UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEIGH BROWN 4711 Myers Lane Harrisburg, NC 28075, LEIGH BROWN FOR CONGRESS 4711 Myers Lane Harrisburg, NC 28075, LEIGH BROWN & ASSOCIATES 24 Cabarrus Avenue East Concord, NC Plaintiffs, v. FEDERAL ELECTION COMMISSION 1050 First Street, NE Washington, DC 20463, Defendant.	Civil Case No. _____ **PLAINTIFFS' STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs request that this Court issue a temporary restraining order enjoining the Defendant from applying the electioneering communications disclosure and disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("FECA"), to Leigh Brown & Associates' commercial radio advertisements for the firm until such time as this court can consider the forthcoming preliminary injunction motion and issue a ruling on that injunction. Plaintiffs have diligently pursued resolution through the administrative process, filing an advisory opinion request with the Federal Election Commission on March 21, 2019 – eight days after Ms. Brown became a candidate for federal office – and requesting expedited consideration. On April 11, 2019, the Commission failed to approve an advisory opinion request that would have granted Plaintiffs the relief sought. Because the electioneering communications window for Ms. Brown

opens Sunday, April 14, 2019, Plaintiffs now seek this Temporary Restraining Order to preserve the status quo until such time as this Court can hear the forthcoming preliminary injunction request.

STATEMENT OF FACTS

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

For the past 13 years, Ms. Brown has voiced radio advertisements publicizing Leigh Brown & Associates. Currently, all of these radio advertisements are run exclusively on WBT 1110, a commercial AM radio station serving the Charlotte metropolitan area, which includes parts of North Carolina and South Carolina. Leigh Brown & Associates has an annual contract with WBT to air 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. The two advertisements are then broadcast on a rotating basis. The length of time a particular advertisement remains on the air varies, but Ms. Brown typically creates and records new advertisements every 60 to 90 days. This radio advertising is a core component of Ms. Brown's efforts to generate business for herself and the other agents on her real estate team. At least 10% of Leigh Brown & Associates' annual

[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.

commission revenue is attributable to clients acquired as a result of the radio advertising. Accordingly, Leigh Brown & Associates spends approximately $50,000 on radio advertising each year.

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 seconds in length, and typically feature discussion of a real estate issue specific to the Charlotte real estate market (*e.g.*, local property values and trends in housing prices). The advertisements typically note how many houses her team sells and consistently include two closing slogans: "I'm interviewing for a job…I want to be your realtor" and "There is a difference when you call Leigh Brown."

If Ms. Brown is unable to advertise for her business during the electioneering communications window, it will have a detrimental impact on her real estate firm and the employees/contractors who rely on it for their livelihood. To be clear, the FECA does not entirely prohibit the firm from running business advertisements after April 14, but as of that date, if the advertisement meets the definition of an electioneering communication, Ms. Brown will be forced to take the current ads off the air and substitute them with one or more new ads that include a lengthy campaign disclaimer at the end that will no doubt confuse listeners and suggest that her real estate advertisements are connected to an election,[2] Ms. Brown's firm would also be required to file public disclosure reports with the FEC to report spending that has absolutely nothing whatsoever to do with an election.

[2] The disclaimer for the commercial real estate advertisement would be "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." This could easily take up 10-15 seconds of a 60 second commercial advertisement.

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. Ms. Brown began airing these specific commercial advertisements in the Charlotte area on or about March 5, 2019, prior to her becoming a federal candidate. As of April 14, these advertisements will satisfy FECA's basic statutory definition of "electioneering communication" and trigger the disclaimer and reporting requirements described above. Ms. Brown does not intend to change the content or advertising volume of these two advertisements during the rapidly approaching electioneering communications window.

Radio Ad #1:

In a world where everything seems to be online and at the click of a button, you have to realize that real estate pricing is just not an exact science. I'm Leigh Brown with RE/MAX and I'm getting a lot of phone calls about the current tax valuations and the updates to the process. My clients need help with disputing that number because occasionally it's wrong. I also have folks that want to know what their property is worth based on their upgrades and condition and I can give a more accurate ballpark than a website can. Frankly, y'all, the reason you have a trusted realtor is that we are there for you between the buying and the selling and all steps in between. My team and I sell a house every two days, y'all, and that's not bragging. That's interviewing for a job. In fact, the job I want is to be your 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. 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 maintinaing a consistent business presence on the radio, Ms. Brown presented the FEC with an alternative, proposing to revise the ad scripts as set forth below, re-record both ads, and replace the currently-airing ads described above with the following ads during the electioneering communications period:

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.

INTRODUCTION

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

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

This Court should either find the statutory electioneering communications regime unconstitutional as applied, or engage in constitutional avoidance and find that these advertisements are entitled to an exemption from the applicable electioneering communications requirements. This is because the FEC failed to exercise its discretion in a reasonable manner by issuing an advisory opinion concluding that Leigh Brown & Associates' current commercial advertisements are entitled to exemption from FECA's electioneering communication regime.

The Court should also find that Leigh Brown & Associates proposed alternative radio advertisements do not fall within the statutory definition of "electioneering communication" because they do not clearly identify a federal candidate. In each of the alternate ads, Ms. Brown narrates the ad, but she does not identify herself individually or refer to herself individually in any way whatsoever. The alternate scripts remove all references to Ms. Brown individually and replace those references with references to a business, Leigh Brown & Associates, or with generic references to her real estate team.

Under similar circumstances presented in Advisory Opinion 2004-31 (Darrow), the Commission determined that commercial advertisements for a series of car dealerships whose names included the same name as federal candidate Russ Darrow did not clearly identify the candidate even though the name "Russ Darrow" was used throughout the proposed advertisements. The Commission relied on several factors to reach this conclusion, including that the business had worked for a decade to develop "Russ Darrow" as a brand name for all its dealerships, and that most of the references included the full name through which a particular dealership does business (*e.g.,* Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). Here, the alternate advertisements include Ms. Brown's name only as part of the name of a business, Leigh Brown & Associates. While Leigh Brown is unquestionably the individual named in "Leigh Brown &

Associates," unlike the more ambiguous situation in Advisory Opinion 2004-31, in which both a father and son shared the name "Russ Darrow," this distinction is not material and does not dictate a different result. In Advisory Opinion 2004-31, the Commission concluded that "proposed advertisements refer to [Russ Darrow Group's] car dealerships or Russ Darrow III, and not to" Russ Darrow, Jr. As in Advisory Opinion 2004-31, Ms. Brown has worked on building her brand, Leigh Brown & Associates, for over 15 years and the continued success of her real estate team depends on the advertising that is the subject of this request. Just as "Russ Darrow Toyota" referred to a car dealership, "Leigh Brown & Associates" refers to a real estate agency.

Further, though Ms. Brown's voice narrates the script of the radio advertisements, this Court should conclude that her voice is not so widely recognized that it "is a contextually unambiguous reference" to a federal candidate. This would be consistent with federal court precedent holding that an incumbent presidential candidate's voice was not necessarily an "unambiguous reference" to that candidate. Specifically, in *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), a federal court considered "an audio clip of President Obama speaking only an eight-word sentence" where that clip is preceded by an announcer saying, "the government says." The court concluded that "because the audio clip of President Obama is not identified as such, whether the advertisement refers to President Obama depends entirely on whether the viewer actually recognizes the voice of the person speaking. Although the FEC argues that President Obama's voice is widely recognized, there is no factual basis for reaching this conclusion." *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 430 (E.D. Va. 2012)." *Id*.

While the court left open the possibility that it could be factually demonstrated that President "Obama's voice is widely recognized," we believe the Court would be on solid ground

if it concluded that Ms. Brown's narration of the advertisements is not so "widely recognized" that it constitutes an unambiguous reference to her. Given that the revised ad scripts do not identify Ms. Brown individually, it is unlikely that the average listener would identify her by voice alone.

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

STANDARD OF REVIEW

The standard for obtaining a temporary restraining order is identical to that of a preliminary injunction. *See, e.g., Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 6 (D.D.C. 2010). 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 temporary restraining order, 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 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). Furthermore, the electioneering communications rules at issue here implicate First Amendment rights, 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.").

Plaintiffs requests that this Court issue a temporary restraining order enjoining the Defendant from applying the electioneering communications disclosure and disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("FECA"), to Leigh Brown & Associates current commercial advertisements. These advertisements are clearly entitled to an exemption from the electioneering communications rules under the standard set forth in FECA, and as further described by the legislative sponsors during floor debate. In the alternative, this Court could issue a temporary restraining order prohibiting enforcement of the electioneering communications rules against the proposed alternative advertisements because they do not meet the statutory definition of electioneering communications.

This case is not ultimately about what might be the best or preferred scope of coverage for federal campaign finance reporting and disclosure requirements, but rather, what the federal campaign finance law currently does cover, and to what extent campaign finance law may properly be construed to cover bona fide commercial advertising under applicable First Amendment precedent. Plaintiffs challenge the constitutionality of the electioneering communications provisions as applied to the current commercial advertisements, and also seek a declaratory judgment that the proposed alternative advertisements are not "electioneering communications."

ARGUMENT

I. PLATINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

a. Plaintiffs are likely to Succeed on the Merits of the Constitutional Claim and the Declaratory Ruling Claim.

"Electioneering communications" are a construct of campaign finance law conceived as an expansion of the so-called "magic words" standard of "express advocacy" set forth in *Buckley v. Valeo*, 424 U.S. at 43-44, that would allow Congress to broaden its scope of regulation to include "so-called issue ads [that] eschewed the use of magic words" but which were being "used to advocate the election or defeat of clearly identified federal candidates." *McConnell v. FEC*, 540 U.S. 93, 126 (2003). As the United States Supreme Court explained in *McConnell*:

> The first section of Title II, § 201, comprehensively amends [Federal Election Campaign Act] § 304, which requires political committees to file detailed periodic financial reports with the FEC. The amendment coins a new term, "electioneering communication," to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley.* As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that
>
> "(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 other than President or Vice President, is targeted to the relevant electorate." 2 USC § 434(f)(3)(A)(i) (Supp. 2003).
>
> New FECA § 304(f)(3)(C) further provides that a communication is "'targeted to the relevant electorate'" if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent. 2 USC § 434(f)(3)(C).

Id. at 189-90 (emphasis added). The plaintiffs in *McConnell* challenged the "electioneering communication" provision, arguing that the Court in *Buckley* "drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an

inviolable First Amendment right to engage in the latter category of speech." *Id.* at 190. They argued that *Buckley* permitted regulation only of communications that contained express advocacy. The majority in *McConnell* rejected these arguments and explained that the *Buckley* Court's adoption of the express advocacy standard was only a narrowing construction that saved otherwise "impermissibly vague" statutory language. *Id.* at 190-91. The Court explained:

> Thus, a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Id. at 191-92. The *McConnell* Court concluded that the new "electioneering communications" standard satisfied the *Buckley* Court's concerns:

> [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*.

Id. at 194 (emphasis added); *see also* FEC Brief at 129 ("Congress designed BCRA's definition of 'electioneering communication[s]' to meet the Supreme Court's concerns about vagueness of certain language in FECA's regulation of independent expenditures. It draws a clear line in the right place…").

After initially upholding the electioneering communications provisions against a facial challenge in *McConnell*, the Supreme Court subsequently issued a series of decisions that dismantled BCRA's electioneering communications funding restrictions. *See Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (*WRTL I*); *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007)

(*WRTL II*); *Citizens United v. FEC*, 558 U.S. 50 (2010). BCRA's disclosure provisions that apply to electioneering communications have survived, however. Thus, while the "electioneering communications" concept previously served (primarily) as a ban on speech, it exists today as a trigger for disclaimer and disclosure requirements. Accordingly, would-be speakers, in order to satisfy various legal requirements, must still be cognizant of whether their constitutionally protected speech is an "electioneering communication."

1. Plaintiffs are Entitled to an Exemption for the Existing and Ongoing Commercial Advertisements.

While the very name of the concept indicates its anticipated scope — i.e., *electioneering* communications – the term's bright line definition makes overbreadth a very real possibility, as the present circumstances demonstrate. 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 FEC 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 FEC, however, declined to adopt a blanket exemption for business advertisements, explaining:

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

Id.

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

> The Commission concludes that your proposed advertisements refer to RDG's [Russ Darrow Group, Inc.] car dealerships or Russ Darrow III, and not to the Candidate. First, the Candidate himself does not speak or appear on screen in any of the advertisements. Second, another individual, Russ Darrow III, does speak and appear in the advertisements. You indicate that he, not the Candidate, has been the public face of the company for more than ten years. Third, "Russ Darrow" is part of the name of all of RDG's dealerships, which RDG has worked for a decade to develop as a brand name for all its dealerships. Finally, while the name "Russ Darrow" is used throughout the proposed advertisements, most of these references include the full name through which a particular dealership does business (*e.g.,* Russ Darrow Toyota, Russ Darrow Kia, Russ Darrow Cadillac). While a couple of the proposed advertisements also include a single reference to "Russ Darrow," rather than the full name through which the dealership does business, these references, taken together with the other references in the advertisement, also refer to the business entity and not to the Candidate. Therefore, the Commission concludes that RDG's television and radio advertisements do not refer to a clearly identified candidate under 11 CFR 100.29(b)(2).

Id.

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

First, a majority of Commissioners agreed that the FEC 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. These Commissioners referenced statements made by the legislation's House sponsors. Specifically, Representative Shays stated "[w]e also expect the Commission to use its Advisory Opinion process to address these [exemption] situations both before and after the issuance of regulations." 148 Cong. Rec. H411 (Feb. 13, 2002) (statement of Rep. Shays). Representative Meehan made a similar statement. 148 Cong. Rec. E178-03 (Feb. 13, 2002) (statement of Rep. Meehan). Vice Chair Weintraub and Commissioner Bauerly wrote: "We are prepared to revisit this issue where the facts presented warrant an exemption." Statement on Advisory Opinion Request 2012-20 (Mullin) of Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly.

Second, the path to concluding that an exemption is warranted requires showing that the communications at issue are "plainly and unquestionably not related to the election." *Id*; *see also* Advisory Opinion 2012-20, Response Draft B. In 2012, two Commissioners concluded that "[t]he Mullin Companies have become intertwined with the Mullin campaign to the point where it can no longer be said that the companies' ads are plainly and unquestionably not related to the

election.'" *Id*. These Commissioners also noted commenters claimed to have "difficulty distinguishing between the Mullin campaign literature and the Mullin Companies' ads" and that "it seemed that the Mullin Companies' ads had become more frequent since Mr. Mullin began running for Congress." *Id*. While the former comment may have been traceable to an opposing candidate, and the latter comment was not substantiated in any way, neither concern has been raised in the present matter.

With respect to Ms. Brown's currently-airing advertisements, this Court can either find that the statutory scheme is unconstitutional as applied here, or engage in constitutional avoidance and determine that Plaintiffs are entitled to an exemption from the statutory regime.

2. The Proposed Alternative Advertisements are Not Electioneering Communications.

With respect to Ms. Brown's proposed alternative advertisements, the Court may rely on statutory interpretation to conclude that the ads in question do not meet the definition of "electioneering communications." In *Buckley v. Valeo*, the United States Supreme Court emphasized that a reference to a "clearly identified" candidate must be explicit and unambiguous. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (holding that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that *an explicit and unambiguous reference* to the candidate appear as part of the communication") (emphasis added).

As noted above, in *Hispanic Leadership Fund*, the Eastern District of Virginia concluded, and issued a declaratory judgment, that the unidentified voice of President Obama did not constitute a clearly identified candidate. The proposed alternative advertisements here – while containing the voice of candidate Leigh Brown – do not identify her and refer to "Leigh Brown &

Associates" solely for the purpose of identifying the legal entity advertising its commercial real estate services – consistent with its actions for the last 13 years.

The inability of four members of the Federal Election Commission to agree on whether these proposed alternative advertisements "refer[] to a clearly identified candidate for Federal office" convincingly demonstrates that the proposed advertisements do not contain the "explicit and unambiguous" references required under *Buckley v. Valeo*. By definition, the 3-1 split vote demonstrates that the references are, in fact, ambiguous.

When the FEC adopted its first "electioneering communications" regulations in 2002, the agency's *Explanation and Justification* stated that the "refers to a clearly identified candidate" standard "would not be based on the intent or purpose of the person making the communication." Explanation and Justification of Final Rule on Electioneering Communications, 67 Fed. Reg. 65,190, 65,192 (Oct. 23, 2002) (describing rule to be codified at 11 C.F.R. § 100.29(b)(2)) ("Explanation and Justification"). This language is consistent 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"); *see also Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. ___, No. 10-1121, slip op. at 13-14 n.3 (June 21, 2012) (quoting *Teachers v. Hudson* 475 U.S. 292, 303 n.11 (1986); *NAACP v. Button*, 371 U.S. 415, 438 (1963)) ("'Precision of regulation must be the touchstone' in the First Amendment context").

However, as concluded in the answers proposed by the FEC's Office of General Counsel in questions 1 and 2 of Draft A and the three Commissioners who supported the Office of General Counsel's proposal here, these proposed advertisements simply fall outside the statutory definition. The Commissioner who voted against the proposed answers to questions 2 and 3 of Draft A improperly invoked subjective considerations and criteria and refused to apply the legally required objective, unambiguous, bright-line test that the FEC previously assured the courts was the hallmark of the electioneering communication standard.

Three other Commissioners, however, recognized that they are bound by the U.S. Supreme Court's construction of the relevant statutory language in *Buckley* v. *Valeo*, the FEC's own regulations, the decision of the Eastern District of Virginia in *Hispanic Leadership Fund*, and the assurances previously provided to the courts by the FEC. These three Commissioners applied an objective, bright-line standard and correctly determined that inherently imprecise or ambiguous terms do not "refer[] to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I).

The applicable bright-line standard cannot turn on whether listeners do or do not recognize the voice speaking. Any standard that turns entirely on the listener's reaction yields inconsistent results that are simply not consistent with an objective, bright-line standard. In this case, the very classification of an electioneering communication and any resultant reporting and disclaimer obligations would depend on whether a listener was able to identify a voice on the radio as that of a particular candidate, leaving the regulated community unable to truly know whether a particular advertisement is regulated or not. Quite simply put, an unidentified audio recording, whether the speaker is recognized by the listener or not, cannot be a reference to a clearly identified candidate for federal office because the applicable statutes,

regulations, and precedent do not include audio clips within the definition of a clearly identified candidate.

However, the full FEC's failure to adhere to the plain language of the statute, the FEC's own regulations, binding Supreme Court precedent, and the agency's own prior representations to the courts leaves Plaintiffs without any legal assurances that they will not be subject to civil enforcement proceedings before the FEC if it airs its proposed advertisements.

b. Plaintiffs Suffer a Threat of Irreparable Harm

The D.C. Circuit held in *Pursuing America's Greatness v. Federal Election Commission*, 831 F.3d 500, 511 (2017), that "we see likely success in PAG's constitutional challenge, we view more favorably PAG's arguments regarding irreparable injury, the balance of the equities, and the public interest." The Circuit noted that "[t] loss of First Amendment freedoms even for minimal periods of time unquestionably constitutes irreparable injury." *Id*. (citing *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009)) (internal quotations and punctuations omitted). Plaintiffs face a real and immediate threat of lengthy government investigations, civil penalties and potential criminal liability if they fail to act in full compliance with applicable legal standards.

First, if Plaintiffs proceed with airing the current or proposed advertisements, they must decide whether to treat the advertisements as electioneering communications and file reports with the FEC.

If Plaintiff Leigh Brown & Associates opts to air either advertisement under the theory that they are exempt or are *not* electioneering communications, a complaint will almost certainly be filed with the FEC. On the other hand, if Plaintiff Leigh Brown & Associates airs its proposed advertisements under the theory that they *are* electioneering communications, and complies with BCRA's disclosure requirements for electioneering communications, it may be required to

disclose the identity of certain customers who have given more than $1,000 to the firm since January 1, 2019, not to mention significantly restructure the advertisements to include lengthy disclaimers that only serve to politicize an otherwise purely commercial communication.

Alternatively, Leigh Brown and Leigh Brown & Associates could determine that the consequences of proceeding are simply too unclear, potentially harmful and irreversible, and not air any of its proposed advertisements. At this point, the FEC's inability to render guidance will have chilled protected speech. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

The deprivation of a plaintiff's First Amendment rights constitutes *per se* irreparable injury. *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978); *see also Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Because Plaintiffs are likely to succeed on the merits of their First Amendment claim, irreparable harm is presumed.

c. 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.

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 prevails on this factor.

d. 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.

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.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ; *see also Knox*, No. 10-1121, slip op. at 22 ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals."). Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). 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.

II. PLAINTIFFS HAVE STANDING.

To demonstrate standing, three elements must be established: an injury in fact, a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will be redressed by a decision favorable to the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560. (internal quotation marks and citations omitted).

Plaintiffs has demonstrated an injury in fact capable of relief by this court. There is a causal connection between the FEC's failure to apply the law and issue an advisory opinion, and the harm now faced by Plaintiffs. This court can cure this injury through the issuance of the injunction sought by Plaintiffs.

In First Amendment cases, pre-enforcement challenges are subject to more flexible standing requirements. *See*, *e.g*., *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *American Booksellers Ass'n*, 484 U.S. at 393 (self-censorship is a harm that can be alleged without actual prosecution); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) ("A party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are arguably chilled, so long as there is a credible threat of prosecution").

In this context, prospective speakers bringing pre-enforcement challenges must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," and make a showing that there exists a "credible threat of prosecution." *Babbitt v. United Farm*

Workers Nat'l Union, 442 U.S. 289, 298 (1979). Plaintiffs meets all of the standing requirements to maintain this action.

CONCLUSION

For the foregoing reasons, this Court should issue the requested Temporary Restraining Order permitting the current advertisements to run until such time as this Court can consider the forthcoming preliminary injunction motion.

Dated: April 11, 2019

Respectfully submitted,

/s/ Jason Torchinsky
Jason Torchinsky (D.C. Bar No. 976033)
jtorchinsky@hvjlaw.com
J. Michael Bayes (D.C. Bar No. 501845)
jmbayes@hvjlaw.com
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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I do hereby certify that, on this 11th day of April 2019, the foregoing Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order was filed electronically with the Clerk of Court using the CM/ECF system. The following parties were served either electronically on April 11th or by USPS First Class Mail on April 12, 2019.

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

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Attorney General William Barr
c/o Assistant U.S. Attorney of Administration
Justice Management Division
950 Pennsylvania Ave. NW
Room 1111
Washington, D.C. 20530

Jessie K. Liu
United States Attorney for the District of Columbia
Civil Process Clerk
555 4th St. N.W.
Washington, D.C. 20530