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' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Comes now Leigh Brown and Mallard Creek Properties, Inc., d/b/a Leigh Brown & Associates (collectively "Plaintiffs") and replies to the FEC' opposition to Plaintiffs' Motion for Preliminary Injunction as follows.

INTRODUCTION

The Supreme Court has made clear that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 475 (2007). In this case, the FEC ties itself in knots in an attempt to convince the Court that the speech at issue is election-related, and thus subject to its regulatory regime, while concluding at the same time that a particular disclaimer requirement is applicable because the speech is not election-related, but rather commercial speech. The only thing clear here is the FEC's own inability to determine how or why its regulatory regime applies to the Advertisements in this

case, a case involving speech the Supreme Court has long prevented from censorship. Simply stated, the FEC—the censor—has been unable take a consistent position, or even take a position at all, on the application of its rules to the Advertisements, and the tie must go to Plaintiffs—the speakers.

In its opposition brief, the FEC, acting as censor,[1] advances consistently contradictory positions that prove Plaintiffs' arguments are correct. These contradictory positions demonstrate the speech stifling conundrum in which Plaintiffs find themselves. The consistently inconsistent positions of the FEC demonstrate the immediate need for preliminary injunctive relief.

On the one hand, the FEC argues that the Plaintiffs' proposed radio advertisements promote or support a candidate for office, Ms. Leigh Brown, which in turn justifies refusal to exempt the advertisements from the definition of "electioneering communications" and requires application of the disclosure and disclaimer regime. On the other hand, the FEC simultaneously argues that the commercial speech safe harbor exemption applies to Plaintiffs, thereby acknowledging that the Advertisements do not promote or support a candidate. This attempt to "have it both ways" follows

[1] "Because the FEC's business is to censor, there inheres the danger [it] may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 335 (2010) (internal citations and quotations omitted).

similarly convoluted and contradictory layers of FEC actions taken (or not taken as with the Plaintiffs' proposed Advisory Opinions) in this matter. As explained below, the result of the FEC's inability to provide a clear interpretation of its own regulations prevents Plaintiffs from speaking without the risk of violating federal law, absent an injunction from this Court.

Importantly, this case is not about disclaimers and disclosure, no matter how desperately the FEC would like this Court to believe otherwise. Rather, this is a case about people who wish to speak on non-election related commercial matters being prevented from doing so because of an overlapping and complicated web of laws and regulations, paired with contradictory actions and inconsistent statements by the FEC and its attorneys, all of which combine to act as a content-based ban on Plaintiffs' speech. Nothing in the FEC's opposition brief does anything to relieve the burden of the inevitable quandary Plaintiffs find themselves in.

Finally, this Court should reject the arguments advanced in the FEC's opposition brief because: (i) the FEC is wrong about the applicable standard of review; (ii) it is clear that the FEC's regulations work a prior restraint on Plaintiffs' speech; and (iii) the inconsistencies of the FEC's arguments demonstrate the importance of granting Plaintiffs injunctive relief. After rejecting the FEC's arguments, this Court should grant the Plaintiffs a preliminary injunction for the reasons stated in their Statement of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction.

I. THE FEC IS INCORRECT ABOUT THE STANDARD OF REVIEW AND THE BURDENS AT THE PRELIMINARY INJUNCTION PHASE.

The FEC argues that it receives a procedural benefit from this Court's determination not to consolidate the injunction hearing with the trial on the merits. Specifically, the FEC contends that it does not bear the burden of proof at the preliminary injunction stage. This is incorrect.

To issue a preliminary injunction, this Court must weigh whether Plaintiffs have demonstrated a likelihood of success on the merits; whether Plaintiffs will suffer irreparable harm absent the grant of the injunction; whether the FEC will suffer substantial harm if the injunction is granted; and whether the injunction is in the public's interest. *See Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1291 (D.C. Cir. 2009); *Pursuing America's Greatness* ("PAG") *v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016). The FEC contends that Plaintiffs bear the burden of proving their First Amendment injuries. FEC Opp.'n Br. at 19-20. But the FEC flips the burden on its head and mischaracterizes the case it relies upon to support its position.

It is well settled that "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *PAG,* 831 F.3d at 510. Because the FEC, acting as censor, is imposing regulations on Plaintiffs' speech, it is the FEC's burden to prove its regulations are constitutional. *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). Accordingly, at the preliminary injunction stage, Plaintiffs are deemed likely to succeed on the merits of their claim unless the FEC demonstrates the constitutionality of its actions. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("As the Government bears the burden of proof on the ultimate question of COPA's

constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA.").

In First Amendment challenges, "'an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id*. (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). The burdens at the preliminary injunction phase track the burdens at trial. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Accordingly, the FEC bears the burden of proving the constitutionality of its actions and Plaintiffs are deemed likely to prevail unless the FEC satisfies its burden. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

In other words, the FEC gains no "burden shifting" benefit from this Court's determination not to consolidate the trial on the merits with the injunction motion hearing.

II. THE FEC'S REGULATIONS WORK A PRIOR RESTRAINT ON PLAINTIFFS' SPEECH.

A "prior restraint" is a government prohibition - statutory, administrative, judicial, or otherwise - that forecloses speech before it takes place. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (*citing* M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984) ("The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"));

Alliance for Community Media v. FCC, 56 F.3d 105, 128 (D.C. Cir. 1995) ("A prior restraint is an administrative or judicial order restraining future speech."); *Fischer* v. *City of St. Paul*, 894 F. Supp. 1318, 1325 (D. Minn. 1995) ("A prior restraint is generally any governmental action that would prevent a communication from reaching the public."). The Supreme Court Reporter is replete with decisions invalidating prior restraints.[2]

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[2] *See*, *e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down statute that prohibited anonymous speech); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down a statute authorizing courts to indefinitely enjoin exhibition of films that had not yet been found to be obscene); *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 390 (1973) (holding city ordinance, as construed to forbid newspapers from publishing sex-designated help wanted ads for jobs where gender was not a bona fide occupational qualification, did not violate the First Amendment, but unequivocally reaffirming the protection afforded to editorial judgment and to the free expression of views, however controversial.); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating an order enjoining petitioners from distributing leaflets anywhere in their town); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (reiterating the heavy presumption against Constitutional validity of prior restraint and holding that the government had not met its heavy burden to justify a prior restraint against publication of classified information); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (invalidating a state anti-obscenity commission that only had the authority to issue informal sanctions because the record demonstrated that the Commission set about to suppress publication of materials it deemed objectionable, with no safeguards to prevent suppression of constitutionally protected materials); *Near v. Minnesota*, 283 U.S. 697 (1931) (holding that a state may punish "abuses" of the freedom of the press-such as the illegal publication of malicious or defamatory material-but that a permanent injunction prohibiting all future publication of a newspaper was an unconstitutional prior restraint on the freedom of the press).

The Supreme Court has also warned of the dangers of regulatory regimes that function as prior restraints in the context of complex FEC regulations that afford significant discretion to the FEC. In *Citizens United v. FEC*, the Court wrote:

> This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. . . . As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. . . . ***These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit***. . . . Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." . . . When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Citizens United v. FEC, 558 U.S. 310, 335 (2010) (internal citations omitted) (emphasis added). The Commission's refusal to issue an exemption, coupled with the intertwined web of disclosure, disclaimer, and speech regulations creates precisely the same situation the Supreme Court found intolerable in *Citizens United*.

"Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books,* 372 U.S. at 70. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."

Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). In the unique circumstances applied to Plaintiffs, the refusal of the FEC to grant an exemption from the definition of electioneering communication foreclosed the *only* manner by which Plaintiffs can speak at all without being subject to criminal or civil liability, absent action from this Court on the underlying constitutional questions.

a. The Denial of the Exemption and Refusal to Determine Inapplicability of the Regulatory Regime Completely Foreclosed Plaintiffs' Speech.

The FEC attempts to distract this Court from the essence of Plaintiffs' claims—the prohibition on their speech. Nothing in the FEC's opposition brief truly contradicts Plaintiffs' claim that they are prohibited from speaking. *See infra* (demonstrating that the commercial safe harbor is unreliable and inapplicable here as interpreted and applied by the FEC). In fact, just the opposite is true—the FEC's brief sows even more uncertainty into an already complicated and conflicting (as applied to Plaintiffs' speech) statutory and regulatory scheme, thereby muffling Plaintiffs even more.

As Plaintiffs have stated repeatedly, the Advertisements do not lend themselves to a typical application of the FEC's disclaimer requirements. The FEC tries and fails to rebut that fact. Rather, the inability to neatly apply the electioneering communications scheme in this case results in a complete ban on Plaintiffs' speech. If Plaintiffs run the Advertisements between now and the special primary election, less than 30 days before any special runoff election, or less than 60 days before the special general election, FECA, as applied by the FEC, would treat them as

"electioneering communications" and require that they must be accompanied by certain disclaimers and disclosure. 11 C.F.R. § 110.11. The applicable disclaimers must state that the Advertisements were paid for by Leigh Brown & Associates and state that either Ms. Brown authorized them, or Ms. Brown did not authorize them.[3] If it were stated that Ms. Brown *did not* authorize the Advertisements, the disclaimer would be absurd on its face, as Plaintiffs' would be stating that the very person voicing the Advertisement did not authorize it.[4] *See* Mem. in Support at 3-4, 14-19. *Id*. Alternatively, if it were stated that Ms. Brown *did* authorize the Advertisements, this would designate the Advertisements as coordinated communications, thus classifying them as impermissible in-kind corporate contributions from Leigh Brown & Associates to Leigh Brown's campaign. If the Advertisements are classified as coordinated communications, they will be treated as in-kind contributions. *Id*. In-kind contributions are prohibited if made by a corporation, like Leigh Brown & Associates (an incorporated entity), to a federal campaign, like Ms. Brown's congressional campaign. *Id*. As discussed throughout this brief, Plaintiffs *cannot* safely be shielded

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[3] The FEC's guidance on electioneering communications states that the disclaimer "must further state that the communication was not authorized by any candidate or candidate's committee." *See* https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ (visited April 25, 2019).

[4] Of course, Plaintiffs cannot legally make false statements on public disclaimers or forms signed under the penalty of perjury.

from the corporate contribution issue by relying on the commercial advertisement safe harbor provided in the coordinated communications regulations, because the FEC has taken inconsistent positions on a critical element of that safe harbor. These inconsistent positions have come to light at a public hearing on these matters, at the Temporary Restraining Order phase of this case, and now at the Preliminary Injunction phrase of this case. While FEC counsel now seems to acknowledge that the commercial advertisement safe harbor would apply, therein implicitly conceding that the Advertisements at issue are not election-related, this latest position on the matter is inconsistent with the agency's Commissioners' position. Overall, the agency's various positions taken thus far are so sufficiently inconsistent that Plaintiffs cannot rely with any certainty on the commercial advertisement safe harbor in hopes of being shielded from prosecution or civil actions.

Accordingly, the electioneering communication trigger at issue in this case still operates as a ban on Plaintiffs' speech. Plaintiffs are unable to advertise in a broadcast medium without fear of prosecution or liability, as they have done for more than a decade.

III. THE INCONSISTENCY OF THE FEC'S ARGUMENTS DEMONSTRATES THE IMPORTANCE OF GRANTING A PRELIMINARY INJUNCTION.

Regardless of FEC counsel's assurances in this case, Plaintiffs cannot speak without being subject to liability. When this matter was considered by the FEC's Commissioners, their votes made clear that two of four Commissioners believe the Advertisements promote, attack, support, or oppose ("PASO") a federal candidate. Regardless of what the FEC counsel now states in their opposition brief to Plaintiffs' motion for preliminary injunction, the FEC's position has been

contradictory as to whether the Advertisements "PASO" Ms. Brown. Accordingly, if Plaintiffs air the Advertisements, regardless of the inclusion of disclaimers, it is unclear whether the Advertisements will actually qualify for the commercial advertisements safe harbor in the coordinated communication regulation. FEC counsel says it will, but the agency's leadership, its Commissioners, appear divided on the question. Even if the FEC counsel's assurances could be relied upon, the FEC's Chair has publicly stated on multiple occasions, including most recently to CNN,[5] that she will act to prevent the Commission from defending itself when sued for dismissing cases. This leads to the direct invocation of the private right of action provisions of FECA, allowing the complainant to proceed to a private civil action against respondents in complaints over violations of the FECA.

Alternatively, if the commercial advertisements safe harbor does in actuality apply to Plaintiffs' speech, this serves only to confirm the lack of governmental interest in imposing disclosure and disclaimer requirements on commercial speech that is, by the very definition of the

[5] Fredreka Schouten, *Group sues Federal Election Commission over allegation NRA broke campaign-finance law*, CNN (Apr. 24, 2019), https://www.cnn.com/2019/04/24/politics/gun-safety-group-lawsuit-fec-nra-campaign-finance/index.html?no-st=1556146647 (visited April 25, 2019).

safe harbor, "not for the purpose of influencing an election" and unrelated to any election.[6] By asserting at times in their briefing that the Advertisements meet the commercial advertisements safe harbor, the FEC accordingly buoys Plaintiffs' claims that the electioneering communications requirements cannot be constitutionally applied here.

a. The FEC Has Contradicted Itself at Every Turn as to the Applicability of the Commercial Speech Safe Harbor.

The FEC's Opposition Brief is a perfect study in the contradictory nonsense that has been the crux of the FEC's arguments throughout both the pendency of this litigation and the advisory opinion request process. The FEC now contends (at times) that Plaintiffs may run the Advertisements without making an illegal corporate contribution to Ms. Brown's campaign

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[6] This is dramatic contrast with the ads before the Supreme Court in Citizens United. That case included the following descriptions of the advertisements:

"Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for Hillary. Each ad includes a short *(and, in our view, pejorative)* statement about Senator Clinton, followed by the name of the movie and the movie's Web site address." *Citizens United*, 558 U.S. at 320 (emphasis added).

"[Citizens United] contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary *and contained pejorative references to her candidacy*. *Id*. at 367-68.

because the commercial advertisement safe harbor in the coordinated communications regulation applies. *See* Opp. Br. at 7, 21-23; *see also* 11 CFR § 109.21(i). According to FEC Counsel, "[t]he ads plainly qualify for a regulatory safe harbor from the coordination rules for certain communications that identify a candidate 'in his or her capacity as the owner or operator of a business that existed prior to the candidacy.'" *See* Opp. Br. at 2; *see also id.* at 22 & 27.

The FEC's Opposition Brief, however, fails to mention that this safe harbor is only applicable where an advertisement "does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate." The safe harbor applies to "[a] public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy" if, and only if, the following criteria are satisfied:

> 1. The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and
> 2. *The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate*.

11 CFR § 109.21(i) (emphasis added).

FEC counsel's claim that this safe harbor is available is directly contrary to both the statements of Commissioners, as well as Counsel's own claims in both the Brief in Opposition to

the Temporary Restraining Order, and most remarkably, in the very same brief where they argue the safe harbor applies.[7]

The FEC—both through inaction on the part of the Commission in response to the Plaintiff's Advisory Opinion request, as well as through the Office of General Counsel's briefs in opposition to both the temporary restraining order and the preliminary injunction—maintains that

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[7] It is important to note that the FEC Office of General Counsel does not speak for the Commission. Indeed, in *Hispanic Leadership Fund*, Judge Ellis concluded:

> In sum, there is in this case no policy statement, regulation, or ruling that constitutes the basis for the FEC's position in this litigation; instead there is only the position of the FEC General Counsel, which is nothing more than the putative litigation position of the FEC that is not entitled to any deference. As the Supreme Court explained in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), that "[w]e have never applied the principle of [*Chevron*] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." 488 U.S. at 212, 109 S.Ct. 468. In *Bowen,* the Supreme Court "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that `Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Id.* (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Thus, because the position taken in this matter is only a litigation position of the FEC's General Counsel, and not the policy or position of the FEC itself, no *Chevron* deference is warranted.

Hispanic Leadership Fund, 897 F.Supp. 2d 407, 428-429 (E.D.Va. 2012).

the Advertisements do *in fact* promote, attack, support, or oppose ("PASO") Ms. Brown's candidacy. If that is the case, then the commercial advertising safe harbor obviously *cannot* apply. FEC Counsel cannot assure Plaintiffs or this Court that the commercial safe harbor applies because at least two of four Commissioners already voted to find that the advertisements promote and support Ms. Brown's candidacy and Counsel itself argues in both of its briefs that the advertisements do "PASO" Ms. Brown.[8]

Furthermore, in yet another quizzical twist, the FEC counsel's assertion that the commercial advertisement safe harbor is available directly conflicts with the views of the agency's Commissioners. The Commission declined to adopt – on a 2-2 vote – a response to the Plaintiff's advisory opinion request that concluded that the advertisements did not "PASO" Ms. Brown. If the Commission is evenly divided on the PASO question, then the availability of the commercial advertising exemption is foreclosed. This obvious, apparent, and notorious contradiction simply serves to underscore why a preliminary injunction is necessary here: if the FEC cannot decide how to apply its own rules, how are Plaintiffs' supposed to comply with those rules? This inconsistency,

[8] The OGC certainly does not have the authority to grant an exception when the Commission itself refused to, and Plaintiffs' cannot possibly be expected to rely upon the OGC's assertions that it has no authority to offer in the first instance.

more than any of the other litany of inconsistencies, highlights the need for preliminary relief in this case.

The question of whether the Advertisements satisfy the PASO standard was at the heart of Plaintiff's advisory opinion request. In order for an exemption to be granted, the Commission must determine that an advertisement does not PASO a clearly identified candidate. 52 USC 30104(f)(3)(B)(iv) (citing 30101(20)(A)(iii)). FECA authorizes the Commission to exempt speech from the definition of electioneering communication only in cases where a communication that refers to a clearly identified candidate *does not* "promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office." *Id*. Therefore, in order to receive an exemption from the electioneering communication provisions of FECA, the speech in question cannot be a "PASO" communication.

In this case, the Commission did not grant the requested exemption. When a motion was made to approve a draft response that concluded the Advertisements did not PASO Ms. Brown, that motion failed on a 2-2 vote. Two commissioners obviously disagreed with the conclusion that the Advertisements did not PASO Ms. Brown. *See* Advisory Opinion Request 2019-14, Draft B, at 8 (2-2 vote rejecting language that found that the Advertisements "do not PASO Brown"). *See also* Opp. Br. at 36 ("As explained in a portion of a draft advisory opinion with reasoning accepted by a portion of the Commission, the Original Ads can be seen to promote a business closely identified with the candidate and burnish the reputation of a person who is a candidate."). This is of little surprise, as it is exact same reason the FEC gave in 2002 when it declined to create a

blanket exemption for commercial ads by regulation, choosing instead to consider communications on a case-by-case basis: "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." Final Rule on Electioneering Communications, 67 Fed. Reg. 65,202 (October 23, 2002).

Interestingly enough, the 2002 reasoning is the exact same reasoning the Office of General Counsel used in its briefs to argue that the Advertisements do "PASO" Ms. Brown. First, in their Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order, the Office of General Counsel repeatedly contextualizes Plaintiffs' advertisements as "PASO" communications.

> "The existing ads explicitly identify a federal candidate— Leigh Brown—by name. The nearly 200 words of each ad are spoken by the candidate herself. **The ads promote a business, Leigh Brown & Associates, that is closely identified with Brown** — the business, which shares a name with the candidate, has aired substantially similar ads featuring Brown's voice in the relevant market for the last 13 years. Further, the ads reference that Brown is "interviewing for a job" and they **generally burnish Brown's reputation**."

TRO Opp. Br. at 2 (emphasis added).

> The existing advertisements are voiced by the candidate herself and **promote a business that is closely identified with the candidate as an individual**, through its name, its advertising history, and the nature of the real estate business. Brown, in fact, states in her own voice, that she is "interviewing for a job." Because **the advertisements centrally involve Brown's reputation**, her identity within the community, and her business, it is entirely reasonable to view these advertisements as having some relation to an election in which **all of these factors affect voter perceptions of candidate competence**.

TRO Opp. Br. at 14 (emphasis added). It is obvious that these excerpts make the overall point—both explicitly and implicitly—that the FEC's Office of General Counsel takes the position that because Ms. Brown is closely identified with her business, to promote her business is to promote her and her candidacy, which the FEC deems to be the essence of a "PASO" communication. *See, e.g., id.* at 14 ("Because the advertisements centrally involve Brown's reputation . . . it is entirely reasonable to view these advertisements as having some relation to an election in which all of these factors *affect voter perceptions of candidate competence*.").

Second, and even stranger still, in its Opposition Brief to this Motion for Preliminary Injunction, the Office of General Counsel takes two contradictory positions. It repeatedly states that Plaintiffs are entitled to the commercial speech safe harbor in the coordinated communications regulations. *See, e.g.,* Opp. Br. at 2 ("The ads plainly qualify for a regulatory safe harbor from the coordination rules for certain communications that identify a candidate 'in his or her capacity as the owner or operator of a business that existed prior to the candidacy."). However, the Office of General Counsel goes on to, just as it did in its TRO opposition, argue the Advertisements "PASO" Ms. Brown:

> As explained in a portion of a draft advisory opinion with reasoning accepted by a portion of the Commission, the Original Ads can be seen to **promote a business closely identified with the candidate and burnish the reputation of a person who is a candidate** while emphasizing that she is "interviewing for a job." Because the advertisements can be viewed **as centrally involving Brown's reputation**, her identity within the community, and her business, plaintiffs cannot establish the impermissibility of viewing these advertisements as having some relation to an election in which **all of these factors affect voter perceptions of candidate competence**.

See, e.g., id. at 36 (emphasis added) (internal citations omitted). This contradictory form of argumentation places Plaintiffs in an impossible position, and highlights the need for a preliminary injunction in order to allow Plaintiffs to speak without fear of enforcement. The Office of General Counsel's assurance that the commercial speech safe harbor of § 109.21(i) applies is irreconcilable with two members of the Commission's finding that the Advertisements "PASO" Ms. Brown. *See id.* at 36. Fundamentally, a "PASO" communication *cannot* qualify for the § 109.21 safe harbor by its own terms.

If it is, as the OGC argues, "entirely reasonable" to view the advertisements as "PASO" communications, TRO Opp. Br. at 14, that necessarily means it is unreasonable to conclude that the § 109.21(i) commercial safe harbor applies. Furthermore, even if the Office of General Counsel could ensure Plaintiffs and this Court that no enforcement action would be levied against Plaintiffs for the Advertisements by virtue of the application of the safe harbor, it is obvious that the agency's Commissioners have taken a different position. And in light of the Chair's threats to prevent the agency from defending itself in court, Office of General Counsel's assurances provide no relief for Plaintiffs. For instance, the Department of Justice can institute criminal action against Plaintiffs' for a knowing violation of the corporate contribution regulations or disclaimer and disclosure requirements, *see* 52 U.S.C. § 30109; 18 U.S.C. § 371; 18 U.S.C. § 1001; 18 U.S.C. § 1505; 18 U.S.C. § 1519, and a private party can also institute initiate a complaint against Plaintiffs

for the same reasons, 52 U.S.C. § 30109, particularly in an environment where the FEC's Chair has made clear publicly she will not vote to defend the FEC's dismissal decisions.[9]

b. <u>If the Advertisements are Purely Commercial the FEC is Without Power to Regulate Them.</u>

Alternatively, if the Advertisements fall under the commercial advertisements safe harbor, which while incredibly reasonable is far from guaranteed, it only confirms that the Advertisements are purely commercial speech and that the FEC lacks sufficient interest and authority to regulate them as electioneering communications at all. The commercial safe harbor to the FEC's coordination regulations, located at 11 C.F.R. § 109.21(i), protects ads from coordinated expenditure classification where (1) the communication identifies a federal candidate "only in his or her capacity as the owner or operator of a business that existed prior to the candidacy"; (2) the "medium, timing, content, and geographic distribution" of the ad is consistent with ads that aired "prior to the candidacy"; and (3) the ad "does not [PASO] that candidate or another candidate who

[9] An example of precisely this "decline to defend" vote from the FEC's Chair permitted the filing of *Citizens for Responsibility and Ethics in Washington v. American Action Network*, Case No. 18-cv-945 (complaint filed April 23, 2018). An oral argument on a motion to dismiss is set for August 6, 2019. This case involves actions originally taken in 2010. Eight years later, despite a 5-year statute of limitations, the Defendant in that case has been defending a more than year-long civil action.

seeks the same office as that candidate." *Id.* § 109.21(i); *see* FEC, *Coordinated Commc'ns*, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).

As Plaintiffs have consistently maintained, the Advertisements constitute commercial speech unrelated to any election or campaign for office. They identify the nature of the services offered, the business owner in her capacity as part of a real estate company or the real estate company, what the business does for its customers, their prowess as realtors, and finally a plea for business. *See* Mem. in Support at 25; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). The FEC's insistence that the Advertisements fall within the commercial advertisements safe harbor is all but a concession that it lacks sufficient interest and authority to regulate such conduct as electioneering communications. If the Advertisements look like commercial advertisements, quack like commercial advertisements, and the FEC is willing to treat them like commercial advertisements, they must be commercial advertisements. The FEC cannot support a content-based speech ban with interests of regulating purely commercial speech, and, further, the FEC lacks the authority to regulate purely commercial speech. These Advertisements are not of the "pejorative" style of "sham issue ads" that were before the Supreme Court in *Citizens United*. *See Citizens United*, 558 U.S. at 320, 367-68; *supra* n. 6.

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; and (2) the Court "ask[s] whether the asserted governmental interest is substantial." *Id*. For commercial speech to be protected by the First Amendment, 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) "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." *Sorrell,* 535 U.S. at 572. "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." *Id*. (emphasis added).

The government's purported interests in classifying certain speech as electioneering communications are the prevention of corruption or appearance thereof through the prevention of "sham issue ads", *see Citizens United*, 130 S. Ct. at 909; *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 204 (D. D.C. 2006) and "'provid[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). The Advertisements are neither sham issue ads, or in danger of being them, nor do they leave any question as to who is paying for them, or have anything to do with an election. Congress did not intend to include *bona fide* commercial advertisements, like the Advertisements at issue here, to be encompassed within the definition of electioneering

communications. Indeed, even the definition of "Federal Election Activity" includes "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is mentioned or identified) *and that promotes or supports a candidate for that office, or attacks or opposed a candidate for that office* (regardless of whether the communication expressly advocates a vote for or against a candidate)". 52 USC 30101.

By maintaining that the Advertisements fall under the commercial safe harbor, the FEC is not only conceding that the Advertisements are commercial in nature, but arguing for it emphatically. After all, how can an advertisement be a "commercial advertisement" for purposes of the safe harbor, but political speech for purposes of furthering the government's interest in regulating it or subjecting it to disclosure and disclaimer requirements? The Government cannot have its cake and eat it too when it comes to its interest in regulating First Amendment-protected speech.

The FEC's contention that the Advertisements would fall into the commercial advertisement safe harbor supports the fact that the FEC both lacks a substantial interest in regulating the Advertisements, and confirms that such regulation is overbroad. There is no substantial state interest because regulating the Advertisements cannot result in the prevention of corruption or its appearance in any way, nor does it give the public any more information other than what is already contained in the Advertisements. It therefore does not directly advance the governmental interests asserted. At the same time, the regulation of the Advertisements is overbroad, and therefore not fit to the means because it is more extensive than is necessary to serve

the governments' purported interests. None of the governments' interests include any commercial concerns.

Accordingly, because the regulation of commercial speech does not directly advance the governmental interests asserted, and is more extensive than is necessary to serve that interest, the FEC cannot be likely to succeed on the merits.

Similarly, the FEC's avowal that the Advertisements fall under the commercial advertisements safe harbor and are commercial speech undercuts its own assertions that the FEC has the authority to regulate purely commercial speech under the circumstances of this case. For the same reasons FECA provides for a commercial safe harbor to coordinated communications, the Advertisements cannot be regulated as electioneering communications. The Advertisements are "plainly and unquestionably not related to the election" and the FEC is without authority to regulate them. *See* U.S. Const. art. I, § 4. The FEC's repeated insistence that the Advertisements are commercial advertisements for purposes of the coordinated communication safe harbor only buoy Plaintiffs' claims.

The Government's interest in transparency for transparency's sake cannot be sufficiently important to justify the burdens on Plaintiffs' First Amendment rights when there is absolutely no risk of quid pro quo corruption. This is especially true when regulating purely commercial conduct, such as the airing of the Advertisements.

CONCLUSION

For the aforementioned reasons, as well as those reasons articulated in Plaintiffs' Statement of Points and Authorities in Support of a Preliminary Injunction, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: April 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 25th day of April 2019, the foregoing Reply to Defendant's Opposition to the Motion for Preliminary Injunction was filed electronically with the Clerk of Court using the CM/ECF system. The following parties were served either electronically or by USPS First Class Mail on April 26, 2019.

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