

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.,**

Plaintiff,

v.

SHANE HINCKLEY,

Defendant.

Civil Action No. 4:20-CV-3681

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, by its counsel, makes its complaint against defendant as follows:

1. Plaintiff People for the Ethical Treatment of Animals, Inc. (“PETA”) created an advertisement featuring an image of an underweight golden retriever named Peony who was drooling and confined to a barren cell in a laboratory at Texas A&M University (“TAMU”), where she suffered from canine muscular dystrophy, a painful and debilitating disease that ravages dogs’ muscles and leaves them struggling to walk, swallow, and even breathe. The advertisement (the “Ad”), attached as Exhibit A, reads, “Imagine having your body left to science while you’re still in it.” To educate the public about the suffering of Peony and dozens of dogs like her who have been held at TAMU’s controversial canine muscular dystrophy laboratory, PETA sought to place the Ad on buses that were part of TAMU’s transit system. Defendant Shane Hinckley, the Vice President of Brand Development for TAMU, rejected PETA’s proposed advertisement on the

ground that it purportedly violates TAMU's advertisement standards, which prohibit ads that contain "political campaigns and viewpoints or endorsements." The Ad contains none of these.

2. In refusing to run the Ad, TAMU violated PETA's First Amendment right to free speech. PETA challenges the "political campaigns and viewpoints or endorsements" prong of TAMU's advertisement standards, both facially and as applied to the Ad. The ban on "political" advertising is a content-based restriction on speech in a limited public forum, which is both unreasonable and viewpoint discriminatory. As applied to PETA, TAMU's refusal to run the Ad constitutes unlawful viewpoint discrimination, which denies PETA the ability to spread a message that is critical of the suffering of dogs in TAMU's canine muscular dystrophy laboratory. Because the First Amendment prohibits such viewpoint discrimination in all forums, including limited public forums like the exteriors of TAMU's buses, PETA is entitled to injunctive relief. Furthermore, PETA is entitled to declaratory and injunctive relief because TAMU's advertising standard is overbroad and impermissibly vague.

Jurisdiction and Venue

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 as this is an action to redress deprivation, under color of state law, of rights secured by the Constitution of the laws of the United States. PETA seeks remedies under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 (protection of constitutional rights), Fed. R. Civ. P. 65 (injunctive relief), and 28 U.S.C. §§ 2201-02 and Fed. R. Civ. P. 57 (declaratory relief).

4. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2). A substantial part of the events giving rise to this claim occurred in this District.

Parties

5. Plaintiff People for the Ethical Treatment of Animals, Inc. (“PETA”) is a section 501(c)(3) animal-protection advocacy organization and charity located in Norfolk, Virginia. Founded in 1980, PETA is dedicated to protecting animals from abuse, neglect, and cruelty. It undertakes these efforts through public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, protest campaigns, administrative petitions, and lawsuits to enforce laws enacted to protect animals.

6. Defendant Shane Hinckley is the Vice President of Brand Development for Texas A&M University (“TAMU”), and is part of TAMU’s President’s Cabinet. Mr. Hinckley made the final decision challenged here, and is sued in his official capacity only for prospective injunctive relief. TAMU is a public research university located in College Station, Texas, and the second largest public university, by student enrollment, in the United States. Mr. Hinckley is responsible for the strategic growth of TAMU’s brand and his efforts include launching TAMU’s first-ever national reputation campaign. He rejected PETA’s Ad pursuant to his duties to grow TAMU’s brand and protect its reputation.

Factual Allegations

TAMU’s Transit Buses are a Limited Public Forum Subject to the First Amendment

7. According to its website, TAMU owns ninety-two full-size transit buses and four smaller buses, which operate both on and off campus and collectively carry over 7.5 million riders per year.¹

¹ See Transit Facts and Figures, <https://transport.tamu.edu/Transit/facts.aspx>.

8. TAMU sells advertising space on both the interior and exterior of these buses, thereby creating a limited public forum, subject to the protections of the First Amendment.

9. TAMU uses the services of an out-of-home media company, Texas A&M Ventures, which is a division of Learfield IMG College, to manage its advertising sales and placement. Texas A&M Ventures describes itself as the official multimedia rights partner for TAMU.²

10. TAMU directs prospective advertisers to submit proposed advertisements to Jarrett Moore, of Texas A&M Ventures, but TAMU ultimately decides whether or not a proposed advertisement complies with TAMU's advertising policy.³ In this instance, TAMU, acting through Defendant Shane Hinckley, was solely responsible for rejecting the Ad for placement on the exterior of its buses; Texas A&M Ventures merely forwarded PETA's Ad to TAMU, which ultimately made the decision to deny its placement.

TAMU's Transit Advertising Standards

11. At all times relevant to the matters set forth in this Complaint, TAMU had and currently has in place a written policy (the "Policy"), in the form of published Advertising Standards on the University website, concerning the acceptance of advertisements to run in or on TAMU transit buses.⁴ These standards state that TAMU's Transportation Services shall not display or maintain any advertisements that:

- are demeaning or disparaging;
- promote the sale or use of alcohol, tobacco, or firearms;

² See Texas A&M Ventures, Learfield IMG College, <https://www.learfield.com/partner/texas-a-m-ventures/>.

³ See Transportation Services Advertising Opportunities, <https://transport.tamu.edu/About/advertising.aspx>.

⁴ Exhibit B, TAMU's Advertising Standards, <https://transport.tamu.edu/WebFS/Transport/About/Advertising/AdvertisingStandards.pdf>.

- contain profane language;
- contain an image or description of violence to humans or other animals;
- promote or encourage unlawful or illegal goods or services;
- promote or encourage unlawful or illegal behavior or activities;
- contain obscenity or nudity;
- contain material that appeals to the prurient interest;
- contain political campaigns and viewpoints or endorsements;
- contain false, misleading, or deceptive commercial speech;
- contain libelous speech or copyright infringement;
- encourage persons to disregard transit safety;
- do not clearly identify the advertiser; or
- are unpaid or discounted.⁵

12. TAMU’s Policy does not define “political.” Because the Policy does not define this term, it fails to enable a reasonable member of the public to know which advertisements are permitted or prohibited under the Policy, and it vests TAMU officials with the unfettered discretion to decide which advertisements to permit or reject.

PETA’s Request to Advertise on TAMU’s Transit Buses

13. On October 9, 2019, PETA’s advertising coordinator, Morgan Solorzano, emailed Texas A&M Ventures’ manager of partnership services, Jarrett Moore, with PETA’s request to place the Ad on TAMU’s transit buses. She indicated that PETA wanted to run the Ad for four weeks in either October or November of that year. Ms. Solorzano copied Deborah Hoffman,

⁵ *Id.*

Director of TAMU's Transportation Services, on that message.⁶

14. That same day, Mr. Moore forwarded PETA's request to Melissa Maraj, who is Manager of Communications with TAMU's Transportation Services and who reports to Ms. Hoffman. He asked her "to run this one up the flagpole for approval" and told her that PETA wanted to run the Ad on the exterior of TAMU's buses.

15. Ms. Maraj responded that the request would have to go through TAMU's Department of Marketing and Communications "for review and approval" and she encouraged Mr. Moore to "start with Shane Hinckley to get his feedback." Mr. Moore indicated that he would. On information and belief, ads submitted to run on TAMU's buses do not typically go to Mr. Hinckley, who leads a separate department, for review; rather, the Ad went to him in this instance because of PETA's speech expressing a viewpoint that is critical of TAMU's dog laboratory and because of his role in managing TAMU's brand before the public eye.

16. Mr. Moore provided Ms. Solorzano TAMU's rates on October 11, 2019, and noted that the Ad was "still in the approval stage." In her response, Ms. Solorzano indicated that the rates were "definitely within [PETA's] budget" and that PETA "would love to advertise." Ms. Hoffman remained copied on their exchange.

17. That same day, Ms. Hoffman forwarded the email thread to Ms. Maraj. In response, Ms. Maraj noted that Mr. Moore's boss and Hinckley were "in discussion" about the Ad. She also shared that she recognized the dog in the Ad as "an actual dog here" at TAMU who made "headlines" because she "was allegedly mistreated and suffered a slow death." She opined that PETA "really went home when they made that ad." Ms. Hoffman responded, "Interesting.

⁶ TAMU's Transportation Services is a unit of TAMU's Division of Finance and Operations. See <https://vpfo.tamu.edu/division-units/index.html>.

Thanks.”

18. On October 15, 2019, Mr. Moore encouraged PETA to run the Ad on multiple buses and routes to maximize exposure. Ms. Solorzano promptly responded that PETA was open to that and reiterated that PETA was planning to run the Ad for four weeks. In his response, Mr. Moore indicated that he was “pushing for approval” of the Ad.

19. Two weeks passed. On November 4, 2019, PETA’s Vice President of Communications, Colleen O’Brien, emailed Peter Lange and Madeline Dillard, who are, respectively, Associate Vice President and Assistant Director of TAMU’s Transportation Services, to inquire about the delay. She asked TAMU to approve the Ad so PETA “may begin running it right away.”

20. Mr. Lange forwarded this message to Ms. Maraj, copying Ms. Hoffman and others with TAMU’s Transportation Services, and asked for an update. Ms. Hoffman provided a timeline of PETA’s request and TAMU’s response to date. Mr. Lange then asked Ms. Hoffman to ask Mr. Moore how to respond. Ms. Hoffman forwarded the email exchange to Mr. Moore and asked him to respond to Ms. O’Brien.

21. On November 5, 2019, Mr. Moore emailed Ms. O’Brien, apologizing for the delay and noting that he still did not “have an adequate update to provide on [PETA’s] transit ad.” She responded, copying Mr. Lange and Ms. Dillard, and reiterated her request for an answer to PETA’s request to run the Ad.

22. That same day, Mr. Lange forwarded Ms. O’Brien’s email to Mr. Hinckley and Jerry Strawser, Executive Vice President for TAMU’s Division of Finance and Operations. He asked if TAMU had “any obligation to provide an answer” to Ms. O’Brien. Mr. Strawser advised that he “would not [respond] at this time.”

23. Finally, on November 19, 2019—more than six weeks into the eight-week period during which PETA had hoped to run the Ad for four weeks—Mr. Hinckley responded to Ms. O’Brien. He indicated that PETA’s advertisement had been “rejected because it fails to comply with the University’s published advertisement standards.” He linked to the Policy, and noted: “Specifically, Transportation Services does not accept political advertisements for posting on its buses.”

24. The next day, Ms. O’Brien emailed Mr. Hinckley and explained that PETA’s Ad “clearly does not pertain to a political campaign, viewpoint, or endorsement,” and asked him to advise. He did not respond.

25. On information and belief, TAMU’s delayed response to PETA’s time-sensitive request to run a transit advertisement was atypical and was precipitated by its decision to send the Ad to Mr. Hinckley for review. This aberrant process reflects TAMU’s intention to prevent PETA from advertising its message, which was critical of TAMU. Ultimately, Mr. Hinckley’s decision to reject the Ad was viewpoint discrimination.

First Cause of Action

TAMU’s Policy is Unconstitutional Facially and As-Applied

First and Fourteenth Amendments (42 U.S.C. § 1983)

26. Plaintiff repeats the allegations set forth above as if fully set forth herein.

27. TAMU’s Policy prohibiting “political” advertisements on its transit buses is unconstitutional on its face and as applied to PETA as described above.

28. TAMU’s Policy prohibiting “political” advertisements on its transit buses and/or TAMU’s interpretation and implementation of that policy, is content- and viewpoint-based discrimination that is not narrowly tailored to promote a compelling government interest, in

violation of the First and Fourteenth Amendments to the United States Constitution.

29. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that policy, is content- and viewpoint-based discrimination that does not serve a substantial interest and is not narrowly drawn, in violation of the First and Fourteenth Amendments to the United States Constitution.

30. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that policy, is not rationally related to a legitimate governmental objective, in violation of the First and Fourteenth Amendments to the United States Constitution.

31. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that Policy, gives TAMU unfettered discretion in enforcement, in violation of the First and Fourteenth Amendments to the United States Constitution.

32. TAMU's refusal to run PETA's advertisement amounts to discrimination on the basis of content and/or viewpoint in violation of the First and Fourteenth Amendments to the United States Constitution.

33. PETA has suffered and will continue to suffer irreparable harm and the deprivation of its rights because of TAMU's unconstitutional Policy and practices.

Second Cause of Action

Vagueness

First and Fourteenth Amendment (42 U.S.C. § 1983)

34. Plaintiff repeats the allegations set forth above as if fully set forth herein.

35. TAMU's Policy prohibiting "political" advertisements on its transit buses is not clearly defined such that a person of ordinary intelligence can readily determine whether an advertisement is allowable or prohibited.

36. The criteria TAMU used and is using to prohibit PETA's advertisement are not clearly defined such that a person of ordinary intelligence can readily determine whether an advertisement is allowable or prohibited. Such vagueness also contributes to the unfettered discretion exercised by TAMU.

37. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that policy, violate PETA's rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

38. PETA has suffered and will continue to suffer irreparable harm and the deprivation of its rights because of TAMU's unconstitutional policy and practices.

Third Cause of Action

Overbreadth

First and Fourteenth Amendment (42 U.S.C. § 1983)

39. Plaintiff repeats the allegations set forth above as if fully set forth herein.

40. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that Policy, is overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution.

41. TAMU's Policy is overbroad because it provides TAMU with unfettered discretion to interpret "political" in a way that renders a substantial number of its applications unconstitutional. Failing to define "political" provides the Policy with such a wide sweep that it

chills protected expression, in violation of the First and Fourteenth Amendments to the United States Constitution.

42. TAMU's Policy prohibiting "political" advertisements on its transit buses and/or TAMU's interpretation and implementation of that policy, violate PETA's rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

43. PETA has suffered and will continue to suffer irreparable harm and the deprivation of its rights because of TAMU's unconstitutional policy and practices.

Prayer for Relief

WHEREFORE, Plaintiff requests that this Court:

1. Declare that TAMU has violated and is violating PETA's rights under the First and Fourteenth Amendments to the United States Constitution;
2. Declare that TAMU's Policy prohibiting "political" advertisements on its transit buses is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
3. Declare that TAMU's interpretation and implementation of its Policy prohibiting "political" advertisements on its transit buses is unconstitutional as applied under the First and Fourteenth Amendments to the United States Constitution;
4. Grant PETA permanent injunctive relief ordering TAMU to accept and display PETA's advertisement on terms no less favorable than those given to other advertisers;
5. Grant PETA preliminary and permanent injunctive relief enjoining TAMU, its employees, agents, successors, and assigns, and all persons acting in concert with them, from continuing to enforce TAMU's Policy prohibiting "political" advertisements on its transit buses;

6. Award PETA its costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988(b); and

7. Grant any additional relief as may be just and proper.

DATED: October 27, 2020

Respectfully submitted:

/s/ Christopher W. Rothfelder
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*Application to appear *pro hac vice* pending
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