No. 18-2743

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,

Appellant,

v.

COUNTY OF LACKAWANNA TRANSIT SYSTEM,

Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania,
Civil Docket for Case #: 3:15-cv-0833-MEM
The Honorable Judge Malachy E. Mannion

BRIEF OF AMERICAN ATHEISTS, INC. AND THE CENTER FOR INQUIRY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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December 17, 2018

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CORPORATE DISCLOSURE STATEMENTS

Both American Atheists and the Center for Inquiry are non-profit corporations, and have been granted 501(c)(3) status by the IRS. Neither has a parent company nor have they issued stock.

American Atheists is a national educational, nonpolitical, non-profit corporation with members, offices, and meeting locations nationwide. American Atheists is a membership organization dedicated to advancing and promoting, in all lawful ways, the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists promotes the stimulation and freedom of thought and inquiry regarding religious belief, creeds, dogmas, tenets, rituals, and practices. American Atheists encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

Center for Inquiry is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church

and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

Pursuant to Circuit Rule 29(d), American Atheists and the Center for Inquiry certify that a separate brief is necessary to emphasize the applicability of the Equal Protection Clause to the Appellee's actions. Government acts which may be permissible under other constitutional clauses can nonetheless be invalid under the Equal Protection Clause of the Fourteenth Amendment if undertaken with discriminatory intent. When the government acts with the intent to discriminate against a suspect class, such as religion, its actions should be subjected to strict scrutiny and invalidated if not narrowly tailored and the least restrictive means of achieving a compelling government interest.

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INTERESTS OF AMICI

This *amici curiae* brief in support of neither party is being filed on behalf of American Atheists, Inc. ("American Atheists") and the Center for Inquiry ("CFI").

Amici comprise secular and humanist organizations that advocate on behalf of the separation of religion and government and offer a unique viewpoint concerning government discrimination based on religious classifications. Amici's missions include addressing and preventing discrimination against atheists and all non-theists.

SUMMARY OF THE ARGUMENT

The religious landscape of America is a diverse and rapidly changing one. One quarter of Americans, a population increasing daily, describe themselves as atheist, agnostic, or having no affiliation to any particular religion ("nones"). Yet each day government officials and agencies, like County of Lackawanna Transit System ("COLTS"), take steps to prevent atheists, agnostics, nones and religious minorities from expressing their views. Amici believe that this is not only out of touch with an evolving society, but also unconstitutionally discriminates against minority religions and irreligious Americans.

Although not expressly addressed by the court below, there are significant indications suggesting that COLTS's decision to convert its bus ad program from a designated public forum to a limited public was motivated by an intent to

discriminate against controversial viewpoints regarding religion. If COLTS did act with discriminatory intent, its actions should be subjected to equal protection analysis. Religion constitutes a suspect classification and should therefore be subjected to strict scrutiny, placing the burden on the government to show that its act of converting the bus ad program to a limited public forum was narrowly tailored and the least restrictive means of achieving a compelling government interest.

Because the court below did not do sufficient fact-finding to conclusively show discriminatory intent and applied a reasonableness standard, rather than strict scrutiny, to COLTS' actions, this Court may and should remand this matter to the trial court with instructions to determine whether COLTS acted with discriminatory intent and, if so, whether the decision to convert its bus ad program to a limited public forum survives strict scrutiny.

ARGUMENT

I. Irreligious Americans Constitute a Large and Rapidly Growing Segment of the US Population

The United States of America in 2018 is a very different one in many ways from the America of prior decades. One of the most noticeable and fundamental changes to our society has been the dramatic and rapid growth of religious diversity in the population. We have moved from a nation that was overwhelmingly Christian in the affiliation of its citizens to one where not only have the number of people following different faiths dramatically expanded, but also the number of Americans who express no affiliation to any individual faith has grown at an astonishing rate.

According to all surveys addressing the issue, the latter demographic group, those without any claimed religious affiliation, is expanding at an accelerating rate, especially among younger Americans. The importance of this change cannot be understated. While the Founding Fathers took great pains to ensure that the United States of America was a secular nation, where "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I, the citizenry then, and for many years, was one made up largely of practicing Christians. This is no longer the case. Government is still constitutionally prohibited from advancing or preferencing any particular religion, such as Christianity, or the notion of religion in general over non-religion. But with the spread of religious diversity, and the growth of the number of the religiously

unaffiliated, government at all levels must recognize and account for those of all faiths and those without religious faith of any type.

This growth in religious diversity and the number of religiously unaffiliated can be seen through data provided by opinion polls. In 1948, according to polling by Gallup in the first year such results were recorded, 91% of the population identified as Christian (either Protestant or Roman Catholic) with 4% Jewish and an extremely small number (2%) saying they had no religion. Gallup Religion Poll (yearly aggregates), http://www.gallup.com/poll/1690/religion.aspx (last viewed Dec. 16, 2018). In 1983, the representation of Christians was still dominant, at 84%, with 2% identifying as Jewish, 4% as "other," and 8% identifying with no religion. *Id.* By 2017, the shift was clearer. The proportion of self-identified Christians had fallen to 68% (including Protestants, Roman Catholics, and 10% "Christian (nonspecific)"); Jews made up 2% of the nation; Mormons 2%, "Others" 5%, and 20% claiming no belief. *Id.*

In 2017, fully one in five Americans according to Gallup noted they had no religious beliefs. This number represents a group almost as large as the 21% of the sample who described themselves as Roman Catholic. Other surveys have consistently demonstrated the same shift towards both a greater diversity of religious beliefs, and a dramatically greater percentage of the nation who are without religious affiliation. For example, the American Religious Identification

Survey showed a drop in Americans self-identifying as Christians from 86% in 1990 to 76% in 2008. Barry A. Kosmin & Ariela Keysar, *American Religious Identity Survey* 3 (2009), *available at* http://tinyurl.com/ARISReport (last visited Dec. 16, 2018).

The Pew Research Center performs regular research into the religious affiliation of Americans through its Religious Landscape Study. The most recent results confirm this accelerating trend. In 2012, Pew announced that one in five Americans as a whole, and one in three Americans under 30, did not affiliate with a religion. Pew Research Ctr., *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* (2012), *available at http://www.pewforum.org/2012/10/09/nones-on-the-rise/* (last visited Dec. 16, 2018). This group constituted almost 6% of the public (more than 13 million citizens) that described themselves as atheists or agnostics, and 14% (nearly 33 million) who said "they have no particular religious affiliation." *Id.* The number of unaffiliated had risen by more than five percentage points in the five years since the previous survey. *Id.*

The latest Pew study provides yet more confirmation of this change in society. Christians of all types comprised under 71% of America in the 2014 numbers. Pew Research Ctr., *America's Changing Religious Landscape*, *available at* http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/

(last visited Dec. 16, 2018). Even within this group, diversity rose, with the share of the largest groups, Evangelical Protestants, Roman Catholics, and Mainstream Protestants, falling, and the proportion of "Unaffiliated Christians" increasing. *Id.* The number of non-Christian religious individuals, comprising of Jewish people, Muslims, Buddhists, Hindus, and others, rose by about one quarter to 5.9%. *Id.* Once again, the largest growth was that of the unaffiliated, who rose by more than a third to 22.8%. *Id.* Between 2007 and 2014, the survey showed the number of religiously unaffiliated Americans ballooned from 36.6 million to 55.8 million. *Id.* This community is larger than any faith based community in the United States with the exception of Evangelical Protestants.

All evidence shows this trend continuing. The 2017 American Family Survey, undertaken by Brigham Young University and the Deseret News, identified the proportion of atheists, agnostics, and "nothing in particular" as 33%. Jana Riess, *Religious 'nones' are gaining ground in America, and they're worried about the economy, says new study*, Religion News Service (Nov. 16, 2017), https://religionnews.com/2017/11/16/religious-nones-are-gaining-ground-in-america-and-theyre-worried-about-the-economy-says-new-study/ (last visited Dec. 16, 2018). This survey found the "nones" to be the largest single group. *Id.*

Even these rapidly growing numbers, and in particular the percentage of atheists within the "nones" group, may understate America's move away from

religion. Research has indicated that "social pressures favoring religiosity, coupled with stigma against religious disbelief…, might cause people who privately disbelieve in God to nonetheless self-present as believers, even in anonymous questionnaires." Michael Shermer, *The Number of Americans with No Religious Affiliation Is Rising*, Scientific American (Apr. 1, 2018), https://www.scientificamerican.com/article/the-number-of-americans-with-no-religious-affiliation-is-rising/ (last visited Dec. 16, 2018). This research estimated the number of atheists in America at 26%, or over 64 million. *Id.*

The breakdown of the "nones" into individual categories of atheist, agnostic, and unaffiliated, and the cross over between these groups, however, is not the central issue. NEPA Freethought Society covers them all. It describes itself as "a social, educational, activist, and philosophical coalition of atheists, agnostics, humanists, secularists, and skeptics." Meetup, *NEPA Freethought Society*, https://www.meetup.com/NEPAFreethoughtSociety/ (last visited Dec. 16, 2018).

It is a fundamental bedrock constitutional principle that the Establishment Clause "mandates government neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Ark.*, 393 U.S. 97, 104 (1968). Federal courts at all levels have recognized this. A state may not require a person to profess religious belief to become a notary public. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). If the government permits exemptions from military service on

grounds of religious belief, it must also permit equivalent non-religious belief holders to be exempted from conscription, *Welsh v. U.S.*, 398 U.S. 333, 339 (1970). If the law allows religious ministers to solemnize weddings, it cannot exclude similarly trained secular celebrants from doing so without violating the Establishment Clause. *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873 (7th Cir. 2014). Discrimination against atheists, agnostics, secular humanists, freethinkers, or any of the "nones" violates the First Amendment.

Often overlooked, however, is the fact that *intentional* discrimination in favor of Protestantism over Catholicism, Christianity over Islam, religion over irreligion, or mainstream religious beliefs over controversial religious beliefs also runs afoul of the Equal Protection Clause of the Fourteenth Amendment.

II. Government Actions that Intentionally Discriminate Along Religious Lines Are Subject to Strict Scrutiny.

As the population of atheists and religious "nones" has grown, and grown more active in public discourse, a trend has developed among government agencies and officials to close or otherwise restrict access to previously available public forums after atheists seek to use such forums to express their viewpoints. Tory Cooney, *Belle Plaine eliminates free speech zone*, Shakopee Valley News (July 17, 2017), https://www.swnewsmedia.com/shakopee_valley_news/news/belle-plaine-eliminates-free-speech-zone/article_683eda20-babf-5b14-8b36-

87bab1f25e56.html. These actions violate the Equal Protection Clause of the Fourteenth Amendment.

Amici do not dispute that a state actor, having created a designated or limited public forum, retains the authority to alter the terms of access to such forums, or close them entirely. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974). This authority, though, is far from absolute. *Lehman*, 418 U.S. at 303 ("[T]he policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious."); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 551 (2011). The Free Speech Clause of the First Amendment, of course, prohibits the government from imposing on public forums new restrictions that discriminate between speakers on the basis of viewpoint. *Perry Educ. Ass'n*, 460 U.S. at 46. However, it is a necessary prerequisite to any otherwise-valid government action that the discriminatory effect played no "causal role" in the decision. *Doe*, 665 F.3d at 551. The Equal Protection Clause of the Fourteenth Amendment prohibits the government from imposing even viewpoint-neutral restrictions if it is doing so in order to disadvantage an individual or group on the basis of race, nationality, or religion. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Doe.*, 665 F.3d at 551.

If the County of Lackawanna Transit System (COLTS) acted with discriminatory intent when it restricted access to its bus ad program in 2011, it violated the Equal Protection Clause of the Fourteenth Amendment. A religiously neutral policy "purposefully 'designed to impose different burdens' on [minority religious viewpoints] and that (even if applied evenhandedly) does in fact have the intended adverse effect" implicates Equal Protection Clause concerns. *Hassan v. City of New York*, 804 F.3d 277, 294 (3d Cir. 2015) (quoting 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 18.4 (10th ed. 2012)). Government policies that draw classifications "upon inherently suspect distinctions such as race, religion, or alienage must meet the strict scrutiny standard, under which a law must be narrowly tailored to further a compelling government interest," *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013) (citing *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992)) (alteration and internal quotation marks omitted); *but see Hassan*, 804 F.3d at 298-99, and be the least restrictive means of achieving that interest. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *see also Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 2231 (2015) (striking down a content-based restriction on signage which the government attempted to justify by citing an interest in traffic safety).

Although the court below did not directly address the question, the trial court's findings of fact strongly suggest that COLTS acted with the intent to discriminate against advertisers professing minority-religious (or irreligious) viewpoints when it decided to begin imposing restrictions on advertisements appearing on its busses. COLTS' decision should therefore be subjected to strict scrutiny. The policy COLTS implemented in 2011 (the 2011 Policy) was not narrowly tailored to achieve a compelling government interest, nor was it the least restrictive means of pursuing that interest. The subsequent adjustment of that policy in 2013 (the 2013 Policy), had it stood alone and been enacted without discriminatory intent, may have survived equal protection analysis if properly administered. In light of the context in which it was adopted, however, the 2013 Policy in fact provides additional evidence that the decision was made with discriminatory intent.

a. It is likely that COLTS acted with discriminatory intent when it imposed new restrictions on its bus ad program.

The facts in the trial record come close to establishing that COLTS intended to discriminate against minority-religious and irreligious viewpoints when it restricted access to its bus ad program. A governmental act that, on its face, is religiously neutral could nonetheless constitute intentional discrimination if it is "purposefully designed" to subject a given religious group to different treatment. *Hassan*, 804 F.3d at 294. The burden is on the plaintiff to show that religion was a

"substantial factor in that different treatment." *Id*. Proving intentional discrimination can be a significant challenge. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the dominant or primary one." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Thus, the inquiry "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.

As it happens, the court below already came very close to establishing COLTS' discriminatory intent in its findings of fact. Prior to instituting the 2011 Policy, COLTS' busses were adorned with "many religious . . . advertisements." *Northeastern Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 327 F. Supp. 3d 767, 772 (M.D. Pa. 2018). However, "[i]n response to the proposed 'Judgment Day' advertisement, Ms. Wintermantel determined that COLTS should set forth an advertising policy defining/clarifying the types of advertisements COLTS would and would not display. . . ." *Id.* Thus, it appears that COLTS' administrators likely adopted the 2011 Policy in order to justify the exclusion of a religious ad that "could be controversial due to its religious nature." *Id.* Religious advertisers that COLTS' administrators did not deem controversial had been receiving the benefit of COLTS' bus ad program for at least eight years (and

perhaps as many as 19 years) by the time the "Judgment Day" ad was submitted for display. *Id.*

COLTS' adoption of the 2013 Policy provides further support for the conclusion that COLTS acted with the intent to discriminate against religious views that are outside what its administrators considered the mainstream. In its findings of fact, the court below concluded that "[t]he 2013 Policy was written to '*clarify*' the 2011 Policy as COLTS understood it and to *more clearly 'set forth* the types of advertisements it will and will not accept.'" *Id.* at 774-75 (emphasis added). In other words, the 2013 Policy was not a change in policy, but rather an attempt to more clearly state the policy put in place in 2011. The 2013 Policy explicitly stated that COLTS would not "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." *Id.* at 776. To that end, the 2013 Policy 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 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." In short, it appears likely from the record that COLTS' administrators chose to exclude all religious points of view in order to avoid providing ad space to a point of view with which they disagreed.

Id. at 775-76.

Finally, the criteria used to implement the new restrictions on the former designated public forum were entirely arbitrary, consisting of a list of keywords that COLTS' administrators decided were associated with religion, *Id.* at 774, leading to absurd results, such as an ad containing the word "freethought" being permitted but an ad containing the word "atheist" being excluded, *Id.* at 776, despite the fact that those terms are often used interchangeably within the context of religious discussion. Susan Jacoby, *Freethinkers: A History of American Secularism*, 2004; *About*, The Freethinker https://www.patheos.com/blogs /thefreethinker/about/ (last accessed Dec. 17, 2018). Based on the record in this case, COLTS made no effort whatsoever to tailor the restrictive measures it chose to impose, let alone attempt to narrowly tailor those measures to achieve public safety.

Thus, it appears likely from the trial court's findings of fact that, in response to one advertiser's attempt to run an ad professing a controversial religious belief ("Judgment Day is Coming in May"), COLTS implemented a policy to exclude that advertiser, as well as all subsequent religious and irreligious advertisers, from a program in which other religious advertisers had previously participated without

incident.[1] By imposing new restricts on its bus ad program, COLTS succeeded in denying the "Judgment Day" advertiser access to a government program from which mainstream religious advertisers had been freely benefiting for at least eight years.[2]

[1] Amici are not objecting to the 2013 Policy on its face. Rather, it is COLTS' discriminatory intent in adopting both the 2011 and 2013 Policies that must doom them. COLTS elected to exclude all religious and irreligious advertisers rather than face the prospect of running an ad espousing what it deemed to be a "controversial" religious view.

[2] That the decision ultimately resulted in COLTS blocking all subsequent ads by religious advertisers who had previously participated in the program is not relevant to the specific inquiry into whether COLTS acted with the intent to discriminate between religious viewpoints. Likewise, COLTS' stated motive of maintaining "the safety of passengers and drivers," *Northeastern Pa. Freethought Soc'y*, 327 F. Supp. 3d at 772, is irrelevant to the intentional discrimination inquiry. These facts will be relevant to the trial court's strict scrutiny analysis, should it conclude that intentional discrimination in fact occurred.

b. If COLTS intended to discriminate against controversial religious topics, the decision should be subject to strict scrutiny.

This court has acknowledged that state actions that draw classifications "upon inherently suspect distinctions such as . . . religion . . . must meet the strict scrutiny standard." *Connelly*, 706 F.3d at 213; *see also New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). However, this statement was dicta and this Court's decision in *Hassan*, delivered two years after *Connelly*, created some minor confusion on this point. In *Hassan*, this Court confirmed that religiously discriminatory state actions are subject to "heightened equal-protection review" but declined to state a position on the proper, heightened standard. 804 F.3d at 801. Amici contend that strict scrutiny should apply to instances of intentional religious discrimination, as this Court stated in *Connelly*. 706 F.3d at 213.

From the moment the court first contemplated strict scrutiny, it was assumed that government actions "directed at particular religious . . . minorities" would trigger such review because such classifications implicate "prejudice against discrete and insular minorities . . ., which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect [them]." *Carolene Products Co.*, 304 U.S. at 152 n.4; *see also Dukes*, 427 U.S. at 303. Strict scrutiny applies to government acts that discriminate on the basis of suspect classifications while only intermediate scrutiny is warranted where the act discriminates on the basis of quasi-suspect classifications. *Hassan*, 804 F.3d at 299-300.

That government discrimination along religious lines should be subject to the same searching judicial inquiry as discrimination on the basis of race, nationality, and alienage is well-supported. Distinctions drawn on the basis of race, nationality, and alienage have warranted strict scrutiny because these classifications are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), superseded by statute on other grounds, Fair Housing Amendments Act of 1988, Pub. L. 100–430, §§ 5, 6(a)–(b)(2), 102 Stat. 1619-22 (1988). Classes that have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" bear the "traditional indicia of suspectness" that warrant the application of strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

An individual's particular views and beliefs regarding religion, like other suspect classifications, will rarely, if ever, be relevant to the achievement of any legitimate state interest. Religious minorities, particularly atheists and other "nones," have long been disadvantaged and subjected to unequal treatment, of both

a *de facto* and *de jure* nature. For the last 181 years, Congress has had rules in place that prohibit religious headwear required to worn by Jews, Muslims, and Sikhs from being worn in the House chamber. Katherine Tully-McManus, *After 181 Years of No Hats in Congress, Dems Eye Exception for Religious Garb*, Roll Call (Nov. 16, 2018), https://www.rollcall.com/news/politics/hats-congress-religious-garb-exception (last visited Dec. 17, 2018). On January 10, 2017, in response to questioning from Sen. Sheldon Whitehouse (D-RI), then-Senator Jefferson Sessions (R-AL), who had been nominated for the position of Attorney General of the United States, stated that he was "not sure" whether "a secular person has just as good a claim to understanding the truth as a person who is religious." Attorney General Confirmation Hearing, Day 1 Part 3, C-SPAN (Jan. 10, 2017) https://www.c-span.org/video/?420932-6/attorney-general-confirmation-hearing-day-1-part-3 (last visited December 14, 2018). In 2014, the New Jersey Supreme Court addressed a situation in which, after the conclusion of a civil trial, a juror informed the trial judge, *ex-parte*, "that she was surprised that defendant had not placed his hand on the Bible before he testified." *Davis v. Husain*, 106 A.3d 438, 441 (N.J. 2014). 2012 marked the first year that a majority of Americans would *consider* voting for a well-qualified atheist for president. Paul Fidalgo, *Gallup: Record number of Americans would vote for an atheist president*, CNN (Jun. 25, 2015) https://www.cnn.com/2015/06/25/living/atheist-president-

gallup/index.html (last visited Dec. 17, 2018). Until the Supreme Court handed down its decision in *Torcaso v. Watkins* in 1961, states were permitted to block atheists from holding public office. 367 U.S. 488 (1961). Were it not for the Supreme Court's decision in *Torcaso*, the Constitution of the Commonwealth of Pennsylvania would, *today*, permit laws prohibiting atheists and agnostics from holding public office. Pa. Const. art. I, § 4.

If it is found that COLTS in fact acted with intent to discriminate on a religious basis, the trial court should subject COLTS' actions to strict scrutiny. No substantial judicial energy would need to be devoted to this matter if, upon initially establishing a program in which it would post ads on its busses, COLTS had adopted an explicit policy under which it would accept all proposed advertisements unless and until it received a proposal promoting a fringe religious belief (such as a warning of an impending apocalypse), at which point it would close the program to all controversial advertisements. Such a policy would be blatantly unconstitutional. It would discriminate on the basis of viewpoint, restrict religious advertisers' ability to freely exercise their religion, and intentionally create a discriminatory effect drawn upon an inherently suspect classification. If COLTS instead took the same action, with the same intent, in an ad hoc manner and not pursuant to a previously established policy, it would be a distinction without a difference.

Put simply, it appears that COLTS' administrators, when faced with the possibility of running a religious ad they found objectionable, elected to drastically curtail access to what was previously a designated public forum. This take-my-ball-and-go-home attitude is rejected by children on the playground and should fare no better in a court of law, particularly so when it works to the disadvantage of groups that have historically been marginalized by the law and society.

III. Conclusion

For these reasons, the amici respectfully request that this court remand this matter to the trial court so that it may ascertain whether COLTS acted with the intent to discriminate along religious lines and, if so, whether its actions are permissible under the strict scrutiny standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(1)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(b)(iii), it contains 4,306 words.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule(a)(6) because it has been prepared using 14-point Times New Roman font.

The text of the brief submitted electronically is identical to the text of the hard copies delivered to this Court and a virus check was performed using ClamAV, update 20181217.

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CERTIFICATE OF SERVICE

In accordance with L.A.R. 31.1(d), this brief is being filed electronically via the Court's CM/ECF system on this day, December 17, 2018, and seven hard copies will be hand delivered to the Court within five days. Counsel for the Parties are being served with electronic copies via the Court's CM/ECF system and email as well as one paper copy each by U.S. Certified Mail.

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