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)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY'S MOTION FOR SUMMARY JUDGMENT

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

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
Mary Catherine Roper (Pa. Id. No. 71107)
Molly Tack-Hooper (Pa. Id. No. 307828)
P.O. Box 60173
Philadelphia, PA 19102
mtack-hooper@aclupa.org
mroper@aclupa.org
(215) 592-1513 x 113
Fax: (215) 592-1343

Attorneys for Plaintiff Northeastern Pennsylvania Freethought Society

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C	Transcript of 30(b)(6) Deposition of COLTS Designee Gretchen Wintermantel (Mar. 11, 2016)
D	Transcript of 30(b)(6) Deposition of COLTS Designee Robert Fiume (Mar. 10, 2016)
E	"Hope Church" Advertising Invoices, Contracts
F	Photograph of "Old Forge Daily News" Advertisement
G	Screenshots of oldforgetimes.blogspot.com
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I	COLTS Advertising Policy (June 21, 2011)
J	Email to Jim Smith from Justin Vacula (Jan. 30, 2012, 3:05 PM)
K	Email to Gretchen Wintermantel, info@coltsbus.com, and J. Timothy Hinton, Jr. from Justin Vacula (Aug. 29, 2013)
L	Letter to Mr. Vacula from Gretchen M. Wintermantel, Communications Director and Right-to-Know Officer, COLTS (Sept. 9, 2013)
M	"Wilkes-Barre Scranton Night Out" Proposed Advertisement
N	COLTS Advertising Policy (Sept. 17, 2013)
O	NEPA Freethought Society Proposed Advertisement (submitted on July 21, 2014)
P	Letter to Mr. Vacula from Gretchen M. Wintermantel, Communications Director and Right-to-Know Officer, COLTS (July 21, 2014)
Q	Email from Justin Vacula to Gretchen Wintermantel (July 21, 2014, 7:01 AM)
R	"National Infant Immunization Week" Advertisement Art and Photograph
S	Diocese of Scranton's "Adoption for Life" Advertisement Photographs, Invoices, and Contracts
T	"Lutheran Home Care & Hospice, Inc." Proposed Advertisement
U	"Patrick O'Malley's 13th Annual Free Children's Halloween Party" Advertisement Invoice, Contract, and Photograph
V	Amended Notice of 30(b)(6) Deposition of COLTS Corporate Designees (Feb. 25, 2016)

QUESTION INVOLVED

Whether a transit agency's content-based advertising policy that was—in the agency's words[1]—designed and intended to suppress debate and discussion of "public issues" aboard buses violates the First Amendment.

Suggested answer: Yes.

INTRODUCTION

Content-based restrictions on speech "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). "As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (citation omitted). When the government restricts speech based on its content, the restriction is presumptively invalid, and the government bears a heavy burden to rebut that presumption. *E.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-17 (2000) (citations omitted).

Plaintiff Northeastern Pennsylvania Freethought Society ("NEPA Freethought Society") wishes to place an ad on the outside of buses that simply

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[1] Pl.'s Stmt. Facts at ¶¶ 56-57, 61, 64-65; *see also id.* ¶¶ 22, 24-26, 28, 31-34, 41-43, 46, 48, 58-59, 71-72, 81, 87-88.

says “Atheists” along with the organization’s name and website address. The County of Lackawanna Transit System (“COLTS”) has rejected three separate attempts by Plaintiff to place such an ad because COLTS believes the word “atheists” could spark debate.

COLTS’ advertising policy violates the First Amendment for several reasons. First, it constitutes censorship aimed at an illegitimate government interest—the suppression of debate and discussion of “public issues.” This unlawful aim cannot justify *any* government restriction on speech.

Second, by soliciting advertisements for its buses and accepting virtually every proposed ad for years, COLTS created a “designated public forum.” Because its content-based restrictions on speech are not narrowly tailored to serve a compelling government interest, COLTS’ policy fails strict scrutiny.

Third, the vagueness of the policy’s terms invites subjective, arbitrary, and discriminatory enforcement of the policy—particularly against unpopular speakers.

Accordingly, Defendant’s policy is unconstitutional on its face and Plaintiff is entitled to judgment as a matter of law.

FACTUAL BACKGROUND[2]

For years, COLTS placed no restrictions on the types of advertisements it would display on its buses. Pl.'s Stmt. Facts ¶¶ 9, 12. It ran advertisements for churches and religiously affiliated organizations and events; a beer distributor; a candidate for political office; and a controversial Internet blog. *Id.* ¶¶ 13-15. None of these ads led to disruption aboard a COLTS bus or prompted a single complaint from a COLTS patron or any loss of ridership. *Id.* ¶¶ 16-18.

COLTS did not reject any ad until May 2011, when it rejected a religious organization's proposed ad forecasting the coming "Judgment Day." *Id.* ¶¶ 21-23. COLTS was concerned that the religious message of the ad could be controversial and provoke debates or arguments aboard COLTS buses, and that, if COLTS opened the door to religious messages, atheist groups might also try to advertise and turn the buses into a "place for debate." *Id.* ¶¶ 24-25.

Thus, in June 2011, COLTS adopted its first advertising policy (the "2011 Policy"), designed to suppress "debate" and "discussion of public issues" on COLTS buses. *Id.* ¶¶ 26-29; Ex. I. The policy reserved limitless discretion to censor ads that were "objectionable, controversial or would generally be offensive

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[2] Plaintiff hereby incorporates its detailed Statement of Undisputed Facts. *See* Pl.'s Stmt. of Undisputed Facts Supp. Mot. for Summary Judgment, ECF No. 33, July 18, 2015 (hereinafter "Pl.'s Stmt. Facts").

to COLTS' ridership based solely on the discretion of COLTS." Ex. I; Pl.'s Stmt. Facts ¶ 27. The policy also contained specific prohibitions on ads for tobacco, alcohol, firearms, or political candidates; violent, sexual, obscene, pornographic, defamatory, or fraudulent ads; and ads that COLTS, in its "sole discretion," deemed "derogatory to any race, color, gender, religion, ethnic background, age group, disability, marital or parental status, or sexual preference." Ex. I; Pl.'s Stmt. Facts ¶ 27.

Plaintiff NEPA Freethought Society's mission is to create a supportive community for atheists, agnostics, and others who believe in the separation of church and state and critical thinking in Northeastern Pennsylvania. Pl.'s Stmt. Facts ¶ 2. In order to recruit potential members, in January 2012, Plaintiff submitted a proposed ad containing the word "Atheists" in large font above the NEPA Freethought Society's website URL. Pl.'s Stmt. Facts ¶¶ 38-39; Ex. J.

However, a COLTS official inspected Plaintiff's website and concluded that Plaintiff's intent was to spark a debate about religion. *Id.* ¶ 40. COLTS concluded that the word "Atheists" was likely to cause passengers to engage in debates about atheism aboard COLTS buses, and rejected the ad. *Id.* ¶¶ 41-44. COLTS did *not* consider Plaintiff's ad to fall within the prohibition on ads that were "derogatory to religion." Ex. C at 77:5-9.

On August 29, 2013, the NEPA Freethought Society submitted a variant on its "Atheists" ad for placement on COLTS buses. *See* Pl.'s Stmt. Facts ¶ 45; Ex. K. By letter dated September 9, 2013, COLTS again rejected the ad because COLTS believed the word "Atheists" would prompt debate. Pl.'s Stmt. Facts ¶¶ 46-47.

Although COLTS rejected ads from only two advertisers[3] under the 2011 Policy, eight days after rejecting Plaintiff's second proposed ad, the COLTS Board of Directors voted to update the policy to "clarify" what kinds of ads COLTS found controversial. *Id.* ¶ 53; Ex. N (the "2013 Policy").

The goal of the policy remained the same: suppressing debate and discussion aboard COLTS buses. *See* Pl.'s Stmt. Facts ¶¶ 56-59, 61, 64-65. The 2013 Policy echoed the 2011 Policy's "no debate" provision, declaring that COLTS intended "**not to allow its transit vehicles . . . to become a public forum for dissemination, debate, or discussion of public issues or issues that are political or religious in nature.**" Ex. N (emphasis in original).

The 2013 Policy added provisions not spelled out in the 2011 Policy, and expanded the specific enumerated prohibitions, including the prohibitions on

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[3] In addition to rejecting Plaintiff's ad, in May 2012, COLTS rejected an ad for "Wilkes-Barre Scranton Night Out" because the ad contained a URL for a website that displayed advertisements for bars where alcohol was served. *Id.* ¶¶ 49-51, 94.

political, religious, and atheist ads. *Compare* Ex. N *with* Ex. I. The "religious and atheist" provision prohibited ads:

> that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religious, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or text involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature.

Ex. N. In February 2014, COLTS invoked this provision to reject an ad for home health care and hospice services submitted by Lutheran Home Care & Hospice, Inc. "because of the cross in the logo and the word Lutheran," which COLTS believed could cause debates. Pl.'s Stmt. Facts ¶¶ 86-87.

In July 2014, COLTS denied another "Atheists" ad proposed by Plaintiff, similar to Plaintiff's second proposed ad but with an updated URL. *Id.* ¶¶ 67-68; Ex. O. COLTS did not view the ad as criticizing or attacking religion; COLTS rejected it because the word "Atheists" addressed the non-existence of a deity and a lack of religious beliefs, and would thus spark debate, in COLTS' view. *Id.* ¶¶ 70-72. COLTS' letter explaining the denial cited both the "religious and atheist" provision and the "no debate" provision of the 2013 Policy. *Id.* ¶¶ 69, 70; Ex. P.

Plaintiff then submitted a fourth proposed ad that omitted the word "Atheists" and simply stated:

NEPA Freethought Society

meetup.com/nepafreethoughtsociety

Id. ¶¶ 73-74; Ex. Q. COLTS accepted that ad, and it ran on the outside of a COLTS bus in the fall of 2014. Pl.'s Stmt. Facts ¶¶ 75-77. There were no complaints about the ad. *Id.* ¶ 78.

Plaintiff filed this lawsuit on April 21, 2015, and the Court denied COLTS' motion to dismiss on January 27, 2016 (ECF Nos. 20-21).

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

A movant is entitled to summary judgment if it shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is "material" only if it has the potential to alter the outcome of the case. *See NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011) (citing *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006)).

In First Amendment cases, the government bears the burden to justify its restriction on speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816-817 (2000) (citations omitted); *accord Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). Where, as here, the non-moving party bears the burden of proof at trial, the movant is entitled to summary judgment if the non-moving party fails sufficiently to establish the existence of an essential element of

its case. *Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 146 (3d Cir. 2016) (citing *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014)).

Because the undisputed record does not reflect a sufficient factual basis to justify COLTS' restrictions on speech, Plaintiff is entitled to summary judgment.

II. THE GOVERNMENT MAY NOT CENSOR SPEECH ON PARTICULAR TOPICS—IN ANY FORUM—FOR THE PURPOSE OF SUPPRESSING DEBATE AND DISCUSSION.

COLTS has consistently maintained that the goal of its advertising policy is to suppress debate and discussion of "public issues" aboard its buses. Pl.'s Stmt. Facts at ¶¶ 56-57, 61, 64-65; *see also id.* ¶¶ 22, 24-26, 28, 31-34, 41-43, 46, 48, 58-59, 71-72, 81, 87-88.

The government does not have a legitimate interest in suppressing debate of public issues. On the contrary, "debate on public issues" is the core activity that the First Amendment is designed to protect. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment[.]"); *Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'")

(citation omitted). Indeed, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted). Accordingly, the Supreme Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* (citations omitted).

In these and other cases, the Supreme Court has held that there is no legitimate state interest in protecting the sensibilities of recipients of the speech or avoiding disagreement. *E.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citations omitted). "Verbal tumult" and "discord" are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve"—even when "the air may at times seem filled with verbal cacophony." *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

For its illegitimate aim alone, COLTS' 2013 Policy fails under any level of scrutiny that could possibly apply to this restriction on speech.[4]

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[4] *See*, *e.g.*, *Planned Parenthood v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985) ("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.") (citations omitted); *Ridley v. MBTA*, 390 F.3d 65, 87 (1st Cir. 2004) (transit agency's rejection of marijuana

…*Continued*

III. THE ADVERTISING SPACE ON COLTS BUSES CONSTITUTES A DESIGNATED PUBLIC FORUM

To decide what level of scrutiny applies to a restriction of speech on government property, a court must define the relevant "forum" by looking at "the access sought by the speaker." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 797, 800 (1985). Here, the relevant forum consists of the advertising space that COLTS makes available on both the inside and outside of COLTS buses. *See* Pl.'s Stmt. Facts ¶¶ 9, 39, 55.

The degree of scrutiny that applies turns on whether the forum is a "traditional public," "designated public," or "nonpublic" forum. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty*., 653 F.3d 290, 295-96 (3d Cir. 2011). A "designated public forum" is government owned property that is not a "traditional" public forum—such as city streets or parks—but which the government has "intentionally opened up for use by the public as a place for expressive activity." *Id*. at 296 (quotation omitted). Advertising spaces within

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ad was unconstitutional, even in a non-public forum, in part because of officials' improper motive); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 970-71 (9th Cir. 2002) (restrictions in any forum are unconstitutional if government was motivated by "the nature of the message rather than the limitations of the forum").

public transit stations,[5] city hall,[6] and city buses[7] have been found to be designated public fora. A "nonpublic forum" is a venue that has not been opened to speech by the public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (discussing definition of nonpublic forum).

To properly classify the forum, the court must examine the government's "policies and practices in using the space and also the nature of the property and its compatibility with expressive activity." *Christ's Bride Ministries*, 148 F.3d at 249. The Court also must examine the government's intent in establishing and maintaining the property. *Cornelius*, 473 U.S. at 802. Importantly, however, the government's "own statement of its intent . . . does not resolve the public forum question." *Christ's Bride Ministries*, 148 F.3d at 251; *see Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990) ("To allow . . . the government's statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of [F]irst

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[5] *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F. 3d 242, 249-55 (3d Cir. 1998).

[6] *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-81 (9th Cir. 2001).

[7] *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998).

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

Third Circuit precedent makes clear that COLTS has created a "designated public forum." In *Christ's Bride Ministries*, the Third Circuit concluded that SEPTA had created a designated public forum because: (1) SEPTA's policies excluded "only a very narrow category of ads," (2) SEPTA's goal was to generate revenue through ad sales, which "suggests that the forum may be open to those who pay the requisite fee[,]" and (3) SEPTA's practice was to permit "virtually unlimited access to the forum[.]" 148 F.3d at 252. The fact that SEPTA's policy permitted it to reject material it "deem[ed] objectionable for any reason" did not change the Third Circuit's analysis; indeed, the record showed that "at least 99% of all ads are posted without objection by SEPTA."[8] *Id*. at 251-52.

Like SEPTA, COLTS chose to open space on the inside and outside of its buses to advertisements for the "sole purpose" of generating revenue, and for years, did not impose any restrictions on the ads it accepted. For at least a decade, COLTS accepted virtually all ads submitted. Pl.'s Stmt. Facts ¶¶ 9, 12. Even after first adopting a policy prohibiting certain categories of ads, COLTS rejected ads by

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[8] The Third Circuit did not address whether SEPTA's policy was unconstitutionally vague.

only two proposed advertisers, including Plaintiff. *Id.* ¶¶ 49-52. As in *Christ's Bride*, the fact that COLTS has professed a desire for its advertising space to be analyzed as a nonpublic forum[9] does not change the proper legal analysis. The government cannot secure a lower standard of scrutiny for its speech-restrictive activities merely by incorporating magic words into an unconstitutional policy. Indeed, courts have not hesitated to reject similar boilerplate in other government policies. *See United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 352 (6th Cir. 1998) (finding that transit agency had created a designated public forum despite policy's statement that "It is SORTA's policy that its buses, bus shelters and billboards are not public forums."); *AIDS Action Committee of Mass., Inc. v. MBTA*, 42 F.3d 1, 10 (1st Cir. 1994) (in determining whether transit agency has created a designated public forum, "actual practice speaks louder than words.").

IV. COLTS' 2013 ADVERTISING POLICY CANNOT SURVIVE STRICT SCRUTINY.

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

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[9] *See* Ex. N (2013 Policy stating "It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum").

It is indisputable that COLTS' advertising policies are content-based rather than content-neutral because COLTS must look to a proposed ad's topic, message, and words in order to determine its permissibility. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the *topic discussed* or the idea or message expressed. . . Some facial distinctions based on message are obvious, defining regulated speech by particular subject matter[.]") (emphasis added).[10]

To survive strict scrutiny, COLTS must show that its restriction on speech is narrowly tailored to achieve a compelling state interest. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 295 (3d Cir. 2011) (citation omitted). A restriction is not "narrowly tailored" if it (1) is not necessary to achieve the government's claimed interest, *see Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 609-10 (1982); (2) is over- or under-inclusive, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793-95

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[10] Examples of content-based regulations include a sign ordinance distinguishing between ideological, political, and directional signs, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) and a tax on general interest magazines that exempting newspapers and religious, professional, trade, and sports journals, *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). An example of a content-neutral regulation is an ordinance controlling noise level at an outdoor concert space. *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

(1978); or (3) is not the least restrictive means of achieving this interest, *see Sable Communications v. FCC*, 492 U.S. 115, 126-31 (1989).

COLTS' asserted interests are, either individually or collectively, insufficient to justify the 2013 Policy:

Suppressing Debate and Discussion of Public Issues. As explained in Section II, *supra*, suppressing debate of public issues is not a legitimate interest, much less a compelling one that could justify a content-based speech restriction.

Generating Revenue While Maintaining Ridership. COLTS' 2013 Policy states that the "sole purpose" of the policy is "generating revenue while at the same time maintaining or increasing its ridership." Pl.'s Stmt. Facts ¶ 62; Ex. N.[11] Even assuming that COLTS has a "compelling interest" in raising a small percentage of its revenue each year through advertising sales without compromising ridership, COLTS' policies are not narrowly tailored to this interest. By restricting the types of advertisements it will accept and rejecting would-be advertisers, COLTS

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[11] Plaintiff disputes that this goal actually motivated the 2013 Policy. The 2011 Policy, which was drafted by COLTS' Communication Manager, rather than by attorneys, did not include this statement of purpose, and, COLTS admits, was not designed to increase ridership or prompted by any revenue-related goals or concerns. Pl.'s Stmt. Facts ¶ 29. Indeed, it had no effect on ridership. *Id*. ¶ 30. And both the 2011 Policy and 2013 Policy contain nearly identical declarations of "intent." *Compare* Ex. I *with* Ex. N. However, Plaintiff is entitled to summary judgment even construing the factual record on this issue in the light most favorable to Defendant.

actually *diminished* the amount of ad revenue it could generate. And COLTS has adduced no evidence at all that suppressing debate aboard its buses was necessary to maintain ridership, or that it has considered less restrictive alternatives to advance its interests. Because the restrictions are neither necessary nor narrowly tailored to achieve a compelling state interest, the policy cannot survive strict scrutiny.

Accordingly, there is no genuine dispute of material fact that precludes judgment as a matter of law.

V. COLTS' 2013 POLICY IS UNCONSTITUTIONALLY VAGUE.

A restriction of speech violates the First Amendment if it is so vague that government officials can enforce it in an arbitrary and discriminatory way. *Child Evangelism Fellowship of New Jersey, 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). This is because "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). "The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d

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

The vagueness of several provisions in COLTS' 2013 Policy confers unconstitutional discretion on officials to approve or reject ads at will. And they have exercised that discretion in an arbitrary and inconsistent manner. For these reasons, the policy invites abuse, and violates the First Amendment.[12]

A. **"No Debate" Provision**

COLTS officials have interpreted the "no debate" provision of the 2013 Policy—declaring COLTS' "intent . . . not to allow its transit vehicles . . . to become a public forum for the dissemination, debate, or discussion of public issues"—as conferring authority to ban ads that might provoke debate or discussion of public issues aboard COLTS buses, whether or not the proposed ad fits into one of the enumerated prohibitions. This interpretation is evident from

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[12] COLTS' inconsistency in interpreting and applying its 2011 and 2013 policies also reinforces the conclusion that its ad space constitutes a public forum, *United Food*, 163 F.3d at 353, and that the prohibited categories of ads are not "inconsistent" with the forum, *Air Line Pilots Ass'n Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1155 (7th Cir. 1995).

COLTS' statements explaining why it rejected Plaintiff's ads. When COLTS rejected Plaintiff's first two ad proposals under the 2011 Policy, the "no debate" provision was the sole basis for the denial. Pl.'s Stmt. Facts ¶¶ 41, 46-47; Ex. L. COLTS did *not* view Plaintiff's ad as falling within the enumerated prohibition on ads "derogatory to . . . religion." Ex. C at 77:5-9. When COLTS considered Plaintiff's ads under the 2013 Policy, COLTS did not simply determine whether the text of the ad fell within the prohibition on ads that "promote the . . . non-existence of a supreme deity" or "address, promote, criticize, or attack a religion . . . or lack of religious beliefs[.]" *See* Ex. N. Rather, a COLTS official engaged in free-form consideration of whether the ad was likely to spark discussion of public issues, concluded it was, and cited the "no debate" provision in COLTS' rejection letter. Pl.'s Stmt. Facts ¶¶ 71, 72; Ex. P.

Any prohibition that turns on whether an ad is likely to promote debate or discussion of public issues invites "subjective or discriminatory enforcement" and is void-for-vagueness. *See United Food & Commercial Workers Union*, 163 F.3d at 360.

In *United Food & Commercial Workers Union*, the Sixth Circuit struck down a transit agency's ban on "[a]dvertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership," holding

that the prohibition "vests the decision-maker with an impermissible degree of discretion." *Id.* at 346, 359-60.

Likewise, COLTS' "no debate" provision gives officials the power to deny proposed ads based on their subjective beliefs about how people will react to the ads. It has unsurprisingly led to arbitrary and inconsistent outcomes.

For example, COLTS' official view as to whether a "National Infant Immunization Week" ad was likely to spark debate has changed over time, based on COLTS' officials' evolving awareness of public discourse. COLTS displayed the ad on its buses in April 2012, and it did not spark any debates, to COLTS' knowledge. But COLTS testified that if the same ad were submitted again under the 2013 Policy, COLTS would reject it as likely to spark debate based on the fact that COLTS officials are now aware, from "[f]riends with kids, and news, media," that "there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad," but in 2012, were unware "of the large debate concerning immunization in this country." Pl.'s Stmt. Facts ¶¶ 80-82.

B. <u>The "Religious and Atheist" Provision</u>

The "religious and atheist" provision[13] of the 2013 Policy has also opened the door to arbitrary and subjective enforcement through its vague language.

With respect to some proposed ads, COLTS officials gave this provision an extremely broad reading, contending that it prohibits all ads containing words that *refer* to religion or a lack of religion—including "Atheist," "Catholic," etc.—regardless of whether the ad's message had any religious content. *Id.* ¶¶ 43, 69-70, 86-88. COLTS officials invoked this provision as one basis for rejecting Plaintiff's "Atheists" ad, as well as an ad from Lutheran Home Care & Hospice, Inc. *Id.* ¶¶ 69-70, 86-87. COLTS also testified that this provision would provide a basis for rejecting an ad that COLTS formerly ran for "St. Stanislaus Polish Food Festival" that contained a reference to "St. Stanislaus Elementary School," a parochial school, because the reference to the school was "religious in nature[.]" *Id.* ¶ 88. Notably, with respect to each of these rejected ads, COLTS also testified that the ad posed a danger of sparking debate. *Id.* ¶¶ 71-72, 87-88.

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[13] "COLTS will **<u>not</u>** accept [ads]: . . . that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religious, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or text involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature." Ex. N.

However, with respect to other proposed ads—particularly those ads that COLTS claimed would *not* spark debate—COLTS officials read the text of the "religious and atheist" provision very narrowly. For example, in 2011, COLTS ran an advertisement from the Diocese of Scranton's "Adoption for Life" campaign that said "Consider Adoption . . . It Works!" *Id.* ¶ 83. COLTS testified that the Diocese's advertisement would still be permissible under the 2013 Policy, despite the policy's prohibition on ads that "address [or] promote . . . religious beliefs" (Ex. N), because COLTS officials did not believe the ad promoted the Diocese's pro-life religious belief nor view the ad as weighing in on the abortion debate. *Id.* ¶¶ 84-85.

It makes shockingly little sense that a provision purporting to ban all "religious and atheist" ads would prohibit a parochial school from advertising a Polish Food Festival or a Lutheran organization from advertising hospice care while allowing a Catholic Diocese to promote its religious beliefs. Plainly, the text of the "religious and atheist" provision is susceptible of a broad enough range of interpretations to allow it to be applied selectively and discriminatorily. It is unconstitutionally vague.

C. **“Political” Provision**

Even the provision purporting to ban ads “involving political figures or candidates for public office” [14] is vague enough to have led to inconsistent application. *See Air Line Pilots Ass’n Int’l . Dep’t of Aviation*, 45 F.3d 1144, 1155 (7th Cir. 1995) (interpretation of word “political” is not immediately obvious). COLTS’ interpretation of what ads are “political” and thus banned has been highly subjective. Every year since 2013, COLTS has accepted County Commissioner Patrick O’Malley’s ads for his annual free children’s Halloween party—despite the 2013 policy’s prohibition on ads “involving political figures or candidates for public office”—because the ads did not mention O’Malley’s elected position or candidacy (only his name), and because COLTS officials believe that a children’s Halloween party has “no relation to politics,” even when it occurs less than a month before election day. *Id.* ¶ 90.

[14] The entire provision reads: “COLTS will **not** accept [ads]: . . . 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.”

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court find Defendant's policy unconstitutional on its face and enter summary judgment in Plaintiff's favor, against Defendant.

Dated: August 1, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper (Pa. ID No. 307828)
Mary Catherine Roper (Pa. ID No. 71107)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
mtack-hooper@aclupa.org
mroper@aclupa.org
(215) 592-1513 x 113
Fax: (215) 592-1343

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

Attorneys for Plaintiff, Northeastern Pennsylvania Freethought Society

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of Local Rule 7.8(b), in that it does not exceed 5,000 words, exclusive of tables and certifications. The body of this brief contains 4,962 words.

Dated: August 1, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was filed electronically and served on all counsel of record via the ECF system of the United States District Court for the Middle District of Pennsylvania.

Dated: August 1, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper