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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

PEOPLE FOR THE ETHICAL  
TREATMENT OF ANIMALS, INC.,

Plaintiff,

v.

LOS ANGELES COUNTY  
METROPOLITAN  
TRANSPORTATION AUTHORITY,

Defendant.

Case No. 2:21-cv-07662-SSS-MAAx

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT [DKT. 47]**

1 Before the Court is Plaintiff People for the Ethical Treatment of Animals,  
2 Inc.'s ("PETA") Motion for Summary Judgment. [Dkt. 47]. Defendant Los  
3 Angeles County Metropolitan Transportation Authority ("Metro") opposes and  
4 seeks summary judgment in its favor. [Dkt. 48]. The Court has reviewed the  
5 Parties' submissions and, for the reasons stated below, **GRANTS** summary  
6 judgment in favor of PETA.

7 **I. BACKGROUND**

8 This dispute arises from PETA's desire to place advertisements ("ads")  
9 on Metro's buses. Metro sells advertising opportunities on its buses and  
10 railways. [Dkt. 50-2 ("SUF") ¶ 4]. Ad sales on Metro's buses are managed by  
11 an out-of-home media company, Outfront Media ("Outfront"). [SUF ¶ 34].  
12 Metro's prohibition on noncommercial ads is as follows:

13 Metro does not accept advertising from non-governmental entities if the  
14 subject matter and intent of said advertising is non-commercial.  
15 Specifically, acceptable advertising must promote for sale, lease or other  
16 form of financial benefit a product, service, event or other property  
17 interest in primarily a commercial manner for primarily a commercial  
18 purpose.

[SUF ¶¶ 12–13]. Metro's policy contains two exceptions:

19 **Exception 1:** Governmental Agencies, meaning public agencies  
20 specifically created by government action located in Los Angeles County  
21 or a Federal or State of California Governmental Agency, may purchase  
22 advertising space for messages that advance specific government  
23 purposes. The advertising must clearly, on the face of the advertising,  
24 identify the Governmental Agency. It is Metro's intent that government  
25 advertising will not be used for comment on issues of public debate.

26 **Exception 2:** Metro will accept paid advertising from non-profit  
27 organizations that partner with a Governmental Agency (as defined in  
28 Exception 1 above) and submit advertising that advances the joint  
purpose of the non-profit organization and the Governmental Agency, as  
determined by each of them. In order for advertising to qualify under this  
exception, the advertising must clearly, on the face of the advertising,

1 identify the Governmental Agency and indicate that the Governmental  
2 Agency approves, sponsors, or otherwise authorizes the advertising. The  
3 non-profit organization must also provide a Statement of Approval  
4 (attached) from the Governmental Agency describing the joint purpose to  
5 be advanced and setting forth a statement acknowledging support and  
6 approval for the submitted advertising. Any message displayed under this  
7 exception must adhere to all other content restrictions stated in this  
8 policy.

9 [SUF ¶¶ 14–17]. Relevant here, Exception 2 allows noncommercial ads that are  
10 endorsed by a governmental agency. [*Id.*]. Metro itself can and has served as a  
11 sponsoring government agency for a non-profit’s noncommercial ad. [SUF  
12 ¶ 18].

13 On July 29, 2021, PETA emailed Outfront expressing interest in running  
14 two ads on Metro buses: one ad included an image of a chicken and the  
15 statement, “I’m not popcorn chicken. I’m a living being! Go vegan,” and the  
16 other ad included an image of a rodent in a laboratory beaker and the statement,  
17 “Mental Health matters. Forced Swim Tests Don’t.” [SUF ¶¶ 140, 154; Dkt.  
18 47-6 at 143–44]. On August 2, 2021, Shannon Garrit, a representative from  
19 Outfront, submitted to Metro the two ads from PETA for approval. [SUF  
20 ¶ 154]. On August 5, 2021, Bernadette Mindiola, Metro’s Deputy Executive  
21 Officer of Marketing [SUF ¶ 41], emailed Garrit stating that the ads would not  
22 be approved because PETA had not secured a “gov’t sponsor.” [SUF ¶ 155].  
23 Mindiola’s determination that PETA would require a government sponsor for  
24 these two ads was made on the basis of Metro’s advertising policy’s prohibition  
25 on noncommercial advertising. [SUF ¶ 157]. On August 6, 2021, Outfront  
26 informed PETA that the ads did not comply with Metro’s prohibition on  
27 noncommercial advertising and PETA would have to obtain a government  
28 sponsor for the ad and place a government seal on its ad for Metro to approve it.  
[Dkt. 47-6 at 105]. Outfront cited “2.1.2 non-commercial advertising clause” of

1 Metro’s advertising policy as the basis for why PETA would not be able to  
2 place its ads on Metro without a government sponsor. [SUF ¶ 142].

3 On December 20, 2021, PETA reached out to Outfront expressing interest  
4 in placing an ad on Metro buses featuring a photograph of a sheep and the text  
5 “I want you to change[.] Wear vegan[.] PETA[.]” [SUF ¶ 144]. On January  
6 13, 2022, Outfront sent an email to Metro stating that PETA was informed that  
7 their ad would not be allowed “because it is not commercial.” [SUF ¶ 159]. On  
8 January 18, 2022, Outfront informed PETA that Metro would not allow the  
9 “wear vegan” ad to be placed because the ad was not “selling something or an  
10 event.” [SUF ¶ 145]. On March 7, 2022, Mindiola sent an email to Outfront  
11 stating that PETA’s ad may be accepted if PETA obtained a government  
12 sponsor and thus satisfied Exception 2. [SUF ¶ 160]. Metro would not run  
13 PETA’s ad because it is a noncommercial ad that did not meet the requirements  
14 of Exception 2. [SUF ¶ 161]. Failure to obtain this government sponsor and  
15 satisfy Exception 2 to the Metro’s prohibition on noncommercial ads is the only  
16 basis in which PETA’s ad was or would be rejected. [SUF ¶ 163].

## 17 **II. LEGAL STANDARD**

18 Summary judgment is appropriate when there is no genuine issue as to  
19 any material fact and the moving party is entitled to judgment as a matter of  
20 law. Fed. R. Civ. P. 56(a). The moving party has the initial burden of  
21 identifying the portions of the pleadings and record that it believes demonstrate  
22 the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S.  
23 317, 323 (1986). The moving party must show that “under the governing law,  
24 there can be but one reasonable conclusion as to the verdict.” *Anderson v.*  
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

26 If the moving party has sustained its burden, the non-moving party must  
27 then show that there is a genuine issue of material fact that must be resolved at  
28 trial. *See Celotex*, 477 U.S. at 324. The non-moving party must make an

1 affirmative showing on all matters placed at issue by the motion as to which it  
2 has the burden of proof at trial. *See id.* at 322; *Anderson*, 477 U.S. at 252. A  
3 genuine issue of material fact exists “if the evidence is such that a reasonable  
4 jury could return a verdict for the non-moving party.” *Id.* at 248. “This burden  
5 is not a light one. The non-moving party must show more than the mere  
6 existence of a scintilla of evidence.” *Oracle*, 627 F.3d at 387 (citing *Anderson*,  
7 477 U.S. at 252).

8 When deciding a motion for summary judgment, the Court construes the  
9 evidence in the light most favorable to the non-moving party. *See Barlow v.*  
10 *Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991). Thus, summary judgment for the  
11 moving party is proper when a “rational trier of fact” would not be able to find  
12 for the non-moving party based upon the record taken as a whole. *Matsushita*  
13 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

### 14 **III. DISCUSSION**

#### 15 **A. Standing**

16 Metro argues PETA lacks standing to pursue its claim for violations of  
17 the First and Fourteenth Amendments because PETA has not suffered an injury  
18 in fact. Constitutional standing requires (1) an injury in fact, (2) causation, and  
19 (3) a likelihood that a favorable decision will redress the injury. *Preminger v.*  
20 *Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*,  
21 504 U.S. 555, 560–61 (1992)). An injury in fact is “an invasion of a legally  
22 protected interest” that is (a) “concrete and particularized” and (b) “actual or  
23 imminent,” not “conjectural” or “hypothetical.” *Id.* “Injury in fact” is  
24 particularized if it has affected the plaintiff in a “personal and individualized  
25 way.” *Id.* Even a minimal injury may suffice to establish standing. *Id.*

26 Metro argues “PETA cannot credibly assert any concrete injury [because]  
27 Metro has not rejected any of PETA’s proposed advertisements.” [Dkt. 48 at  
28 11]. But Metro’s assertion is contrary to the undisputed facts. Metro refused to

1 approve PETA’s “popcorn chicken” and “[m]ental health matters” ads because  
2 PETA had not secured a government sponsor . [SUF ¶¶ 140, 142, 154–55, 157].  
3 Metro also did not allow PETA’s “wear vegan” ad because it was a  
4 noncommercial ad that did not meet the requirements of Exception 2. [SUF  
5 ¶¶ 145, 160–61, 163]. Metro’s statements that PETA’s ads would not be  
6 approved or allowed constitute a rejection of PETA’s proposed ads and are an  
7 injury in fact. PETA thus has standing.

### 8 **B. Ripeness**

9 Metro also argues PETA’s claim is not ripe because “there is no final  
10 action by Metro denying PETA access to Metro’s advertising space.” [Dkt. 48  
11 at 12]. According to Metro, it “merely requested PETA to comply with the  
12 advertising policy requirements[.]” [*Id.*]. Ripeness prevents courts from  
13 adjudicating premature disputes, such as an abstract disagreement over  
14 administrative policies. *See Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538  
15 U.S. 803, 807 (2003).

16 Similar to Metro’s standing argument, its ripeness argument also fails  
17 because it contradicts the undisputed facts. Metro rejected PETA’s ads when it  
18 stated the ads would not be approved or allowed, [SUF ¶¶ 154–55, 158–59], and  
19 thus denied PETA access to Metro’s advertising space. Metro’s subsequent  
20 requests that PETA comply with Exception 2 and PETA’s subsequent attempts  
21 to do so do not nullify the fact that Metro had already rejected PETA’s ads.<sup>1</sup>  
22 PETA’s claim is thus ripe for adjudication.

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28 <sup>1</sup> Indeed, Metro does not dispute that it “rejected” four ads from APLA health  
when it required the advertiser to first obtain a government sponsor. [SUF  
¶ 126]. Similarly, requiring PETA to first obtain a government sponsor also  
constitutes a rejection.

1           **C.     Type of Forum**

2           The Parties disagree on whether Metro’s bus ad space is a designated  
3 public forum or limited public forum, which determines the standard of review  
4 the Court applies to speech restrictions therein. In a designated public forum,  
5 content-based restrictions on speech are prohibited unless they meet strict  
6 scrutiny, and in a limited public forum, such restrictions are permissible as long  
7 as they are reasonable and viewpoint neutral. *Amalgamated Transit Union Loc.*  
8 *1015 v. Spokane Transit Auth.*, 929 F.3d 643, 651 (9th Cir. 2019) (citation  
9 omitted).

10           PETA argues Metro’s bus ad space is a designated public forum. “The  
11 government creates a designated public forum when it intends to make property  
12 that hasn’t traditionally been open to assembly and debate ‘generally available’  
13 for ‘expressive use by the general public or by a particular class of speakers.  
14 The defining characteristic of a designated public forum is that its open to the  
15 same ‘indiscriminate use,’ and ‘almost unfettered access’ that exist in a  
16 traditional public forum.” *Seattle Mideast Awareness Campaign v. King Cnty.*  
17 (“*SeaMAC*”), 781 F.3d 489, 496 (9th Cir. 2015) (citation omitted). “In contrast,  
18 when the government intends to grant only ‘selective access,’ by imposing  
19 either speaker-based or subject-matter limitations, it has created a limited public  
20 forum.” *Id.* at 497 (citing *Arkansas Educ. Television Comm'n v. Forbes*, 523  
21 U.S. 666, 679 (1998); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*,  
22 473 U.S. 788, 806 (1985)).

23           While in the past, the Ninth Circuit has found that certain bus advertising  
24 spaces qualified as limited public fora, *see id.* (citing *SeaMAC*, 781 F.3d 489,  
25 497 (9th Cir. 2015); *Am. Freedom Def. Initiative v. King Cty.* (“*AFDI I*”),  
26 796 F.3d 1165, 1168–70 (9th Cir. 2015)), it did not adopt a bright-line rule or  
27 categorically hold that all bus ad space will always qualify as a limited public  
28 forum. Instead, the Ninth Circuit analyzed three factors to ascertain the



1 government’s intent to create either a designated public forum or limited public  
2 forum with respect to bus ad space: (1) the terms of any policy the government  
3 has adopted to govern access to the forum, (2) how the government’s policy has  
4 been implemented in practice, and (3) the nature of the government property at  
5 issue. *See SeaMAC*, 781 F.3d at 497; *see also AFDII*, 796 F.3d at 1170  
6 (applying *SeaMAC* factors).

7 Under the first *SeaMAC* factor, if the government requires speakers  
8 seeking access to first obtain permission under pre-established guidelines that  
9 impose speaker-based or subject-matter limitations, the government generally  
10 intends to create a limited, rather than a designated, public forum. *SeaMAC*,  
11 781 F.3d at 497. Here, Metro requires speakers to first obtain permission  
12 pursuant to its advertising policy, i.e. the instant policy at issue, before  
13 permitting ads to be placed on its buses. [SUF ¶¶ 7–17]. Therefore, this factor  
14 indicates Metro’s intent to create a limited public forum.

15 Under the second *SeaMAC* factor, “[i]f the policy requires speakers to  
16 obtain permission under guidelines whose terms are routinely ignored, such that  
17 in practice permission is granted ‘as a matter of course to all who seek [it],’ the  
18 government may have created a designated public forum.” *Id.* This factor is the  
19 core of PETA’s argument.

20 PETA argues that because Metro has permitted several ads that violate its  
21 policy, Metro has created a public forum.<sup>2</sup> There is evidence that Metro did  
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23 <sup>2</sup> Although PETA argues Metro has “allowed in *five and half times*” more ads  
24 that violate the noncommercial ad prohibition than it has prohibited, PETA does  
25 not cite competent evidence to support this claim. [Dkt. 47-1 at 31]. While  
26 PETA does cite permitted ads that Metro has admitted violated its policy, which  
27 serve as the numerator of PETA’s statistic, PETA does not cite evidence to  
28 show the entire body of ads that were rejected by Metro under the policy, and  
thus there is no established denominator for PETA’s statistical representation.  
Moreover, even if PETA were to establish its statistic by competent evidence, a  
ratio of permitted and unpermitted ads is not meaningful because the ratio could  
be explained by reasons other than the government’s intent, such as the number



1 apply its policy by rejecting several noncommercial ads [SUF ¶¶ 126–129].<sup>3</sup> As  
2 discussed more fully below, although Metro has permitted certain  
3 noncommercial ads that violate its advertising policy [See SUF ¶ 46, 51–52, 54–  
4 57, 59–60, 64, 78], Metro has admitted that these violating ads were permitted  
5 by error and mistake [SUF ¶¶ 47, 53, 58, 61, 66, 80], i.e. not by intent.

6 Metro’s inconsistent application of its policy distinguishes the instant  
7 case from *SeaMAC* and *AFDI*, wherein the Ninth Circuit found that in each of  
8 those cases the government had consistently applied its restriction to its ad  
9 space. See *SeaMAC*, 781 F.3d at 498 (“By consistently limiting ads it saw as in  
10 violation of its policy,” the County ‘evidenced its intent not to create a  
11 designated public forum.’”); *AFDI*, 796 F.3d at 1170 (finding bus ad space  
12 constituted limited public forum, in part, because “Metro has rejected a range of  
13 proposed ads, including other public-issue ads”).

14 However, this case is also distinguishable from the out-of-circuit cases  
15 PETA relies on, wherein the government agency converted its ad space into  
16 public fora by accepting certain ads. In *Planned Parenthood Ass’n/Chicago*  
17 *Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1233 (7th Cir. 1985), the Seventh  
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19 and type of proposed ads and their susceptibility to mistaken characterization.  
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21 <sup>3</sup> Metro objects to SUF ¶¶ 127–29 as “unsupported by admissible evidence”  
22 based on *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 776 (9th Cir. 2002),  
23 claiming the exhibits PETA relies on are not properly authenticated. However,  
24 “Rule 56 was amended in 2010 to eliminate the unequivocal requirement that  
25 evidence submitted at summary judgment must be authenticated.” *Romero v.*  
26 *Nevada Dep’t of Corr.*, 673 F. App’x 641, 644 (9th Cir. 2016). The amended  
27 Rule requires that such evidence “would be admissible in evidence” at trial. *Id.*  
28 (citing Fed. R. Civ. P. 56(c)(4)). The Court finds that Exhibits VV, WW, and  
XX to the Strugar Decl. [Dkt. 47-6 at 50–61], the bases for SUF ¶¶ 127–29,  
would be admissible in evidence at trial and overrules Metro’s objection thereto.  
The Court also overrules all of Metro’s evidentiary objections to the Declaration  
of Matthew Strugar and/or Material Noted Therein because they are all based on  
Metro’s improper reliance on *Orr*. [See Dkt. 50-1 at 2–8].

1 Circuit found the ad space was a public forum where there was “no policy at  
2 all.” That is not the case here as Metro has its advertising policy prohibiting  
3 noncommercial ads that is the center of the dispute.

4 In *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 130 (2d  
5 Cir. 1998), the Second Circuit found the bus ad space was a designated public  
6 forum because the Metropolitan Transportation Authority (“MTA”) had  
7 accepted political advertising, which the Second Circuit found “evidences a  
8 general intent to open a space for disclosure.” *See also Lebron v. Washington*  
9 *Metro. Area Transit Auth.*, 749 F.2d 893, 894, 896 (D.C. Cir. 1984) (finding ad  
10 space was a public forum because government had accepted political ads in the  
11 past); *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg’l Transit*  
12 *Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (finding government designated its ad  
13 space as a public forum because it “accept[ed] a wide array of political and  
14 public-issue speech”). But PETA does not assert Metro has accepted political  
15 ads in the past. In contrast, the Second Circuit noted that “[d]isallowing  
16 political speech, and allowing commercial speech only,” as Metro’s policy does  
17 here “indicates that making money is the main goal.” *Id.* Moreover neither  
18 *New York Magazine*, *Lebron*, or *United Food* involved the same facts present  
19 here, which involve an inconsistent application of an ad policy and instances of  
20 allowing some, but not all, advertisements that violate the policy.

21 In *Christ’s Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*,  
22 148 F.3d 242, 252 (3d Cir. 1998), the Third Circuit found that the government  
23 created a designated public forum based on its written policy which only  
24 prohibited ads in a few areas (alcohol, tobacco, and ads deemed libelous or  
25 obscene), its goal of generating revenue through ad space, and its practice of  
26 “permitting virtually unlimited access to the forum.” But Metro’s policy here is  
27 more robust and restricts an entire category of noncommercial ads, subject to  
28 two exceptions. Moreover, although Metro has permitted some ads that violate

1 its policy, the evidence does not demonstrate Metro has permitted “virtually  
2 unlimited access to the forum.”

3 Notwithstanding the instances in which Metro has permitted  
4 noncommercial ads that violate its policy, whether mistakenly or not, Metro’s  
5 policy against noncommercial ads and its application thereof demonstrate that  
6 Metro does require speakers to obtain permission before allowing ads on its  
7 buses. The undisputed record does not demonstrate that Metro has a practice of  
8 granting permission “as a matter of course to all who seek it.” Thus, the second  
9 factor weighs in favor of finding a limited public forum.

10 Under the third *SeaMAC* factor, the nature of the government property,  
11 “use of the property as part of a commercial enterprise is generally incompatible  
12 with granting the public unfettered access for expressive activities.” *SeaMAC*,  
13 781 F.3d at 498 (citing *Cornelius*, 473 U.S. at 804). Here, like in *SeaMAC*,  
14 “[t]he principal purpose of the bus advertising program is to generate revenue  
15 for the bus system,” and the Court is therefore “reluctant to infer that [Metro]  
16 intended to open the sides of Metro buses to all comers absent clear indications  
17 of such an intent.” *Id.* And PETA does not demonstrate any clear indication of  
18 Metro’s intent to open the sides of all Metro buses to all comers. Thus, all three  
19 *SeaMAC* factors weigh in favor of finding Metro’s bus ad space qualifies as a  
20 limited public forum.

#### 21 **D. Whether Metro’s Policy Violates the First Amendment**

22 PETA claims that both Metro’s Exception 2 and general prohibition on  
23 noncommercial ads are unconstitutional. In a limited public forum, such as  
24 Metro’s bus ad space, a government regulation on speech is permitted as long as  
25 it is reasonable and viewpoint neutral. *AFDI I*, 904 F.3d at 1132.

##### 26 **1. Metro’s Exception 2**

27 PETA claims Exception 2 is both unreasonable and viewpoint  
28 discriminatory. The Court agrees.



1 claims the reason for the adoption of Exception 2 was “to allow paid advertising  
2 from a nonprofit organization and increase revenues from noncommercial  
3 advertising, while continuing to limit the permitted subject matter to a  
4 governmental purpose and keeping the policy viewpoint neutral.” [Dkt. 48 at  
5 16–17].

6 But even in light of Metro’s stated interests, Exception 2 is unreasonable.  
7 For example, Metro states that it has approved the content of PETA’s ads but is  
8 merely requiring PETA to comply with Exception 2 and find government  
9 endorsement for its messages. [Dkt. 48 at 6]. Thus, according to Metro’s own  
10 statements, Metro ostensibly has no issue with the content or viewpoint of  
11 PETA’s ad, and the only reason Metro is refusing to allow PETA’s messages is  
12 because PETA lacks government endorsement. Such arbitrary reasoning does  
13 not align with any of Metro’s purported interests in prohibiting noncommercial  
14 speech or the enacting Exception 2. For example, if, as Metro claims, the  
15 content of PETA’s ads are acceptable, it is unclear as to how or why Metro  
16 believes that by requiring PETA to comply with Exception 2, a government  
17 endorsement will act as somewhat of a talisman and transform PETA’s ads from  
18 unacceptable to acceptable. Such an arbitrary restriction on otherwise  
19 acceptable ads is unreasonable and thus unconstitutional.

20 **b. Viewpoint Discrimination**

21 As a separate basis for challenging the constitutionality of Exception 2,  
22 PETA argues that it is viewpoint discriminatory because it censors  
23 noncommercial messages that the government does not endorse. “A regulation  
24 engages in viewpoint discrimination when it regulates speech based on the  
25 specific motivating ideology or perspective of the speaker.” *Interpipe*  
26 *Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018) (citation  
27 omitted).

28

1 Metro argues that its policy is not viewpoint discriminatory because it  
2 does not draw distinctions between groups based on their message or  
3 perspective and is thus “textbook viewpoint neutral.” [Dkt. 48 at 22 (citing  
4 *Christian Legal Soc. Chapter of the University of California, Hastings College*  
5 *of the Law v. Martinez*, 561 U.S. 661, 694–95 (2010))]. In *Martinez*, the  
6 Supreme Court found that a public law school’s policy—conditioning official  
7 recognition of a student group on the organization’s agreement to open  
8 eligibility for membership and leadership to all students—was viewpoint  
9 neutral. The Court found that the school’s policy drew no distinction between  
10 groups based on their message or perspective and was thus “textbook viewpoint  
11 neutral.” *Id.* at 694–95. Metro argues Exception 2 is similarly viewpoint  
12 neutral. It is not.

13 Pursuant to Exception 2, Metro’s policy requires noncommercial ads to  
14 first be endorsed by a government agency as a prerequisite to approval. Metro’s  
15 policy is similar to the unconstitutional policy the Supreme Court struck down  
16 in *Saia v. People of State of New York*, 334 U.S. 558, 559 (1948), which  
17 allowed the use of loud-speakers only if approved and permitted by the Chief of  
18 Police. The Court found the ordinance was unreasonable because it placed the  
19 right to be heard within the “uncontrolled discretion of the Chief of Police.” *Id.*  
20 at 560–61. The Court further noted that the ordinance did not include any  
21 standards prescribed for the exercise of Chief of Police’s discretion. *Id.* at 560.  
22 Metro’s policy similarly prohibits noncommercial speech except in instances  
23 where the government allows it, without any standards or guidance as to why or  
24 when a government agency should approve a noncommercial advertisement.  
25 That Metro itself, like the Chief of Police in *Saia*, has the ability to approve  
26 noncommercial ads under Exception 2 further demonstrates the prohibition’s  
27 capriciousness and unreasonableness.

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1           Although Metro claims it “approved the content of PETA’s  
2 advertisements” [Dkt. 48 at 22] and “merely requested PETA to comply with  
3 the advertising policy requirements related to public agency co-sponsorship,”  
4 [Dkt. 48 at 6], such a requirement is obvious pretext for viewpoint  
5 discrimination. In stark contrast to the regulation in *Martinez*, which required  
6 all student groups to accept all interested students, Metro’s policy does not  
7 accept all ads submitted by all noncommercial speakers. Instead, Metro accepts  
8 only noncommercial ads that are first endorsed by the government. Such a  
9 policy of censorship is the opposite of “textbook viewpoint neutral”—it is  
10 textbook viewpoint discriminatory and thus unconstitutional.

## 11           **2. Metro’s General Policy Against Noncommercial Ads**

12           PETA further argues that even without Exception 2, Metro’s general ban  
13 on noncommercial ads violates the First Amendment because is it viewpoint  
14 discriminatory and incapable of reasoned application.

### 15           **a. Facial Viewpoint Discrimination**

16           PETA claims Metro’s policy is facially viewpoint discriminatory. An  
17 ordinance is facially unconstitutional if “it is unconstitutional in every  
18 conceivable application, or [ ] it seeks to prohibit such a broad range of  
19 protected conduct that it is unconstitutionally overbroad.” *Foti v. City of Menlo*  
20 *Park*, 146 F.3d 629, 635 (9th Cir. 1998), *as amended on denial of reh’g* (July 29,  
21 1998) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789,  
22 796 (1984)). “A regulation engages in viewpoint discrimination when it  
23 regulates speech based on the specific motivating ideology or perspective of the  
24 speaker.” *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir.  
25 2018).

26           Metro’s ban on commercial ads is not facially viewpoint discriminatory.  
27 PETA argues that Metro’s policy allows ads encouraging the purchase of a  
28 product but bans ads that discourage the purchase of the same product and is



1 thus viewpoint discriminatory. But PETA’s argument is overly simplistic. For  
2 example, under Metro’s policy, a speaker would be able to discourage the  
3 purchase of a product as long as it was also promoting its own commercial  
4 transaction. Thus, the prohibition on noncommercial messages does not turn on  
5 a speaker’s viewpoint but only whether the message is commercial in nature.  
6 “In these circumstances, the managerial decision to limit car card space to  
7 innocuous and less controversial commercial and service oriented advertising  
8 does not rise to the dignity of a First Amendment violation.” *Child. of the*  
9 *Rosary v. City of Phoenix*, 154 F.3d 972, 981 (9th Cir. 1998) (citing *Lehman v.*  
10 *Shaker Heights*, 418 U.S. 298, 304 (1974)). Indeed, both the Ninth Circuit and  
11 Supreme Court have upheld prohibitions on noncommercial speech, finding no  
12 First Amendment violations therefrom. *See Lehman*, 418 U.S. 298, 304 (1974);  
13 *Children of the Rosary*, 154 F.3d 972, 981 (9th Cir. 1998).

14 **b. As-Applied Viewpoint Discrimination**

15 PETA also claims Metro’s prohibition on noncommercial ads is  
16 viewpoint discriminatory as applied to PETA’s ads. “An as-applied challenge  
17 contends that the law is unconstitutional as applied to the litigant's particular  
18 speech activity, even though the law may be capable of valid application to  
19 others.” *Foti*, 146 F.3d at 635.

20 Even if a restriction is facially neutral, the uneven application of the  
21 policy may nevertheless constitute as-applied viewpoint discrimination. In  
22 *Cornelius*, 473 U.S. at 812, although a charity drive’s policy excluding  
23 messages from advocacy groups was facially neutral, the Supreme Court  
24 remanded the case because there existed evidence that some groups that should  
25 have been excluded by the policy were in fact permitted to participate. Thus,  
26 the Court remanded the case for a determination regarding whether the charity  
27 drive excluded certain advocacy groups because it disagreed with their  
28 viewpoints. *Id.*

1           Similarly, in *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*  
2 *of Allegheny Cnty.*, 653 F.3d 290, 297–98 (3d Cir. 2011), the Third Circuit  
3 found that the Port Authority, despite banning noncommercial ads, accepted  
4 several comparable noncommercial ads but rejected the challenger’s ad. The  
5 Third Circuit held that this evidence strongly suggested viewpoint  
6 discrimination. *Id.* Further, although the Port Authority argued it simply made  
7 a mistake in accepting the comparator ads, the evidence showed the Port  
8 Authority accepted the comparator ads with full knowledge of their contents,  
9 which the Third Circuit found “amply establishe[d] viewpoint discrimination.”  
10 *Id.* at 298–99.

11           Here, the undisputed record demonstrates that Metro improperly  
12 permitted several noncommercial ads that did not comply with Exception 2, thus  
13 evincing uneven application of its policy and possible viewpoint discrimination  
14 as applied to PETA’s ads. For example, Metro rejected PETA’s ads and  
15 required PETA to comply with Exception 2 because PETA’s ads were  
16 noncommercial, yet Metro allowed numerous noncommercial ads from non-  
17 government organizations without requiring them to comply with Exception 2,  
18 such as five ads from The Foundation for a Better Life promoting health care  
19 workers, law enforcement, and the virtues of bravery, courage, service,  
20 optimism, and unity [SUF ¶ 46], sixty-five ads from the United Way of Greater  
21 Los Angeles regarding the social problem of homelessness [SUF ¶¶ 51–52, 54–  
22 57, 59–60], an ad from United Teachers Los Angeles containing a pro-teacher  
23 message [SUF ¶ 64], and seven ads from Martin Luther King Jr. Center for  
24 Nonviolent Social Change promoting “A Movement for Justice” and the website  
25 TheKingCenter.org [SUF ¶ 78]. Moreover, Mindiola, Metro’s Deputy  
26 Executive Officer of Marketing, admitted that permitting several of these  
27 advertisements were errors and mistakes by Metro. [SUF ¶¶ 47, 53, 58, 61, 66,  
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1 80].<sup>4</sup> Although the undisputed record demonstrates Metro’s inconsistent  
2 application of its policy, there is a triable issue of material fact as to whether this  
3 discrepancy constitutes actual viewpoint discrimination or whether these  
4 instances were merely honest mistakes by Metro. Thus, summary judgment  
5 based on potential viewpoint discrimination as applied to PETA’s ads is  
6 inappropriate. *See* Fed. R. Civ. P. 56(a).

7 **c. Unreasonableness of Metro’s Noncommercial Ad**  
8 **Ban**

9 PETA argues Metro’s application of its ban on noncommercial ads is  
10 unreasonable in practice. Similar to the reasonableness analysis of Exception 2  
11 above, the Ninth Circuit’s three-part test for reasonableness applies here as well.  
12 *See Amalgamated Transit Union*, 929 F.3d at 651; *supra* Section III.D.1.a.

13 The first prong of the reasonableness test, whether the prohibition is  
14 reasonable in light of the purpose served by the forum, is easily met. In  
15 *Children of the Rosary*, 154 F.3d at 979, the Ninth Circuit upheld the City of  
16 Phoenix’s prohibition on noncommercial speech. The city asserted four  
17 interests to justify its limitation on noncommercial speech: “(1) maintaining a  
18 position of neutrality on political and religious issues; (2) a fear that buses and  
19 passengers could be subject to violence if advertising is not restricted; (3)  
20 preventing a reduction in income earned from selling advertising space because  
21 commercial advertisers would be dissuaded ‘from using the same forum  
22 commonly used by those wishing to communicate primarily political or  
23 religious messages;’ and (4) a concern that allowing [the challenger’s]

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25 \_\_\_\_\_  
26 <sup>4</sup> Metro also approved noncommercial ads from private entities that it claims to  
27 have mistaken for county, state, or federal agencies, including six ads from  
28 Pacific Gas and Electric Company (PG&E), two ads from People Assisting the  
Homeless (PATH), and an ad from the Lundquist Institute. PSUF 82–86, 99–  
104, 113–116.

1 advertisement would violate the Establishment Clause.” *Id.* The district court  
2 found that each of the first three interests were sufficient to support the  
3 reasonableness of the city’s prohibition,<sup>5</sup> and the Ninth Circuit agreed, finding  
4 especially strong the city’s interests in protecting revenue and maintaining  
5 neutrality on political and religious issues. *Id.*

6 Similarly here, Metro asserts six interests to justify the reasonableness of  
7 its policy: (1) “to formalize the practices and increase the efficiency of the  
8 procedures related to acceptance of advertising to produce revenues for Metro.”  
9 (2) “to clarify the use of advertising space for the placement of Metro’s own  
10 advertising to promote transit-related objectives in a variety of forms and  
11 locations throughout the Metro System.” (3) “to protect Metro from potential  
12 litigation.” (4) “to protect Metro...from the potential association of advertising  
13 images with Metro services.” (5) “in order to maintain Metro’s neutrality on  
14 issues of public debate.” (6) “to avoid negative impacts on ridership patronage  
15 or commercial advertising and corresponding revenues, while at the same time  
16 respecting First Amendment principles.” [SUF ¶¶ 20–26]. Like the city’s  
17 interests in *Children of the Rosary*, Metro’s interests sufficiently support the  
18 reasonableness of its policy, and especially strong are its interests in maintaining  
19 neutrality on issues of public debate and avoiding negative impacts on ridership  
20 patronage or commercial advertising revenues. *See Children of the Rosary*,  
21 154 F.3d at 979.

22 PETA argues that Metro’s interest in avoiding negative impacts on  
23 ridership patronage or commercial advertising revenues is belied by the fact that  
24 Metro cannot show that it suffered harm from the noncommercial ads that Metro  
25 erroneously permitted even though these ads violated Metro’s policy.

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28 <sup>5</sup> In *Children of the Rosary*, the district court declined to address the  
Establishment Clause issue. 154 F.3d at 979.

1 According to PETA, because these violating ads did not cause any harm to  
2 Metro, any concern by Metro as to future harm resulting from similar  
3 noncommercial ads that violate its ban is speculative and unreasonable.

4 But there are several issues with PETA’s argument. First, PETA  
5 inappropriately places the burden on Metro to demonstrate harm, disruption, or  
6 interference to its service to justify its stated concern and reason for prohibiting  
7 noncommercial speech. But PETA is the moving party and therefore bears the  
8 burden of establishing the purported unreasonableness of Metro’s interests. *See*  
9 *Celotex*, 477 U.S. at 323. It is thus PETA, not Metro, who bears the burden of  
10 providing evidence to demonstrate there is no triable issue regarding whether  
11 Metro has suffered any harm from the erroneous noncommercial ads that were  
12 permitted. *Id.* PETA has not met its burden. Second, even if PETA were able  
13 to show that Metro did not suffer harm from the erroneous ads it permitted, that  
14 would not necessarily demonstrate that Metro’s interest in avoiding negative  
15 impact to its service or ad revenues is unreasonable because future harm arising  
16 from a future noncommercial ad, such as a provocative or offensive one, would  
17 still be reasonably foreseeable. Third, it is possible that the reason Metro  
18 erroneously permitted the noncommercial ads on which PETA relies is because  
19 those ads appeared innocuous and did not raise any red flags upon Metro’s  
20 review. Thus, it cannot be said that these erroneously permitted ads are a proper  
21 weathervane for whether Metro’s interest in avoiding harm in the future is  
22 unreasonable.

23 However, Metro’s ban on noncommercial ads fails the second prong of  
24 the reasonableness test, which is whether the prohibition is sufficiently definite  
25 and objective to prevent arbitrary or discriminatory enforcement by Metro. In  
26 both *Amalgamated Transit Union* and *Children of the Rosary*, the Ninth Circuit  
27 found that prohibitions against noncommercial advertising similar to Metro’s  
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1 policy here were sufficiently definite and objective. *See Amalgamated Transit*  
2 *Union*, 929 F.3d at 656; *Children of the Rosary*, 154 F.3d at 982.

3 However, PETA argues that Metro’s policy is unreasonably vague  
4 because Metro has an unwritten policy of looking beyond the messages of  
5 proposed ads and into the speakers’ identities, positions, and motivations. For  
6 example, PETA notes that Metro approved ads that do not appear to propose  
7 any commercial transaction if, after investigation, Metro determines the speaker  
8 engages in commercial activity generally or even has a paying membership  
9 structure. [Dkt. 47-1 at 30 (citing SUF ¶¶ 68–69, 71–75, 105–07, 121–24)].

10 In *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th  
11 179, 201 (4th Cir. 2022), the Fourth Circuit found that the Greater Richmond  
12 Transit Company’s ban on political ads was unconstitutional because it  
13 contained vaguely defined policies and even vaguer unwritten rules that “ma[de]  
14 it impossible for a reasonable person to identify what violates their advertising  
15 policy and what does not.” *Id.* Similarly, in *AFDI I*, 978 F.3d at 498, the Sixth  
16 Circuit found that an “amorphous ban on ‘political’ speech” lacked objective,  
17 workable standards and was thus incapable of reasoned application.

18 So too here. Nowhere in Metro’s policy does it state that an  
19 organization’s commercial identity or activity will impact the determination as  
20 to whether the content of the ad is considered commercial or not. Yet, Metro’s  
21 officials have admitted, as described below, that Metro has categorized certain  
22 ads as “commercial,” not because of the content of the ad, but based on the  
23 identity of the speaker, which is not a criterion specified in Metro’s policy.

24 For example, Metro deemed commercial an ad by the Black Women for  
25 Wellness containing a pro-choice message, encouraging people to visit the  
26 website [www.stopfclinics.net](http://www.stopfclinics.net) to learn how to “spot fake clinics” because the  
27 organization charged membership dues. [SUF ¶ 69]. But nowhere in Metro’s  
28 policy does it state an ad is “commercial” if the proposing organization charges

1 membership dues. Moreover, PETA has members that pay to be members and  
2 yet Metro did not make any effort to determine if PETA charges its members for  
3 membership. [SUF ¶¶ 146, 148].

4 Similarly, Metro also deemed commercial an ad from Stanbridge  
5 University that read “COVID-19 First Responders, We Thank You,” because it  
6 found Stanbridge University itself is a “commercial company – or venture.”  
7 [SUF ¶ 97]. But nowhere in Metro’s policy does it state that the content of an  
8 ad will be deemed commercial if the proposing entity is a commercial company  
9 or venture.<sup>6</sup> Moreover, PETA sells a variety of products and its gross  
10 merchandise sales in fiscal year 2021 totaled \$129,381. [SUF ¶ 147]. But  
11 Metro did not make any effort to determine if PETA sells merchandise or is a  
12 commercial entity. [SUF ¶ 189].

13 Metro also deemed commercial six ads from the Children’s Hospital Los  
14 Angeles and Kohl’s Cares to raise awareness about child safety and injury  
15 prevention. [SUF ¶ 105; Dkt. 47-5 at 84–90]. Metro admitted the six ads were  
16 noncommercial but deemed the ad commercial because the ad was “from  
17 commercial entities” that were “not nonprofits.” [SUF ¶ 106]. But Metro’s  
18 noncommercial ad ban does not explain that a speaker’s commercial or  
19 nonprofit identity will determine whether the content of its ad is commercial.  
20 Moreover, the Children’s Hospital Los Angeles is a nonprofit organization.  
21 [SUF ¶ 107].

22 Metro also approved a noncommercial ad from the nonprofit AIDS  
23 Healthcare Foundation stating, “Syphilis is Serious” and promoting the website  
24 freeSTDcheck.org even though the ad did not comply with Exception 2. [SUF  
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27 <sup>6</sup> Metro also approved ads from commercial entities that comment on social  
28 issues and do not on their face appear to be commercial ads. Metro approved  
ads from McDonald’s thanking first responders [SUF ¶ 95], and an ad from Jack  
in the Box about feeding hungry children [SUF ¶ 94].



1 ¶ 72–74]. Mindiola stated Metro approved the noncommercial ads because the  
2 AIDS Healthcare Foundation also “offer[s] other services.” [SUF ¶ 74]. But  
3 again, nowhere in Metro’s ad policy does it state that offering other services is a  
4 basis to approve an otherwise noncommercial ad from a nonprofit organization.

5 Metro also approved two ads from Google encouraging readers to “get  
6 the Facts” regarding the COVID vaccine. [SUF ¶ 76]. Metro deemed  
7 commercial Google’s ads on the basis that it was a “commercial venture” and  
8 involved “brand equity.” [SUF ¶ 77]. But again, Metro’s noncommercial ad  
9 ban says nothing regarding brand equity as a basis for deeming an ad  
10 commercial.

11 Because of Metro’s unwritten rules and seemingly arbitrary application of  
12 its policy, Metro’s noncommercial ad ban lacks definiteness and objectivity and  
13 fails the second prong of the reasonableness test. Metro’s noncommercial ad  
14 ban is thus unconstitutional.

15 Because Metro’s ban on noncommercial ads fails the second prong of the  
16 reasonableness test, the Court need not go further to analyze the third prong.  
17 However, for the sake of completion, the Court notes that the third prong,  
18 whether an independent review of the record supports Metro’s conclusion that  
19 PETA’s ad is prohibited by Metro’s general prohibition against noncommercial  
20 ads and that PETA was required to comply with Exception 2, is satisfied. In  
21 analyzing the third prong, the Court considers the application of Metro’s policy  
22 as written as opposed to incorporating Metro’s unwritten rules and seemingly  
23 arbitrary application as discussed in prong two.

24 PETA argues that its ads should be deemed commercial because PETA is  
25 an entity that engages in interstate commercial activity. In so arguing, PETA  
26 relies on *Amalgamated Transit*, wherein the Ninth Circuit found that the  
27 Spokane Transit Authority (“STA”) improperly excluded an advertisement by  
28 the Amalgamated Transit Union (“ATU”) as noncommercial. 929 F.3d at 657.

1 The STA’s policy permitted not only commercial ads promoting commercial  
2 transactions, but also ads that “more generally promote[] an entity that engages  
3 in such activity.” *Id.* at 656. Because the ATU engaged in interstate commerce,  
4 the Court found its ad “promote[d] an organization that engages in commercial  
5 activity” and thus was improperly rejected by STA. *Id.* at 656–57.

6 But PETA’s argument is misplaced because unlike the policy in  
7 *Amalgamated Transit*, Metro’s policy does not permit noncommercial ads for  
8 the reason that they promote an organization that engages in commercial  
9 activity. Metro’s policy only considers whether an organization is  
10 governmental and whether the ad promotes a “sale, lease or other form of  
11 financial benefit,” not whether it promotes an organization that engages in  
12 commercial activity. Whether PETA engages in interstate commerce is  
13 inapposite as far as Metro’s policy is concerned, and thus, it cannot be said that  
14 Metro unreasonably applied its policy to PETA’s ads on this basis.

15 Because Metro’s general prohibition on noncommercial ads fails prong  
16 two of the Ninth Circuit’s reasonableness test, it is unconstitutional. *See*  
17 *Amalgamated Transit Union*, 929 F.3d at 651.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court **ORDERS**<sup>7</sup> as follows:

- 20 1. PETA has standing to pursue its claims.
- 21 2. PETA’s claims are ripe for determination.
- 22 3. Metro’s ad space is a limited public forum.

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<sup>7</sup> Metro filed evidentiary objections in response to PETA’s reliance on Deposition Testimony of Bernadette Mindiola [Dkt. 50-1 at 8–9], but none are dispositive to the Court’s ruling, and the Court therefore declines to rule on them.

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- 4. The Court **OVERRULES** Defendants’ Objections to the Declaration of Matthew Strugar and/or Material Noted Therein [Dkt. 50-1 at 2–8].
- 5. The Court **GRANTS** summary judgment in favor of PETA, finding Metro’s Exception 2 is unconstitutional.
- 6. The Court **GRANTS** summary judgment in favor of PETA, finding Metro’s general prohibition on noncommercial advertisements is unconstitutional.
- 7. The Court **DIRECTS** PETA to prepare and lodge a Judgment consistent with this Order by December 23, 2022.

**IT IS SO ORDERED.**

Dated: December 19, 2022



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SUNSHINE S. SYKES  
United States District Judge