UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEIGH BROWN AND MALLARD CREEK PROPERTIES, INC. D/B/A LEIGH BROWN & ASSOCIATES Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Case No. 1:19-cv-01021-TJK **PLAINTIFFS' STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs request that this Court issue a preliminary injunction to enjoin the Defendant from enforcing an unconstitutional prior restraint on the commercial speech of Leigh Brown and Mallard Creek Properties, Inc., d/b/a Leigh Brown & Associates (hereinafter "Leigh Brown & Associates"), or in the alternative find that none of the advertisements are electioneering communications. Plaintiffs have diligently pursued their rights. First, resolution was sought through the administrative process by filing an advisory opinion request with the Federal Election Commission on March 21, 2019–six days after Ms. Brown became a candidate for federal office– and requesting expedited consideration. On April 11, 2019, the Commission failed to approve the advisory opinion request. Because the electioneering communications window for Ms. Brown opened Sunday, April 14, 2019, Plaintiffs harms are now accruing with every passing day. Plaintiffs therefore seek this Preliminary Injunction to alleviate the current constitutional harms brought about by the FEC's regulatory scheme as applied to Plaintiffs and thereafter preserve the status quo until such time as this Court can decide the case on the merits.

STATEMENT OF FACTS

Leigh Brown, a first-time federal candidate, is a Realtor, and the President and Chief Executive Officer of Mallard Creek Properties, Inc. d/b/a Leigh Brown & Associates. The company is a for-profit business entity that was incorporated in North Carolina under the name Mallard Creek Properties, Inc. *See* Dec. of Brown at ¶ 15 (attached as Exhibit D to the Amended Complaint, ECF No. 11-4). Leigh Brown & Associates provides real estate agent services in and around the Charlotte area of North Carolina. *See id*. at ¶ 19. 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. *See id.* at ¶ 20-21.

For the past 13 years, Ms. Brown has voiced radio advertisements publicizing Leigh Brown & Associates. *See id.* at ¶ 22. 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 the company's advertisements.[1] 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. *See id.* at ¶ 24. 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. *See id.* at ¶ 23. In any event, Plaintiffs run radio advertisements year-round. *See id.* at ¶ 26.

The specific content of the radio advertisements run by Leigh Brown & Associates has varied over the years, but ads have followed a similar template. Advertisements generally are 60

[1] The 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.

seconds in length, and typically feature discussion of a real estate issue specific to the Charlotte real estate market (*e.g.*, local property values or 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."

Ms. Brown is now unable to broadcast advertisements for her business during the electioneering communications window, and it is already having a detrimental impact on her real estate firm along with the employees/contractors who rely on it for their livelihood. *See* Dec. of Brown at ¶ 21, 28-31. To be clear, the FEC's application of FECA has entirely prohibited the firm from running business advertisements after April 14.

FECA as applied here by the FEC prohibited the firm from broadcasting advertisements after April 14. As of that date, if the advertisement falls within the definition of an electioneering communication, Ms. Brown will be forced to refrain from airing the advertisements because she is unable to advertise on the radio for Leigh Brown & Associates and comply with the disclosure, disclaimer, source limitations and personal use prohibitions of FECA, while simultaneously complying with applicable North Carolina state law.

As outlined below, the disclaimer and disclosure requirements force Plaintiffs to choose between advertising and making false statements or refraining from commercial business advertisements. Disclaimers that indicate an electioneering communication is "authorized" by a candidate but paid for by someone else imply an in-kind contribution to Ms. Brown's congressional campaign, which both her incorporated company and herself as the CEO of the company are prohibited from doing without violating the source and amount limitations of FECA. If Ms. Brown put personal funds into her Congressional campaign and uses those funds to run

radio advertisements for her real estate business, that expenditure would violate FECA's personal use of campaign funds prohibition.

Therefore, she seeks to continue airing the two radio advertisements transcribed below during the electioneering communication window for the upcoming special primary election on May 14, 2019. 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 a result of this Court's denial of the temporary restraining order on April 13, 2019, the advertisements were removed from the radio as of 5pm that evening.

As of April 14, 2019, the FEC maintains that these advertisements satisfy FECA's basic statutory definition of "electioneering communication," promotes or supports her candidacy, and triggers the disclaimer and reporting requirements described above. Ms. Brown contends that these advertisements refer to Ms. Brown the Realtor, and not Ms. Brown the federal candidate, and therefore the advertisements do not satisfy the electioneering communications definitions. However, the FEC maintains that these advertisements do reference a clearly identified candidate, and therefore are subject to the the regulatory regime that effectively prohibits the speech.

The advertisements that ran through April 13, 2019 are here:

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 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 Leigh Brown & Associates' past advertisements. *See* Dec. of Brown at ¶ 40. 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.

In the interest of maintaining a consistent business presence on the radio, Ms. Brown has recorded alternative advertisements and, if permitted by this Court, the alternative advertisements will replace the ads that were withdrawn from the air on April 13, 2019. The recorded replacement ads are as follows – with the edits showing how the advertisements have been changed from the original:

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~~ sell**s** 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**.

The FEC failed to approve either version of Ms. Brown's request. In preparation for swiftly re-engaging with its consumers, Leigh Brown & Associates recorded the alternate versions so that they can be immediately aired pending a favorable decision of this Court. *See* Dec. of Brown at ¶ 39-40.

Once again, Plaintiffs maintain that the proposed scripts refer only to a business, and not to a clearly identified candidate. However, the FEC maintains that these scripts are electioneering communications and cannot lawfully air without the applicable disclaimers and disclosures.

The same day that the FEC failed to take action on approving the waiver request, Plaintiffs filed a Complaint, (ECF No. 1), and an Emergency Motion for Temporary Restraining Order, (ECF No. 2), in this Court. After a hearing and deliberation, the Court denied the TRO, (April 13, 2019 Minute Order), and noticed a scheduling conference for April 15, 2019. At the conference, the Court ordered expedited briefing and argument on this Motion for Preliminary Injunction. Plaintiffs, immediately preceding this Motion, filed an Amended Complaint for injunctive relief. Plaintiffs now present this Motion for Preliminary Injunction for this Court's consideration.

STANDARD OF REVIEW

The preliminary injunction standard is well understood in this Court. This Court recently explained that "[a] preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 38 (D.D.C. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). To obtain a preliminary injunction, the moving party must show: "(1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that the public interest would be furthered by the injunction." *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, 2015 U.S. Dist. LEXIS 83838, *11-12 (D.D.C. June 29, 2015) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)); *see also Coalition for Parity, Inc.*, 709 F. Supp. 2d at 7-8; *Hall v. Johnson*, 599 F. Supp. 2d 1, 6 n. 2 (D.D.C. 2009).

"In conducting an inquiry into these four factors, [a] district court must balance the strengths of the requesting party's arguments in each of the four required areas." *Elec. Privacy Info. Ctr*, 15 F. Supp. 3d at 38 (internal citation and quotation marks omitted). "The District of Columbia Circuit applies a 'sliding-scale' approach to the preliminary injunction factors, meaning

that 'a strong showing on one factor could make up for a weaker showing on another.'" *Indian River Cnty. v. Rogoff*, 2015 U.S. Dist. LEXIS 74895, *17 (D.D.C. June 10, 2015) (citation omitted). However, "Plaintiff's probability of success on the merits is the most critical of the criteria when considering a motion for preliminary injunction." *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011).

Furthermore, the electioneering communications rules at issue here implicate First Amendment rights through the prior restraint on Leigh Brown & Associate's speech, meaning the burden shifts to the FEC to justify its regulatory actions. *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). When the government bears the ultimate burden of proof demonstrating a statute's constitutionality, a movant in a preliminary injunction setting must be deemed likely to succeed on the merits unless the government is able to demonstrate the statute's constitutionality. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

ARGUMENT

I. PLATINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

a. Standard of Review of the Merits.

This case is not one about simply requiring the use of disclaimers. Plaintiffs are being regulated only because of the following three facts: (1) Leigh Brown, as an individual, is a candidate for federal office; (2) Leigh Brown's company operates under her own name as a licensed real estate broker in North Carolina; and—closely related to number (2)—(3) Leigh Brown & Associates operates under the name of a person who is a candidate for federal office—something the business has done for the past 15 years.

Through its ability to grant exemptions and advisory opinions, the FEC has characterized itself as a speech commission for Leigh Brown & Associates and other similarly situated businesses, determining what speech is acceptable and what speech is not when a principal of a business runs for office. The facts of this case therefore lead to the inexorable conclusion that the FEC's ban on Leigh Brown & Associates speech is a *content based* prior restraint on speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Alternatively, if the Plaintiffs' speech is purely commercial, then the FEC was and is without power to regulate that speech.

The standard of review of the merits of this case highlights the absurdity of the FEC's position. Fundamentally, one of the following two things *must* be true: either (1) Plaintiffs' speech is political speech, and thus may be regulated by the FEC subject to strict scrutiny analysis, because the regulatory framework constitutes a content based ban on the speech in this circumstance; or (2) Plaintiffs' speech is commercial speech, outside of the jurisdiction of the FEC, and subject to "heightened" or "intermediate" scrutiny.[2] If (1) applies then the FEC cannot possibly satisfy its burden under strict scrutiny. If (2) applies, then the FEC's actions in this matter were *ultra vires* and should be struck down by this Court. Under any level of scrutiny, it is the FEC, not Plaintiffs,

[2] Needless to say, it is a unique situation indeed when the party seeking relief against government action is in fact advocating a *lesser* form of scrutiny. However, the unusual circumstances of this case necessitate the conclusion that Leigh Brown & Associates' speech is purely commercial in nature and therefore the FEC has neither the power nor the authority to regulate it. *See infra*. The FEC simply cannot implement a have-their-cake-and-eat-it-too approach allowing them to regulate commercial speech as political and yet have that regulation subject to the lessor form of scrutiny afforded commercial speech.

that have the burden of proof. *See Reed*, 135 S. Ct. at 2231; *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). This is a burden they cannot possibly maintain.

i. Political Speech

The FEC's speech ban, under the FEC's formulation of the fact, is a content-based restriction on Plaintiffs' speech and subject to strict scrutiny. As an initial matter, if a communication truly is an "electioneering communication" it is *per se* political speech. *See* 52 U.S.C. 30104(f)(3)(A)(i) (defining an "electioneering communication" as a "broadcast . . . communication" that "refers to a clearly identified candidate for Federal office" and is made close in time to an election); *cf McConnell v. FEC*, 540 U.S. 93, 206 (2003) ("[I]ssue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."). The Supreme Court has "insisted that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Because the actions of the FEC constitute a content based ban on the speech of Plaintiffs, the challenged provisions are subject to strict scrutiny. *Id*.

Classifying the Leigh Brown & Associates advertisement's as "electioneering communications" and subjecting them to the applicable limitations and disclosure requirements is clearly a content-based speech ban. The FEC is applying FECA by designating itself as a curator of content and determining that Plaintiffs' longstanding method of advertising its commercial business is suddenly candidate speech because the business' owner is a federal candidate. *See*

Opposition to TRO at pp. 14 and 16.[3] If Plaintiffs wanted to air the same exact ads but with a different business name, they would not meet the FEC's definition of electioneering communication. This is nearly identical to the situation faced by the Supreme Court in *Reed v. Town of Gilbert*.

"[I]t is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). For example, any ban on political speech, and only political speech, would be content based even if the restriction does not limit the viewpoint underlying the speech. *See id*. Furthermore, "the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral." *Id*. The Supreme Court has:

> insisted that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers.

Id. (internal quotations and citations omitted). Similarly, "the fact that a distinction is event based does not render it content neutral." *Id*. at 2231.

Fundamentally, "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea of message expressed." *Id*. ("The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for

[3] The Supreme Court expressly warned against this behavior by regulators in *Citizens United*. 558 U.S. at 336.

example. Instead, come election time, it requires Town officials to determine whether a sign is 'designed to influence the outcome of an election' (and thus 'political') or merely 'communicating a message or ideas for noncommercial purposes' (and thus 'ideological'). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (i.e., an election) is involved.").

Here, the FEC's position in this litigation and the resultant application of FECA works to prohibit *any* advertisements promoting Leigh Brown & Associates[4], simply because the advertisements contain the name of the business owner, who is also a candidate for Congress. If the advertisements were not considered electioneering communications, they could be aired. The FEC has essentially created two categories of speech: (1) speech that refers to the name of a business named after its owner who also happens to be a candidate for federal office; and (2) speech that does not refer to the name of a business named after its owner who also happens to be a candidate for federal office. This is a *per se* content based speech ban.

Similar to the Town of Gilbert in *Reed*, the FEC's inquiry into the nature of the communication requires an examination of the content of the speech. As such, the FEC's speech ban is a prior restraint on speech subject to strict scrutiny.

ii. Commercial Speech

The Supreme Court has long recognized that commercial speech falls "under the purview of the First Amendment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) "Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent

[4] In actuality, the FEC is banning all speech by the corporations of candidates for federal office if the corporation or other business organization contains the name of the candidate. This is hardly a limited number of individuals, as many professions, such as law firms or real estate brokers, *require* that the name of the owner be part of the name of the company.

with the First Amendment." *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 571-72 (2011) (citing *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002)). To sustain a "content-based burden . . . on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 535 U.S. at 572. To accomplish this the government must show that there is a "fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* (quoting *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989)). The test for analyzing commercial speech is as follows: (1) the Court "must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading," *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980); and (2) the Court "ask[s] whether the asserted governmental interest is substantial." *Id*. "If both inquiries yield positive answers, [the Court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id*.

"Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Id*. at 564 (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (speaker-based financial burden)). "As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Sorrell,* 564 U.S. at 572.

While a finding that Plaintiffs' speech is commercial would subject them to a lower scrutiny threshold, it also necessitates the finding that the FEC was without power to enforce their

regulations in the first instance, *see infra* at 24-26. At the very least, any finding or insistence that Plaintiffs' speech was commercial in nature is directly contrary to the FEC's *per se* finding that the advertisements were electioneering communications. As such, either strict scrutiny applies, or, if intermediate scrutiny applies because the speech is commercial in nature, the FEC was without power to regulate the speech in the first instance.

b. Plaintiffs are likely to Succeed on the Merits of the Constitutional Claim.

i. The FEC's Regulatory Structure as Applied by the FEC Here Constitutes a Prior Restraint on Speech.

1. The Disclosure Scheme Subjects Plaintiffs to an Inherent Legal Quandary and Automatic Liability

This case does not present the typical operation of disclaimer requirements, where a party is able to run advertisements, but chooses not to do so because of the burdens of disclosure and disclaimer. Here, Plaintiffs are altogether unable to air any advertisements during the electioneering communication 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. The application of these laws to Plaintiffs' advertisements operates as a total and complete ban on their speech. This outright ban cannot survive constitutional scrutiny regardless of whether it is considered commercial speech, as Plaintiffs maintain, or political speech, as the FEC seems to argue.

If Plaintiffs run any of the Advertisements between now and the special primary election, less than 30 days before the special runoff election (if applicable), or less than 60 days before the special general election, FECA, as applied by the FEC, would treat them as "electioneering communications" and requires that they must be accompanied by certain disclaimers and

disclosure. 11 CFR 110.11. For broadcast advertisements, such as those aired over the radio as the Advertisements are, disclaimers must be read aloud by the speaker. Id.

In addition, the FEC's "Form 9" requires that the person responsible for the advertisements be identified, and in this case that would be Leigh Brown. These disclosure requirements mandate that the person responsible for the advertisements be disclosed on FEC Form 9. *See* FEC FORM 9.[5] In this case, Ms. Brown would be disclosed as the responsible person on Form 9 for the Advertisements. So, Plaintiffs would simultaneously be forced to air disclaimers stating that Ms. Brown did not authorize the Advertisements, yet file forms with the FEC signed under penalty of perjury by Ms. Brown stating that she shares/exercises control over the Advertisements. These requirements present an unresolvable catch-22 in requirements, forcing Plaintiffs to file a form with the federal government that would be inconsistent with the text of the broadcast advertisements, potentially subjecting them to both civil investigations and liability under the FECA, or criminal prosecution by the Department of Justice.

Furthermore, treating the Advertisements as electioneering communications and requiring such nonsensical disclaimers would make it likely that these advertisements would also be captured under the definition of "coordinated communications." 11 CFR 109.20; 11 CFR 109.21(a). Coordinated communications are treated as in-kind contributions to the candidate's campaign committee and subject to contribution restrictions. 11 CFR 109.21(b); McConnell, 124 S. Ct. at 704; Buckley, 424 U.S. at 46-47. Leigh Brown & Associates is a taxable business entity and cannot legally make any contributions to Ms. Brown's congressional campaign. 11 CFR 110.1.

[5] 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).

"[C]ommunications count as 'coordinated' (and thus as contributions) if: (1) someone other than the candidate, party, or official campaign pays for them, (2) the communication itself meets specified 'content standards,' and (3) the payer's interaction with the candidate/party satisfies specified 'conduct standards.'" *Shays v. FEC*, 414 F.3d 7, 986 (D.C. Cir. 2005) (quoting 11 C.F.R. § 109.21). The conduct standard can be satisfied in several ways, e.g., if "[t]he communication is created, produced, or distributed at the request or suggestion of a candidate," 11 C.F.R. § 109.21(d)(1)(i); if a "A candidate . . . is materially involved in decisions regarding: (i) The content of the communication; (ii) The intended audience for the communication; (iii) The means or mode of the communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or (vi) The . . . duration of a communication by means of broadcast . . ." 11 C.F.R. § 109.21(d)(2); or if "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication . . . and the candidate who is clearly identified in the communication . . ." 11 C.F.R. § 109.21(d)(3). The FEC would undoubtedly find that the Advertisements satisfy the coordinated communication definition because the authorization, planning, and voicing for the Advertisements was done by Ms. Brown, a federal candidate. This most likely meets the "material involvement" standard at 11 C.F.R. § 109.21(d)(2).

While the coordination rules do have an exemption for commercial transactions, 11 CFR 109.21(i), the FEC's analysis of all the proposed communications here seems to indicate that while these Advertisements promote Ms. Brown's services as a Realtor and Leigh Brown & Associates, they are inexplicably really related to a political campaign and therefore support a federal candidate. (*See* Opposition to TRO at pp. 14 and 16). The FEC's position in this litigation is that the Advertisements promote, attack, support, or oppose ("PASO") Ms. Brown, the candidate.

Because the Advertisements PASO the candidate, they are electioneering communications. Without a finding that these Advertisements are not electioneering communications, the FEC will consider the Advertisements as coordinated communications. This would turn the Advertisements into illegal corporate contributions, and immediately subject the campaign to sanctions from the FEC, and potentially the DOJ.

Alternatively, Plaintiffs could attempt to treat the Advertisements as an independent expenditure. However that would require the inclusion of untruthful disclaimers. If the Advertisements are treated as independent expenditures, they would have to include a disclaimer that states "Leigh Brown & Associates is responsible for the content of this advertising. Paid for by Leigh Brown & Associates. Not authorized by any candidate or candidate's committee. www.leighsells.com." Plaintiffs cannot attempt to classify these Advertisements as independent expenditures without fear of prosecution, as Ms. Brown, a federal candidate, has in fact "authorized" the Advertisements, played a material role in creation of the advertisements (after all, she is the one who has produced and voiced them), and the FEC declares that the content promotes her candidacy for office.

Additionally, if Plaintiffs air the Advertisements as independent expenditures, they would be required to file disclosure forms with the FEC that would subject Plaintiffs to additional legal liability. Similar to the Form 9 for electioneering communications, the FEC has promulgated Form 5 for reporting independent expenditures. The instructions to this form provide: "FEC FORM 5 must be signed by the person making the independent expenditure, who must certify verifiably under penalty of perjury that the expenditure was not made in cooperation, consultation or concert with, or at the request or suggestion of any candidate or authorized committee or agent or a political party committee or its agents." *See* https://www.fec.gov/resources/cms-

content/documents/fecfrm5i.pdf (Visited April 17, 2019). Plaintiffs obviously cannot sign such a form, since Ms. Brown produced and recorded the ads and her business pays for them.

Another fruitless option that Plaintiffs could attempt to pursue is depositing personal funds in Ms. Brown's campaign account, and have her Congressional campaign run the advertisements. However, other provisions of FECA prohibit the use of campaign funds for "personal use" – even if those funds originated with the candidate herself. 52 U.S.C.S. § 30114(b); 11 CFR 113.1. See e.g. Federal Election Commission v. Craig for U.S. Senate, 816 F.3d 829 (D.C. Cir. 2016) (finding personal use violation using campaign funds for legal fees); Federal Election Commission v. O'Donnell, 2017 U.S. Dist. LEXIS 59524, 2017 WL 1404387 (D. Del. 2017) (finding personal use when campaign funds were used to, among other things, pay a portion of a candidate's mortgage). Moreover, expenses that would exist irrespective of the candidacy are considered personal use and cannot be paid for with campaign funds. 11 CFR 113.1(g). Given that the Advertisements in question have been aired for the past 13 years, before Ms. Brown ever contemplated running for office, the expenses would clearly exist irrespective of her candidacy, and would be automatically categorized as impermissible personal use of campaign funds.

Making Plaintiffs' predicament even worse are the requirements North Carolina Real Estate Commission places on real estate marketing. As 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 provisions 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 a candidate for federal office and her name is contained within the name of her business, and therefore federal law, as interpreted and applied by the FEC, would find that any commercial advertisement for her business would be treated as an electioneering communication, and subject to the applicable disclaimer requirements.

Even if Plaintiffs could air the Advertisements without fear of prosecution under FECA absent some action from this court, adding a disclaimer to the end of the Advertisements would confuse the public and destroy any commercial value those Advertisements have for Plaintiffs. To add this sort of clearly-political disclaimers to radio ads 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 into thinking this real estate business was engaging in political activity.

Accordingly, classifying Plaintiffs’ Advertisements, clearly commercial speech, as electioneering communications operates to completely prohibit them from undertaking that speech at all. The operation of FECA and the FEC’s regulations force Plaintiffs into an impossible situation. They have the option to: (1) air the Advertisements in violation of coordinated communication prohibitions (again exposing Plaintiffs to civil and criminal liability); (2) air the Advertisements and make patently false statements in the attendant disclaimers and disclosure

forms (opening Plaintiffs to civil and criminal liability); (3) air the advertisements in violation of the personal use prohibition (exposing Plaintiffs to civil and criminal liability) or (4) not air the Advertisements at all. Plaintiffs are stuck in a catch-22 with no way out and are therefore wholly unable to advertise their business on broadcast mediums during the electioneering communication windows.

Such an outright prohibition of speech cannot survive constitutional scrutiny no matter whether the speech is considered commercial in nature, as Plaintiffs contend, or political in nature, as the FEC seems to contend through enforcement of FECA and its and regulatory scheme.

2. The Classification of the Advertisements as Electioneering Communications Is an Unconstitutional Content-Based Speech Ban.

Classifying the Advertisements as electioneering communications and subjecting them to the applicable limitations and disclaimer requirements is clearly content-based speech ban and the government's rationale is insufficient to satisfy either heightened/intermediate scrutiny or strict scrutiny. The FEC has decided to apply FECA after reviewing the content and inexplicably finding that these Advertisements are related to an election, despite the fact that substantially similar advertisements have been running for 13 years, long before Ms. Brown ever contemplated running for office. *See* Opposition to TRO at pp. 14 and 16. If Plaintiffs wanted to air the same exact ads but with a different business name, they would not meet the FEC's definition of electioneering communication. If the Advertisements are not considered electioneering communications, they could be aired. The FEC has essentially created two categories of speech: (1) speech that refers to the name of a person who also happens to be a candidate for federal office; and (2) speech that does not refer to the name of a person who also happens to be a candidate for federal office. This is a per se content based speech ban.

If FECA and the FEC's regulations impose a content based restriction on the Advertisements as commercial speech, as Plaintiffs here maintain, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571-72 (2011), *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) control and mandate this Court find in favor of Plaintiffs and against the FEC. If those laws instead impose a content based restriction on the Advertisements as political speech, as the FEC seems to maintain, and indeed must maintain, *see infra* 24-26, then *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) controls and also mandates Court to find in favor of Plaintiffs and against the FEC. The FEC simply cannot win.

Plaintiffs have maintained, and will continue to maintain, that the prohibited speech is in fact commercial in nature. *See infra* 24-26. Under a commercial speech inquiry, the government cannot overcome its burden to justify this complete speech prohibition. See Sorrell, 564 U.S. at 571-72 (citing Thompson, 535 U.S. at 373). The government's purported interest in maintaining disclaimer and disclosure requirements is the prevention of corruption or appearance thereof. See *Citizens United*, 130 S. Ct. at 909. Specifically, in the electioneering communications context, it is well established that Congress' motivation in enacting those provisions of FECA was to regulate so-called "sham issue ads", issue advocacy intended to benefit federal campaigns that is actually paid for with non-federal funds. *See Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 204 (D. D.C. 2006). Another 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). There is no suggestion anywhere in the legislative record that Congress intended to include bona fide commercial advertisements for commercial products and services in the definition of electioneering communications.

Accordingly, as applied to Plaintiffs and the Advertisements, the electioneering communication requirements do not "directly advance[] the governmental interest asserted" and are "more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). The government bears the burden to prove otherwise and it cannot do so. Sorrell, 564 U.S. at 571-72 (citing *Thompson*, 535 U.S. at 373). While the government's purported interest has consistently been held to be more than legitimate, *Buckley*, 424 U.S. 1, *Citizens United*, 130 S. Ct. at 909, the means are extreme. Based on a complex web of statutory and regulatory requirements, FECA, as interpreted and applied by the FEC, operates as complete ban on Plaintiffs commercial speech during electioneering windows, which could encompass up to 4 months this special election cycle alone.

Plaintiffs proposed activities pose no threat of corruption or its appearance 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. Therefore, FECA and the FEC's attendant regulations classifying the Advertisements as electioneering communications must fail constitutional scrutiny because they are statutorily overbroad and practically unnecessary.

The United States Supreme Court's "commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent." Lowe v. SEC, 472 U.S. 181, 234-35 (1985) (Jackson, J., concurring) (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); In re R. M. J., 455 U.S. 191, 203 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977)). This is hardly the "fit" envisioned by the Supreme Court in Sorrell, the "narrow tailoring" envisioned by the Supreme Court in *Lorillard Tobacco*, or the "not more extensive than is necessary" tailoring envisioned by the Supreme Court in *Central Hudson*. This is the absolute prohibition of

commercial speech, inherently designed to serve interests that have no application to the speech itself. Such an absolute ban, for what could add up to one-third of the calendar year, is repugnant to the First Amendment.

In the alternative, the FEC maintains, and must maintain that the Advertisements constitute political speech in order to have the authority to regulate them. *See infra* 24-26. However, this places the FEC in the odd position of essentially seeking a higher scrutiny than Plaintiffs seek. Compare Reed, 135 S. Ct. 2230 (applying strict scrutiny to content based regulation of speech) to Sorrell, 564 U.S. at 571-72 (applying heightened scrutiny to commercial speech). If strict scrutiny indeed applies, the portions of FECA and the FEC regulations applying electioneering communication restrictions to the Advertisements must fail. The FEC's position in this litigation and FECA's other requirements serve to prohibit any advertisements promoting Plaintiffs, because no advertisement can be the least bit effective without containing the name of the real estate broker and business owner, who is also, in this case, a candidate for Congress. Restrictions apply based "entirely on the communicative content of the" business' speech. *Reed*, 135 S. Ct. at 2227. This is precisely the kind of content based speech ban contemplated and struck by the Supreme Court in *Reed*, 135 S. Ct. 2218.

3. *Citizens United's* Blessing of Disclaimer Requirements is Unfitting to the Unique Facts of this Case.

At the April 15, 2019 status conference, the Court expressed some concerns about this quotation from *Citizens United*: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. The case before the Court now is factually distinct from the commercial transaction at issue in *Citizens United*. In that case, an interest group had created a movie criticizing Hillary Clinton's record as a public official, and stopped just short of urging a vote

against her. The "commercial transaction" at issue there was the organization's proposed advertisements urging people to view their movie about Hillary Clinton either on pay per view cable television or in select movie theaters. These commercial transactions were not long standing, and the movie was created only after Hillary Clinton became a candidate for federal office.

This current case is very different. The commercial transactions have been part of Leigh Brown & Associates regular course of business for 13 years, and promotes only real estate related services. As a result, this case is factually distinguishable from the type of commercial transactions at issue in *Citizens United*, and is more consistent with the notion that factually specific as applied challenges are available in these cases and are not foreclosed by even broad sounding language from prior cases. *See Wisconsin Right to Life FEC*, 546 U.S. 410 (2006).

ii. Plaintiffs' Speech is Commercial and the FEC is Without Power to Regulate Purely Commercial Speech, and These Advertisements are Not Electioneering Communications.

Count Three of the Complaint provides this Court with an alternative path in this case that avoids adjudicating the "as applied" challenges outlined above. The facts show that the first two advertisements refer to Ms. Brown as a realtor and not as a clearly identified candidate. The facts also show that the second two advertisements refer to Ms. Brown's company – a legal entity entitled to be mentioned in an advertisement just as the FEC found an advertisement for Wisconsin car dealer Russ Darrow not to be an electioneering communication. FEC Advisory Opinion 2004-31. Having made these findings, this Court can grant an injunction pursuant to Count Three as the advertisements at issue are not electioneering communications because they do not refer to a clearly identified candidate

Plaintiffs' speech is *commercial* speech under any coherent definition of the term. "[T]he core notion of commercial speech [is] speech which does no more than propose a commercial

transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks and alterations omitted). Any of the proposed and recorded advertisements plainly meet the Supreme Court's definition of commercial speech, and these advertisements are not electioneering communications.

In the first sentence, the Advertisements identify the nature of the product sold: the ads are very clearly promoting the provision of real estate services. *See, e.g.,* Dec. of Brown at ¶ 40(c) ("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."). The second sentence identifies the business owner in her capacity as part of a real estate company. *See, e.g., id.* ("We're Leigh Brown & Associates with RE/MAX . . . ."). The Advertisements then turn to what Leigh Brown & Associates does for their customers. *See, e.g., id.* ("Our clients need help with disputing" their tax valuations . . . and "want to know what their property is worth."). They then go on to notify their potential customers of their prowess as Realtors. *See, e.g., id.* ("Our team sells a house every two days . . ."). Finally, like every good advertisement, there is a call to action to recruit customers seek their real estate services. *See, e.g., id.* ("[T]hat's not bragging. That's interviewing for a job. In fact, the job we want is to be your Realtor for life. For more information, visit 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."). There is absolutely nothing political or election related about the Advertisement, as it "does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66.

Because the Advertisements are clearly commercial in nature, the questions then become: (1) Does the FEC have the power to regulate *commercial* speech? (2) Are these Advertisements electioneering communications in the first place? The answers to these questions must be an emphatic "no." First, the authority invoked by Congress when enacting both FECA and BCRA

was the authority to regulate *elections*. Congress' authority to regulate elections arises from Article I, § 4 of the Constitution. *See* U.S. Const. art. I, § 4 (granting Congress the authority to enact time, place, and manner restrictions on elections); *see also Buckley*, 424 U.S. at 14 n.16. As a simple matter of logic, if an election is not implicated, then the communication is outside the scope of Congress' grant of authority to the FEC.

If the speech is "plainly and unquestionably not related to the election" then the FEC is without authority to pass judgment upon the speech in the first instance. *See* U.S. Const. art. I, § 4. Any finding otherwise is inconsistent with the FEC's litigation position in *McConnell v. FEC*, in which the agency assured the courts, "BCRA's definition of electioneering communication is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers 'wholly at the mercy of the varied understanding' of their listeners, *Buckley*, 424 U.S. at 43 (quoting Thomas, 323 U.S. at 535)." Brief of Government Defendants at 156, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582) ("FEC Brief"). Furthermore, it is not the FEC's place to stand in judgment as the speech police for commercial speech, to find otherwise subverts the very core freedoms the First Amendment seeks to protect. What is clear in all of the Advertisements, and exceedingly, explicitly clear in the revised and amended Advertisements, is that the speech contained therein is commercial speech. As such, the FEC is without authority to regulate it, because the FEC cannot regulate commercial speech and these advertisements are not electioneering communications.

c. <u>Plaintiffs are Currently Suffering Irreparable Harm.</u>

In First Amendment challenges, once likelihood of success on the merits is established, the other preliminary injunction elements follow as a result. "When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the

merits will often be the determinative factor." *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.").

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The D.C. Circuit applies *Elrod v. Burns* with the understanding that "[t]he Supreme Court has instructed that injunctive relief is not appropriate unless the party seeking it can demonstrate that 'First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought.'" *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987) (citing Elrod, 427 U.S. at 373-374; *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." Plaintiffs face a real and immediate threat of lengthy government investigations, civil penalties and potential criminal liability if they speak *at all*. Consequently, by not being permitted to speak *at all* to advertise on behalf of her business in the broadcast medium in which the business has advertised for years, Leigh Brown & Associates is experiencing a loss of business, Dec. of Brown at ¶ 38, that has already resulted in specific and identifiable harms.

As has been discussed at length *supra*, Leigh Brown & Associates simply cannot advertise under its trade name—one that it has been building through advertisements for the past 13 years—

without committing a violation of the law. Because Plaintiffs are likely to succeed on the merits of their First Amendment claim, irreparable harm is presumed.

d. The Balance of the Harms Favor Granting an Injunction.

This Circuit has held that when First Amendment rights are involved, the plaintiff's constitutional rights are critically important. *See Pursuing America's Greatness*, 831 F.3d at 511. "In evaluating whether a preliminary injunction should issue, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, 2015 U.S. Dist. LEXIS 83838, *18-19 (D.D.C. June 29, 2015) (citing *Winter*, 555 U.S. at 24). The balancing required by this Court favors Plaintiff's constitutional right to freedom of expression over the government interest in maintaining an unconstitutional position. *See id*. at 506-512.

Finally, as the Supreme Court has made clear, courts "must give the benefit of any doubt to protecting rather stifling speech," and that "the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 469, 474. Plaintiffs prevail on this factor.

e. The Public Interest Would be Furthered by an Injunction.

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *United States v. Raines*, 362 U.S. 17, 27 (1960). This Circuit has held that protecting the First Amendment's right of political expression is in the public's interest. *Pursuing America's Greatness,* 831 F.3d at 511-12; *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. N.Y. 2013) ("[S]ecuring First Amendment rights is in the public interest.").

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S.

290, 295 (1981). It simply cannot be in the public interest to force business owners who run for Congress to abandon advertising for their business in exchange for exercising their constitutional rights to seek public office.

"The public interest is supported by protecting the right to speak, both individually and collectively." *Carey v. FEC*, 791 F. Supp.2d 121, 136 (D.D.C. 2011). "It is in the public interest not to perpetuate the unconstitutional application of a statute." *Martin–Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). "To assess speech in a public forum some balancing may be necessary, but the 'thumb of the court should always be on the speech side of the scales.'" *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp.2d 73, 84 (D.D.C. 2012) *quoting Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 898 (D.C. Cir. 1984). "[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *U.S. v. Raines*, 362 U.S. 17, 27 (1960).

The government cannot prohibit a person's business from advertising or control the content of those advertisements just because an owner is running for Congress.

CONCLUSION

For the foregoing reasons, this Court should GRANT the Motion for Preliminary Injunction to permit the current advertisements to run until such time as this Court can consider the case on the merits.

Dated: 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 Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction 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.

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