UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEIGH BROWN, *et al.*,	)	
Plaintiffs,	)	Civ. No. 19-1021 (TJK)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Kevin P. Hancock
Acting Assistant General Counsel
khancock@fec.gov

Robert W. Bonham III (D.C. Bar No. 397859)
Senior Attorney
rbonham@fec.gov

Tanya Senanayake
tsenanayake@fec.gov
Haven Ward (D.C. Bar No. 976090)
hward@fec.gov
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

April 23, 2019

TABLE OF CONTENTS

Page

This Court should deny plaintiffs' motion for a preliminary injunction. That injunction would cause harm to the voters of North Carolina's Ninth Congressional District by denying them important information about who is speaking about a federal candidate on the eve of that District's May 14, 2019 special primary election. Plaintiffs have met none of the four preliminary injunction factors and so cannot justify the extraordinary relief they seek, which would unnecessarily upset the status quo just days before the election.

Plaintiffs are unlikely to succeed on the merits. Federal law requires entities that widely broadcast ads just prior to an election and that clearly identify a federal candidate (called "electioneering communications") to publicly disclose who authorized and paid for the ads. Plaintiff Leigh Brown is a federal candidate in the May 14 election. Her realty company, plaintiff Leigh Brown & Associates, wishes to broadcast two of four proposed radio ads, all of which may permissibly be deemed to constitute electioneering communications: the ads would air in the Ninth Congressional District within 30-days of the election and would either refer to Brown by using her name or refer to her business, which includes her name, and her voice, which reads the ads. As a result, plaintiffs have failed to demonstrate that the ads should not bear a disclaimer informing North Carolina voters who authorized and paid for the ad. In the unlikely event plaintiffs spend in excess of $10,000 on the ads in 2019, Leigh Brown & Associates would also have to file a disclosure report identifying who was responsible for the ad.

These critical disclosure and disclaimer requirements are constitutional as applied to plaintiffs' ads. The Supreme Court has thrice held that these exact laws do not violate the First Amendment, even when applied to electioneering communications that (like here) pertain to a commercial transaction. In each case, the Court applied only intermediate-level "exacting" scrutiny — given that disclosure and disclaimer requirements do not prevent anyone from

speaking — and upheld the laws since they substantially relate to the important interest in informing voters about who is speaking about candidates just before an election.

Yet in the face of this well-settled law, plaintiffs incorrectly assert that the disclosure and disclaimer requirements *ban* them from running their ads. They do not. Plaintiffs are free to air their ads with a disclaimer accurately stating that the ads are authorized by Brown and paid for by Leigh Brown & Associates. Plaintiffs may also consistently and factually state in their FEC disclosure report (if necessary) that Brown is responsible for the ads. None of this would cause plaintiffs' ads to violate FECA's separate prohibition on corporate contributions to candidates, as plaintiffs claim to fear. Although Brown authorized the ads, that coordination would not cause the ads to constitute illegal corporate contributions from Leigh Brown & Associates to Brown. This is because 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." Plaintiffs' acknowledge that they are aware of this safe harbor. (*See* Am. Compl. ¶ 67 (citing 11 C.F.R. § 109.21(i)).). Yet they give no reason why they failed to ask defendant Federal Election Commission ("FEC" or "Commission") in their March 22, 2019 advisory opinion request for an opinion stating that the safe harbor applies to their ads. Instead, plaintiffs have rushed into court demanding an unnecessary constitutional ruling and an emergency injunction that would harm voters.

Not only do the electioneering communication disclosure and disclaimer rules not restrain plaintiffs' speech content, those rules are substantially related to the government's interest in ensuring that North Carolina voters know who is speaking about Brown prior to the election. Disclosure is particularly important here: Brown is one of 10 candidates in the election, her campaign committee discloses its spending, and a national real estate political

committee (which also must disclose its spending) has already spent $1.3 million on ads supporting Brown. The contrasting absence of any disclosure for Leigh Brown & Associates's ads about Brown would threaten to confuse the voting public. Because plaintiffs' ads all include Brown's name — either alone or as part of her business entity name — and voice, plaintiffs cannot show they are situated similarly to businesses running ads lacking a candidate's name or voice, and so they have no valid claim to an equal protection violation either.

Plaintiffs have also failed to demonstrate irreparable harm. Plaintiffs are able to run their ads while providing truthful disclosure. It is highly unlikely that plaintiffs will need to file the electioneering communication disclosure reports they claim will harm them, since that requirement would apply only once plaintiffs have spent an aggregate of more than $10,000 on electioneering communications in a calendar year. Their radio station contract indicates their ads cost about $68 each, and at that rate it would take plaintiffs more than 10 weeks to reach the $10,000 threshold, while just three weeks remain before the May 14 election. Also, plaintiffs have failed to pursue alternative methods of airing their ads as non-electioneering communications, such as by using a voice other than Brown's in the ad.

Finally, plaintiffs have failed to show that the balance of equities favors them. While they face no imminent harm, the relief plaintiffs seek would harm the public interest by enjoining federal election laws that the Supreme Court has repeatedly held serve important government interests and are thus constitutionally valid. By doing so, a preliminary injunction would upset, not preserve, the status quo less than three weeks before the election.

The preliminary injunction should be denied.

BACKGROUND

I. LEGAL BACKGROUND

A. The Federal Election Commission

The FEC is an independent agency of the United States with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act ("FECA" or "the Act"), 52 U.S.C. §§ 30101-46 (formerly 2 U.S.C. 431-57).[1] By statute, no more than three of the FEC's six Commissioners may be members of the same political party, and at least four votes are required for the Commission to take certain actions, including, *inter alia*, issuing advisory opinions. *Id*. §§ 30106(a)(1), (c), 30107(a)(7), (8).

When the Commission issues an advisory opinion in response to a request, the opinion acts as a safe harbor against prosecution for any person who follows the opinion in good faith and is involved either the transactions addressed in the opinion or materially indistinguishable transactions. 52 U.S.C. § 30108(c). If the Commission is unable to garner the necessary four affirmative votes to issue an advisory opinion, the agency sends the requestor a letter stating that the Commission was unable to approve an advisory opinion. 11 C.F.R. § 112.4(a).

The Act also authorizes any person who believes a violation of FECA has occurred to file an administrative complaint with the Commission, which may investigate such allegations if, by an affirmative vote of four of its members, it determines there is reason to believe a violation has occurred. 52 U.S.C. § 30109(a).

[1] In 2014, FECA was moved from Title 2 to Title 52 of the United States Code. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html (last visited Apr. 22, 2019).

B. The Federal Election Campaign Act

In 1974, Congress created the FEC and substantially revised FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). With FECA, Congress intended to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26. To that end, the Act limits the dollar amounts of contributions to candidates for federal office, political parties, and political committees. 52 U.S.C. § 30116(a). FECA also prohibits contributions from certain sources, including foreign nationals, government contractors, labor organizations, and corporations. *Id.* §§ 30118-19, 30121. The Act also requires candidates, political party committees, and political committees to disclose comprehensively what they spend and receive through reports filed with the FEC, as well as disclosure for other persons resulting from certain event-driven triggers. *See id.* § 30104.

For candidates, FECA requires the filing of a statement of candidacy, 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a), and like all political committees, a candidate's principal campaign committee must file periodic reports for disclosure which include its receipts and disbursements above a $200 threshold. 52 U.S.C. §§ 30103, 30104. In addition, a principal campaign committee must identify itself through "disclaimers" on all of its public political advertising, on their websites, and in mass emails. 11 C.F.R. § 110.11(a)(1).

C. FECA's Prohibition on Corporate Contributions

Since 1907, Congress has prohibited corporations from contributing their general treasury funds in connection with federal elections out of concern that they could make "huge political contributions" to purchase political favors. *United States v. Automobile Workers*, 352 U.S. 567,

571 (1957). Today, that prohibition is found in FECA, which bars a corporation from contributing its general treasury funds to any federal candidate, among others. *See* 52 U.S.C. § 30118(a).[2] The Act defines "contribution" to include "any gift … of money or anything of value made by any person for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i), and "anything of value" includes in-kind contributions, 11 C.F.R. § 100.7(a)(1)(iii)(A). The Supreme Court and other courts have upheld the constitutional validity of FECA's prohibition on corporate contributions. *See FEC v. Beaumont*, 539 U.S. 146, 163 (2003); *United States v. Danielczyk*, 683 F.3d 611, 615-19 (4th Cir. 2012).

FECA's prohibition on corporate contributions also prevents a corporation from making expenditures that are *coordinated* with federal candidates. The Act treats "coordinated expenditures" as contributions, *see* 52 U.S.C. § 30116(a)(7)(B)(i), because an expenditure that is coordinated with a candidate is functionally equivalent to a direct contribution: "A person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agen[t], that would constitute an independent expenditure . . . ." *Buckley*, 424 U.S. at 46 n.53 (internal quotation omitted). On the other hand, "if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct contribution enabling the candidate to place the advertisement himself." *Id*. (internal quotation marks omitted). As the Court further explained, "prearrangement and coordination of an expenditure with the candidate or his agent" poses a

[2] Corporations are permitted to establish a "separate segregated fund" (a form of political committee) that may make contributions to federal candidates, political parties, and political committees using donations received from the corporation's stockholders and employees. 52 U.S.C. § 30118(b)(2).

"danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 46, 47. Thus, FECA's dollar amount and source restrictions on contributions apply with equal force to coordinated expenditures. *Buckley*, 424 U.S. at 46-47, 50.

The Commission has promulgated a three-pronged test for determining if a communication is coordinated. 11 C.F.R. § 109.21. First, under the "payment prong," a communication must be paid for by someone other than the candidate. *Id.* § 109.21(a)(1). Second, under the "content prong," the communication must be one of a few types of communications specified, including an electioneering communication. *Id.* § 109.21(c). Third, under the "conduct prong," there must be one of several types of interaction between the candidate and whoever paid for the communication. *Id.* § 109.21(d). This prong is satisfied if, for example, the candidate requested or suggested the creation of the communication, was materially involved in its creation, or had substantial dissuasions with the person or entity paying for the communication. *Id.* § 109.21(d)(1)-(3).

The coordination regulations contain a few safe harbors, including a safe harbor for "commercial transactions." 11 C.F.R. § 109.21(i). Under this commercial safe harbor, an ad is not coordinated if (1) it 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 promote, support, attack, or oppose that candidate or another candidate who 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).

D. Electioneering Communications

1. The Bipartisan Campaign Reform Act

In addition to contributions, FECA prohibited corporations from making any independent expenditures, 52 U.S.C. § 30118(a), which FECA defines as communications "expressly advocating the election or defeat of a clearly identified candidate" and not made in coordination with a candidate or political party, *id.* § 30101(17).

This prohibition, which Congress enacted in the 1970s, was being widely circumvented by the end of the 1990s. Independent groups had begun to spend millions of dollars on so-called "sham issue ads" — ads that avoided "expressly advocating" for or against candidates but nonetheless included candidate advocacy under the guise of educating the public about legislative issues. *See McConnell v. FEC*, 540 U.S. 93, 126-28 (2003). After conducting an exhaustive investigation, Congress determined that entities were funding sham issue ads to influence federal elections "while concealing their identities from the public" by avoiding FECA's disclosure requirements. *Id*. at 196-97.

Congress addressed this problem by enacting the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). BCRA expanded FECA's corporate financing prohibition to encompass any "electioneering communication" and required disclaimer and disclosure for such communications. 52 U.S.C. §§ 30104(f), 30118(b)(2).

2. Definition of Electioneering Communication

BCRA defines "electioneering communication" as a "broadcast, cable, or satellite communication" that:

(a) "refers to a clearly identified candidate for Federal office,"

(b) is aired within 60 days before the general election or 30 days before a primary election or convention, and

(c) is targeted to the relevant electorate, which, in an election for the U.S. House of Representatives, means that the communication could be received by 50,000 or more persons in the district the candidate seeks to represent.

See 52 U.S.C. § 30104(f)(3)(A)(i), (C).

3. Disclosure and Disclaimer Requirements for Electioneering Communications

BCRA requires entities permitted to air electioneering communications to comply with certain disclosure and disclaimer requirements. First, every person who makes electioneering communications aggregating in excess of $10,000 during a calendar year must file within 24 hours a statement (FEC Form 9) that identifies the maker, amount, and recipient of each disbursement over $200, as well as information about donors who contributed to the person making the disbursement for the purpose of furthering electioneering communications. 52 U.S.C. § 30104(f)(1)-(2); 11 C.F.R. §§ 104.5(j), 104.20.

Second, BCRA requires an electioneering communication to bear a disclaimer. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(4). In general, a disclaimer must state (1) whether a candidate authorized the communication, and (2) who paid for the communication. 52 U.S.C. § 30120(a)(1)-(3); 11 C.F.R. § 110.11(b)(1)-(3). Both the Act and Commission regulations provide for three different types of disclaimers, one of which specifically allows a person airing an electioneering communication to state that the communication is authorized by a candidate, but "paid for by any other person." 52 U.S.C. § 30120(a)(2); 11 C.F.R. § 110.11(b)(2).

4. *Citizens United* Allowed Corporations to Make Independent Electioneering Communications While Requiring Them to Comply With BCRA's Disclosure and Disclaimer Requirements

Initially, the Supreme Court upheld the constitutionality of BCRA's prohibition on corporate financing of electioneering communications "to the extent that the [communications] .

. . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206; *see also id.* at 189-94, 203-08. The Court later defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (Roberts, C.J., controlling op.).

Then, in *Citizens United v. FEC*, the Court struck down two parts of the corporate financing prohibition, the bans on corporate electioneering communications under BCRA and corporate expenditures under FECA, as applied to communications aired independently and not in coordination with candidates. 558 U.S. 310, 365 (2010). Citizens United, a nonprofit corporation, sought to distribute a film about then-Senator Hillary Clinton, who at the time was a candidate in the 2008 Democratic presidential primary elections. *Id.* at 319-20. Citizens United also sought to broadcast three commercial ads (one 30-second ad and two 10-second ads) to promote the movie, which qualified as electioneering communications. *Id.* at 320, 368.

But in *Citizens United*, eight Justices also upheld BCRA's disclosure and disclaimer requirements for *all* electioneering communications, even those that are not the functional equivalent of express advocacy. *Id.* at 364-69. Citizens United had sought to "import . . . into BCRA's disclosure requirements" a distinction similar to *Wisconsin Right to Life*'s limit on permissible financing restrictions, contending that "the disclosure requirements . . . must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 368-69. But the Court rejected that contention, because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369; *see also McConnell*, 540 U.S. at 196 (upholding the application of BCRA's "disclosure requirements to the entire range of 'electioneering communications'"). *Citizens United* explained that "[d]isclaimer and disclosure

requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64). The Court thus declined to review the disclosure and disclaimer requirements through the lens of strict scrutiny, and instead "subjected these requirements to 'exacting scrutiny,' which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id*. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66).

Applying exacting scrutiny, *Citizens United* held that the government could constitutionally require disclaimers and financial disclosure relating to all electioneering communications, including Citizens United's movie and its proposed advertisements for the film. 558 U.S. at 366-71. The Court explained that the disclaimers and disclosure further the government's important interest in ensuring that the public can know "who is speaking about a candidate shortly before an election," even if the ads contain no candidate advocacy. *See id*. at 369. Specifically regarding Citizens United's proposed advertisements, the Court said, "[e]ven 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." *Id*.

Since *Citizens United*, the Supreme Court rejected a subsequent attempt to carve out an exception to BCRA's disclosure and disclaimer requirements for certain alleged sub-types of electioneering communications. In *Independence Institute v. FEC*, the Supreme Court affirmed the holding of a three-judge district court that BCRA's disclosure and disclaimer requirements validly apply to electioneering communications that allegedly identify specific political candidates only as part of "genuine" issue advocacy focused on pending legislation. 216 F. Supp. 3d 176 (D.D.C. 2016), *aff'd*, 137 S. Ct. 1204 (2017). As the three-judge court explained, "Under *McConnell* and *Citizens United*, . . . it is the tying of an identified candidate to an issue

or message that justifies [BCRA's] tailored disclosure requirement because that linkage gives rise to the voting public's informational interest in knowing 'who is speaking about a candidate shortly before an election.'" *Id.* at 188 (quoting *Citizens United*, 558 U.S. at 369).[3]

5. Requirement That an Electioneering Communication Must "Refer[] to a Clearly Identified Candidate for Federal Office"

As noted above, a broadcast communication is not regulated as an "electioneering communication" unless it "refers to a clearly identified candidate for Federal office." 52 U.S.C. § 30104(f)(3)(A)(i)(I). FECA defines the term "clearly identified" to mean "that

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference."

Id. § 30101(18). The Commission's regulations similarly explain the term:

> *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

11 C.F.R. § 100.29(b)(2) (emphasis added); *see also* 11 C.F.R. § 100.17.

6. Exemptions from the Definition of Electioneering Communications

In BCRA, Congress exempted certain specific categories of communications, not relevant here, from the definition of electioneering communications. 52 U.S.C. § 30104(f)(3)(B)(i)-(iii). It also authorized the FEC to promulgate regulations exempting other types of communications,

---

[3] "The Court's summary affirmance establishes binding precedent on the precise issues presented to the Court and necessarily resolved by its judgment . . . ." *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 91-92 (D.D.C. 2016) (three-judge court) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)).

but only so long as those communications do not publicly promote, attack, support, or oppose a federal candidate. *Id.* § 30104(f)(3)(B)(iv) (citing *id.* § 30101(20)(A)(iii)).

Representative Shays, a sponsor of the legislation that introduced the definition of "electioneering communications," explained that the Commission has "limited discretion" to exempt some communications because "it is possible that there could be some communications that will fall within this [electioneering communication] definition even though they are plainly and unquestionably not related to the election," and that the Commission could "issue regulations to exempt such communications from the definition of 'electioneering communications' because they are wholly unrelated to an election." 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). When the Commission adopted its regulations on electioneering communications, it considered but declined to create a blanket exemption for situations where a federal candidate shares a name with a business entity or where the candidate is referred to in the context of promoting a business, because "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." Electioneering *Commc'ns*, 67 Fed. Reg. 65,190, 65,202 (Oct. 23, 2002).

Rep. Shays also expressed the view that Congress "expect[ed] the Commission to use its Advisory Opinion process to address these situations both before and after the issuance of regulations." 148 Cong. Rec. at 411; *see also* 148 Cong. Rec. El78-03 (Feb. 13, 2002) (statement of Rep. Meehan). The Commission previously considered the extent of its authority to grant exemptions but was unable issue an advisory opinion. *See* Advisory Op. Request 2012-20 (Mullin), https://www.fec.gov/data/legal/advisory-opinions/2012-20/.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Plaintiffs Leigh Brown and Mallard Creek Properties, Inc. d/b/a Leigh Brown & Associates

Leigh Brown is a candidate for federal office. (Am. Verified Compl. ("Am. Compl.") ¶ 34 (Docket No. 11).) On March 15, 2019, Brown announced her candidacy for the Republican nomination in North Carolina's Ninth Congressional District. (*Id.* ¶ 33; Verified Compl. ("Original Compl.") Exh. 1 ("Advisory Op. Request") at 1 (Docket No. 1-5).) The special primary election will take place on May 14, 2019. (Am. Compl. ¶ 34.)

Brown filed a statement of candidacy with the FEC on March 24, 2019.[4] A principal campaign committee ("Brown Committee") subsequently filed a Statement of Organization with the Commission on March 30, 2019.[5] The Brown Committee has filed a report of receipts and disbursements with the Commission covering the period from January 1 to March 31, 2019.[6]

Brown is also a North Carolina real estate broker and agent. (Am. Compl. ¶ 45.) Brown is President, Chief Executive Officer, and 99% owner (with her husband owning 1%) of Mallard Creek Properties, Inc., which does business as Leigh Brown & Associates, a for-profit business entity that provides real estate services. (*Id.* ¶¶ 13, 45-46.)

B. Leigh Brown's Advisory Opinion Request

On March 22, 2019, Brown submitted an advisory opinion request to the Commission. (*See* Advisory Op. Request (Docket No. 1-5).) In that request, Brown asked the Commission to

---

[4] *See* FEC Form 2, Statement of Candidacy for Leigh Brown (Mar. 29, 2019), http://docquery.fec.gov/cgi-bin/forms/H0NC09203/1321030/.

[5] *See* FEC Form 1, Statement of Org. for Comm. to Elect Leigh Brown (Mar. 24, 2019), http://docquery.fec.gov/pdf/996/201903309145972996/201903309145972996.pdf.

[6] *See* FEC Form 3, April 15, 2019 Quarterly Report for Comm. to Elect Leigh Brown (Apr. 15, 2019), http://docquery.fec.gov/pdf/168/201904159146356168/201904159146356168.pdf.

determine whether certain radio advertisements that she and Leigh Brown & Associates seek to broadcast in the district in which she is a candidate qualify as "electioneering communications." (Advisory Op. Request at 1.) The request stated that "[f]or the past 13 years, Ms. Brown has aired radio advertisements publicizing Leigh Brown & Associates." (*Id.*) Brown develops the ad content herself without use of a media production vendor, records the advertisements at a Charlotte-area radio station (WBT 1100), and voices the ads herself. (*Id.* at 1-2.) Specific ad content has varied, but has followed a similar template. They generally are 60 seconds in length, typically feature discussion of a real estate issue specific to the Charlotte real estate market (though some have also included political commentary), and note how many houses her team sells. (*Id.* at 2 & n.1.) The ads also consistently state: 'I'm interviewing for a job…I want to be your realtor' and 'There is a difference when you call Leigh Brown.'" (*Id.*)

Brown's request states that in December 2018 she entered into an annual contract with Entercom Charlotte WBT AM/FM to air advertisements on WBT 1110 for Leigh Brown & Associates during 2019. (Advisory Op. Request at 1.) Under that one-year contract, Leigh Brown & Associates is obligated to pay $48,204 for 706 broadcast spots during 2019 (i.e., 13.5 spots per week). (*Id.*)

Brown's request states that, pursuant to that contract, she seeks to air ads within the 30-day electioneering communication window (the "30-day window," which started on April 14, 2019) leading up to her May 14, 2019 special primary election. (Advisory Op. Request at 1.) Brown's request included four proposed advertisements. Two of those ads, "Brown – Radio Ad 1" and "Brown – Radio Ad 2" (the "Original Ads"), are ads that Brown stated that she started airing in the Charlotte area on or about March 5, 2019, and wished to continue to run during the 30-day window. (*Id.* at 2.) Brown acknowledged that, if aired during the 30-day window, the

Original Ads "will satisfy the basic statutory definition of 'electioneering communication," but requested that the Commission exempt the ads from that definition. (*Id.*)

The Original Ads, read by Brown, state "I'm Leigh Brown with RE/MAX," and urge listeners to hire her and her firm as their realtor. Both ads state that Brown is "interviewing for a job," and they conclude with, "There is a difference when you call Leigh Brown." (*See* Advisory Op. Request at 2-3 (includes full text).). Brown's request also contained an "[a]lternative [p]roposal" offering that if the Commission were unable to conclude that the Original Ads were exempt from the definition of electioneering communication, then "Brown proposes to revise the ad scripts . . . , re-record both ads" with certain revisions ("Amended Ads"). The Amended Ads would replace the Original Ads' references to "I" and "I'm" with "We" and "We're," and would state, "We're Leigh Brown & Associates with RE/MAX," and "There is a difference when you call Leigh Brown & Associates." (Advisory Op. Request at 7-8 (includes full text).) Brown would speak the scripts for the Amended Ads just as she did for the Original Ads. (*Id.* at 8.) The request then asks whether the Amended Ads' use of Brown's voice and references to "Leigh Brown & Associates" would qualify as references to a clearly identified candidate and thus qualify the ads as electioneering communications. (*Id.* at 8.)

In a public meeting held on April 11, 2019, the Commission considered but did not adopt either of two alternative draft advisory opinions (Drafts A & B). (*See* Am. Compl., Exhs. B and C (Docket No. 11-2, 11-3).) Draft A proposed that the Commission conclude that the Original Ads are electioneering communications and do not warrant an exemption from that definition. (Am. Compl., Exh. C ("Draft A") at 5 (Docket No. 11-3).) In contrast, Draft B proposed that the Commission conclude that the Original Radio Ads qualify for an exemption. (Am. Compl., Exh. B ("Draft B") at 5 (Docket No. 11-2).) The Commissioners did not reach a

consensus by the required four votes on this question, as motions to approve Draft A and B failed to garner the required four votes. *See* Certification at 1, AO 2019-06 (April 11, 2019).[7]

As to the Amended Ads, both Drafts A and B proposed that the Commission conclude that those ads would not be electioneering communications because they do not reference a clearly identified candidate. (Draft B at 13.) During the public meeting, one Commissioner expressed disagreement with this conclusion but stated that if the text of the Amended Ads were instead read by someone other than Brown (such as someone else who works for the company), she would no longer conclude that the Amended Ads refer to a clearly identified federal candidate (and thus would conclude that they are not electioneering communications). In response, counsel for Brown stated that he would ask his client to consider the proposal. After a 10-minute break, counsel for Brown stated that his client could not be reached but that the Commission should vote on Draft A so that counsel could "decide whether we are proceeding to court this afternoon."[8] A vote to approve the portion of Draft A relating solely to the Amended Ads then failed to garner the requisite four votes. *See* Certification at 1-2, AO 2019-06. The deliberations made clear that had the Amended Ads been proposed without the candidate's voice, the Commission possessed four affirmative votes to determine that they did not refer to a clearly identified candidate.[9] Plaintiffs have never indicated that they plan to run such ads.

---

7 *See* https://www.fec.gov/files/legal/aos/2019-06/201906V_1.pdf.

8 Audio of FEC Consideration of AOR 2019-06 at Its April 11, 2019 Open Meeting ("Meeting Audio"), https://www.fec.gov/resources/cms-content/documents/2019041105.mp3 (relevant discussion from 19:03-19:52, 28:24-28:43).

9 Meeting Audio (relevant discussion from 19:03-19:52, 28:24-28:43).

C. Plaintiffs' Original Complaint and Motion for a Temporary Restraining Order

On April 11, 2019, plaintiffs filed their Original Complaint, which based this Court's jurisdiction in part on the Administrative Procedure Act, 5 U.S.C. §§ 702-706. (Original Compl. ¶ 31.) Plaintiffs simultaneously filed a motion for temporary restraining order (Docket No. 2), which the Court denied on April 13, 2019 after a hearing. The Court then held a status conference on April 15, 2019, and later issued a minute order denying consolidation of plaintiffs' planned preliminary injunction motion with the merits of this case.

D. Plaintiffs' Amended Complaint and Preliminary Injunction Application

Plaintiffs filed their Amended Complaint on April 17, 2019. It abandons any reliance upon the Administrative Procedure Act and no longer claims that the Original Ads are exempt from the definition of electioneering communications. Counts One and Two assert that FECA's electioneering communication provisions are unconstitutional as applied to the Original Ads and the Amended Ads, respectively. (*Id.* ¶¶ 72-78, 81-87.) Count Three asserts that the Court should find that the Original and Amended Ads are not electioneering communications in order to "[a]void First and Fourteenth Amendment [p]roblems." (*Id.* at 23, ¶¶ 9, 89-105.) That same day, plaintiffs also filed a motion for preliminary injunction. (Docket No. 12; Docket No. 12-1 (Pls.' Statement of P.&A. in Supp. of Mot. for Prelim. Inj. ("PI Mem.").)

ARGUMENT

I. PLAINTIFFS MUST CARRY A HEAVY BURDEN TO QUALIFY FOR THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). A plaintiff

seeking a preliminary injunction must establish that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Id*. at 20.

This extraordinary remedy is only available upon a "clear showing" that it is necessary, and not "based only on a possibility of irreparable harm." *Id*. at 22. The D.C. Circuit "has suggested, without deciding," that "*Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)).

Plaintiffs here shoulder a particularly heavy burden because their request is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather than seeking to preserve the status quo, plaintiffs seek to "upend" it by asking this Court to change the application of important federal election laws that have been repeatedly upheld just weeks before a federal election. *See Sherley*, 644 F.3d at 398.

Plaintiffs cannot avoid bearing this heavy burden merely because they allege constitutional claims, as they assert. (PI Mem. at 8.) To be sure, during consideration *on the merits* of a constitutional claim that is subject to heightened scrutiny, the government must prove that the challenged law is valid. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 816 (2000) (reviewing a full trial). But here, at the preliminary injunction stage, plaintiffs still bear the burden of proving that it is likely that the FEC would fail to make that showing if the case were to proceed to the merits. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Since the merits have not been consolidated with plaintiffs' preliminary injunction request (Minute Order

(Apr. 15, 2019), the FEC does not *now* have the burden to establish FECA's constitutionality.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. Applying the Electioneering Communications Rules to Plaintiffs' Ads Would Not Violate the First Amendment

1. The Electioneering Communications Disclosure and Disclaimer Requirements Do Not Prohibit Plaintiffs' Speech and Are Subject to Exacting Rather Than Strict Scrutiny

The Commission has not determined that there is reason to believe plaintiffs' ads are electioneering communications; it has merely not provided plaintiffs with an advisory opinion stating that those ads are not electioneering communications. But if the electioneering communications rules were applied to plaintiffs' ads, doing so would not violate the First Amendment. As plaintiffs concede (*see* Am. Compl. ¶ 2), the Supreme Court has repeatedly upheld the very provisions they attack here because they "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal quotation marks omitted) (upholding disclaimer and disclosure provisions as applied to commercial ads); *see also McConnell*, 540 U.S. at 201 (same, facially upholding the provisions); *Indep. Inst.*, 216 F. Supp. 3d at 187-92 (same, upholding provisions as applied to "genuine" issue ads). On the contrary, these disclosure and disclaimer requirements are a "less restrictive alternative to more comprehensive regulations of speech," and so the Court has not applied the standard of scrutiny that applies to expenditure limits, but rather "exacting scrutiny," which requires only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67, 369 (quoting *Buckley*, 424 U.S. at 64). Consistent with this well-settled law, plaintiffs previously admitted in these proceedings that they are able to broadcast versions of their ads even if they are electioneering

communications by including disclaimers and potentially filing disclosure reports. (*See* Pls.' Stmt. of P.&A. in Supp. of Emergency Mot. for TRO ("TRO Mem.") at 3 (Docket No. 2-1).)

Nevertheless, plaintiffs now claim for the first time that the electioneering communications disclaimer and disclosure requirements "in fact prohibit Plaintiffs from speaking." (Am. Compl. ¶ 23.) This is incorrect. If any part of FECA could be considered to prohibit their ads, it would be the entirely separate prohibition on corporate contributions to candidates. (*See supra* at pp. 5-7 (explaining 52 U.S.C. § 30118(a).) As plaintiffs recognize, "Leigh Brown & Associates is a taxable business entity and cannot legally make any contributions to Brown's congressional campaign." (PI Mem. at 15.) Plaintiffs further concede that Leigh Brown & Associates coordinates its ads with Brown since "the authorization, planning, and voicing for the Advertisements was done by Brown, a federal candidate." (*Id.* at 16.) And finally, plaintiffs confirm that the bar on corporate coordinated expenditures is the real potential obstacle to airing their ads by admitting that an exception from that bar — the safe harbor for commercial transactions, 11 C.F.R. § 109.21(i) — would save their ads from being "illegal corporate contributions." (PI Mem. at 16-17; Am. Compl. ¶ 67.)[10]

[10] Despite the Commission's Draft A *sua sponte* raising the availability of the commercial safe harbor (Am. Compl. Exh. C at 13 n.4), plaintiffs never asked the Commission to address that question. They instead have sought a potentially needless and premature preliminary injunction and constitutional ruling from this Court based solely on their unsupported assertion that "the FEC will consider the Advertisements as coordinated communications." (PI Mem. at 17.) They now cite to the FEC's "position in this litigation," but until plaintiffs filed their Amended Complaint and motion for a preliminary injunction on April 17, 2017, section 109.21(i) had not even been cited, let alone put at issue by plaintiffs, despite their being on notice of the safe harbor. Courts entertain only ripe disputes in part due to "the court's interests in avoiding unnecessary adjudication." *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 683 F.3d 382, 387 (D.C. Cir. 2012) (internal quotation marks omitted). Though there is little doubt about the applicability of the safe harbor, plaintiffs' reliance on a faulty assumption and failure to seek administrative consideration provide grounds to find that plaintiffs' request to enjoin important disclosure and disclaimer requirements is not ripe.

Plaintiffs' proposed ads do indeed fit within that safe harbor for commercial advertisements and thus would not constitute prohibited corporate contributions. There is no "catch-22": Leigh Brown & Associates could comply with the electioneering communications disclosure requirements (assuming they ever cross the $10,000 threshold) by stating on an FEC Form 9 that Leigh Brown is the "person responsible" for the ads (*see* Am. Compl. ¶ 65), while including a consistent and factual disclaimer in the ads acknowledging that Brown authorized them and that they were paid for by Leigh Brown & Associates (*id.* ¶¶ 63-66). Under the commercial safe harbor, none of these factual disclosures would cause the ads to be impermissibly coordinated with a candidate and thus a violation of 52 U.S.C. § 30118(a).

The FEC confirmed this as recently as two months ago in an enforcement matter. The agency found that the commercial safe harbor applied to the airing of advertisements similar in all material respects to plaintiffs' proposed course of conduct. At issue there were ads run by a federal candidate who acted as his company's spokesman in distributed company advertisements, and whose name was in the name of his business, like Brown's ads here. *See* Factual & Legal Analysis at 6-8, *In re: Matlock for Congress*, MUR 7428 (Feb. 26, 2019).[11] The Commission applied the commercial safe harbor and, accordingly, found no reason to believe that the respondents had made or accepted prohibited corporate contributions. *Id*. at 8.

Under the commercial safe harbor, plaintiffs could comply with the electioneering communication disclosure and disclaimer requirements without having to make false or inconsistent representations, as they wrongly allege. (Am. Compl. ¶¶ 63-64, 66.)[12] The ads'

---

11 *See* https://www.fec.gov/files/legal/murs/7428/19044457785.pdf.

12 Including FECA disclaimers does not violate North Carolina law, which, according to plaintiffs, merely requires inclusion of the name of the "broker *or* firm" (Am. Compl. ¶ 69) (emphasis added), as all four of plaintiffs' proposed ads contain "Leigh Brown" (broker), "Leigh Brown & Associates" (firm), or both. (Am. Compl. Exh. A at 2-3, 7-8.)

disclaimers could accurately state that the ads were authorized by Brown while paid for by Leigh Brown & Associates. *See, e.g.*, Statement of Reasons at 6, *In re Musgrove for Senate*, MUR 6044 (July 4 & 14, 2009) (assuming disclaimer noting candidate authorization could have been required for ad that was not coordinated).[13] And, in the uncertain event that plaintiffs did trigger the $10,000 reporting threshold (*see infra* pp. 40-41), Leigh Brown & Associates' FEC Form 9 could accurately state that Leigh Brown & Associates is the person "Making the Disbursements/Obligations" and list Brown as the person "Sharing/Exercising Control."[14] Plaintiffs thus could comply with these requirements without making any false statements.

Because the electioneering communications disclosure and disclaimer provisions do not bar plaintiffs' speech, this Court should apply exacting scrutiny to those claims, just as the Supreme Court has repeatedly done.

2. The Electioneering Communications Disclosure and Disclaimer Requirements Are Not a Prior Restraint

Because the electioneering communications rules do not prohibit plaintiffs' ads from airing, they do not operate as a prior restraint on their speech, as plaintiffs assert. (*See* PI Mem. at 1, 8, 9, 14.) "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." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks omitted). Thus, *Buckley* rejected a nearly identical argument as by plaintiffs here: holding the "burden imposed" by political committee disclosure "is no prior restraint, but a

---

13 *See* https://www.fec.gov/files/legal/murs/6044/29044250029.pdf.

14 FEC, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements/Obligations for Electioneering Communications) ("Form 9 Instructions") https://www.fec.gov/resources/cms-content/documents/fecform9i.pdf at 2.

reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." 424 U.S. at 82. Electioneering communications disclosure and disclaimer rules likewise are not a prior restraint.

3. The Electioneering Communications Disclosure and Disclaimer Requirements Are Not Content-Based Discrimination

Because BCRA's disclosure and disclaimer rules do not prohibit speech, they do not constitute a "content-based speech ban" that is subject to strict scrutiny, as plaintiffs' claim. (*See* PI Mem. at 20.) The cases cited by plaintiffs are inapposite because they do not involve disclosure and disclaimer requirements. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (concerning laws restricting the size, location, and duration of outdoor signs); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 507-08 (D.C. Cir. 2016) (applying strict scrutiny to an FEC regulation only after concluding that it was *not* a "disclosure requirement"). Indeed, no less than three Supreme Court opinions in recent years — which considered the very FECA provisions plaintiffs challenge here —refused to apply strict scrutiny, applying instead lesser, exacting scrutiny. (*See supra* pp. 10-12.)

4. Under Exacting Scrutiny, the Electioneering Communication Disclaimer and Disclosure Requirements Are Constitutional As Applied Here

The electioneering communications disclaimer and disclosure rules are reviewed for "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (internal quotation marks omitted). Just as they repeatedly have in past cases, these rules readily satisfy this intermediate level of constitutional scrutiny here.

a. *They serve the important government interests of informing voters and deterring and detecting FECA violations*

The Supreme Court has repeatedly concluded that "important state interests" sufficient to uphold disclosure laws include "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196 (discussing *Buckley*). In *McConnell*, the Court held that these important interests "apply in full" to BCRA's disclosure requirements. *Id.* Indeed, even after the Court later struck down the electioneering communications financing (not disclosure) provisions, it held that BCRA's disclosure requirements continue to serve the public "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369.[15]

b. *Requiring disclosure and disclaimers for plaintiffs' electioneering communications substantially relates to the government's important interests*

In *McConnell*, the Court facially upheld the BCRA disclosure provisions at issue here, finding that the government's important interests "amply support[] application of . . . disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 196. Courts have since denied as-applied challenges to these laws, holding that the government's interests apply with equal force to allegedly different types of electioneering communications.

For instance, in *Independence Institute*, the Supreme Court affirmed the conclusion that BCRA's disclosure and disclaimer requirements validly apply even to alleged "genuine" issue advocacy focused only on pending legislation. 216 F. Supp. 3d at 188 (explaining that voters'

[15] There, the Court declined to consider "other asserted interests" only because "the informational interest alone [wa]s sufficient to justify application" of the disclosure provisions in that case. *Citizens United*, 558 U.S. at 369.

informational interest is invoked by an ad that ties "an identified candidate to an issue or message" just before an election), *aff'd*, 137 S. Ct. 1204 (2017).

Similarly, in *Citizens United*, the Court upheld the disclosure and disclaimer requirements as applied to commercial ads urging viewers to see a film about then-candidate Hillary Clinton. The plaintiff argued that they were invalid as applied because, even though electioneering communications, the ads (1) were not functionally equivalent to express advocacy for or against Clinton, and (2) were purely commercial in nature. But the Court held that the laws were substantially related to the voters' interest in knowing "who is speaking about a candidate shortly before an election" even if the ads were not equivalent to express candidate advocacy and "[e]ven if the ads only pertain to a commercial transaction." 558 U.S. at 369.

Likewise, here, the voters' informational interest applies in this case regardless of plaintiffs' contentions that their ads are "commercial speech." (Am. Compl. ¶¶ 38, 70.) Just as voters in the 2008 presidential election had a valid interest in knowing who authorized and paid for commercial ads about a Clinton movie in *Citizens United*, the voters of North Carolina's Ninth Congressional District have a valid interest in knowing who authorized and paid for commercial ads that name and feature the voice of a candidate for election in that district.

Voters' interest in learning about persons financing pre-election ads regarding a candidate like Brown is always apparent, but also exemplified in some of the particular circumstances here. Brown is one candidate in a broad field of at least 10 candidates running in the special general election. The Brown Committee is required to disclose its finances and provide disclaimers on its ads. A national real estate political committee has reportedly spent about $1.3 million on independent advertising supporting Brown, *see* Jim Morrill, *Realtors' group spending in the 9th District has hit a record $1.3 million*, The Charlotte Observer (Apr.

20, 2019),[16] and some of those ads have or will air on the same WBT radio station where Leigh Brown & Associates airs its ads, *see* Jim Morrill, *Realtors appear to make big investment in 9th District primary. But will it help?*, The Charlotte Observer (Apr. 13, 2019).[17] Such political committees are also required to disclose and use disclaimers. The presence of disclaimers on ads by all of these persons will help illuminate which messages Brown has approved and which have content that she did not, contrary to plaintiffs' misguided claim that providing more information to the voting public would only "confuse" them. Am. Compl. ¶¶ 68, 101; *but see Citizens United*, 588 U.S. at 368 ("At the very least, the disclaimers avoid confusing by making clear that the ads are not funded by a candidate or political party.").

Accordingly, applying BCRA's disclosure and disclaimer rules to plaintiffs' ads that clearly identify a federal candidate substantially relate to the interest of the voters in knowing who is speaking about that candidate just days before an election.

B. FECA's Prohibition on Corporate Contributions Is Constitutional

As discussed above, BCRA's disclosure and disclaimer provisions do not prevent plaintiffs from airing their ads. FECA's prohibition on corporate contributions, 52 U.S.C. § 30118(a), also does not prevent plaintiffs from airing their ads, since those ads qualify for the commercial safe harbor. (*See supra* pp. 21-23.) Had plaintiffs' ads not qualified for that safe harbor, then the corporate contribution prohibition would have presented an obstacle to plaintiffs' admittedly coordinated ads. But the Amended Complaint does not challenge (or even

---

16 *See* https://www.charlotteobserver.com/news/politics-government/article229436299.html (last visited Apr. 23, 2019); *see also* Indep. Exp. Report for Nat'l Assoc. of Realtors PAC, http://docquery.fec.gov/cgi-bin/forms/C00030718/1327644/se (indicating $1.29 million in independent expenditures as of April 19, 2019).

17 https://www.charlotteobserver.com/news/politics-government/election/article229186434.html (last visited Apr. 23, 2019).

cite) section 30118(a), and so this Court lacks jurisdiction to grant a preliminary injunction against that statutory provision. *Adair v. England*, 193 F. Supp. 2d 196, 198 (D.D.C. 2002).

In the event that plaintiffs' motion could nevertheless be read to rest on an implicit challenge to the constitutionality of the corporate contribution prohibition, that challenge would be unlikely to succeed. The Supreme Court and other courts have already held that the 112-year-old prohibition on corporate contributions is constitutional. In *Beaumont*, the Supreme Court upheld section 30118(a) as applied to contributions made by a nonprofit advocacy corporation. 539 U.S. at 149-52. The Court examined the law with the intermediate level of scrutiny ("closely drawn scrutiny") applicable to contribution limits, in contrast to the strict scrutiny applicable to limits on independent spending. *Id.* at 161-62 ("[R]estrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment" since *Buckley*.)

Applying that level of scrutiny, the Court found that the corporate contribution prohibition promotes at least four important government interests, including preventing corruption and its appearance, and preventing corporations from being used as conduits for illegal contributions made in excessive amounts or by impermissible sources. *Id.* at 154-55. The Court noted that "traditional business companies" are susceptible "to misuse as conduits for circumventing the contribution limits imposed on individuals." *Id.* at 160

The corporate contribution prohibition remains valid today even though *Citizens United* later invalidated section 30118(a)'s separate prohibition on corporate *independent* expenditures. *Citizens United* explained that the threat of corruption and its appearance is lacking where "political speech presented to the electorate . . . is *not coordinated* with a candidate." 558 U.S. at 360 (emphasis added); *see also id.* at 357 ("'The absence of prearrangement and coordination of

an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" (quoting *Buckley*, 424 U.S. at 47)). *Citizens United* thus left § 30118(a)'s prohibition on corporate contributions (including coordinated expenditures) untouched. *Id.* at 359 ("[C]ontribution limits . . . unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.").

Subsequent court rulings have therefore rejected post-*Citizens United* challenges to prohibitions on corporate contributions. For instance, in *Danielczyk*, the Fourth Circuit upheld § 30118(a) as applied to a for-profit corporation's contributions, noting that *Citizens United* "explicitly declined to address the constitutionality of the ban on direct contributions." 683 F.3d at 615-19 (holding that "*Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont*'s reasoning" supporting § 30118(a)'s constitutionality).[18]

C. Plaintiffs Are Unlikely to Succeed on Any Equal Protection Claim

Plaintiffs' Amended Complaint appears to assert an equal protection theory. (Am. Compl. ¶¶ 95, 102.) Plaintiffs' brief, however, does not assert equal protection as a basis for this Court to issue a preliminary injunction and it should not be considered here. Nonetheless, in an abundance of caution, the Commission addresses it briefly below.

The Amended Complaint states that plaintiffs are deprived of equal protection because the electioneering communication definition does not apply to ads run by "other businesses . . .

[18] Other Courts of Appeals have issued similar rulings since *Citizens United* upholding state corporate contribution limits. *Ognibene v. Parkes*, 671 F.3d 174, 195 n.21 (2d Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125 (9th Cir. 2011); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010).

that do not share a name of a federal candidate," which plaintiffs claim are "exactly situated" to Leigh Brown & Associates. (Am. Compl. ¶ 102.) This claim is unlikely to succeed because plaintiffs' conclusory assertion fails to satisfy their burden of showing "that the government has treated it differently from a similarly situated party." *Cannon v. D.C.*, 717 F.3d 200, 207 (D.C. Cir. 2013). Leigh Brown & Associates is not situated similarly to a business whose ad does not feature the name of a candidate in its business name and whose ads do not feature the voice of a candidate. That hypothetical business is situated differently because its ad is not speaking about a candidate shortly before an election. In contrast, FECA is justified in treating the ads by Leigh Brown & Associates differently due to the public interest in pre-election speech about a candidate shortly before an election, including in connection with commercial advertisements. *Citizens United*, 558 U.S. at 369.

D. Plaintiffs Are Unlikely to Demonstrate They Have a Valid Claim Supporting Their Request That the Court "Find" That Their Ads Were Not Electioneering Communications

In Count 3 of their Amended Complaint, plaintiffs ask the Court to construe FECA to exclude their ads "To Avoid First and Fourteenth Amendment Problems."[19] (Am. Compl. at 23.) When explaining the denial of the temporary restraining order, the Court stated that Count 2 of plaintiffs' Original Complaint was unlikely to succeed because it failed to rest upon a valid cause of action. (Apr. 15, 2019 Hearing Tr. at 7:22-8:13 (attached as Exh. A).) In Count 3 of their Amended Complaint, plaintiffs again asked this Court to declare that their ads are not electioneering communications, but they again have identified no distinct, viable claim and are thus again unlikely to succeed.

[19] Plaintiffs erroneously cited the Fourteenth, instead of the Fifth, Amendment here.

1. The First and Fifth Amendments Provide No Basis for Plaintiffs' Proposed Finding

As explained above, plaintiffs are unlikely to succeed on their First and Fifth Amendment theories. Plaintiffs fail to develop any First Amendment theories for relief with respect to Count 3 that are not duplicative of the invalid First Amendment theories underlying Counts 1-2, and their equal protection argument fails at the outset.

Plaintiffs' apparent appeal to a canon of statutory construction, constitutional avoidance, in the title of Count 3 highlights that their claim is, in truth, not a claim likely to succeed, but instead is an abstract request for this Court to construe FECA to their liking. Constitutional avoidance is a canon that instructs courts to "construe federal statutes to avoid constitutional infirmity." *Lo Duca v. United States*, 93 F.3d 1100, 1110 (2d Cir. 1996). Because plaintiffs fail, however, to establish that BCRA's disclosure and disclaimer requirements are vague or overbroad, there are no constitutional infirmities to serve as a basis for the Court to issue a narrowing construction.

2. The Agency's Response to Plaintiffs' Demands Has Been Neither *Ultra Vires* Nor an Unlawful Withholding of Required Action

Plaintiffs continue to indirectly seek to have the Court review the manner in which the agency has responded to plaintiffs' advisory opinion request, characterizing the agency and its position in court defending against plaintiffs' previous APA-based challenge as "*ultra vires*." (*See* Mot. at 9 ("[T]he FEC's actions in this matter were *ultra vires* and should be struck down by this Court."), 14, 24-26.). Such claims attempt to set forth what has been called a nonstatutory cause of action for review, which "is intended to be of extremely limited scope." *Trudeau*, 456 F.3d at 190 (internal quotation marks omitted). To state a cause of action for nonstatutory review, plaintiffs must establish (a) that they are unable to obtain review under the APA or any other statutory provision, *id.*; and (b) there is "a specific provision of [FECA] which,

although it is clear and mandatory, was nevertheless violated by the [agency]." *Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 283 F.3d 339, 344 (D.C. Cir. 2002) (some alteration in the original). Plaintiffs, however, cannot establish either element.

Even if a Commission enforcement action were commenced against plaintiffs, they would have the ability to assert their *ultra vires* defense in either administrative or subsequent judicial proceedings before plaintiffs could be found liable. *See* 52 U.S.C. § 30109(a). This alone is sufficient to defeat plaintiffs' attempt to assert a nonstatutory cause of action. *Royster-Clark Agribusiness, Inc. v. Johnson*, 391 F. Supp. 2d 21, 25 (D.D.C. 2005) (holding that, if a statutory "violator is able to enjoin an agency's nascent enforcement action by merely claiming that the [agency] has acted *ultra vires*, as plaintiffs attempt to do here, the statutory enforcement mechanisms would be rendered meaningless," and that "[t]his outcome is flatly inconsistent with the notion of administrative adjudication").

Plaintiffs, however, have also failed to allege any provision of FECA that clearly and expressly requires the agency to find that plaintiffs' proposed ads are not electioneering communication provisions. FECA's provision stating that the Commission "*may* promulgate" regulations exempting a subset of electioneering communications that do not promote, attack, support, or oppose a candidate is plainly not mandatory. 52 U.S.C. § 30104(f)(3)(B)(iv) (emphasis added). And while the Commission may be able to interpret FECA to authorize it to grant exemptions via advisory opinion due to the provision's legislative history (*see supra* p. 13), it is "a cardinal principle of the judicial function of statutory interpretation" that "courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point." *Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 712

(D.C. Cir. 1987) (emphasis omitted). Accordingly, plaintiffs are not likely to succeed on their contentions that the agency has acted in an *ultra vires* manner.

Nor can plaintiffs assert the ordinary claim for judicial review of an agency's failure to act as well. *See* 5 U.S.C. § 706(1). Inaction is only reviewable if a statute "provides a 'specific, unequivocal command' to an agency or 'a precise, definite act . . . about which [an official has] no discretion whatever.'" *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004)). The FEC must garner the affirmative vote of four of its six Commissioners "in order for the Commission to take any action" to render an advisory opinion. 52 U.S.C. §§ 30106(c), 30107(a)(7). While FECA provides that the Commission "shall" render an "advisory opinion" within a certain number of days of receiving a request, 52 U.S.C. § 30108(a), if the Commission cannot issue an advisory opinion due to the four-vote requirement, it provides a timely notice so stating, 11 C.F.R. § 112.4(a). Section 30108(a) does not limit the Commission's discretion regarding the substance of any advisory opinion request.

Plaintiffs also cannot rely upon statements made by the FEC in its TRO opposition to serve as a basis for a claim that the agency should have undertaken some action. (*See* Am. Compl. ¶¶ 73, 82, 97.) Setting aside that plaintiffs mischaracterize the agency's brief — which merely made arguments about the zone of agency discretion in interpreting FECA — agency discussion of statute and regulations in a legal brief cannot, in any event, constitute "final agency action," a requirement for a claim under the APA. *Querim v. EEOC*, 111 F. Supp. 2d 259, 269–70 (S.D.N.Y. 2000), *aff'd*, 9 Fed. App'x 35 (2d Cir. 2001) (holding that the agency's statements in a legal brief are not "final agency action" under the APA). Just as statements by counsel may

not be considered reviewable agency action under the APA, they should not be deemed to be agency action for purposes for of purported constitutional challenges.

3. Plaintiffs Are Unlikely to Succeed On Their Claim that Their Ads Must Be Found Not to Be Electioneering Communications

Plaintiffs no longer rely on the APA; their claims of constitutional violations and for freestanding constitutional avoidance are invalid for the reasons given above. Even if plaintiffs had presented a valid claim necessitating that the Court review the classification of their ads, however, plaintiffs have not shown the interpretations they urge are mandatory or compelled.

a. Original Ads

Plaintiffs do not establish that the Original Ads are not electioneering communications, since those ads fit the statutory definition. First, they are targeted to the relevant electorate in the Charlotte metropolitan area. Am. Compl. ¶ 47; 52 U.S.C. § 301014(f)(3)(A)(i)(III). Second, they would air within 30 days before the May 14, 2019 primary election. Am. Compl. ¶ 37; 52 U.S.C. § 30104(f)(3)(A)(i)(II)(bb). Third, and finally, they refer to a clearly identified federal candidate, at a minimum due to their inclusion of Brown saying, "I'm Leigh Brown." Am. Compl. Exh. A at 2, 3; 52 U.S.C. § 30104(f)(3)(A)(i)(I).

Yet in their Amended Complaint, plaintiffs claim for the first time claim that their Original Ads do not constitute "electioneering communications" because they allegedly fail to reference a clearly identified candidate for office, despite their references to "Leigh Brown." (*See* Mot. at 24; Am. Compl. ¶¶ 9, 14, 35, 91, 93.) Before the Commission in their Advisory Opinion request and before this Court in their Original Complaint, plaintiffs had admitted that the Original Ads reference a clearly identified candidate for office, but argued that the

Commission should exempt the ads. (*See* Am. Compl. Exh. A at 2; Original Compl. ¶¶ 39, 48.) Plaintiffs' new claim regarding the Original Ads is unlikely to succeed.[20]

FECA would not have required the agency to agree that the Original Ads fail to "refer[] to a clearly identified candidate for Federal office" under 52 U.S.C. § 30104(f)(3)(A)(i)(I). FECA defines the term "clearly identified" to include where "the name of the candidate involved appears." *Id.* 30101(18). The name of the candidate involved appears in the Original Ads twice: Both Original Ads state, "I'm Leigh Brown with RE/MAX . . . ." and, "There is a difference when you call Leigh Brown." (PI Mem. 4-5.) Plaintiffs of course do not dispute that the ads' reference to "Leigh Brown" is to the same Leigh Brown who is a candidate for federal office. (*See, e.g.,* Am. Compl. ¶ 14.) Instead, plaintiffs assert that the Original Ads nevertheless fail to refer to a candidate because they refer to Brown in her capacity as a realtor (*see, e.g.*, Am. Compl. ¶ 9); however, the reach of the statute's plain text is not limited to only communications where a candidate is identified by name in their capacity as a candidate, *see Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (reviewing plain statutory language).

Moreover, the electioneering communication definition does not require the limiting construction that plaintiffs demand (*i.e.*, to exclude communications that "are purely commercial in nature involving transactions wholly unrelated to politics or qualifications for office," Am. Compl. ¶ 14, and that "plainly and unquestionably not related to any election," Am. Compl. ¶ 76). This is true as both a statutory and constitutional matter. First, the limiting language

---

[20] Under ordinary rules for consideration of claims against agencies, plaintiffs would be deemed to have waived their new argument by failing to raise it before the Commission. The "failure to raise a particular question of statutory construction before an agency constitutes waiver of the argument in court." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 7 (D.C. Cir. 2011) (internal quotation marks omitted) (collecting cases).

plaintiffs' endorse comes verbatim from legislative and regulatory history discussing the Commission's *discretionary* authority to exempt such communications from regulation as electioneering communications. (*See supra* p. 13.) The FEC specifically *declined* to enact a regulation under this authority that would carve out communications where a candidate shares a name with a business entity, just like plaintiffs' ads. (*Id.*) Second, as a constitutional matter, *Citizens United* upheld the application of the electioneering communication provisions against precisely such a challenge regarding commercial transactions. (*See supra* p. 11.)

Third, even if, *arguendo*, the Commission were required to adopt the limiting construction that plaintiffs' demand, plaintiffs do not demonstrate that the conclusion that the original advertisements fit within such a conclusion is compelled. 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." (Am. Compl. Exh. C at 8-9.) 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.

Though not necessary to the analysis, even the most cursory examination of Brown's campaign website provides further support for this view, revealing that she identifies her success as an "award winning Realtor®" and position as the head of Leigh Brown & Associates as some, if not all, of her key qualifications for federal office. *See generally* https://www.leighbrownforcongress.com/ (last visited Apr. 23, 2019). For example, Brown states:

> I have the unique experience of owning and operating a successful real estate company, and I completely understand how the market works. I know what

> helps businesses and local communities thrive, and as a fiscal conservative I want to bring that first-hand experience to Washington. Too many politicians don't know how to create jobs and grow our economy, because they've never done it. But, I have, and I'm ready to work.
>
> As the CEO of a real estate company, I have helped many people throughout the 9th district buy and sell their homes. I have fought to improve housing affordability because as a REALTOR® I believe homeownership is part of the American dream.

See https://www.leighbrownforcongress.com/bio-1 (last visited Apr. 23, 2019). Given the extent to which the candidate herself has intertwined her realty activities (Am. Compl. ¶ 35), with her qualifications as a candidate, plaintiffs fail to establish that viewing Leigh Brown as having distinct capacities and viewing her ads as exempt from the electioneering communications is the only permissible view.

b. Amended Ads

Plaintiffs are also unlikely to succeed in establishing that the conclusion that the Amended Ads are not electioneering communications is a mandatory one and that the view that those ads also fit the statutory definition is impermissible. First, they are targeted to the relevant electorate in the Charlotte metropolitan area. Am. Compl. ¶ 47; 52 U.S.C. § 301014(f)(3)(A)(i)(III). Second, they would air within 30 days before the May 14, 2019 primary election. Am. Compl. ¶ 53; 52 U.S.C. § 30104(f)(3)(A)(i)(II)(bb). Third, and finally, they can be viewed as referring to a clearly identified federal candidate, since they feature Brown's actual voice in an ad that also twice references her firm which includes her name. PI Mem. 5-6; 52 U.S.C. § 30104(f)(3)(A)(i)(I).

It is permissible to treat this case as distinguishable from *Hispanic Leadership Fund, Inc. v. FEC* ("*HLF*"), where a Virginia federal district court held that an ad failed to reference a clearly identified candidate where it featured just eight words spoken by then-candidate Barack

Obama in an ad that did not use his name. 897 F. Supp. 2d 407, 416, 429-430 (E.D. Va. 2012). In contrast here, the Amended Ads refer to the company which includes the candidate's name and Brown speaks approximately 186-203 words in the ad. (PI Mem. 5-6.) Moreover, in *HLF*, the ad was run by an independent entity that was not advertising a business named after and closely identified with a candidate, and had not run advertisements about that candidate the way that Brown has for 13 years. 897 F. Supp. 2d at 414-16. Given these factors, it is permissible to find that listeners in the Charlotte area would recognize Brown as the speaker of the Amended Ads as highly likely.[21] Brown's efforts to promote her candidacy by touting her achievements as a realtor, and the media attention Brown has received from the $1.3 million that a realty association has already spent in support of her candidacy, provide further support for this view.

Even if it were not distinguishable, *HLF* is not binding on this Court and is not required to be followed. Its conclusion that the use of a candidate's actual voice in an ad does not reference that candidate unless listeners would recognize the voice can be viewed as inconsistent with FECA. This recognizability requirement is not in FECA's text. 52 U.S.C. § 30101(18). The first two prongs of the definition do not require that the use of a name, photo, or drawing of a candidate be recognizable to clearly identify the candidate. *Id.* § 30101(18)(a)-(b). Recognizability thus need not be required for references that fall under the third prong's catch-all category, including a candidate's voice. *Compare id.* § 30101(18)(c), *with Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1625 (2018) (explaining that where "a more general term follows more

[21] The Commission's advisory opinion in AO 2004-31 (Darrow) does not compel a different result. There, the Commission concluded that a commercial advertisement for "Russ Darrow" car dealerships did not reference federal candidate Russ Darrow Jr., but rather his son Russ Darrow III and the car dealership that his son operated and had been the pubic face of in its advertising for 10 years. *See* Advisory Op. 2004-31 (Darrow) at 1-3, https://www.fec.gov/files/legal/aos/2004-31/2004-31.pdf.

specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (internal quotation marks omitted)).

Also, requiring recognizability would lead to obvious inequities. For example, the photo, drawing, or voice of a fringe candidate unknown to the vast majority of the electorate would fail to "clearly identify," while photos, drawings, or the voice of well-known candidates would. As a result, ads featuring a well-known incumbent would be substantially more likely to constitute an electioneering communication than would a nearly identical ad featuring his or her challenger.

Additionally, recognizability can be considered to be a subjective standard that would be unworkable both for the Commission and the regulated community, as plaintiffs previously recognized here. (TRO Mem. at 18.) It would potentially require the Commission to conduct public-opinion surveys or similar empirical studies of the viewing public to determine whether an ad meets the definition of an electioneering communication. Such a requirement is contrary to Congress's enactment of a "bright-line" definition for electioneering communications. *See Wis. Right to Life, Inc.*, 551 U.S. at 474 n.7. Similarly, the *HLF* court's standard could be seen to leave the regulated community with no easy way to determine *ex ante* whether the use of a candidate's voice would trigger reporting obligations. Groups that want to run pre-election ads would be required to study (or guess) the proportion of the population that would recognize a given candidate's voice.

Plaintiffs also contend that that the Amended Ads fit within the criteria for an exemption from the definition of "electioneering communication" (Am. Compl. ¶ 85), but that contention is not compelled for the same reasons as the Original Ads (*see supra* p. 35).

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

Plaintiffs fail to meet their burden to show that they will suffer irreparable harm without the extraordinary remedy they seek. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury," underscoring that the injury "must be both certain and great . . . actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).

First, as explained above, plaintiffs have previously admitted they may run their ads, BCRA's disclosure and disclaimer provisions do not stop them from running their ads, and the commercial transactions safe harbor means that FECA's corporate contribution ban does not restrict their ads. (*See supra* pp. 20-23). Accordingly, plaintiffs cannot claim irreparable harm. *See Real Truth About Obama v. FEC*, No. 3:08-cv-483, 2008 WL 4416282, at *15-16 (E.D. Va. Sept. 24, 2008) (finding no irreparable harm where "Plaintiff is free to disseminate their message and make any expenditures they wish" subject only to "constitutionally permitted restrictions").

Second, plaintiffs cannot establish that any claimed harm arising out of the operation of BCRA's disclosure requirements is "imminent" and "certain" because they have failed to show that they will definitely trigger those laws by spending more than $10,000 in 2019 on electioneering communications. BCRA's disclosure provisions apply only if an entity spends "an aggregate amount in excess of $10,000 during any calendar year" on electioneering communications. 52 U.S.C. § 30104(f)(1); *see also* 11 C.F.R. §§ 104.5(j), 104.20, 114.10(b)(2). Here, Leigh Brown & Associates has a one-year contract with Entercom Charlotte WBT AM/FM for calendar year 2019 to air a total of 706 broadcast spots, "or approximately 13.5 airings per

week," for a total cost of $48,204. (Am. Compl. ¶ 47.) Based on that total amount, each ad costs about $68, and a week's worth of ads (13.5) costs approximately $921. At those rates, Leigh Brown & Associates would have to air ads for more than 10 weeks during electioneering communications windows before the costs would exceed $10,000. Only after that point would the company be required to file a disclosure report. 11 C.F.R. § 104.20(a)(1); *see supra* p. 23 n. 13 (Form 9 Instructions at 1). Even if plaintiffs' ads begin airing immediately and aired during the 30 days before the primary election, the thirty days before a potential primary run-off election, and the 60 days before the general election, the $10,000 threshold for electioneering communication disclosures could not be reached until the general election and only if Brown was a candidate in each of those elections.

Brown has failed to demonstrate with certainty that she will have the opportunity to air ads during another electioneering communications window in which she will be a candidate after the May 14, 2019 special election and eventually cross the $10,000 spending threshold. Brown is just one of 10 candidates for the Republican nomination. The winner of the election will be a candidate in the September 10, 2019 general election or, if no candidate receives more than 30 percent of the vote, the second place finisher could trigger a run-off special primary election that would take place on September 10 instead. *See* N.C. State Board of Elections, *New Election in District 9* at 1.[22] Brown would therefore have to defeat at least eight of her opponents on May 14 and prevail in any primary runoff for there to even be a possibility that Leigh Brown & Associates could air ads during an electioneering communications window during which it might pass the disclosure spending threshold. The Amended Complaint's only allegation on this issue

[22] *See* https://www.ncsbe.gov/Portals/0/Forms/2019/NC09_infosheet_Voters_20190322.pdf (last visited Apr. 23, 2019).

is to note that there could be a run-off or special general election "if applicable." (Am. Compl. ¶ 56.) That indefinite and contingent allegation fails to show the requisite certainty to demonstrate irreparable harm.

The Supreme Court has recognized that harm of constitutional dimension can arise from disclosure when there is a "reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370. Harm of this kind has been demonstrated only in cases involving organizations, such as the NAACP and the Socialist Workers Party, whose members faced actual, documented danger at the relevant time. *See Buckley*, 424 U.S. at 69; *McConnell*, 540 U.S. at 198-99. Plaintiffs make no attempt to make such a showing. And indeed, counsel for plaintiff acknowledged at this Court's April 12, 2019 hearing that FECA's regulations would not require disclosure for customers of Leigh Brown & Associates since as a business it does not receive funds for the purpose of furthering electioneering communications. (Apr. 12, 2019 Hearing Tr. at 12:13-18 (attached as Exh. B).)

Third, plaintiffs have failed to show that they will suffer irreparable harm if required to provide disclaimers on their ads. As explained above, disclaimers on plaintiffs' ads will reduce the danger of confusion among the public, not increase it.

Fourth, plaintiffs rely primarily on out-of-circuit precedent to incorrectly assume that irreparable harm flows automatically from its contentions that its First Amendment rights have been infringed. (PI Mem. at 26-28.) The Supreme Court's ruling in *Elrod v. Burns* also does not stand for that principle, as plaintiffs claim (*id.*), since the D.C. Circuit "has construed *Elrod* to require movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301; *see also Christian Knights of the Ku Klux Klan Invisible*

Empire, Inc. v. District of Columbia, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (mere allegation of First Amendment burden does not support finding of irreparable harm under *Elrod*).

Fifth, plaintiffs cannot demonstrate irreparable harm because they have failed to pursue a clear option that would allow them to air their ads without the electioneering communications disclaimers or reports: record them with a voice other than the candidate's. Three Commissioners voted in favor of finding that plaintiffs' Amended Ads, which refer to Leigh Brown & Associates instead of to Leigh Brown, were not electioneering communications because they do not refer to a clearly identified federal candidate. During the public meeting, the Commissioner who dissented from that vote told plaintiffs' counsel that she would join her colleagues in finding that the Amended Ads were not electioneering communications if they were spoken by someone other than the candidate. In response, counsel for plaintiffs said he would check with his client to discuss the possibility of updating their request accordingly. But after indicating that he could not reach his client, plaintiffs instead opted for this lawsuit.

Plaintiffs have not alleged injuries in this case related to Brown using her voice to read the advertisements. Plaintiffs allege that they are not able to air their ads and that the disclaimer and disclosure requirements would cause confusion and lessen the ads' value. But at no point do plaintiffs allege that they would suffer harm if the ads were not read by Brown herself and plaintiffs have not explained why they did not pursue that option.

Finally, plaintiffs' claims of irreparable *economic* harm are insufficient, because it is "well settled that economic loss does not, in and of itself, constitute *irreparable* harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added); *see also Classic Cab, Inc. v. District of Columbia*, 288 F. Supp. 3d 218, 231 (D.D.C. 2018).

IV. THE RELIEF THAT PLAINTIFFS REQUEST WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

The balance of harms and the public interest also weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief.

There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

That presumption is at its apex here because the Supreme Court has already determined in *McConnell*, *Citizens United*, and *Independence Institute* that the electioneering communications disclosure and disclaimer provisions are constitutional. As discussed above, the electioneering communications provisions are a critical part of FECA's public disclosure regime; enjoining their enforcement would therefore substantially injure the public interest. *See Real Truth About Obama v. FEC*, 575 F.3d 342, 352 (4th Cir. 2009) (upholding denial of pre-election preliminary injunction regarding a regulation and policy that implicated disclosure requirements), *vacated on other grounds*, 559 U.S. 1089 (2010). Prior to an election, the public also has "a heightened interest in knowing who [is] trying to sway [its] views . . . and how much they were willing to spend to achieve that goal." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010). The price of a preliminary injunction here would ultimately be

paid by the public. *Cf. Real Truth About Obama*, 2008 WL 4416282, at *16 (noting that "enjoining application of the challenged provisions could confuse political actors . . . and deprive the public of important information") (internal quotation marks omitted).

Furthermore, granting the preliminary injunctive relief plaintiffs seek in this case would alter the "federal campaign finance framework only [days] prior to the next federal election . . . . Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014).

Preliminary injunctions are merely for the purpose of preserving the relative positions of the parties during the pendency of a case. *Camenisch*, 451 U.S. at 395. Granting preliminary relief in this case would do precisely the opposite.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

/s/ *Kevin P. Hancock*
Kevin P. Hancock
Acting Assistant General Counsel
khancock@fec.gov

Robert W. Bonham III (D.C. Bar No. 397859)
Senior Attorney
rbonham@fec.gov

Tanya Senanayake
tsenanayake@fec.gov
Haven Ward (D.C. Bar No. 976090)
hward@fec.gov
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
1050 First St. NE
Washington, DC 20463
(202) 694-1650

April 23, 2019