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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-14-A
AGENDA ITEM
For Meeting of April 11, 2019

April 4, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2019-06 (Brown) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on April 10, 2019.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-06

2

3 Ms. Jessica F. Johnson, Esq.

4 Mr. Jason Torchinsky, Esq.

DRAFT

5 Holtzman Vogel Josefiak Torchinsky PLLC

6 45 North Hill Drive, Suite 100

7 Warrenton, VA 20186

8

9 Dear Ms. Johnson and Mr. Torchinsky:

10 We are responding to your advisory opinion request on behalf of Leigh Brown
11 regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to proposed radio advertisements that would air
13 within 30 days of an upcoming special primary election. The Commission concludes that
14 the existing versions of the proposed advertisements will constitute electioneering
15 communications when aired during the upcoming pre-primary period and do not qualify
16 for an exemption, while the proposed alternate versions of the advertisements would not
17 constitute electioneering communications.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 March 22, 2019.

21 Leigh Brown is a candidate in the upcoming special election in North Carolina’s
22 Ninth Congressional District, to be held on May 14, 2019. Advisory Opinion Request at
23 AOR001. Brown is also the President and CEO of Leigh Brown & Associates, a for-
24 profit business entity that provides real estate agent services in the Charlotte area, and is
25 incorporated in North Carolina under the name Mallard Creek Properties, Inc. *Id.*

26 Leigh Brown & Associates has been airing radio ads promoting its business for
27 the past 13 years. *Id.* The ads are a core component of the company’s marketing efforts,

1 and at least 10% of Brown’s annual commission revenue can be attributed to clients
2 generated by the radio advertising. AOR002. The company currently has an annual
3 contract with WBT, a commercial radio station serving the Charlotte area, to air
4 advertisements for the calendar year 2019. AOR001. Leigh Brown & Associates entered
5 this contract with Entercom Charlotte WBT AM/FM in December 2018. *Id.*

6 Brown develops the content of the ads herself and records two ads at a time at
7 WBT’s facilities. AOR002. The specific content of the ads has varied over the years, but
8 they generally follow a similar template, featuring discussion of a real estate issue
9 relevant to the Charlotte real estate market and the number of houses Brown’s team sells,
10 and they consistently include two closing slogans: “I’m interviewing for a job . . . I want
11 to be your realtor” and “There is a difference when you call Leigh Brown.” *Id.* Brown
12 has recorded two ads that began airing on or about March 5, 2019, prior to the time she
13 became a candidate for federal office. *Id.* The content of these ads is as follows:

14 *Radio Ad #1:*

15 In a world where everything seems to be online and at the click of a button, you
16 have to realize that real estate pricing is just not an exact science. I’m Leigh
17 Brown with RE/MAX and I’m getting a lot of phone calls about the current tax
18 valuations and the updates to the process. My clients need help with disputing
19 that number because occasionally it’s wrong. I also have folks that want to know
20 what their property is worth based on their upgrades and condition and I can give
21 a more accurate ballpark than a website can. Frankly, y’all, the reason you have a
22 trusted realtor is that we are there for you between the buying and the selling and
23 all steps in between. My team and I sell a house every two days, y’all, and that’s
24 not bragging. That’s interviewing for a job. In fact, the job I want is to be your
25 realtor for life. For more information, visit my website at leighsells.com or call
26 anytime at 704-705-7036, that’s 705-7036. There is a difference when you call
27 Leigh Brown.

1 *Radio Ad #2:*

2 I believe it's a natural human reflex to see a realtor and as, "Hey, how's the
3 market?" I'm Leigh Brown with RE/MAX and I can tell y'all that is the number
4 one question I'm being asked right now by folks considering buying or selling
5 real estate in the Charlotte market. Sellers should know that while prices are still
6 creeping upward, so are days on market. That's reducing the number of multiple
7 offer situations although frankly it all depends on what zip code you're in and
8 your price point. Now, let's look at those factors differently and realize it creates
9 a favorable situation for buyers. Add great interest rates to the normalization of
10 the market and you probably should consider calling me for an evaluation on
11 buying and selling. You can always get information on my website at
12 leighsells.com and find out why my team and I are selling a house every two
13 days. I'm not bragging about that statistic, y'all, I'm interviewing for a job. I
14 want to be your realtor. Call me anytime at 704-705-7036, that's 705-7036.
15 There is a difference when you call Leigh Brown.

16 AOR002-03.

17 These two ads are consistent with Leigh Brown & Associates' previous
18 advertising in content, timing, geographic distribution, and frequency.¹ AOR003,
19 AOR006. Brown acknowledges that if these advertisements are aired within 30 days of
20 the May 14, 2019 special election, they will satisfy the basic statutory definition of
21 'electioneering communication.' AOR002.

22 Brown also proposes alternate versions of both ads, to replace the ads described
23 above if the Commission concludes that the above ads are not exempt from the definition
24 of "electioneering communication." The alternate versions are as follows:

25 *Radio Ad #1 – Alternate Script:*

26 In a world where everything seems to be online and at the click of a button, you
27 have to realize that real estate pricing is just not an exact science. ~~I'm~~ We're
28 Leigh Brown & Associates with RE/MAX and ~~I'm~~ we're getting a lot of phone
29 calls about the current tax valuations and the updates to the process. ~~My~~ Our

¹ Brown has included with her request recordings of Radio Ads #1 and #2, as well as examples of additional ads used in the past few years. Links to these recordings can be found on the final page of the request, available on the Commission's website at <https://www.fec.gov/data/legal/advisory-opinions/2019-06/>.

1 clients need help with disputing that number because occasionally it's
2 wrong. ~~I~~ We also have folks that want to know what their property is worth based
3 on their upgrades and condition and ~~I~~ we can give a more accurate ballpark than a
4 website can. Frankly, y'all, the reason you have a trusted realtor is that ~~I am~~ we
5 are there for you between the buying and the selling and all steps in
6 between. ~~My~~ Our team sells a house every two days, y'all, and that's not
7 bragging. That's interviewing for a job. In fact, the job ~~I~~ we want is to be your
8 realtor for life. For more information, visit ~~my~~ our website at leighsells.com or
9 call anytime at 704-705-7036, that's 705-7036. There is a difference when you
10 call Leigh Brown & Associates.

11 *Radio Ad #2 – Alternate Script:*

12 I believe it's a natural human reflex to see a realtor and ask, "Hey, how's the
13 market?" ~~I'm~~ We're Leigh Brown & Associates with RE/MAX and I can tell
14 y'all that is the number one question ~~I'm~~ we're being asked right now by folks
15 considering buying or selling real estate in the Charlotte market. Sellers should
16 know that while prices are still creeping upward, so are days on market. That's
17 reducing the number of multiple offer situations although frankly it all depends on
18 what zip code you're in and your price point. Now, let's look at those factors
19 differently and realize it creates a favorable situation for buyers. Add great
20 interest rates to the normalization of the market and you probably should consider
21 calling ~~me~~ us for an evaluation on buying and selling. You can always get
22 information on ~~my~~ our website at leighsells.com and find out why ~~my~~ our team
23 sells a house every two days. ~~I'm~~ We're not bragging about that statistic,
24 y'all, ~~I'm~~ we're interviewing for a job. ~~I~~ We want to be your realtor. Call ~~me~~ us
25 anytime at 704-705-7036, that's 705-7036. There is a difference when you call
26 Leigh Brown & Associates.

27 AOR008-09.

28 Brown's campaign committee has engaged a political media vendor for campaign
29 advertising and media strategy, and this vendor has played no role in the creation or
30 airing of the above radio ads for Leigh Brown & Associates. AOR003.

31 ***Questions Presented***

32 1. *Are Radio Ads #1 and #2 exempt from the definition of "electioneering*
33 *communication" when aired during the upcoming pre-primary period?*²

² The Commission has combined the first two of the requestor's questions because they rely on identical analysis.

1 2. *Would the references to “Leigh Brown & Associates” in the alternate*
2 *scripts of Radio Ads #1 and #2 be construed as the name of a business rather than the*
3 *name of a candidate such that the advertisements do not refer to a clearly identified*
4 *candidate and thus are not “electioneering communications”?*

5 3. *Does the presence of Ms. Brown’s voice alone in the alternate versions of*
6 *Radio Ads #1 and #2 constitute a reference to a clearly identified candidate?*

7 ***Legal Analysis and Conclusions***

8 1. *Are Radio Ads #1 and #2 exempt from the definition of “electioneering*
9 *communication when aired during the upcoming pre-primary period?*

10 No, the existing versions of Radio Ads #1 and #2 are not exempt from the
11 definition of “electioneering communication.”

12 The Act and Commission regulations define “electioneering communication” as
13 any broadcast, cable, or satellite communication that (1) refers to a clearly identified
14 federal candidate; (2) is publicly distributed within 30 days before a primary election or a
15 convention or caucus of a political party or 60 days before a general election; and (3) is
16 targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(a).
17 In the case of a candidate for the House of Representatives, “targeted to the relevant
18 electorate” means that the communication can be received by 50,000 or more persons in
19 the district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i). For purposes of
20 the electioneering communication definition, “[r]efers to a clearly identified candidate”
21 means that the candidate’s name, nickname, photograph, or drawing appears, or the
22 identity of the candidate is otherwise apparent through an unambiguous reference such as
23 ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’ or through an unambiguous

1 reference to his or her status as a candidate such as ‘the Democratic presidential nominee’
2 or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R.
3 § 100.29(b)(2). *See also* 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17. Brown
4 acknowledges, and the Commission agrees, that during the 30-day period before the
5 primary election, “these advertisements will satisfy the basic statutory definition of
6 ‘electioneering communication.’”

7 Brown’s question, therefore, is whether the existing ads fall within an exemption
8 from the definition of “electioneering communications.” Congress authorized the
9 Commission to exempt, through regulation, certain communications from the definition
10 of “electioneering communications,” but limited that authority, providing that “a
11 communication may not be exempted if it meets the requirements of this section and is
12 described in section 30101(20)(A)(iii) of this title.” 52 U.S.C. § 30104(f)(3)(B). The
13 referenced section includes any communication that “refers to a clearly identified
14 candidate for [f]ederal office . . . and that promotes or supports a candidate for that office,
15 or attacks or opposes a candidate for that office” 52 U.S.C. § 30101(20)(A)(iii).
16 *See also* Electioneering Communications, 67 Fed. Reg. 65,190, 65,196 (Oct. 23, 2002).
17 Representative Shays, a sponsor of the legislation that introduced the definition of
18 “electioneering communications,” explained that the Commission’s “limited discretion”
19 to exempt some communications was based on the fact that “it is possible that there could
20 be some communications that will fall within this [electioneering communication]
21 definition even though they are plainly and unquestionably not related to the election,”
22 and that the Commission could “issue regulations to exempt such communications from

1 the definition of ‘electioneering communications’ because they are wholly unrelated to an
2 election.” 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays).

3 Rep. Shays also stated that Congress “expect[ed] the Commission to use its
4 Advisory Opinion process to address these situations both before and after the issuance of
5 regulations.” *Id.* at 411; *see also* 148 Cong. Rec. E178-03 (Feb. 13, 2002) (statement of
6 Rep. Meehan). The Commission considered the extent of its authority to grant
7 exemptions in Advisory Opinion Request 2012-20 (Mullin), and although it did not issue
8 an advisory opinion as to whether an exemption was appropriate in that particular
9 circumstance, a majority of Commissioners did indicate their agreement that the
10 Commission was authorized to grant exemptions through advisory opinions, in addition
11 to blanket exemptions within its regulations. *See* Advisory Opinion Request 2012-20
12 (Mullin), Draft B (citing legislative history for the Commission’s authority to exempt
13 communications from the definition of “electioneering communication through the
14 advisory opinion process, and approved by Commissioners Hunter and McGahn II); Draft
15 C (same, approved by Commissioners Bauerly, Walther, and Weintraub). *See also*
16 Advisory Opinion 2012-20 (Mullin), Statement of Vice Chair Ellen L. Weintraub and
17 Commissioner Cynthia L. Bauerly (May 31, 2012).

18 When the Commission adopted its regulations on electioneering communications,
19 it considered but declined to create a blanket exemption for situations where a federal
20 candidate shares a name with a business entity or where the candidate is referred to in the
21 context of promoting a business, because “it is likely that, if run during the period before
22 an election, such communications could well be considered to promote or support the

1 clearly identified candidate, even if they also serve a business purpose unrelated to the
2 election.” *Electioneering Communications*, 67 Fed. Reg. at 65,202.

3 Here, Brown asks that the existing versions of Radio Ads #1 and #2 be exempt
4 from the definition of “electioneering communication” based on the fact that they are
5 business communications consistent with the company’s previous ads, and that they do
6 not refer to Brown in her capacity as a candidate or promote or support her candidacy.
7 As explained above, the Commission previously considered, but declined, to grant an
8 exemption for such business communications through regulation. *See Electioneering*
9 *Communications*, 67 Fed. Reg. at 65,202.

10 The Commission also declines to grant an exemption under the circumstances
11 presented in this advisory opinion request. The standard for the Commission to grant an
12 exemption is high: exemptions were intended to be available for communications that
13 “are plainly and unquestionably not related to the election” or “wholly unrelated to an
14 election.” 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). Here,
15 the Commission cannot say that the existing ads are “plainly and unquestionably not
16 related to the election,” meeting the high standard articulated by Rep. Shays. The ads
17 clearly identify Brown personally by name; Brown’s statement in her own voice that
18 “I’m Leigh Brown” is an unambiguous reference to a clearly identified candidate. The
19 existing ads also are recorded by the candidate herself and they promote a business that is
20 closely identified with the candidate as an individual, through its name, its advertising
21 history, and the nature of the real estate business and the personal relationships between
22 real estate agents and their clients. The existing ads serve a business purpose unrelated to
23 the election, but inasmuch as Brown’s business is closely identified with her personally

1 and the ads emphasize that she is “interviewing for a job,” the ads also burnish the
2 reputation of a person who is a federal candidate.³

3 Accordingly, because Radio Ads #1 and #2 are not plainly and unquestionably
4 unrelated to an election, the Commission concludes that the ads are not exempt from the
5 definition of “electioneering communication.”

6 2. *Would the references to “Leigh Brown & Associates” in the alternate*
7 *scripts of Radio Ads #1 and #2 be construed as the name of a business rather than the*
8 *name of a candidate such that the advertisements do not refer to a clearly identified*
9 *candidate and thus are not “electioneering communications”?*

10 3. *Does Ms. Brown’s voice alone constitute a reference to a clearly identified*
11 *candidate?*

12 Under the circumstances described in the request, the Commission is unable to
13 conclude that Brown’s voice *alone* constitutes a reference to a clearly identified
14 candidate. However, considered in their overall context, which includes references to the
15 name of the business “Leigh Brown & Associates” and do not specifically identify the
16 speaker, the alternate versions of the ads would not reference a clearly identified
17 candidate and, therefore, would not be electioneering communications.

18 For purposes of the electioneering communication definition, “[r]efers to a
19 clearly identified candidate’ means that the candidate’s name, nickname, photograph, or

³ *Cf.* Advisory Opinion 2009-26 (Coulson) (concluding legislative updates distributed by federal candidate who was also a state officeholder did not promote, support, attack, or oppose candidate for purposes of determining whether the candidate was required to use hard money for the costs of producing and distributing them, but no analysis of whether legislative updates were “plainly and unquestionably unrelated” to an election).

1 drawing appears, or the identity of the candidate is otherwise apparent through an
2 unambiguous reference such as ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’
3 or through an unambiguous reference to his or her status as a candidate such as ‘the
4 Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of
5 Georgia.’” 11 C.F.R. § 100.29(b)(2). *See also* 52 U.S.C. § 30101(18); 11 C.F.R.
6 § 100.17.

7 As the court noted in *Hispanic Leadership Fund, Inc. v. FEC*, when a speaker is
8 not otherwise identified, whether the voice alone is sufficient to constitute a reference to
9 a clearly identified candidate turns on whether the audience actually recognizes the voice.
10 897 F. Supp. 2d 407, 429-30 (E.D. Va. 2012) (finding that whether an ad contained an
11 unambiguous reference to President Obama when it included an audio clip of him
12 speaking an eight-word sentence but identified only as “the government” depended
13 “entirely on whether the viewer actually recognizes the voice of the person speaking,”
14 and that no evidence had been offered to show that an average listener would recognize
15 President Obama’s voice solely from the clip).

16 Here, Brown has been advertising her business to radio audiences in the Charlotte
17 area for many years. These ads have all included Brown’s voice and have clearly
18 identified her as the speaker, and as a result her voice may well be familiar to some
19 listeners. However, in the context of the alternate ads presented in the request, which do
20 not specifically identify Leigh Brown as the speaker of the ads, there is no evidence that
21 the presence of Brown’s voice is sufficiently recognizable to constitute an unambiguous
22 reference to her. The alternate ads do contain the name “Leigh Brown & Associates,”
23 which may help listeners connect the voice with the name of the speaker if the voice is

1 familiar to them from previous ads, but the Commission has insufficient information to
2 conclude that listeners would be familiar with the voice itself or that the average listener
3 would make that connection between the voice and the identity of the speaker.

4 However, as the court noted in *Hispanic Leadership Fund*, whether “the identity
5 of the candidate is apparent by unambiguous reference” must be determined by looking
6 “both to the context of the reference as well as to the meaning of the reference itself.”
7 897 F. Supp. 2d at 427. Therefore, in determining whether the alternate ads would be
8 electioneering communications, the Commission considers the entire context of the ads,
9 including the language used, not only the voice of the speaker.

10 The Commission previously considered an instance in which a company’s name
11 contained the name of a federal candidate, in Advisory Opinion 2004-31 (Darrow).
12 There, a U.S. Senate candidate, Russ Darrow, Jr., had founded a group of car dealerships,
13 each of which bore his name as part of the name of the dealership (*e.g.*, Russ Darrow
14 West Bend, Russ Darrow Appleton Chrysler). Advisory Opinion 2001-31 (Darrow) at 1.
15 The company had worked to develop “Russ Darrow” as a brand name for its dealerships
16 for a decade. *Id.* At the time of the advisory opinion, the candidate’s son, Russ Darrow
17 III, was primarily responsible for all day-to-day operations, plans, and advertising
18 decisions of the business, and had been the public face of the company in all advertising
19 for over 10 years. *Id.* at 1-2. The Commission concluded that in those circumstances,
20 references to “Russ Darrow” in the company’s advertising would not be a reference to a
21 clearly identified candidate, because they referred to the car dealerships or Russ Darrow
22 III, and not to the candidate Russ Darrow, Jr. The Commission’s conclusion was based
23 on the ambiguity inherent in the facts of that particular case, where both the candidate

1 and his son shared the same name but only the candidate's son appeared in the ads, and
2 most of the references to "Russ Darrow" also included the full name of a particular
3 dealership, such as "Russ Darrow Toyota" or "Russ Darrow Kia." *See id.* at 3.

4 Here, although not all of the same facts are present, there are sufficient
5 overlapping facts to support a similar conclusion: that the alternate ads refer to a
6 business entity, Leigh Brown & Associates, and not to Leigh Brown herself. Although
7 Brown plans to voice the alternate versions of the ads herself, and no contention is made
8 that there is another individual involved named Leigh Brown to whom the alternate ads
9 might refer, the alternate ads would refer to the full name of the business, similar to the
10 references to "Russ Darrow Toyota" and other dealership names used by Darrow's
11 business. In fact, Brown's proposed alternate ads refer to the name of a business less
12 ambiguously than some of the Darrow ads did, because a few of the Darrow ads included
13 references to "Russ Darrow" rather than the full name of a business. *See Advisory*
14 *Opinion 2004-31 (Darrow)* at 3. Taken together with the references to "we" and "our
15 team" in the alternate ads and the absence of any references to Brown as an individual or
16 identification of her as the speaker, the references to "Leigh Brown & Associates" refer
17 to the business entity and not the candidate.

18 After considering the entire context of the alternate ads, the Commission
19 concludes that the alternate ads do not contain references to a clearly identified federal
20 candidate. Accordingly, the alternate ads would not be electioneering communications if
21 aired within 30 days of the May 14 special election.

1 ***Conclusion***

2 The Commission concludes that Radio Ads #1 and #2 will be electioneering
3 communications when aired during the upcoming pre-primary period and do not qualify
4 for an exemption.⁴ The proposed alternate ads would not be electioneering
5 communications.

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
9 in any of the facts or assumptions presented, and such facts or assumptions are material to
10 a conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the

⁴ The request asserts that, if the exemption does not apply, Brown will be “unable to advertise for her business during the electioneering communications window.” The Commission notes that corporations may make electioneering communications, 11 C.F.R. § 114.10(a), so long as they include the disclaimers required under 11 C.F.R. § 110.11(a)(4) and report electioneering communications aggregating more than \$10,000 per calendar year as required under 11 C.F.R. § 104.20(b); 11 C.F.R. § 114.10(b)(2). Corporations are prohibited under section 114.10(a) from making communications that are coordinated with a candidate, but business communications such as Radio Ads #1 and #2 generally are exempt from this regulation. *See* 11 C.F.R. § 109.21(i) (excluding from the coordinated communication definition a public communication that identifies a federal candidate only in his or her capacity as the owner or operator of a business that existed prior to the candidacy if (1) the medium, timing, content, and geographic distribution of the communication are consistent with public communications made prior to the candidacy; and (2) the public communication does not promote, support, attack, or oppose that candidate or another candidate for the same office). The request does not ask — and the Commission need not answer, given its conclusion that Brown may advertise for her business using the alternate scripts for Radio Ads #1 and #2 — whether the original versions of Radio Ads #1 and #2 would be deemed coordinated with a candidate under the circumstances presented here.

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

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Ellen L. Weintraub

10

Chair

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