

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
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5
6 AMALGAMATED TRANSIT UNION
7 LOCAL 1015,

8 Plaintiff,

9 v.

10 SPOKANE TRANSIT AUTHORITY,
11

12 Defendant.
13

NO. 2:17-CV-00053-JLQ

MEMORANDUM OPINION,
FINDINGS OF FACT, AND
CONCLUSIONS OF LAW RE:
BENCH TRIAL

14 **I. Introduction**

15 On February 6, 2017, Plaintiff, Amalgamated Transit Union - Local 1015
16 (“Plaintiff” or “ATU”) filed the Complaint alleging the Defendant, Spokane Transit
17 Authority (“Defendant” or “STA”) violated ATU’s constitutional rights by refusing to
18 allow it to run an advertisement stating drivers of various entities have the right to
19 organize. (ECF No. 1). On May 16, 2017, the court denied STA’s Motion to Dismiss.
20 (ECF No. 28). On May 25, 2017, the court granted the parties’ joint request for a bench
21 trial on an expedited basis due to the minimally disputed facts. (ECF No. 31).

22 On June 27, 2017, the court held the bench trial in this matter. Plaintiff was
23 represented by Steven Crumb and Sean Morales-Doyle. James McPhee and John Drake
24 appeared on behalf of the Defendant. At the conclusion of the bench trial, the court
25 ordered the parties to submit briefing to address the issues raised at trial. On July 21,
26 2017, the parties submitted briefs and on August 4, 2017, submitted reply briefs. *See*
27 (ECF No. 42); (ECF No. 44); (ECF No. 46); (ECF No. 47). The parties also submitted
28 proposed Findings of Fact and Conclusions of Law. *See* (ECF No. 43); (ECF No. 45).

1 This Order memorializes the court’s Findings of Fact and Conclusions of Law in this
2 matter.

3 **II. Findings of Fact¹**

4 ATU is a nonprofit union representing all transit operators, maintenance, clerical,
5 and customer service employees at STA, as well as drivers for STA’s para-transit
6 program. (ECF No. 41 at 43:8-15, 22-25). ATU provides collective bargaining services,
7 contract enforcement, and assistance in organizing new members. (ECF No. 41 at 43:17-
8 18).

9 STA provides public bus transportation to the Spokane region. (ECF No. 41 at
10 112:7-8). STA had an advertising program to generate non-tax revenue. (ECF No. 41 at
11 112:13-14). To implement the advertising program, STA, at all relevant times, had a
12 “Commercial Advertising Policy” (“Policy”) setting forth the criteria by which
13 advertising would be approved for display on STA buses. (ECF No. 41 at 112:20-21);
14 (Ex. 1). The Policy delegated daily administration of the policy to an “Advertising
15 Contractor.” (Ex. 1 at §III.A). Until November 7, 2016, the Advertising Contractor was
16 Ooh Media LLC. (ECF No. 41 at 166:22-25).

17 The Policy permitted two types of advertising content for display on STA buses:
18 (1) “Commercial and Promotional Advertising”; and (2) “Public Service
19 Announcements.” (Ex. 1 at ¶9); (Ex. 1 at § II.A). “Commercial and Promotional
20 Advertising” is defined by the Policy as advertising that “promotes or solicits the sale,
21 rental, distribution or availability of goods, services, food, entertainment, events,
22 programs, transaction, donations, products or property for commercial purposes or more
23 generally promotes an entity that engages in such activity.” (Ex. 1 at § II.A.1).

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25
26 ¹ To the extent the Discussion section of this Memorandum Opinion contains
27 mixed Findings Of Fact and Conclusions Of Law, those findings are deemed part of the
28 court’s Findings Of Fact and Conclusions Of Law.

1 To qualify as a “Public Service Announcements” (“PSA”), proposed
2 advertisements were required to meet three criteria: (1) the sponsor “must be a
3 government entity or a nonprofit corporation that is exempt from taxation under §
4 501(c)(3) of the Internal Revenue Code”; (2) the “PSA must be directed to the general
5 public or a significant segment of the public and relate to: i. Prevention or treatment of
6 illness; ii. Promotion of safety, health or personal well-being; iii. Provision of family or
7 child social services; iv. Solicitation by broad-based employee contribution campaigns
8 which provide funds to multiple charitable organizations (e.g. United Way); or v.
9 Provision of services and programs that support low income citizens or persons of
10 disability”; and (3) “may not include a commercial message or mention a festival, show,
11 sporting event, concert, lecture, or event for which an admission fee is charged.” (Ex. 1 at
12 § II.A.2.c).

13 The Policy also listed categories of “Prohibited Advertising Content” including ads
14 containing deceptive commercial speech, political speech, the promotion of unlawful
15 goods or services, or “expressing or advocating an opinion, position, or viewpoint on
16 matters of public debate about economic, political, religious or social issues.” (Ex. 1 at §
17 II.B(13)). The “Prohibited Advertising Content” applied equally to both “Commercial
18 and Promotional Advertising” and “Public Service Announcements.” (ECF No. 41 at
19 178:14-22).

20 If the Advertising Contractor was unable to make a determination whether a
21 proposed advertisement complied with the Policy, the Director of Communications
22 reviewed the advertisement. (ECF No. 41 at 113:23-114:2). If the Director of
23 Communications could not make a decision, the STA CEO made the final decision on a
24 proposed advertisement. (ECF No. 41 at 113:23-114:2). When proposed advertisements
25 came to the CEO, she consulted at times with legal counsel before rendering a decision.
26 (ECF No. 41 at 116:5-8).

1 The prior version of the Policy did not contain prohibitions on “Public Issues.” Ex.
2 501 at 3). Under the prior version of the Policy, the Coalition of Reason ran an
3 advertisement on STA buses stating “Are you good without God? Millions Are.” (Ex.
4 513); (ECF No. 41 at 116:20-117:3). STA received complaints above and beyond normal
5 complaints concerning this advertisement, both before and after the advertisement started
6 appearing on STA buses. (ECF No. 41 at 117:4-6, 120:22-24, 122:15-17, 127:19-23);
7 (Ex. 514a-b); (Ex. 515a-c). The advertisement brought attention that negatively affected
8 STA operations in the form of concerns expressed to STA bus operators who did not
9 want to drive buses with those advertisements and customer service representatives who
10 dealt with the complaints and reactions. (ECF No. 41 at 193:16-24, 194:7-11).

11 Also under the old Policy, an advertisement ran on STA buses stating “Fred Meyer
12 Firing workers for one honest mistake is JUST WRONG.” (Ex. 511); (ECF No. 41 at
13 132:10-21). STA received complaints about the advertisement. (Ex. 512a); (ECF No. 41
14 at 132:23-25, 133:8-18, 194:23-195:5). The complaints raised concern with STA because
15 the complaints suggested STA used taxpayer funded buses to promote messages from
16 particular viewpoints. (ECF No. 41 at 134:15-22). The complaints prompted an internal
17 discussion within STA to determine if there was anything it could do about the
18 complained of advertisements. (Ex. 512b); (ECF No. 41 at 134:25-137:1).

19 Under the former version of the Policy, another advertisement campaign ran which
20 was critical of Albertsons and encouraged shoppers to shop at Rosauers. (Ex. 508); (ECF
21 No. 41 at 137:15-17). STA received complaints about the advertising campaign. (Ex.
22 509); (ECF No. 41 at 137:18-19, 138:7-21).

23 An advertisement also ran under the old policy for Busty’s Top Espresso, a bikini
24 espresso. (Ex. 516); (ECF No. 41 at 139:16-23). STA and counsel reviewed the original
25 proposed advertisement and it was rejected. (ECF No. 41 at 141:18-21). Local media
26 interviewed STA CEO E. Susan Meyer regarding the Busty’s Top Espresso
27 advertisements and complaints received by the local media. (Ex. 517b); (ECF No. 41 at
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1 140:21-141:15). STA also received complaints regarding this advertisement. (Ex. 517a);
2 (ECF No. 41 at 140:10-17).

3 STA spent a significant amount of time responding to complaints under the former
4 policy. (ECF No. 41 at 142:13-24). The complaints generated STA concerns about the
5 impact on bus operators and possible funding problems from voter backlash. (ECF No.
6 41 at 144:6-19). Based on these issues, in late 2012, STA revised the Policy to its current
7 form with review of legal counsel and the Communications Manager. (ECF No. 41 at
8 144:24-145:13); (Ex. 501, 503). On December 5, 2012, the Performance Monitoring and
9 External Relations Committee, composed of the STA CEO, a labor representative, and
10 other community members, reviewed the proposed changes, made its own changes, and
11 passed the Policy. (ECF No. 41 at 145:14-149:10, 199:2-200:19). On December 20, 2012,
12 the STA Board of Directors met, discussed the proposed changes to the Policy, and
13 passed it unanimously. (Ex. 503 at 2-3); (ECF No. 41 at 149:15-151:21, 200:20-201:4).

14 The Board has not issued guidance as to what constitutes a matter of public debate
15 or how to interpret the “Public Issue” portion of the Policy. (ECF No. 41 at 186:3-5).
16 STA interprets the “Public Issue” to constitute “subjects on buses that would create a
17 negative impression of the organization that would be hard on our employees and hard on
18 the organization.” (ECF No. 41 at 187:1-11). Under the current Policy, STA has not
19 received complaints over advertisements run on its buses. (ECF No. 41 at 153:11-13).

20 In January 2013, the Seventh Day Adventist Church of Spokane submitted a
21 proposed series of advertisements for STA buses stating: “Jesus Cares About Your
22 Future,” “You Matter to Jesus,” and “Jesus Head of Lost and Found.” (Ex. 520); (ECF
23 No. 41 at 155:19-156:3, 157:10-16); (Ex. 522-A). The proposed advertisements were
24 rejected because they promoted a religious message that was prohibited as a “Public
25 Issue” under the revised Policy. (ECF No. 41 at 181:1-7). This prompted a public records
26 request and letter from the Church as to why the advertisements were rejected. (Ex. 521-
27 A); (ECF No. 41 at 156:12-23). STA’s response explained the Policy had been changed,
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1 the proposed advertisements which were allowed under the old Policy were not allowed
2 under the revised Policy, and attached a copy of the current Policy. (Ex. 522-A); (ECF
3 No. 41 at 157:4-16, 158:3-8). STA worked with the Church on revising the proposed
4 advertisements to comply with the Policy. (Ex. 522-C); (ECF No. 41 at 160:2-5). The
5 advertisements accepted by STA stated “YOU MATTER TO SOMEONE,” “SOMEONE
6 CARES ABOUT YOUR FUTURE,” and “WE CARE ABOUT YOU.” (Ex. 522-C at 1);
7 (ECF No. 41 at 180:8-25). Another advertisement only stated the Church’s website. (Ex.
8 522-C at 1). STA found the advertisements, which promoted the Seventh Day Adventist
9 Church generally, did not take a position on a “Public Issue.” (ECF No. 41 at 181:8-16).

10 In the summer of 2016, Ooh Media approved advertisements by the United Food
11 and Commercial Workers’ Union Local 1439 that ran on 11 buses. (ECF No. 41 at 168:1-
12 17, 169:6-12); (Ex. 525). The advertisements all stated “GET UNITED!” with other
13 messages such as “Get the wages, healthcare, and safe working conditions you deserve,
14 for a happier home life,” “Stand up & have a voice in your workplace... for better wages,
15 healthcare, and a happier home life!”, and “Union workers banding together have better
16 healthcare, wages, working conditions, & a happier home life.” (Ex. 525). Each
17 advertisement had the Union’s logo, website, and phone number. (Ex. 525). Upon seeing
18 the advertisements on STA buses, CEO Meyer had the advertisements removed because
19 she believed they did not comply with the Policy. (ECF No. 41 at 168:4-169:4). STA had
20 received no complaints about these advertisements. (ECF No. 41 at 176:18-177:3,
21 206:22-207:4).

22 On August 8, 2016, ATU President/Business Agent Thomas Leighty contacted
23 Ooh Media about running bus advertisements “promoting our union and getting others
24 organized.” (Ex. 3 at 1). On August 9, 2016, Ooh Media responded by including a copy
25 of STA’s Policy. (Ex. 3 at 2). Leighty responded, stating he believed ATU could run
26 advertisements promoting ATU, highlighting the Policy’s allowance of advertisements
27 promoting the availability of services. (Ex. 3 at 4). On August 10, 2016, Ooh Media
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1 responded, stating “[t]he ads you wish to post are simply solicitation to join a union or
2 organizing. This is not a commercial purpose, nor does it promote an entity that engages
3 in such activity. Your union would be a 501(c)(5) and as such your message is not for
4 commercial purposes.” (Ex. 3 at 6).

5 At some point after this email exchange, ATU’s attorney sent a letter to STA
6 threatening legal action if STA did not allow ATU to advertise. (ECF No. 41 at 154:11-
7 13).² After exchanging emails with ATU’s attorney, counsel for STA sent an email
8 stating she reviewed the emails between Ooh Media and ATU, and stated “[i]t appears to
9 me that ooh [sic] Media probably read the request from ATU Local 1015 as seeking to
10 place ads that would violate its policy and STA’s policy, but that the messaging was
11 muddied by a reference to the tax status of Local 1015.” (Ex. 5 at 1). Counsel further
12 stated advertisements “promoting our union and getting others organized” “does not
13 appear to me to be commercial advertising promoting a commercial service or product
14 and Ooh Media apparently interpreted the request in the same way (although I haven’t
15 spoken with ooh [sic] Media specifically about their thought process and I don’t represent
16 the company).” (Ex. 5 at 1). Counsel for STA also stated “I think I would have come to
17 the same conclusion.” (Ex. 5 at 1). STA counsel ended the email by suggesting the parties
18 meet to “get the miscommunication [from Ooh Media] cleared up and to allow a chance
19 of ATU Local 1015 to present [an] ad copy ... to be fully evaluated by ooh [sic] Media to
20 determine if it is indeed Commercial or Promotional Advertising, or contains Prohibited
21 Advertising Content.” (Ex. 5 at 1).

22 On September 15, 2016, ATU and STA representatives and counsel met to discuss
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24 ² Defendant’s proposed Findings of Fact cite to the ECF filing for some findings,
25 including emails and communication between ATU and STA’s attorney. This evidence
26 was not presented at the bench trial and the court does not rely thereon. *See California*
27 *Offset Printers, Inc. v. Hampton Intern. Communications, Inc.*, 95 F.3d 1156, 1996 WL
28 490184 at *5 (9th Cir. 1996) (unpublished).

1 ATU potentially running an advertisement on STA buses. (ECF No. 41 at 98:13-15,
2 154:17-155:4). At the meeting, STA requested ATU submit an advertisement for its
3 consideration. (ECF No. 41 at 98:16-18, 154:25-155:1).

4 Thereafter, ATU submitted a proposed advertisement to Ooh Media. The
5 advertisement stated: “Do you drive: Uber? Lyft? Charter Bus? School Bus? You have
6 the Right to Organize! Contact ATU 1015 Today at 509-325-2955.” (Ex. 2). The
7 advertisement also had ATU’s logo. (Ex. 2). At some point after the advertisement was
8 submitted to Ooh Media, CEO Meyer contacted Ooh Media to get a status report. (ECF
9 No. 41 at 170:17-22). On October 7, 2016, Ooh Media informed Leighty it was “meeting
10 with my content reviewer today to go over the ad. I will let you know later today how
11 things look so we can move forward with the next step.” (Ex. 4 at 1). On October 10,
12 2016, at 10:31 a.m., Ooh Media informed Leighty “Ooh Media is ready to move forward
13 with your ad creative proposed recently.” (Ex. 4 at 2). At 6:55 p.m., Ooh Media informed
14 Leighty “[t]hough I believe we were at a point to approve your content, I actually have a
15 delay in final approval as I must meet with STA for their input.” (Ex. 4 at 3).

16 On November 6, 2016, STA terminated its contract with Ooh Media. (ECF No. 41
17 at 166:21-25). STA made its decision based on “[r]epeated errors in applying the [STA]
18 board’s policy to advertisements.” (ECF No. 41 at 167:1-5). STA asserted Ooh Media
19 “continued to be unable to distinguish between the policy before 2013 and the policy
20 after 2013.” (ECF No. 41 at 167:7-8).

21 On November 7, 2016, counsel for ATU contacted STA regarding the status of its
22 proposed advertisement because it had not heard anything since the October 7, 2016,
23 email from Ooh Media. (Ex. 6 at 3). On November 9, 2016, counsel for STA informed
24 ATU it had terminated the contract with Ooh Media and “[a]s a result, no further
25 advertising will be sold or accepted by ooh [sic] Media for placement on Spokane Transit
26 buses.” (Ex. 6 at 1).

27 STA claims ATU’s proposed advertisement is not allowable under the Policy
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1 because it addresses a “Public Issue” as defined in the Policy. (ECF No. 41 at 160:24-
2 161:6). STA asserts worker organization, representation, and collective bargaining falls
3 under the “right to organize” movement and is a matter of public debate. (ECF No. 41 at
4 162:4-163:6). STA contends if it runs ATU’s proposed advertisement, it would be
5 required to run anti-right to organize and right to work advertisements. (ECF No. 41 at
6 163:15-24). Regarding right to work advertisements, STA is concerned “for our coach
7 operators and anyone else who deals with the public, to have an ad that would be the
8 topic of highly emotional debate.” (ECF No. 41 163:25-164:6).

9 STA further claims any advertisement making reference to collective bargaining,
10 worker organization, worker representation, or soliciting people to organize is prohibited
11 by the Policy because those constitute a “Public Issue”. (ECF No. 41 at 173:15-19, 174:4-
12 8, 178:23-179:5, 181:18-182:8). STA also claims an advertisement promoting ATU
13 generally as an entity is not “a good or a service that’s being offered for sale” because
14 ATU does not provide commercial products or services. (ECF No. 41 at 174:12-175:1,
15 175:14-17, 179:24-180:7). STA believes a union could possibly “advertise a good or a
16 service that they provided that is not organizing.” (ECF No. 41 at 179:15-17).

17 Since at least 2008, STA has had stickers inside all of its buses stating “[t]his
18 vehicle is operated and maintained by union members Amalgamated Transit Union AFL-
19 CIO/CLC” and containing ATU’s logo. (Ex. 601); (ECF No. 41 at 104:5-11, 205:17-25).
20 The sticker is located inside the buses alongside STA’s membership in the Better
21 Business Bureau. (ECF No. 41 at 206:1-9). STA has never received complaints about
22 these stickers nor do they disrupt operations. (ECF No. 41 at 207:5-19). STA considers
23 these stickers to be “a statement of fact” and believes they do not set “any precedent as to
24 whether we’re taking a position on any issue.” (ECF No. 41 at 207:9-12).

25 26 27 **III. Discussion** 28

1 **A. Standard of Review**

2 For the purposes of the bench trial, the parties stipulated to the advertising space on
3 STA’s buses being a limited public forum. *See* (ECF No. 38 at 9); *Seattle Mideast*
4 *Awareness Campaign v. King County*, 781 F.3d 489, 498 (9th Cir. 2015). As such, any
5 speaker-based or subject-matter-based limitations must be “reasonable and viewpoint
6 neutral.” (*Id.* at 499). In order to be reasonable, a subject-matter or speaker-based
7 exclusion must be (1) “reasonable in light of the purpose served by the forum” and (2)
8 “based on a standard that is definite and objective.” (*Id.*) (quotation marks and citation
9 omitted).

10 The first requirement “focuses on whether the exclusion is consistent with ‘limiting
11 [the] forum to activities compatible with the intended purpose of the property.’” (*Id.*)
12 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983))
13 (brackets in original). “Restrictions on speech that will foreseeably disrupt the intended
14 function of government property have generally been held reasonable in limited public
15 forums.” (*Id.* at 500). In the context of Seattle Metro buses, the Ninth Circuit held the
16 intended purpose of the buses “is to provide safe and reliable public transportation. Any
17 speech that will foreseeably result in harm to, disruption of, or interference with the
18 transportation system is, by definition, incompatible with the buses’ intended purpose.”
19 (*Id.*).

20 The second requirement requires the court to determine whether the standard
21 established by the government is “sufficiently definite and objective to prevent arbitrary
22 or discriminatory enforcement” by government officials. (*Id.*). The policy at issue must
23 supply a “sufficiently definite and objective benchmark against which to judge” the
24 government’s enforcement of the policy. (*Id.*). In contrast, a constitutionally infirm policy
25 is one with a “standardless standard whose application will be immune from meaningful
26 judicial review.” (*Id.*) (quotation marks and citation omitted).

27 In addition to being reasonable, the exclusion must also be viewpoint neutral. (*Id.*)
28

1 at 501). Viewpoint discrimination occurs when the governmental entity “denies access to
2 a speaker solely to suppress the point of view he espouses on an otherwise includible
3 subject.” *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788,
4 806 (1985); *see also, Rosenberger v. Rector and Visitors of University of Virginia*, 515
5 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based
6 on its substantive content or the message it conveys.”). Viewpoint discrimination is “an
7 egregious form of content discrimination” and “[t]he government must abstain from
8 regulating speech when the specific motivating ideology or the opinion or perspective of
9 the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829. Viewpoint
10 discrimination “is presumed impermissible when directed against speech otherwise
11 within the forum’s limitations.” (*Id.* at 830).

12 STA argues the court should give deference to STA in applying its Policy, citing
13 cases from the First Circuit and Sixth Circuit. *See* (ECF No. 42 at 7-9) (discussing
14 *American Freedom Defense Initiative v. Massachusetts Bay Transportation Authority*,
15 781 F.3d 571 (1st Cir. 2015), and *American Freedom Defense Initiative v. Suburban*
16 *Mobility Authority for Regional Transportation*, 698 F.3d 885 (6th Cir. 2012)).

17 In *Massachusetts Bay*, the First Circuit reviewed the rejection of “support Israel”
18 bus advertisements under a “relatively generous standard” acknowledging “there can be
19 more than one reasonable decision, and an action need not be the most reasonable
20 decision possible in order to be reasonable.” 781 F.3d at 588 (quotation marks and
21 citation omitted). The First Circuit upheld the rejection of the advertisements, declining,
22 in a “borderline case, to undertake such review in a manner that would effectively
23 transfer to the federal judiciary the detailed and case-specific application of a facially
24 constitutional public transit authority advertising guideline.” (*Id.* at 589). The First
25 Circuit based this conclusion on the fact it was reviewing the denial of a preliminary
26 injunction, because the plaintiff “may still press its constitutional challenge on a more
27 developed record.” (*Id.*).

1 In *Suburban Mobility*, the Sixth Circuit held “[w]henver a rule is applied by an
2 official, a certain amount of discretion must necessarily be exercised.” 698 F.3d at 893.

3 The Sixth Circuit further explained:

4 On the margins, there may be some difficult determinations, on which
5 reasonable people may disagree. However, eliminating all discretion is not
6 required by *Shuttlesworth* [*v. City of Birmingham*, 394 U.S. 147 (1969)]....
7 While decisionmakers under [the defendant’s] policy may at times make
8 incorrect determinations within their limited discretion, these errors are not
9 the sort that *Shuttlesworth* intended to address.

10 (*Id.*). The Sixth Circuit concluded by finding a bus advertisement policy prohibiting
11 political advertisements, without any accompanying definition of “political,” was a
12 “reasonably objective exercise.” (*Id.* at 894). The policy in *Suburban Mobility* was
13 distinguishable from a policy prohibiting “controversial” advertisements which had “no
14 articulated definitive standard to determine what was ‘controversial.’ This discretion
15 allowed for the arbitrary rejection of advertisements based on viewpoint.” (*Id.*)
16 (discussing *United Food & Commercial Workers Union v. Sw. Ohio Reg’l Transit Auth.*,
17 163 F.3d 341 (6th Cir. 1998)).

18 To the extent these two cases set forth a deferential standard of review, it is only
19 for cases on the margins or close-calls. Those cases do not purport to categorically adopt
20 a deferential standard of review in all cases. The Ninth Circuit has explicitly declined to
21 afford deference to agency determinations in proposed bus advertisements. *Seattle*
22 *Mideast*, 781 F.3d at 500-01 (“We must independently review the record, without
23 deference to the threat assessment made by County officials, to determine whether it
24 ‘show[s] that the asserted risks were real.’”) (quoting in part *Sammartano v. First*
25 *Judicial Dist. Court*, 303 F.3d 959, 967 (9th Cir. 2002), *abrogated on other grounds by*
26 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). The court will follow the
27 Ninth Circuit’s directives of reasonableness and viewpoint neutrality.

28 **B. Viewpoint Discrimination**

ATU argues STA has engaged in viewpoint discrimination because “STA allows
ads promoting commercial services that are not pro-union, but prohibits ads promoting

1 commercial services that are pro-union.” (ECF No. 44 at 9). ATU further argues “STA
2 actually only applies [its interpretation of “Public Issue”] to unions, while allowing other
3 commercial advertisers to run ads and other nonprofits to run PSAs, regardless of [sic]
4 whether there are those who dislike the services they provide or even their very
5 existence.” (ECF No. 47 at 4-5).

6 STA asserts “ATU has misstated the standard for proving viewpoint
7 discrimination” because ATU must prove “STA opposed or disagreed with its union-
8 organizing mission.” (ECF No. 42 at 12). STA argues there is insufficient evidence to
9 show STA disagreed with ATU’s message and rejected the advertisement because of it.
10 (ECF No. 42 at 13). STA points to the ATU sticker in all STA buses and CEO Meyer
11 speaking at an ATU regional conference as evidence it has not discriminated against
12 ATU or unions. (ECF No. 42 at 13-14).

13 In general, “the First Amendment forbids the government to regulate speech in
14 ways that favor some viewpoints or ideas at the expense of others.” *Members of City*
15 *Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The
16 evidence adduced at trial established STA had no intent to silence union speech when it
17 revised the Policy. *See* (ECF No. 41 at 148:14-20); (Ex. 501); (Ex. 503). Additionally, a
18 labor representative took part in the revision process. *See* (ECF No. 41 at 146:16-147:15);
19 (Ex. 501); (Ex. 503). This evidence shows a lack of viewpoint discrimination. *See*
20 *Members of City Council*, 466 U.S. at 804.

21 Despite ATU’s broad arguments, the only specific advertisements addressed at trial
22 under the revised Policy were the Seventh Day Adventist and United Food and
23 Commercial Workers’ Union advertisements. The evidence did not establish whether
24 unions are the only entities affected by the narrow interpretation of the Policy. No details
25 on other advertisements were presented in testimony. There was no evidence presented
26 showing STA has allowed advertisements with explicitly anti-union messages on its
27 buses. The court is left with two isolated instances where union advertisements were
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1 rejected (in the case of ATU) or removed (in the case of United Food and Commercial
2 Workers) and one instance where an advertisement was treated differently. The court
3 finds this evidence does not establish “the specific motivating ideology or the opinion or
4 perspective of the speaker is the rationale for the restriction [on speech].” *Rosenberger*,
5 515 U.S. at 829.

6 **C. Type of Challenge**

7 “As a general matter, a facial challenge is a challenge to an entire legislative
8 enactment or provision.” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011); *see*
9 *also, Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (a facially
10 unconstitutional statute or policy is “unconstitutional in every conceivable application, or
11 it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally
12 overbroad.”) (quotation marks and citation omitted)). A successful facial challenge
13 invalidates the entire law or policy. *Foti*, 146 F.3d at 635.

14 “A paradigmatic as-applied attack, by contrast, challenges only one of the rules in
15 a statute, a subset of the statute’s applications, or the application of the statute to a
16 specific factual circumstance, under the assumption that a court can separate valid from
17 invalid subrules or applications.” *Hoye*, 653 F.3d at 857 (quotation marks and citation
18 omitted). “An as-applied challenge does not implicate the enforcement of the law against
19 third parties.... A successful as-applied challenge does not render the law itself invalid but
20 only the particular application of the law.” *Foti*, 146 F.3d at 635. The difference between
21 a facial and as-applied challenge “lies only in whether all or only some of the statute’s
22 subrules (or fact-specific applications) are being challenged.” *Hoye*, 653 F.3d at 635; *see*
23 *also, Citizens United v. Federal Election Com’n*, 558 U.S. 310, 331 (2010) (stating the
24 distinction between facial and as-applied challenges “goes to the breadth of the remedy
25 employed by the Court”).

26
27 ATU asserts the Policy is both facially unconstitutional and unconstitutional as
28

1 applied to its proposed advertisement. (ECF No. 44 at 2). ATU’s facial claim is based on
2 STA’s alleged interpretation of the Policy to ban union speech. (ECF No. 44 at 2). ATU
3 argues the Policy is also unconstitutional as-applied because STA “engaged in an
4 unreasonable, arbitrary and capricious” application of the Policy in rejecting ATU’s
5 proposed advertisement. (ECF No. 44 at 2). ATU requests the court to order STA “to run
6 the substance of Plaintiff’s proposed ad, with appropriate artistic modifications, and any
7 similar ad promoting Plaintiff and the services it provides.” (ECF No. 44 at 15).

8 ATU did not present evidence or suggest the Policy is unconstitutional in every
9 application: ATU “takes no issue with the STA Policy regarding commercial advertising
10 *as written*. Nor does Local 1015 challenge the ‘Public Issue’ prohibition *as written*.”
11 (ECF No. 44 at 11-12) (emphasis in original). Rather, ATU argues the Policy has been
12 unreasonably interpreted to not allow union goods or services to be advertised. (ECF No.
13 44 at 12). The fact the facial challenge is premised on STA’s interpretation of the Policy
14 demonstrates counsel’s conflation of the two separate types of challenges. Additionally,
15 ATU does not seek to invalidate the entire Policy, only the portions or interpretations
16 thereto that have been interpreted to prohibit it from advertising. Accordingly, the court
17 construes ATU’s claims as an as-applied challenge. The court notes this conclusion does
18 not require a different standard for evaluating the merits of ATU’s challenge. *See Hoye*,
19 653 F.3d at 857 (noting “the substantive legal tests used in the two challenges are
20 invariant”) (quotation marks and citation omitted).

21 **D. “Public Issue”**

22 The Policy prohibits “[a]dvertising expressing or advocating an opinion, position,
23 or viewpoint on matters of public debate about economic, political, religious or social
24 issues.” (Ex. 1 at § II.B(13)).

25 STA asserts the court should first evaluate this issue because if STA reasonably
26 determined the advertisement constituted a “Public Issue” then ATU’s challenges to
27 “Commercial and Promotional Advertising” and “Public Service Announcements” are
28

1 moot. (ECF No. 42 at 5). STA argues the evidence “unequivocally” showed the proposed
2 advertisement fell within the definition of “Public Issue.” (ECF No. 42 at 2). STA relies
3 on Leighty’s testimony wherein he admitted promoting the right to organize is an
4 economic, political, and social issue, and admitted there is a public debate surrounding
5 the right to work between labor unions and right to work organizations. (ECF No. 42 at 2-
6 3).

7 ATU argues the proposed advertisement is not a “public issue” because it “does
8 not express or advocate an opinion at all. It makes a statement of fact.” (ECF No. 44 at 9-
9 10). ATU also asserts the right to work movement is not equivalent to its proposed
10 advertisement because the right to work movement “advocates for changes to the current
11 state of the law.” (ECF No. 44 at 10). Additionally, ATU contends STA cannot
12 reasonable interpret this portion of the Policy “to mean that an advertiser cannot promote
13 a commercial service if the advertised product or service itself is a matter of public
14 debate.” (ECF No. 44 at 10). ATU points out “virtually every product and service could
15 be characterized in that manner” and such an interpretation makes the Policy “not
16 sufficiently definite or objective to prevent arbitrary or discriminatory enforcement, and it
17 is unconstitutional.” (ECF No. 44 at 10).

18 To the extent STA’s position suggests the prohibition applies to any advertisement
19 touching on any issue having any level of public debate, such an interpretation is
20 unreasonable. For most every good or service, there is some level of debate. Such an
21 expansive view of the “Public Issue” prohibition would swallow the rest of the Policy so
22 no advertisement would ever be allowed on STA buses. Leighty admitted, under leading
23 questions on cross-examination, to certain facts. However, the court does not find such
24 testimony is dispositive. The issue is whether STA’s interpretation is reasonable.

25 There is evidence showing STA received public complaints over advertisements
26 targeting specific grocery stores and urging customers to not shop there. The court
27 declines to find whether the backlash over the Albertsons and Fred Meyer advertisements
28

1 constitutes a significant disruption, but such a finding is unnecessary. Those
2 advertisements were materially different than ATU's proposed advertisement.

3 First, the Fred Meyer and Albertsons advertisements caused immediate backlash
4 and publicity. The United Food and Commercial Workers' Union advertisement in the
5 summer of 2016 contained essentially the same message ATU's proposed advertisement
6 contained and those advertisements did not cause any complaints or public backlash. The
7 evidence shows STA has not received complaints or backlash for running advertisements
8 encouraging unionization.

9 Second, the Fred Meyer and Albertsons advertisements were specifically targeted
10 at those grocery stores and argued their employment practices were wrong. The
11 advertisements called for shoppers to take action against those grocery stores. ATU's
12 advertisement, on the other hand, did not criticize any business or person or call for
13 consumers to take their business elsewhere. The proposed ATU advertisement simply
14 stated the fact that drivers had the right to organize and provided ATU's contact
15 information. For these reasons, the court rejects STA's claim that the proposed
16 advertisement was a "Public Issue" based on the Fred Meyer and Albertsons
17 advertisements.

18 STA's reliance on the "right to work" movement to establish the public debate
19 surrounding unions is also unpersuasive. STA presented no evidence suggesting any of
20 those movements have attempted to advertise on STA buses, or establishing a nexus
21 between ATU's advertisement and the right to work movement. The court does not and
22 need not determine whether right to work advertisements would constitute "Public Issue"
23 advertising under the Policy. STA's arguments are too speculative to warrant any
24 deference to the decision to, at best, preemptively silence the debate by prohibiting
25 ATU's advertisement.

26
27 The Seventh Day Adventist advertisement further illustrates ATU's proposed
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1 advertisement was not a “Public Issue.” Religion is specifically listed in the definition of
2 “Public Issue,” yet STA allowed the Church to run advertisements with its contact
3 information and messages that were not explicitly religious. The fact the Seventh Day
4 Adventist advertisement was run as a “Public Service Announcement” is immaterial
5 because the “Public Issue” restriction applies to all advertisements. *See* (ECF No. 41 at
6 178:14-22). STA did not narrowly interpret the Policy in that instance where the
7 advertisements as approved arguably touched on issues of public debate. Undoubtedly
8 some people could be offended by any advertisement promoting a church, similarly to
9 STA’s position regarding unions. However, STA treated religion differently than it
10 treated ATU. If STA could find a church advertisement that did not explicitly advocate
11 religious beliefs to not be a “Public Issue,” then it was unreasonable to treat ATU’s
12 proposed advertisement different. STA failed to provide a reasonable basis whereby it
13 could allow a church to run an advertisement promoting itself without being a “Public
14 Issue” while ATU could not run an advertisement promoting itself. While it was only
15 mentioned in passing at trial, an advertisement run by Planned Parenthood on STA buses
16 could support this conclusion for the same reasons.

17 The court finds STA did not reasonably interpret the “Public Issue” portion of the
18 Policy when it applied that prohibition to the proposed ATU advertisement stating
19 various transportation employees have the right to unionize. STA did not present credible
20 evidence to establish the proposed advertisement would cause a significant disruption of
21 services akin to the inflammatory advertisements at issue in other similar cases. *See*
22 *Seattle Mideast*, 781 F.3d at 494-95 (addressing advertisements stating “ISRAELI WAR
23 CRIMES YOUR TAX DOLLARS AT WORK,” “PALENSTINIAN WAR CRIMES
24 YOUR TAX DOLLARS AT WORK,” and “IN ANY WAR BETWEEN THE
25 CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. Support
26 Israel, Defeat Islamic Jihad”); *Massachusetts Bay*, 781 F.3d at 575-76 (addressing
27 advertisements stating “IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE
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1 SAVAGE, SUPPORT THE CIVILIZED MAN. SUPPORT ISRAEL,” “IN ANY WAR
2 BETWEEN THE CIVILIZED MAN AND THOSE ENGAGED IN SAVAGE ACTS,
3 SUPPORT THE CIVILIZED MAN. DEFEAT VIOLENT JIHAD SUPPORT ISRAEL,”
4 and “IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE,
5 SUPPORT THE CIVILIZED MAN. DEFEAT VIOLENT JIHAD SUPPORT
6 ISRAEL.”); *Suburban Mobility*, 698 F.3d at 888 (addressing an advertisement stating
7 “Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got
8 Questions? Get Answers! RefugefromIslam.com”).

9 There was insufficient evidence presented at trial to show STA reasonably
10 determined the proposed advertisement was a “Public Issue.” Accordingly, the court does
11 not resolve this issue in STA’s favor and further examination of the Policy is necessary.

12 **E. “Commercial and Promotional Advertising”**

13 According to the Policy, “[c]ommercial and promotional advertising promotes or
14 solicits the sale, rental, distribution, or availability of goods, services, food,
15 entertainment, events, programs, transaction, donations, products or property for
16 commercial purposes or more generally promotes an entity that engages in such activity.”
17 (Ex. 1 at § II.A(1)).

18 STA admits “[w]hether an ad promoting the right to organize qualifies as
19 ‘commercial’ is a closer question.” (ECF No. 42 at 10). Nonetheless, STA argues “this is
20 an issue of first impression on which reasonable minds might disagree.” (ECF No. 42 at
21 10). STA asserts it was reasonable to conclude the proposed advertisement did not meet
22 the definition of “Commercial and Promotional Advertising” because it did “not propose
23 a commercial transaction and is several steps removed from ATU forming a labor union
24 and collecting dues payments.” (ECF No. 42 at 10-11). STA has also cited to its Trial
25 Brief which discussed this issue at greater length. *See* (ECF No. 36 at 10-15) (discussing
26 *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998)).

27 STA asserts it interprets its Policy “to require that an advertisement propose a
28

1 commercial transaction.” (ECF No. 36 at 11). STA’s argument relies heavily on *Children*
2 *of the Rosary*. That case, however, is distinguishable. In *Children of the Rosary*, the City
3 of Phoenix rejected a proposed advertisement for its buses which stated ““Before I
4 formed you in the womb, I knew you’ –God Jeremiah 1:5. Purchase this message as a
5 bumpersticker for your vehicle!” 154 F.3d at 975. Phoenix had an advertising policy
6 which limited bus advertising to “speech which proposes a commercial transaction.”
7 (*Id.*). STA’s Policy is not so narrowly worded. Under the plain language of the STA
8 Policy, an advertisement may promote the availability of goods or services. Under the
9 broadest language of the Policy, an advertisement need only “promote[] an entity that
10 engages in such [commercial] activity.” STA’s effort to align this case with the facts of
11 *Children of the Rosary* is unpersuasive. Instead, *Children of the Rosary* serves to further
12 show the unreasonableness of STA’s interpretation.

13 Had STA crafted a narrow policy, it could reasonably exclude advertisements that
14 do not propose a commercial transaction. It has not crafted a narrow policy, and as such,
15 the Policy provides no basis for the interpretation STA now urges this court to accept as
16 reasonable. The fact ATU is organized under the Internal Revenue Service code as a non-
17 profit does not *ipsa facto* mean ATU only engages in non-commercial activity. STA
18 admits ATU is engaged in interstate commerce. (ECF No. 36 at 10). Additionally, the
19 Policy is not limited to advertisements which specifically relate to commercial activity,
20 provided the advertisement promotes an entity that engages in commercial activity as
21 defined in the Policy. The fact ATU’s proposed advertisement may be “several steps
22 removed” from ATU receiving monetary benefit does not take it outside the definition of
23 “Commercial and Promotional Advertising” in the Policy. The advertisement generally
24 promotes ATU as a resource for drivers seeking to form a labor union. If drivers from one
25 of the named companies contacted ATU, ATU would provide help which may lead to the
26 formation of a labor union. *See* (ECF No. 41 at 84:25-8). Even if the activity of recruiting
27 and forming new labor unions were not deemed commercial, the proposed advertisement
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1 fell within the Policy’s definition of “Commercial and Promotional Advertising” because
2 it promoted ATU, an entity that engages in commercial activity. Under STA’s Policy,
3 ATU’s proposed advertisement was “Commercial and Promotional Advertising” and the
4 court rejects STA’s position on this issue.

5 **F. “Public Service Announcement”**

6 The court notes the parties presented scant evidence on the issue of whether the
7 Policy’s limitation of “Public Service Announcements” to 501(c)(3) organizations is
8 reasonable. Plaintiff’s counsel conceded ATU did not propose to run a “Public Service
9 Announcement” advertisement. (ECF No. 41 at 20:12-16). Because of the court’s
10 discussion and findings above, it is unnecessary to reach this issue. The court declines to
11 make any finding regarding the reasonableness of this portion of the Policy or STA’s
12 interpretation thereto.

13 **IV. Conclusions of Law**

14 Based on the foregoing discussion, the court concludes STA did not engage in
15 viewpoint discrimination and ATU did not present a facial challenge to the Policy. In
16 evaluating ATU’s as-applied challenge, the court finds ATU’s proposed advertisement
17 did not constitute “Public Issue” advertising as defined in the Policy. STA’s
18 determination to the contrary was an unreasonable interpretation of the Policy. The court
19 finds ATU’s proposed advertisement was “Commercial and Promotional Advertising” as
20 defined in the Policy and STA’s determination to the contrary was an unreasonable
21 interpretation of the Policy. Because of these conclusions of law, the court does not make
22 any conclusions regarding the “Public Service Announcement” portion of the Policy.

23 **V. Conclusion**

24 Based on all of the forgoing Findings Of Fact and Conclusions Of Law, the court
25 finds STA violated ATU’s First Amendment rights by rejecting the proposed
26 advertisement. In the event STA continues its advertising program, STA shall not reject
27 this proposed advertisement. The court makes no determination on other hypothetical
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1 advertisements.

2 **IT IS HEREBY ORDERED:**

3 Within ten days from the filing of this Opinion, the parties shall submit briefs, not
4 to exceed ten (10) pages, as to the relief sought by and to which ATU is entitled.

5 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Opinion and
6 furnish copies to counsel.

7 Dated September 28, 2017.

8 s/ Justin L. Ouackenbush
9 JUSTIN L. QUACKENBUSH
10 SENIOR UNITED STATES DISTRICT JUDGE