



On September 17, 2013, COLTS adopted a new advertising policy which is attached to the Complaint as Exhibit "F". Id. at 21. The policy indicates, in pertinent part, that it is COLTS intent to maintain its advertising space on its property as a nonpublic forum and not to allow its transit vehicles of property to become a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature." Id. at 23.

On July 21, 2014, Plaintiff submitted a new ad which was nearly identical to those previously rejected. Id. at 26. That ad was rejected pursuant to the 2013 policy. Id. at 27. On July 21, 2014, Plaintiff submitted a new ad which stated only "NEPA Freethought Society. Meetup.com/NEPA Freethought Society." Id. at 29. That ad was accepted for publication on July 21, 2014 and began to run in October 2014. Id. at 29.

Count I of the Complaint alleges First Amendment violations pursuant to 42 U.S.C. §1983. Plaintiff alleges that COLTS advertising policy violates the First Amendment of the United States Constitution. Id. at 34. Plaintiff alleges that the refusal to run the ad with the word Atheist in it is an impermissible content and viewpoint based restriction on their rights under the free speech clause of the First Amendment. Id. at 42. They seek declaration that the rejection violates the First Amendment, declaration that the policy violates the First Amendment, an injunction, and costs and fees.

## **II. ISSUES PRESENTED**

Should the Court Dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted?

Suggested Answer: Yes.

## **III. LAW AND ARGUMENT**

### **Motion to Dismiss Standard**

Pursuant to Fed. R.C.P. 12(b)(6), a court may dismiss a Complaint for failure to state a cause of action. If a Plaintiff has not plead "enough facts to state a claim to relief that is plausible on its face", dismissal is appropriate. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The purpose of a 12(b)(6) motion is to test the legal sufficiency of the complaint and to "streamline litigation by dispensing with needless discovery and fact finding." Neitzke v. Williams, 490 U.S. 319, 326-27 (1989); Holder v. City of Allentown, 987 F.2d 188, 194 (3rd Cir. 1993). Mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." Fowler v. UPMC Shadyside, 578 F.3d 203, 211. Instead, a complaint must "show" this entitlement by alleging sufficient facts. Id.

**A. Plaintiff's Complaint must be dismissed as they have failed to allege a First Amendment Violation**

**i. COLTS' advertising spaces are a nonpublic forum**

The government may, as a general rule, limit speech that takes place on its own property without running afoul of the First Amendment. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Where, however, the property in question is either a traditional public forum or a forum designated as public by the government, the government's ability to limit speech is impinged upon by the First Amendment. Perry, 460 U.S. at 45-46. Specifically, transit bus advertisement is considered a nontraditional forum subject to a lighter standard. In either a traditional or a designated public forum, the government's content-based restrictions on private speech must survive strict scrutiny to pass constitutional muster. Id.; International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

The government has, however, a far broader license to curtail speech if the forum has not been opened to the type of expression in question. In such a case, the government's restrictions need only be viewpoint neutral and "reasonable in light of the purpose served by the forum." Rosenberger v. Rector and Visitors of the

Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 2516-2517, 132 L. Ed. 2d 700 (1995) (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1262 (3d Cir. 1992).

In order to decide whether a public forum is involved here, we must first determine the nature of the property and the extent of its use for speech. As the Court noted in Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County, 653 F.3d 290 (3d Cir 2011):

The government does not have "to grant access to all who wish to exercise their right to free speech on every type of [public] property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799-800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). The Supreme Court has developed a forum analysis to determine when the government's interest in limiting the use of its property outweighs the interest of those wishing to use the property as a place for expressive activity. Id.

There are three types of fora. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 n.11, 177 L. Ed. 2d 838 (2010). On one end of the spectrum lie traditional public fora. These fora, of which public streets and parks are examples, "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)). In traditional public fora, content-

based restrictions on speech are subject to strict scrutiny (i.e., the restrictions must be narrowly tailored to serve a compelling governmental interest). Id. Next are designated public fora. These fora consist of 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. Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009). As is the case in traditional public fora, content-based restrictions are subject to strict scrutiny in designated public fora. Perry, 460 U.S. at 45. Finally, public property that "is not by tradition or designation a forum for public communication" constitutes a nonpublic forum. Id. at 46. Access to a nonpublic forum can be restricted so long as the restrictions are reasonable and viewpoint neutral. Cornelius, 473 U.S. at 800.

The forum at issue here is COLTS advertising space on its buses, literature and stops. See Airline Pilots Assoc. v. Dept. of Aviation of the City of Chicago, 45 F.3d 1144, 1151 (7th Cir. 1995) (holding that display diorama in airport, not entire concourse, constituted relevant forum); Lebron v. Nat'l. R.R. Passenger Corp., 69 F.3d 650, 655-656 (holding that one billboard was the relevant forum, not the entire Penn Station).

Clearly, the advertising space on COLTS buses and stops do not constitute a "traditional" public forum. Traditional public forums include public streets, parks, and other public areas traditionally devoted to assembly and debate. See Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677, 118 S.Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998).

The facts also fail to establish that COLTS created a designated public forum. A party creates a designated public forum when it intentionally designates property that traditionally has not been regarded as a public forum for use as a public forum. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S.Ct. 2971, 2984 n.11, 177 L. Ed. 2d 838 (2010). The question is whether COLTS has created a designated public forum by "expressly" dedicating its advertising space to "speech activity." U.S. v. Kokinda, 497 U.S. 720, 726-727, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality opinion). A designated public forum is created because the government so intends. Inaction does not make such a forum; neither does the allowance of "limited discourse." Cornelius, 473 U.S. at 802. The Court must look to the COLTS' intent with regard to the forum in question and ask whether they clearly and deliberately opened its advertising space to the public. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 269- 270, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988); Perry, 460 U.S. at 37.

To gauge COLTS' intent, the Court must examine its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity. Gregoire v. Centennial School District, 907 F.2d 1366, 1371 (3d Cir. 1990) (citing Cornelius, 473 U.S. at 802); Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992). Courts must rely on several factors to gauge the government's intent. Cornelius, 473 U.S. at 802. They look first to the terms of any policy the

government has adopted to govern access to the forum. Id. If the government requires speakers seeking access to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations, the government generally intends to create a limited, rather than a designated, public forum.

Forbes, 523 U.S. at 679-80; Cornelius, 473 U.S. at 804; Perry, 460 U.S. at 47.

Granting selective access in that fashion negates any suggestion that the government intends to open its property to the "indiscriminate use by all or part of the general public" necessary to create a designated public forum. Hills v.

Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1050 (9th Cir. 2003) (per curiam);

*see also* Forbes, 523 U.S. at 679; Perry, 460 U.S. at 47.

The policy here is very specific and has been drafted with a clear intent. COLTS' prior policy 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." *See* Complaint at 13. That intent was reiterated by COLTS' solicitor in March of 2012. Id. at 14. On September 17, 2013, COLTS adopted a new advertising policy. Id. at 21-22; Exhibit F to the Complaint. The Policy again indicates that "It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and not to allow transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues that are political or religious in nature. " Id. Since the adoption of



the new policy on September 17, 2013, no ads have been permitted with regard to the exist or non-existence of god. In fact, Plaintiff has not made any allegation that such ads have ever been run on COLTS advertising space.

At best, the allegations of the Plaintiff establish only that COLTS intended to create a non public forum or limited public forum, open only to certain kinds of expression. See, e.g., Kreimer, 958 F.2d at 1261 (public library constituted a limited public forum for "reading, writing and quiet contemplation," but not for "oral and interactive" First Amendment activities); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995) (student activities fund, available to student groups meeting certain criteria, constituted limited public forum); See also, Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1<sup>st</sup> Cir. 2004) (an entity that allowed a wider range of speech than was permitted in Lehman is not automatically stripped of its ability to adopt other viewpoint-neutral criteria for selecting content that reasonably served the agency's overriding commercial purpose); *See also*, Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015)(the fact that a transit system runs some controversial ads does not mean that its advertising program becomes a designated public forum).

The Supreme Court has used the term "limited public forum" interchangeably with "nonpublic forum," thus suggesting that these categories of

forums are the same. *See* Martinez, 130 S.Ct. at 2985 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49, 103 S.Ct. 948, 957, 74 L. Ed. 2d 794 (1983)); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106, 121 S.Ct. 2093, 2100, 150 L. Ed. 2d 151 (2001). The First Amendment prohibits restrictions based on a speaker's viewpoint in both types of forums. Id. In contrast to traditional and designated public forums, a governmental entity creates a limited public forum when it provides for "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." Id.; Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003).

Herein, the facts alleged by Plaintiff can only establish a non public or limited public forum not that any type of discrimination occurred. Clearly, the COLTS advertising space is not a traditional public forum. Furthermore, Plaintiff has failed to allege sufficient facts to establish that the spaces are a dedicated public forum. As the Complaint makes clear, it was COLTS intention not to allow ads promoting or attacking religion. *See* Complaint at 14-15. The allegation that churches and other groups ran advertisements is not dispositive of the issue. *See* Complaint at 16. As Plaintiff's Complaint concedes, it was not prohibited from advertising the name of its organization and its website address. *See* Complaint at 29. The allegations of Plaintiff's Complaint fail to establish that COLTS ever accepted an advertisement promoting or attacking any religion. *See* Complaint

generally. As such, the COLTS advertising spaces must be treated as a non public or limited public forum.

**ii. The restrictions placed upon COLTS advertising space are viewpoint-neutral and reasonable in light of the purpose served by the forum**

COLTS Advertising Policy provides that "COLTS has decided to sell space for advertising on its vehicles, route schedules and other literature, bus shelters or other property, for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." *See* Exhibit F to the Complaint. The Policy also provides that "It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and not to allow transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues that are political or religious in nature. " *Id.*

In Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. 2004), the Court addressed restrictions on speech in a limited public forum. There we held that the citizens' forum portion of the Indiana Township Board of Supervisors meeting was a limited public forum because "public bodies may confine their meetings to specified subject matter . . . matters presented at a citizen's forum may be limited to issues germane to town government." *Id.* at 281 (citations and internal quotation marks omitted). In limited public forums, to avoid infringing on First Amendment rights, the governmental regulation of speech only need be

viewpoint-neutral and "reasonable in light of the purpose served by the forum[.]" Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107, 121 S.Ct. 2093, 2100, 150 L. Ed. 2d 151 (2001) (citation and internal quotation marks omitted).

In a limited public forum "content-based restraints are permitted, so long as they are designed to confine the forum to the limited and legitimate purposes for which it was created." Eichenlaub, 385 F.3d at 280 (internal quotation marks and citation omitted). The government may not "regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995). The government, however, may restrict the time, place and manner of speech, as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. Pleasant Grove, 129 S.Ct. at 1132.

In Lehman v. City of Shaker Heights, 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974), the Court addressed a similar issue. In Lehman, the city imposed a ban on political advertisements in buses, but allowed other types of advertisements, including commercial and public service ads. A candidate for public office challenged this policy as a First Amendment violation, and the Court responded as follows:

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 of Shaker Heights. The car card space, although incidental to the provision of public transportation, is part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." Public Utilities Comm'n v. Pollak, 343 U.S. [451,] 464-65 [(1952)].

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. . . . Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. . . . No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

Lehman, 418 U.S. at 303-04 (plurality opinion). Likewise, COLTS has similar goals for its advertisement spaces – revenue, not debate forms the basis for the advertisement.

The allegations of the complaint establish that the restrictions of the COLTS policy are both content-neutral and reasonable in light of the forum. COLTS will not accept advertising "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 beliefs or lack of religious beliefs." *See Exhibit F to the Complaint.* It was also COLTS intent not to make their property "a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature." *Id.*

This is clearly not a viewpoint restriction. A viewpoint restriction "targets not subject matter, but particular views taken by speakers on a subject."

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

COLTS policy placed no such restrictions on speech.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, the Supreme Court declared that "there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. See, e. g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); Perry Ed. Assn., *supra*, at 49. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. See Perry Ed. Assn., *supra*, at 46. In other words, 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.

Pittsburgh League of Young Voters Educ., 653 F.3d at 296. The COLTS policy clearly precludes speech regarding the existence or non-existence of a supreme deity or deities, as well as advertising promoting or attacking a religion. Because it precludes all advertisements, regardless of their viewpoint on the issue, it is viewpoint neutral.

The restriction is also reasonable. It must be "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806. This requirement focuses on whether the exclusion is consistent with "limiting [the] forum to activities compatible with the intended purpose of the property." Perry, 460 U.S. at 49. The intended purpose of the property at issue here, buses, stops and literature, is to provide safe and reliable public transportation. It is COLTS intent to not allow its property to become a forum for debate on political or religious issues. It is also their goal to "a safe and welcoming environment on its buses for the public at large." *See* Exhibit H and E to the Complaint. Any speech that will foreseeably result in harm to, disruption of, or interference with the transportation system is, by definition, incompatible with the buses' intended purpose. *See* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 979 (9th Cir. 1998). Restrictions on speech that will foreseeably disrupt the intended function of government property have generally been held reasonable in limited public forums.



*See* United States v. Kokinda, 497 U.S. 720, 732—33, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality opinion); Perry, 460 U.S. at 51—52 & n.12.

The COLTS policy is both content-neutral and reasonable in light of the forum. The allegations of the Complaint fail to establish otherwise. As such, Plaintiff's Complaint must be dismissed with prejudice.

MARSHALL DENNEHEY  
WARNER COLEMAN & GOGGIN



By: \_\_\_\_\_

William J. McPartland, Esquire  
Attorney I.D. No: PA 94214  
P.O. Box 3118  
Scranton, PA 18505-3118  
(570) 496-4600

**L.R. 7.8(b) CERTIFICATE**

This brief complies with the Local Rule 7.8(b) The brief contains 4,189 words.

MARSHALL DENNEHEY  
WARNER COLEMAN & GOGGIN



By: \_\_\_\_\_

William J. McPartland, Esquire  
Attorney ID. No: PA 94214  
P.O. Box 3118  
Scranton, PA 18505-3118  
(570) 496-4600

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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.

**COMPLAINT**

**NATURE OF THE SUIT**

1. In violation of the Free Speech Clause of the First Amendment to the United States Constitution, Defendant County of Lackawanna Transit System (“COLTS”) has refused to lease advertising space on its busses to Plaintiff Northeastern Pennsylvania Freethought Society (“NEPA Freethought Society”) due to the content of the proposed advertisements and the viewpoint that COLTS inferred that NEPA Freethought Society had expressed in the ads. NEPA Freethought Society seeks injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, as well as attorneys’ fees and costs under 42 U.S.C. § 1988(b), to remedy ongoing violations of Plaintiff’s constitutional rights.

2. NEPA Freethought Society brings this action as both a facial challenge to COLTS’ advertising policies and a challenge to the policies as applied to NEPA Freethought Society’s efforts to advertise on COLTS’ busses.

### **PARTIES**

3. Plaintiff Northeastern Pennsylvania Freethought Society is an unincorporated association, with its principal office at 30 Hayes Lane, Wilkes-Barre, Pennsylvania 18702.

4. Plaintiff's mission is to facilitate a social, educational, activist, and philosophical coalition of atheists, agnostics, humanists, secularists, and skeptics predicated on support and community that upholds the separation of church and state and promotes critical thinking.

5. Defendant County of Lackawanna Transit System is a public transportation authority operating under the Municipal Authorities Act of 1945, 53 Pa. C.S. § 5607, and headquartered at 800 North South Road, Scranton, PA 18504. At all times relevant to this Complaint, COLTS acted under color of state law.

### **JURISDICTION AND VENUE**

6. This action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

7. Venue is proper in this district under 28 U.S.C. § 1391 because the events giving rise to the claims in this action occurred within the Middle District of Pennsylvania and Defendant resides in this district.

### **FACTUAL BACKGROUND**

8. COLTS has a longstanding policy of leasing advertising space on its vehicles (inside and out), route schedules and literature, bus shelters, and other property.

9. COLTS has opened its advertising space to the public for the purpose of raising revenue, and not to further any other organizational policy or goal.

10. COLTS' practice has been to exercise discretion randomly and favor some viewpoints over others.

11. In January 2012, NEPA Freethought Society submitted an ad for publication on the outside of COLTS' busses. The ad stated, "Atheists. NEPAfreethought.org." A true and correct copy of that ad is attached hereto as Exhibit A.

12. In February 2012, COLTS rejected the ad because, as described below, COLTS believed it may spark public debate and attacked religion.

13. The COLTS advertising policy in place at the time prohibited advertising "that is deemed in COLTS['] sole discretion to be derogatory to any . . . religion," or "that [is] objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS," and further stated 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." June 21, 2011 COLTS Advertising Policy, attached hereto as Exhibit B (emphasis in original). It also prohibited ads for tobacco products, alcohol, and political candidates. *Id.*

14. In response to a media inquiry about the denial of Plaintiff's ad, COLTS' solicitor made a statement to a reporter that "we will not allow our transit vehicles to become a public forum for the debate and discussion of public issues. . . . We don't accept ads promoting any certain religion or religion in general, so we don't want to accept an ad attacking religion." S. Zaimov, *Atheist Group Pleads Freedom of Speech Violations After Rejected Bus Ad*, Christian Post, Mar. 21, 2012, attached hereto as Exhibit C.

15. Another solicitor for COLTS told press that COLTS rejected the ad because statements on the NEPA Freethought Society website led COLTS to believe the ad's purpose

was to promote debate. See David Singleton, *Atheist Group Challenges COLTS Ad Ban*, Times Tribune, Mar. 1, 2012, available at <http://thetimes-tribune.com/news/atheist-group-challenges-colts-ad-ban-1.1279600#axzz1r50ThUmL>.

16. Although COLTS' solicitor told a reporter that COLTS had "been very consistent in not allowing ads that violate the policy," see Ex. C, in fact, prior to rejecting Plaintiff's ad in February 2012, COLTS had accepted numerous advertisements from religious organizations and other ads that it later deemed to violate its policy, including ads from:

- a. St. Mary's Byzantine Catholic Church
- b. St. Matthew's Lutheran Church;
- c. Christian Women's Devotional Alliance;
- d. Hope Church;
- e. a School Board candidate; and
- f. Brewer's Outlet, a beer distributor; and
- g. Old Forge Times, an online blog that contained links to anti-Semitic websites, holocaust denial websites, and white supremacist websites.

17. Moreover, for years prior to NEPA Freethought Society's attempt to advertise, an electric sign on the front of one COLTS bus had displayed the message "God Bless America." COLTS only stopped displaying the message after NEPA Freethought Society attempted to advertise.

18. Thus, all restrictions on advertising and any concerns regarding religious advertisements were ignored until NEPA Freethought Society sought to advertise, and the ad

space on COLTS had been historically available to all speakers. Indeed, for at least a decade before January 2012, COLTS had never rejected *any* advertisement.

19. On August 29, 2013, NEPA Freethought Society again submitted an advertisement for placement on COLTS busses. The ad stated, “Atheists. NEPA Freethought Society. NEPAfreethought.org.” A true and correct copy of that ad is attached hereto as Exhibit D.

20. On September 9, 2013, COLTS rejected the proposed NEPA Freethought Society ad by letter, stating that:

COLTS does not accept advertisements that promote the belief that “there is no God” or advertisements that promote the belief that “there is a God.” As stated in COLTS’ Advertising Policy, it is COLTS’ declared intent not to allow its property to become a public forum for the dissemination, debate, or discussion of public issues. The existence or non-existence of a supreme deity is a public issue. COLTS believes that your proposed advertisement may offend or alienate a segment of its ridership and thus negatively affect its revenue. . . . 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 . . . the existence of God in a confined space like the inside of a bus detracts from this goal.

Letter from G. Wintermantel to J. Vacula (Sept. 9, 2013) (emphasis in original), attached hereto as Exhibit E.

21. On September 17, 2013, just 8 days after COLTS rejected the second NEPA Freethought Society ad, COLTS adopted a new advertising policy (the “2013 Policy”), attached hereto as Exhibit F.

22. Among other things, the 2013 Policy stated that:

COLTS will not accept advertis[ements]:

[...] [t]hat 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 of lack of religious beliefs; or are otherwise religious in nature.

**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.**

COLTS' Advertising Policy is intended to be an objective and enforceable standard for advertising that is consistently applied.

Exhibit F (emphasis in original).

23. Upon information and belief, COLTS has previously run advertisements and messages that it would not allow under the 2013 Policy (as currently applied) without complaint and without experiencing a resulting loss of ridership.

24. While the 2013 Policy purports to be objective and consistently applicable, in reality, COLTS has implemented the policy purportedly designed to prevent controversy and “public debate” in a vague, inconsistent, and discretionary manner.

25. For example, in addition to the rejection of the NEPA Freethought Society ads discussed below, in February 2014, COLTS twice rejected ads submitted by Lutheran Home Care and Hospice, Inc., presumably for containing the word “Lutheran.”

26. On July 21, 2014, NEPA Freethought Society submitted a new ad for consideration under the 2013 Policy. That ad was nearly identical to those previously rejected, stating “Atheists. NEPA Freethought Society. [meetup.com/nepafreethoughtsociety](http://meetup.com/nepafreethoughtsociety).” A true and correct copy of this ad is attached hereto as Exhibit G.

27. That same day, COLTS rejected the revised ad, stating that the advertising space on its busses is a nonpublic forum, and citing the 2013 Policy's prohibition on 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



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.

*See* Letter from G. Wintermantel to J. Vacula (July 21, 2014), attached hereto as Exhibit H.

28. COLTS also cited its intent, expressed in the 2013 Policy, not to allow its vehicles to become a forum for the “dissemination, debate, or discussion of public issues or issues that are political or religious in nature” as another reason it rejected the NEPA Freethought Society ad, stating that the existence of a supreme deity is a public issue. *See id.* COLTS stated that accepting ads “that promote debate over public issues such as . . . the existence of God in a confined space like the inside of a bus detracts from this goal.” *Id.*

29. On or about July 21, 2014, NEPA Freethought Society submitted a new ad for consideration by COLTS. This ad stated only “NEPA Freethought Society. [meetup.com/nepafreethoughtsociety](http://meetup.com/nepafreethoughtsociety),” and did not contain the word “atheist” or any other reference to the group’s purpose or mission. A true and correct copy of this ad is attached hereto as Exhibit I. COLTS accepted this ad for publication on July 21, 2014, and it began to run on a bus in October 2014.

30. Upon information and belief, COLTS has suffered no negative repercussions as a result of running that ad.

31. Although NEPA Freethought Society has run the ad containing only the group’s name and website, and no description of the group’s mission, NEPA Freethought Society still wishes to run one of the previously rejected “atheist” ads, to further its mission of bringing like-minded individuals together for social, educational, and philosophical discussion related to their belief in the nonexistence of god.

32. COLTS' application of its Policy hindered and will continue to hinder NEPA Freethought Society from achieving its goals by preventing it from running any advertisement on COLTS busses in 2012 and 2013 and by forcing NEPA Freethought Society to omit the word "atheist" from any advertisement, rendering the meaning of the advertisement and focus of the group unclear, thus interfering with the organization's efforts to reach its intended audience.

**COUNT I—42 U.S.C. § 1983  
VIOLATION OF FIRST AND FOURTEENTH AMENDMENTS**

33. Plaintiff hereby incorporates each and every allegation in the preceding paragraphs of this Complaint as if set forth in full herein.

34. The purpose of the First Amendment is to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

35. As a government entity, COLTS cannot restrict the content of advertisements on its buses so as to favor purely commercial speech over speech on matters of public concern.

36. COLTS, through its longstanding practice of accepting all advertisements for placement, including advertisements that would violate policies in place at the time they were published, created in its advertising space a designated public forum.

37. As such, COLTS may not restrict speech in that forum absent a compelling government interest.

38. Even if COLTS had maintained its ad space as a nonpublic forum, any restrictions on speech in that nonpublic forum would have to be reasonable and viewpoint and content neutral.

39. COLTS only began enforcing its policies after NEPA Freethought Society attempted to advertise with it. COLTS' decision to begin enforcing its advertising policy as to

all advertisers was motivated by its disagreement with, and distaste for, the viewpoint of one would-be advertiser: NEPA Freethought Society.

40. COLTS' denial of the NEPA Freethought Society ads and enforcement of its policies was neither viewpoint neutral nor reasonable.

41. COLTS' policies are so vague as to prevent clear and consistent application and avoid content-based discrimination.

42. COLTS' refusal under either policy to run the proposed NEPA Freethought Society ad with the word "atheist" on it is an impermissible content- and viewpoint-based restriction on NEPA Freethought Society's rights under the Free Speech Clause of the First Amendment to the United States.

**WHEREFORE**, Plaintiff asks that the Court enter judgment in its favor against Defendant, and award all such relief as is just and proper, including, but not limited to:

- a. A declaration that Defendant's rejection of NEPA Freethought Society's ads as alleged herein violates the Free Speech Clause of the First Amendment to the United States Constitution;
- b. A declaration that Defendant's 2013 Policy violates the First Amendment to the United States Constitution;
- c. An Order permanently enjoining Defendant from enforcing the 2013 Policy;
- d. An award of costs and attorneys' fees;
- e. Any other relief that this Court deems just and proper.

Dated: April 28, 2015

*/s/ Mary Catherine Roper*

Mary Catherine Roper (Pa. I.D. No. 71107)

Molly Tack-Hooper (Pa. I.D. No. 307828)

AMERICAN CIVIL LIBERTIES UNION OF

PENNSYLVANIA

P.O. Box 40008

Philadelphia, PA 19106

mroper@aclupa.org

mtack-hooper@aclupa.org

(215) 592-1513 x 116

Fax: (215) 592-1343

Theresa E. Loscalzo (Pa. I.D. No. 52031)\*

Stephen J. Shapiro (Pa. I.D. No. 83961)\*

Monica Clarke Platt (Pa. I.D. No. 311445)\*

SCHNADER HARRISON SEGAL & LEWIS LLP

1600 Market Street, Suite 3600

Philadelphia, PA 19103-7286

(215) 751-2000

Fax: (215) 751-2205

\*Application seeking special admission pursuant to  
Local Rule 83.8.2.1 will be filed.

*Attorneys for Plaintiff,*

*Northeastern Pennsylvania Freethought Society*