No. 18-2743

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,

Appellant,

v.

COUNTY OF LACKAWANNA TRANSIT SYSTEM,

***Appellee*.**

On Appeal from the United States District Court for the Middle District of Pennsylvania,
No. 15-cv-00833

BRIEF OF APPELLANT AND JOINT APPENDIX VOLUME I

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Northeastern Pennsylvania Freethought Society represents that it is an unincorporated entity that does not have any parent entities and does not issue stock.

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Molly Tack-Hooper

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STATEMENT OF JURISDICTION

The Northeastern Pennsylvania Freethought Society (the "NEPA Freethought Society") filed this federal civil rights suit against the County of Lackawanna Transit System ("COLTS") in the United States District Court for the Middle District of Pennsylvania under 28 U.S.C. § 1331 and § 1343. By order dated July 9, 2018, the District Court entered judgment in favor of COLTS. The NEPA Freethought Society filed its Notice of Appeal on August 6, 2018. JA1–3. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

COLTS rejected the NEPA Freethought Society's "Atheists" advertisements under provisions of COLTS' advertising policy that state COLTS' intent not to allow its vehicles to become a forum for the debate of public issues (the "no debate" provision) and prohibit advertisements that contain a reference to religion or atheism (the "religious" provision).

1) Do the "religious" and "no debate" provisions discriminate based on viewpoint by (a) prohibiting religious and atheist speakers from advertising on any topic, while allowing other speakers to advertise on the same topics, and (b) prohibiting advertisements and advertisers that COLTS deems controversial?

Suggested answer: Yes.

The District Court ruled on this issue in its Memorandum & Opinion granting judgment for COLTS. JA35–37.[1]

2) Did the District Court err in concluding that COLTS' advertising policy was "reasonable" in light of the revenue-generating purpose of the forum and did not vest officials with unbridled discretion to censor speech?

Suggested answer: Yes.

The District Court ruled on this issue in its Memorandum & Opinion granting judgment for COLTS. JA32–35; JA37–39.[2]

3) Did the District Court err in holding that COLTS had effectively "closed" its advertising space and converted it into a limited public forum by adopting a policy that excludes advertisements that COLTS previously ran, without incident, in order to allow COLTS to censor advertisements that it deems likely to spark debate?

Suggested answer: Yes.

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[1] Plaintiff challenged both provisions as viewpoint discriminatory in the District Court. *See*, *e.g.*, JA53; JA64–65; JA113–16; JA135; JA268–72; JA278–79; JA1576–80; JA1592–94. The District Court implicitly rejected, but did not explicitly analyze, Plaintiff's viewpoint discrimination argument about the "no debate" provision.

[2] Plaintiff raised this issue below at JA53–54; JA64–66; JA98–102; JA110–13; JA116–20; JA133–35; JA259–61; JA267–68; JA273–79; JA1576–80; JA1588–92; JA1594–99; JA1603.

The District Court ruled on this issue in its Memorandum & Opinion granting judgment for COLTS. JA23–31.[3]

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. There are no related cases.

STATEMENT OF THE CASE

I. INTRODUCTION

Like many transit agencies, COLTS solicits advertisements to run on the advertising space on COLTS' buses in order to raise revenue. For more than two decades, COLTS had no restrictions on the types of advertisements it accepted. It ran advertisements for religious entities, and advertisements involving politics and government, alcohol, tobacco, gambling, and other topics that are sometimes debated—all without incident. In 2011, prompted by a proposed religious advertisement that COLTS saw as controversial, COLTS adopted an advertising policy designed to exclude advertisements that COLTS believed would spark debate. In 2013, it amended the policy to clarify some of the kinds of advertisements that COLTS believed would spark debate. The 2013 clarification

[3] Plaintiff raised this issue below at JA54; JA66–67; JA102–20; JA133–34; JA267–68; JA1580–88; JA1602–03.

prohibited any advertisements that contain references to a religion or to atheism, regardless of the topic of the advertisement.

Under both the 2011 version and 2013 clarification of its policy, COLTS rejected proposed advertisements from the NEPA Freethought Society, which contained the word "Atheists" along with the organization's name and website. COLTS explained that it rejected the Society's advertisement because it believed the reference to atheism would spark debate.

The District Court held that COLTS' advertising policy and rejection of advertisements that COLTS believed would spark debate rendered the advertising space a limited public forum. It further ruled that COLTS acted reasonably in "prohibiting all controversial speech in advertising," including even passing references to religion or atheism, in light of the possibility that riders might react badly to some advertisements, which might impair safety or cause COLTS to lose revenue. The District Court also rejected the NEPA Freethought Society's arguments that COLTS' policy discriminates based on viewpoint by treating religious and atheist advertisers differently from similar advertisers and by treating speech that COLTS perceives as controversial differently from speech it perceives as widely accepted.

This case is about whether the First Amendment permits such a result. Given the First Amendment's critical function of safeguarding controversial

speech and public debate against government interference, the NEPA Freethought Society submits that it does not.

II. FACTS

COLTS is a transit authority headquartered in Scranton, Pennsylvania, that operates the Lackawanna County bus system. JA55.

The NEPA Freethought Society is an association of atheists, agnostics, secularists, and skeptics. JA54. The Society's goals include building a supportive community for residents of northeastern Pennsylvania who do not believe in the existence of God, as well as promoting critical thinking and upholding the separation of church and state. JA54. A minority of Americans identify as atheists or agnostics,[4] and the NEPA Freethought Society has struggled to attract new members. JA142–43.

A. COLTS Accepted All Advertisements for Nearly Three Decades.

Since at least 1993, COLTS has leased to the public advertising space on the inside and outside of its buses. JA56. COLTS stipulated that it leases advertising space on its vehicles for one purpose only—to raise revenue—and not to further any other organizational policy or goal. JA56; JA171; JA234. Advertising

[4] Pew Research Center, Religious Landscape Study (2014), http://www.pewforum.org/religious-landscape-study/.

revenue comprises less than half of one percent of COLTS' annual revenue. JA234.

Until 2011, COLTS did not have a policy restricting the types of advertisements that it would display on its vehicles, and it never rejected a proposed advertisement. JA82; JA171; JA1058–60. Indeed, from the time COLTS first started leasing advertising space through 2011, COLTS displayed numerous advertisements on its buses that it would reject today, including several advertisements for religiously affiliated entities like Hope Church, Diocese of Scranton, Mercy Home Health and Hospice, St. Matthew's Lutheran Church, Evangelist Beverly Benton, St. Mary's Byzantine Catholic Church, and the Office of Catholic Schools. JA10; JA323–28; JA375–402; JA641–45; JA468–86; JA172–78. COLTS also ran:

- several campaign advertisements for a school board candidate, which, if submitted today, would violate COLTS' current prohibition against "political" advertisements, JA183–84; JA405;
- advertisements for governmental entities such as the Scranton Housing Authority, Pennsylvania Department of Health, Pennsylvania District Attorney's Institute, and the National Guard, JA186–88, which today might violate the prohibition against advertisements that "implicate[] the action, inaction, prospective action, or policies of a governmental entity," JA687;[5]
- an advertisement for an anti-Semitic website, JA329–54, which COLTS testified at deposition would be prohibited today, JA1158–63, but then testified at trial would be permitted because the text of the advertisement did

[5] A district court recently ruled that nearly identical language in SEPTA's advertising policy was unconstitutionally vague. *Center for Investigative Reporting v. SEPTA*, No. 18-1834, 2018 WL 6201967, *28 (E.D. Pa. Nov. 28, 2018).

not include any of the objectionable content on the advertiser's website, JA179–81;
- many years' worth of advertisements for Brewer's Outlet, which, if submitted today, would violate the prohibition on alcohol-related advertisements, JA191; JA355–69;
- pro-gambling and anti-tobacco advertisements, JA185–86; JA191–92; JA681–83;
- advertisements for newspapers and educational institutions—entities known for stimulating conversation and debate, JA187–88; JA593–602; JA626–36; JA650–52; JA673–80; and
- public service announcements and advertisements for nonprofits, which receive a discount for interior advertisements, JA185; JA189.

COLTS first decided to restrict the types of advertisements that it would accept in 2011 when a local man sought to run a bus advertisement that warned that "Judgment Day" was coming. JA193–94; JA684–85. COLTS officials were alarmed by the religious nature of the proposed advertisement and the advertiser's website, and worried that the content "could be controversial" and might cause heated debates. JA56–57. COLTS informed the advertiser that it would not accept the proposed advertisement. JA57.

B. COLTS' 2011 Advertising Policy

Following its rejection of the "Judgment Day" advertisement, on June 21, 2011, COLTS' Board of Directors approved COLTS' first advertising policy restricting the types of advertisements that COLTS would accept. JA57. The 2011 policy stated:

> 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 [is] obscene or pornographic
- that promotes violence or sexual conduct
- that [is] deemed defamatory, libelous or fraudulent based solely on the discretion of COLTS
- that [is] objectionable, controversial or would generally be offensive to COLTS’ ridership based solely on the discretion of COLTS

JA686. The 2011 policy further stated, “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.” JA686.[6]

C. The NEPA Freethought Society’s First and Second Proposed “Atheists” Advertisements

The NEPA Freethought Society first submitted a proposed advertisement to COLTS on January 30, 2012 in an effort to recruit new members. JA14–15; JA57–58; JA123; JA143–44. The advertisement, which the Society wanted to run on the exterior of a bus, looked like this:

[6] COLTS’ advertising policy applies to all of COLTS’ advertising space. COLTS does not distinguish between advertisements on the interior and exterior of the bus in deciding whether to accept a proposed advertisement. JA203.

JA144; JA1524.

COLTS believed the advertisement would spark debate. JA58. COLTS informed the NEPA Freethought Society by telephone that COLTS would not run the advertisement. JA58.

On August 29, 2013, the NEPA Freethought Society sent COLTS a redesigned version of the proposed advertisement:

JA145; JA1525. On September 9, 2013, COLTS sent the Society a letter rejecting this advertisement. JA59; JA701. The letter stated, in part:

> 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 non-existence of a supreme

> deity is a public issue. COLTS believes that your advertisement may offend or alienate a segment of its ridership and thus negatively affect its revenue. COLTS does not wish to become embroiled in a debate over your group's viewpoints. Your proposed ad violates COLTS' advertising policy and COLTS has decided not to display it.
>
> It 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 that goal.

JA701 (emphasis in original).

D. COLTS' 2013 Clarification of Its Advertising Policy

On September 17, 2013—eight days after sending the NEPA Freethought Society a letter rejecting its second proposed "Atheists" advertisement—COLTS amended its advertising policy to "clarify" COLTS' understanding of the policy and to specify types of advertisements that COLTS would not accept. JA59–60. The 2013 clarification stated that COLTS sells advertising space for "the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." JA687–88. And it included an expanded statement explaining COLTS' intent behind the advertising policy, which said:

> **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.**

JA688 (emphasis in original).

The 2013 clarification also expanded several of the bullet-pointed prohibitions in the 2011 policy and added new standalone prohibitions on advertisements that propose illegal activity, violate intellectual property protections, or are profane. JA687–88. Most importantly, COLTS added a new, broad prohibition on advertisements involving religion or atheism:

> COLTS will **not** accept advertising:
>
> [. . .]
>
> - that promote[s] the existence or non-existence of a supreme deity, deities, being or beings; that address[es], promote[s], criticize[s] or attack[s] a religion or religions, religious beliefs or lack of religious beliefs; that directly quote[s] or cite[s] scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [is] otherwise religious in nature.

JA687–88. COLTS added this prohibition because COLTS believes that religion, like politics, is a topic about which people may have strong feelings. JA60.

The 2013 clarification is in effect today. JA60.

E. The Purpose of COLTS' Advertising Policy

COLTS' primary goal in enacting its advertising policy was to suppress debate on COLTS buses. JA60. When pressed as to why COLTS wanted to prevent debate, COLTS explained that controversial advertisements might offend

riders—especially elderly riders—and debate might make riders feel uncomfortable.[7] COLTS cited a single 2010 New York Times article that described what COLTS called a "war of words" on the Fort Worth, Texas, bus system, in which religious and atheist advertisers engaged with each other's advertisements and offered competing perspectives.[8] COLTS also claimed that it wanted to prevent vandalism, noting that the New York Times article had cited instances of atheist advertisements being defaced in Detroit, Tampa, and Sacramento, and that the transit system in Little Rock, Arkansas, had required an atheist advertiser to carry insurance that would cover vandalism. JA220–21; JA734–36. Finally, COLTS stated that debates aboard COLTS' buses could pose a safety threat, because arguments could distract the driver or require intervention. JA60; JA249–50; JA1104; JA1111–12. However, the record contains no evidence of any instance, anywhere in the country, where an advertisement ever rendered a bus unsafe. JA249.

During this litigation, COLTS repeatedly disavowed any connection between its advertising policy and goals related to revenue or ridership, including

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[7] JA217–18; JA231; JA1110; JA1112; JA1165.

[8] JA220–23; JA734–36; JA1169–70.

through stipulations of fact.[9] COLTS had no data to suggest that banning controversial advertisements would protect its bottom line, and COLTS reports that, in fact, the advertising policy did not have any beneficial impact on its revenue or ridership. JA57; JA1079–80; JA1317–18. Indeed, COLTS admitted that its advertising policy most likely negatively impacted its revenue by causing COLTS to lose advertising revenue. JA234–35; JA1079.

Various documents drafted by COLTS' solicitor, however, attempt to draw a connection between COLTS' advertising and concerns about revenue and ridership,[10] and COLTS elicited vague testimony from its witnesses that COLTS was concerned that controversial advertisements could cause "issues" that might affect its ridership—particularly among senior citizens—and thus its revenue.[11]

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[9] JA57 ("The 2011 Policy was not designed to increase COLTS' ridership nor was it prompted by any revenue-related goals or concerns."); JA230–31 (Wintermantel testifying, "I don't think the goal of the advertising policy has to do with ridership, no."); JA234–35 (Fiume testifying that the advertising policy wasn't prompted by concerns about revenue or about losing riders); *see also* JA13 (acknowledging parties' stipulation that COLTS advertising policy had nothing to do with revenue or ridership).

[10] *See* JA251–53; JA687–88; JA701–04.

[11] JA220; JA222; JA248; JA1110; JA1339; *see also* JA17.

F. COLTS' Interpretation of Its Advertising Policy

COLTS interprets the "religious" provision as prohibiting any words or symbols that COLTS understands to be associated with religion or atheism, including "Agnostic," "Atheist," "Catholic" or "Diocese," "Hindu," "Jew," "Muslim," "Christian," and "Church."[12] JA58; JA176; JA1099; JA1103; JA1110; JA1129–30; JA1165. Thus, although in the past COLTS has accepted advertisements for healthcare providers (Mercy Home Health and Hospice, Maternal and Family Health Services, and Scranton Primary Health Care Center),[13] under the 2013 clarification of its advertising policy, COLTS rejected an advertisement proposal submitted by Lutheran Home Care & Hospice, Inc. "because of the cross in the logo and the word Lutheran":

[12] COLTS questioned whether to permit an advertisement containing the word "Halloween" because it is a pagan holiday, but ultimately decided to allow it. JA218. COLTS apparently did not recognize that the term "Freethought" is connected to atheism, as it ultimately permitted the NEPA Freethought Society to advertise. JA1572.

[13] JA210–12; JA458–59; JA464; JA641–45.

JA212–13.

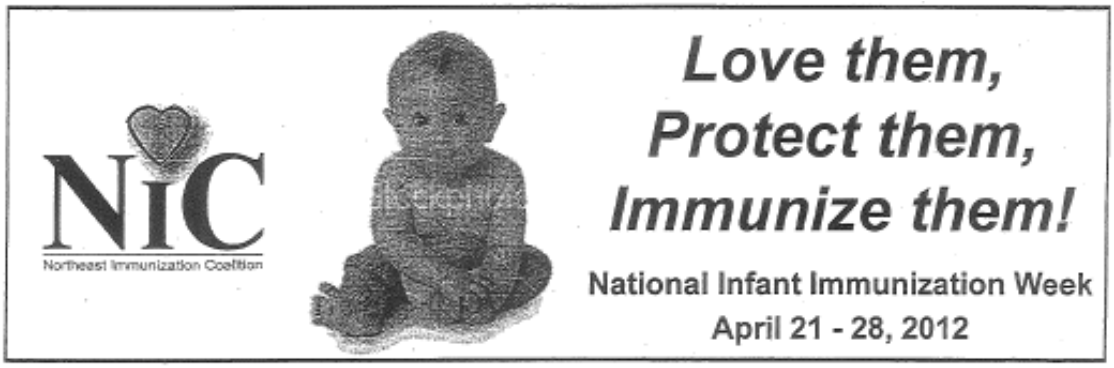
Similarly, COLTS testified that it would reject an advertisement for a "Polish Food Festival & Fair" that contained a reference to "St. Stanislaus Elementary School" because "St. Stanislaus" is "obviously religious" and "could possibly cause debate." JA178; JA1148. Before adopting its advertising policy, COLTS ran that advertisement without incident. JA1148. COLTS also testified that it would reject any advertisements for the YMCA because the "C" in "YMCA" stands for "Christian." JA1165.

The 2013 clarification eliminated the explicit "catch-all" provision expressly reserving the "discretion" to censor advertisements that COLTS deems "objectionable," "controversial," or "offensive." *Compare* JA686 *with* JA687–88. However, COLTS' corporate designee explained that the purpose statement in the 2013 clarification allows COLTS to reject any advertisements it deems controversial or potentially offensive:

> I would say [COLTS' advertising policy is] just to be an outline for what we would accept, things we felt would cause an unwelcoming atmosphere on the bus[,] thing[s] that would spark some debate. **And one of the main points that's still in there now [is] it's our declared intent not to let our transit vehicles or property become a public forum for debate or discussion of public issues**. And that was a huge – you know, we don't want for or against anything, we don't want for or against religion, guns, you know, sexual preference, violence. **It's kind of a – that kind of is a catchall, that statement.**

JA1061 (emphasis added). In other words, COLTS seems to understand this "no debate on public issues" language to provide an independent basis for rejecting an advertisement that COLTS believes may cause debate or offend, separate from the bullet-pointed list of specific prohibitions.

For example, at deposition and at trial, COLTS' designee testified that COLTS previously accepted a pro-immunization advertisement that COLTS now would reject because it addresses a controversial topic:



JA186; JA373; JA1139–42. COLTS displayed the advertisement without incident in April 2012. JA1141–42. COLTS' Communications Director, Gretchen Wintermantel, testified at deposition and at trial that COLTS would now reject the advertisement because she has learned that there is a debate about immunization, and was not previously aware of this controversy. JA186; JA1141. There is nothing in the record to suggest that the immunization advertisement violates any of the enumerated prohibitions in the bullet-pointed section of COLTS' advertising

policy, and COLTS cited no other basis for censoring the advertisement other than immunization being a controversial "public issue." JA186.

Likewise, COLTS' designee testified at trial that COLTS might reject an advertisement COLTS previously ran for the Susan G. Komen Foundation—an organization that has been the subject of controversy, including after it terminated a grant to Planned Parenthood to provide mammograms[14]—because the organization "could be considered controversial." JA228–29. COLTS offered no other basis for rejecting the advertisement.

In letters rejecting the NEPA Freethought Society's proposed advertisements under both the 2011 policy and 2013 clarification, COLTS also suggested that it would censor any advertisements dealing with "public issues" such as abortion. JA701 (stating that accepting advertisements on "public issues such as abortion, gun control, and the existence of God" detracts from COLTS' goal of providing a safe and welcoming environment); JA702–04 (same). There is nothing in the record to suggest any basis for rejecting an advertisement about abortion other than the "no debate" provision.

[14] *E.g.*, Gardiner Harris, Pam Belluck, *Uproar as Breast Cancer Group Ends Partnership With Planned Parenthood*, N.Y. Times, Feb. 1, 2012, https://www.nytimes.com/2012/02/02/us/uproar-as-komen-foundation-cuts-money-to-planned-parenthood.html.

G. COLTS' Rejection of the "Atheists" Advertisement Under the 2013 Clarification

On July 21, 2014, the NEPA Freethought Society submitted a third version of its proposed "Atheists" advertisement:

JA1526. That same day, COLTS rejected the proposal by letter. The letter was similar to COLTS' previous rejection letter, but now cited the text of the "religious" and "no debate" provisions. JA702–04. COLTS stipulated at trial that it rejected the proposed advertisement because of both "the fact that the proposed advertisement addressed the non-existence of a deity and that the word 'Atheists' on the advertisement would promote debate over a public issue, and thus violated COLTS' advertising policy." JA61; *see also* JA20.

COLTS rejected the NEPA Freethought Society's proposed "Atheists" advertisements under the 2011 and 2013 versions of its advertising policy because COLTS officials believed that the word "Atheists" would likely cause passengers to engage in debates about atheism. JA58. COLTS believes any word referring to religion or lack of religion—"could spark debate on a bus" and "be a controversial issue" regardless of the context in which the word was used. JA58.

The NEPA Freethought Society then submitted a revised version of the rejected third advertisement that omitted the word "Atheists":

JA1527. COLTS agreed to run that advertisement, and sent the NEPA Freethought Society a price list for the different COLTS advertising spaces. JA62; JA705–07. The advertisement appeared on the outside of a COLTS bus in the fall of 2014. JA62. COLTS did not receive a single complaint about the NEPA Freethought Society's advertisement, nor did it receive any report of passengers on COLTS' buses debating religion, atheism, or the advertisement. JA192; JA1128–29.

The NEPA Freethought Society would like to run the rejected "Atheists" advertisement because it believes that using the word "Atheists" will more clearly explain who its members are. JA144; JA147–48.

H. No History of Ill Effects Caused by Advertisements on COLTS Buses

COLTS has rejected proposals from only three advertisers under its advertising policy: the NEPA Freethought Society, Lutheran Home Care & Hospice, and Northeast Firearms. JA59; JA197; JA212.[15]

Nonetheless, COLTS never received complaints from anyone—including riders or advertisers—about *any* of the advertisements that it has displayed on its buses. JA10–11; JA192. And COLTS has never lost a rider because of an advertisement that ran on a COLTS bus. JA236.

And COLTS admitted that no advertisement has ever jeopardized the safe operation of COLTS buses. JA192–93. Indeed, COLTS could offer no example of any advertisement ever jeopardizing the safety of *any* transit system. JA249.

III. PROCEDURAL HISTORY

The NEPA Freethought Society filed this action for declaratory and injunctive relief on April 28, 2015. The District Court denied COLTS' motion to dismiss the complaint on January 27, 2016. *See* ECF No. 21. After the close of discovery, the parties submitted cross-motions for summary judgment. *See* ECF No. 30–52. On April 10, 2017, the District Court denied both motions. *See* ECF No. 53.

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[15] COLTS also rejected an advertisement for Wilkes-Barre/Scranton Night Out, but now contends that the rejection was an error. JA206.

The Honorable Malachy E. Mannion presided over trial on November 13, 2017. Gretchen Wintermantel, COLTS' communications director, and Robert Fiume, COLTS' executive director, testified on behalf of COLTS, and Justin Vacula, testified for the NEPA Freethought Society. Timothy Hinton, COLTS' solicitor, also testified. *See generally* JA126–295.

On July 9, 2018, the District Court issued an opinion upholding COLTS' advertising policy and rejection of the NEPA Freethought Society's "Atheists" advertisements, and entered judgment for COLTS. *See* JA6–39.

The District Court acknowledged that COLTS' advertising space "may very well" have been a designated public forum at its inception. But the Court ruled that COLTS' advertising space was now a limited public forum because COLTS had adopted and enforced an advertising policy that declared COLTS' intent not to become a public forum, required review of all proposed advertisements, and excluded certain types of advertisements. JA23–31. The Court opined that this ruling was consistent with *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), quoting the *Lehman* Court's observation that transit advertisements are "commerce," not a traditional public forum for speech, and transit systems therefore have discretion to make reasonable choices about what advertising may be displayed. JA29 (citing *Lehman*, 418 U.S. at 303).

Noting that "history and religion have been deemed controversial for ages," the District Court ruled that COLTS' policy of prohibiting controversial topics was reasonably connected to the purpose of the advertising space—generating revenue. JA6, JA32–35. The Court ruled that COLTS didn't have to show that the prohibited speech would actually cause harm. JA34. It held that COLTS had a "reasonable basis" for its policy in light of the New York Times article—which indicated that, in other cities, advertisements for atheist organizations had prompted debate, some had been defaced, and a church group had unsuccessfully attempted to organize a bus boycott—and in light of the "decrease in civil tolerance and increase in civil unrest" in society. JA34–35.

The District Court held that COLTS' policy is viewpoint neutral because "COLTS is not targeting Freethought's particular views," but rather, "excluding the entire subject matter of religion[.]" JA37. It also held that COLTS' advertising policy is not unconstitutionally vague because "a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed." JA38.[16]

[16] The District Court opinion did not address the NEPA Freethought Society's observation that COLTS seems to interpret its statement of intent as authorizing it to censor any advertisement that COLTS believes will spark a debate on a public issue. However, the Court made several references to COLTS' policy as banning all controversial speech and speech on public issues. *E.g.*, JA27 (referring to "COLTS' policy prohibiting all controversial speech in advertisements");

SUMMARY OF ARGUMENT

COLTS' advertising policy, which it designed for the express purpose of banning advertisements that might cause debate, is anathema to the First Amendment's protection of public debate against government interference. The "religious" and "no debate" provisions that COLTS invoked to reject the NEPA Freethought Society's "Atheists" advertisements violate the First Amendment for several independent reasons.

To begin, the "religious" and "no debate" provisions both discriminate based on viewpoint. The "religious" provision goes far beyond banning religion and atheism as a topic: it prohibits advertisements *on any topic* by advertisers with recognizable religious or atheist affiliations in their name. Banning speech on an otherwise acceptable topic because the speaker has a religious or atheist viewpoint is a form of viewpoint discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830–31 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527–28 (3d Cir. 2004).

The "no debate" provision—which COLTS interprets as a "catch-all" ban on controversial or offensive advertisements—discriminates based on viewpoint by

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JA32 (referring to "COLTS' ban on controversial public issue speech"); JA33 ("COLTS was trying to restrict all public issue and controversial advertisements to avoid heated arguments and debates amongst riders on its buses.").

targeting speech precisely because COLTS believes some may take issue with its viewpoint. *Child Evangelism Fellowship*, 386 F.3d at 527–28; *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017). The fact that COLTS' advertising policy may have the effect of censoring multiple viewpoints on any given issue, rather than just one, does not make the policy any less unconstitutional. *Rosenberger*, 515 U.S. at 831–32; *Matal*, 137 S. Ct. at 1763.

In addition, the "religious" and "no debate" provisions are not "reasonable" attempts to preserve COLTS' advertising space for its intended revenue-generating purpose. *See NAACP v. City of Phila.*, 834 F.3d 435, 444–48 (3d Cir. 2016). Indeed, throughout the litigation, COLTS repeatedly disavowed any connection between the provisions of its advertising policy and the revenue-generating purpose of its advertising space. Indeed, COLTS admitted that, if anything, the advertising policy undermines this goal. *See supra* 12–13 & n.9.

The "no debate" provision is also unreasonable because it is so vague that it is incapable of reasoned application. *See Minn. Voters Alliance v. Mansky*, 137 S. Ct. 1876, 1888–92 (2018).

Because they are not viewpoint neutral and reasonable, the "religious" and "no debate" provisions are unconstitutional even in a limited public forum. However, on the record in this case, COLTS' advertising space should be analyzed as a designated public forum. For decades, COLTS had no advertising restrictions

at all, and accepted—without incident—many advertisements that would now be prohibited. COLTS' adoption of an advertising policy did not change the purpose of the advertising space or make the newly prohibited advertisements any less compatible with the advertising space. Nor did it change the generally open character of the advertising space; since adopting an advertising policy in 2011, COLTS has rejected proposed advertisements from only two advertisers besides the NEPA Freethought Society. For these reasons, COLTS' advertising space remains a designated public forum, as it was when COLTS first started accepting advertisements from the public. *See*, *e.g.*, *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 255 (3d Cir. 1998).

COLTS cannot meet its burden to justify the "religious" and "no debate" provisions under the strict scrutiny that applies to content-based restrictions on speech in a designated public forum. Indeed, in the District Court, COLTS did not even attempt to demonstrate that its advertising policy is "narrowly tailored" to a "compelling interest." *See id*. Nor could it on this record.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews determinations of law by the District Court *de novo*. *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008). Although appellate courts normally review factual findings for clear error, because this is a First Amendment

case, the Court has a constitutional duty to conduct a "searching" and "independent" factual review of the record. *Id.* (citing *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001)).

II. FORUM ANALYSIS STANDARDS

The government bears the burden of justifying its restrictions on speech. *NAACP v. City of Phila.*, 834 F.3d 435, 443 (3d Cir. 2016) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). When the government opens its property for expressive purposes, the amount of flexibility the government has to restrict speech on that property depends on whether the property at issue is a "traditional public forum" (such as sidewalks and parks), a "designated public forum," or a "limited public" (aka "nonpublic") forum. *E.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 295–96 (3d Cir. 2011).

In order to justify a content-based restriction on speech in a traditional or designated public forum, the government must satisfy "strict scrutiny" by showing that the restrictions are "narrowly tailored" to a "compelling governmental interest." *Id*. at 295 (citation omitted); *see also NAACP*, 834 F.3d at 441.

In a limited public forum, the government may not impose content-based restrictions on speech unless they are "reasonable" and viewpoint neutral. *E.g.*,

Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A restriction on speech is not "reasonable" if it is not designed to preserve the forum for its intended purpose, *NAACP*, 834 F.3d at 445, or if it is so vague as to vest officials with unbridled discretion to censor speech, *Mansky*, 138 S. Ct. at 1891. A content-based regulation of speech that discriminates based on viewpoint or is not "reasonable" is unconstitutional in any type of forum.

III. COLTS' ADVERTISING POLICY IS VIEWPOINT DISCRIMINATORY AND, THUS, UNCONSTITUTIONAL, NO MATTER HOW THE COURT CHARACTERIZES THE FORUM.

First and foremost, the District Court erred in ruling for COLTS because the "religious" and "no debate" provisions discriminate based on viewpoint. The Supreme Court has explained that viewpoint discrimination is an egregious form of content discrimination, and that the government may not censor speech when the "motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Courts have acknowledged that it can be difficult to distinguish between prohibitions that target particular subjects and those that target particular viewpoints. *See, e.g., Rosenberger*, 515 U.S. at 830–31 (the distinction between content discrimination and viewpoint discrimination "is not a precise one");

Sammartano v. First Judicial Dist. Ct., 303 F.3d 959, 970 (9th Cir. 2002) (describing this distinction as "elusive"); *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (acknowledging that "the line between content and viewpoint discrimination is a difficult one to draw"). Although COLTS' "religious" and "no debate" provisions may appear at first blush to be viewpoint-neutral subject-matter regulations, upon closer inspection, they are indistinguishable from provisions that courts have previously struck down as viewpoint discriminatory. The "religious" provision is viewpoint discriminatory because it discriminates against religious and atheist advertisers, regardless of the subject of the advertisement, and the "no debate" provision is viewpoint discriminatory because it targets speech that COLTS views as controversial while allowing speech that COLTS views as widely accepted.

A. COLTS' Advertising Policy Discriminates Based on Viewpoint by Prohibiting Speech by Recognizably Religious or Atheists Speakers.

The Supreme Court has made clear that the government cannot censor speech on otherwise acceptable subjects because the speaker has a religious identity or viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830–31 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

Applying this principle, the Supreme Court in *Lamb's Chapel* held that where a school district allowed its property to be used after school for civic purposes, it could not deny access to a church wishing to air a film addressing otherwise permissible subjects, such as child-rearing, from a religious standpoint. 508 U.S. at 392–93. Similarly, in *Rosenberger*, the Supreme Court held that a school committed viewpoint discrimination when it authorized funding for student group periodicals, but denied funding for a student periodical dedicated to exploring a range of issues from a Christian perspective under a rule prohibiting reimbursement for "religious activities." 515 U.S. at 830–32. Likewise, in *Good News Club*, the Supreme Court held that a school engaged in viewpoint discrimination when it applied a policy prohibiting use of school property for "religious purposes" to exclude the Good News Club, which engaged in instruction in morals and character similar to other groups to which the school granted access. 533 U.S. at 109–10.

As the Supreme Court has explained, "[r]eligion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831.

COLTS' "religious" provision goes far beyond prohibiting advertisements on the topics of religion or atheism. It also prohibits advertisements on any topic

that contain any reference to the existence of religion or atheism. JA58; JA176; JA1099; JA1103; JA1110; JA1129–30; JA1165; *cf. Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 877 F.3d 1066, 1067 (D.C. Cir. 2017) ("WMATA does not exclude religious speakers from advertising when their proposed messages comport with the allowed categories of speech."). The breadth of the provision is clear from both the face of the policy and from how COLTS has applied it. On its face, the provision prohibits not only advertisements that "promote" or "criticize" religion or atheism or are "religious in nature," but also advertisements that "address" religion or atheism. JA687–88. And COLTS interprets this provision broadly as banning any advertisement that contains a word or symbol that COLTS recognizes as being associated with religion or atheism. As a result, entities with words in their name that COLTS recognizes as being associated with religion or atheism cannot advertise on any topic if they put their name on the advertisement.

The record is unambiguous that COLTS' "religious" provision treats similar speech differently depending on the identity of the advertiser. For example, although COLTS' advertising policy does not prohibit advertisements for cultural festivals or schools, COLTS interprets the "religious" provision as precluding an advertisement COLTS previously ran for a Polish food festival because it was held at a school named after a saint. JA178; JA1148. Similarly, although COLTS permitted the NEPA Freethought Society to advertise itself once it removed the

word "Atheists" from the advertisement, under COLTS' reading of its policy, similar organizations such as American Atheists or Americans United for Separation of Church and State would not be permitted to run the same type of advertisement for themselves—or advertise on any other topic—because of the words "Atheists" and "Church" in their names.

COLTS' differential treatment of speech on the same topics depending on the advertiser's identity is most evident from a comparison of the healthcare-related advertisements that COLTS has accepted with the similar healthcare advertisement for Lutheran Home & Hospice Care that COLTS rejected. *Compare* JA403 *with* JA210–12; JA458–59; JA464; JA641–45. COLTS rejected the Lutheran healthcare service provider's advertisement not because COLTS has prohibited advertising healthcare services, but because of the word "Lutheran" and the cross in the provider's logo. *See* JA212–13.

In sum, COLTS' advertising policy favors the speech of non-religious, non-atheist speakers over nearly identical speech by speakers who have a religious or atheist affiliation that is apparent from their name. This is evidence that COLTS has prohibited religious viewpoints, not religion as a topic. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297–98 (3d Cir. 2011). This Court previously rejected a school district's attempt to defend its prohibition on religious groups using school property as a viewpoint-

neutral subject-matter ban on religion, holding that such an exclusion flew in the face of *Lamb's Chapel*, *Rosenberger*, and *Good News Club* and was viewpoint discriminatory. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527–28 (3d Cir. 2004).

It does not help COLTS that it has prohibited atheist viewpoints as well as religious ones. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831–32 (1995). The silencing of multiple voices does not mean that the debate is not skewed; it means that the debate is skewed in multiple ways. *Id.* The Supreme Court reinforced this concept in *Matal v. Tam*, 137 S. Ct. 1744 (2017), when it struck down an anti-disparagement clause that the government had argued "evenhandedly prohibits disparagement of all groups." *Id*. at 1763. The Court rejected this characterization, explaining that censoring speakers on more than one side of an issue can still be viewpoint discrimination. *Id*.

B. COLTS' Advertising Policy Discriminates Based on Viewpoint by Prohibiting Speech that COLTS Believes Could Be Controversial or Could Cause Debate.

COLTS' "catch-all" "no debate" provision is also viewpoint discriminatory. Speech that will spark debate is another way of describing speech that is controversial or likely to offend. *See, e.g.*, Controversial, Oxford English Dictionary, http://www.oed.com ("Giving rise or likely to give rise to controversy or public disagreement; subject to (heated) discussion or debate; contentious,

questionable; disputed."); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361 (6th Cir. 1998) (defining "controversy" as "a disputation concerning a matter of opinion") (citing Random House Unabridged Dictionary 443 (2d ed. 1993)); JA1109–10 (COLTS prohibits advertisements on "public issues," which are issues "that are discussed out in the public . . . controversial issues, or issues where there are two sides that are pro and anti."). And both this Court and the Supreme Court have held that banning speech because some people are likely to take issue with it is a form of viewpoint discrimination.

As this Court explained, banning speech because it is "controversial" is a form of viewpoint discrimination because such a ban singles out viewpoints that are not universally accepted. *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (explaining that "[a] group is controversial or divisive because some take issue with its viewpoint"); *see also United Food & Commercial Workers Union*, 163 F.3d at 361 ("We believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination. A controversy arises where there exists a 'disputation concerning a matter of opinion.'") (citation omitted).

The Supreme Court's decision in *Matal v. Tam* underscores this principle. In that case, the Court struck down an anti-disparagement clause that targeted

speech that the government deemed offensive to a substantial percentage of any group of people, holding that the regulation was "viewpoint discrimination in the sense most relevant here: giving offense is a viewpoint." 137 S. Ct. 1744, 1763 (2017).

The concerns underlying the First Amendment prohibition on viewpoint discrimination are heightened here because the "no debate" provision, like the anti-disparagement clause in *Matal*, is based on a prediction about how others will react to the prohibited speech. As Justice Kennedy explained:

> The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience . . . The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive[.]

Id. at 1766–77 (Kennedy, J., concurring).

By censoring speech precisely because it is likely to be poorly received, COLTS' advertising policy turns the First Amendment on its head. First Amendment jurisprudence has recognized that controversial and offensive speech is particularly vulnerable to government censorship. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). Indeed, if no one took issue with controversial or offensive advertisements, COLTS presumably would have no desire to ban them; COLTS' concern with the

advertisements it seeks to preclude is precisely that some people might react badly to them and feel offended, uncomfortable, or stirred to anger.[17] But the fact that some of the prohibited advertisements may be controversial or offensive is a reason to protect them against censorship, not a reason to allow the government to censor them. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 829 (2000) (Thomas, J., concurring); *Johnson*, 491 U.S. at 409 ("It would be odd indeed to conclude *both* that 'if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection,' . . . *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence." (emphasis in original) (internal citation omitted)).

Because COLTS' "no debate" provision is simply a reservation of authority to ban speech that COLTS believes may be controversial or offensive, it is viewpoint discriminatory and unconstitutional in any forum.

[17] *E.g.*, JA701 ("COLTS believes that your proposed advertisement may offend or alienate a segment of its ridership"); JA704 (same); JA1112 ("elderly people would be . . . obviously frightened or offended by any kind of debate"); JA1165 ("we just don't want to offend anyone, and that's hard to do sometimes").

IV. THE "RELIGIOUS" AND "NO DEBATE" PROVISIONS ARE NOT "REASONABLE" ATTEMPTS TO PRESERVE THE FORUM FOR ITS INTENDED PURPOSE.

The "religious" and "no debate" provisions are also unconstitutional in any forum because they are not "reasonable."

A. Reasonableness Standard

The "reasonableness" standard in First Amendment jurisprudence involves a "more exacting review" of the government's justification for its actions than ordinary rational basis review. *NAACP v. City of Phila.*, 834 F.3d 435, 443 (3d Cir. 2016); *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 966-67 (9th Cir. 2002) (reasonableness requires "more of a showing" than rational basis review); *Multimedia Pub. Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993) (under reasonableness review, it isn't enough to show that the regulation of speech is rationally related to a legitimate governmental objective).

For a content-based restriction on speech to be "reasonable" within the meaning of limited public forum analysis, it must be "designed to confine the 'forum to the limited and legitimate purposes for which it was created.'" *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)). To determine whether the government has met its burden of justifying the

reasonableness of its restrictions, the court first determines the purpose to which the government has devoted the forum. *NAACP*, 834 F.3d at 445. Then, the court analyzes whether the record evidence or commonsense inferences therefrom "provide a way of tying the limitation on speech to the forum's purpose." *Id*.

B. The "Religious" and "No Debate" Provisions Are Not "Reasonable" in Light of the Revenue-Generating Purpose of COLTS' Advertising Space.

The "religious" and "no debate" provisions are not reasonable in light of the revenue-generating purpose of COLTS' advertising space for the simple reason that the parties stipulated that they were not actually designed to further that interest. *See NAACP v. City of Phila.*, 834 F.3d 435, 446 (3d Cir. 2016).

The parties stipulated—and the District Court found—that "COLTS opened its advertising space to the public for the purpose of raising revenue, not to further any other organizational policy or goal." JA10; JA56. They further stipulated that COLTS' advertising policy "was not designed to increase COLTS' ridership nor was it prompted by any revenue-related goals or concerns." JA13; JA57.

The record supports the parties' stipulations. Many advertisements that are now barred by COLTS' advertising policy previously ran on COLTS buses without incident and without affecting COLTS' revenue. *See* JA170–235. Thus, COLTS' own experience demonstrated that there was no reason to think that the advertisements banned by its advertising policy would threaten COLTS' revenue.

And COLTS' decision to adopt an advertising policy was not based on any data suggesting the policy would have a positive impact on COLTS' revenue. *See* JA57; JA1079–80; JA1110; JA1217–18. Indeed, COLTS admitted that the advertising policy likely costs COLTS revenue by obliging it to reject proposals to advertise. JA234–35; JA1079.

In *NAACP*, a similar record proved fatal to the government's argument that its advertising policy was reasonable in light of its goal of revenue maximization. *NAACP v. City of Phila.*, 834 F.3d 435, 446 (3d Cir. 2016). Because of the City's testimony disavowing any connection between the advertising policy and revenue maximization and admitting that the policy "arguably costs the City money," the Court ruled that "logic does not allow an inference that [the ban] is reasonably connected to revenue maximization." *Id.* The record in this case compels the same conclusion as to COLTS.

Despite the parties' stipulation that COLTS' advertising policy was not motivated by revenue concerns, the District Court ruled that COLTS' policy was reasonable in light of the purpose of the forum because it was aimed at other goals that ultimately could prevent a loss of revenue: ensuring rider comfort, preventing vandalism, and safety. JA34–35.

The Court should be skeptical of any claim that COLTS' efforts to suppress controversial speech were in furtherance of goals unrelated to the suppression of

ideas. *NAACP*, 834 F.3d at 446 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 812 (1985)); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (a claimed government interest in controversy avoidance is "nebulous and not susceptible to objective verification" and other proffered rationales "must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose").

At any rate, none of these justifications—ensuring rider comfort, preventing vandalism, or safety—can satisfy COLTS' burden of demonstrating that its advertising policy is designed to confine COLTS' advertising space for the purpose of raising revenue. The record shows that any connection between COLTS' advertising policy and these justifications is entirely speculative and undermined by COLTS' own experience.

1. Rider Comfort

COLTS' primary and overarching justification for its advertising policy is that it is designed to exclude advertisements that might make its riders feel uncomfortable or unwelcome. *See supra* 11–12 & n.7. This goal cannot serve to justify COLTS' advertising policy as "reasonable."

To begin, shielding people from offense is not a legitimate government reason for censorship. *E.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). The Supreme Court recently

rejected—again—the notion that "[t]he government has an interest in preventing speech expressing ideas that offend," describing this as an idea that "strikes at the heart of the First Amendment." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The government is only justified in censoring protected speech if the censorship furthers some legitimate government interest unrelated to the suppression of ideas, but protecting the audience from the emotional impact of the speech is not an interest "unrelated to the suppression of ideas." *Id*. at 407, 412. This Court has observed that "United States Supreme Court guidance cautions against readily drawing inferences, in the absence of evidence, that controversy avoidance renders a ban constitutional." *NAACP v. City of Phila.*, 834 F.3d 435, 446 (3d Cir. 2016).

In addition, it is entirely speculative to think that all—or even most—of the advertisements banned by COLTS' advertising policy would make riders uncomfortable to such an extent as to impact COLTS' revenue. Although literally anything can offend someone, the record reveals that COLTS has never received a single complaint about any advertisement—even during the decades in which it displayed many advertisements that would now be prohibited by its policy. JA10–

11; JA192. Thus, COLTS' own experience undermines its professed concern about rider discomfort. The lack of complaints or incidents arising from advertisements is not surprising; people who might be offended by the content of the advertisements can always "avoid further bombardment of their sensibilities by averting their eyes." *Cohen v. California*, 403 U.S. 15, 22 (1971). Indeed, riders aboard COLTS buses would not even have to avert their eyes in order to avoid the NEPA Freethought Society's "Atheists" advertisement, as the Society was planning to advertise on the *exterior* of the bus. JA144.

2. **Vandalism**

The only evidence COLTS offered to demonstrate that its advertising policy furthers COLTS' interest in preventing vandalism was a single 2010 New York Times article reporting that atheist advertisements were vandalized in several cities, and that one city required an atheist organization to carry insurance to cover repairs of vandalism. *See* JA221; JA734–36. But COLTS offered no evidence that all—or even most—of the advertisements banned under COLTS' advertising policy pose a greater risk of being vandalized than the advertisements that COLTS accepts.[18]

[18] And even if COLTS had some reason to believe that all advertisements banned by its policy would pose a heightened risk of vandalism—which it does not—censoring advertisements likely to be vandalized would not advance COLTS' revenue goals unless the cost of repairing the vandalized vehicles outweighed the

Generally, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969); *see also Cohen v. California*, 403 U.S. 15, 23 (quoting *id.*). The Supreme Court has rejected regulations of speech based on a presumption that a deeply offended audience is inherently likely to disturb the peace. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 407–09 (1989) (collecting cases). Even in a limited public forum, to ban speech based on prospective harm, the threatened harm has to be real, not just speculative. *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 501 & n.4 (9th Cir. 2015) (citing *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959 (9th Cir. 2002); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 810 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 n.12 (1983)).

More importantly, the Supreme Court has made clear time and again that the government may not prohibit speech that is likely to prompt a negative reaction simply because censorship is easier than dealing with the negative response to the speech. "[T]he Supreme Court and the courts of appeals have consistently held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity." *United States v. Marcavage*, 609 F.3d 264, 282

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lost advertising revenues. There is no evidence COLTS performed this financial calculation.

(3d Cir. 2010). This is true even where the negative response feared by the government is the commission of a crime—like vandalism. *See* 18 Pa. C.S. § 3304 (criminal mischief); 18 Pa. C.S. § 3307(a)(3) (institutional vandalism). The Supreme Court has explained repeatedly that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). Thus, the Court has held that the government may not order a speaker to stop speaking because the audience threatens violence—or actually engages in violence—in response to the speech. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). To hold otherwise would create a "heckler's veto," whereby people who dislike speech can effectively shut it down by behaving badly in response to it. *E.g.*, *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242–55 (6th Cir. 2015) (collecting cases).

The District Court opinion in this case threatens the same result. The decision below sends a clear message: if enough people threaten to—or actually do—deface an advertisement, then government entities around the country will be justified in silencing the offending speech. *See Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 504 (9th Cir. 2015) (Christen, J., dissenting) (in challenge to transit authority's prohibition on speech that makes

disruption "reasonably foreseeable," observing that the standard "actually invite[s] a heckler's veto by expressly authorizing the censorship of speech whenever it is 'reasonably foreseeable' that there will be strong objections").

3. **Safety**

Although COLTS elicited from its witnesses testimony that COLTS' advertising policy was motivated in part by concerns about "safety" issues, by and large, the testimony did not specify the nature of the threat to safety. *E.g.*, JA60; JA267. When pressed to explain how COLTS' advertising policy advanced its goal of safety, COLTS' witnesses stated that the prohibited advertisements could hypothetically cause heated arguments and fights, which could distract bus drivers or require intervention. JA221–22; JA1104; JA1104; JA1111–12.

COLTS itself did not draw any connections between safety and revenue; it treated these as separate concerns. *See* JA244. But the District Court did draw such a connection, holding: "Commonsense inferences dictate that, if COLTS can not [sic] provide safe transportation to its riders, they [sic] will lose riders, and consequently, revenue." JA35.

There is neither an evidentiary nor a logical basis for the District Court's inference that COLTS' advertising policy will prevent a loss of revenue by advancing the goal of safety. Most importantly, there is no evidence that an advertisement ever led to an unsafe situation on a COLTS bus—or on ***any*** transit

system. *See* JA249. Although COLTS noted that, in the past, fights between high school students on COLTS buses had required intervention by a bus driver, these arguments were not related to an advertisement or even a debate about a public issue. JA1062; JA1064; JA1339.

As explained above, a purely hypothetical risk does not justify abridgement of protected speech. This is all the more true when the risk is that the speech will provoke illegal conduct by third parties.[19] *See supra* Argument § IV(B)(2) ("Vandalism"). There is no basis for recognizing an exception to these general First Amendment principles here.

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In sum, even if the speculative connections between COLTS' advertising policy and its goals of rider comfort, preventing vandalism, and safety were sufficient to pass a rational basis test, they do not justify COLTS' policy under the "more exacting" reasonableness standard.

Ultimately, the District Court's holding that COLTS can justify its advertising policy by reference to its interests in rider comfort, preventing vandalism, and safety proves too much. If COLTS can reject advertisements on controversial topics simply because they are controversial and some people might

[19] The unsafe rider conduct that COLTS has suggested might result from seeing a controversial advertisement would likely be chargeable as disorderly conduct (18 Pa. C.S. § 5503), simple assault (18 Pa. C.S. § 2701), or aggravated assault, if the victim were a COLTS employee (18 Pa. C.S. § 2702(a)(2)).

react badly to them, then the government could always ban speech on controversial topics from other limited public forums, like town hall meetings. This would be a perversion of the First Amendment's robust protections for public debate and for unpopular speech.

For all of these reasons, the District Court erred in holding that COLTS had met its burden of showing that its advertising policy was "reasonable" in light of the purpose of COLTS' advertising space.

V. THE "NO DEBATE" PROVISION IS ALSO UNREASONABLE BECAUSE IT IS VAGUE AND VESTS OFFICIALS WITH UNBRIDLED DISCRETION.

A. Vagueness Standard

A restriction on speech violates the First Amendment—even in a limited public forum—if it is so vague that it does not give government officials clear standards for determining what is permissible and what is prohibited.[20] This is because "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a

[20] *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 537–38 (1981) (Brennan, J., concurring) (observing that "[a]ccording such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases") (collecting cases); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." (citation omitted)).

forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Indeterminate, content-based regulation of speech "'may authorize and even encourage arbitrary and discriminatory enforcement' by failing to 'establish minimal guidelines to govern . . . enforcement.'" *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Courts have struck down advertising policies that did not sufficiently constrain officials' discretion, allowing officials to make subjective determinations about what is prohibited. *See, e.g., United Food & Commercial Workers Union*, 163 F.3d 341, 349, 359–60 (6th Cir. 1998) (striking down transit agency's ban on "[a]dvertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership," and holding that the prohibition "vests the decision-maker with an impermissible degree of discretion"); *Center for Investigative Reporting v. SEPTA*, No. 18-1834, 2018 WL 6201967, *28 (E.D. Pa. Nov. 28, 2018) (striking down as "incapable of reasoned application" portions of SEPTA's advertising policy prohibiting advertisements that are "political in nature," "advertisements involving an issue that is political in nature in that it directly or indirectly implicates the action, inaction, prospective action or policies of a government entity," and advertisements that express a viewpoint on a "matter of public debate").

Although courts have long recognized First Amendment challenges based on vagueness, the Supreme Court made clear in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), that vague prohibitions on speech are not "reasonable," even in a limited or nonpublic forum. *Mansky*, 138 S. Ct. at 1892.

A policy is unconstitutionally vague and unreasonable when it "fails to articulate some sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 138 S. Ct. at 1888. The government "must draw a reasonable line." *Id*.[21] While virtually all application of rules requires some degree of interpretation and discretion, "that discretion must be guided by objective, workable standards. Without them, an [official's] own politics may shape his views" as to what is prohibited. *Id*. at 1891. As the Supreme Court has cautioned, vague prohibitions on speech pose a risk of viewpoint discrimination. "It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually pen-ended interpretation." *Id*. at 1981 (quoting *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)).

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

Evidence about how a provision has been applied is relevant to whether the provision is capable of reasoned application under *Mansky*. *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 373 (D.C. Cir. 2018).

B. COLTS' "No Debate" Provision Is Unconstitutionally Vague.

COLTS' "no debate" provision is unconstitutionally vague because it provides literally no standards to guide officials' discretion. It offers no benchmarks at all for determining when an advertisement threatens to convert COLTS' transit vehicles into "a public forum for the dissemination, debate, or discussion of public issues." JA688.

In the absence of any guidance, COLTS' determination of what is likely to spark debate "may turn in significant part on the background knowledge and media consumption of the particular [COLTS official] applying it." *Mansky*, 138 S. Ct. at 1890. Thus, whether an advertisement is prohibited or not may change depending on who is applying the policy, and may change as a particular official's views evolve.

For example, COLTS' view on whether a "National Infant Immunization Week" advertisement was controversial—and thus, prohibited—changed over time. In 2012, COLTS officials were unaware of the public debate over the efficacy and safety of vaccinating children. COLTS thus accepted and displayed an advertisement promoting infant immunization in April 2012. JA186; JA373;

JA1139–42. The advertisement did not spark any debates. JA236–37. But COLTS testified that if the same advertisement were submitted again, COLTS would reject it as likely to spark debate because COLTS officials are now aware that "there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad." JA1140–42.

When, as here, a government official's personal worldview and "mental index" of public issues is the sole determinative factor as to whether an advertisement will be accepted or rejected, the regulation of speech is unconstitutionally vague. *Mansky*, 138 S. Ct. at 1889. COLTS' "no debate" provision plainly vests officials with unbridled discretion to censor speech.

Because COLTS officials are "unmoored" from any guidelines, *Mansky*, 138 S. Ct. 1888, the "no debate" provision creates ample opportunity for viewpoint discrimination, as officials are free to apply the "controversial" kiss of death to advertisements that they personally disfavor. There is nothing in COLTS' advertising policy to safeguard against the risk that the "no debate" provision will be enforced discriminatorily against unpopular or disfavored speakers. *See*, *e.g.*, *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 233 F. Supp. 2d 647, 666 (D.N.J. 2002), *aff'd*, 386 F.3d 514 (3d Cir. 2004).

The lack of any guidelines constraining officials' discretion is exacerbated by the fact that, to apply the "no debate" provision, an official must make a

subjective prediction about how others will respond to the speech. *See Matal v. Tam*, 138 S. Ct. 1744, 1766–77 (2017) (Kennedy, J., concurring) (observing that the danger of viewpoint discrimination "is all the greater" if the government is attempting to suppress ideas or perspectives based on its predictions about what an audience might think offensive); *see supra* Argument § III(B). As the Seventh Circuit has remarked, "We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster." *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985).

VI. COLTS' ADVERTISING SPACE CONSTITUTES A DESIGNATED PUBLIC FORUM, AND ITS POLICY IS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST.

The Court need not rule on whether COLTS' advertising space is a limited public forum or a designated public forum; as explained above, even assuming the advertising space is a limited public forum, COLTS' policy is unconstitutional because it is both viewpoint-discriminatory and unreasonable. *See, e.g.*, *NAACP v. City of Phila.*, 834 F.3d 435, 442 (3d Cir. 2016) (assuming, without deciding, that the district court was correct that the airport advertising space was a limited public forum); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011) (noting that courts "need not tackle the forum-selection question" when the regulation would be invalid in any type of

forum). If the Court does reach this question, however, the record demonstrates that COLTS has not effectively "closed" the forum, and that COLTS' advertising space remains a designated public forum.

A. Designated Public Forum Standard

A designated public forum is government property that the government intentionally opened up as a place for expressive activity by the public. *Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 296. A limited public forum is government property that the government has opened up for speech but "limited to use by certain groups" [22] or "dedicated solely to the discussion of certain subjects." *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1127 (2009).[23]

In determining whether the government has created a designated public forum, courts look to the government's policies and practice, as well as the nature of the property and its compatibility with expressive activity, to ascertain the

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[22] *E.g.*, *Rosenberger v. Record & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (student activities fund was limited public forum restricted to student groups meeting certain criteria).

[23] *E.g.*, *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004) ("citizen's forum" at town government meeting was limited public forum in which township could restrict comment to issues germane to town government); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526 (3d Cir. 2004) (district created limited public fora for use by community groups on speech related to district's students and schools).

government's intent. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

B. COLTS' Advertising Space Is a Designated Public Forum.

These factors make clear that COLTS' advertising space was a designated public forum prior to 2011. First, COLTS created the forum to raise revenue, which this Court has observed is suggestive of a designated public forum rather than a limited public forum. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3d Cir. 1998) ("The goal of generating income by leasing advertising space suggests that the forum may be open to those who pay the requisite fee."). Second, for decades, COLTS had no restrictions on who could advertise or what could be advertised. JA82; JA171; JA1058–60. In other words, COLTS treated all advertisements as suitable for COLTS' advertising space.

The question for this Court is whether COLTS effectively "closed" the forum when it adopted an advertising policy in 2011 or revised that policy in 2013. It did not.

Courts have found government advertising space to be a designated public forum even when the government, through policy or practice, enacted some restrictions on the permissible types of advertisements. *See, e.g.*, *Christ's Bride Ministries*, 148 F.3d at 249–55 (advertising space on SEPTA stations and vehicles); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074–81 (9th Cir. 2001) (city

hall advertising space); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (city bus advertising space); *N.Y. Magazine v. MTA*, 136 F.3d 123, 130 (2d Cir. 1998) (advertising space on the outside of buses); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1232–33 (7th Cir. 1985) (advertising space inside buses and transit cars); *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (subway station advertising space).[24]

COLTS' adoption of an advertising policy did not change the essential nature of the advertising space or its compatibility with expressive activity. The purpose of COLTS' advertising space is still to raise revenue. And COLTS' own experience demonstrates that the prohibited advertisements are perfectly compatible with COLTS' advertising space. For years, COLTS accepted advertisements that are now prohibited by COLTS' advertising policy—including public service announcements, political advertisements, religious advertisements,

[24] To the extent that the District Court read *Lehman v. Shaker Heights* as suggesting that the commercial nature of advertising space on buses makes it a limited public forum, the District Court's analysis is inconsistent with this Court's reading of *Lehman*. *Compare* JA29 (discussing *Lehman*) *with Christ's Bride Ministries v. SEPTA*, 148 F.3d 242, 250 (3d Cir. 1998) (acknowledging *Lehman* but stating that the nature of SEPTA's advertising space suggests that it is a designated public forum); *NAACP*, 834 F.3d at 448 (discussing *Lehman* but holding that the Court need not decide whether the airport advertising space is a designated or limited public forum because the airport's advertising policy was not reasonable).

advertisements for alcohol, anti-tobacco advertisements, advertisements for newspapers and educational institutions that exist to promote debate, and advertisements that COLTS views as controversial—without incident, and without losing revenue.[25]

Nor has COLTS changed the generally open character of its advertising space. COLTS has not confined the forum to only certain kinds of advertisers. The advertising space is still open to advertisements from both commercial and noncommercial entities. Although COLTS now prohibits some advertisements, the advertising space is still generally open to speech on almost every imaginable topic. Indeed, COLTS has rejected proposed advertisements from *only three* entities. *See Christ's Bride*, 148 F.3d at 251–52 (noting in designated public forum analysis that "at least 99% of all advertisements are posted without objection by SEPTA"); JA59; JA197; JA212.

Furthermore, COLTS' "own statement of its intent" to be a limited public forum "does not resolve the public forum question." *Christ's Bride*, 148 F.3d at 251. Courts have found other government property to be a designated public forum notwithstanding language similar to COLTS' statement of intent. *See, e.g.*, *United Food & Commercial Workers Union*, 163 F.3d at 352 (finding that transit

[25] *See supra* Statement of the Case § II(A) ("COLTS Accepted All Advertisements for Nearly Three Decades.").

agency had created a designated public forum despite policy's statement that "It is SORTA's policy that its buses, bus shelters, and billboards are not public forums"); *AIDS Action Committee of Mass., Inc. v. MBTA*, 42 F.3d 1, 10 (1st Cir. 1994) (observing that, in determining whether transit agency has created a designated public forum, "actual practice speaks louder than words"); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) (explaining that "the forum inquiry does not end with the government's statement of intent").

Converting a designated public forum to a limited public forum must require more than merely adopting some restrictions on speech. If the mere existence of restrictions were sufficient to limit the forum, there would be no need for courts to have articulated the standard that applies to content-based restrictions on speech in a designated public forum. *See*, *e.g.*, *Christ's Bride*, 148 F.3d at 256 (holding that transit authority's advertising space was a designated public forum); *Am. Freedom Def. Initiative v. SEPTA*, 92 F. Supp. 3d 314, 326 (E.D. Pa. 2015) (holding that transit authority's advertising space remained a designated public forum, despite the adoption of content-based restrictions). As the Second Circuit explained:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what

> is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

N.Y. Magazine v. MTA, 136 F.3d 123, 129–30 (2d Cir. 1998).

But COLTS has not done anything to change the character of the forum other than enacting a policy purporting to exclude all advertisements that COLTS deems controversial. The key factors that indicate that the government has created a designated public forum remain the same.

In sum, COLTS' advertising space remains a designated public forum.

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

Because COLTS' advertising spaces constitute a designated public forum, content-based restrictions on speech, like the "religious" and "no debate" provisions, are subject to strict scrutiny. *See Christ's Bride Ministries*, 148 F.3d at 248; *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

1. Strict Scrutiny Standard

To survive strict scrutiny, COLTS must show that its content-based restriction on speech is narrowly tailored to achieve a compelling state interest. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty*, 653 F.3d 290, 295 (3d Cir. 2011). A "compelling government interest" is an interest "of the highest order," which is "unusually important" and weightier than a "significant" or "substantial" interest. *United States v. Marcavage*, 609 F.3d 264,

287–88 (3d Cir. 2010) (collecting cases). A restriction on speech in a designated public forum is not "narrowly tailored" if it is not necessary to achieve the government's interest,[26] or if there exists a less restrictive means of achieving the government's asserted interest. *See Sable Communications v. FCC*, 492 U.S. 115, 126–31 (1989); *NAACP v. City of Phila.*, 834 F.3d 435, 441 (3d Cir. 2016). Silencing a speaker due to the audience's potentially hostile reaction to the speech "will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose." *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello v. City of Chi.*, 337 U.S. 1 (1949); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chi.*, 394 U.S. 111 (1969)). When a content-based restriction on speech is designed "to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *United States v. Playboy Enmt't Grp.*, 529 U.S. 803, 813 (2000) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

[26] *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 609–10 (1982).

2. COLTS Cannot Meet Its Burden to Justify Its Advertising Policy Under Strict Scrutiny.

In the trial court, COLTS did not even attempt to justify its restrictions on speech under strict scrutiny. *See* JA1606–21 (Def.'s Post-Trial Proposed Findings of Fact and Conclusions of Law). This apparent concession that COLTS cannot meet its burden under this standard is reason alone to reverse the judgment below. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 255 (3d Cir. 1998) ("SEPTA has not argued that its actions survive strict scrutiny. Accordingly, we conclude that CBM's First Amendment rights were violated when SEPTA removed CBM's ads.").

Nor could COLTS satisfy strict scrutiny on the record in this case. As explained above, COLTS' interests in shielding riders from speech that may offend them and avoiding disagreement are not even legitimate interests, let alone compelling ones. *See supra* Argument § IV(B)(1) ("Rider Comfort").

And even assuming COLTS' asserted interests in safety, preventing vandalism, and revenue-generation were "compelling," the "religious" and "no debate" provisions are plainly not "narrowly tailored" to achieve those interests. As explained above, *see supra* Argument § IV(B), there is at best a speculative and remote relationship between these interests and COLTS' restrictions on advertisements. Restrictions on speech that are not "reasonable" are also not narrowly tailored.

The strict scrutiny test is such that, generally, in a designated public forum, the government "may not select which issues are worth discussing or debating." *Christ's Bride*, 148 F.3d at 255. Accordingly, COLTS cannot meet its burden to justify its advertising policy under strict scrutiny.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: December 11, 2018

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COMBINED CERTIFICATIONS

I hereby certify that:

1. At least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court, as required by Local Rule 28.3(d).

2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,896 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14 font.

4. The text of the electronic versions of this Brief and Joint Appendix filed on ECF are identical to the text of the paper copies filed with the Court.

5. The electronic versions of the Brief and Joint Appendix filed on ECF were virus checked using Webroot SecureAnywhere, and no virus was detected.

Dated: December 11, 2018

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I hereby certify that on this date, the foregoing Brief of Appellants and accompanying Joint Appendix were filed electronically and served on all counsel of record via the ECF system of the U.S. Court of Appeals for the Third Circuit.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,

Appellant,

v.

COUNTY OF LACKAWANNA TRANSIT SYSTEM,

***Appellee*.**

On Appeal from the United States District Court for the Middle District of Pennsylvania, No. 15-cv-00833

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JA1-JA39 (39 Pages)

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JOINT APPENDIX
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VOLUME I

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)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Northeastern Pennsylvania Freethought Society, appeals to the United States Court of Appeals for the Third Circuit from the Judgment (Doc. 88) and the accompanying Memorandum (Doc. 86) and Order (Doc. 87) entered in this matter by the Honorable Malachy E. Mannion on July 9, 2018.

Dated: August 6, 2018

/s/ Benjamin D. Wanger

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CERTIFICATE OF SERVICE

I, Benjamin D. Wanger, Esquire, do hereby certify that I caused to be served a true and correct copy of the foregoing Notice of Appeal upon the following counsel of record by electronic mail on the 6th day of August, 2018 at the following address:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,	:	
	:	**CIVIL ACTION NO. 3:15-833**
Plaintiff	:	**(JUDGE MANNION)**
v.	:	
COUNTY OF LACKAWANNA TRANSIT SYSTEM,	:	
	:	
Defendant	:	

O R D E R

In accordance with the memorandum issued this same day, **IT IS HEREBY ORDERED THAT:**

(1) Judgment is entered in favor of the defendant, County of Lackawanna Transit System ("COLTS"), and against the plaintiff, Northeastern Pennsylvania Freethought Society ("Freethought").

(2) The Clerk of Court is directed to **CLOSE THIS CASE**.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: July 9, 2018

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AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Middle District of Pennsylvania

NORTHEASTERN PA FREETHOUGHT SOCIETY
Plaintiff
v.
COUNTY OF LACKAWANNA TRANSIT SYSTEM
Defendant

Civil Action No. 15-833

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: Judgment entered in favor of the defendant and against the plaintiff.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☑ tried by Judge Malachy E. Mannion, U.S. District Judge without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for

Date: 7/9/18

CLERK OF COURT

Barbara A. Sampson

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,	:	
	:	**CIVIL ACTION NO. 3:15-833**
Plaintiff	:	**(JUDGE MANNION)**
v.	:	
COUNTY OF LACKAWANNA TRANSIT SYSTEM,	:	
	:	
Defendant	:	

MEMORANDUM

The saying has been around since at least the 1800's:

> "Never discuss religion or politics with those who hold opinions opposite to yours; they are subjects that heat in handling, until they burn your fingers; . . ."[1]

Even Linus van Pelt has acknowledged:

> "There are three things I have learned never to discuss with people . . . religion, politics and the Great Pumpkin!"[2]

Certainly, topics such as religion and politics have been deemed controversial for ages, but can the government prohibit advertising about such topics in public transit advertising spaces without violating the First Amendment?

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[1]15 February 1840, The Corsair, "The Letter Bag of the Great Western," pg. 775, col. 1.

[2]PEANUTS by Charles M. Schulz, October 25, 1961.

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. CONST. AMEND. I. However, courts have differed on how that guarantee applies when private speech occurs on government property. Depending on the forum in which the speech occurs -- a traditional public forum, a designated forum, or a limited (or nonpublic) forum -- private speech is afforded different levels of protection. One particular area that has frustrated the courts is how to distinguish between designated and limited public forums. The Supreme Court has stated that whether the government has created a designated public forum depends on its intent, as evidenced by its "policy and practice" and the "nature of the [government] property and its compatibility with expressive activity." Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 801 (1985). The federal courts, however, have disagreed over the proper application of this direction, especially in the area of advertising in public transit spaces. The classification of a public transit advertising space will have a significant impact on the types of speech that large numbers of commuters are exposed to everyday. The instant action presents this court with an opportunity to weigh in on the following issues of law: (1) whether the defendant County of Lackawanna Transit Systems' ("COLTS") advertising space is a designated public or limited forum, and (2) whether COLTS was justified in this case in refusing to display Northeastern Pennsylvania Freethought Society's ("Freethought") atheist advertisements in its public transit advertising space.

Freethought filed the instant civil rights action pursuant to 42 U.S.C. §1983, alleging that COLTS' advertising policy on its buses violates Freethought's right to free speech. Specifically, Freethought alleges that COLTS' refusal to run advertisements containing the word "atheists" is an impermissible content and viewpoint-based restriction in violation of its First Amendment rights. Freethought seeks a declaration that COLTS' rejection of its advertisements violated the First Amendment and a declaration that COLTS' 2013 Policy continues to violate the First Amendment.[3] Freethought also seeks a permanent injunction prohibiting COLTS from enforcing its 2013 Policy. Finally, Freethought requests costs and attorney's fees under 42 U.S.C. §1988.

A one-day, non-jury trial was held on November 13, 2017 at which the court heard testimony and received evidence. Based upon the testimony, the evidence of record and the applicable law, the following constitutes the court's findings of fact and conclusions of law with respect to Freethought's claims. For the reasons set forth herein, the court finds 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 Freethought's advertisements containing the word "atheists" on COLTS' buses. Judgment

[3]As previously noted by this court, Freethought cannot seek declaratory relief for alleged past constitutional violations. See Blakeney v. Marsico, 340 Fed.Appx. 778, 780 (3d Cir. 2009).

will therefore be entered in favor of COLTS.

I. Findings of Fact

Freethought is an unincorporated association of atheists, agnostics, secularists and skeptics, with its principal office in Wilkes-Barre, Pennsylvania. 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. Further, Freethought engages in debates over the existence or non-existence of God. A typical consequence of the appearance of Freethought at an event is the discussion of whether or not God exists.

Justin Vacula is a co-organizer and spokesperson for Freethought. Mr. Vacula testified that Freethought wants the government to remain neutral on matters of religion. However, Mr. Vacula has stated that, if the government gets involved with religious advertisements, then it should treat other viewpoints equally.

COLTS is a public transportation authority headquartered in Scranton, Pennsylvania. Robert Fiume has served as COLTS' Executive Director since June 2008. Mr. Fiume is responsible for overseeing the entire transportation system. He initially delegated responsibility for deciding whether to accept proposed advertisements to the Advertising Manager, Jim Smith, and later to

the Communications Director, Gretchen Wintermantel.

Ms. Wintermantel has served as COLTS' Communications Director since 2009. In that capacity, she is responsible for, among other things, increasing ridership and interpreting COLTS' advertising policies to determine whether to accept particular proposed advertisements. At times, Ms. Wintermantel consults with COLTS' management and solicitor to determine whether to accept or reject proposed advertisements. Ms. Wintermantel and Mr. Fiume each possess final policymaking authority with respect to COLTS' enforcement of its advertising policies.[4]

COLTS has leased advertising space on the inside and outside of its vehicles since at least 1993. In doing so, COLTS opened its advertising space to the public for the purpose of raising revenue, not to further any other organizational policy or goal. Traditionally, advertising revenue has comprised less than 2% of COLTS' yearly revenue.

When it initially opened its advertising space, COLTS did not have any advertising policy restricting the types of advertisements it would run. Dating back to at least 2003, COLTS ran many religious and political advertisements, as well as advertisements for newspapers, educational institutions and beer distributors. During this time, COLTS did not receive any complaints about any advertisement that ran on a COLTS bus, nor was COLTS aware of any

[4]Both Ms. Wintermantel and Mr. Fiume were designated to testify on behalf of COLTS pursuant to Fed.R.Civ.P. 30(b)(6).

disruption on its buses caused by the advertisements it displayed.

It was not until May 2011 that COLTS finally rejected an advertisement proposal. On that occasion, Mr. Smith received a phone call from a local man who wanted to run an advertisement on a COLTS bus that said "Judgment Day is Coming in May." Mr. Smith informed Ms. Wintermantel about the proposed advertisement. Both Mr. Smith and Ms. Wintermantel were alarmed by the proposed "Judgment Day" advertisement due to its apparent religious nature. Ms. Wintermantel reviewed the website affiliated with the advertiser's campaign and confirmed that it was, in fact, religious. Mr. Smith and Ms. Wintermantel consulted with Mr. Fiume and decided that the "Judgment Day" advertisement could be controversial due to its religious nature. They agreed to not display the proposed advertisement, reasoning that religious advertisements can cause heated debates and arguments and that COLTS did not want such debates or arguments to occur inside the buses. The concern of COLTS was that buses are confined spaces and, for the safety of passengers and drivers, they did not want heated debates, arguments or anything else that could cause disruption on their buses. COLTS informed the potential customer that it would not run the "Judgment Day" advertisement.

In response to the proposed "Judgment Day" advertisement, Ms. Wintermantel determined that COLTS should set forth an advertising policy defining/clarifying the types of advertisements COLTS would and would not display. She drafted COLTS' first formal advertising policy (the "2011 Policy"),

which was reviewed by COLTS' solicitor and later approved by the COLTS Board of Directors on June 21, 2011. In developing the 2011 Policy, COLTS considered issues occurring at transit agencies in other cities throughout the country, including New York, Fort Worth, Detroit, Philadelphia, Washington, Chicago, Houston, New Orleans, Seattle and St. Louis. These issues included the boycotting of buses, vandalism of buses and the occurrence of "a war of words" on buses over controversial public issue advertisements, including the existence or non-existence of God. COLTS officials were concerned that, if they continued to allow such controversial advertisements on public issues on their buses, they would become a place that could make riders feel unwelcome. They also believed such advertisements could compromise riders' safety or cause vandalism of buses. Mr. Fiume 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. While unrelated to advertisements, Mr. Fiume testified that past incidents on the buses involved people arguing, which led to the driver becoming distracted and needing to intervene. Mr. Fiume further indicated that debates and arguments occurring on the buses due to controversial advertisements could affect ridership.

The 2011 Policy provided that:

"COLTS will **not** accept advertising:

- for tobacco products, alcohol, and political candidates

- that is deemed in COLTs [sic] sole discretion to be derogatory to any race, color, gender, religion, ethnic background, age group, disability, marital or parental status, or sexual preference
- that promotes the use of firearms or firearm-related products
- that are obscene or pornographic
- that promotes violence or sexual conduct
- that are deemed defamatory, libelous or fraudulent based solely on the discretion of COLTS
- that are objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS"

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."

The parties have stipulated that the 2011 Policy was not designed to increase COLTS' ridership, nor was it prompted by any revenue-related goals or concerns. The 2011 Policy had no effect on COLTS' ridership and "was specifically to prevent debate inside of COLTS' buses . . . and had nothing to do with debate outside the buses."

While the 2011 Policy was being drafted, COLTS was approached by Northeast Firearms to run an advertisement for their business. Although the 2011 Policy was not yet in effect, the 2011 Policy was going to contain a restriction on any advertisements having to do with firearms, so COLTS did not accept the advertisement for Northeast Firearms.

At the time when the 2011 Policy was enacted, COLTS was running an advertisement for a beer distributor called "Brewer's Outlet." Despite the 2011

Policy's ban on advertisements for alcohol, COLTS continued to run the advertisements for Brewer's Outlet until its contract expired. Brewer's Outlet was informed that COLTS would not renew its advertising contract.

After the 2011 Policy was put in place, COLTS ran an advertisement for the annual Halloween party of Patrick O'Malley, Lackawanna County Commissioner. The advertisement, however, did not identify Mr. O'Malley as a County Commissioner, or in any political fashion, and did not contain any political statements.

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. After seeing this message, Mr. Vacula called COLTS to complain, and the message was taken down. Mr. Vacula later saw a "God Bless America" ribbon or magnet attached to the inside of a COLTS bus by the driver. Again, Mr. Vacula complained, and it was removed. 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. However, Mr. Vacula saw the signs as promoting a religious message, and he felt that COLTS, as a government entity, should not be promoting such a message.

On January 30, 2012, Mr. Vacula sent an e-mail to Mr. Smith on behalf of 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 the NEPA Freethought Society's webpage

(www.nepafreethought.org) in smaller font. Although he was not aware of any "God Bless America" signs continuing to run on the buses, Mr. Vacula submitted the proposed advertisement in response to the "God Bless America" messages on the COLTS buses and, further, to recruit potential new members to Freethought. 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. Mr. Smith showed Mr. Vacula's e-mail to Ms. Wintermantel. 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. COLTS believed that the words "atheist," "agnostics," "Catholic," "Jews," "Muslims," or "Hindu" -- or any word referring to a religion or lack of religion -- "could spark debate on a bus" and could "be a controversial issue," regardless of the context in which the word was used. COLTS also believed that such controversial messages could make riders feel uncomfortable. Mr. Vacula himself testified that the advertisement containing the word "atheists" could be offensive to some people. A few days after COLTS received Freethought's proposed advertisement, Mr. Smith telephoned Mr. Vacula to inform him that COLTS would not run the advertisement.

After the rejection of Freethought's advertisement, articles were run in

the Scranton Times-Tribune newspaper, which discussed the advertisement's rejection. In response to these articles, various comments were posted online that personally attacked Mr. Vacula and led to a controversial discussion between those who supported the advertisement and those who opposed it. In addition, there was discussion in the comments regarding the existence or non-existence of God.

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. Ms. Wintermantel, who made the decision to reject the advertisement, 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.

On August 29, 2013, Freethought submitted a second advertisement for placement on COLTS buses. The proposed advertisement stated, "Atheists. NEPA Freethought Society. NEPAfreethought.org." On September 9, 2013, Ms. Wintermantel, writing on behalf of COLTS, sent a letter to Mr. Vacula, stating that COLTS would not display Freethought's proposed advertisement. In her letter, Ms. Wintermantel indicated that COLTS considered its property to be a nonpublic forum. Ms. 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. Ms. Wintermantel expressed COLTS' goal of providing a safe and welcoming environment on its buses for the public at large, and she emphasized that the acceptance of public issue advertisements, such as those proposed by the plaintiff, in a confined space like the inside of a bus detracts from this goal.

On September 17, 2013, eight days after COLTS sent the letter to Mr. Vacula denying his second proposed advertisement, the COLTS Board of Directors enacted a new advertising policy (the "2013 Policy"), which was drafted by COLTS' solicitor, Mr. Hinton, after a discussion with the plaintiff's attorney. The 2013 Policy rescinded and replaced the 2011 Policy. The 2013 Policy was written to "clarify" the 2011 Policy as COLTS understood it and to more clearly "set forth the types of advertisements it will and will not accept[.]" The 2013 Policy, which is still in effect, provides that COLTS' leasing of advertising space is for "the sole purpose of generating revenue, while at the same time maintaining or increasing COLTS' ridership." Both Ms. Wintermantel and Mr. Hinton testified at trial that they were concerned that allowing controversial public issue advertisements on COLTS' buses would affect ridership and, as a result, revenue.[5] The 2013 Policy provides that:

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[5]Freethought urges the court to reject any finding that COLTS' advertising policy was related to ridership or revenue. Indeed, Freethought has cited to portions of the record, which would seem to indicate that neither was the direct force behind the advertising policy. However, when one (continued...)

"COLTS will **not** accept advertising:

- for tobacco or alcohol or for businesses that primarily traffic in such goods;
- that promotes the use of firearms or firearm-related products or for businesses that primarily traffic in such goods;
- that are obscene, pornographic, or promotes or depict sexually-oriented goods or services or for businesses that primarily traffic in such goods or services or that appeal to prurient interests;
- that promotes violence or sexual conduct;
- that are deemed defamatory, illegal, fraudulent, misleading or false;
- that proposes a transaction or activity that is prohibited by federal, state or local law;
- that exploit the likeness, picture, image or name of any person, and/or trademark, trade name, copyrighted materials or other intellectual property of a third party, without adequate proof of express written authorization to do so;
- that contain, employ or imply profane or vulgar words;
- that demean or disparage a person, group of persons, business or group of businesses;
- that, if permitted, could reasonably subject COLTS to civil

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[5](...continued)
considers the record as a whole in this case, there is evidence that the advertising policy was related to ridership and revenue. To this extent, the record demonstrates that the advertising policy, at its core, was enacted to avoid controversy on the buses for the safety and comfort of passengers. This, in turn, was to maintain ridership and, as a result, revenue. In fact, although Ms. Wintermantel testified in her deposition that the advertising policy was not driven by revenue concerns, it was clear in her letter to Mr. Vacula denying his proposed advertisement, which was written prior to her deposition, that ridership and revenue were a concern. In her letter, Ms. Wintermantel expressed COLTS' goal of providing a safe and welcoming environment for its passengers and indicated that controversial advertisements, such as Freethought's proposed advertisement, could result in the alienation of riders and, in turn, negatively affect COLTS' revenue.

or criminal liability;

- that are political in nature or contain political messages, including advertisements involving political figures or candidates for public office, advertisements involving political parties or political affiliations, and/or advertisements involving an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity;
- that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature."

The 2013 Policy further 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."

The 2013 Policy was again enacted to prevent debates or arguments on COLTS buses because COLTS believes debates aboard buses could be dangerous and render the buses potentially unsafe for its passengers and drivers. Additionally, COLTS did not want to offend or alienate anyone who would see the advertisements. COLTS wanted to remain neutral on controversial issues. In creating the 2013 Policy, COLTS specifically sought to preclude issues that are political or religious in nature because COLTS believes these are topics that people feel strongly about.

On July 21, 2014, Freethought submitted a new advertisement proposal to COLTS that stated:

"Atheists.
NEPA Freethought Society
meetup.com/nepafreethoughtsociety"

That same day, COLTS sent Mr. Vacula a letter, again denying the proposed advertisement based upon the fact that it addressed the non-existence of a deity and that the word "atheists" on the advertisement would promote debate over a public issue, thus violating COLTS' 2013 advertising policy.

Again, that same 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." Rather, it read:

"NEPA Freethought Society
meetup.com/nepafreethoughtsociety"

On the following day, July 22, 2014, Ms. Wintermantel sent an e-mail to Mr. Vacula agreeing 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. This final version of Freethought's advertisement ran on the outside of a COLTS bus in October or November of 2014. COLTS did not receive any complaints about Freethought's advertisement or any reports of passengers on COLTS' buses debating the advertisement.

COLTS has rejected other advertisements under the 2013 Policy, including an advertisement from Lutheran Home Healthcare and Hospice. In

rejecting the advertisement, COLTS' solicitor noted the word "Lutheran," along with a cross, in the advertisement. The solicitor recommended that the advertisement be rejected to facilitate consistent enforcement of the advertising policy. This way, COLTS would not be allowing an advertisement containing religious connotations while disallowing Freethought's advertisement.

The testimony of COLTS' solicitor was that both the 2011 Policy and the 2013 Policy were meant to keep COLTS out of the religion business. It was believed that once COLTS opened the door to religion, they would be opening themselves up to other more hard-hitting religious advertisements, which could cause disruptions and disturbances on the buses. COLTS took note that there were, in fact, controversies occurring in other cities throughout the country over advertisements on buses related to religion and other controversial matters, which led to the boycotting and vandalism of buses, as well as a "war of words" on the buses.[6]

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[6]Freethought urges the court to afford Solicitor Hinton's testimony no weight because the Fed.R.Civ.P. 30(b)(6) deposition testimony was taken from Ms. Wintermantel and Mr. Fiume on the topics that Mr. Hinton addressed in his trial testimony. Freethought argues that COLTS is bound by the testimony of its 30(b)(6) designees and therefore cannot present any evidence differing from that of its designees.

Initially, the court does not find Mr. Hinton's testimony to be inconsistent with that of Ms. Wintermantel or Mr. Fiume. Moreover, "the testimony of a Rule 30(b)(6) representative, although admissible against the party that (continued...)

II. Conclusions of Law

"The Supreme Court has outlined a three-step analysis regarding a prima facie case of alleged First Amendment violations." Am. Freedom Defense Initiative 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." 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 anti-disparagement standard at issue survives the applicable level of scrutiny." Id.

This court decided on summary judgment, and the parties have not

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[6](...continued)
designates the representative, is not a judicial admission absolutely binding on that party." 250 F.R.D. at 212 (quoting Charles A. Wright et al., 8A Federal Practice and Procedure §2103 (Supp. 2007)) (further citations omitted). Rather, "testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes." Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC, 40 F.Supp.3d 437, 451 (E.D. Pa. 2014) (citing A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001) (quoting Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F.Supp.2d 786, 791 (N.D.Ill. 2000)); accord R & B Appliance Parts, Inc. v. Amana Co., L.P., 258 F.3d 783, 786 (8th Cir. 2001). As such, the court will consider the trial testimony of COLTS' solicitor, Mr. Hinton.

disputed, that the plaintiff's advertisements are speech protected by the First Amendment. The issue then becomes "the nature of the forum created by [COLTS'] advertising space." Id. at 323.

Freethought argues that COLTS' advertising space[7] is a designated public forum[8], while COLTS argues that its advertising space is a limited or nonpublic forum[9]. At summary judgment, the court determined on the

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[7]The court determined at summary judgment that the relevant forum is COLTS' advertising space on its buses, as opposed to all of COLTS' property, since this is the specific public property that plaintiff is seeking to access. See Cornelius, 473 U.S. at 801. The parties have not challenged this determination.

[8]"A designated public forum is public property 'that has not traditionally been regarded as a public forum' but that the government has intentionally opened up for use by the public as a place for expressive activity." Am. Freedom Defense Initiative, 92 F.Supp.3d at 323 (citing Pittsburgh League of Young Voters Educ. Fund v. Port Auth., 653 F.3d 290, 296 (3d Cir. 2011)); see also Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Christ's Bride Ministries v. Se. Pa. Transp. Auth., 148 F.3d 242, 248 (3d Cir. 1998) (the court asks whether the government "clearly and deliberately opened its advertising space to the public."). In designated public fora, "content-based restrictions are subject to strict scrutiny." Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 296) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[9]The Third Circuit has noted that the terms limited forum and nonpublic forum are interchangeable and that these categories of forum are the same. See NAACP v. City of Phila., 834 F.3d 435, 441 n.2 (3d Cir. 2016). The court will use the term limited forum herein.

A limited forum consists of "public property that 'is not by tradition or designation a forum for public communication . . .' Pittsburgh League of Young Voters Educ. Fund, 653 F.3d at 296 (citing Perry, 460 U.S. at 46).

(continued...)

undisputed factual record that COLTS' advertising space is a limited forum. Nothing in the evidence presented at trial alters the court's determination of the forum.

A determination as to whether COLTS' advertising space is a designated public forum or a limited forum requires the court to engage in a fact-specific analysis of the forum itself. Christ's Bride Ministries, 148 F.3d at 248-52. In Am. Freedom Defense Initiative, 92 F.Supp.3d at 324, the court explained:

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

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. See Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).

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[9](...continued)
"Access to a [limited] forum can be restricted so long as the restrictions are reasonable and viewpoint neutral." Id. (citing Cornelius, 473 U.S. at 800).

To gauge COLTS' intent, the court looks to the terms of any policy COLTS has enacted to govern access to the forum. Cornelius, 473 U.S. at 802. Moreover, if COLTS requires potential advertisers to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations, it will generally be found that COLTS intended to create a limited, rather than designated, public forum. Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 679-80 (1998); Cornelius, 473 U.S. at 804; Perry, 460 U.S. at 47.

The evidence in this case shows that COLTS initially opened its advertising space on buses for sale to the general public for the purpose of raising revenue. Up until May 2011, just before the passage of the 2011 Policy, COLTS did not reject any advertisement proposal and accepted a wide array of political and religious advertisements. While this may very well have rendered COLTS' advertising space a designated public forum at the time, in June 2011, COLTS adopted its first advertising policy. The 2011 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." According to the record, the 2011 Policy was drafted and implemented to prevent controversy and public debate on its buses. The evidence in the record indicates that the intent in implementing the policy was not to avoid debate simply to avoid debate, but to avoid debate for the safety and comfort of COLTS' passengers, who are essentially a captive audience,

as well as for the safety of COLTS' drivers. At the time when the 2011 Policy was drafted, officials at COLTS were taking note of issues occurring at transit authorities in other cities 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. In taking these matters into consideration, COLTS' 2011 Policy restricted a number of topics for advertisements that could be deemed controversial. Among these were religious advertisements.

In 2012, after a discussion with the plaintiff's attorney, COLTS began revising its 2011 Policy to make more clear the types of advertisements it would and would not accept and to alleviate the "catch all" discretionary clause in the 2011 Policy, which would limit COLTS' discretion in which advertisements it would or would not display. The 2013 Policy rescinded and replaced the 2011 Policy, rendering the 2011 Policy a nullity. Again, the 2013 Policy declared COLTS' 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." The 2013 Policy contained a number of restrictions on public issue advertisements. Included among the specific restrictions in the 2013 Policy were religious advertisements "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 belief; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature." The 2013 Policy provides that the sale of advertising space was "for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." Pursuant to the evidence, 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 demonstrating its intent to control access to its buses.

Concerning its practices, the evidence demonstrates 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. Enforcement of COLTS' policy prohibiting all controversial speech in advertisements has been 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. The evidence demonstrates that COLTS did not allow the plaintiff's advertisement which contained the word "atheists" and also did not allow the Lutheran advertisement which depicted the cross. COLTS did not allow a proposed advertisement from Northeast Firearms in 2011 while it was drafting its initial policy, as that advertisement would have been in violation of the ban on

advertisements "that promotes the use of firearms or firearm-related products." Moreover, COLTS rejected an advertisement in May 2012 for the "Wilkes-Barre Scranton Night Out" since the website on the advertisement contained advertisements for establishments that serve alcohol.

In light of COLTS' written advertising policy, which declares its intent not to become a public forum, and which provides for the exclusion of very specific types of advertisements requiring a review process prior to the placement of an advertisement, and based on COLTS' practice of permitting only limited access to the advertising spaces on its buses, the court finds that COLTS' advertising space is not a designated public forum, regardless of how the forum previously could have been labeled.[10] See Cornelius, 473 U.S. at

[10]Even if COLTS' advertising space was previously a designated public forum, such a forum can be closed. See Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489, 496 (9th Cir. 2015) (citing Perry, 460 U.S. at 45-46) ("The principal difference between traditional and designated public forums is that the government may close a designated forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether."). See also Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va., 894 F.Supp.2d 768, 773-74 (W.D.Va. 2012), *aff'd*, 722 F.3d 224 (4th Cir. 2013) (government "is not required to indefinitely retain the open character of the facility," and may indeed close the forum as it sees fit) (citations omitted); Satawa v. Macomb Cty. Rd. Comm'n, 689 F.3d 506, 517 (6th Cir. 2012) (government . . . need not indefinitely retain the open character of the facility); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006) (plaintiff's challenge to an ordinance was no longer viable because the defendant city had recently closed the public forum in which the plaintiffs sought to exercise First Amendment rights); Ridley, 390 F.3d at 77 ("The government is free to change the nature of any nontraditional (continued...)

805. COLTS' policy and practice show that the advertising space on its buses was not open and suitable for speech concerning public issues and the evidence shows that, after the enactment of its advertising policy, COLTS did not have a history of allowing such advertisements. Rather, the advertising space on COLTS' buses is a limited forum. This finding is consistent with Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), in which the court stated:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters . . . The [advertising] space, although incidental to the provision of public transportation, is a part of the commercial venture . . . [A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303.

In arguing that COLTS' advertising space is a designated public forum,

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[10](...continued)
forum as it wishes."); Currier v. Potter, 379 F.3d 716, 728 (9th Cir. 2004) (government may close a designated public forum "whenever it wants"); Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004) ("Furthermore, the government may decide to close a designated public forum."); Shopco Distribution Co. v. Commanding Gen. of Marine Corps. Base, Camp Lejeune, N.C., 885 F.2d 167, 173 (4th Cir. 1989) ("Even assuming arguendo that the Commanding General did . . . change Camp Lejeune housing areas from non-public to public forums, he 'is not required to indefinitely retain the open character of the facilit[ies],'") (quotation omitted); U.S. v. Bjerke, 796 F.2d 643, 647 (3d Cir. 1986) ("[O]fficials may choose to close such a designated public forum at any time.")

Freethought provides that, even after the passage of the 2011 and 2013 Policies, COLTS ran non-commercial advertisements on issues of public concern, including the Diocese of Scranton's "Adoption for Life" advertisement that said "Choose Adoption . . . It Works!," an advertisement for "National Infant Immunization Week," and annual advertisements for a free children's Halloween party hosted by Patrick O'Malley, a Lackawanna County Commissioner, all of which Freethought believes demonstrate inconsistencies in the application of the advertising policy. As to these advertisements, the adoption advertisement did not contain any religious references or any references to the Diocese of Scranton and, as such, was neutral on its face. The O'Malley Halloween advertisement did not reference Mr. O'Malley's political office or his candidacy, so it was also neutral on its face. Finally, COLTS admittedly ran the immunization advertisement without a clear understanding of the controversial nature of the subject matter at the time, but COLTS indicated that, currently, the advertisement would not be displayed. This single advertisement does not demonstrate that COLTS opened its advertising space for all intents and purposes to the public, so as to render the advertising space a designated public forum.

The plaintiff also argues that COLTS continued to run the commercial advertisement for "Brewer's Outlet" after the 2011 Policy was enacted, despite its ban on alcohol related advertisements. The record demonstrates that COLTS had a pre-existing contract with Brewer's Outlet and continued to run

this advertisement until the contract with Brewer's Outlet expired in April 2012. As there was an existing contract in place at the time the 2011 Policy was enacted, COLTS was justified in running the Brewer's Outlet advertisement to the conclusion of its contract, rather than facing a breach of contract claim. Brewer's Outlet was informed that the contract would not be renewed once it expired.

Having found that COLTS' advertising space is a limited forum, the court must now determine whether COLTS' advertising policy comports with the prescribed level of scrutiny applicable to a limited forum. A limited forum has "the least protection under the First Amendment." Perry, 460 U.S. at 46; NAACP, 834 F.3d at 441. As previously noted, restrictions on speech in a limited forum are allowed if they are reasonable and viewpoint neutral. Id. "[T]he 'Government's decision to restrict access . . . need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'" Id. (quoting Cornelius, 473 U.S. at 808) (emphasis in original). "Reasonableness is a case-specific inquiry." NAACP, 834 F.3d at 448. Reasonableness is assessed based on the purpose of the forum and based on all surrounding circumstances of a particular case. Cornelius, 473 U.S. at 808-09. "[A] restriction on speech in a [limited] forum is 'reasonable' when it is 'consistent with the [government's] legitimate interest in preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992) (citing Perry, 460 U.S.

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at 50-51). When analyzing the reasonableness of speech restrictions, courts may rely on "record evidence or commonsense inferences. First . . . the evidence or commonsense inferences must allow us to grasp the purpose to which the [government] has devoted the forum. And second, the evidence or commonsense inferences also must provide a way of tying the limitation on speech to the forum's purpose." NAACP, 834 F.3d at 445. COLTS need not prove that its restrictions are the only way to achieve its articulated goals, but it must provide at least "a legitimate explanation for the restriction." Id. Because it is the government that is restricting speech, even in a limited forum, the burden of establishing reasonableness is on the government. Id. at 443.

The record establishes in this case that COLTS initially opened its advertising space to the public for the purpose of raising revenue. COLTS' 2013 Policy now 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." With this, COLTS has met the initial part of its burden, which is to establish that generating revenue, while maintaining or increasing ridership, is the purpose of the forum. The issue then is whether COLTS' ban on controversial public issue speech is reasonably connected to that purpose. Even if COLTS cannot produce record evidence to show that the ban is reasonably connected to the purpose of the advertising space, commonsense inferences can salvage the ban.

COLTS has provided testimony that the advertising policy was enacted to keep COLTS neutral on matters of public concern. Moreover, COLTS was trying to restrict all public issue and controversial advertisements to avoid heated arguments and debates amongst riders on its buses. COLTS was concerned about potential dangerous situations on its buses which may result from heated debates. COLTS has stated that the purpose of its buses is to provide safe and reliable public transportation, as well as to provide a welcoming environment for the public. COLTS was concerned about its passengers and also believed that heated debates of public issues in the confined spaces of its buses could deter passengers from riding. 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.

Initially, to the extent COLTS has provided that the advertising policy was enacted to keep COLTS neutral on matters of public concern, 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. See Children of the Rosary, 154 F.3d at 979. 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 does not appear to take direct issue

with COLTS' neutrality stance and, in fact, Mr. Vacula testified that he wants the government to remain neutral on matters of religion.

As to COLTS' concern for decreased ridership, Freethought argues that COLTS has not produced evidence that shows allowing advertisements that may spark debate on buses causes any decrease in passengers. Along this line, Freethought argues 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."

As indicated earlier, COLTS does not have to show that the prohibited speech would actually cause harm if it was allowed, rather it only has to show by the evidence or by commonsense inferences that it could potentially affect its revenue or ridership. 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. These incidents involved the boycotting of bus companies, vandalism of buses, and the initiation of "a war of words" on buses over advertisements containing controversial issues, including the existence or non-existence of God. 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. In fact, at the time Freethought's initial advertisement was declined and the matter was discussed in the local newspaper, various comments were posted that personally attacked Mr. Vacula and a controversial discussion ensued between those who supported the advertisement and those who opposed it. While Freethought dismisses this exchange because it did not take place in person inside a COLTS bus, it is not unreasonable to envision that such an exchange could occur on a COLTS bus and potentially lead to a dangerous situation for both passengers and drivers.

Furthermore, the 2013 Policy is related to COLTS' duty to provide safe transportation to its riders. Commonsense inferences dictate that, if COLTS can not provide safe transportation to its riders, they will lose riders and, consequently, revenue. The purpose of the advertising policy was to avoid heated debate or controversy on the buses, which could result in riders not taking the bus and, as a result, decrease ridership.

In light of the above, the court finds that COLTS' advertising policy restrictions are reasonable, as the reason for the restriction can be tied to the purpose of the forum. The determination then must be made whether the restriction is viewpoint neutral.[11]

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[11]Freethought has also raised a viewpoint discrimination claim, which the court will consider since Freethought would be entitled to relief if it (continued...)

"A viewpoint restriction 'targets not subject matter, but particular views taken by speakers on a subject.'" Am. Freedom Defense Initiative, 92 F.Supp.3d at 324 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)); Pittsburgh League of Young Voters Educ., 653 F.3d at 296. Thus, "if the government allows speech on a certain subject in any forum, it must accept all viewpoints on the subject, even those that it disfavors or finds unpopular." Id. (citing Pittsburgh League of Young Voters Educ., 653 F.3d at 296)."[I]n Cornelius the [Supreme] Court suggested that a restriction will be unconstitutional if it was 'impermissibly motivated by a desire to suppress a particular point of view.'" Id. (citing Cornelius, 473 U.S. at 812-13).

Freethought argues that COLTS' advertising policy is viewpoint discriminatory because it favors non-religious/non-atheist speakers over religious/atheist speakers. However, the court finds that the restriction on all speech related to religion is a content, not viewpoint, based restriction. In fact, Freethought itself elsewhere refers to the advertising policy in its materials as a content-based restriction. 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

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[11](...continued)
establishes this claim. With respect to plaintiff's viewpoint discrimination claim, it does not matter if the advertising space on COLTS' buses is a designated public forum or a nonpublic forum. Regardless of the designation, plaintiff will prevail in its case if it establishes its viewpoint discrimination claim. See Pittsburgh League of Young Voters Educ., 653 F.3d at 296.

> 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 v. Rector Visitors of Univ. of Va., 515 U.S. at 829-30.

Here, 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 in nature or that appear to promote either the existence or the non-existence of God. Freethought's advertisements do not seek to address a general, but otherwise permissible, topic. The sole purpose of Freethought's advertisements was to challenge COLTS' advertising policy and to bring awareness to the atheist perspective to recruit members. 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.

Finally, Freethought argues that the 2013 Policy is unconstitutionally vague and allows COLTS too much discretion in what to allow or not allow in its advertising spaces. Simply because a policy requires some interpretation

does not render the policy vague. See 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. 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 & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 358-59 (6th Cir. 1998). Upon a reading of COLTS' advertising policy, a person of ordinary intelligence can generally tell what types of advertisements are permitted or proscribed.

Moreover, COLTS revised their 2011 Policy and, in the 2013 Policy, took away COLTS' unfettered discretion to refuse advertisements. 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." Minnesota Voters Alliance v. Mansky, ___ U.S. ___ (2018), 2018 WL 2973746, at 1891 (June 14, 2018) (citing Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)). 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. The court concludes, therefore, that COLTS' advertising policy is not unconstitutionally vague.

III. CONCLUSION

The legal issues presented in this case are particularly fact specific. By way of this decision, the court in no way diminishes the importance of free speech in our society. In fact, in today's society, free speech is more important than ever. That being said, the law dictates that, under the facts of this case alone, that COLTS' advertising space is a limited forum and that COLTS did not violate Freethought's First Amendment right to free speech by refusing to place its advertisement on COLTS' buses.

For the foregoing reasons, judgment will be entered in favor of COLTS and against Freethought. An appropriate order will issue.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: July 9, 2018

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