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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—
GENERAL

Case No.	2:21-cv-07662-SSS-MAAx	Date	November 8, 2023
Title	*People for the Ethical Treatment of Animals, Inc. v. L.A. Cnty. Metro. Transit Auth.*		

Present: The Honorable	SUNSHINE S. SYKES, UNITED STATES DISTRICT JUDGE

Irene Vazquez	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s): None Present	Attorney(s) Present for Defendant(s): None Present

Proceedings: (IN CHAMBERS) ORDER DENYING MOTION TO DISSOLVE PERMANENT INJUNCTION [DKT. 95]

I. INTRODUCTION

Defendant Los Angeles County Metropolitan Transportation Authority ("Metro") moves to dissolve the permanent injunction that prohibits it from enforcing two unconstitutional portions of a prior version of its advertising policy. [Dkt. 95, Mot. to Dissolve Permanent Inj. ("Mot")]. Plaintiff People for the Ethical Treatment of Animals, Inc. ("PETA") opposes. [Dkt. 98, PETA's Opp'n to Metro's Mot. to Vacate Permanent Inj. ("Opp'n")]. For the reasons below, the motion is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Metro is responsible for providing public transportation to patrons in Los Angeles County. As a method of generating revenue, Metro sells advertising opportunities on its buses and railways. When this lawsuit was filed, Metro's advertising policy generally prohibited the placement of noncommercial advertising

on its buses under a section titled "Non-Commercial Advertising." [Dkt. 57, Order Granting Pl.'s Mot. for Summ. J. ("MSJ Order") at 2; *see also* Dkt. 97, Decl. of Glen Becerra ("Becerra Decl.") Ex. C at 52]. The prior ban read as follows:

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

[MSJ Order at 2; Becerra Decl. Ex. C at 52]. Under this same section, Metro granted two exceptions to this ban, the second of which allowed nonprofit organizations who partnered with governmental agencies to place noncommercial advertisements on Metro's buses ("Exception 2"):

> **Exception 2**: Metro will accept paid advertising from non-profit organizations that partner with a Governmental Agency (as defined in 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, identify the Governmental Agency and indicate that the Governmental Agency approves, sponsors, or otherwise authorizes the advertising. The non-profit organization must also provide a Statement of Approval (attached) from the Governmental Agency describing the joint purpose to be advanced and setting forth a statement acknowledging support and approval for the submitted advertising. Any message displayed under this exception must adhere to all other content restrictions stated in this policy.

[MSJ Order at 2-3; Becerra Decl. Ex. C at 52-53].

In 2021, PETA submitted to Metro two advertisements for approval to place on Metro's buses. Metro rejected the request because the advertisements were prohibited under its noncommercial advertising ban and because PETA was not sponsored by a governmental agency. A few months after the rejection, PETA sued Metro alleging its ban on noncommercial advertising and Exception 2 violated its free speech rights under the First Amendment. The Court granted summary judgment in PETA's favor and permanently enjoined Metro from enforcing the

version of noncommercial advertising ban and Exception 2 that was in effect while the lawsuit was pending. [*See* MSJ Order at 11-13, 18-24; Dkt. 60, Final J. & Permanent Inj. ¶¶ 4-5].

Both parties later cross appealed to the Court of Appeals for the Ninth Circuit. [Dkt. 68, 84]. While the cross appeals were pending, Metro overhauled its advertising policy in response to this Court's decision. [Becerra Decl. ¶ 10]. In doing so, Metro removed the section "Non-Commercial Advertising" from its new advertising policy, which included the unconstitutional version of its noncommercial advertisement ban and Exception 2. [*Id.* Ex. C. at 63-64]. Metro replaced the prior version of the noncommercial advertisement ban with a new one under the section titled "Permitted Advertising Content," which reads as follows:

> Metro will only accept paid commercial advertising that proposes, promotes, or solicits the sale, rent, lease, license, distribution or availability of goods, property, products, services, or events that anticipate an exchange of monetary consideration for the advertiser's commercial or proprietary interest, including advertising from tourism bureaus, chambers of commerce or similar organizations that promote the commercial interests of its members, and museums that offer admission to the public.

[Becerra Decl. Ex. D at 74-75]. The new policy also states that it "will accept only commercial advertising [sic] regardless of whether the proponent is a commercial or nonprofit organization." [*Id.* at 75]. To determine whether an advertisement is commercial, the new policy outlines four nonexclusive factors that Metro can consider:

> (a) whether a commercial product or service is apparent from the face of the ad; (b) whether the commercial product or service is incidental to the public interest content of the ad; (c) whether the sale of commercial products or services is the primary source of the advertiser's total annual revenue; and (d) whether the advertiser is a for-profit entity

[*Id.*]. The revised policy went into effect on April 27, 2023. [Becerra Decl. ¶ 13].

After the new policy went into effect and before the Ninth Circuit could resolve the parties' cross appeals, Metro moved this Court to dissolve the permanent injunction under Federal Rule of Civil Procedure 60(b)(5). The Court

deferred ruling on the motion pending resolution of the cross appeals, [Dkt. 107]. On August 23, 2023, the Ninth Circuit remanded to this Court the issue of "whether and to what extent the permanent injunction should be dissolved." [Dkt. 110, Order].

III. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b)(5) authorizes a court to relieve a party from a final judgment if, among other things, "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). To obtain Rule 60(b)(5) relief, the moving party carries the initial burden of showing that a significant change of fact or law warrants modification of the permanent injunction. *See Horne v. Flores*, 557 U.S. 433, 447 (2009); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383-84 (1992). When Rule 60(b)(5) relief is based on changed factual conditions, the moving party must show (1) that the "changed factual conditions make compliance with the decree substantially more onerous," (2) that "a decree proves to be unworkable because of unforeseen obstacles," or (3) that "enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. If the moving party meets its burden, then the court should consider whether dissolution of the permanent injunction is suitably tailored to the changed circumstances. *See id.* "A district court's authority to modify an injunction is more limited than its authority to formulate an injunction in the first instance because of the additional interest in the finality of judgments. 'A balance must thus be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances.'" *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1097 (9th Cir. 2021) (quoting *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647-48 (1961)).

IV. DISCUSSION

Metro argues the permanent injunction should be dissolved because its purpose—that is, to prohibit Metro from enforcing the unconstitutional portions of the prior version of the advertising policy—has been achieved. It would thus be inequitable, Metro contends, to maintain the injunction when the "portions of the prior policy enjoined by the Court no longer exist in the New Policy." [Mot. at 11]. PETA contends Metro fails to meet its burden of showing that the new advertising policy makes its compliance with the injunction "onerous, unworkable, or detrimental to the public interest." [Opp'n at 12].

The Court finds the appropriate route here is not to dissolve the permanent injunction but rather clarify its scope. As discussed in the summary judgment

order, the Court held as unconstitutional the version of the noncommercial advertisement ban and Exception 2 that was in effect while the lawsuit was pending. [*See* MSJ Order at 11-13, 18-24]. When the injunction is read together with the summary judgment order, it becomes clear that this Court intended only to prohibit Metro from enforcing the now-nonexistent portions of the *prior* advertising policy. [*See id.*; Final J. & Permanent Inj. ¶¶ 4-5]. Notably, the injunction does not enjoin Metro from revising, enacting, and enforcing any future versions of the noncommercial advertisement ban as long as it does not reenact the version this Court found unconstitutional. To take the additional step and find that the new ban is a "durable remedy," as Metro asks the Court to do here, would be the functional equivalent of concluding that the new ban meets First Amendment muster. This Court declines to give Metro's new noncommercial advertisement ban the stamp of constitutional approval because that would be an improper advisory opinion on an issue that is neither a live case nor controversy here.

The Court is not alone in its approach. *See Chase v. Town of Ocean City*, No. ELH-11-1771, 2015 WL 4993583 (D. Md. Aug. 19, 2015); *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health*, No. 1:13-cv-01335-JMS-MJD, 2015 WL 4065441 (S.D. Ind. July 2, 2015). In *Chase*, for example, the town had a local ordinance that prohibited certain artistic activities on its boardwalk. 2015 WL 4993583, at *2. The plaintiff, a visual artist and street performer, sued the town alleging the local ordinance violated his First Amendment free expression rights, among other things. *Id.* After the town was preliminarily enjoined from enforcing the ordinance, the district court granted the parties' consent decree, which effectively enjoined the town from enforcing portions of the local ordinance. *Id.* at *3. Three years later, a new ordinance was enacted that expressly repealed the old ordinance. *Id.* at *3-4. The town moved to dissolve the preliminary injunction and consent decree under Rule 60(b)(5), arguing, as Metro does here, that the new ordinance complies with the prior orders. *Id.* at *4. The district court denied the motion, clarifying that its orders pertained only to the prior version of the ordinance and did not prevent the town from revising and enforcing new versions of the ordinance. *Id.* at *5. The district court, however, declined to comment on the legality or constitutionality of the new ordinance because that would be an improper advisory opinion. *Id.*; *see also id.* at *11 ("It is not appropriate for the Court to ascend the pulpit and issue a judicial blessing with regard to the New Ordinance.").

The district court in *Planned Parenthood* took the same approach for resolving a Rule 60(b)(5) motion. There, the plaintiff brought a lawsuit alleging, among other things, that two abortion-related state statutes violated the Equal

Protection Clause of the Fourteenth Amendment. 2015 WL 4065441, at *1. After summary judgment was granted in the plaintiff's favor on the equal protection claim, the district court permanently enjoined the state and its agents from enforcing that version of the statutes. *Id.* at *2. A few years later, the prior versions of the statutes were repealed, and new versions were enacted. *See id.* at *1-2. The state entity moved to dissolve the permanent injunction under Rule 60(b)(5), arguing that no basis existed to maintain the judgment or permanent injunction. *Id.* at *2. The district court denied the motion, concluding that the appropriate route there was to clarify that its orders only enjoined the state actors from enforcing the prior version of the statutes that were in effect during the lawsuit and did not have any effect on the newly revised statutes. *Id.* at *3. The district court noted that "any further pronouncement by the Court would smack of an improper advisory opinion on the amended statutes." *Id.*

Consistent with the district courts' approach in *Chase* and *Planned Parenthood*, and as already discussed above, the Court finds the appropriate route here is not to dissolve the permanent injunction but rather to clarify that it only prohibited Metro from enforcing the prior, now-nonexistent version of the noncommercial advertisement ban and Exception 2. To be abundantly clear, the injunction has no effect on Metro's newly enacted noncommercial advertisement ban.

V. CONCLUSION

For the above reasons, Metro's motion to dissolve the permanent injunction is **DENIED**. The Clerk of Court shall transmit a copy of this order to the United States Court of Appeals for the Ninth Circuit. Because there are no more pending matters in this case, the Clerk of Court is directed to close the case.

IT IS SO ORDERED.