UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROWN, et al.,	)	
Plaintiffs,	)	Civ. No. 19-1021 (TJK)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO MOTION FOR TEMP. RESTRAINING ORDER
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs Leigh Brown ("Brown"), Leigh Brown for Congress, and Leigh Brown & Associates ask this Court for extraordinary preliminary injunctive relief that would alter the status quo and bar enforcement of a key provision of the Federal Election Campaign Act ("FECA") that ensures the voting public has access to information about who is financing campaign-related advertisements just one month before a federal election. The Court should deny this relief because plaintiffs meet none of the requirements for a preliminary injunction.

Plaintiffs are unlikely to succeed on the merits. Plaintiff Brown is a candidate for federal office in the upcoming May 14, 2019 special primary election being held in North Carolina's Ninth Congressional District. At issue here are whether four advertisements that her company, Leigh Brown & Associates, wishes to air in the time period immediately preceding this election are within the scope of FECA's provision governing "electioneering communications." For the first two of those ads (the "existing" ads), plaintiffs concede that the ads are in fact electioneering communications, but claim they are entitled to an exemption. For the second two of those ads (the "alternative" ads), plaintiffs claim they are not electioneering communications

because they do not "refer[] to a clearly identified candidate for Federal office," despite featuring both the actual voice and a reference to the business that includes the actual name of the federal candidate, Leigh Brown. If the electioneering communications provision applies, then plaintiffs may have to disclose certain information relating to the financing of those ads and include in their text a disclaimer stating that Leigh Brown & Associates is responsible for their content.

On Thursday, April 11, 2019, the Commission did not garner the four votes necessary to issue plaintiffs an advisory opinion stating that the four ads at issue would not qualify as electioneering communications. Plaintiffs fail to establish that the Commission's handling of their advisory opinion request was not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §§702-706. There is no law compelling the agency to conclude that the ads at issue qualify as electioneering communications and that no exception is applicable. The agency reasonably could conclude that plaintiffs' proposed ads meet the statutory criteria for electioneering communications since they would be broadcast, cable, or satellite communications that are (1) publicly distributed within 30 days before a primary election; (2) targeted to the relevant electorate; and (3) refer to a clearly identified candidate. It was also reasonable to not grant plaintiffs' claim that their existing ads should receive an exemption for electioneering communications that are "wholly unrelated" to an election. The existing ads explicitly identify a federal candidate — Leigh Brown—by name. The nearly 200 words of each ad are spoken by the candidate herself. The ads promote a business, Leigh Brown & Associates, that is closely identified with Brown — the business, which shares a name with the candidate, has aired substantially similar ads featuring Brown's voice in the relevant market for the last 13 years. Further, the ads reference that Brown is "interviewing for a job" and they generally burnish Brown's reputation.

Plaintiffs claim that their alternative ads are not electioneering communications because they fail to refer to a clearly identified candidate. But the position of the Commissioner who opposed granting an advisory opinion — that the ads do in fact clearly identify Leigh Brown — is reasonable. The ads feature Leigh Brown's actual voice. They also still contain her name in the context of referring to "Leigh Brown & Associates." And given that plaintiffs have aired substantially similar ads for 13 years, it is highly likely that listeners in the relevant market closely associate Leigh Brown with Leigh Brown & Associates and would recognize that the alternative ads clearly identify her.

Additionally, plaintiffs cannot show that they will suffer irreparable harm in the absence of a temporary restraining order. Plaintiffs' motion states that it seeks only to avoid disclosure, and that the legal regime it challenges does not prevent it from speaking, *i.e.*, from running the advertisements at issue. Plaintiffs have not even attempted to show that they would suffer the kind of serious threats or reprisals necessary to demonstrate irreparable injury from such disclosure.

In contrast, a preliminary injunction barring disclosure of information about the funding of electioneering communications would significantly harm the public because it would erode the public's confidence in the federal campaign finance system and deprive voters of knowledge about who is speaking about candidates shortly before an election. As the Supreme Court has noted, "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010). Enjoining a campaign finance statute providing for disclosure just months before an election would harm that interest by depriving the public of important information.

BACKGROUND

I. LEGAL BACKGROUND

A. Electioneering Communications

The text of FECA, 52 U.S.C. §§ 30101-46), as amended, prohibits corporations and labor unions from making any "expenditure" in connection with a campaign for federal office. 52 U.S.C. § 30118(a). Included within this statutory prohibition are "independent expenditures," 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. 52 U.S.C. § 30101(17). FECA also requires that any entity financing an independent expenditure file with the Commission for public disclosure certain information regarding the entity's disbursements in support of the expenditure, and contributions the entity received "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2).

This statutory regime, 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, 126-128 (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 (discussing Congressional report of investigation); *see also id*. at 131-32.

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," 52 U.S.C. §§ 30104(f), 30118(b)(2), which BCRA defines as a "broadcast, cable, or satellite communication" that (a) "refers to a clearly identified candidate for Federal office," and (b) is aired within sixty days before the general election or thirty days before a primary election or convention. 52 U.S.C. § 301044(f)(3)(A)(i). Regarding campaigns for the United States Senate and House of Representatives, the communication must also be broadcast within the geographic area of the relevant jurisdiction to constitute an electioneering communication. See 52 U.S.C. § 30104(f)(3)(A)(i)(III), (C).

BCRA also contains disclosure provisions requiring each entity spending more than $10,000 in a calendar year on electioneering communications to file with the Commission a statement that identifies the maker, amount, and recipient of each of the entity's disbursements over $200, as well as information about donors who contributed to the entity making the communications. 52 U.S.C. § 30104(f)(1)-(2). Additionally, BCRA requires an electioneering communication that is not authorized by a candidate to contain a disclaimer stating the name and the address, phone number, or website of the entity that paid for the advertisement, and stating that the communication is not authorized by any candidate. 52 U.S.C. § 30120(a)(3), (d)(2); 11 C.F.R. § 110.11.

The Supreme Court initially 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 189-94, 203-08 (quotation at 206). 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.). In *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010), the Court subsequently struck down both corporate financing prohibition, BCRA's restrictions on corporate electioneering communications and FECA's ban on corporate expenditures, as applied to communications aired independently and not in coordination with candidates.

But in *Citizens United*, eight Justices upheld BCRA's disclosure and disclaimer requirements for all electioneering communications, even those that are not the functional equivalent of express advocacy. 130 S. Ct. at 913-15. The Court held that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" *Id*. at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). The Court thus declined to review such 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*. (quoting Buckley, 424 U.S. at 64, 66). Applying that standard, the Court held that the government can constitutionally require disclaimers and financial disclosure relating to all electioneering communications to 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 915-16.

B. "Clearly Identified"

As noted above, a broadcast communication is not regulated as an "electioneering communication" unless it "refers to a clearly identified candidate for Federal office." 2 U.S.C. §30104(f)(3)(A)(i)(I). The Act exempts four categories of communications from the statutory

definition, including "any other communication exempted under such regulations as the Commission may promulgate . . . to ensure the appropriate implementation of this paragraph, except that under such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section30101(20)(A)(iii) of this title." 52 U.S.C. § 30104(f)(3)(B)(iv).

Section 30101defines "Federal Election Activity" to include "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposed a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 52 U.S.C. § 30101(20(A)(iii).

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."

52 U.S.C. § 30101(18) (emphasis added). 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); *see also* 11 C.F.R. § 100.17.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. Congress empowered the Commission to "formulate policy" with respect to the Act, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 52 U.S.C. § 30107(a)(8); to issue advisory opinions construing the Act, 52 U.S.C. §§ 30107(a)(7), 30108; and to civilly enforce against violations of the Act. 52 U.S.C. § 30109.

The Commission has six voting members. 52 U.S.C. § 30106(a)(1). Decisions of the Commission with respect to the exercise of its duties and powers under the Act are made by a majority vote of the members.[1] The Commission currently has only four Commissioners, two Commissioner seats are vacant.

On March 22, 2019, counsel for plaintiff Leigh Brown submitted an advisory request to the Commission pursuant to 52 U.S.C. § 30108 and 11 C.F.R. § 112.1 regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 and Commission regulations to activity she proposes to undertake. (Letter to Lisa J. Stevenson, Acting General Counsel from Jessica F. Johnson and Jason Torchinsky, Holtzman, Vogel Josfiak Torchinsky,PLLC (Mar. 21, 2019).)

According to Brown's request, she is a candidate for election in the May 14, 2019 special primary election for the United States House of Representatives in North Carolina's Ninth Congressional District, and plans to air radio advertisements within 30 days of that election (*Id.* at 1.) Brown's advisory opinion request acknowledged that during the 30-day period before the

[1] The affirmative vote of four members is required to take actions in accordance with 52 U.S.C. § 30107(a) (6), (7), (8) and (9), including the rendering of advisory opinions.

primary election, "these advertisements will satisfy the basic statutory definition of 'electioneering communication.'" Brown sought an advisory opinion that the proposed ads would be exempt from the electioneering communication disclosure requirements. Descriptions of the proposed ads and the context of those ads can be found in the Commission's draft advisory opinions. (*See* Docket Nos. 1-6, 1-7.)

On April 11, 2019, the Commission considered those two alternative draft advisory opinions. (*See* Docket Nos. 1-6, 1-7.) Neither draft garnered the necessary four affirmative votes necessary for the Commission to issue an advisory opinion.

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER IS AN EXTRAORDINARY REMEDY THAT REQUIRES PLAINTIFFS TO MEET A HEAVY BURDEN

"A temporary restraining order is an extraordinary remedy, one that should be granted only when the moving party, by a clear showing, carries the burden of persuasion." *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011). The moving party must demonstrate: "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 6, 8 (D.D.C. 2010).

A "foundational requirement" for obtaining a temporary restraining order is that "the plaintiffs demonstrate a likelihood of success on the merits." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 19-5042, --- F.3d ---, 2019 WL 1430505, at *4 (D.C. Cir. Apr. 1, 2019). But even if a plaintiff can show a likelihood of success on the merits, a temporary restraining order "does not follow as a matter of course." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018); *Winter*, 555 U.S. at 24 (holding that preliminary relief is "never awarded as of

right"). Failure to show a substantial likelihood of success, requires "a very strong showing on the other factors" before an order will issue. *RCM Techs., Inc. v. Beacon Hill Staffing Grp.*, 502 F. Supp. 2d 70, 73 (D.D.C. 2007). And notably, "[t]he D.C. Circuit 'has set a high standard for irreparable injury'—it 'must be both certain and great; [and] it must be actual and not theoretical.'" *Baker DC v. Nat'l Labor Relations Bd.*, 102 F. Supp. 3d 194, 198 (D.D.C. 2015) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (alteration in original)).

Plaintiffs here shoulder a particularly heavy burden because their request is at odds with the purpose of a temporary restraining order, which is to preserve the status quo pending briefing and a hearing for preliminary injunctive relief. *Judicial Watch, Inc. v. Dep' t of Commerce*, 501 F. Supp. 2d 83, 91 (D.D.C. 2007); *Bradshaw v. Veneman*, 338 F. Supp. 2d 139, 141 (D.D.C. 2004). Rather than seeking to preserve the status quo, plaintiffs seek to upend it by asking the Court to prevent the Commission from enforcing an important provision of FECA in the final months of an election.

II. PLAINTIFFS CANNOT MEET THEIR HEAVY BURDEN OF DEMOSNTRATING THAT THEY ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs' Existing Ads Are Electioneering Communications

The Act and Commission regulations define "electioneering communication" as any broadcast, cable, or satellite communication that (1) refers to a clearly identified federal candidate; (2) is publicly distributed within 30 days before a primary election or a convention or caucus of a political party or 60 days before a general election; and (3) is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(a). In the case of a candidate for the House of Representatives, "targeted to the relevant electorate" means that the communication

can be received by 50,000 or more persons in the district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i). For purposes of the electioneering communication definition, "'[r]efers 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). *See also* 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

It is undisputed that plaintiffs' existing radio advertisements both qualify as electioneering communications under the Act. (Pls.' Br. at 16.) Plaintiffs contend, however, that they should be granted an exemption from the Act in order to run those two advertisements. (*Id.*) Additionally, plaintiffs argue that their proposed alternative radio advertisements do not constitute electioneering communications (Pls.' Br. at 7, 16) and thus should not be subject to the corresponding disclosure obligations under the Act. For plaintiffs to show that they are likely to succeed on the merits, however, plaintiffs must demonstrate that the Commission acted unreasonably when it did not find that plaintiffs' current and proposed advertisements constitute electioneering communications and are not exempt from the required disclosure obligations. This plaintiffs cannot do.

B. It Was Reasonable to Conclude That the Existing Ads Are Not Wholly Unrelated to an Election and Thus Are Not Exempt from the Definition of Electioneering Communications

Plaintiffs concede that their existing radio advertisements constitute electioneering communications under the Act. (Pls.' Br. at 4.) The dispute here centers on whether the

Commission acted unreasonably in not finding that these advertisements fall within an exemption from the definition of "electioneering communications."

It was, however, entirely reasonable for the Commission not to find that plaintiffs' current advertisements fall within an exemption. Congress authorized the Commission to exempt, through regulation, certain communications from the definition of "electioneering communications," but limited that authority, providing that "a communication may not be exempted if it meets the requirements of this section and is described in section 30101(20)(A)(iii) of this title." 52 U.S.C. § 30104(f)(3)(B). The referenced section includes any communication that "refers to a clearly identified candidate for [f]ederal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." 52 U.S.C. § 30101(20)(A)(iii). *See also* Electioneering Communications, 67 Fed. Reg. 65,190, 65,196 (Oct. 23, 2002). Representative Shays, a sponsor of the legislation that introduced the definition of "electioneering communications," explained that the Commission's "limited discretion" to exempt some communications was based on the fact that "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 Communications, 67 Fed. Reg. at 65,202. Plaintiffs thus seek an exemption that is available through regulation but no such regulations have been promulgated.

Rep. Shays did also stated that Congress "expect[ed] the Commission to use its Advisory Opinion process to address these situations both before and after the issuance of regulations." *Id.* at 411; *see also* 148 Cong. Rec. El78-03 (Feb. 13, 2002) (statement of Rep. Meehan). Though that is a mere floor statement, Commissioners have exercised their authority to issue advisory opinion in a manner consistent with that intent, and have entertained the possibility of issuing exemptions through the advisory opinion process. The standard for the Commission to grant such an exemption is, however, high: Exemptions were intended to be available for communications that "are plainly and unquestionably not related to the election" or "wholly unrelated to an election." 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). Here, plaintiffs suggest that the current radio advertisements should be exempt from the electioneering communication definition because they are purportedly "plainly and unquestionably not related to the election." (Pls.' Br. at 15.) But while plaintiffs attempt to show the reasonableness of their position, what is required here is a showing that the agency's position was *not* reasonable.

The Commission acted reasonably in not finding that the two existing radio advertisements qualified for an exemption. Information presented by plaintiffs supported the conclusion that the existing ads are not in fact "plainly and unquestionably not related to the election," and that these advertisements therefore could not meet the high standard articulated by Representative Shays. The existing advertisements clearly identify Brown personally by name,

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

Plaintiffs fail to point to a single comparable instance where the Commission granted an exemption from the electioneering communication rules. Plaintiffs' reliance on Advisory Opinion 2004-31 (Darrow) (*see* Pls.' Br. at 14), is misplaced: That advisory opinion concerned whether advertisements clearly identified a federal candidate, not whether the advertisements fell within an exemption to the electioneering communications definition. In the circumstances presented there, a U.S. Senate candidate, Russ Darrow, Jr., had founded a group of car dealerships, each of which bore his name as part of the name of the dealership (*e.g.*, Russ Darrow West Bend, Russ Darrow Appleton Chrysler). Advisory Opinion 2001-31 (Darrow) at 1. The company had worked to develop "Russ Darrow" as a brand name for its dealerships for a decade. *Id*. At the time of the advisory opinion, the candidate's son, Russ Darrow III, was primarily responsible for all day-to-day operations, plans, and advertising decisions of the business, and had been the public face of the company in all advertising for over 10 years. *Id*. at 1-2. The Commission concluded that in those circumstances, references to "Russ Darrow" in the company's advertising would not be a reference to a clearly identified candidate, because they

referred to the car dealerships or Russ Darrow III, and not to the candidate Russ Darrow, Jr. The Commission's conclusion was based on the ambiguity inherent in the facts of that particular case, where both the candidate and his son shared the same name but only the candidate's son appeared in the ads, and most of the references to "Russ Darrow" also included the full name of a particular dealership, such as "Russ Darrow Toyota" or "Russ Darrow Kia." *See id*. at 3. Plaintiffs also cite to Advisory Opinion Request 2012-20 (Mullin) but acknowledge that the Commission was unable to approve an exemption in those circumstances. (Pls.' Br. at 15.) In short, it is undisputed that the Commission is able to grant exemptions, but plaintiffs fail to show that it was unreasonable for the Commission to not grant one here.

In sum, plaintiffs cannot show that the Commission failed to act reasonably in refusing to grant an exemption to plaintiffs' current radio advertisements on the basis that these advertisements were not wholly unrelated to the election. While plaintiffs' interpretation may in some cases be reasonable as well, the central question remains whether the Commission acted reasonably. Here, it did, and plaintiffs thus fail to show that they are likely to succeed on the merits.

C. It Was Also Reasonable to Conclude That Plaintiffs Proposed Alternative Ads Are Electioneering Communications Since They Reference a Clearly Identified Candidate

Next, plaintiffs contend that their proposed alternative radio advertisements do not constitute electioneering communications (Pls.' Br. at 7, 16) and thus should not be subject to the corresponding disclosure obligations under the Act. Plaintiffs ultimately contend that the "applicable bright-line standard cannot turn on whether listeners do or do not recognize the voice speaking." (Pls.' Br. at 18.) The Commission agrees that the Court's inquiry would preferably not do so.

The Commission acted reasonably in not finding that plaintiffs' two proposed advertisements were not electioneering communications. For purposes of the electioneering communication definition, "'[r]efers 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). *See also* 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17. Nothing in FECA or its implementing regulations prevents the Commission from looking to the entire context of a communication to determine whether it unambiguously references a federal candidate. Plaintiffs point to nothing in the statutory or regulatory language to the contrary.

Here, the proposed advertisements would include the name of the firm, which incorporates the candidate's name, and is closely associated with her. The advertisements would also feature the candidate's actual voice. By doing so, the ad can reasonably be interpreted to clearly identify her, similar to how the Commission's regulations specify that a candidate's actual name or use of the candidate's actual picture clearly identifies that candidate (without any reference to who might recognize the name, picture, or indeed, voice). Furthermore, the use of Brown's actual voice in the context of this particular ad further confirms that the ad clearly identifies her. Brown has been advertising to radio audiences in the Charlotte area for 13 years. Because these ads have all included Brown's voice and have clearly identified her as the speaker, her voice may well be familiar to listeners. It is reasonable to conclude that the public would associate Brown's voice with Brown when they hear the name of Brown's firm. When seen in

context, the advertisements made apparent that they unambiguously refer to Leigh Brown, a candidate for federal office.

Hispanic Leadership Fund (*HLF*) is not binding on this court and, in any event, distinguishable from this case. In *HLF*, the advertisement at issue included only eight words in the candidate's voice. Here, Brown voices the entire length of the advertisements, which run between approximately 186 and 203 words. And in *HLF*, the ad was run by an independent entity, 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 done for thirteen years.

In sum, the Commission did not act unreasonably in examining the context of the advertisement to determine whether it refers to a clearly identified candidate for federal office. Because plaintiffs cannot show that the Commission acted unreasonably, they cannot demonstrate a likelihood of success on the merits.

D. Disagreements About Whether a Particular Ad References a Clearly Identified Candidate Do Not Make the Ads Inherently Ambiguous

Although the Commissioners were not unanimous in their conclusions about the meaning of references like Leigh Brown's voice and the use of Leigh Brown's name in the proposed advertisements, such disagreement does not, as plaintiff suggests (Pls.' Br. at 17), demonstrate that such references are ambiguous for purposes of the "clearly identified" standard.

While the parties here agree that the "clearly identified" standard is a bright-line test, as courts have long recognized, bright-line tests often present hard cases. "This kind of difficulty is simply inherent in any kind of standards-based test." *RTAA*, 681 F.3d at 554; *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 211 (1982) (holding FEC's construction of statute not unconstitutionally vague even if it might "leave room for uncertainty at the periphery"); *United*

States v. Williams, 553 U.S. 285, 306 (2008) ("Close cases can be imagined under virtually any statute. The problem that poses is [not] addressed . . . by the doctrine of vagueness."); *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (holding that Federal Corrupt Practices Act was not invalid because "[w]herever the law draws a line there will be cases very near each other on opposite sides"). "[R]egulations 'are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal [cases] fall within their language.'" *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986) (quoting *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963)). Even in reviewing statutes regulating political activity, the Supreme Court has stated that "there are limitations in the English language with respect to being both specific and manageably brief, and . . . although the prohibitions may not satisfy those intent on finding fault at any cost, [it is enough that] they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973).

Although the parties also agree that the definition of "clearly identified" requires an "unambiguous reference" to a candidate, the Supreme Court did not, as plaintiffs suggest (Pl.'s Br. at 17), impose a "limiting construction" on that definition in *Buckley*. Rather, when the Court explained the definition's meaning, it gave examples of unambiguous references and stated non-exhaustively that they "would *include*" references such as a candidate's initials or nickname. *Buckley*, 424 U.S. at 43 n.51 (emphasis added). Nothing in the Court's opinion suggests that "unambiguous reference" is to be equated with wooden literalism; there are numerous ways to make an "unambiguous reference to [someone's] identity," that "would

include" but not be limited to a "drawing," "nickname," or "status as a candidate." *Id.* As the Ninth Circuit has warned:

> Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987). In a variety of contexts involving regulation of speech, courts have recognized that — understood in context — creative or symbolic expressions can convey the same message as literal appellations or descriptions. Thus, "clearly identified" should not construed extremely narrowly. Such a crabbed reading is especially at odds with the Supreme Court's reaffirmation in *Citizens United* of the important informational interests served by the disclosure plaintiffs seek to avoid — including disclosure for all ads that meet the definition of electioneering communication, "[e]ven if the ads only pertain to a commercial transaction." 130 S. Ct. at 915; *see also Doe v. Reed*, 130 S. Ct. 2811, 2819-22 (2010) (upholding disclosure of names and addresses of signatories on petitions to place referenda on ballot); *id.* at 2837 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

Just as plaintiffs cannot establish that FECA should not apply to their conduct, they cannot establish that it would be unconstitutional for the Act to apply to their conduct. *Hispanic Leadership Fund*, 897 F. Supp. 407, 431-32 (E.D. Va. 2012).

III. PLAINTIFFS CANNOT DEMONSTRATE THAT MERE DISCLOSURE REGARDING THEIR PROPOSED ADS WILL CAUSE IRREPARABLE HARM

Plaintiffs fail to meet its burden to show that it will suffer irreparable harm without the extraordinary remedy it seeks. *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).

Plaintiffs proffer no evidence of any irreparable harm that they will suffer by abiding by the disclosure and disclaimer requirements for electioneering communications. Instead, plaintiffs simply assumes that irreparable harm flows from its contentions that its First Amendment rights have been infringed. (Pls.' Br. at 20-21.) But plaintiffs' "mere allegations, without more, do not support a finding of irreparable injury," even in the First Amendment context. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297-99; *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 76 (D.D.C. 2013) (noting that the D.C. Circuit in *Chaplaincy* has required "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." (citations and internal quotation marks omitted)), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014).

As two other courts in this District recently concluded, in rejecting motions to preliminarily enjoin other parts of FECA, "[p]laintiffs are not likely to suffer irreparable harm; rather, 'they will simply be required to adhere to the regulatory regime that has governed campaign finance for decades.'" *Holmes v. FEC*, 71 F. Supp. 3d 178, 188 (D.D.C. 2014) (quoting *Rufer*, 64 F. Supp. 3d at 206).

Plaintiffs also admit that they may run their current advertisements with additional disclaimer language. (*See* Pls.' Br. at 3.) Indeed, Citizens United reaffirmed that disclosure requirements "do not prevent anyone from speaking." 130 S. Ct. at 914. Accordingly, plaintiffs

do not allege that they are prevented from running radio advertisements or from engaging in any other electioneering activity. Thus, plaintiffs cannot claim irreparable harm on the basis of its suggestion that its speech is being limited. *See Real Truth About Obama*, 2008 WL 4416282, at *15-*16 (finding *Elrod v. Burns* inapplicable and no threat of irreparable harm where "Plaintiff is free to disseminate their message and make any expenditures they wish" and subject only to "constitutionally permitted restrictions"); *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*).

The only relevant harm plaintiffs could possibly allege here would be one arising from FECA's disclosure and disclaimer requirements for electioneering communications. (*See* Pl.'s Br. at __ (seeking injunction to prevent Commission from applying "disclosure and disclaimer requirements").) But plaintiffs fail to identify *any* irreparable harm that would result from complying with those provisions while this case is pending. In fact, Brown is already a declared federal candidate subject to disclosure and disclaimer requirements, and plaintiffs have not shown how any additional reporting obligations tied to the advertisements at issue would cause irreparable harm to Brown.

As to FECA's disclaimer requirements, plaintiffs identify no prospective harm whatsoever that would result from having to identify themselves as the source of its advertising. And as to the disclosure requirements, the Supreme Court has recognized that harm can arise from disclosure only when there is a "reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 130 S. Ct. at 916. 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 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *McConnell*, 540 U.S. at 198-99 (noting that *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), found "reasonable probability" of "threats, harassment, and reprisals"). While plaintiffs argue that "deprivation" of First Amendment Rights constitutes irreparable injury, Pls.' Br. at 20, plaintiffs cannot show that they have been deprived of any First Amendment rights in the first instance.

Plaintiffs also allege that they could decide to "not air any of its proposed advertisements." (Pls.' Br. at 20.) But any purported economic loss as a result of choosing not to air advertisements cannot be considered irreparable harm. *Classic Cab, Inc. v. D.C.*, 288 F. Supp. 3d 218, 231 (D.D.C. 2018); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Plaintiffs have failed to allege with any specificity how they or their interests would be harmed in the event that they would be required to run their advertisements with the required disclaimers.

Because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974), plaintiffs' failure to establish this element alone warrants denial of the requested temporary restraining order.

IV. THE BALANCE OF HARMS FAVORS THE COMMISSION AND AN INJUNCTION WOULD BE ADVERSE TO THE PUBLIC INTEREST

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

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). 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); *Holmes*, 71 F. Supp. 3d at 188 (same); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 50 (D.D.C. 2012) (same), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014). 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). The government and the public are similarly harmed when a court proscribes enforcement of a federal statute. Enjoining the FEC from performing its statutory duty constitutes a substantial public injury. *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (per curiam).

That presumption is at its apex here, because the Supreme Court has already determined in *Citizens United* that the electioneering communications disclosure provisions are constitutional. *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006) (three-judge court) ("To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court . . . , the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.").

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*, 575 F.3d at 352 (upholding denial of pre-election preliminary injunction regarding a regulation and policy that implicated disclosure requirements); *see generally Citizens United*, 130 S. Ct. at 914-15 (discussing public interest in disclosure). 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 restraining order here is undisclosed, untraceable advertising is ultimately paid by the public. That price far outweighs any burden arising from plaintiffs' *voluntary* decision to withhold its advertising rather than take responsibility for its communications and make the required disclosures. *See 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); *see also Iowa Right to Life Comm., Inc. v. Smithson*, 750 F. Supp. 2d 1020, 1048-49 (S.D. Iowa 2010) (finding that balance of harms favored government because injunction would impair government's "valid interest in facilitating transparency in . . . elections").

As the Supreme Court has noted, "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 130 S. Ct. at 915. This interest would be impaired, not served, by enjoining the FECA provisions at issue in this case. Such an injunction also could cause confusion among political actors and undermine the public's confidence in the federal campaign finance system. "Should this Court enter the injunction, the next two months of election law and enforcement would likely become a 'wild west' of electioneering communication[s] . . . ." *Real Truth About Obama*, 2008 WL 4416282, at *16; *see Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections . . . can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase."); *Iowa Right to Life*, 750 F. Supp. 2d at 1049 (declining to impose preliminary injunction that would "radically change Iowa's campaign finance rules mid-stream during an election"). Such irreparable harm to the public interest counsels heavily against granting plaintiff's desired relief.

Furthermore, granting the preliminary injunctive relief plaintiffs seek in this case would alter the "federal campaign finance framework only months prior to the next federal election based on an as yet untested legal theory. Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Rufer*, 64 F. Supp. 3d at 206; *cf. Holmes*, 71 F. Supp. 3d at 188 ("Plaintiffs' attempt to locate a problem of constitutional proportions in the [challenged] contribution limit would upset settled expectations immediately before the vote itself."). The Supreme Court has made clear that "[t]he purpose of a preliminary injunction 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); *Rufer*, 64 F. Supp. 3d at 206 (same); *cf. Stop This Insanity, Inc. Emp. Leadership Fund*, 902 F. Supp. 2d at 50 ("[P]laintiffs do not seek a preservation of the status quo, but rather they seek fundamental change in how [separate segregated funds] are regulated by the FEC . . . ."). Granting preliminary relief in this case would do precisely the opposite.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for an emergency temporary restraining order should be denied.

Respectfully submitted,

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