No. 18-2743

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,

Plaintiff-Appellant,

v.

COUNTY OF LACKAWANNA TRANSIT SYSTEM,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
THE HONORABLE MALACHY E. MANNION

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 17 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

Bruce D. Brown
Counsel of Record
Katie Townsend
Caitlin Vogus
Lindsie Trego
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
bbrown@rcfp.org

Additional amici counsel listed in Appendix B

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

Digital First Media, LLC. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Courthouse News Service, Digital First Media, First Amendment Coalition, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, POLITICO LLC, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, Student Press Law Center, and Tully Center for Free Speech. A supplemental statement of identity and interest of *amici* is included below as Appendix A.

Amici are members of the news media or organizations who advocate on behalf of the First Amendment rights of news organizations and journalists. *Amici* file this brief in support of Plaintiff-Appellant Northeastern Pennsylvania Freethought Society ("Appellant") because *amici* have an interest in ensuring that the First Amendment rights of those who advertise on public transit systems—which can and does include members of the news media—are protected. News organizations use advertisements to reach their audiences, both to remind them of the importance of a free press, generally, and to capture the public's attention for specific news outlets or stories. The advertising policy at issue in this case

unconstitutionally bans certain advertisements on the basis that they may be "controversial." This ban affects not only Appellant, but also the news media and the public, which will be less informed if the advertising policy is upheld.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellant consents to the filing of this brief. Counsel for Defendant-Appellee does not oppose the filing of this brief, but reserves the right to oppose any and all arguments raised by this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns a policy of the County of Lackawanna Transit System ("COLTS") that bans certain advertisements on the transit system based on their content (the "COLTS policy").[1] *See* JA at 7–8, 13–14. Appellant filed suit pursuant to 42 U.S.C. § 1983, seeking a declaration that the COLTS policy violates the First Amendment and a permanent injunction prohibiting COLTS from enforcing it. Following a trial, the district court ruled in favor of COLTS, finding that its advertising space is a limited forum and that the COLTS policy—which permits county officials wide latitude to exclude advertisements that they might find controversial—is reasonable, viewpoint neutral, and not unconstitutionally vague. *Id.* at 24, 30, 32, 34.

The district court erred in upholding the COLTS policy. This decision, if affirmed, will impact not only Appellant but also other potential advertisers, including news organizations. Many news organizations seek to engage with readers and viewers through advertisements. Indeed, in the face of increasing anti-press rhetoric by politicians and others, some news outlets have begun ad campaigns emphasizing the importance of a free and independent press. Other

[1] COLTS' first formal advertising policy was adopted in 2011. JA at 11–17. The 2013 COLTS policy replaced the 2011 policy, *id.* at 26, and the district court's decision upholds the constitutionality of the 2013 COLTS policy. *Id.* at 35, 37, 38 (discussing the 2013 COLTS policy).

advertisements by news organizations promote specific stories in order to encourage readers to consume the news. Yet because the news necessarily focuses on political, cultural, religious, and societal issues of the day—topics which may be considered "controversial" by COLTS—these advertisements are at risk of being banned under the COLTS policy.

This Court should reject the district court's conclusion that the COLTS policy is reasonable. The very purpose of the First Amendment is to encourage public discussion and debate about issues of public importance. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Stifling those discussions because of fear that some transit riders may find certain topics "controversial" should not be considered a "reasonable" purpose for restricting speech, as it is contrary to the purpose of the First Amendment. Moreover, the COLTS policy is unreasonable because it is under-inclusive, and it is tantamount to a "heckler's veto," which under the First Amendment cannot serve as the foundation for restrictions on speech.

Finally, the imprecise terms used in COLTS policy vests too much authority in the hands of government officials to determine which ads are forbidden or permitted; the COLTs policy should be struck down as unconstitutionally vague.[2]

[2] *Amici* do not address arguments that the COLTS policy is viewpoint discriminatory or that COLTS' advertising space is a designated public forum,

ARGUMENT

I. The COLTS policy could prohibit advertisements that news organizations increasingly rely on to reach the public.

A. Advertising that promotes press freedom and accountability journalism could be banned under the COLTS policy.

In the last decade, the news media has seen public trust in the news diminish and attacks on the press increase. Jeffrey M. Jones, *U.S. Media Trust Continues to Recover from 2016 Low*, Gallup (Oct. 12, 2018), https://perma.cc/7F23-GVWM (stating that while 68% of American adults in 1972 said they trusted mass media a great deal or a fair amount, in 2016 only 32% said the same, and in 2018 only 45% said the same); *Attacks on the Record: The State of Global Press Freedom, 2017-18*, Freedom House, https://perma.cc/UV9E-QLJD (last visited Dec. 18, 2018) (discussing an increase in criticism of the news media in the United States). At the same time, the circulation of many publications has decreased. *See Newspapers Fact Sheet*, Pew Research Center (June 13, 2018), https://perma.cc/67ND-5L6L (showing that while U.S. daily newspapers had a total weekday circulation of 62.1 million in 1970, they had a total weekday circulation of 30.9 million in 2017). Both of these trends have encouraged news media to use advertisements to impress

---

both of which are fully covered in Appellant's brief. *See* Br. of Appellant at 27–35, 51–60.

upon the public the importance of freedom of the press, counter anti-press sentiment, and increase their readership and viewership.

For example, *The New York Times* aired its first-ever advertisement during the Academy Awards in 2017, heralding the message, "The truth is hard." *See* Ann-Christine Diaz, *'The truth is hard,' says the New York Times' first-ever Oscars ad*, AdAge (Feb. 23, 2017), https://perma.cc/JA4A-BZLL. This advertisement debuted a month-long campaign that included both television and digital ads. *See* Sarah Steimer, *The New York Times 'Truth' Campaign Drives Digital Subscriptions*, American Marketing Association (Sept. 18, 2018), https://perma.cc/2WDA-Y8VT. The purpose of the campaign was to counteract anti-press rhetoric while increasing subscriptions. *Id*.

Soon after *The New York Times* campaign began, *The Wall Street Journal* debuted its own advertising campaign, "The Face of News." Ann-Christine Diaz, *The Wall Street Journal puts a 'Face' on real news* (March 7, 2017), https://perma.cc/JDY6-GWC4. The *Journal*'s chief marketing officer called the campaign "the perfect antidote to 'fake news.'" *Id*.

Yet the COLTS policy could proscribe ad campaigns like those run by *The New York Times* or *Wall Street Journal*. The stated goal of both campaigns is to counteract the anti-press rhetoric that has infected American politics. *See id.*; Steimer, *supra*. This purpose could be considered "political in nature," causing

even a message as innocuous as "The truth is hard" to be swept into the broad categories of speech prohibited by the COLTS policy.

B. The COLTS policy may prohibit advertisements about specific news stories.

News, by definition, reports on political, cultural, and societal issues of the day—the very kinds of issues that can lead to the "heated arguments and debates" that COLTS claims its policy seeks to avoid. *See* Mem. at 28 (filed July 9, 2018), ECF No. 86. These issues, however, are also the most important for the public to understand and discuss, and the most important for the news media to bring to light. By prohibiting advertisements "that address . . . a religion or religions" and those "that are political in nature or contain political messages," the COLTS policy potentially prohibits advertisements about specific news stories.

The news media frequently covers religion and related topics. For example, in 2002, *The Boston Globe*'s Spotlight team reported a series of investigative stories unveiling the decades-long, systemic sexual abuse and assault of children within the Catholic Church in Boston and elsewhere. Matt Carroll, et al., *Church allowed abuse by priest for years*, Boston Globe (Jan. 6, 2002), https://perma.cc/665Y-RNLK. The series earned the *Globe* the 2003 Pulitzer Prize for Public Service Journalism and inspired the Oscar-winning film *Spotlight*. *See 2003 Pulitzer Prizes*, Pulitzer, https://perma.cc/6Q7N-AMSX (last visited Nov. 20, 2018); Spotlight, http://spotlightthefilm.com/about (last visited Nov. 20, 2018).

This summer, *The Philadelphia Enquirer* published a story about data demonstrating an increase in anti-Muslim bullying in Philadelphia schools. Kelly Brennan, *Data show cases of anti-Muslim bullying in schools on the rise*, Philadelphia Enquirer (July 22, 2018), https://perma.cc/9ZL4-B86D. More recently, the *Pittsburgh Post-Gazette* covered the shooting at the Tree of Life Synagogue in Pittsburgh in which eleven people were murdered. *See, e.g.*, *Squirrel Hill Synagogue massacre: Remembering the victims*, Pittsburgh Post-Gazette, https://perma.cc/YYJ6-2PM4 (last visited Nov. 20, 2018). If the *Globe* had sought to advertise its Spotlight series, or the *Post-Gazette* or *Enquirer* their coverage of recent newsworthy events involving religion, these ads would likely have been prohibited under the COLTS policy because they arguably "address . . . a religion or religions." Mem. Op. at 14 (filed July 9, 2018), ECF No. 86.

The potential effect of the district court's ruling on the press, if upheld, is more than hypothetical. In February of 2018, the Southeastern Pennsylvania Transportation Authority ("SEPTA") denied the Center for Investigative Reporting ("CIR") space to advertise its reporting about racial disparities in the home mortgage market, including in Philadelphia, on the interior advertising space of SEPTA buses. *Ctr. for Investigative Reporting v. Se. Pa. Trans. Auth.*, No. CV 18-1839, 2018 WL 6201967, at *2 (E.D. Pa. Nov. 28, 2018). The rejected advertisement featured a comic strip offering statistics about disparities in

mortgage approval rates based on race. *Id.* However, SEPTA rejected the advertisement pursuant to a policy similar to the COLTS policy.[3] *Id.* SEPTA said the ad was an "issue ad" and that "[d]isperate lending is a matter of public debate and litigation." *Id.*

The CIR case demonstrates the heavy burden that policies like the COLTS policy place on news organizations, which often disseminate information about hotly debated topics of the utmost public importance. Controversial topics such as religion and politics are often at the core of press coverage and, thus, news organizations' potential advertisements regarding their work. Affirming the district court's ruling may allow COLTS to prevent the news media from

[3] The SEPTA policy prohibited:

> (a) Advertisements promoting or opposing a political party, or promoting or opposing the election of any candidate or group of candidates for federal, state, judicial or local government offices are prohibited. In addition, advertisements that are *political in nature or contain political messages*, including advertisements involving political or judicial figures and/or 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.
>
> (b) Advertisements expressing or advocating an opinion, position or viewpoint on matters of public debate about economic, political, religious, historical or social issues.

Id. at *2–3 (emphasis added).

advertising on public transit simply because their business is to inform the public of important and sometimes controversial matters of public concern.

II. The COLTS policy is unreasonable and it is tantamount to an unconstitutional heckler's veto.

When restricting speech in a limited public forum, the government must act in a fashion that is both viewpoint-neutral and reasonable in light of the purpose of the forum. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995); *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1886 (2018). COLTS argues that the purpose of its policy is to prevent debate on its transit system, thereby ensuring that the system does not lose riders. *See* Mem. at 14 (filed July 9, 2018), ECF No. 86. But discouraging discussion of matters of public concern is an unreasonable and therefore unconstitutional purpose for restricting private speech in a limited forum designated for revenue generation through advertisements. In addition, the under-inclusiveness of the COLTS policy renders it unreasonable. Finally, by relying on the potential reactions of third parties to justify restricting wide swathes of private speech on matters of public concern, the COLTS policy codifies an unconstitutional heckler's veto.

A. Discouraging debate about controversial issues is not a reasonable basis for restricting advertising on the transit system.

Avoidance of controversy is a constitutionally suspect goal under the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 728 (2012) ("Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."). The very purpose of the First Amendment is to encourage public discussion and debate about issues of public importance—including and especially controversial topics such as religion and politics. *See Sullivan*, 376 U.S. at 269 (describing the First Amendment as a reflection of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"); *see also Alvarez*, 567 U.S. at 728 (reiterating that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market'" (quoting *Abrams v. United States*, 250 U.S. 616, 630–31 (Holmes, J., dissenting) (1919)); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties.").

Stifling such discussion and debate cannot be considered a "reasonable" purpose for restricting speech. The district court concluded that the purpose of the COLTS 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," and tied that purpose "to COLTS' duty to provide safe transportation to its riders." Mem. at 30 (filed July 9, 2018), ECF No. 86. Yet COLTS offered no evidence that advertisements that may stir debate will endanger the safety of its riders, and the district court found none, instead relying on what it deemed "commonsense" to reach this conclusion. *Id.* at 29. While COLTS offered vague testimonial references to "boycotting of bus companies, vandalism of buses, and the initiation of 'a war of words[,]'" *see* JA at 34, such vague concerns do not support the contention that riders will be unsafe. Boycotts, vandalism, and debate do not have the potential to directly cause physical injury to riders. Additionally, even if the concerns did speak to physical safety concerns, it appears COLTS has offered no evidence to support these testimonial assertions. Aside from the unsubstantiated recollections of COLTS' solicitor, *see id.* at 16, and a single 2010 *New York Times* article, Br. of Appellant at 12, there is no indication that issues such as boycotts and vandalism are common responses to controversial transit advertisements. Given the First Amendment's protections for controversial speech and public debate, and the lack of evidence that advertisements prohibited by the COLTS

policy will impede COLTS' ability to either generate revenue or maintain safety, the goal of avoiding controversy cannot be considered reasonable.

B. The COLTS policy is under-inclusive.

A restriction on speech that is under-inclusive—*i.e.*, a policy that bars some speech, yet leaves untouched other speech that is indistinguishable in terms of the policy's purpose—is not reasonable. For example, in *Tucker v. State of California Department of Education*, 97 F.3d 1204 (9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit determined that a policy prohibiting state employees from displaying religious materials outside their offices was an unreasonable restriction on speech within a nonpublic forum, because the policy allowed for other forms of non-religious controversial speech. *Id*. at 1215.

The COLTS policy suffers a similar infirmity. Even controversial issues targeted by the COLTS policy may still be introduced on the transit system by individuals. The COLTS policy does not prevent a bus rider from wearing a religiously themed T-shirt, reading a politically themed book during her ride, or proselytizing or engaging in in-person political advocacy. This under-inclusiveness renders the COLTS policy unreasonable.

C. The COLTS policy is tantamount to a codified heckler's veto.

A heckler's veto occurs when First Amendment-protected speech is restricted or banned because of a feared reaction from third parties. *Startzell v.*

City of Phila., Pa., 533 F.3d 183, 200 (3d Cir. 2008); *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (discussing speech restrictions based upon third-party reaction). The Supreme Court has held that a heckler's veto cannot serve as the foundation for restrictions on speech. *See Forsyth Cty.*, 505 U.S. at 134–35 (finding that speech cannot "be punished or banned, simply because it might offend a hostile mob"); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that "[i]f 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").

The Supreme Court discussed this principle in *Cohen v. California*, determining that California could not prohibit a man from wearing a jacket bearing the phrase "Fuck the Draft" in a Los Angeles courthouse on the basis of its purported offensiveness to the public and possible third-party violence. 403 U.S. 15, 23 (1971). The Court recognized that to proscribe offensive and controversial speech is a "self-defeating proposition that to avoid [third-party] physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." *Id.*

Numerous federal courts of appeals have applied heckler's veto precedent to hold that the First Amendment prohibits restrictions on speech in limited fora

based on potential third-party reactions to that speech. For example, in *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, the United States Court of Appeals for the Seventh Circuit determined that the Chicago Pier could not charge lower facilities rental fees to groups the Pier expected to bring positive publicity to the Pier, as this would be tantamount to a heckler's veto. 150 F.3d 695, 700–01 (7th Cir. 1998); *see also Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 969–70 (9th Cir. 2002) (citing *Cohen* to hold that restrictions on what individuals may wear to court based upon anticipated offensiveness to third-parties, who then may cause a disruption, is an unreasonable purpose for a restriction on speech in a nonpublic forum).

Similarly, in *Robb v. Hungerbeeler*, the United States Court of Appeals for the Eighth Circuit held that the participation by members of the Ku Klux Klan in Missouri's Adopt-a-Highway program—which the Eighth Circuit concluded is a nonpublic forum—could not be restricted based upon a group's history of violence for the purpose of preventing driver "road rage." 370 F.3d 735 (8th Cir. 2004). The program was essentially an advertising program that allowed organizations to clean up trash along portions of highway in exchange for installation of highway-side signs bearing the organizations' names. *Id.* The appeals court determined that "the State's desire to exclude controversial organizations in order to prevent . . .

public backlash . . . is simply not a legitimate governmental interest that would support the enactment of speech-abridging regulations." *Id.*

The COLTS policy seeks to ban even broader categories of speech than the aforementioned cases, based on the fear that they may be controversial in the eyes of some transit riders. This justification for the COLTS policy is contrary to the bedrock principle that avoidance of potential adverse reactions by third parties is not a reasonable or legitimate reason for the government to restrict speech.

III. Policies that seek to avoid controversial speech often suffer imprecision rendering them unconstitutionally vague, and the COLTS policy is no exception.

As recently reaffirmed by the Supreme Court, while restrictions on speech in nonpublic fora need not be narrowly tailored, the government must "articulate some sensible basis for distinguishing what may come in from what may stay out[.]" *Mansky*, 138 S.Ct. at 1888. In *Mansky*, the Supreme Court held that while restrictions on speech in nonpublic or limited fora are not required to be narrowly tailored, restrictions that are so broad as to "carry with [them] '[t]he opportunity for abuse[,]'" *id.* at 1891 (quoting *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987)), cannot be tolerated, even in nonpublic fora.

Mansky concerned a Minnesota statute that proscribed, among other things, the distribution or wearing of a "political" badge, button, or other insignia at a polling place, which the Court concluded was a nonpublic forum. *Id*. at 1883,

1886. Although the Court held that Minnesota could choose to prohibit certain apparel at polling places because of the message it conveys, "so that voters may focus on the important decisions immediately at hand," *id.* at 1888, it nevertheless struck down the statute for failing to adequately define "political." *Id.* at 1891. Even in light of an "Election Day Policy" that provided guidance on the enforcement of the political apparel ban,[4] the Court found that the word "political," can be "expansive," encompassing "anything 'of or relating to government, a government, or the conduct of governmental affairs,' . . . or anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state[.]'" *Id*. at 1888. Accordingly, the Court determined that the statute left too much

[4] The Election Day Policy "specified that examples of apparel falling within the ban 'include, but are not limited to':

> '• Any item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties.
> • Any item including the name of a candidate at any election.
> • Any item in support of or opposition to a ballot question at any election.
> • Issue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons).
> • Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).'

Id. at 1884 (quoting App. to Pet. for Cert. I–1 to I–2).

authority in the hands of individual election judges to determine exactly what apparel was prohibited. *Id*. at 1890–91.

The COLTS policy suffers similar lack of precision. As did the political apparel policy in *Mansky*, the COLTS policy could prohibit advertisements for "the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's," all of which "have stated positions on matters of public concern" *Id.* at 1890; *compare* JA at 19 (stating that the COLTS policy prohibits advertisements "that are political in nature or contain political messages, including . . . advertisements involving . . . political affiliations"); *Ctr. for Investigative Reporting*, 2018 WL 6201967, at *28 (holding that the phrase "political in nature" in SEPTA's advertising policy is unconstitutionally vague) . And it is clear that the COLTS policy is intended to prohibit essentially "anything 'of or relating to government, a government, or the conduct of governmental affairs,' . . . or anything '[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state[.]'" *Mansky*, 138 S.Ct. at 1888; *compare* JA at 19 (stating that the COLTs policy prohibits "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"); *Ctr. for Investigative Reporting*, 2018 WL 6201967, at *28 (holding that the phrase "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" in SEPTA's advertising policy is unconstitutionally vague).

The portion of the COLTS policy that prohibits advertisements that "address, promote, criticize or attack a religion or religions . . ." is just as expansive. It may include anything "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity" and anything "scrupulously and conscientiously faithful[.]" *Religious*, Merriam-Webster, https://www.merriam-webster.com/dictionary/religious (last visited Nov. 20, 2018).

The COLTS policy suffers from the same fatal flaw as the statute found unconstitutional in *Mansky*: its vague language vests too much authority in the hands of individual government officials to determine what ads are political or religious and which ads are not. As the Supreme Court noted in *City of Lakewood v. Plain Dealer Publishing Co.*, the danger of censorship "is at its zenith when the determination of who may speak and who may not [speak] is left to the unbridled discretion of a government official." 486 U.S. 750, 763 (1988). Here, what is considered "political" or "religious" is left to the broad discretion of COLTS officials. Indeed, under some interpretations, the COLTS policy could bar advertisements that state "Read about election results in today's newspaper." *See* Mem. at 14 (filed July 9, 2018), ECF No. 86 (stating that the COLTs policy prohibits advertisements "*involving* political figures or candidates for public

office" (emphasis added)). The COLTs policy should be struck down on the basis that it is unconstitutionally vague alone.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to reverse the district court's decision upholding the constitutionality of the COLTS policy.

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown
Counsel of Record
Katie Townsend
Caitlin Vogus
Lindsie Trego
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

Dated: December 18, 2018
Washington, D.C.

CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,264 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Bruce D. Brown

Bruce D. Brown
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: December 18, 2018
Washington, D.C.

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse

network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

Digital First Media publishes the San Jose Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive

government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a

circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

Additional Counsel:

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

Rachel Matteo-Boehm
Bryan Cave LLP
560 Mission Street, Suite 2500
San Francisco, CA 94105
Counsel for Courthouse News Service

Marshall W. Anstandig
Senior Vice President, General Counsel and Secretary
Digital First Media
4 North 2nd Street, Suite 800
San Jose, CA 95113
manstandig@bayareanewsgroup.com
1-408-920-5784

James Chadwick
Counsel for Digital First Media LLC
Sheppard Mullin Richter & Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901
David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for The Media Institute

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY14202
Counsel for National Press Photographers Association

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

D. Victoria Baranetsky
General Counsel
Reveal from The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on December 18, 2018.

Dated: December 18, 2018

By: */s/ Bruce D. Brown*

Bruce D. Brown
Counsel for Amici Curiae