

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

<b>PITTSBURGH LEAGUE OF YOUNG</b>	)	
<b>VOTERS EDUCATION FUND and</b>	)	
<b>AMERICAN CIVIL LIBERTIES</b>	)	<b>2:06-cv-1064</b>
<b>FOUNDATION OF PENNSYLVANIA,</b>	)	
<b>Plaintiffs,</b>	)	
<b>v.</b>	)	
	)	
<b>PORT AUTHORITY OF ALLEGHENY</b>	)	
<b>COUNTY and ANTHONY J. HICKTON</b>	)	
<b>Director of Sales,</b>	)	
<b>Defendants.</b>	)	

**OPINION AND ORDER OF COURT**

August 14, 2008

Pending before the Court are the parties' cross-motions for summary judgment: MOTION FOR SUMMARY JUDGMENT filed by defendant Port Authority of Allegheny County (Document No. 48); MOTION FOR SUMMARY JUDGMENT filed by defendant Anthony J. Hickton (Document No. 50); and the MOTION FOR PARTIAL SUMMARY JUDGMENT filed by plaintiffs Pittsburgh League of Young Voters Education Fund and American Civil Liberties Foundation of Pennsylvania (Document No. 55). The Motions for Summary Judgment have been thoroughly briefed (Document Nos. 49, 51, 67, 68, 69, 70) and are ripe for disposition. The Motion for Partial Summary Judgment has also been thoroughly briefed (Document Nos. 61, 62, 72, 74) and is ripe for disposition.

The factual record has also been thoroughly developed via the DEFENDANTS JOINT CONCISE STATEMENT OF FACTS (Document No. 52), PLAINTIFFS' POSITION WITH RESPECT TO DEFENDANTS' UNDISPUTED FACTS (Document No. 65), PLAINTIFFS' CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (Document No. 60), and the ANSWER TO PLAINTIFFS' CONCISE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (Document No. 63), as well as the numerous exhibits submitted by both parties.

After an indepth consideration of the motions, the filings in support and opposition thereto, the briefs of the parties, the relevant case law, and the record as a whole, the Court finds that there is sufficient record evidence upon which a reasonable fact-finder could return a verdict for plaintiffs on their claims of viewpoint discrimination. Accordingly, the defendants' motions for summary judgment will be denied in part and granted in part. The Court also finds that the plaintiffs' claims for viewpoint discrimination cannot be resolved on summary judgment because of the existence of genuine issues of material fact. Accordingly, the plaintiffs' motion for partial summary judgment will be denied.

### **PROCEDURAL BACKGROUND**

Plaintiffs, Pittsburgh League of Young Voters Education Fund ("Fund") and American Civil Liberties Foundation of Pennsylvania ("ACLU"), brought this lawsuit on December 8, 2006 by filing an amended complaint pursuant to 42 U.S. C. § 1983 alleging that defendants violated their rights under the First and Fourteenth Amendments to the United States Constitution by refusing to accept and display their proposed ex-offender voter-education advertisements.

Plaintiffs have filed the instant motion for partial summary judgment in which they contend that they are entitled to judgment as a matter of law on the issue of the defendants' liability because 1) Port Authority designated its bus-advertising space as a public forum, 2) Port Authority acted unreasonably and committed viewpoint discrimination by refusing to run their advertisements despite having run similar advertisements in the past, and 3) Port Authority's advertising policy is unconstitutionally vague.

Defendant Port Authority of Allegheny County ("Port Authority") has filed the instant motion for summary judgment in which it contends that it is entitled to judgment as a matter of law because 1) the advertising space on Port Authority's vehicles constitutes a non-public forum and Port Authority reasonably exercised its right to restrict political and non-commercial advertisements on its vehicles and 2) Port Authority's rejection of the advertisements was viewpoint neutral because it did not accept advertisements with contrary viewpoints.

Finally, Defendant Anthony J. Hickton ("Hickton") has filed a motion for summary judgment in which he contends that he is entitled to judgment as a matter of law for the reasons that Port Authority asserts and because he is entitled to qualified immunity since a reasonable person would not have known that rejecting the advertisements clearly violated established First Amendment law.

## FACTUAL BACKGROUND

### *The Advertising Policy*

Port Authority is a state government agency that owns and operates the public mass transportation system in Allegheny County, Pennsylvania, including buses and light rail vehicles. As part of its services, Port Authority maintains advertising space on its vehicles and property. The advertising space includes spaces for cards called “interior bus cards” above the seats and along the internal side of buses. Port Authority has space for approximately 16,000 interior bus cards, but less than 20% of the available spaces are typically in use at any given time.

During the relevant period, Port Authority had a formal Advertising Policy in place, which has been in effect since March 27, 1998. The Policy was prepared by outside legal counsel and adopted by the Port Authority Board of Directors. The Policy provides:

It shall be the policy of Port Authority of Allegheny County to accept commercial advertising for posting in and on Port Authority vehicles and other property owned or controlled by Port Authority, of its sole choosing, with the objective of maximizing revenue while maintaining standards of decency and good taste without infringing on First Amendment rights of Prospective Advertisers. Accordingly, Port Authority will not accept advertisements that are obscene, unlawful, misleading, libelous or fraudulent. Further, Port Authority will not accept advertisements that are non-commercial; that appeal to prurient interests, that are or may be offensive to riders; that glamorize or otherwise promote violence, sexual conduct, alcohol, or tobacco use; that are political in nature or contain political messages; or that are reasonably determined not to be in good taste. This policy is intended to be an objective and enforceable standard for advertising that is consistently applied. It is also Port Authority’s declared intent not to allow any of its Transit Vehicles or Property to become a public forum for dissemination, debate or discussion of public issues.

Pl. Appx. 336a. At all times relevant to this case, much of the responsibility for applying the Policy rested with Anthony J. Hickton, who, as Director of Sales, was responsible for supervising the sale of Port Authority advertising space. He held that position from July 2004 until he retired on March 1, 2007. As Director, Hickton had the authority to approve or disapprove the sale of proposed advertisements on Port Authority vehicles. Hickton testified that his approval was necessary for all sales of interior bus cards, unless

they were co-sponsored by Port Authority.<sup>1</sup>

Hickton was not a lawyer nor did he have any type of formal legal training. He did not attend any training seminars related to the application of the Policy, Pl. Appx. 39a, nor did he have the benefit of any additional written definitions of any of the Policy's terms in any document adopted by Port Authority's Board of Directors. When Hickton initially became the Director of Sales, however, he discussed the policy with the then in-house legal counsel of Port Authority. The in-house counsel informed Hickton that an advertisement was "commercial" "[i]f there was something for sale, a price of admission or goods were being exchanged." Pl. Appx. 35a. Hickton testified that he applied that definition during his tenure as Director of Sales and had no reason to believe that the definition had changed. Pl. Appx. 36a.

When Hickton was presented with an advertisement, he would initially apply his own judgment to determine whether it satisfied the terms of the Advertising Policy. Pl. Appx. 45a, 50a. If he did not have any questions as to whether the advertisement satisfied the Policy, he had the authority to independently authorize or reject it. Pl. Appx. 37a, 132a. If Hickton had questions about an advertisement he could bring the matter to the attention of Port Authority's in-house counsel, Senior Staff Attorney Christopher J. Hess ("Hess"), who is now assistant general manager for legal and corporate services. Hess provided guidance to Hickton about the interpretation of a commercial advertisement on a number of occasions. Hickton has also sometimes encouraged prospective advertisers with questions about the interpretation of the Policy to contact Hess.

Hess testified that the term "commercial advertising" as used in the Policy was defined as "any form of advertising which either has an explicit commercial purpose or which involves the provision of a good [or] service, some form of compensation in exchange for you taking some action to receive that good [or] service or some other form of compensation, direct or indirect." Pl. Appx. 131a. He stated that he spoke to Hickton about his interpretation and required him to follow it as substantially as possible. In addition, Hess prepared a 12-page legal memorandum, dated August 15, 2005, in which he analyzed whether Port Authority could accept advertisements from government agencies without having to open its advertising space to private citizens with similar

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<sup>1</sup> Defendants allege that Hickton's approval was not required for advertisements co-sponsored by Port Authority or "a government entity." Ans. to Pl. Stmt. of Facts ¶ 31. Hickton's statements, however, only refer to advertisements co-sponsored by Port Authority.

messages. Hess concluded that Port Authority could accept advertisements about the availability of government agencies' services or programs without opening up the advertising space, regardless of whether the advertisements were commercial or non-commercial in character. Hess provided a copy of the memo to Hickton and had a number of discussions with him about the substance of the memo.

Both Hickton and Hess claim that Port Authority routinely rejects advertisements that it believes violate the Policy. Port Authority, however, does not maintain any records or statistics regarding advertisements it has rejected or the basis for those rejections. Pl. Supp. Appx. 2b. Hickton asserts that Port Authority refused an advertisement from an organization named Jews for Jesus because it was non-commercial and rejected an advertisement from a candidate seeking election to Allegheny County Council because it was political in nature. Def. Appx. Ex. G.

#### *The Ex-Offender Voting Rights Advertisements*

Plaintiff Pittsburgh League of Young Voters Education Fund is the local affiliate of the national League of Young Voters Education Fund, a 501(c)(3) organization. The Fund engages in non-partisan community and civic education and voter registration and conducts numerous educational workshops for students in local high schools. It also attempts to educate people about the ways in which they can become more engaged in the political process. Plaintiff American Civil Liberties Foundation of Pennsylvania is a 501(c)(3) organization that engages in litigation, public education around voter and other civil liberties issues, and membership drives.

In late 2005, the Fund and the ACLU entered into a coalition with other organizations to undertake a project designed to inform the community that convicted felons, or "ex-offenders," have the right to vote in Pennsylvania upon their release from prison.<sup>2</sup> After members of the coalition determined that bus advertisements would be a good medium to reach ex-offenders and their families in Allegheny County, the ACLU applied for and received a grant on behalf of the coalition to pay for advertisements on Port Authority buses.

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<sup>2</sup> The parties dispute the full purpose of the program and the substance of the advertisements that the plaintiffs desired to run. Both parties agree that one of the purposes was to educate the community about ex-offender voting rights in Pennsylvania. Defendants argue that the program and the plaintiffs proposed advertisements were also designed to encourage ex-offenders to exercise their right to vote.

In late 2005, Lisa Krebs, who was employed by the ACLU as a community education organizer, contacted Hickton to inquire about placing paid advertisements related to their ex-offender voter-education advertisements on Port Authority buses. Hickton informed her verbally that Port Authority would not run the advertisements. Khari Mosley, who was the Fund's state director, also communicated with Hickton about the advertisements and was advised that Port Authority would not accept them. Hickton testified that he declined the advertisements because they were both non-commercial and political in nature.<sup>3</sup> Pl. Appx. 87a. Liza Krebs testified, however, that Hickton informed her that he could not run the advertisement because Port Authority only runs commercial advertising, Pl. Appx. 102a, and Khari Mosley testified that Hickton referenced the Policy's commercial versus non-commercial distinction in rejecting the advertisement.

On February 24, 2006, representatives of the ACLU sent a letter to Port Authority's Chief Executive Officer requesting that Port Authority reconsider its position and permit representatives of the coalition to purchase "public-service advertising of its campaign to educate voters regarding their voting rights on PAT buses." Def. Opp. Appx. Ex. J at 1. Hess then sent a reply letter to the ACLU's legal director, dated March 24, 2006, explaining Port Authority's refusal to place the advertisements. *Id.* at 3-4 Hess stated that

you are aware that Port Authority's Advertising Policy prohibits advertisements that are non-commercial. . . .

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<sup>3</sup> In his testimony on this aspect, Hickton referred to "the ad." In their briefs and other materials, defendants also repeatedly refer to "the ex-offender advertisement" or "the advertisement." The plaintiffs' complaint and other materials, on the other hand, refer to Port Authority's refusal to run their "voting rights advertisements" or "voter-education advertisements." The defendants refer to a specific advertisement based on their assertion that the plaintiffs' intended to submit an advertisement identical to a billboard that they ran at a later time. *See infra* p.6. Plaintiffs argue that the billboard is not necessarily identical to any advertisements they would have submitted for approval.

At the time of Hickton's initial rejection of the plaintiffs' proposed advertisement and of Hess's later affirmation of that rejection, however, defendants had not seen any actual draft advertisements. Defendants only knew that plaintiffs desired to run advertisements involving voting rights. Thus, the Court will usually refer to the as-yet-unidentified advertisements that plaintiff would have submitted as the "ex-offender voting rights advertisements."

. . . [T]he purpose of the ACLU's proposed advertising is explicitly non-commercial and is solely directed at education of potential voters. The obvious risk to Port Authority in accepting advertisements such as your own is that Port Authority vehicles could become a public forum and the captive audience of the riding public . . . will be subjected to advertisements that many would find offensive and improper.

Id. at 1-2. Neither Hess, Hickton, nor anyone else at Port Authority received or requested a written draft of the proposed text or graphics of the ex-offender voting rights advertisements before making his decision, but they were informed of the subject matter of the proposed advertisements.

Following Defendant's refusal to run the ex-offender voting rights advertisements, Plaintiffs used the grant money to purchase six billboard advertisements sometime in September and October of 2006. Above the logos of the Fund and the ACLU, the billboard included the text "Vote Nov. 7th. Its Your Right. For your family. For our future. *Questions?* 412-728-2197."

Plaintiffs then filed a complaint which alleged that Port Authority created a designated public forum for advertisements on its buses through its widespread practice of accepting and running non-commercial advertisements. They claim that the refusal of Port Authority and Anthony Hickton to run their ex-offender voting rights advertisements amounted to impermissible content-based discrimination and was not narrowly tailored to promote a compelling government interest. In the alternative, they assert that the defendants' refusal to run the advertisements despite having run similar non-commercial advertisements from other organizations was unreasonable and viewpoint discriminatory. Plaintiffs seek declaratory and injunctive relief and damages for the violation of their rights under the First and Fourteenth Amendments to the U.S. Constitution.

### **STANDARD OF REVIEW**

Rule 56(c) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows:

[Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In interpreting Rule 56(c), the United States Supreme Court has stated:

The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must view the facts in a light most favorable to the non-moving party, and the burden of establishing that no genuine issue of material fact exists rests with the movant. Celotex, 477 U.S. at 323. The "existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against the moving party." Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978) (quoting Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972)). Final credibility determinations on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. Josey v. John R. Hollingsworth Corp., 996 F.2d 632 (3d Cir.1993); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir.1993).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'-that is, pointing out to the District Court-that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party, who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Petruzzi's IGA Supermarkets, 998 F.2d at 1230. When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is "merely colorable" or "not significantly probative," the court may grant summary judgment. Anderson, 477 U.S. at 249-250.

## DISCUSSION

“Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property . . . .” Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799-800 (1985). The Supreme Court has adopted a forum analysis to determine whether a government entity must permit speech on its property whereby “the extent to which the Government can control access depends on the nature of the relevant forum.” Id. at 800. Where “the property in question is either a traditional public forum or a forum designated as public by the government . . . the government’s content-based restrictions on private speech must survive strict scrutiny to pass constitutional muster.” Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority, 148 F.3d 242, 247 (3d Cir. 1998). In a nonpublic forum, however, access “can be restricted as long as the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’” Cornelius, 473 U.S. at 800 (quoting Perry Education Assn. v. Perry Local Educators. Assn., 460 U.S. 37, 46 (1983)).

Plaintiffs claim that Port Authority has created a designated public forum on its buses’ for non-commercial, public issue, or educational advertisements in its advertising space by its widespread practice of running non-commercial advertisements. Defendants respond that Port Authority has consistently applied its Policy to prohibit political and non-commercial advertisements. They argue that all of advertisements that plaintiffs point to as evidence that it has opened its advertising space are either government-sponsored advertisements not subject to the forum analysis or were commercial advertisements that were in conformity with their Policy.

### Government Speech

Before delving into the forum analysis, the Court must address the defendants’ contentions that any advertisements sponsored by Port Authority or another government agency should not factor into the forum analysis because they are government speech. When the government speaks “different principles” apply than those involving government regulation of private speech. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 834 (1995). When the government “is the speaker or when it enlists private entities to convey its own message” it is entitled to make “content-based choices,” id. at 833, and may discriminate based on viewpoint. Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786, 792 (4th Cir. 2004).

The natural first step in a case involving a state's action in refusing or authorizing a particular message is to determine whether the message is government speech or whether it falls "[i]n the realm of private speech or expression [where] government regulation may not favor one speaker over another." Rosenberger, 515 U.S. at 834. If, when authorizing a certain message the state actor adopts it as its own, then it is exercising its authority to "promote its policies and positions either through its own officials or through its agents." Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles, 288 F.3d 610, 617 (4th Cir. 2002).

Here defendants do not apply the government speech doctrine in its usual context by arguing that they were entitled to reject the advertisements because they were government speech. See, e.g., Arizona Life Coalition Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008) (rejecting argument that License Plate Commission was entitled to deny specialty license plate because the messages on specialty license plates were government speech). Instead, defendants seek to limit the scope of their actions that will be considered in determining whether their denial of the advertisements was content or viewpoint-based.

This apparently new use of the doctrine is reasonable in this context. Plaintiffs recognize that the sponsorship of the advertisements "has little relevance to the forum analysis," Pl. Resp. to Def. M.S.J. at 12, if they are Port Authority's speech. Although plaintiffs do not claim that Port Authority violated their constitutional rights by sponsoring other non-commercial advertisements, they claim that the sponsored advertisements show that defendants had a pattern of violating the Policy. But, the sponsorship did not violate the Policy and the Court should not consider it in the forum analysis if it was an exercise of Port Authority's right to "promote particular messages." Griffin v. Department of Veterans Affairs, 274 F.3d 818, 822 (4th Cir. 2001). Thus, the Court will determine whether by sponsoring or co-sponsoring non-commercial advertisements Port Authority adopted them as its own speech. Id. at 963.

#### *The Four-Factor Test*

The Court must determine the proper standard for distinguishing between government and private speech. The government speech doctrine is still in the formative stages. The doctrine had its origin in Rust v. Sullivan in which the Supreme Court upheld a provision allocating funds to doctors for family planning counseling but forbidding them from discussing abortion with the program's patients. 500 U.S. 173 (1991). The Court explained that, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." Id. at 174-75. Although the Court did not rely explicitly on the rationale that the doctors' actions were

government speech, the Court has consistently interpreted Rust on that basis in later cases. Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

Following Rust, the Court discussed the doctrine in dicta in a number of cases, but did not provide a clear standard for determining what constitutes government speech. Wells v. City and County of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001); Sons of Confederate Veterans, Inc., 288 F.3d at 617. To distinguish between government and private speech the Fourth, Eighth, and Tenth Circuits adopted a nonexhaustive four-factor test. See Arizona Life Coalition Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008). The factors are:

(1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Sons of Confederate Veterans, Inc., 288 F.3d at 618 (quoting Wells, 257 F.3d at 1141).

In 2005, after the four-factor test had been developed, the Supreme Court addressed the government speech doctrine in the context of a compelled-subsidy challenge to a federal program. Johanns v. Livestock Marketing Ass’n, 544 U.S. 550, 553 (2005). The program required beef producers to fund generic promotional messages supporting the beef industry through a tax on the sale or importation of cattle. Id. Johanns centered on the government versus private speech distinction because under the First Amendment the government can compel individuals to subsidize government speech, but not private speech. Id. at 559. The Court held that the promotional campaign was government speech even though nongovernmental entities helped to design it because the campaign was “effectively controlled by the Federal Government itself.” Id. at 560.

First, the Court reasoned that the message of the campaign was “established by the Federal Government” because “Congress has directed the implementation of a ‘coordinated program’ of promotion,” and “Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain.” Id. at 560-61. Second, the message was subject to a high degree of governmental control because “the Secretary exercises final approval authority over every word used in the promotional campaign.” Id. at 562. The Court concluded that, “[w]hen . . . the government sets the

overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” Id.

The Supreme Court did not reference the four-factor test used by the Fourth, Eighth, and Tenth Circuits in Johanns. In 2006, the Sixth Circuit concluded that Johanns effectively negated the four-factor test. American Civil Liberties Union of Tennessee v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006). The Bredesen Court relied on Johanns to uphold the Tennessee legislature’s adoption of a law approving the issuance of a “Choose Life” specialty license plate while declining to make available a “Pro-Choice” plate. Id. at 375. The law authorized the issuance of a license plate with a “Choose Life” logo that was to be designed in consultation with a representative of a private organization. Id. at 372. Tennessee retained a veto over the plate design. Id. at 376. The Court held that “Johanns requires the court to conclude that ‘Choose Life’ is Tennessee’s message because the [statute] determines the overarching message and Tennessee approves every word on such plates.” Id. at 375. In reaching its decision, the Court rejected the reasoning of a Fourth Circuit case that invalidated a virtually identical “Choose Life” license plate law while holding that the speech on the plate was a hybrid of government and private speech. Id. at 380 (citing Rose, 361 F.3d 786). The Court rejected the reasoning of Rose in part because it believed that it was “in tension with the intervening case of Johanns” because it relied on the pre-Johanns four-factor test rather than on Johanns’ “authoritative test for determining when speech may be attributed to the government for First Amendment purposes.” Id.

In Arizona Life Coalition Inc. v. Stanton, the Ninth Circuit disagreed with the Bredesen Court’s conclusion that the Johanns test is markedly different from the four-factor test employed by the Fourth Circuit. 515 F.3d 956, 965 (9th Cir. 2008). The Court noted that Johanns is factually distinguishable because it involved the unique compelled-speech context, but said that it could be instructive when determining whether messages disseminated under a specialty license plate statute were government speech. Id. It explained that in Johanns “the Court relied on factors similar to those set forth in the four-factor test,” including “who controlled the speech, the purpose of the program, and the fact that the Secretary of Agriculture exercised final editorial control over the promotional campaign.” Id. (internal citations omitted). The Court decided to “adopt the Fourth Circuit’s four-factor test-supported by the Supreme Court’s decision in Johanns-to determine whether messages conveyed through Arizona’s special organization plate program constitute government or private speech.” Id.

This Court agrees with the Ninth Circuit that the Fourth Circuit’s four-factor test remains viable after Johanns and will adopt it, as informed by Johanns, as a helpful tool

for distinguishing between government and private speech. See also WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave, 512 F. Supp. 2d 424, 433 (S.D. W.Va. 2007) (“The four-factor . . . test is consistent with the Supreme Court's subsequent decision in” Johanns). The Court will apply the test while keeping mind that the four factors are not exhaustive or always applicable. Sons of Confederate Veterans, Inc., 288 F.3d at 619; Musgrave, 512 F. Supp. 2d at 435.

### *The Program*

Before delving into the specifics of the four-factor test, the Court must determine the definition of Port Authority's “program” that is to be analyzed. Under the first factor of the Sons of Confederate Veterans (“SCV”) test the Court examines “the central ‘purpose’ of the program in which the speech in question occurs.” SCV, 288 F.3d at 618 (quoting Wells, 257 F.3d at 1141). In the context of the specialty license plate cases, courts have debated whether the “program” is the particular license plate at issue, the specialty license plate program, or the state's entire license plate program. In Arizona Life Coalition, for example, the Ninth Circuit decided to analyze the purpose of the specialty license plate program rather than Arizona's entire license plate program because the specialty license plate program had a more specific purpose than Arizona's general license plate program. 515 F.3d at 965 (“By allowing organizations to obtain specialty license plates with their logo and motto, Arizona is providing a forum in which philanthropic organizations can exercise their First Amendment rights in the hopes of raising money to support their cause.” (internal citation omitted)). In Bredesen, on the other hand, the majority simply analyzed the specific “Choose Life” specialty license plate at issue. 441 F.3d at 381 (Martin, J., dissenting) (criticizing the majority for examining the specific “Choose Life” license plate rather than the entire specialty license plate program).

Here, a similar question arises as to whether this Court should examine each sponsored advertisement individually or view all of the sponsored advertisements as one program. The most reasonable approach is to divide the advertisements into the three categories or programs adopted by the parties during their briefing and the hearing on the motions: 1) those that were co-sponsored by Port Authority 2); those that were co-sponsored by another state agency; and 3) those that were exclusively sponsored by Port Authority. This division recognizes the unique characteristics of the three categories and is supported by the parties' reliance on these categories. Analyzing each advertisement individually would create a laborious and unworkable test that does not properly recognize the context in which the different categories of advertisements were published. The Court will analyze each of the three ‘programs’ to determine if the messages involved were government speech.

*I. Advertisements Co-sponsored by Port Authority*

Port Authority identifies several advertisements that it claims are government speech by virtue of its co-sponsorship. It identifies advertisements that it co-sponsored with the 1) United Way, 2) Three Rivers Film Festival, 3) Read 365, 4) Carnegie Library, 5) Mentoring Partnership, 6) Center for Hearing & Deaf Services, 7) Attorney General's Office, Project Safe Neighborhood, and 8) an organization which discourages giving money directly to the homeless.<sup>4</sup> The logo of Port Authority was displayed on all the

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<sup>4</sup> 1) The United Way advertisement identified by plaintiffs included a large picture of the city of Pittsburgh with the words "Pittsburgh Matters" and "Support the United Way Impact Fund" overtop. Pl. Appx. 374a. The logos of United Way and Port Authority were displayed on the advertisement.

2) The Three Rivers Film Festival included some artistic graphics surrounding the name of the Festival and a reference to a website and phone number. Pl. Appx. 378a. The Port Authority logo was included in small lettering at the bottom of the advertisement with a number of other apparent sponsors. Id.

3) Plaintiffs provided copies of three different advertisements that Port Authority co-sponsored with Read 365. Pl. Appx. 359a-361a. They each began with large titles, such as "Explore," "Dream," and "Enjoy," and included the slogan "With a child. For a child." Id. The advertisement also provided Read 365's website and included the logos of Read 365 and Port Authority. Id.

4) The Carnegie Library advertisement included the name "Carnegie Library of Pittsburgh" with the title "Woods Run is open!" Pl. Appx. 362a. It included Carnegie Library's website, but did not include the Port Authority logo. Id.

5) The Mentoring Partnership advertisement included a picture of several children and began with a title stating "We're Looking for a Few Good Mentors." Pl. Appx. 358a. It also included a phone number and website, along with the Port Authority logo and a logo for The Mentoring Partnership of Southwestern Pennsylvania. Id.

6) The Center for Hearing & Deaf Services advertisement was a plain advertisement with a title stating "Have your hearing tested. With frequency." Pl. Appx. 363a. It provided a phone number and website for the Center and included its and Port Authority's logo. Id.

advertisements, with the exception of the Carnegie Library advertisement and one other advertisement. It asserts that its logo was inadvertently omitted from the last two advertisements. Plaintiffs have not provided any evidence to suggest that the omission was other than inadvertent, so the Court will view them as co-sponsored.

Port Authority claims that the co-sponsored advertisements are its own speech because 1) it only co-sponsored advertisements that advanced its own interests, 2) it contributed some or all of the space for the advertisements at no charge, and 3) it identified the advertisements as its own speech. Plaintiffs respond that the advertisements were private speech because several of the co-sponsors paid Port Authority to run the advertisements, Port Authority exercised little editorial control over them, the materials for them were supplied by the co-sponsors, and Port Authority's control and responsibility for them were limited by the terms of the contracts with the co-sponsors.

### *I. Central Purpose*

Under the first SCV factor the Court examines the central 'purpose' of the program in which the speech in question occurs. Defendants contend that the co-sponsorship program was designed to promote advertisements that are "beneficial to its own business," Def. Ans. to Pl. Stmt. of Facts. ¶ 144, or, as Hickton testified, "in line with our normal course of business." Pl. Appx. 64a. Plaintiffs assert that Port Authority simply co-sponsors advertisements if it "likes the ad's message and wants to run the ad on the buses". Pl. Memo. in Opp. M.S.J at 15. A review of the evidence suggests that the program was designed to promote messages beneficial to the business of Port Authority while continuing to raise revenue.

Port Authority has provided evidence to show that it co-sponsored at least some of the advertisements because they were beneficial to its business. Hickton testified that Port Authority asked Read 365 to place the Port Authority logo on its advertisement

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7) Hickton testified that Port Authority co-sponsored an advertisement opposed to gun crime with the Attorney General's office, Project Safe Neighborhood because it promoted a nonviolent atmosphere for Port Authority's customers. Def. Appx. Ex. A. 90-92. Hickton stated that he initially denied the advertisement because of its content, even though it was sponsored by the Attorney General's Office. Id.

8) Port Authority states that it sponsored an advertisement which encouraged individuals to give money to charity rather than the homeless. Def. Ans. to Pl. Stmt. Of Facts. ¶ 134.

promoting literacy because he believed it was important for Port Authority customers to be literate so that they could better utilize Port Authority's services by, for example, being able to read the schedules. Pl. Appx. 78a. A similar rationale could support Port Authority's decision to sponsor the Carnegie Library advertisement. Hickton suggested that the Mentoring Partnership's advertisement seeking mentors was in the line of Port Authority's business because it has mentoring programs within its organization. Pl. Appx. 73a. Hickton also testified that Port Authority co-sponsored the advertisement opposed to gun crime because it promoted a nonviolent atmosphere for its customers. Def. Appx. Ex. A. 90-92.<sup>5</sup> Finally, he claimed that the Center for Hearing & Deaf Services' advertisement promoting hearing tests was in its line of business. That advertisement could be beneficial to Port Authority by promoting the safety of its hearing-impaired passengers. Further, by taking the initiative to co-sponsor some of these advertisements at its request, Port Authority may have indicated that it believed the relevant messages were important to its business.

The lack of direction in Port Authority's co-sponsorship program, however, suggests that the running of beneficial advertisements may not be its only purpose. It does not maintain any written standards for determining which non-commercial advertisements it should co-sponsor and appears to leave the decision solely to the discretion of Hickton's superiors. Hickton explained that if a prospective advertiser requested that Port Authority co-sponsor an advertisement that did not fit within Port Authority's Policy he would take it to his superior for a determination whether Port Authority should sponsor it. Pl. Appx. 75a

The evidence suggests that Port Authority was also motivated by the desire to maximize revenue that drove its overall Policy. At the hearing on the summary judgment motions, Port Authority claimed that in every situation in which it co-sponsored an advertisement it provided something to aid the advertiser, such as a discount, running the advertisements for a longer period than usual, or printing some advertisements free of charge. Yet, Hickton testified that Port Authority does "not necessarily" give the original advertiser a break in price when it places its logo on an advertisement. Pl. Appx. 79a. He stated that he believed that Read 365 paid for its co-sponsored advertisement. Pl. Appx. 68a. He also testified that Port Authority sponsored the Mentoring Partnership advertisement "by way of our logo, but we did not absorb the cost of the production or the running of the ad itself." Pl. Appx. 63a-64a.

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<sup>5</sup> It is unclear why defendants do not also include this advertisement under the category of advertisements co-sponsored by other government agencies since it was originally sponsored by the Attorney General's Office, Project Safe Neighborhood.

Port Authority received significant revenue from at least some of the co-sponsored advertisements. In addition to the revenue from the Read 365 advertisements, the Center for Hearing and Deaf Services paid \$13,625 to run its advertisements and the Mentoring Partnership paid \$9,600 for their advertisements. Pl. Supp. Appx. 29-35b. The action of Port Authority in asking advertisers to place its logo on their advertisements could also be interpreted as an attempt to gain revenue from advertisements that it would otherwise have to reject as violating its Advertising Policy.

Thus, the Court concludes that the purpose of Port Authority's co-sponsorship program was to publish messages beneficial to its business while maximizing its advertising revenue. This purpose is suggestive of both government and private speech. Like in Johanns, by seeking only advertisements that were "beneficial to its business," Port Authority set the overall message of its co-sponsorship program, while leaving the details of the message to the co-sponsors who created the advertisements. Johanns, 544 U.S. at 560-61 ("The message set out in the beef promotions is from beginning to end the message established by the Federal Government."). This control over the message involved is suggestive of government speech.

The message here, however, is not as well-defined as that in Johanns. In Johanns, Congress also "specified, in general terms, what the promotional campaigns shall contain," id. at 561, while Port Authority does not have any standards for determining when an advertisement is "beneficial." See also Bredesen, 441 F.3d at 376 ("Tennessee set the overall message and the specific message when it spelled out in the statute that these plates would bear the words 'Choose Life.'"). Moreover, unlike in Johanns, Port Authority has obscured its message by having a revenue raising purpose. Arizona Life Coalition, 515 F.3d at 966 (a "revenue-raising purpose . . . supports a finding of private speech"); WV Ass'n of Club Owners and Fraternal Services, Inc., 512 F. Supp. 2d at 433 (a revenue-production purpose is evidence of the lack of an overarching governmental message). The revenue-raising purpose suggests that Port Authority left the messages of the co-sponsored advertisements up to the individual sponsors.

At the same time, the immediate revenue-producing aim does not dominate over Port Authority's goal of publishing beneficial messages. In Sons of Confederate Veterans, the revenue-raising purpose was the dominant purpose because the specialty licence plate program was designed only to allow messages that would produce a significant amount of revenue and the purchasers paid more than they would for a regular license plate. 288 F.3d at 619. Here, however, the co-sponsored advertisements arguably produced less revenue than non-sponsored advertisements because of the discounts involved.

Thus, the purpose of the co-sponsorship program to both produce immediate revenue and publish messages beneficial to the business of Port Authority is suggestive of both government and private speech.

*ii. Editorial Control*

The second SCV factor involves the degree of “editorial control” exercised by the government or private entities over the content of the speech. Port Authority’s minimal control over the content of the advertisements weighs in favor of a finding of private speech. Port Authority had the authority to reject any advertisement that it believed violated its Policy, required the placement of its logo on the advertisements, and stated that it would not have run the co-sponsored advertisements without its logo on them. But, Port Authority left the creation of the message of the advertisements and the design entirely up to the co-sponsors.

Port Authority essentially possessed only a veto power, but had little editorial control because of its lack of involvement in creating the advertisements’ message. In Knights of Ku Klux Klan v. Curators of University of Missouri, the Eighth Circuit found that a radio station’s control over underwriting acknowledgments suggested private speech where the station exercised control not only over the decision to accept an announcement, but also “over the form and content of the announcements themselves.” Knights of Ku Klux Klan v. Curators of University of Missouri, 203 F.3d 1085, 1094 (8th Cir. 2000). The Court noted that the station’s employees “compose, edit, and review acknowledgment scripts to insure compliance with both FCC and internal guidelines.” Id. Similarly, in Johanns, the Secretary of Agriculture had final approval authority over the promotional materials and exercised it to reject some proposals and rewrite others. 544 U.S. at 561. In addition, “Officials of the Department also attend and participate in the open meetings at which proposals are developed.” Id.

Here, Port Authority only decided to sponsor an advertisement after receiving a specific proposal from a private entity with an idea that originated with the private organization. See Arizona Life Coalition, 515 F.3d at 966 (finding a lack of editorial control where idea of a specialty license plate came from the state). It has not argued, other than the logo placement, that it requested alterations to any of the advertisements or played a role in crafting the message displayed. Port Authority’s lack of control over the substance of the advertisements is evidenced by the Carnegie Library advertisement. Port Authority asked the library to place its logo on the advertisement, but Carnegie mistakenly failed to include the logo and Port Authority ran the advertisement anyway. Pl. Appx. 110a. Thus, Port Authority’s lack of editorial control is suggestive of private speech.

*iii. Literal Speaker*

The third SCV factor involves the identity of the “literal speaker.” This factor may have less importance after Johanns, since, as the Bredesen court noted, “Johanns also says that a government-crafted message is government speech even if the government does not explicitly credit itself as the speaker.” 441 F.3d at 377. However, in Johanns the advertisements could not be specifically attributed to either the government or a particular private party. Johanns, 544 U.S. at 566. The Supreme Court specifically left open the question whether messages that are attributed to private parties can be government speech. Id. at 564-65. Thus, after Johanns the attribution of an advertisement to a private party can suggest that the advertisement is private speech.

This factor is more suggestive of private speech. Port Authority owns the advertising space. See Sons of Confederate Veterans, Inc., 288 F.3d at 621 (“ownership of the means of communication [is] a valid consideration in determining whether [a license plate] contained government speech”). But, the actual advertisements are likely solely owned or at least co-owned by the sponsoring organizations, who in at least some of the cases paid for the advertisements and signed a contract for their display. Although Port Authority and the co-sponsoring organization are identified as the literal speaker on the advertisement, the messages displayed are more closely identified with the organizations that created the original message. The United Way advertisement, for example, asks for donations to the United Way and the Three Rivers Film Festival promotes the Festival itself. Thus, those who view the advertisements are more likely to identify the speech with the sponsors who created the advertisements.

Although this factor has some characteristics of government and private speech, because the private organizations initiate the advertisements, pay for much if not most of them, and are more closely identified with the message, it weighs in favor of a finding of private speech.

*iv. Ultimate Responsibility*

The fourth SCV factor involves whether the government or the private entity bears the “ultimate responsibility” for the content of the speech. This factor is similar to the literal speaker factor. Arizona Life Coalition, 515 F.3d at 967. Both Port Authority and the private organizations bear some of the ultimate responsibility for the advertisement because they are identified as sponsors. The private organizations may bear a greater responsibility since they contracted with Port Authority to run the advertisement and had more control over the message. Arizona Life Coalition, 515 F.3d at 967 (private organization bore the ultimate responsibility for the “Choose Life” license plate where it

“controlled the message” of the plate”). But, Port Authority took on a significant responsibility since the advertisements would not have run without its co-sponsorship. Thus, this factor is suggestive of both government and private speech.

*v. Conclusion*

A review of the referenced factors leads the Court to conclude that the co-sponsored advertisements are best identified as private speech. The first and fourth factors of the test are indeterminate while the second and third factors are suggestive of private. The second and third factors best reflect the reality that Port Authority essentially affixed its logo to advertisements that it had no involvement in creating and that were paid for in significant part by the private organization.<sup>6</sup> Thus, the advertisements co-sponsored by Port Authority are not protected government speech.

*II. Advertisements co-sponsored by other government agencies*

Port Authority also identifies two advertisements that it alleges are government speech because they were co-sponsored by other agencies. The First Advertisement addressed Housing Discrimination and was co-sponsored by the Fair Housing Partnership and the City of Pittsburgh’s Commission on Human Relations. Pl. Appx. 343a. The second advertisement was an advertisement run by Just Harvest which related to information about tax credits and tax counseling. Defendants allege that it was co-sponsored by the Pennsylvania Department of Welfare and a number of other government “partners.” Plaintiffs, however, allege that the government organizations were not co-sponsors and were at the bottom of the advertisement because one of Just Harvest’s

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<sup>6</sup> Even if the co-sponsored advertisements are not private speech, in the very least the analysis of the relevant factors indicates that they are a mixture of government and private speech. See, e.g., Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (“the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two”); Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Dept. of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (“speech in fact can be, at once, that of a private individual and the government”) (Luttig, J., respecting the denial of rehearing en banc). If the advertisements are mixed speech, this Court should still consider them in conducting its analysis since the government is likely prohibited from engaging in viewpoint discrimination in such a situation. See Rose, 361 F.3d at 799; Sons of Confederate Veterans, Inc., 305 F.3d at 247 (Luttig, J., respecting the denial of rehearing en banc).

funding agencies required that its name be included on all publicly disseminated information. We will assume for the purpose of this discussion that the Pennsylvania Department of Welfare co-sponsored the advertisement.

Port Authority argues that these advertisements are government speech because they are co-sponsored by a government agency. This argument suggests that the question before the Court is whether the advertisements can be considered the speech of any government agency, rather than simply whether they are Port Authority's speech. Plaintiffs argue that the advertisements should not be protected under the government speech doctrine because they are not Port Authority's speech since they promote the policies and positions of the governmental agency sponsoring the advertisement. The Court agrees with plaintiffs that the relevant question for the forum analysis is whether the advertisements were Port Authority's speech.

The general inquiry here involves the scope of the actions considered in determining whether the defendants' denial of the ex-offender voting-rights advertisements was content or viewpoint-based. The purpose of the government speech analysis here is to determine whether the sponsored advertisements should not be considered in that inquiry because they are protected as an exercise of Port Authority's right to speak. It is not relevant whether the advertisements were an exercise of another entity's right to speak. To refuse to consider an advertisement sponsored by another agency when reviewing Port Authority's actions would allow Port Authority to shield viewpoint-based decisions by asking another government agency to co-sponsor a message. If Port Authority wishes to disseminate a particular message, it can take the necessary steps to adopt it as its own.

An analysis of the instant subject advertisements referenced above shows that Port Authority did not make them its own. Port Authority has not identified any central purpose to the advertisements and does not exercise editorial control over their content. Port Authority possesses the authority to refuse to publish the advertisements, but, as noted above, that authority is not determinative when it has little control over the advertisements' substance. Port Authority has not suggested that it created, designed, or paid for any portion of the advertisements. The record indicates that the Fair Housing Partnership paid for its advertisement. Port Authority is not identified as a speaker on the advertisements, nor has it provided any basis to suggest that it was a speaker. Finally, it does not appear to bear any responsibility for the advertisements other than placing them on its buses as required by its contracts.

Thus, Port Authority did not adopt the two advertisements as its own government speech.

### *III. Advertisements exclusively sponsored by Port Authority*

Port Authority also identifies two advertisements that it argues are government speech because they were exclusively sponsored by Port Authority. The first advertisement began with a prominent title, stating “She refused to move, and changed the course of history” and included some historical information about Rosa Parks. Pl. Appx. 364a. The second advertisement was a simple advertisement comprised of the language of Section 601 of Title VI of the Civil Rights Act of 1964. Pl. Appx. 365a. The logo of Port Authority was prominently displayed on both advertisements.

These advertisements can only be classified as government speech and are a perfect example of a government entity exercising its right to “speak.” The advertisements were intended to disseminate a message chosen solely by Port Authority. See WV Ass’n of Club Owners and Fraternal Services, Inc., 512 F. Supp. 2d at 435. There is simply no private party involvement in these advertisements. Port Authority financed, created, and maintained the advertisements, determined their message, ran them on its own advertising space, was the only party identified on the advertisements, and was the only party that bore any responsibility for them. Advertisements sponsored exclusively by Port Authority are protected government speech.

### **The Forum Analysis**

The Supreme Court has divided government property into three forums: traditional public forums, designated public forums, and non-public forums. Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority, 148 F.3d 242, 247 (3d Cir. 1998). Traditional forums are places such as streets or parks that “by long tradition or by government fiat have been devoted to assembly and debate.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). Content-based restrictions in traditional forums must survive the strict scrutiny standard.” Christ’s Bride Ministries, Inc., 148 F.3d at 247. A designated public forum, which “consists of public property which the state has opened for use by the public as a place for expressive activity,” is subject to the same restrictions as a traditional public form. Perry Educ. Ass’n, 460 U.S. at 45-46. In a non-public form, on the other hand, “the government’s restrictions need only be viewpoint neutral and ‘reasonable in light of the purpose served by the forum.’” Christ’s Bride Ministries, 148 F.3d at 247 (quoting Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 (1995)). Neither of the parties contend that the advertising space is a traditional public forum, nor can it be considered the type of forum traditionally open to public speech. See Christ’s Bride Ministries, Inc., 148 F.3d at 248. Plaintiff argues that Port Authority created a designated public forum.

Initially, the Court must define the relevant forum. As in Christ's Bride Ministries, plaintiffs here seek access only to advertising space leased by Port Authority on its buses. Id. Thus, the forum at issue is the advertising space on Port Authority's buses. Id.

Whether this forum is a designated public forum depends on Port Authority's intent. New York Magazine, a Div. of Primedia Magazines, Inc. v. Metropolitan Transp. Authority, 136 F.3d 123, 129 (2d Cir. 1998). Port Authority can only create a designated public forum on its buses by "'expressly' dedicating its advertising space to 'speech activity.'" Christ's Bride Ministries, 148 F.3d at 248 (quoting United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (plurality opinion)). It cannot create a "public forum by inaction or by permitting limited discourse." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802 (1985). Thus, the Court asks whether Port Authority "clearly and deliberately opened its advertising space to the public." Christ's Bride Ministries, Inc., 148 F.3d at 248.

To evaluate Port Authority's intent, the Court examines its "policies and practices in using the space and also the nature of the property and its compatibility with expressive activity." Id. at 249. This examination of intent can be broken down into a two-step analysis. United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority ("SORTA"), 163 F.3d 341, 352 (6th Cir. 1998). First, the Court considers the "nature of the restraints on speech" imposed through Port Authority's policy and practice. New York Magazine, 136 F.3d at 129. Second, it considers "whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose." SORTA, 163 F.3d at 352.

In making this determination, the Court is mindful that the mere existence of restrictions on the use of a forum does not mean it is a non-public forum, since a designated forum may be of an unlimited or a limited character. Christ's Bride Ministries, Inc., 148 F.3d at 248. An unlimited forum will be designated "for use by the public at large," while a limited forum will be designated "for use by certain speakers, or for the discussion of certain subjects." Cornelius, 473 U.S. at 803; see also Brody By and Through Sugzdinis v. Spang, 957 F.2d 1108, 1118 (3d Cir. 1992) (restrictions on use can "show that the government has created a 'limited public forum,' a subset type of designated public forum, whose scope is circumscribed either by subject matter or category of speaker"). Where the government creates a designated public forum of a limited character "the first amendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum." Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986).

*I. Port Authority's Policy and Practice*

Port Authority's Policy and practice suggest that it did not intend to create a public forum. In evaluating a government entity's policy, courts have emphasized the importance of clear standards for limiting categories of speech. Essentially limitless policies suggest that a public forum has been created. In Christ's Bride Ministries, the Court concluded that the Southeastern Pennsylvania Transportation Authority's ("SEPTA") written advertising policy was not conclusive of its intent. Id. at 251. The policy had only a few unrelated restrictions on advertising that involved alcohol and tobacco use or that was considered libelous or obscene. Id. Otherwise, SEPTA reserved the right "in its sole discretion to reject or remove any advertisement that it deems objectionable." Id. The Court concluded that SEPTA could not show it intended to close its advertising space by reserving an unlimited right to object to any advertisement while not placing any express limits on the type of speech in question. Id. Similarly, in Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit found that the Chicago Transit Authority created a public forum where the application of its unwritten policy depended on a "series of events that can only be described as whimsical," id. at 1230, and its policy amounted to "no policy at all." Id. at 1233.

Policies that restrict non-commercial speech and, in particular, that ban political speech, indicate an intent to create a non-public forum. In Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), the Ninth Circuit found that an advertising policy supported a finding that bus panels on city buses had not been designated a public forum where it limited advertising to "speech which proposes a commercial transaction." Id. at 974, 978. On the other hand, in New York Magazine, the Court agreed that advertising space on the defendant's buses constituted a public forum because the defendant's policies allowed for both commercial and political speech. 136 F.3d at 130. The Court explained: "Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the [Supreme] Court . . . recognized as inconsistent with sound commercial practice." Id.; see also Lehman v. City of Shaker Heights, 418 U.S. 298, 300 (1974) (where policy allowed commercial and public-service advertising while limiting political advertising the "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").

Thus, Children of the Rosary and New York Magazine indicate that a policy that restricts advertising on buses to commercial advertising and limits political advertising

suggests that the government agency is acting in a proprietary capacity and does not intend to designate the space as a public forum. Christ's Bride Ministries and Planned Parenthood Ass'n/Chicago Area indicate that essentially limitless policies suggest an intent to create a public forum.

Applying these rules, Port Authority's written Policy is more indicative of an intent to maintain a closed forum. Generally, Port Authority's Advertising Policy is to "accept commercial advertising . . . of its sole choosing" for posting on its advertising space. Besides some restrictions relating to "standards of decency and good taste" like those in Christ's Bride Ministries, which are not implicated here, Port Authority's Policy states that it "will not accept advertisements that are non-commercial . . . [and] that are political in nature or contain political messages." Id. The Policy also includes a statement of intent explaining that the "Policy is intended to be an objective and enforceable standard for advertising that is consistently applied. It is also Port Authority's declared intent not to allow any of its Transit Vehicles or Property to become a public forum for dissemination, debate or discussion of public issues." Id.

Port Authority's stated intent to not operate a public forum is not dispositive, SORTA, 163 F.3d at 352, but the Policy does include additional restrictions supporting the statement. Unlike the policy in New York Magazine and like the policy at issue in Children of the Rosary, Port Authority has expressly limited its advertising space to commercial speech and rejected political speech. Although it states that it will only accept commercial advertising "of its sole choosing," that provision reads as granting discretion only to determine which commercial advertisements to accept and appears to have no application to the general prohibition on non-commercial advertising. Thus, Port Authority's written Policy suggests that it was acting in a proprietary capacity and its intent was to maintain its advertising space as a closed non-public forum.

The inquiry into the restraints Port Authority placed on speech in its advertising space is not complete with the examination of its Policy. Christ's Bride Ministries, Inc., 148 F.3d at 249. Port Authority's Policy means little if it was not followed in practice. SORTA, 163 F.3d at 353. The Court must evaluate whether Port Authority followed its Policy in practice.

Defendants argue that they have consistently applied their Policy's prohibition on non-commercial and political advertisements. They assert that their general conduct is consistent with an intent to limit advertising in their space. They also argue that any of the advertisements that plaintiffs identify as violating the Policy are either commercial advertisements or government-sponsored advertisements which they believed they could display without violating the Policy. In the very least, they assert that plaintiffs cannot

identify any advertisements accepted by Port Authority that are of a political nature. Plaintiffs respond that Port Authority's actual practice "has been to accept and run numerous non-commercial, public-service and issue advertisements." *Id.* ¶ 4.

As an initial matter, the Court must resolve the parties' dispute over the proper definition of the term "commercial" in order to determine whether Port Authority applied its Policy. Plaintiffs argue that defendants have exhibited an inability to define the term "commercial" in a consistent manner. They note that Hickton testified that he understood an advertisement to be commercial "[i]f there was something for sale, a price of admission or goods were being exchanged." Pl. Appx. 36a. Hess gave a slightly more nuanced definition, testifying that the term "commercial advertising" as used in the Policy was defined as "any form of advertising which either has an explicit commercial purpose or which involves the provision of a good [or] service, some form of compensation in exchange for you taking some action to receive that good [or] service or some other form of compensation, direct or indirect." Pl. Appx. 131a; *see also* Def. Stmt. Of Facts. ¶ 12. Plaintiffs also argue that the advertisements should be analyzed under the Supreme Court's definition of commercial speech. Defendants in turn contest the plaintiffs' categorization of the Supreme Court standard.

The Court does not need to address the Supreme Court's definition of the term "commercial." The Policy does not rely on that definition, defendants have not suggested that they adopted it, and plaintiffs have not provided a reason why defendants should adopt it. Policy terms are read according to the standard of a person of "ordinary intelligence." *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1330 (Fed. Cir. 2002). In the context of Port Authority's Policy, the common term "commercial" does not require additional definition for its meaning to be understood. *See Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."). The definitions that defendants set forth and that were relied on by Hess and Hickton are reasonable definitions of the term "commercial" and are similar enough that they are not directly contradictory. In examining the practice of Port Authority, the Court need only inquire whether it consistently applied its reasonable definitions of the term commercial.

In addition to the advertisements co-sponsored by Port Authority, Plaintiffs identify a number of advertisements accepted by Port Authority that they contend are non-commercial. A substantial portion of these advertisements satisfy the defendants' reasonable definition of non-commercial. These include advertisements for fairs or other

events<sup>7</sup> and advertisements soliciting attendance at two schools and a summer camp<sup>8</sup> that can be identified as having a commercial purpose. The advertisements soliciting individuals to participate in medical studies can also be considered commercial since they offered either monetary compensation, Pl. Appx. 355a, 366a, or compensation in the form of medical services or products at no cost. Pl. Appx. 356a, 357a. Finally, the advertisements sponsored by the Pittsburgh Downtown Partnership and others encouraging shopping and eating downtown, referencing events and “traditions” downtown, and offering two free hours of wireless downtown can be categorized as having the commercial purpose of stimulating commerce in downtown Pittsburgh.

The parties’ primary dispute over Port Authority’s practice centers around the characterization of four advertisements that were sponsored by the Fair Housing Partnership, Just Harvest, the Women’s Law Project, and Job Corps. Plaintiffs argue that these four advertisements do not meet either the Supreme Court’s or the defendants’ definition of commercial advertisements. Defendants, on the other hand, argue that they are commercial advertisements because they solicit individuals to use a service that will result in some direct or indirect financial benefit to the service provider or is related to the audience’s commercial interests.<sup>9</sup> The first three advertisements are discussed in more detail in the later discussion of viewpoint discrimination. See infra pps. 40-43. Here, it is sufficient to state that the advertisements’ focus on information about individual rights and/or provision of free services suggests that they do not have a commercial purpose and

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<sup>7</sup> These include advertisements for the Washington County Fair, Pressly Ridge, and St. Joan of Arc Festival and an advertisement entitled “2007 Muscle Team” that references “a private event to benefit the Muscular Dystrophy Association,”

<sup>8</sup> The two schools are Carlow College and Renaissance Academy, which is a charter school. Port Authority also accepted two YMCA advertisements soliciting individuals to attend YMCA summer camps and join their gym.

<sup>9</sup> In their Memorandum in Support of their Motion for Summary Judgment and in their Memorandum in Opposition to the Plaintiff’s Motion for Summary Judgment defendants initially relied on the argument that the advertisements promoted services that would lead to a benefit for the advertiser. In their Reply Brief in Support of their Motion for Summary Judgment they suggested an alternate standard that focuses on the benefit to the audience and asserted that the advertisements “promoted services which related to the audience’s commercial interests.” Rep. in Supp. M.S.J. at 3.

are, therefore, non-commercial.<sup>10</sup> Thus, in the least, the commercial nature of these advertisements is a disputed question of fact.<sup>11</sup>

Even if the four advertisements are non-commercial, they are not conclusive proof of Port Authority's intent to create a designated public forum in light of the significant evidence suggesting a contrary intent. Plaintiffs argue that Port Authority created a public forum because it failed to *consistently apply* its Policy. Defendants respond that an inconsistent application of the Policy is insufficient proof of Port Authority's intent to create a public forum. They argue that Port Authority only intended to create a public forum if it consistently granted access to the advertising space "to all advertisers on all issues." Def. S.J.M. Mem. at 6. In essence, they assert that plaintiffs must show that they *consistently violated* their own Policy.

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<sup>10</sup> Job Corps' advertisements included large words such as "SELF" and "EMPLOYED" or "SKILL" and "POSITION" with the Job Corps logo in between and a phone number and website address underneath. The Pittsburgh Job Corps is a training facility that trains young adults in different skills like working and trade skills. Defendants argue that the advertisement is commercial because it solicits individuals to use Job Corps' placement services and serves the audience's interest in obtaining employment. Hickton testified that he believed that Job Corps was compensated based on their enrollment. Def. Opp. Appx. S.M.J. Ex. D. 154-55. Plaintiffs assert that Job Corps is a federal government-run program that provides free job-training services to those who qualify and quotes from a United States Department of Labor website that says Job Corps is "a no-cost education and vocational training program administered by the U.S Department of Labor that helps young people ages 16-24." Pl. Mem. in Opp. to Def. M.S.J. at 6. They argue that the advertisement cannot be commercial because the federal government lacks an economic motivation for the program.

<sup>11</sup> The parties also dispute the proper categorization of an advertisement Port Authority ran from the Alliance for Infants and Toddlers, Inc., a for-profit organization that provides free services to families with low birth weights. The defendants' argument that the advertisement is commercial appears to rely on Hess's statement in his affidavit that it is "my understanding that Alliance for Infants often refers families to health care and other service providers, which providers are paid for their services [and that] Alliance for Infants is funded by federal grants such that, the more families that it services, the more funding it receives." The ad stated "Do you have a child between the ages of birth and 3? Are you concerned about a delay in his or her development? For help call 412-885-6000 Services are provided at no cost to families." Plaintiffs did not discuss in any detail their argument as to why the advertisement is non-commercial.

A consistent practice of applying the Policy to restrict advertisements would be strong evidence of Port Authority's intent to keep the forum closed. Cornelius, 473 U.S. at 802 (government agency did not intend to create public forum where "its consistent policy has been to limit participation" in the forum); see also Lehman, 418 U.S. at 300-301 (City transit system did not create public forum when "during the 26 years of public operation . . . [it] had not accepted or permitted any political or public issue advertising on its vehicles."); Ridley v. Massachusetts Bay Transp. Authority, 390 F.3d 65, 78 (1st Cir. 2004) (Transit Authority did not create a forum where it rejected at least seventeen advertisements that were contrary to the policy and plaintiffs only identified one instance of potentially contradictory enforcement); SORTA, 163 F.3d 341, 353 (6th Cir. 1998) (SORTA's "consistent policy of limiting access to its advertising space to those advertisements that conform to its written policy indicates an intent to follow this policy."). On other hand if Port Authority's consistent practice was to grant access to the forum and violate its Policy, it likely intended to create a designated public forum. See, e.g., Christ's Bride Ministries, 148 F.3d at 252 (SEPTA intended to create a public forum on its advertising space where it had a "practice of permitting virtually unlimited access to the forum.").

But, Port Authority will not be found to have a consistent practice of granting access in opposition to its Policy if it only applies the Policy "imperfectly" and permits "[o]ne or more instances of erratic enforcement," Ridley, 390 F.3d at 78, or grants "selective access for individual speakers." SORTA, 163 F.3d at 350. To create a public forum Port Authority must grant "general access for an entire class of speakers," 163 F.3d at 350 (citing Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) or grant permission to use its advertising space "as a matter of course." Perry Educ. Ass'n, 460 U.S. at 47. It need not grant access to all advertisers on all issues, however, but can create a designated public forum of a limited nature by granting access to a particular category of speakers or a particular subject. Cornelius, 473 U.S. at 802. Thus, to create a public forum, defendants must have granted "general access" to a certain category of speakers or subjects. See Calash v. City of Bridgeport, 788 F.2d at 82. The evidence indicates that Port Authority has not granted such wide access to its advertising space.

Plaintiffs have created an issue of fact as to whether the four contested advertisements are non-commercial. In addition, with the possible exception of the Three Rivers Arts Festival Advertisements, the majority of the co-sponsored advertisements are admittedly non-commercial.<sup>12</sup> Hickton testified that an advertisement sponsored by the

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<sup>12</sup> The co-sponsored advertisements included advertisements sponsored by seven organizations, but involved more than seven advertisements because the relevant agencies

United Way was non-commercial. Pl. Appx. 117a-118a. Defendants also admitted that the advertisements with the Mentoring Partnership, Read 365, the Center for Hearing and Deaf services, and Carnegie library are non-commercial. Ans. Pl. Stmt. Of Facts. ¶ 145-52. The advertisements opposing gun crime and providing money directly to the homeless are also best described as non-commercial.

The government-sponsored advertisements, however, are not strong evidence of an intent to create a public forum. Hess's preparation of the memorandum which concluded that Port Authority could accept government-sponsored advertisements without creating a designated public forum indicates that Port Authority believed that they could publish the advertisements as protected government speech. Moreover, co-sponsorship was not granted as a matter of course, but only where requested by the original sponsor or by Port Authority. Finally, although Port Authority did not have clear standards for granting co-sponsorship, Hickton's superiors had to approve the sponsorship and Hickton testified that Port Authority only co-sponsored advertisements in line with its business.

The four contested advertisements also do not serve as strong evidence of an intent to open the forum because permission to grant the advertisements was not granted as a matter of course. Three of the four contested advertisements were initially rejected by Port Authority: the Fair Housing Partnership advertisement, the Just Harvest advertisement, and the Women's Law Project advertisement. Port Authority initially rejected the Just Harvest advertisement in early 2003 because it viewed it as non-commercial and only accepted the advertisement at a later time. Although it is unclear why Port Authority changed its mind, the earlier rejection suggests that it was attempting to apply its Policy and may have allowed the advertisement based on a new understanding of its content.

The other two advertisements were only accepted after they were changed in some manner at Port Authority's request in order to bring them more in line with the Policy. The Pittsburgh Commission on Human Relations apparently collaborated on the fair housing advertisement with the Fair Housing Partnership because Port Authority initially refused to run its advertisement that announced its housing-discrimination services.<sup>13</sup> Pl.

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may have published more than one advertisement. For example, the record includes three different advertisements from Read 365.

<sup>13</sup> Port Authority asserts that it did not accept the advertisement as government speech since, "[b]ecause the advertisement pre-dated Port Authority's analysis of government speech in the Memorandum in 2005, Port Authority did not appreciate that it could accept the Pittsburgh Commission on Human Relations' advertisement without

Appx. 407a. The Commission's staff informed the Partnership's staff that they were told that "Port Authority required that 'money change hands' to advertise with them." Pl. Appx. 408a. Port Authority only ran the advertisement after the Fair Housing Partnership co-sponsored it. It asserts that it did so because it learned that the Fair Housing Partnership may receive attorneys' fees in exchange for its services. Hickton testified that it was his understanding that the Fair Housing Partnership's goal was to represent individuals who may have been discriminated against in litigation and that the lawyers who handled the cases would be compensated. Pl. Appx. 101a-103a. He believed the advertisement was commercial because it was "basically recruiting people to benefit the attorney's in the end." Pl. Appx. 106a.

Port Authority only ran the Women's Law Project advertisement after it learned more about the services being offered and exercised some editorial control over its content. Hickton initially rejected the advertisement after being informed that the Project sought to advertise free legal services for women because he believed it was non-commercial. A senior staff attorney then contacted Christopher Hess to discuss the matter further. During their discussions Hess was informed that the Project files lawsuits on behalf of people who have their rights violated and may collect attorneys' fees if they are successful in their representation. Pl. Appx. 148b. Hess informed the staff attorney that he would work with the Project to try to put together an advertisement with a commercial purpose that satisfied the Policy. Pl. Appx. 151a. After reviewing a draft advertisement, Hess provided recommendations regarding the wording of the proposed advertisement, including that the Project could not state that it offered "free" services in the advertisement. Port Authority ultimately approved a revised advertisement that both Hess and Hickton found acceptable. Pl. Appx. 158a.

Port Authority also exercised editorial control over the advertisement opposing gun crime sponsored by the Attorney General's Office, Project Safe neighborhood.<sup>14</sup> Port Authority refused to run the advertisement until it co-sponsored it on the basis that it promoted a nonviolent atmosphere for its customers. Even then, Port Authority only ran it after it was altered to address Port Authority's concern with running an advertisement that had a picture of an individual with a gun in his hands. Def. Opp. App. Ex. E. at 89-92.

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creating a designated forum." Rep. Brief. in Supp. of Hickton's M.S.J. at 3 n.1.

<sup>14</sup> It is unclear why Port Authority required co-sponsorship when the advertisement could fall under the government speech exception. Like the fair housing advertisement, the advertisement may have run before Hess prepared his memorandum.

Further, defendants have identified two situations in which they rejected advertisements that were not published: a Jews for Jesus advertisement and an advertisement for a political candidate. Thus, Port Authority has exercised significant editorial control over advertisements on a number of occasions, has denied advertisements on a number of occasions, and only allowed some of the contested advertisements after taking steps to ensure that they satisfied the Policy. Moreover, even if Port Authority allowed some commercial advertisements, plaintiffs have not provided evidence to suggest that Port Authority has ever allowed political advertisements on its buses.<sup>15</sup>

In addition, Defendants adopted a general approach suggesting that they attempted to apply the Policy. Each advertisement was reviewed by Hickton to ensure compliance with the Policy. Hickton would approach Hess with specific legal questions whenever necessary and Hess would discuss the Policy with prospective clients when necessary to ensure that it was properly followed.

Even though the defendants' application of the Policy was arguably flawed on a number of occasions, its actions indicate that it did not grant access to its advertising space to all non-commercial speakers or a specific category of non-commercial speakers or generally grant access to its space as a matter of course. In practice, therefore, Port Authority did not grant the sort of virtually unlimited access seen in other cases where a designated public forum was created. See, e.g., Christ's Bride Ministries, 148 F.3d at 252.

Thus, Port Authority's practice accords with its Policy in suggesting an intent to limit access to its forum.

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<sup>15</sup> At the summary judgment hearing, plaintiffs asserted that an advertisement featuring Allegheny County Chief Executive Dan Onorato that was not included in the summary judgment exhibits was political. Defendants argued that it was not political because it only mentioned Dan Onorato in relation to a hearing involving Port Authority service cuts. They also claimed that it was government speech because the advertisement was run by Port Authority. Even if the advertisement could be categorized as political, this single example does not suggest that Port Authority routinely accepted political advertisements, especially since Port Authority has provided an example of a political advertisement that it rejected.

*ii. Nature of the Forum and Compatibility with Expressive Activity*

The Court next considers whether the limits Port Authority placed on speech on its advertising space are “properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum’s purpose.” SORTA, 163 F.3d at 352.

By co-sponsoring various non-commercial public service type advertisements, Port Authority suggested that its advertising space is suitable for some forms of non-commercial speech. See Christ’s Bride Ministries, 148 F.3d at 252; Planned Parenthood Ass’n/Chicago Area, 767 F.2d at 1232 (“[S]ince CTA already permits its facilities to be used for public-issue and political advertising, it cannot argue that such use is incompatible with the primary use of the facilities.”). Further, unlike a military base or jail, the advertising space is not the sort of forum where “the principal function of the property would be disrupted by expressive activity.” Cornelius, 473 U.S. at 804. Nor has Port Authority provided any evidence to show that the plaintiff’s advertisements would interfere with its provision of transportation services to the public. See Christ’s Bride Ministries, 148 F.3d at 250 (stating that a forum’s revenue-raising purpose was not established where it was used for expressive activity that did not interfere with the provision of services to the public).

Although some forms of non-commercial speech may be compatible with the purpose of the advertising space, the nature of the forum suggests that Port Authority intended to maintain a closed forum. In evaluating the nature of the forum and its effect on Port Authority’s intent, the Court looks to the purpose for which Port Authority used the space in question. Christ’s Bride Ministries, Inc., 148 F.3d at 249. If Port Authority opened its forum for speech in “its ‘proprietary capacity,’ for the purpose of raising revenue or facilitating the conduct of its own internal business” then its advertising space will be considered a non-public forum, whereas if it “acted for the purpose of benefitting the public” its advertising space will be considered a public forum. New York Magazine, 136 F.3d at 129.

In Christ’s Bride Ministries, 148 F.3d at 249, the Third Circuit concluded that SEPTA’s advertising space was at least “partly commercial” because SEPTA sought to earn a profit on its advertising space. Id. at 250. In that case, SEPTA had also accepted advertisements on a broad range of topics, including religious and political messages. Id. at 251. The Court held that, the nature of the forum only suggested, but did not establish that the government had dedicated the space “to expression in the form of paid advertisements.” Id. at 250. The Court explained that the commercial purpose was not determinative because “SEPTA has also used the advertising space to generate a profit through *expressive* activity” that had not interfered with its provision of transportation

services. Id.

Like in Christ's Bride Ministries, Port Authority's advertising space is at least "partly commercial." Its Advertising Policy states that the purpose of its advertising space is "maximizing revenue while maintaining standards of decency and good taste." Further, many of the advertisements run by Port Authority are paid non-commercial advertisements and even the organizations that co-sponsor advertisements with Port Authority often pay for their advertisements. At the same time, like in Christ's Bride Ministries, the commercial nature of the forum is not conclusive because Port Authority also generated a profit through expressive activity by raising funds through the co-sponsored advertisements that included public-service type messages.

Port Authority's generation of profit through expressive activity, however, was far more limited than SEPTA's in Christ's Bride Ministries. Port Authority has not opened its forum to the same broad range of messages on political, religious, and controversial topics or provided virtually unlimited access to its forum. Although, the evidence does not conclusively establish that the forum was limited to the commercial purpose of generating revenue, Port Authority's commercial purpose is strong.

Thus, although some forms of non-commercial speech may be compatible with Port Authority's advertising forum, the purpose of the form is primarily commercial and suggests that Port Authority intended to maintain a closed forum.

### *iii. Conclusion*

A review of the relevant factors shows that Port Authority did not intend to create a public forum for non-commercial, public issue, or educational advertisements. Port Authority has a strong Policy against accepting non-commercial or political advertisements, has not granted general access to its advertising forum or granted access as a matter of course, and created and used the forum primarily to raise revenue.

In those cases where courts have found an intent to create a public forum, the relevant agency generally had both a policy and practice of allowing virtually unlimited access to the forum. In Christ's Bride Ministries, for example, SEPTA accepted a "broad range of advertisements for display," including religious and political advertisements and advertisements on controversial topics. 148 F.3d at 251. Moreover, SEPTA did not reject any advertisements on the basis of its policy and only requested minor modifications in three instances. Id. at 252. The Court noted that "at least 99% of all ads were posted without objection by SEPTA," id., and SEPTA's policy reserved for it the "right to reject ads *for any reason at all.*" Id. at 251. Thus, SEPTA had an extremely

narrow policy as well as a practice of “permitting virtually unlimited access to the forum.” Id. at 252.

\_\_\_\_ Similarly, in Planned Parenthood Ass’n/Chicago Area, the Chicago Transit Authority accepted a “wide variety of commercial, public-service, public-issue, and political ads.” 767 F.2d at 1232. Its general policy denying “vulgar, immoral, or disreputable advertising,” id., amounted to “no policy at all.” Id. at 1233. 767 F.3d 1233. The Court explained, “[a]ccess to CTA’s advertising system . . . is virtually guaranteed to anyone willing to pay the fee.” Id. at 1232. And, finally, in New York Magazine, 136 F.3d at 130, the Metropolitan Transportation Authority permitted “political and other non-commercial advertising generally” under its broad policy Id. at 130.

Port Authority has not permitted virtually unlimited access to its advertising space and has a strong Policy against unlimited access. The limited commercial purpose of its advertising space is confirmed by its consistent refusal to run any political advertisements. See Ridley, 390 F.3d at 80 (distinguishing Christ’s Bride Ministries, Planned Parenthood Ass’n/Chicago Area, and New York Magazine and the basis that “[i]n each of these cases . . . the system accepted explicitly political advertising, an important (but not dispositive) factor in forum analysis.”).

Thus, plaintiffs have not demonstrated that Port Authority intended to create a public forum on its advertising space. Port Authority’s advertising space, therefore, is a non-public forum.

### **Reasonableness and Viewpoint Discrimination**

In a non-public forum, a government entity can still restrict access on the basis of subject matter and identity “so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” Cornelius, 473 U.S. at 806 (1985). The reasonableness of restrictions is “assessed in the light of the purpose of the forum and all the surrounding circumstances.” Cornelius, 473 U.S. at 809. The restrictions “need not be the most reasonable or the only reasonable limitation.” Id. at 809. Even if restrictions on access are reasonable, a government entity “violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” Id.

As in initial matter, the restrictions on non-commercial and political advertisements in Port Authority's Policy are both reasonable and viewpoint neutral.<sup>16</sup>

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<sup>16</sup> Plaintiffs facial challenge to the Advertising Policy is not before the Court. As noted in addressing the defendants' motions to dismiss, plaintiffs did not make a facial challenge to the Policy in their Amended Complaint. Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County, 2007 WL 1007968, \*7 n.1 (W.D. Pa. 2007) ("The Amended Complaint challenges only the defendants refusal to run the plaintiffs' voter-education advertisements. Thus, it only challenges the constitutionality of PAT's advertising policy as applied to Plaintiffs.").

In their Motion for Partial Summary Judgment, plaintiffs attempted to raise a facial challenge to the Policy, arguing that it is unconstitutionally vague because the lack of definition of terms such as "political" and "commercial" gives unbridled discretion to Port Authority officials. In defendants' response and both parties' sur-reply briefs, the parties vigorously dispute whether the plaintiffs' facial challenge could survive when it had not been included in the Amended Complaint.

At the argument on the current motions, however, plaintiffs abandoned their facial challenge. Plaintiffs' attorney stated that plaintiffs were arguing that the Policy was vague as applied and agreed that it is not vague on its face. The attorney asserted that Port Authority's alleged inability to define the relevant terms left defendant Hickton with excessive discretion in deciding whether to accept the plaintiffs' advertisements. Although the argument seemed to confuse the concepts of a facial challenge and an as applied challenge, it is best interpreted as a challenge to the application of the Policy to reject the plaintiffs' advertisements. The plaintiffs' attorney's focus on Port Authority's alleged inability to consistently define the terms goes to the merits of the reasonableness of the defendants' actions.

Regardless, a facial challenge has little merit here. Concerns over vagueness typically arise in cases involving the government's imposition of a fine or sanction for speech and concerns over excessive discretion typically involve licensing schemes for use of traditional public fora. Ridley v. Massachusetts Bay Transp. Authority, 390 F.3d 65, 94 (1st Cir. 2004). Neither of those situations are present here. Further, the terms "commercial" and political have "reasonably clear meanings" when used "for purposes of the acceptance or rejection of advertising." Id. at 95; see also Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 658 (2d 1995) ("Nor would a policy against 'political' advertising . . . be void for vagueness in light of the Supreme Court's decision in Lehman.").

Defendants argue that the Policy's restrictions are justified by Port Authority's interest in 1) maintaining neutrality on political matters and 2) preventing the loss of revenue that could occur if riders, advertisers, or the entities that fund Port Authority viewed it as taking positions on candidates, political issues, or religious matters.

Courts have found similar restrictions reasonable for the reasons defendants suggest. In Children of the Rosary v. City of Phoenix, the Ninth Circuit found the City of Phoenix's prohibition on non-commercial advertising on city buses reasonable. 154 F.3d 972, 979 (9th Cir. 1998). The Court explained that "[t]he city's interests in protecting revenue and maintaining neutrality on political and religious issues are especially strong." Id. The Court relied on Lehman v. City of Shaker Heights in which the Supreme Court upheld a city's prohibition on political or public issue advertising on its transit system vehicles. The Supreme Court stated:

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. . . .

. . . 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.

Lehman, 418 U.S. at 304.

Here Port Authority's restrictions on non-commercial and political advertising are similarly reasonable means of protecting its interests in preserving its revenue and in remaining neutral on political issues. See Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F.2d 431, 437 (3d Cir. 1985) ("The desire to avoid potentially disruptive political controversy and to maintain the appearance of neutrality is sufficient justification for excluding speakers from a nonpublic forum."(internal quotation omitted) ). Further, the Policy's restriction on non-commercial and political speech does not discriminate against any viewpoint, nor do plaintiffs argue that the Policy is viewpoint discriminatory. The Policy restricts certain forms of content

without giving priority to a particular viewpoint. See Ridley, 390 F.3d at 91 (policy restricting demeaning speech disfavors some kinds of content, but does not give preference to any viewpoint).

*A. Reasonableness as Applied*

A main dispute of the parties involves whether the defendants' application of the reasonable and neutral Policy to reject the plaintiffs' advertisement was unreasonable or motivated by viewpoint discrimination. Plaintiffs have raised a genuine issue of material fact as to whether Port Authority accepted other non-commercial advertisements on similar topics. Therefore, Defendants' actions may have been unreasonable unless they reasonably concluded that the plaintiffs' advertisements violated the Policy's prohibition on "political" advertisements.

Plaintiffs claim that defendants cannot reject the advertisements on the basis of their alleged political nature because that justification is a post-hoc rationalization rather than the real basis of their actions. They assert that the real basis for the defendants' refusal was the alleged non-commercial nature of the advertisements. The record reflects that defendants did not explicitly refer to the political nature of the advertisements at the time they rejected them. Although Hickton testified that he declined the advertisements because they were both non-commercial and political in nature, Pl. Appx. 87a, both Liza Krebs and Khari Mosely testified that Hickton referenced the Policy's commercial versus non-commercial distinction in rejecting the advertisement. Moreover, Hess's letter to the ACLU repeatedly referred to the non-commercial nature of the intended advertisements and did not mention that they were political.

The defendants' designation of the advertisements as non-commercial is not inconsistent with them being political because political advertisements are a category of non-commercial advertisements. Defendants argue that the intended advertisements were non-commercial precisely because they were political. The advertisements are allegedly non-commercial for the same reason that Hickton testified that they were political – they were about voting rights rather than the provision of a particular service or product. The defendants' discussion of the political nature of the advertisements can reasonably be construed as a further explanation of the non-commercial nature of the advertisements, rather than a post-hoc rationalization.

Plaintiffs next argue that their advertisements cannot reasonably be defined as "political." Defendants respond that the advertisements are clearly political because they advise ex-offenders of their right to vote and encourage them to exercise it.

Defendants attempt to emphasize the political nature of the advertisements by claiming that their purpose was to encourage ex-offenders to vote in the upcoming election as well as to inform them of their rights. They base this argument largely on the text of the billboards run by plaintiffs after Port Authority rejected their advertisements. The billboards stated “Been to jail or prison? Vote Nov. 7th. *It’s Your Right.*” At the time of the rejection of the plaintiffs’ proposed advertisements, however, defendants had not seen any draft advertisements and were only aware that they would involve voting rights for ex-offenders. Plaintiffs argue that the later created billboards are not necessarily identical to the advertisements they would have submitted and assert that they were willing to work with Port Authority to craft an acceptable advertisement. In order to get permission to run their advertisements, plaintiffs may well have been willing to adapt their advertisement so that it was more like the other arguably non-commercial advertisements run by Port Authority. Defendants have not provided evidence to support their assumption that Port Authority would have submitted advertisements identical to the billboards.

Defendants also assert that the advertisements’ purpose of encouraging ex-offenders to vote and their general political nature is underscored by the lobbying activities of the plaintiffs’ related entities. Defendants claim that during much of the events at issue here those entities were in the midst of intense lobbying efforts against a Pennsylvania House Bill that would have precluded ex-offenders from voting. Plaintiffs respond that any lobbying was done by a separate non-party entity, the Pittsburgh League of Young Voters, which is a 501(c)(4) organization, and is irrelevant to the determination at issue.

The League of Young Voters alleged lobbying activities are not indicative of the advertisements’ political nature. That the activity of lobbying to preserve voting rights for ex-offenders may be political does not require the conclusion that an advertisement informing ex-offenders about their rights is political. Organizations can lobby for numerous rights or protections that may not be defined as “political” rights. The defendants have not proven that a right is political if its existence or creation is disputed.

In the end, the record indicates that defendants acted knowing only that the advertisements would involve ex-offender voting rights. The relevant action for the purpose of the reasonableness analysis is the defendants’ decision to refuse an advertisement informing the public about ex-offender voting rights.

Defendants argue that the plaintiffs’ intended advertisements were political because they would have discussed voting rights and “voting is arguably the most fundamental right associated with the political process.” Mem. In Supp. Of Def. M.S.J. at

14. Plaintiffs respond that their intended advertisements were educational rather than political. They assert that their advertisements do not fall under the plain meaning of the term political and cite to the Merriam-Webster definition of “political” in support. They assert that the defendants alleged interest in avoiding political controversy is not implicated by their advertisements because they are far different from the advertisements involving partisan political activity that the Supreme Court was concerned about in Lehman v. City of Shaker Heights, 418 U.S. at 304.

A reasonable person could conclude, however, that the advertisements fall under the plain meaning of political and fit within the Merriam-Webster definition. That definition states that the term political can be defined as “of or relating to government, a government, or the conduct of government” or “of, relating to, involving or involved in politics.” Pl. Memo. in Opp. to Def. M.S.J. at 18 (quoting Merriam-Webster Online Dictionary). A reasonable person could conclude that the right to vote relates to government or the conduct of government or to politics since voting is a necessary part of the democratic system of government and the American political system.

As the Merriam-Webster definition suggests, the word “political” may be used in a broader context than the partisan political context. Other courts have used the term outside of the partisan context. For example, in Lebron the Second Circuit discussed whether Amtrak’s policy prohibiting “political” advertising was reasonable. 69 F.3d at 654. The Court defined as political a billboard consisting of a photomontage and accompanying text criticizing the Coors family for its support of right-wing causes. Id. at 653. The work did not relate to partisan political activity, but was rather characterized by the artist as “an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures.” Id.

The plaintiffs advertisement here is more closely related to the political process than the advertisement in Lebron. Thus, although the plaintiffs have advanced reasons why the advertisement may not be political, it is enough that a reasonable person could find the advertisement political. See Cornelius, 473 U.S. at 808 (“The Government’s decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.”)

Finally, Plaintiffs argue that the defendants’ rejection of their advertisements was unreasonable because their inability to consistently define the term “commercial” and acceptance of advertisements on similar topics shows that they are able to apply the Policy to support the denial of any advertisement. As noted above, however, the different definitions relied on by the defendants are largely consistent and fall under a reasonable

definition of the term commercial. Even if the definitions are substantially different, it was not unreasonable for the defendants to conclude that the intended advertisements were non-commercial because it was a ‘political’ advertisement about voting rights. Plaintiffs have only created an issue of fact as to whether Port Authority published other non-commercial advertisements, not whether they published other political advertisements. Thus, defendants could reasonably conclude that the plaintiffs’ intended advertisements were different from the other allegedly non-commercial advertisements because of their political nature.

The defendants’ rejection of the plaintiffs’ intended advertisement, therefore, was reasonable.

### *B. Viewpoint Discrimination as Applied*

A government agency “violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” Cornelius, 473 U.S. at 806. It does so when it “targets not the subject matter, but particular views taken by speakers on the subject.” Rosenberger, 515 U.S. at 831. The government’s reliance on viewpoint-neutral justifications does not shield its actions from scrutiny since it may be using the justifications as “mere pretext for an invidious motive.” Ridley, 390 F.3d at 86. A Court may conclude that neutral justifications are a pretext for discrimination “where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted.” Id. at 87. That “sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive.” Id.

The parties dispute the proper level of generality for defining an “otherwise includible subject.” Defendants argue that their actions constituted viewpoint discrimination only if they accepted advertisements with “contrary messages.” They define “contrary messages” narrowly, asserting they have not committed viewpoint discrimination since they have not run advertisements stating that ex-offenders should not have the right to vote or should not vote and have not run any advertisements addressing voting rights.

Plaintiffs respond that they do not need to show that Port Authority ran advertisements involving voting rights to create a suspicion of viewpoint discrimination. Instead, they need only establish that their advertisement related to “an otherwise permissible subject.” They define “permissible subjects” broadly, asserting that the subject of their advertisement, “rights education,” is an otherwise permissible subject because the defendants have run other “rights education” advertisements in the past.

Defendants define the required similarity to prove viewpoint discrimination at a level of specificity that would make instances of viewpoint discrimination very difficult to prove. Plaintiffs do not need to show that the defendants accepted advertisements with the exact opposite message or a related message on the exact issue. Instead, they must show that the defendants accepted advertisements that discussed similar topics at a level that is suggestive of discrimination. In AIDS Action Committee of Massachusetts, for example, the plaintiffs sought to publish advertisements with the message that “that wearing a latex condom is an effective means of preventing the transmission of HIV.” AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transp. Authority (“MBTA”), 42 F.3d 1, 10 (1st Cir. 1994). In concluding that the MBTA committed viewpoint discrimination the Court asked not whether the MBTA had published advertisements opposing that message, but asked whether it had published advertisements that were similarly “sexually explicit and/or offensive.” Id. Similarly, in Ridley, the First Circuit found that the MBTA’s acceptance of advertisements promoting alcohol that appealed to juveniles cast suspicion on its assertion that its rejection of advertisements relating to marijuana laws was justified on the grounds that the advertisements would promote illegal use of marijuana among children. 390 F.3d at 88-89.

Here, Plaintiffs have provided evidence which creates a genuine issue of fact as to whether the defendants rejected the plaintiffs’ advertisements because they disliked the viewpoint espoused therein. Plaintiffs have shown that its advertisements are similar enough to three other advertisements to suggest that Port Authority’s actions were motivated by viewpoint discrimination. Plaintiffs assert that the advertisements run by the Fair Housing Partnership, the Women’s Law Project, and Just Harvest have rights-education themes similar to their advertisements.

The Fair Housing Partnership is a non-profit organization that promotes fair housing through education, outreach, assistance to housing discrimination victims, advocacy, and counseling. Although it does not charge its clients for its services, it will attempt to collect costs and attorneys’ fees on the rare occasions when it litigates a housing discrimination case and an award of attorneys’ fees is available. Its advertisement began with a large statement that “Most People Don’t Advertise Their Prejudice.” It then stated that “Housing Discrimination is Illegal” and continued “[i]f you suspect that you are a victim of housing discrimination . . . We Can Help.” Hickton testified that it was his understanding that the goal of the Fair Housing Partnership was to represent individuals who may have been discriminated against in litigation and that the lawyers who handled the cases would be compensated. Pl. Appx. 101a-103a. He believed the advertisement was commercial because it was “basically recruiting people to benefit the attorney’s in the end.” Pl. Appx. 106a.

The Women's Law Project also does not charge any of its clients for its services, but may receive legal fees for successful representation of clients in certain cases. It is a non-profit public interest legal advocacy organization that seeks to advance the legal, social, and economic status of women through public policy advocacy, public education, litigation, and individual counseling. Its advertisement stated "just because you're Young does not mean that you don't have RIGHTS" followed by a request to "Call the Women's Law Project for Confidential Legal Services." Defendants argue that this advertisement is commercial because it promotes the use of the Project's legal services, for which they may be compensated if they bring a successful lawsuit

Finally, Just Harvest is a non-profit organization that promotes economic justice in order to end hunger in Allegheny County. One of the services provided by Just Harvest is the preparation of free tax returns for low income workers. Its advertisement began with a section with a heading that stated "Give Your Paycheck a Boost! GET FREE MONEY!" Pl. Appx. 347a. It then provided information about two tax credits. A second section began with a heading "And for help filing your taxes. . ." and advertised "Free Tax Preparation . . . For low-income working families and individuals." It explained, "We will prepare SIMPLE tax returns free of charge!" Defendants assert that the advertisement is commercial because it solicits individuals to use tax preparation services to receive cash refunds and payments, benefitting both Just Harvest and the audience.

Plaintiffs argue that the three advertisements are non-commercial advertisements that educate readers about rights. They assert that the Fair Housing Partnership's advertisement was primarily designed to inform readers that they have a right to not be subject to housing discrimination, the Just Harvest advertisement was designed to inform low-income workers about the potential eligibility for income tax credits and refunds as well as the availability of free tax-preparation services, and the Women's Law Project was designed to educate young women about their rights. They also assert that all the advertisements were motivated by the relevant missions of the organization rather than by economic considerations.

Plaintiffs argue that their intended advertisements can be similarly construed as "rights-education" advertisements. Plaintiffs assert that their advertisements would have educated the public about ex-offender voting rights and that those rights are similar to the right to equal access to housing, the right to certain tax credits, and the rights of young women. Moreover, they assert that their advertisements cannot be distinguished on the basis that the above organizations provide special services since the ACLU provides similar services. They assert that, if their advertisements had been posted and the ACLU had received information that an ex-offender was denied the right to vote, they would

have considered representing that individual in litigation. Pl. Stmt. Of Facts ¶ 80. In fact, they argue that the ACLU has successfully represented clients and received fees in voting rights cases. Pl. Stmt. Of Facts ¶ 22. They also assert that they would have been willing to design their advertisement so that it offered a service similar to those in the advertisements above. Their advertisement could have mimicked the Women's Law Project advertisement, for example, by stating "Just because you're an ex-offender doesn't mean that you don't have the right to vote. Call us for Confidential Legal Services."<sup>17</sup>

Plaintiffs argue that the suspicion of viewpoint discrimination created by the similarity of the advertisements is confirmed by the preferential treatment that defendants showed to the Women's Law Project. Port Authority only ran the Women's Law Project advertisement after it learned more about the services being offered and Hess viewed draft language of their advertisement and provided it with guidance on producing an acceptable advertisement. Plaintiffs claim that Port Authority did not offer similar guidance to them or take the same steps to learn that the ACLU would have been entitled to attorneys' fees for any cases it brought as a result of the advertisement. Defendants dispute the plaintiffs' characterization and assert that they were as responsive to plaintiffs as they were to the Women's Law Project. They point out that Hess discussed the Policy with the plaintiff's representatives and Hess drafted a letter that responded to counsel's request that Port Authority reconsider its position.

The rights-education message of the plaintiffs' intended advertisement is similar enough to the messages in the three other advertisements referenced above that it raises a suspicion of viewpoint discrimination. If a fact-finder concludes that defendants granted the Women's Law Project favorable treatment, that the plaintiffs' would have offered similar legal services in their advertisements, or that the plaintiffs' advertisement would have been similarly educational, it could reasonably find that the defendants' justifications were a pretext for viewpoint discrimination. This suspicion could be deepened by the defendants' alleged inability to use one definition of the term "commercial" and the lack of definitions of several of the specific terms of the Policy.

On the other hand, a fact-finder could also conclude that plaintiffs have not provided enough direct evidence to show that the defendants acted out of an animus for their viewpoint. Ridley, 390 F.3d at 87. It could conclude that defendants were motivated by their conclusion that the plaintiffs' advertisement could be rejected because

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<sup>17</sup> The original billboard advertisement stated "Vote Nov. 7th. Its Your Right. For your family. For our future. *Questions?* 412-728-2197."

they were different from the other advertisements because of their non-commercial or political nature. See, e.g., *Id.* at 91-92 (“because a government commercial enterprise has opened up discussion on one particular “topic” (say, religion), it [does not have to] allow any and all discussion on that topic. Reasonable ground rules, so long as they are not intended to give one side an advantage over another, can be set without falling prey to viewpoint discrimination.”).

Thus, the Court will deny all parties’ motions for summary judgment on the issue of viewpoint discrimination.

### **Qualified Immunity**

Anthony Hickton also asserts that he is entitled to qualified immunity on all the plaintiffs’ claims. He asserts that a reasonable person would not have known that rejecting the proposed advertisement clearly violated established First Amendment law.

#### **1. Qualified Immunity-General Principles**

In Wright v. City of Philadelphia, 409 F.3d 595 (3d Cir.2005), the United States Court of Appeals for the Third Circuit provided the following discussion of section 1983 claims and the privilege of qualified immunity:

“Section 1983 provides a cause of action against any person who, acting under color of state law, deprives another of his or her federal rights. When an officer's actions give rise to a § 1983 claim, the privilege of qualified immunity, in certain circumstances, can serve as a shield from suit. The primary purpose of affording public officials the privilege of qualified immunity, thus insulating them from suit, is to protect them from undue interference with their duties and from potentially disabling threats of liability. The privilege of qualified immunity, however, can be overcome when state officials violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

Wright, 409 F.3d at 599 (citations and quotations omitted). The analysis for determining whether qualified immunity applies was explained by the United States Supreme Court in Saucier v. Katz, 533 U.S. 194 (2001):

“A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry . . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.”

Saucier, 533 U.S. at 201. Over a well-reasoned dissent by Judge Smith, in Wright the Third Circuit interpreted Saucier and the Supreme Court's subsequent opinion in Brosseau v. Haugen, 543 U.S. 194 (2004) to establish “a two-step qualified immunity inquiry, with the first step being the ‘constitutional issue’ and the second step being ‘whether the right was clearly established.’” Wright, 409 F.3d at 601. The Third Circuit has summarized the inquiry into whether a right was “clearly established:”

“As a general matter, a right is clearly established for purposes of qualified immunity when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. To find that a right is clearly established, the right allegedly violated must be defined at the appropriate level of specificity. As the Supreme Court explained in Hope v. Pelzer, in some cases “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.” 536 U.S. 730, 741. Indeed, officials can still be on notice that their conduct violates established law even in novel factual circumstances.”

Williams v. Bitner, 455 F.3d 186, 191 (3d Cir. 2006) (citations and quotation marks omitted). Finally, in the Third Circuit “qualified immunity is an objective question to be decided by the Court as a matter of law.” Carswell, 381 F.3d at 242 (citing Doe v. Groody, 361 F.3d 232, 238 (3d Cir. 2004)).

## 2. Constitutional Violation

The initial step in this Court's qualified immunity analysis, therefore, is to determine whether the facts alleged show that Anthony Hickton's conduct violated a constitutional right when viewed in the light most favorable to plaintiffs. As noted above, a reasonable jury could conclude that Hickton's actions constituted viewpoint

discrimination.

### 3. Clearly Established

\_\_\_\_\_ This Court must next determine whether the constitutional right at issue was clearly established. “As a general matter, a right is clearly established for purposes of qualified immunity when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Williams, 455 F.3d at 191 (citations and quotation marks omitted).

Denying an advertisement on the basis of its expressed viewpoint has long been held a violation of a plaintiff’s First Amendment rights. See Cornelius, 473 U.S. at 806 (1985) (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”); Rosenberger, 515 U.S. at 829 (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.”). Anthony Hickton was responsible for making decisions about which advertisements to allow on Port Authority buses. A reasonable official in his position would have known that denying the plaintiffs’ advertisements on the basis of their expressed viewpoint amounts to impermissible viewpoint discrimination. A reasonable government official should have known the “alleged action violated the plaintiffs’ rights.” Doe v. County of Centre, Pa., 242 F.3d 437, 454 (3d Cir.2001). Thus, Anthony Hickton is not entitled to qualified immunity on the plaintiffs’ claims of viewpoint discrimination.

### **CONCLUSION**

For all the reasons hereinabove set forth, the motions for summary judgment filed by defendants Port Authority of Allegheny County and Anthony J. Hickton will be granted in part and denied in part. The Court will grant summary judgment in defendants’ favor on plaintiffs’ claims of impermissible content-based discrimination and deny summary judgment on plaintiffs’ claims of viewpoint discrimination. The motion for partial summary judgment filed by plaintiffs Pittsburgh League of Young Voters Education Fund and American Civil Liberties Foundation of Pennsylvania will be denied.

MCVERRY, J.