**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| LEIGH BROWN<br>4711 Myers Lane<br>Harrisburg, NC 28075,<br><br>MALLARD CREEK PROPERTIES, INC.<br>D/B/A/ LEIGH BROWN & ASSOCIATES<br>24 Cabarrus Avenue East<br>Concord, NC 28025<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION<br>1050 First Street, NE<br>Washington, DC 20463,<br>Defendant. | Civil Case No. 1:19-CV-01021-TJK |

**AMENDED VERIFIED COMPLAINT**

Plaintiffs, Leigh Brown and Mallard Creek Properties, Inc. d/b/a/ Leigh Brown & Associates ("Plaintiffs"), pursuant to Fed. R. Civ. P. 15(a)(1)(A), bring this amended complaint for injunctive relief, stating as follows:

**INTRODUCTION**

1. This is a pre-enforcement, as-applied challenge to a Federal Election Campaign Act ("FECA") definitional Statute at 52 U.S.C. 30104(f)(3)(A)(i) and the Federal Election Commission's ("FEC") parallel implementing regulations at 11 C.F.R. §§ 100.29 ("electioneering communications"), 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4) (electioneering communications

disclaimer and reporting requirements), which impact Plaintiffs' ability to engage in constitutionally protected speech.

2. In the "normal" campaign finance case, the usual mantra from the Federal Election Commission and the courts has been that disclosure and disclaimer requirements "do not prevent anyone from speaking." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 367 (2010) (citing *McConnell v. Federal Election Commission*, 540 U.S. 93, 201 (2003). This as-applied challenge presents the unique case where on these facts this mantra simply does not hold true.

3. This case challenges a law that, as interpreted and applied by the FEC, abridges the freedom of speech and association guaranteed under the First Amendment to the United States Constitution. These challenges are brought as applied against 52 U.S.C. 30104(f) and its implementing regulations.

4. The First Amendment to the United States Constitution protects Plaintiffs' right to continue to advertise their longstanding business while Ms. Brown runs for federal office. As it stands, Plaintiffs are unable to exercise that right because FECA's web of regulations place Plaintiffs in a catch-22 which ultimately makes it impossible for them to engage in commercial speech. This quandary is made even more severe given Plaintiffs' professional legal obligations under North Carolina law.

## LEGAL AND REGULATORY BACKGROUND

5. The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech . . . ." U.S. Const. amend. I. [S]peech that is considered "commercial" may be regulated by the government provided that the regulations are narrowly tailored to advance a legitimate

governmental interest." *Taucher v. Born*, 53 F. Supp. 2d 464, 479-80 (D.D.C. 1998) (citing *Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 234 (1985).

6. A prior restraint "arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official." *Times Film Corp. v. Chicago*, 365 U.S. 43, 56, (Warren, C.J., dissenting) (quoting Thomas I. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 655). While not all restrictions on speech are impermissible, a restriction that imposes a prior restraint on speech "comes to the Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

7. Indeed, courts allow this "'most extraordinary remedy' only where the evil that would result from the [speech] is both great and certain and cannot be militated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (quoting *Nebraska Press Association v. Stuart*, 427 U.S. 539, 562 (1976)). *See also Taucher*, 53 F. Supp. 2d at 481-82. "Regulatory schemes "conditioning expression on a licensing body's prior approval of content 'present[] peculiar dangers to constitutionally protected speech'" and demand "extraordinary procedural safeguards" in order to survive constitutional scrutiny. Thomas, 534 U.S. at 321, 323 (quoting Freedman v. Maryland, 380 U.S. 51, 57 (1965)).

8. In the alternative, if this Court determines that FECA and the FEC's parallel implementing regulations do not operate a prior restraint on speech, which they do, Plaintiffs still challenge the disclosure and disclaimer requirements as overbroad under "exacting scrutiny." *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) ("The Court has subjected [disclosure] requirements

to 'exacting scrutiny'"); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam); *accord Doe v. Reed*, 561 U.S. 186, 187-88 (2010).

9. Additionally, Plaintiffs maintain that in an effort to avoid First, Fifth and Fourteenth Amendment vagueness concerns, this Court can conclude that none of the advertisements reference a clearly identified *candidate,* but rather all refer only to a local business person continuing the profession she has engaged in for more than 15 years.

10. There must be a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). To survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68) (emphasis added).

11. Exacting scrutiny is not simply a way to force judicial approval of government regulations regarding the First Amendment. *See Buckley*, 424 U.S. at 64, 66 (describing exacting scrutiny as a "strict test" requiring more than "a mere showing of some legitimate governmental interest"); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (noting the "[s]tate may not choose means that unnecessarily restrict constitutionally protected liberty" nor choose a regulatory scheme broadly stifling speech if the state has available a "less drastic way of satisfying its legitimate interests") (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (internal quotation marks omitted)). Laws that are "no more than tenuously related to the substantial interests disclosure serves . . . fail exacting scrutiny." *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 204 (1999) (internal marks omitted).

12. One governmental interest cited in *Citizens United* is "'[P]rovid[ing] the electorate with information' about the sources of *election-related* spending." *Citizens United*, 558 U.S. at 315 (quoting *Buckley*, 424 U.S. at 66) (emphasis added). Given that Plaintiffs have been airing

advertisements substantially similar to the advertisements in question for 13 years, it is plainly true that the advertisements in questions are in no way related to any election.

13. "To decide whether a law is a disclosure requirement or a ban on speech, [courts] ask a simple question: does the law require the speaker to provide more information to the audience than he otherwise would?" *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 507 (D.C. Cir. 2016). Just as in *Pursuing America's Greatness*, the requirements in this case function to prevent Plaintiffs from conveying information to the public or by requiring additional, unnecessary speech, and therefore operate as a ban on speech rather than merely requiring simple disclaimers. *Id*. at 507-508.

14. In this case, Plaintiffs' proposed business advertisements are not election-related because they do not constitute "electioneering communications" involving "clearly identified candidates." Instead, they are purely commercial in nature involving transactions wholly unrelated to politics or qualifications for office, constituting pleas for business as done by any other realty firm and by Plaintiffs for over a decade before Ms. Brown became a candidate for federal office.

**A. The Federal Election Campaign Act and the Bipartisan Campaign Reform Act**

15. In 1976, the U.S. Supreme Court explained in *Buckley v. Valeo* that a "clearly identified candidate" under the FECA has a very specific meaning:

> Section 608 (e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e.g., FDR), the candidate's nickname (e.g., Ike), his office (e.g., the President or the Governor of Iowa), or his status as a candidate (e.g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

*Buckley*, 424 U.S. at 43 n. 51; *see also FEC v. Nat'l Org. for Women*, 713 F. Supp. 428, 433 (D.D.C. 1989) ("An explicit and unambiguous reference to the candidate must be mentioned in the communication . . .").

16. This language has since been incorporated into federal regulations 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4), and federal statute, 52 U.S.C. 30104(f)(3)(A)(i).

17. In 2002, Congress enacted The Bipartisan Campaign Reform Act of 2002 ("BCRA"), defining the term "electioneering communication" as:

> any broadcast, cable, or satellite communication which – (I) *refers to a clearly identified candidate for Federal office*; (II) is made within – (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. 30104(f)(3)(A)(i) (emphasis added).

18. Under FECA, any person who makes an electioneering communication is subject to a number of disclosure, disclaimer, and reporting obligations with the FEC.

19. The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), upheld these disclosure and disclaimer rules against a facial challenge because, as the Court explained, they were "both easily understood and objectively determinable":

> [W]e observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable.

*McConnell*, 540 U.S. at 194.

20. However, the Supreme Court has not foreclosed future *as applied* challenges to disclosure and disclaimer requirements. In *Wisconsin Right To Life v. FEC*, 546 U.S. 410 (2006), the Supreme Court confirmed that a statute upheld as facially constitutional still can be successfully challenged later on an as-applied basis. The plaintiff in *Wisconsin Right To Life*, a non-profit corporation, argued that its proposed advertisements were "genuine issue ads" free from restraint under the First Amendment. *See generally* 551 U.S. 449. The Supreme Court agreed, finding that the First Amendment does not permit the restriction of corporate speech unless it is express advocacy or the "functional equivalent of express advocacy." *Id*. at 2667, 2671.

21. Further, the portion of the *Citizens United* upholding disclaimers for election-related speech is not applicable to this case because the factual circumstances underlying each case are inapposite to one another in the disclaimer context. *Citizens United* concerned a documentary critical of Hillary Clinton's qualifications for public office. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) overruled on other grounds 558 U.S. 310. That documentary focused on then Senator and Presidential Clinton's "Senate record, her White House record during President Bill Clinton's presidency, her presidential bid, and include[d] express opinions on whether she would make a good president", and was timed particularly to affect the upcoming election in which Hillary Clinton would be a candidate. *Id*. (internal citations, quotation marks, and alterations omitted).

22. Unlike the speech at issue in *Citizens United*, the truthful purely commercial communications at issue in this case similar to and consistent with the advertising run by the Plaintiffs for the past 15 years clearly do not implicate the same type of government interests.

23. Regulations purported to require only disclosure and disclaimers "often do incidentally prohibit speech . . ." *Pursuing America's Greatness*, 831 F.3d at 508. Cf. *Citizens United*, 558

U.S. at 366 ("[D]isclosure requirements . . . 'do not prevent anyone from speaking.'" (quoting *McConnell v. FEC*, 540 U.S. 93, 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003))). *See also generally Pursuing America's Greatness*, 831 F.3d 500 (discussing the interaction of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *Citizens United*, 558 U.S. 310). In this case, the operation of law here in fact prohibit Plaintiffs from speaking.

24. FECA exempts four categories of communication from the statutory definition of "electioneering communications," including "any other communication exempted under such regulations as the Commission may promulgate . . . to ensure 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). That provision refers to "a public communication that refers to a clearly identified candidate for Federal office . . . 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).

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

**B. The Federal Election Commission**

26. In the first electioneering communications rulemaking, the FEC 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*.

27. In 2004, the Commission determined that it could consider through the advisory opinion process, on a case-by-case basis, whether particular advertisements referred to 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 simply 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 is not a candidate." Advisory Opinion 2004-31 at 3. The Commission explained that "your proposed advertisements

refer to RDG's [Russ Darrow Group, Inc.] car dealerships or Russ Darrow III, and not to the Candidate." The Commission concluded that the advertisements simply did not refer to a clearly identified candidate.

28. In 2012, the Commission considered a request to grant an exemption for a commercial advertisement that was commonly agreed to include 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.

29. First, a majority of Commissioners in the Mullin matter 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. 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*.

30. 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 that 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.

31. Here, the Plaintiffs' case presents just the opposite circumstance of the Mullin matter. Plaintiffs' commercial advertisements are in no way intertwined with any of Ms. Brown's campaign communications. There are completely separate vendors, distinct media plans, and entirely disparate messages.

32. On April 11, 2019 the FEC considered but failed to grant affirmative responses to any of the advertisements presented in an advisory opinion request by Plaintiffs. The request sought a declaration that the proposed communications would not be deemed to refer to "clearly identified candidates," and therefore not be electioneering communications.

**FACTUAL BACKGROUND**

33. Plaintiffs' planned advertisements, attached in the Request for Advisory Opinion (Exhibit A), filed on March 21, 2019 (just eight days after becoming a candidate) consist of original and amended versions of two advertisements promoting Plaintiffs' real estate business. (hereinafter "Original Advertisements" and "Amended Advertisements" respectively, collectively the "Advertisements").

34. Ms. Brown also happens to be a congressional candidate, running for the current special election being held in North Carolina's Ninth Congressional District, with a special primary election on May 14.

35. The Original Advertisements mention Ms. Brown in her capacity as a realtor and solicits persons to contact her for real estate services.

36. The Amended Advertisements mention the firm Leigh Brown & Associates and solicits persons to contact the business for real estate services.

37. Either the Original or the Amended Advertisements will be aired during the electioneering communication window for the upcoming special primary election held on May 14, 2019 which began Sunday, April 14, 2019, depending on the outcome of this action. Accordingly, Ms. Brown sought the FEC's guidance on the application of the statute and regulations to the advertisements and proposed alternative advertisements.

38. FECA's electioneering communications provisions, as applied to the Original and Amended Advertisements at issue here, are unconstitutional as applied because they act as prior restraints on speech by foreclosing any opportunity for Plaintiffs to engage in commercial speech. *See* Declaration of Leigh Brown §§28-33 (attached hereto as Exhibit D).

39. Plaintiffs will need to refrain from speech in which they had previously engaged, thereby altering their means and methods of communications to comply with FECA content, disclaimer and reporting requirements, all of which are because of a legitimate fear of civil and criminal enforcement by the government or private parties.

40. Plaintiffs are presently stymied in their ability to advertise commercially and thus are cut off from their lifeblood income.

41. Plaintiffs seek injunctive relief from this court finding that 52 U.S.C. 30104(f)(3)(A)(i) and the FEC's parallel implementing regulations at 11 C.F.R. §§ 100.29 ("electioneering communications"), 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4) (electioneering communications

disclaimer and reporting requirements) as applied to Plaintiffs' current communications are unconstitutional infringements on Plaintiffs' First Amendment rights as applied.

**JURISDICTION AND VENUE**

42. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201 as a challenge arising under the First Amendment to the Constitution of the United States.

43. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(c) because Defendant is an entity of the United States Government.

**PARTIES**

44. The FEC is the federal agency charged with enforcement of the Federal Election Campaign Act and is located in Washington, D.C.

45. Ms. Brown is a North Carolina real estate broker and agent and the President and Chief Executive Officer of Mallard Creek Properties, Inc, D/B/A Leigh Brown & Associates. She is also a first-time federal candidate for Congress in North Carolina's Ninth Congressional District.

46. 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.

**STATEMENT OF FACTS**

47. For the past 13 years, Plaintiffs have aired radio advertisements publicizing Leigh Brown & Associates. Currently, these radio advertisements are aired 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.).

48. 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.

49. This radio advertising is a core component of Ms. Brown's efforts to generate business for herself and the other members of her real estate team working with Leigh Brown and Associates. The inability to advertise is detrimental to the Plaintiffs' business and the livelihood of those working with the Plaintiffs. *See* Brown Decl. at §§29-31.

50. Accordingly, because of their importance to the Plaintiffs' business, Ms. Brown typically records 10 business advertisements each year. *See* Brown Decl. at §§21-24.

51. 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). For the past several years, 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."

52. If Plaintiffs are unable to advertise for their business during the electioneering communications window, it will have a detrimental impact on the real estate firm and the employees/contractors who rely on it for their livelihood. *See* Brown Decl. at §§28-33. Therefore, Ms. Brown wishes to continue airing the Original Advertisements 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. She is prepared to air those advertisements but will not do so out of fear of enforcement of 52 U.S.C. 30104(f)(3)(A)(i); 11 C.F.R. §§ 100.29; 104.5(j); 104.20; 114.10(b)(2); 110.11(a)(4).

53. Alternatively, Plaintiffs wish to air the Amended Advertisements during the special primary electioneering communication window. Plaintiffs are prepared to air those advertisements, and have recorded them for distribution, but will not do so out of fear of enforcement of 52 U.S.C. 30104(f)(3)(A)(i); 11 C.F.R. §§ 100.29; 104.5(j); 104.20; 114.10(b)(2); 110.11(a)(4).

54. This Court also has authority to issue a declaration under the Declaratory Judgment Act that these advertisements are not "electioneering communications" because of a lack of reference to a clearly identified candidate, thereby avoiding the First and Fifth Amendment vagueness concerns that otherwise exist.

55. Now that the electioneering window has opened, the FEC contents the advertisements will satisfy the basic statutory definition of "electioneering communication" under the FEC's interpretation of the statute. Ms. Brown does not intend to change the content or advertising volume of either the Original or Amended Advertisements during the electioneering communications window.

56. Plaintiffs also plan to air similar advertisements, just as they have done for years, during the electioneering windows preceding the run-off special primary election, if applicable, and the special general election, regardless of whether Ms. Brown is a candidate in either election.

57. The content of these Advertisements is consistent with the format of 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.

58. Ms. Brown requested an advisory opinion from the FEC as to whether the Original and Amended Advertisements would constitute "electioneering communication" when aired during the upcoming pre-primary period.

59. The FEC considered but did not approve any of the draft advisory opinions. The FEC voted 2-2 on Agenda Document No. 19-14-B (attached hereto as Exhibit B), 3-1 against on Agenda Document No. 19-14-A (attached hereto as Exhibit C), and 3-1 in favor of a motion to approve the responses to Questions 2 and 3 in Agenda Document 19-14-A (Ex. 3). The affirmative vote of four members of the FEC is required to render and advisory opinion under FECA. See 52 U.S.C. §§30106(c), 30107(a)(7); *see also* 11 C.F.R. §112.4(a). Thus, the FEC was unable to render an opinion in this matter.

60. Plaintiffs are wholly unable to run any advertisements whatsoever during the electioneering communications windows due to the application of FECA, FEC's attendant regulations, and the FEC's failure to exempt the Advertisements from the definition of electioneering communications.

61. If Plaintiffs run either the Original or Amended Advertisements, it is the FEC's position that they must be accompanied by certain required disclaimers, which must be read aloud by the speaker. 11 CFR 110.11.

62. The FEC explains that the following are the required disclaimers for an electioneering communication:

> Wording of disclaimer notice
> A disclaimer notice must contain the full name of the individual, group, corporation, or labor organization that paid for the communication, along with any abbreviated name it uses to identify itself. The disclaimer notice must also provide the payor's permanent street address, telephone number, or website address and must further state that the communication was not authorized by any candidate or candidate's committee.
> *EXAMPLES:*
>
> *Paid for by the Fishermen's Union (www.fishunion.org) and not authorized by any candidate or candidate's committee."*
>
> *"Paid for by John Doe (jdoe@ecexample.com) and not authorized by any candidate or candidate's committee."*

See https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ (Visited April 16, 2019).

63. In this situation, according to the FEC's stated position, any "electioneering communication" aired by Plaintiffs would need to include a disclaimer that says "Paid for by Leigh Brown and Associates. Leigh Brown and Associates is responsible for the content of this advertising. Not authorized by any candidate or candidate's committee. www.leighsells.com"

64. Plaintiffs cannot use this disclaimer method because Ms. Brown authorized the Advertisements. After all, she was the one who produced and voiced them.

65. In addition, the disclosure forms filed with the FEC require that the "person responsible" for the advertisements be disclosed on FEC Form 9. In this case, that would be Leigh Brown. So, utilizing the FEC required disclaimer would result in a form submitted to the federal government that would not be consistent with the text of the broadcast advertisement. FEC Form 9 and its instructions are available at https://www.fec.gov/resources/cms-content/documents/fecfrm9.pdf

and https://www.fec.gov/resources/cms-content/documents/fecform9i.pdf (visited April 16, 2019).

66. The only other possible alternative disclaimer language for the authorized / not authorized statement is located at 11 CFR 110.11. However, if the Advertisements are electioneering communications under FECA and FEC regulations and considered to be authorized by a candidate, they would be considered to be "coordinated communications" since they are authorized, planned, and voiced by the candidate. 11 CFR 109.20; 11 CFR 109.21(a). Thus, application of this disclaimer would result in an apparent admission to an impermissible coordinated communication, which is clearly not the case.

67. Coordinated communications are treated as in-kind contributions to the candidate's campaign committee and subject to contribution restrictions. 11 CFR 109.21(b). Leigh Brown & Associates is a taxable business entity and either cannot legally make any contributions to Ms. Brown's congressional campaign. 11 CFR 110.1. While the coordination rules do technically have an exemption for commercial transactions, 11 CFR 109.21(i), the FEC's analysis of all the proposed communications here seem to indicate that because these advertisements promote Leigh Brown's services as a realtor, they are really about the campaign. (See Opposition to TRO at pp. 14 and 16).

68. Even if the Advertisements were aired by someone exempted from the contribution restrictions and limits imposed by FECA, which they are not, adding a disclaimer to the end of the Advertisements would confuse the public and destroy any commercial value. If the Advertisements could even be "authorized" by Ms. Brown while simultaneously being considered electioneering communications, 11 CFR 110.1 requires a disclaimer that states either: (A) "I am Leigh Brown, a candidate for Congress, and I approved this advertisement"; or (B) "My name is Leigh Brown. I

am running for Congress, and I approved this message." 11 CFR 110.1. To add either of those disclosures to an ad for a real estate brokerage wholly unrelated to any election activity highlights the absurdity of the application of these regulations in this case and would surely confuse the public.

69. Further, a real estate broker and brokerage, respectively, in North Carolina, Plaintiffs are subject to certain rules and laws promulgated by the North Carolina Real Estate Commission. Among those rules is NCAC 58A *et seq*. which includes the following rules governing advertisements: "An individual broker shall not advertise or operate in any manner that would mislead a consumer as to the broker's actual identity or as to the identity of the firm which . . . she is affiliated." 21 NCAC 58A.0103. Any advertisement for the "sale or purchase . . . of real estate for others . . . shall indicate that it is the advertisement of a broker or firm . . ." NCAC 58A.0105(b). So, it is impermissible under North Carolina Real Estate Commission rules to produce and distribute an advertisement for real estate without mentioning the name of the broker or brokerage. *See also* NCREC License Law and Rules Comments at 14, https://www.ncrec.gov/pdfs/studyguide.pdf. Plaintiffs are therefore required by North Carolina law to include their names in the Advertisements. In this instance, Ms. Brown, is the broker, and Leigh Brown & Associates is the brokerage. Both contain Ms. Brown's name. Ms. Brown is both a candidate for federal office and a Realtor in North Carolina, a dual status which, as considered by the FEC, would require Ms. Brown to choose which legal regime she would like to violate.

70. Accordingly, classifying Plaintiffs' Advertisements, clearly commercial speech, as electioneering communications operates to completely prohibit them from undertaking that speech at all. *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748,

771 n. 24 (1976). Plaintiffs are stuck in a catch-22 with no way out. Plaintiffs are wholly unable to advertise their business without using Ms. Brown's name.

**COUNT 1**
***FECA's Electioneering Communication Provisions are Unconstitutional as Applied to Leigh Brown's Original Advertisements***

71. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

72. The application of the statutory definition of "electioneering communication" candidate at 52 U.S.C. 30104(f)(3)(A)(i) and the Federal Election Commission's parallel implementing regulations at 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4), to the Original Advertisements acts as an unconstitutional prior restraint on Plaintiffs' speech in violation of the First Amendment to the United States Constitution.

73. As applied by the FEC positions before this Court in its Opposition to Motion for Temporary Restraining Order, ECF No. XX, 52 U.S.C. 30104(f)(3)(A)(i) combined with 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4), are the functional equivalent of a speech ban imposed by federal statute against Plaintiffs during electioneering communication windows.

74. This prohibition applies to all individuals who happen to own a business sharing their name (a not uncommon occurrence) and simultaneously seek federal office.

75. But for operation of the law, Plaintiffs are prepared to run these advertisements, and other similar communications, consistently through the year.

76. The Original Advertisements are "plainly and unquestionably not related to any election." Ms. Brown has aired similar advertisements for more than a decade, exclusively for the purpose of promoting her real estate business. The Original Advertisements do not promote or support Ms.

Brown's candidacy, or attack or oppose any other federal candidate. The Original Advertisements do not mention or contain references to any clearly identified candidate for federal office.

77. The outright prohibition on Plaintiffs' advertising speech during the electioneering communications window is not narrowly tailored to the government's anti-corruption interest. "[Such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent." *Lowe*, 472 U.S. at 234-35 (Jackson, J., concurring). Further, there is no mystery as to who is paying for the Advertisements. Ms. Brown is speaking about Leigh Brown & Associates, and about her real estate services. There is no question who made the Advertisements, and in what capacity the Advertisements are being broadcast.

78. This statutory scheme is unconstitutional as applied to these advertisements, in violation of the First Amendment.

79. Wherefore, Plaintiffs pray for the following relief:

a. Declare the application of 52 U.S.C. 30104(f)(3)(A)(i); 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4) to Plaintiffs' Original Advertisements unconstitutional as a prior restraint on speech and void as applied;

b. A preliminary and permanent injunction enjoining Defendant FEC from enforcing 2 U.S.C. §§ 431(18) and 434(f), as well as any applicable rules and regulations regarding those provisions, against Plaintiffs when they air the Original Advertisements;

c. An award of nominal damages of $1 for the violation of Plaintiffs' constitutional rights;

d. Costs and attorney's fees pursuant to any applicable statute or authority;

e. Any other relief that the Court deems just and appropriate.

**COUNT 2**
***FECA's Electioneering Communication Provisions are Unconstitutional as Applied to Plaintiffs' Amended Advertisements***

80. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

81. The application of the statutory definition of "electioneering communication" candidate at 52 U.S.C. 30104(f)(3)(A)(i) and the Federal Election Commission's parallel implementing regulations at 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4), to the Amended Advertisements acts as an unconstitutional prior restraint on Plaintiffs' speech in violation of the First Amendment to the United States Constitution.

82. As applied by the FEC positions before this Court in its Opposition to Motion for Temporary Restraining Order, ECF No. XX, 52 U.S.C. 30104(f)(3)(A)(i) combined with 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4), are the functional equivalent of a speech ban imposed by federal statute against Plaintiffs during electioneering communication windows.

83. This prohibition applies to all individuals who happen to own a business sharing their name (a not uncommon occurrence) and simultaneously seek federal office.

84. But for operation of the law, Plaintiffs are prepared to run these advertisements and other similar communications consistently through the year.

85. The Amended Advertisements are "plainly and unquestionably not related to any election." Plaintiffs have aired similar advertisements for more than a decade, exclusively for the purpose of promoting her real estate business. The Amended Advertisements do not promote or support Ms. Brown's candidacy, or attack or oppose any other federal candidate. The Amended Advertisements do not mention or contain references to any clearly identified candidate for federal office, but rather clearly and plainly refer to the business known as Leigh Brown and Associates.

86. The outright prohibition on Plaintiffs' advertising speech during the electioneering communications window is not narrowly tailored to the government's anti-corruption interest. "[Such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent." *Lowe*, 472 U.S. at 234-35 (Jackson, J., concurring). Further, there is no mystery as to who is paying for the Advertisements. Ms. Brown is speaking about Leigh Brown & Associates, and about realty. There is no question who made the Advertisements, and in what capacity the Advertisements are being broadcast.

87. This statutory scheme is unconstitutional as applied, in violation of the First Amendment.

88. Wherefore, Plaintiffs pray for the following relief:

a. Declare the application of 52 U.S.C. 30104(f)(3)(A)(i); 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4) to Plaintiffs' Amended Advertisements unconstitutional as a prior restraint on speech and void as applied;

b. A preliminary and permanent injunction enjoining Defendant FEC from enforcing 2 U.S.C. §§ 431(18) and 434(f), as well as any applicable rules and regulations regarding those provisions, against Plaintiffs when they air the Amended Advertisements;

c. An award of nominal damages of $1 for the violation of Plaintiffs' constitutional rights;

d. Costs and attorney's fees pursuant to any applicable statute or authority;

e. Any other relief that the Court deems just and appropriate.

**COUNT 3**

***To Avoid First and Fourteenth Amendment Problems, this Court Should Find that the Advertisements are not Electioneering Communications and issue an Injunction***

89. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

90. The application of the definition of Electioneering Communication to the Advertisements is unconstitutional under the First and Fifth Amendments to the United States Constitution.

91. The Original Advertisements refer only to a clearly identified realtor.

92. Amended Advertisements refer only to Leigh Brown & Associates, a clearly identified business name, and not any candidate or committee.

93. None of the four Advertisements refer to a clearly identified *candidate* for federal office.

94. If the use of a business name and professional name refers to a clearly identified candidate, then all electioneering communications rules apply to any and every advertisements Plaintiffs will ever air.

95. The application of the statutory definition of "clearly identified" at 2 U.S.C. § 431(18) to the Amended Advertisements' use of the business names of Plaintiffs, if interpreted to refer to a clearly identified candidate, is inconsistent with Supreme Court precedent, and the precedent of other courts *See Hispanic Leadership Fund, Inc., v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), and severely burdens Plaintiffs' right to speech, freedom of association, and equal protection.

96. As applied to Plaintiffs and other organizations that are unable to comply with the burdensome FEC regulations and disclosure requirements, these provisions act as absolute expenditure prohibitions.

97. As applied by the FEC, 2 U.S.C. § 431(18) combined with 2 U.S.C. § 434(f) are the functional equivalent of a political speech ban imposed by federal statute against individuals and organizations who are federal candidates and who share a name of a federal candidate owner/operator, respectively.

98. Plaintiffs have prepared advertisements only promoting their business.

99. But for operation of the law, Plaintiffs are prepared to run these advertisements and other communications similar to them consistently through the year.

100. Under 2 U.S.C. §§ 431(18) and 434(f) and the FEC's regulations, as interpreted and applied by the FEC in contradiction to the First Amendment and opinions of the U.S. Supreme Court in *Buckley v. Valeo*, *McConnell v. FEC*, and *Hispanic Leadership Fund, Inc.*, 897 F. Supp. 2d 407, *FEC v. Christian Action Network,* 110 F.3d 1049, 1057 (4th Cir. 1997) (discussing the dangers of subjecting communications to the "unpredictability of audience interpretation"), Plaintiffs would be subject to the electioneering communications regime even though their advertisements do not promote a candidate for office and are not political issue advertisements.

101. The application of the electioneering communications rules to Plaintiffs' business Advertisements severely burdens their right to associate with their potential clients by outright prohibiting the Advertisements from airing, thus violating the First and Fifth Amendments. Even if the Advertisements could be aired with a disclaimer, imposing such broad and sweeping disclaimer and disclosure requirements that may discourage or confuse clients would still burden Plaintiffs' freedom to associate.

102. Further, other businesses that are exactly situated to Leigh Brown & Associates, except do not share a name of a federal candidate, and that run the exact same Advertisements, would not be subject to the same outright prohibitions and restrictions. This deprives Plaintiffs of the equal protection component of the due process clause of the Fifth Amendment.

103. Plaintiffs actions pose no threat of corruption, or the appearance of corruption, because the Advertisements are purely and expressly commercial and plainly state on their face who is airing them. *See Citizens United*, 130 S. Ct. at 909.

104. If these laws are interpreted to apply to the name of a business or a Realtor in her professional capacity, which is the position maintained by the FEC, that interpretation goes beyond any permissible construction of "clearly identified candidate" as defined by the Supreme Court in *Buckley v. Valeo*, and is void as applied.

105. Wherefore, Plaintiffs pray for the following relief:

a. Find the application of 52 U.S.C. 30104(f)(3)(A)(i); 11 C.F.R. §§ 100.29, 104.5(j), 104.20, 114.10(b)(2), 110.11(a)(4) to Plaintiffs' Advertisements as violative of Plaintiffs' rights under the First and Fifth Amendments and void as applied.

b. A preliminary and permanent injunction enjoining Defendant FEC from enforcing 2 U.S.C. §§ 431(18) and 434(f), as well as any applicable rules and regulations regarding those provisions, against Plaintiffs when they air the Advertisements;

c. An award of nominal damages of $1 for the violation of Plaintiffs' constitutional rights;

d. Costs and attorney's fees pursuant to any applicable statute or authority;

e. Any other relief that the Court deems just and appropriate.

Date: April 17, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that, on this 17th day of April 2019, the foregoing Amended Verified Complaint was filed electronically with the Clerk of Court using the CM/ECF system. The following parties were served either electronically on April 17th or by USPS First Class Mail on April 18, 2019.

/s/Jason Torchinsky
Jason Torchinsky (D.C. Bar No. 976033)

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