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March 21, 2019

Lisa J. Stevenson
Acting General Counsel
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

2019 MAR 22 AM 10:31
OFFICE OF
GENERAL COUNSEL

Re: Advisory Opinion Request

Dear Ms. Stevenson,

Pursuant to 52 U.S.C. § 30108 and 11 C.F.R. § 112.1, Leigh Brown, a candidate for election in the current special election being held in North Carolina's Ninth Congressional District, by and through the undersigned counsel, requests an advisory opinion on the questions set forth below. Furthermore, given that the electioneering communications window for the upcoming May 14, 2019 special primary election opens on April 14, 2019, Ms. Brown seeks an expedited response to this request under 11 C.F.R. § 112.4(b)(1). This request is submitted within the 60-day window required for expedited review as set forth at 11 C.F.R. § 112.4(b)(1).

Ms. Brown announced her candidacy on March 15, 2019. She seeks an advisory opinion from the Commission exempting the commercial radio advertisements described below from the definition of "electioneering communication."

Factual Background

Leigh Brown, a first-time federal candidate, is a partner with RE/MAX and the President and Chief Executive Officer of Leigh Brown & Associates. Leigh Brown & Associates is a for-profit business entity that was incorporated in North Carolina under the name Mallard Creek Properties, Inc. on July 25, 2003. Leigh Brown & Associates provides real estate agent services in and around the Charlotte area in North and South Carolina. A total of eight other individuals work with Leigh Brown & Associates – four real estate agents and four administrative staff members – either as employees or independent contractors.

For the past 13 years, Ms. Brown has aired radio advertisements publicizing Leigh Brown & Associates. Currently, all of these radio advertisements are run exclusively on WBT 1110, a commercial AM radio station serving the Charlotte metropolitan area, which includes parts of North Carolina and South Carolina. Leigh Brown & Associates has an annual contract with WBT to air her advertisements (Ms. Brown's current contract was entered into with Entercom Charlotte WBT AM/FM in December 2018 and covers calendar year 2019. The contract specifies 706 broadcast spots for \$48,204, or approximately 13.5 airings per week,

further divided into a series of daily time ranges.) Ms. Brown develops the content of the advertisements herself without the use of a media production vendor, and she typically records two radio advertisements at a time at WBT's facilities. The two advertisements are then broadcast on a rotating basis. The length of time a particular advertisement remains on the air varies, but Ms. Brown typically creates and records new advertisements every 60 to 90 days. This radio advertising is a core component of Ms. Brown's efforts to generate business for herself and the other agents on her real estate team. At least 10% of her annual commission revenue is attributable to clients acquired as a result of the radio advertising. Accordingly, Ms. Brown spends approximately \$50,000 on radio advertising each year.

The specific content of the radio advertisements that Ms. Brown runs has varied over the years, but ads have followed a similar template. Advertisements generally are 60 seconds in length, and typically feature discussion of a real estate issue specific to the Charlotte real estate market (*e.g.*, local property values and trends in housing prices). The advertisements typically note how many houses her team sells and consistently include two closing slogans: "I'm interviewing for a job...I want to be your realtor" and "There is a difference when you call Leigh Brown." The enclosed USB drive includes copies of radio advertisements that have aired over the past several years.¹

If Ms. Brown is unable to advertise for her business during the electioneering communications window, it will have a detrimental impact on her real estate firm and the employees/contractors who rely on it for their livelihood. Therefore, she seeks to continue airing the two radio advertisements transcribed below, and included on the enclosed USB drive under file names "Brown - Radio Ad 1" and "Brown - Radio Ad 2, during the electioneering communication window for the upcoming special primary election on May 14. Ms. Brown began airing these specific commercial advertisements in the Charlotte area on or about March 5, 2019, prior to her becoming a federal candidate. As of April 14, these advertisements will satisfy the basic statutory definition of "electioneering communication." Ms. Brown does not intend to change the content or advertising volume of these two advertisements during the rapidly approaching electioneering communications window.

Radio Ad #1:

In a world where everything seems to be online and at the click of a button, you have to realize that real estate pricing is just not an exact science. I'm Leigh Brown with RE/MAX and I'm getting a lot of phone calls about the current tax valuations and the updates to the process. My clients need help with disputing that number because occasionally it's wrong. I also have folks that want to know what their property is worth based on their upgrades and condition and I can give a more accurate ballpark than a website can. Frankly, y'all, the reason you have a trusted realtor is that we are there for you between the buying and the selling and all steps in between. My team and I sell a house every two days, y'all, and that's not bragging. That's interviewing for a job. In fact, the job I want is to be your

¹ File name dates are approximate. In 2016, Ms. Brown recorded four advertisements that included "political" content that referred generically to the 2016 presidential election season. *See* 2016-3, 2016-4, 2016-12, and 2016-13 on the enclosed USB drive. These advertisements were intended to be current and topical and were not intended to (and did not) promote or oppose particular candidates. Nevertheless, Ms. Brown does not intend to include similarly "political" content in any real estate ads while she is a federal candidate.

realtor for life. For more information, visit my website at leighsells.com or call anytime at 704-705-7036, that's 705-7036. There is a difference when you call Leigh Brown.

Radio Ad #2:

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

The content of these two advertisements is consistent with the format of Ms. Brown's past advertisements. Ms. Brown's political campaign has engaged an entirely separate, political media vendor for campaign advertising and strategy purposes and that vendor played no role in the creation or airing of the commercial advertisements for Ms. Brown's real estate business.

Legal Background

The statutory definition of "electioneering communication" is set forth at 52 U.S.C. § 30104(f)(3)(A). The Act also exempts four categories of communications from the statutory definition, including "any other communication exempted under such regulations as the Commission may promulgate ... to ensure the appropriate implementation of this paragraph, except that under such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 30101(20)(A)(iii) of this title." 52 U.S.C. § 30104(f)(3)(B)(iv). The provision referenced in the quoted language above refers to "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 52 U.S.C. § 30101(20)(A)(iii).

It is well established that Congress' stated motivation in enacting the "electioneering communications" provisions was to regulate so-called "sham issue ads" that were paid for with non-federal funds. There is no suggestion anywhere in the legislative record that Congress intended to include *bona fide* commercial advertisements.

In the first electioneering communications rulemaking, the Commission noted that "the principal Congressional sponsors of BCRA explained the exemption authority would 'allow the

Commission to exempt communications that ‘plainly and unquestionably’ are ‘wholly unrelated’ to an election and do not ‘in any way’ support or oppose a candidate.” Final Rule on *Electioneering Communications*, 67 Fed. Reg. 65,190, 65,198 (October 23, 2002). In 2002, the Commission considered adopting a regulatory exemption for business advertisements, specifically, “an exemption for communications that refer to a clearly identified candidate in the context of promoting a candidate’s business, including a professional practice, for example.” *Id.* at 65,202. The Commission, however, declined to adopt a business advertisement exemption, explaining:

The Commission has determined that a narrow exemption for such ads is not appropriate and cannot be promulgated consistent with the Commission’s authority under 2 U.S.C. 434(f)(3)(B)(iv). Based on past experience, the Commission believes that it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.

Id.

In 2004, the Commission determined that it could consider through the advisory opinion process, on a case-by-case basis, whether particular advertisements referenced a clearly identified candidate or not. See Advisory Opinion 2004-31 (Russ Darrow Group, Inc.) at 4 (“The decision not to adopt a blanket exemption for such communications, however, does not preclude the Commission from making a determination that the specific facts and circumstances of a particular case indicate that certain advertisements do not refer to a clearly identified Federal candidate and, hence, do not constitute electioneering communications.”). In the Russ Darrow matter, the Commission concluded that commercial advertisements for Russ Darrow-branded car dealerships did not refer to a clearly identified candidate for federal office, and thus, were not “electioneering communications.” Rather, under “the factual circumstances presented,” “the use of the name ‘Russ Darrow’ refers to a business or to another individual who not a candidate.” Advisory Opinion 2004-31 at 3. The Commission explained:

The Commission concludes that your proposed advertisements refer to RDG’s [Russ Darrow Group, Inc.] car dealerships or Russ Darrow III, and not to the Candidate. First, the Candidate himself does not speak or appear on screen in any of the advertisements. Second, another individual, Russ Darrow III, does speak and appear in the advertisements. You indicate that he, not the Candidate, has been the public face of the company for more than ten years. Third, “Russ Darrow” is part of the name of all of RDG’s dealerships, which RDG has worked for a decade to develop as a brand name for all its dealerships. Finally, while the name “Russ Darrow” is used throughout the proposed advertisements, most of these references include the full name through which a particular dealership does business (e.g., Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). While a couple of the proposed advertisements also include a single reference to “Russ Darrow,” rather than the full name through which the dealership does business, these references, taken together with the other references in the advertisement, also refer to the business entity and not to the Candidate. Therefore, the Commission concludes that RDG’s television and radio

advertisements do not refer to a clearly identified candidate under 11 CFR 100.29(b)(2).

Id.

In 2012, the Commission considered a request to grant an exemption for a commercial advertisement that everyone agreed included references to a clearly identified candidate. In Advisory Opinion Request 2012-20, Markwayne Mullin sought an electioneering communication exemption for televised business advertisements for his company, Mullin Plumbing, Inc. The Commission was unable to approve a response, but the applicable legal standard appears to be clear.

First, a majority of Commissioners agreed that the Commission had the authority to grant an exemption through the advisory opinion process, although the issue was not settled definitively. Two Commissioners voted to approve a draft that would have granted the exemption sought, while two other Commissioners wrote, “[w]e agree that the Commission may grant such exemptions,” while noting that there was legislative history in support of that position.² Statement on Advisory Opinion Request 2012-20 (Mullin) of Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly. Vice Chair Weintraub and Commissioner Bauerly wrote: “We are prepared to revisit this issue where the facts presented warrant an exemption.” *Id.*

Second, the path to concluding that an exemption is warranted requires showing that the communications at issue are “plainly and unquestionably not related to the election.” *Id.*; see also Advisory Opinion 2012-20, Response Draft B. In 2012, two Commissioners concluded that “[t]he Mullin Companies have become intertwined with the Mullin campaign to the point where it can no longer be said that the companies’ ads are plainly and unquestionably not related to the election.” *Id.* These Commissioners also noted commenters claimed to have “difficulty distinguishing between the Mullin campaign literature and the Mullin Companies’ ads” and that “it seemed that the Mullin Companies’ ads had become more frequent since Mr. Mullin began running for Congress.” *Id.* While the former comment may have been traceable to an opposing candidate, and the latter comment was not substantiated in any way, we do not believe either issue is present in this matter.

Questions Presented

We present the following questions for the Commission’s consideration:

1. Under 52 U.S.C. § 30104(f)(3)(A)(i) and 11 C.F.R. § 100.29, is Radio Advertisement #1 exempt from the definition of “electioneering communication” when aired during the upcoming pre-primary period?

² Representative Shays stated “[w]e also expect the Commission to use its Advisory Opinion process to address these [exemption] situations both before and after the issuance of regulations.” 148 Cong. Rec. H411 (Feb. 13, 2002) (statement of Rep. Shays). Representative Meehan made a similar statement. 148 Cong. Rec. E178-03 (Feb. 13, 2002) (statement of Rep. Meehan).

2. Under 52 U.S.C. § 30104(f)(3)(A)(i) and 11 C.F.R. § 100.29, is Radio Advertisement #2 exempt from the definition of “electioneering communication” when aired during the upcoming pre-primary period?

Analysis

The two radio advertisements are “plainly and unquestionably not related to any election.” First, Ms. Brown has aired similar advertisements exclusively for the purpose of promoting her real estate business for years prior to her declaration of candidacy, and these two advertisements are no different in form or purpose than those she has previously aired. Second, the advertisements do not promote or support Ms. Brown, or attack or oppose any other federal candidate. Accordingly, the Commission should conclude that these communications are exempt from the definition of electioneering communication.

1. Ms. Brown Has Aired Similar Advertisements for Years and Created and Aired These Specific Advertisements Prior to Becoming a Candidate

Ms. Brown has aired radio advertisements promoting her real estate firm, Leigh Brown & Associates, for approximately 13 years prior to her candidacy. Radio advertisements have consistently been the primary focus of her paid advertising efforts, and they have been an essential element of business development for Leigh & Associates since its inception. While the specific content of Ms. Brown’s radio advertisements has varied over time in order to address current real estate market conditions and concerns, as described above, the format has remained consistent, as has the repeated use of the same slogans that make it clear that the purpose of these advertisements is strictly commercial and the intent is to gain real estate clients.

The specific advertisements proposed in this request are not materially different from past ads aired by Ms. Brown. As noted, these two advertisements were created and began airing before Ms. Brown declared her federal candidacy. The content of these advertisements is similar in nature to past advertisements. Both ads are consistent with past, pre-candidacy advertisements in terms of timing, geographic distribution, and frequency of airing. The timing, frequency of airing, and geographic distribution are determined by the terms of the annual contract referenced above. Ms. Brown does not intend to seek any amendments to alter the scope of this contract during her federal candidacy. In short, the purpose of airing these advertisements during any electioneering communications time period is solely commercial so that Ms. Brown’s real estate business, which includes her real estate team members, is not harmed while Ms. Brown runs for federal office.

Ms. Brown proposes to continue airing the same type of real estate advertisements she has aired for years. In past matters, the Commission has recognized that when an individual continues engaging in an activity that he or she began prior to becoming a federal candidacy, the fact of federal candidacy does not alter the purpose of that activity. *See* Advisory Opinion 1999-11 at 3, n.6 (Byrum) (State senator’s disbursements for billboards advertising weekly coffee meetings with constituents were not for the purpose of influencing her Federal election because the “continuation” of this practice would not alter the purpose of the disbursements “simply because [she] has become a Federal candidate”); Advisory Opinion 2009-26 (Coulson) (approving the issuance of a health care legislative update by state Representative Coulson because she was merely continuing activities she had previously undertaken as a State

officeholder prior to her Federal candidacy). Consistent with Commission precedent, the mere fact of Ms. Brown's candidacy does not transform the purpose of her radio advertisements.

2. The Ads Do Not PASO Any Candidate

Ms. Brown's ads do not promote or support her candidacy, and they do not attack or oppose any of her opponents. No candidates other than Ms. Brown are clearly identified in the advertisements. The Commission has previously determined that the mere identification of an individual who is a Federal candidate does not, in itself, promote, support, attack or oppose that candidate. Advisory Opinion 2003-25 (Weinzapfel) at 4 ("Under the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate."); *see also* Advisory Opinions 2007-34 (Jackson), 2007-21 (Holt), and 2006-10 (Echostar). Thus, there must be some election-related content beyond the mere mention of an individual who happens to also be a federal candidate.

Here, no such election-related content exists. The advertisements are for real estate services, wholly unrelated to an election, and the ads are designed only to promote Ms. Brown's real estate company in the same manner as she had done for the past 13 years. Specifically, the advertisements presented here do not mention Ms. Brown's election campaign or her qualifications for office, nor do they mention the election itself or discuss any issues that would conceivably arise in the course of an election. Both ads focus entirely and exclusively on real estate matters, and in each ad, Ms. Brown makes the ad's purpose absolutely clear: "*I want to be your realtor.*" There is nothing ambiguous or unclear about the nature of these advertisements. As a result, the issues that arose during consideration of Advisory Opinion 2012-20 about the potential interrelated nature of the candidate's commercial and campaign advertisements are not present here. Under the circumstances here, the Commission should conclude that these advertisements are strictly commercial advertisements that do not promote or support Ms. Brown or attack or oppose any other federal candidate and are therefore "plainly and unquestionably not related to the election" and should be exempted from the statutory definition of "electioneering communication."

Alternative Proposal

If the Commission is unable to conclude that the two radio advertisements set forth above are exempt from the definition of "electioneering communication," Ms. Brown proposes to revise the ad scripts as set forth below, re-record both ads, and replace the ads described above with the following ads:

Radio Ad #1 – Alternate Script

In a world where everything seems to be online and at the click of a button, you have to realize that real estate pricing is just not an exact science. ~~I'm~~ **We're** Leigh Brown & Associates with ReMax and ~~I'm~~ **we're** getting a lot of phone calls about the current tax valuations and the updates to the process. ~~My~~ **Our** clients need help with disputing that number because occasionally it's wrong. ~~I~~ **We** also have folks that want to know what their property is worth based on their upgrades and condition and ~~I~~ **we** can give a more accurate ballpark than a website can. Frankly, y'all, the reason you have a trusted realtor is that we are there for

you between the buying and the selling and all steps in between. **My Our** team ~~and I~~ sells a house every two days, y'all, and that's not bragging. That's interviewing for a job. In fact, the job ~~I~~ **we** want is to be your realtor for life. For more information, visit ~~my our~~ website at leighsells.com or call anytime at 704-705-7036, that's 705-7036. There is a difference when you call Leigh Brown & Associates.

Radio Ad #2 – Alternate Script

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

Questions Presented Regarding Alternate Proposal

With regard to the revised advertisements set forth above, we present the following questions for the Commission's consideration:

3. Would the references to "Leigh Brown & Associates" in Radio Ad # 1 – Alternate Script and Radio Ad #2 – Alternate Script be construed as the name of a business rather than the name of a candidate such that the advertisements do not refer to a clearly identified candidate under 52 U.S.C. § 30104(f)(3)(A)(i)(I) and 11 C.F.R. § 100.29(b)(2) and thus are not "electioneering communications"?
4. Does the presence of Ms. Brown's voice alone in Radio Ad # 1 – Alternate Script and Radio Ad #2 – Alternate Script constitute a reference to a clearly identified candidate under 52 U.S.C. § 30104(f)(3)(A)(i)(I) and 11 C.F.R. § 100.29(b)(2)?

Analysis

As revised, the radio advertisements do not fall within the definition of "electioneering communication" because they do not clearly identify a federal candidate. In each of these alternate ads, Ms. Brown narrates the ad, but she does not identify herself individually or refer to herself individually in any way whatsoever. The alternate scripts remove all references to Ms.

Brown individually and replaced those references with references to a business, Leigh Brown & Associates, or with generic references to her real estate team.

Under similar circumstances presented in Advisory Opinion 2004-31 (Darrow), the Commission determined that commercial advertisements for a series of car dealerships whose names included the same name as federal candidate Russ Darrow, did not clearly identify the candidate even though the name “Russ Darrow” was used throughout the proposed advertisements. The Commission relied on several factors to reach this conclusion, including that the business had worked for a decade to develop “Russ Darrow” as a brand name for all its dealerships, and that most of the references included the full name through which a particular dealership does business (*e.g.*, Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). Here, the alternate advertisements include Ms. Brown’s name only as part of the name of a business, Leigh Brown & Associates. While Leigh Brown is unquestionably the individual named in “Leigh Brown & Associates,” unlike the more ambiguous situation in Advisory Opinion 2004-31, in which both a father and son shared the name “Russ Darrow,” this distinction is not material and does not dictate a different result. In Advisory Opinion 2004-31, the Commission concluded that “proposed advertisements refer to [Russ Darrow Group’s] car dealerships or Russ Darrow III, and not to” Russ Darrow, Jr. As in Advisory Opinion 2004-31, Ms. Brown has worked on building her brand, Leigh Brown & Associates, for over 15 years and the continued success of her real estate team depends on the advertising that is the subject of this request. Just as “Russ Darrow Toyota” referred to a car dealership, “Leigh Brown & Associates” refers to a real estate agency.

Further, though Ms. Brown’s voice narrates the script of the radio advertisements, the Commission should conclude that her voice is not so widely recognized that it “is a contextually unambiguous reference” to a federal candidate. This conclusion is consistent with federal court precedent holding that an incumbent presidential candidate’s voice was not necessarily an “unambiguous reference” to that candidate. Specifically, in *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), a federal court considered “an audio clip of President Obama speaking only an eight word sentence” where that clip is preceded by an announcer saying, “the government says.” The court concluded that “because the audio clip of President Obama is not identified as such, whether the advertisement refers to President Obama depends entirely on whether the viewer actually recognizes the voice of the person speaking. Although the FEC argues that President Obama’s voice is widely recognized, there is no factual basis for reaching this conclusion.” *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 430 (E.D. Va. 2012).” *Id.* While the court left open the possibility that it could be factually demonstrated that President “Obama’s voice is widely recognized,” we believe the Commission would be on solid ground if it concluded that Ms. Brown’s narration of the advertisements is not so “widely recognized” that it constitutes an unambiguous reference to her. Given that the revised ad scripts do not identify Ms. Brown individually, it is unlikely that the average listener would identify her by voice alone.

Based on the foregoing, the Commission should conclude that the alternate radio advertisements do not refer to a clearly identified candidate under 11 C.F.R. § 100.29(b)(2) and, thus, do not fall within the definition of “electioneering communication.”

We respectfully request that the Commission consider this Advisory Opinion request promptly under the 20-day provisions of 11 C.F.R. § 112.4(b)(1). Counsel will be prepared to address this matter before the Commission at the April 11, 2019 public session, or at any other such public hearing that the Commission directs. Please do not hesitate to contact us if we can provide any further information to the Commission as it considers this request.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Johnson", with a long horizontal flourish extending to the right.

Jessica F. Johnson
Jason Torchinsky
Counsel to Leigh Brown