, Ms. Wintermantel indicated that COLTS considered its property to be a nonpublic forum. (JA 701). It stated that "COLTS does not accept advertisements that promote the belief that 'there is no God' or advertisements that promote the belief that 'there is a God.' As stated in COLTS' Advertising Policy, it is COLTS' declared intent not to allow its property to become a public forum for the dissemination, debate, or discussion of public issues. The existence or nonexistence of a supreme deity is a public issue." (JA 701). Wintermantel further indicated that COLTS was rejecting Freethought's proposed advertisement based on COLTS' belief that the word "atheists" may offend or alienate a segment of its bus riders and therefore negatively affect its revenue. (JA 701). Wintermantel expressed COLTS' goal of providing a safe and welcoming environment on its buses for the public at large, and emphasized that the acceptance of public issue advertisements in a confined space like the inside of a bus detracts from this goal. (JA 701).

2013 Policy

On September 17, 2013, COLTS Board of Directors enacted the 2013 Policy to "rescind," "replace," and "clarify" the 2011 Policy and to more clearly "set forth the types of advertisements it will and will not accept[.]" (JA 59-60, 687-688).[4]

The 2013 Policy, which is still in effect, provides that COLTS' sells advertising space on its vehicles "for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." (JA 716). *See also*, (JA 233-234). Both Ms. Wintermantel and COLTS' Solicitor, J. Timothy Hinton, Esquire, who drafted the 2013 Policy, testified at trial that they were concerned that allowing controversial public issue advertisements on COLTS' buses would affect ridership and, as a result, revenue. (JA 200, 222, 230-231, 244).

However, the 2013 Policy was also enacted because COLTS determined that debates aboard buses could be dangerous and render the buses potentially unsafe. (JA 60, 222, 230, 232-233, 244).[5] Ms. Wintermantel testified that "COLTS looked

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[4] COLTS had been working on the 2013 Policy since March 2012, partly based upon recommendations made by an ACLU attorney. (JA 199-200, 246-248).

[5] Mr. Hinton stated:

> We really didn't feel that the advertising space on the bus was an appropriate forum for the dissemination and debate and discussion of public issues. In a way our ridership is tra[pped] . . . on the buses. . . . They don't want to be involved in a debate or listen to it. . . . we didn't think that would good for ridership in terms of revenue, No. 1. Secondly, there could be safety concerns depending upon what the issue is.

at what was happening in other transit agencies and problems that were going on there. We frankly didn't want them to go on . . . in our small transit system." (JA 232-233).[6] In this regard, COLTS seeks to prevent debates or argument on its buses. (JA 60). COLTS did not want to offend or alienate anyone who would see the advertisements. (JA 202). COLTS wanted to remain neutral on controversial issues. (JA 202). In creating the 2013 Policy, COLTS sought to preclude issues that are political or religious because COLTS believes that politics and religion are topics that people feel strongly about. (JA 60). COLTS was also concerned it would be a safety issue on buses because there can be arguments over those types of issues, which could distract passengers and drivers, (JA 222, 249-250), and eventually affect revenue. (JA 222, 250).

More specifically, the 2013 Policy provides, in part, 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; . . .

(JA 244).

[6] In researching the policy, it was noted that there were controversies throughout the country over advertisements on buses related to God. (JA 220, 248, 734-736). These were a concern for COLTS when discussing its advertising policy. (JA 221). There was a concern that it would affect revenue at COLTS because once they opened the door to religion, more hard-hitting religious advertisements would follow. (JA 248-250).

- 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.

(JA 716-717).

Through the 2013 Policy, COLTS explicitly declared its intent to maintain the advertising space on its vehicles as a limited public forum. (JA 717). In bold letters, the 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.**" (JA 717).

Subsequent to the adoption of the 2013 Policy, on July 21, 2014, Freethought submitted a new advertisement proposal that stated: "Atheists. NEPA Freethought Society meetup.com/nepafreethoughtsociety." (JA 61, 702-707). That same day, COLTS sent Mr. Vacula a letter, denying the proposed advertisement because it addressed the non-existence of a deity. (JA 704). Because "the existence or non-existence of a supreme deity is a public issue," it was concluded

that the proposed ad violated COLTS' advertising policy and COLTS decided not to display it. (JA 61, 704). The letter concluded: "[i]t is COLTS' goal to provide a safe and welcoming environment on its buses for the public at large. The acceptance of ads that promote debate over public issues such as abortion, gun control or the existence of God in a confined space like the inside of a bus detracts from this goal." (JA 704).

Later that day, Mr. Vacula submitted another proposed advertisement, which was identical to the advertisement proposal rejected earlier that day, except that it did not include the word "atheists." (JA 61-62, 706-707). Rather, it read: "NEPA Freethought Society meetup.com/nepafreethoughtsociety." (JA 707).

On the following day, Ms. Wintermantel agreed to run Freethought's proposed advertisement because the word "atheists" had been taken out and because, on its face, it did not violate COLTS' advertising policy. (JA 62, 705). This final version of Freethought's advertisement ran on the outside of a COLTS bus in October or November of 2014. (JA 62). COLTS did not receive any complaints about Freethought's advertisement. (JA 192).

COLTS has rejected other advertisements under the 2013 Policy, including an advertisement from Lutheran Home Healthcare and Hospice. (JA 123). In rejecting the advertisement, *See*, (JA 1548-1551), COLTS' noted the word "Lutheran," along with a cross, in the advertisement. (JA 1545-1547). COLTS'

solicitor recommended that it be rejected to facilitate consistent enforcement of the advertising policy. (JA 1545).

RELATED CASES AND PROCEEDINGS

Colts is unaware of any cases and proceedings related to this case.

SUMMARY OF THE ARGUMENT

The July 9, 2018 Judgment in favor of COLTS must be affirmed. COLTS' 2013 Policy does not violate the First Amendment.

The "religious advertisements" provision that COLTS invoked to reject Freethought's "atheists" advertisements is a valid and permissible subject matter restriction on speech in a limited public forum – the exterior advertising spaces of COLTS' buses. Freethought's attempt on appeal to now contort COLTS' statement of intent contained within the 2013 Policy into a "catch-all," "no-debate" provision should be rejected. COLTS' 2013 Policy specifically enumerated the subject matter restricted by it.

COLTS' declared intent to close the forum, when taken in conjunction with the specific 2013 Policy restrictions, COLTS' review process, and its consistent practices in applying the provisions of the 2013 Policy, provided strong factual support for the District Court's conclusion that COLTS intended to close the forum and that its advertising space was a limited or nonpublic forum. Therefore, the "religious advertisements" provision utilized to refuse Freethought's initial advertisements containing "atheists" language was correctly analyzed by the District Court under the "reasonable" and "viewpoint neutral" standard applicable to limited and nonpublic forums that does not require that the decision to restrict

access be the "most reasonable" in a range of possible decisions but only that it not be "arbitrary, capricious, or invidious."

COLTS' decision to restrict advertisements concerning religion and, in particular, Freethought's advertisements containing "atheists" language, was neither arbitrary, capricious, or invidious, but reasonable. The "religious advertisements" provision was reasonable in that continuation of religious advertisements like those proposed by Freethought could have resulted in dangerous situations on COLTS' buses stemming from heated arguments, controversy, and debates, which could have affected safe and comfortable transportation, ridership and revenue. The findings of the District Court in this regard were not clearly erroneous and must be accepted by this Court.

The provision was also viewpoint neutral, in that COLTS does not target Freethought's particular views by way of its advertising policy. Instead, COLTS excludes the entire subject matter of religion from its advertising space. As noted by the District Court, Freethought admitted that COLTS' 2013 Policy was content-based, and not based on viewpoint.

Finally, COLTS' 2013 advertising policy is not unconstitutionally vague and does not allow COLTS too much discretion in what to allow or not allow in its advertising spaces. As properly held by the District Court, merely because a policy might require some interpretation does not render it vague. COLTS' 2013 Policy

specifically enumerated the subject matter restricted by it and a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed by COLTS' 2013 Policy. Based on discussions with the ACLU, the 2013 Policy took away COLTS' unfettered discretion to refuse advertisements. Freethought's attempt on appeal to contort COLTS' statement of intent contained within the 2013 Policy into a vague, "catch-all," "no-debate" provision should be rejected.

ARGUMENT

I. This Honorable Court must affirm the District Court's July 9, 2018 Judgment when the District Court rightly concluded that COLTS' 2013 Policy pertaining to its buses, and, in particular, COLTS' refusal to run Freethought's advertisements containing the word "atheists," did not violate Freethought's right to free speech under the First Amendment.

To prove a violation of 42 U.S.C. § 1983, Freethought must establish that COLTS acted under color of state law and that COLTS deprived Freethought of a right secured by the Constitution or laws of the United States. *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009). Freethought has alleged that its First Amendment right to free speech was violated by and through COLTS' advertising policy on its buses. (JA 744). Specifically, Freethought alleged that COLTS' refusal to run advertisements containing the word "atheists" impermissibly violated its rights as an improper, content and viewpoint-based restriction. (JA 744, 751-752). The District Court rightly concluded that Freethought's First Amendment right to free speech has not been violated. *See gen.*, (JA 22-39).

A. COLTS' advertising space is a limited (or nonpublic) forum because i.) COLTS' written advertising policy(ies) declared its intent that its advertising space not become a public forum, ii.) COLTS' written advertising policy(ies) provide for the exclusion of specific types of advertisements and required a review process prior to placement of any advertisement with COLTS, and iii.) COLTS has a practice of permitting only limited access to the advertising spaces on its buses.

"The Supreme Court has outlined a three-step analysis regarding a prima facie case of alleged First Amendment violations." *AFDI v. SEPTA*, 92 F.Supp.3d 314,

322 (E.D.Pa. 2015)(citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985)). First, the court must "determine whether the advertisement in question constitutes speech protected by the First Amendment." *Id.*[7] Second, the court must determine "the nature of the forum created by [COLTS'] advertising space" "because the appropriate level of scrutiny depends on the categorization of the forum." *Id.* Third, the court must examine "whether the . . . standard at issue survives the applicable level of scrutiny." *Id.*

1. Types/definitions of forums.[8]

The Supreme Court articulated the standards that apply to the three different types of free speech forums in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-47 (1983). In a traditional or "quintessential" public forum, such as a street or park, "the government may not prohibit all communicative activity." *Perry*, 460 U.S. at 45. Rather, "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* In a designated public forum, defined by "public property which the state has opened for use by the public as a place for expressive activity," the state "is bound by the same standards as apply in a traditional public forum." *Id.*, at 45-46. Finally, in a

[7] This issue is not in dispute herein.
[8] Here, Freethought has not challenged that the relevant forum is the advertising space on the outside of COLTS' buses. *See*, FN 1, *supra*.

limited public or nonpublic forum, which is characterized by "[p]ublic property which is not by tradition or designation a forum for public communication," the state "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*, at 46. The reasonableness of a restriction in a nonpublic[9] or limited public forum "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, *supra*, 473 U.S. at 809.

Courts outside this Circuit have explained that "[t]he past history of characterization of a forum may well be relevant; but that does not mean a present characterization about a forum may be disregarded." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004)(discussing changes to transportation authority's advertising restrictions as if advertising space had previously been considered designated public forum). *See also*, *AFDI v. Metro Transp. Auth.*, 109 F.Supp.3d 626, 632-633 (S.D.N.Y. 2015)(noting that changes made to transportation authority's

[9] The Supreme Court has identified limited public forums and nonpublic forums as distinct categories. *See*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 427 (1992)(identifying limited public and nonpublic forums as separate "geographic categories of speech"). The same level of scrutiny applies in a nonpublic or limited public forum. *NAACP v. City of Phila.*, 834 F.3d 435, 452 (3d Cir. 2016). In both types of forums, restrictions on speech must be reasonable in light of the purpose served by the forum and viewpoint neutral. *Id.* (citing *Rosenberger v. Rector Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

advertising restrictions likely "converted its advertising space from a designated public forum to a limited public forum or a nonpublic forum"); *Coleman v. Ann Arbor Transp. Auth.*, 947 F.Supp.2d 777, 779-80 (E.D.Mich. 2013)(revisions to transportation authority's advertising policy changed forum from designated public forum to limited or nonpublic forum). Thus, "[t]he government is free to change the nature of any nontraditional forum as it wishes. . . . [I]t would be free to decide in good faith to close the forum at any time." *Ridley*, 390 F.3d at 77. *See also*, (JA 28).[10]

2. The advertising space on COLTS' buses is a limited or nonpublic forum.[11]

To determine whether COLTS closed the forum of its advertising spaces on buses, the Court must review COLTS' intent. *Cornelius*, *supra*, 473 U.S. at 802. The government does not create a designated public forum through inaction or by

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[10] In a dynamic society, a government must be free to expand and contract the venues it creates to account for evolving circumstances. *Coleman*, 947 F.Supp. at 788. *See also*, (JA 34). In the transit context, in particular, changing customer reactions to certain kinds of advertising may counsel avoidance of certain categories of ads to prevent customer dissatisfaction and abandonment of the forum. *See*, *AFDI v. Metro Transp. Auth.*, 880 F.Supp.2d 456, 477-478 (S.D.N.Y. 2012)(recognizing that transit authority should have "the latitude to investigate and experiment with alternative mechanisms for using ad space on the exteriors of city buses productively, profitably, and constitutionally, while ensuring that this space is not used as a tool for disparagement and division").

[11] For the reasons set forth herein, Freethought's designated public forum and strict scrutiny arguments do not merit relief and should be disregarded. Further, if this Court were somehow to conclude that COLTS' advertising space on its buses is a designated public forum, COLTS notes that, as set forth, *infra*, the purposes to be served by the 2013 Policy are compelling and that the terms of the 2013 Policy are narrowly drawn through specific restrictions to achieve those interests/purposes.

permitting only limited discourse. *Id.* Instead, the government must intend to grant "general access" to its property for expressive use, either by the general public or by a particular class of speakers. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998); *see also*, *Widmar v. Vincent*, 454 U.S. 263, 267-268 (1981)(designated public forum created for student groups).[12] In contrast, when the government intends to grant only "selective access," by imposing either speaker-based or subject-matter limitations, it has created a limited public forum. *Forbes*, 523 U.S. at 679; *Cornelius*, 473 U.S. at 806.

Courts rely on several fact-specific factors to gauge the government's intent. *Cornelius*, 473 U.S. at 802. *See also*, (JA 24-31). First, a court looks to the terms of any policy the government has adopted to govern access to the forum. *Id.* If the government requires speakers seeking access to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations, the government generally intends to create a limited, rather than a designated, public forum. *Forbes*, 523 U.S. at 679-680; *Cornelius*, 473 U.S. at 804; *Perry*, 460 U.S. at 47. Granting selective access in that fashion negates any suggestion that the government intends to open its property to the "indiscriminate use by all or part of the general public" necessary to create a designated public forum. *Hills v. Scottsdale*

[12] The defining characteristic of a designated public forum is that it's open to the same "indiscriminate use," *Perry*, *supra*, 460 U.S. at 47, and "almost unfettered access," *Forbes*, 523 U.S. at 678, that exist in a traditional public forum.

Unified Sch. Dist. No. 48, 329 F.3d 1044, 1050 (9th Cir. 2003)(per curiam); *see also*, *Forbes*, 523 U.S. at 679; *Perry*, 460 U.S. at 47.

Two other factors help to ascertain the government's intent. If the government has adopted a policy governing access to the forum, courts examine how that policy has been implemented in practice. *Cornelius*, 473 U.S. at 802. If the policy requires speakers to obtain permission under guidelines whose terms are routinely ignored, such that in practice permission is granted "as a matter of course to all who seek [it]," the government may have created a designated public forum. *Perry*, 460 U.S. at 47. Courts also take into account the nature of the government property at issue. *Cornelius*, 473 U.S. at 802. If the property is "designed for and dedicated to expressive activities," *Id.*, at 802-803, courts will more readily infer the intent to create a designated public forum. *See*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975)(municipal theater). On the other hand, if the property is used primarily as part of a government-run commercial enterprise, and the expressive activities the government permits are only incidental to that use (as here), that fact tends to support finding a limited public forum. *See*, *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 682 (1992)(airport terminal)(hereinafter "*ISKCON*")); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974)(public transit system).

Applying these three factors here, as determined by the District Court, *See*, (JA 25-31), the factual record demonstrates that COLTS intended to create a limited, rather than a designated, public forum, and that it closed the forum. First, COLTS adopted a formal policy in 2011 and then, in 2013, *See*, (JA 686, 716-717), that required everyone seeking access to COLTS' bus advertising program to obtain permission through a pre-screening process. (JA 233, 237-238, 243). The policies established fixed guidelines that imposed categorical subject-matter limitations, *See*, (JA 686, 716-717), excluding (for example as part of the 2013 Policy) ads that are political in nature or contain political messages, and that promote the existence or non-existence of a supreme deity, that address, promote, criticize or attack a religion or religions, that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or that are otherwise religious. (JA 716-717). Collectively, the exclusions in the policies indicate that COLTS intended to grant only "selective access," rather than "almost unfettered access," to its bus advertising program. *Forbes*, 523 U.S. at 678-679.

Second, COLTS' implementation of the 2011 Policy and later, 2013 Policy confirms its intent to grant only selective access. The record establishes that COLTS pre-screened all proposed ads and consistently rejected ads that were non-compliant. *See*, (JA 14, 58-59, 61-62, 123-124, 177, 183-185, 191, 197, 206, 230-231, 233, 237-

238, 243, 355, 375-376, 406-414, 688, 698-707, 1545-1551).[13] As factually resolved by the District Court, (JA 25-31), no evidence suggests that, notwithstanding the formal terms of its policy(ies), COLTS granted permission "as a matter of course to all who seek [it]." *Perry*, 460 U.S. at 47.[14] The undisputed evidence establishes that COLTS has consistently rejected proposed ads that fail to comply with the bus advertising program's subject-matter limitations. "By consistently limiting ads it saw as in violation of its policy," COLTS "evidenced its intent not to create a designated public forum." *Ridley*, 390 F.3d at 78; *see also*, *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 970 (9th Cir. 2008).

Finally, the third factor – the nature of the government property – also supports the conclusion that COLTS intended to create a limited public forum. The principal purpose of the bus advertising program is to generate revenue for the bus system. (JA 56, 171). The expressive activities the city permits are therefore "incidental to the

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[13] In late 2011/early 2012, COLTS even remedied non-advertisements. It ordered removal of pre-programmed "God Bless America" scrolling messages on its buses and magnets/ribbons that were placed in the buses by drivers. (JA 122-123, 159-164, 218-219, 246, 743).

[14] There is evidence that after the adoption of an advertising policy in 2011, COLTS ran an immunization advertisement without a clear understanding of the controversial nature of the subject matter at the time, and indicated that, currently, the advertisement would not be displayed. (JA 30). However, as the First and Sixth Circuits have noted, and echoed by the District Court, (JA 30), "[o]ne or more instances of erratic enforcement of a policy does not defeat the government's intent not to create a public forum." *Ridley*, 390 F.3d at 78. *See also*, *AFDI v. SMART*, 698 F.3d 885, 892 (6th Cir. 2012).

provision of public transportation," and "a part of the commercial venture." *Lehman*, 418 U.S. at 303 (plurality opinion). As with any business, when the government is engaged in commerce, allowing certain expressive activity might harm that business and affect revenue and ridership by imposing upon a captive audience, fostering heated argument, or creating dangerous situations that would affect driver and rider safety and rider comfort – all concerns of COLTS. *See*, (JA 57, 60, 202, 219-222, 230, 232-233, 244-245, 248-250).[15] For that reason, use of the property as part of a commercial enterprise is generally incompatible with granting the public unfettered access for expressive activities. *See*, *Cornelius*, 473 U.S. at 804. As found by the District Court, (JA 25-30), the record supports COLTS' concern that ridership and revenue likely would diminish were it to allow political or religious advertisements (for example).[16] The reasons for COLTS' restrictions tie directly to the purpose of

[15] COLTS shares these concerns with other transit authorities. *See e.g.*, *CIR v. SEPTA*, 337 F.Supp.3d 562, 590-591 (E.D.Pa. 2018); *AFDI v. WMATA*, 245 F.Supp.3d 205, 213 (D.D.C. 2017); *ACLU v. WMATA*, 303 F.Supp.3d 11, 19 (D.D.C. 2018).

[16] When the 2011 Policy was drafted, officials at COLTS were taking note of issues occurring at transit authorities throughout the country, including the boycotting and vandalism of buses that displayed controversial advertisements, as well as a "war of words" occurring on the buses over controversial issues. (JA 60, 202, 220-221, 232-233, 244, 248-250, 734-736). There was a fear that revenue could be affected as once the religion door was opened, more hard-hitting advertisements would follow. (JA 248-250). Moreover, at the time COLTS refused one of Freethought's proposed ads in January 2012, virulent debate erupted on the issue in the pages of the local newspaper and on blogs between those favoring and opposing the ad and regarding the existence or non-existence of God. (JA 124, 726-728).

the forum – maintaining ridership through a safe, comfortable transportation environment and raising revenue (JA 244) – and therefore indicates that COLTS wanted to establish a limited or nonpublic forum instead of opening the forum to the public. This Court should therefore refuse to infer that COLTS intended to open the advertising space of its buses to all comers absent clear indications of such an intent. *See*, *Cornelius*, at 804. *See also*, *CIR v. SEPTA*, 337 F.Supp.3d at 602 (SEPTA's exertion of significant control over advertising review process showed intent to close forum and create limited public forum). No such intent exists on this record.

In short, though some municipal bus systems permit wide-ranging advertisements, other bus systems need not.[17] And, in fact, in cases involving other transit agencies, many courts have found that advertising spaces in public transport systems were limited or nonpublic forums. *See*, *Lehman*, *supra*, 418 U.S. at 304 (plurality)(affirming Ohio Supreme Court holding that advertising space on public transit was nonpublic forum because "[t]he city consciously ha[d] limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience");[18]

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[17] COLTS was entitled to limit access to its advertising space to avoid imposing upon its captive audience and becoming a "Hyde Park" on wheels, as feared by the Supreme Court. *Lehman*, 418 U.S. at 304.

[18] Although *Lehman* was decided prior to the Supreme Court's articulation of the public forum doctrine in *Perry*, the Court's analysis there most closely comports with that of a nonpublic forum. Although *Lehman* was a plurality opinion, it relates to advertising restrictions in public transportation systems.

Archdiocese of Wash. v. WMATA, 897 F.3d 314, 323 (D.C.Cir. 2018)(holding that transit authority had created nonpublic forum and that rejection of religious advertisement was reasonable because policy was consistently enforced and tied to stated purpose of providing reliable, inclusive service); *SMART*, 698 F.3d at 890 (concluding city bus advertising space was nonpublic forum and that transit agency's rejection of AFDI advertisement as political was reasonable and viewpoint neutral); *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015)(transit authority's paid advertising program was nonpublic forum where it granted only "selective access" to advertisers and selective criteria agency used to determine which ads could be run were consistently applied); *Ridley*, 390 F.3d at 81-82 (holding transit authority advertising program constituted a nonpublic forum).

B. COLTS' restrictions on its public transit advertising space are constitutional, as they comport with the prescribed level of scrutiny applicable to a limited forum, since any restrictions on speech are i.) reasonable, in that continuation of religious advertisements could have resulted in dangerous situations on its buses stemming from heated arguments, controversy, and debates, which could have affected safety, ridership, and revenue, and ii.) viewpoint neutral, in that COLTS does not target Freethought's particular views by way of its advertising policy but, instead, excludes the entire subject matter of religion from its advertising space.

Since COLTS' advertising space on buses is a limited or nonpublic forum, this Court must now analyze whether COLTS' restrictions on speech are constitutional in such a forum. By definition, that forum is a place where the government may disallow certain types of speech. Freethought complains that COLTS' restrictions

are content-based. *See*, (JA 108, 111). However, content-based restrictions are permissible in a limited or nonpublic forum. "[A]ccess to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.

In this regard, a limited forum has "the least protection under the First Amendment." *Perry*, 460 U.S. at 46. The government may restrict access to a nonpublic forum "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius*, 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46). The government's restrictions must "articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1888 (2018). They must also be reasonable in light of the purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 809; *NAACP*, 834 F.3d at 445.

1. Reasonableness standard.

The reasonability inquiry is not a demanding one, but rather is a "forgiving test." *Minn. Voters Alliance*, 138 S. Ct. at 1888. In *United States v. Kokinda*, the Supreme Court explained the "reasonableness" standard:

> The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints . . .but its action is valid . . . unless it is unreasonable, or as was said in *Lehman*, 'arbitrary, capricious, or invidious.'

497 U.S. 720, 726 (1990).[19] Notably, "the 'Government's decision to restrict access . . . need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" *NAACP*, 834 F.3d at 441 (quoting *Cornelius*, 473 U.S. at 808)(emphasis in original))

As to who has the burden of proving reasonableness in a limited forum, this Court has noted that neither the Supreme Court nor our court has expressly decided the allocation of the burden to establish reasonableness in a limited public or nonpublic forum." *NAACP*, 834 F.3d at 443. This Court further explained: "[t]his is not surprising. Reasonableness is a relatively low bar, and in most instances the technical question of who bears the burden will not be consequential because the law or regulation would survive either way." *Id.* The Court then placed the burden on the government but noted that it could be met by either record evidence or commonsense inferences. *Id.*, at 443-444.

As to commonsense inferences, in *Kokinda*, the Supreme Court stated that not every conclusion needs to be backed up by evidence. Justice O'Connor, writing for a plurality, clarified that courts can use "common-sense" to "uphold a regulation under

[19] Thus, the Supreme Court in *Lehman* found that the regulation of political speech on buses was reasonable because it assured that passengers were spared the blare of political propaganda. 418 U.S. at 304 ("managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.").

reasonableness review." 497 U.S. at 734-735 (plurality). *See also*, *NAACP*, 834 F.3d at 444-445. She noted that judges need look no further than logic and experience. *Kokinda*, *supra.* Later, in *ISKCON*, Justice O'Connor would further explain that, although the government does not need to prove that a particular use will actually disrupt the "intended function" of its property, 505 U.S. at 691-692 (quoting *Perry*, 460 U.S. at 52 n. 12)(internal quotation marks omitted), "we have required some explanation as to why certain speech is inconsistent with the intended use of the forum." *ISKCON*, 505 U.S. at 691-692. *NAACP*, 834 F.3d at 445.

2. The 2013 Policy passes muster under the reasonableness standard based upon record evidence and commonsense inferences.

As correctly determined by the District Court, (JA 30-35),[20] the record and commonsense inferences establish that the content restrictions of the 2013 Policy are reasonable in light of the purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 809; *NAACP*, 834 F.3d at 445. The restrictions authored by COLTS in its proprietary capacity as a transit authority are valid and have not been shown to be arbitrary, capricious, or invidious. *See*, *Kokinda*, 497 U.S. at 726 (action

[20] The District Court applied the above standard, but, as Freethought appears to be mounting solely a facial challenge to the 2013 Policy, to succeed in such a challenge, as explicated by Judge Hardiman in his *NAACP* dissent, a plaintiff must show "the law is unconstitutional in all of its applications." 834 F.3d at 452 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). That burden has not even been attempted to be met by Freethought.

of government acting in proprietary capacity is valid "unless it is unreasonable, or, as was said in *Lehman*, 'arbitrary, capricious, or invidious.'").

COLTS set forth several interests justifying the restrictions, and, in particular, the "religious advertisements" provision. COLTS' decision to restrict advertisements concerning religion and, in particular, Freethought's "atheists" advertisements, was neither arbitrary, capricious or invidious, but reasonable. The "religious advertisements" provision was reasonable in that continuation of religious advertisements like those proposed by Freethought, rather than a stance of neutrality on religion, could have resulted in dangerous situations on COLTS' buses stemming from heated arguments, controversy, and debates, which could have affected safe transportation, ridership and revenue. The findings of the District Court in this regard were not clearly erroneous and must be accepted by this Court.

COLTS' 2013 Policy provides that the "leasing of advertising space is for the sole purpose of generating revenue, while at the same time maintaining or increasing COLTS' ridership." (JA 716). With this, COLTS has met the initial part of its burden, which is to establish that generating revenue, while maintaining or increasing ridership, by and through the provision of safe and comfortable transportation to its passengers, is the purpose of the forum.

Record evidence and commonsense inferences demonstrate that COLTS' limitations on certain specific types of speech (including religious advertisements)

likely to cause argument and debate and potentially affect safe and comfortable transportation and, eventually, ridership and revenue, is also reasonably connected to that purpose. For instance, COLTS' advertising policies were enacted to keep COLTS neutral on matters of public concern. (JA 202, 245). Maintaining a position of neutrality on public issues such as politics and religion has been found to be an especially strong interest supporting the reasonableness in limiting speech. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998). *See also*, *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors*, 776 F.2d 431, 437 (3d Cir. 1985)("The desire to avoid potentially disruptive controversy and maintain the appearance of neutrality is sufficient justification for excluding speakers from a [limited] forum.")(internal quotation omitted). Freethought did not take direct issue with COLTS' neutrality stance below, and, in fact, Mr. Vacula testified that he wants the government to remain neutral on matters of religion. (JA 151).

Moreover, COLTS was trying to restrict specific subject matter that encompasses public issue and controversial advertisements, to avoid heated arguments and debates amongst riders on its buses. (JA 57, 60, 194, 220-222, 230-233, 244, 248-250, 734-736). COLTS was concerned about potential dangerous situations on its buses which may result from heated debates. *Id.* COLTS has stated that the purpose of its buses is to provide safe and reliable public transportation, as well as to provide a welcoming, comfortable environment for the public. (JA 58, 220-

222, 230-231, 248-250, 704). COLTS was concerned about its passengers (who were a captive audience) and also believed that heated debates of public issues in the confined spaces of its buses could deter passengers from riding. (JA 200, 222, 230-231, 244, 250). COLTS was concerned that its failure to provide for safe transportation for its passengers could lead to decreased ridership and, as a result, impact its revenue. *Id.* Passenger ticket sales were approximately 10% of COLTS' budget – not a negligible amount. (JA 235). Additionally, even though advertising sales were only 2% of COLTS' budget, long-term revenue advertising could conceivably have been affected by being forced to display the controversial religious advertisements, which although making money in the short run, may have alienated advertisers and decreased the potential audience (ridership) – it is common sense that short term losses may lead to long term gains. *See*, *Lehman*, 418 U.S. at 304.

Freethought argues that COLTS has not produced evidence that shows allowing advertisements that may spark debate on buses causes any decrease in passengers. It contends that many of the advertisements banned by the 2013 Policy previously ran on COLTS buses and that "COLTS was unaware of any disruption on a COLTS bus caused by an [advertisement] or by debate among passengers." *See e.g.*, (JA 192-193). Freethought's argument overlooks that evidence relied upon by COLTS in this regard included disruption, vandalism, and boycotting of buses that occurred in other areas of the country as a result of the ads that COLTS sought to

limit. (JA 124, 219-221, 232-233, 248-250, 726-728, 734-736). With respect to the Scranton, Pennsylvania area, the virulent reaction to the refusal to run one of Freethought's ads that occurred in local newspapers and on the internet is certainly evidence of the type of conduct COLTS sought to prevent from spilling over to its buses – conduct that could pose a safety hazard. *See*, (JA 124, 726-728).[21] The District Court did not commit clear error in choosing to credit the foregoing evidence, especially when no evidence was presented by Freethought that, in today's contentious civil climate, passenger safety and comfort would not have been affected and decreased revenue and ridership would not have occurred.

Nevertheless, COLTS does not have to show that the prohibited speech would have actually caused harm if it was allowed, rather it only has to show by the evidence or by commonsense inferences that it potentially could have. *See*, *ISKCON*, 505 U.S. at 691-92 (O'Connor, J., concurring)("Although we do not 'requir[e] that . . . proof be present to justify the denial of access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function,' we have required some explanation as to why certain speech is inconsistent with the intended use of the forum." (quoting *Perry*, 460 U.S. at 52 n. 12)). As aptly stated by the District Court and supported by the record:

[21] Mr. Hinton testified that past incidents on the buses involved people arguing, which led to the driver becoming distracted and needing to intervene. (JA 249-250).

> COLTS has presented evidence that, at the time they were drafting their advertising policy, they were aware of incidents occurring in a number of cities throughout the country. . . . Given the decrease in civil tolerance and the increase in social unrest and violence in today's society, and even dating back to the time of the implementation of COLTS' policies, COLTS had a reasonable basis for its advertising restrictions. COLTS was concerned that its continuation of such advertisements could subject them to similar incidents, which could affect ridership and revenue. . . . .

(JA 34-35). *See also*, *United Food & Commercial Workers Union v. SW Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998)(political and public issue advertisements by their very nature generate conflict).

Furthermore, the 2013 Policy is related to COLTS' duty to provide safe and comfortable transportation to its riders and its desire to raise revenue. It avoids the appearance of favoritism and the risk of imposing upon a captive audience. Commonsense inferences dictate that, if COLTS can not provide safe and comfortable transportation to its riders, they will lose riders and, consequently, revenue. The reason for the restrictions on religious advertising at issue tie directly to the purpose of the forum, as the restricted speech would actually interfere with the forum's purposes. *See*, *United Food*, 163 F.3d at 358 (quoting *Air Line Pilots Ass'n v. Dep't of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995)). The 2013 Policy sought to avoid heated debate or controversy on the buses, which could result in riders not taking the bus and, as a result, decrease ridership and revenue. COLTS attempted to create an environment where the public will want to use its buses as a means of transportation, rather than indoctrination. Other courts have found

prohibitions on public transit like the one here reasonable attempts to keep the peace. *Archdiocese of Wash. v. WMATA*, 897 F.3d at 331; *Lehman*, 418 U.S. at 304; *SMART*, 698 F.3d at 892-94; *Children of the Rosary*, 154 F.3d at 975, 979. COLTS' 2013 Policy and its "religious advertisements" limitation are not arbitrary, capricious or invidious but reasonable as consistent with COLTS' legitimate interest in maintaining the property for its dedicated use. *Perry*, 460 U.S. at 46, 51.

3. The 2013 Policy is viewpoint neutral.

Initially, COLTS contends that illicit motive is not enough and that there must be proof that the 2013 Policy restrictions are being implemented in a discriminatory way. *See*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968)("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *see also*, *Children of the Rosary*, 154 F.3d at 980 (stating that motive alone "is not dispositive when there is no indication that the city is implementing the standard in a viewpoint discriminatory manner that reflects an intent to use the policy to exclude disfavored perspectives on the issues"); *AFDI*, 109 F.Supp.3d at 634-635 (purported illicit motive insufficient to invalidate constitutional blanket ban); *cf.*, *Cornelius*, 473 U.S. at 811-13 (questioning viewpoint neutrality of regulation in light of allegations of improper motive and viewpoint discriminatory application). "A façade for viewpoint discrimination, in short, requires discrimination behind the façade." *Grossbaum v.*

Indianapolis-Marion Cty. Bldg. Auth., 100 F.3d 1287, 1292-1294, 1296-1298 (7th Cir. 1996). No such discrimination exists on this record. *See*, (JA 29-31, 37)(explaining that since the passage of COLTS' advertising policy, the record demonstrates that COLTS has not accepted any advertisements that are religious in nature or that appear to promote either the existence or the non-existence of God). *Compare*, *Good News/Good Sports Club v. School Dist. of Cty. of Ladue*, 28 F.3d 1501, 1506 (8th Cir. 1994)(invalidating school district policy permitting "any speech relating to moral character and youth development" but excluding club that wished to speak on that topic from religious perspective); *Summum v. Callaghan*, 130 F.3d 906, 918 (10th Cir. 1997)("[i]f . . . the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective."). Also, the 2013 Policy on its face is neutral – excluding atheist and religious speakers alike. Thus, the viewpoint neutral inquiry need go no further than this.

However, if this Court were to disagree, apart from being reasonable, a speech restriction in a nonpublic forum must also be viewpoint neutral. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011)(citing *Rosenberger*, *supra*, 515 U.S. at 829). This means that if the government permits speech regarding a particular subject on government property, it must allow for the expression of all viewpoints on that subject. *Cornelius*, 473 U.S. at 806. To do

otherwise and deny access to a forum solely to suppress a point of view is "anathema to free expression and impermissible in both public and nonpublic fora." *Pittsburgh League*, 653 F.3d at 296 (citing *R.A.V. v. City of St. Paul*, 505 U.S. at 382).

Freethought argues that COLTS' advertising policy is viewpoint discriminatory because it favors non-religious/non-atheist speakers over religious/atheist speakers. However, the the restriction on speech related to religion, (JA 716-717), is a content, not viewpoint, based restriction. Given the express boundaries and narrow character of COLTS' forum, Freethought's "atheist" ad does not represent an excluded viewpoint on an otherwise includable subject. The rejection of its ad instead reflects COLTS' implementation of a policy that the Supreme Court has deemed permissible in a non-public forum, namely the "exclu[sion of] religion as a subject matter," *Rosenberger*, 515 U.S. at 831; *see also*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393 (1993)(control over access to nonpublic forum can be based on subject matter).

Also, at pages 32-35 of Appellant's Brief, Freethought argues that the "no debate" provision of the 2013 Policy is viewpoint discriminatory. As explained *infra*, in Section C of COLTS' argument relating to alleged "vagueness," the supposed "no debate" provision of the 2013 Policy is not a restriction used to filter ads with "unbridled discretion," but merely a statement of intent that is merely a characteristic of the subject matter restrictions specifically listed within the policy,

that limit and define that intent, and are utilized to determine what ads may run. This statement of intent is not a basis to find the 2013 Policy to be viewpoint discriminatory or vague. The "no debate" argument regarding viewpoint and vagueness is a red herring. The 2013 Policy restricts subject matter, not viewpoints.

As if the foregoing were insufficient, Freethought has previously admitted that the restrictions in this case are content-based and not viewpoint-based. (JA 36, 108, 111). The Supreme Court has stated:

> [I]n determining whether the state is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger, 515 U.S. at 829-30. Therefore, by Freethought's own admission, COLTS is not targeting Freethought's particular views by way of its advertising policy. Instead, it is excluding the entire subject matter of religion from its advertising space. As found by the District Court:

> Freethought has failed to establish that COLTS rejected its advertisements to suppress a point of view that Freethought sought to espouse on an otherwise includible subject. *See*, *Cornelius*, 473 U.S. at 806. There is therefore no viewpoint based restriction. COLTS' content based restriction on promoting or opposing religion is neutral and reasonable.

(JA 37). The First Amendment does not prohibit the government from imposing content-based exclusions, as long as such are reasonable, which is the case here. The July 9, 2018 Order must be affirmed.

C. COLTS' 2013 advertising policy is not unconstitutionally vague and does not allow COLTS too much discretion in what to allow or not allow in its advertising spaces, as i.) merely because a policy might require some interpretation does not render it vague, ii.) a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed by COLTS' advertising policy, iii.) the 2013 advertising policy took away COLTS' unfettered discretion to refuse advertisements; and iv.) the restrictions of the policy set forth precise and objective criteria to utilize in making advertising decisions.[22]

Insofar as Freethought mounts a facial challenge to COLTS' 2013 Policy, Freethought has the burden of proof. "This is the most difficult challenge to mount successfully," and it "affects the burden on [the plaintiff]." *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011)(en banc). A plaintiff can succeed in a facial challenge only by establishing that no circumstances exist under which the act, policy or regulation would be valid, i.e., that it would be unconstitutional in all of its applications. *Washington State Grange*, 552 U.S. at 449. Freethought cannot do so here. As described throughout this brief, numerous courts have found standards similar to COLTS to be constitutionally reasonable and valid. The 2013 Policy has a

[22] Amici cannot raise new issues or proffer evidence not presented to the lower court by the parties. *See*, *PPL Corp. v. Comm'r of Internal Revenue*, 133 S.Ct. 1897, 1907 n. 6 (2013)(declining to consider argument that IRS Commissioner admitted it had not preserved for review); *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. 1990)(materials outside record not considered); *Genova v. Banner Health*, 734 F.3d 1095, 1102–03 (10th Cir. 2013)(rejecting argument by amicus that defendant breached the implied duty of good faith and fair dealing because plaintiff had not raised the argument). The only issue addressed by Amici that has been preserved by Freethought relates to vagueness, which is addressed by COLTS herein.

"'plainly legitimate sweep.'" *Washington v. Glucksberg*, 521 U.S. 702, 739-740 and n. 7 (1997)(Stevens, J., concurring in judgments).

Additionally, COLTS rejects the premise that its restriction on religious advertising should be construed generally as characterized by Freethought as a "no-debate" provision as argued by Appellant at pages 46-51 of its brief. Freethought latches onto the "statement of intent" contained in the 2013 Policy, *See*, (JA 717)("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."), that is refined by the specific and objective advertising restrictions that precede and follow it, *See e.g.*, (JA 716-717)(preceded by advertising restrictions, including political and religious advertising restrictions, and followed by "political or religious" modifier), to make its argument that the 2013 Policy contains no standard to guide discretion. The supposed "no debate" provision of the 2013 Policy is not a restriction used to filter ads with "unbridled discretion," but merely a statement of intent that is a characteristic of the subject matter restrictions specifically listed within the policy, that limit and define that intent and are utilized to determine what ads may run. The specific, objective advertising restrictions themselves are what have been applied to proposed advertisements. *See*, (JA 14, 58-59, 61, 124, 178, 197, 206, 701, 704, 1545). COLTS presents precise and

objective criteria for officials to utilize in making advertising decisions. *See e.g.*, (JA 716-717)(listing advertising COLTS will not accept). This is all that is required. *See e.g.*, *SMART*, 698 F.3d at 894 (Advertising policy not unconstitutionally vague where "employee must determine whether or not something is political – a reasonably objective exercise."); *AFDI*, 109 F.Supp.3d at 634 (policy prohibiting advertisements "regarding disputed economic, political, moral, religious or social issues or related matters," did not allow too much discretion to determine what is "disputed" because language was but illustrative of example of broader "political in nature" ban and provided sufficient guidance to restrict discretion of government actor); *see also*, *Lebron v. AMTRAK*, 69 F.3d 650, 658 (2d Cir. 1995)("Nor would a policy against 'political' advertising on the Spectacular be void for vagueness in light of the Supreme Court's decision in *Lehman*, 418 U.S. at 303-04 (plurality opinion).").

Even if the 2013 Policy does call for some thought in application, the mere fact that a regulation requires interpretation does not make it vague. *McConnell v. FEC*, 540 U.S. 93, n. 64 (2003); *Rose v. Locke*, 423 U.S. 48, 49-50 (1975); *Children of the Rosary*, 154 F.3d at 983 (relaxing vagueness standard in context of city transportation system's advertising policy because "this claim is unlike the usual vagueness challenge involving a fine or other sanction that has the potential to chill conduct."). Excessive discretion and vagueness inquiries under the First Amendment are not static inquiries, impervious to context. *See*, *Reno v. ACLU*, 521 U.S. 844,

871-872 (1997)(vagueness inquiry is most rigorous in criminal context, where there is a high risk speech will be chilled); *Vill. of Hoffman Estates v. Flipside*, *Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)("The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment.").

A policy is vague where it does not adequately inform the public of what they can and cannot do. The constitutional test for vagueness is whether a person of ordinary intelligence can tell what conduct is permitted or proscribed. *United Food*, 163 F.3d at 358-359. COLTS' 2013 Policy permits a person of ordinary intelligence to generally tell what types of advertisements are permitted or proscribed. Moreover, with the input of counsel for the ACLU, COLTS revised its 2011 Policy and, in the 2013 Policy, took away COLTS' unfettered discretion to refuse advertisements by removing the advertising restriction that stated that COLTS would not accept advertising "that are objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS." *See*, (JA 199-200, 246-248).

It is inevitable that there will be some degree of interpretation necessary where regulations are imposed. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Mansky*, 138 S.Ct. at

1891 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).[23] It is an indeterminate prohibition that carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Id.* (citing *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 576 (1987)). No policy can be so specific as to cover every conceivable situation and to disallow all discretion or interpretation in its application. *See*, *Ridley*, 390 F.3d at 95. Although COLTS' advertising policy allows for limited leeway in its interpretation, it is not indeterminate. COLTS' advertising policy is not unconstitutionally vague.

[23] The 2013 Policy is readily distinguishable from the ordinance struck down in *Mansky*. *See*, *Appellant's Brief*, at pp. 49-50 COLTS' prohibitions on religious and political advertisements are narrower and more precise than simply a general ban on "religious" or "political" speech. *See*, *Mansky*, 138 S.Ct. at 1891. Moreover, there is no indication that COLTS has promulgated anything like conflicting or confusing guidance that, "combined with" the term "political," rendered the Minnesota ordinance unreasonable. *Id.*, at 1889.

CONCLUSION

For all of the foregoing reasons, the July 9, 2018 Order that entered Judgment in favor of COLTS and against Freethought must be affirmed.

Respectfully submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Attorneys for Defendant/Appellee

By: */s/Thomas A. Specht*
Thomas A. Specht

P.O. Box 3118
Scranton, PA 18505-3118
Ph: 570-496-4600
Fax: 570-496-0567

Dated: February 11, 2019.

CERTIFICATION OF BAR MEMBERSHIP

The undersigned hereby certifies that, pursuant to 3rd Circuit Local Appellate Rules 28.3(d), Thomas A. Specht, is a member of the Bar of the United States Court of Appeals for the Third Circuit.

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The undersigned hereby certifies that the text of the electronic brief is identical to the text of the paper copies, and that the McAfee ViruScan Enterprise 8.0.0 detection program has been run on the file and no virus has been detected.

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(g), the undersigned hereby certifies that the brief to which this certification is attached complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i)-(ii). Relying on the word count of the word processing system used to prepare this brief, I hereby state that the number of words in the brief (including footnotes) is less than 13,000 words (12,991 words).

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MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Attorneys for Defendant/Appellee

By: */s/Thomas A. Specht*
Thomas A. Specht

Dated: February 11, 2019.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief for Defendant/Appellee was submitted to the Court electronically and that the Court will provide a copy to the parties listed below electronically:

Counsel for Plaintiff-Appellant, Northeastern Pennsylvania Freethought Society

Molly M. Tack-Hooper, Esq. (MTack-Hooper@aclupa.org)
Benjamin D. Wanger, Esq. (bwanger@schnader.com)
Brian M. Hauss, Esq. (bhauss@aclu.org)

Counsel for Amicus Appellant, Reporters Committee for Freedom of the Press

Bruce D. Brown, Esq. (bbrown@rcfp.org)

Counsel for Amicus Curiae, American Atheists and Center for Inquiry

Geoffrey Blackwell, Esq. (gblackwell@atheists.org)

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
Attorneys for Defendant/Appellee

Dated: February 11, 2019

s/Thomas A. Specht
Thomas A. Specht