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For meeting of April 11, 2019
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April 10, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

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Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: AO 2019-06 (Brown) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on April 11, 2019.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-06

2

3 Jessica F. Johnson, Esq.

4 Jason Torchinsky, Esq.

DRAFT B

5 Holtzman Vogel Josefiak Torchinsky PLLC

6 45 North Hill Drive, Suite 100

7 Warrenton, VA 20186

8

9 Dear Ms. Johnson and Mr. Torchinsky:

10 We are responding to your advisory opinion request on behalf of Leigh Brown
11 regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to proposed radio advertisements that would air
13 within 30 days of an upcoming special primary election. The Commission concludes that
14 the existing versions of the advertisements are exempt from the definition of
15 electioneering communications because they do not promote or support Brown’s
16 candidacy or attack or oppose her opponents, and the existing ads plainly and
17 unquestionably do not relate to an election. The Commission also concludes that the
18 proposed alternate versions of the advertisements do not refer to a clearly identified
19 federal candidate and therefore would not constitute electioneering communications.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 March 22, 2019.

23 Leigh Brown is a candidate in the upcoming special election in North Carolina’s
24 Ninth Congressional District, to be held on May 14, 2019. Advisory Opinion Request at
25 AOR001. Brown is also the President and CEO of Leigh Brown & Associates, a for-
26 profit business entity that provides real estate agent services in the Charlotte area, and is
27 incorporated in North Carolina under the name Mallard Creek Properties, Inc. *Id.*

1 Leigh Brown & Associates has been airing radio ads promoting its business for
2 the past 13 years. *Id.* The ads are a core component of the company's marketing efforts,
3 and at least 10% of Brown's annual commission revenue can be attributed to clients
4 generated by the radio advertising. AOR002. The company currently has an annual
5 contract with WBT, a commercial radio station serving the Charlotte area, to air
6 advertisements for the calendar year 2019. AOR001. Leigh Brown & Associates entered
7 this contract with Entercom Charlotte WBT AM/FM in December 2018. *Id.*

8 Brown develops the content of the ads herself and records two ads at a time at
9 WBT's facilities. AOR002. The specific content of the ads has varied over the years, but
10 they generally follow a similar template, featuring discussion of a real estate issue
11 relevant to the Charlotte real estate market and the number of houses Brown's team sells,
12 and they consistently include two closing slogans: "I'm interviewing for a job . . . I want
13 to be your realtor" and "There is a difference when you call Leigh Brown." *Id.* Brown
14 has recorded two ads that began airing on or about March 5, 2019, prior to the time she
15 became a candidate for federal office. *Id.* The content of these ads is as follows:

16 *Radio Ad #1:*

17 In a world where everything seems to be online and at the click of a button, you
18 have to realize that real estate pricing is just not an exact science. I'm Leigh
19 Brown with RE/MAX and I'm getting a lot of phone calls about the current tax
20 valuations and the updates to the process. My clients need help with disputing
21 that number because occasionally it's wrong. I also have folks that want to know
22 what their property is worth based on their upgrades and condition and I can give
23 a more accurate ballpark than a website can. Frankly, y'all, the reason you have a
24 trusted realtor is that we are there for you between the buying and the selling and
25 all steps in between. My team and I sell a house every two days, y'all, and that's
26 not bragging. That's interviewing for a job. In fact, the job I want is to be your
27 realtor for life. For more information, visit my website at leighsells.com or call
28 anytime at 704-705-7036, that's 705-7036. There is a difference when you call
29 Leigh Brown.

1 *Radio Ad #2:*

2 I believe it's a natural human reflex to see a realtor and as, "Hey, how's the
3 market?" I'm Leigh Brown with RE/MAX and I can tell y'all that is the number
4 one question I'm being asked right now by folks considering buying or selling
5 real estate in the Charlotte market. Sellers should know that while prices are still
6 creeping upward, so are days on market. That's reducing the number of multiple
7 offer situations although frankly it all depends on what zip code you're in and
8 your price point. Now, let's look at those factors differently and realize it creates
9 a favorable situation for buyers. Add great interest rates to the normalization of
10 the market and you probably should consider calling me for an evaluation on
11 buying and selling. You can always get information on my website at
12 leighsells.com and find out why my team and I are selling a house every two
13 days. I'm not bragging about that statistic, y'all, I'm interviewing for a job. I
14 want to be your realtor. Call me anytime at 704-705-7036, that's 705-7036.
15 There is a difference when you call Leigh Brown.

16 AOR002-03.

17 These two ads are consistent with Leigh Brown & Associates' previous
18 advertising in content, timing, geographic distribution, and frequency.¹ AOR003,
19 AOR006. Brown acknowledges that if these advertisements are aired within 30 days of
20 the May 14, 2019 special election, they will satisfy the basic statutory definition of
21 'electioneering communication.' AOR002.

22 Brown also proposes alternate versions of both ads, to replace the ads described
23 above if the Commission concludes that the above ads are not exempt from the definition
24 of "electioneering communication." The alternate versions are as follows:

25 *Radio Ad #1 – Alternate Script:*

26 In a world where everything seems to be online and at the click of a button, you
27 have to realize that real estate pricing is just not an exact science. ~~I'm~~ We're
28 Leigh Brown & Associates with RE/MAX and ~~I'm~~ we're getting a lot of phone
29 calls about the current tax valuations and the updates to the process. ~~My~~ Our

¹ Brown has included with her request recordings of Radio Ads #1 and #2, as well as examples of additional ads used in the past few years. Links to these recordings can be found on the final page of the request, available on the Commission's website at <https://www.fec.gov/data/legal/advisory-opinions/2019-06/>.

1 clients need help with disputing that number because occasionally it's
2 wrong. ~~I~~ We also have folks that want to know what their property is worth based
3 on their upgrades and condition and ~~I~~ we can give a more accurate ballpark than a
4 website can. Frankly, y'all, the reason you have a trusted realtor is that ~~I am~~ we
5 are there for you between the buying and the selling and all steps in
6 between. ~~My~~ Our team sells a house every two days, y'all, and that's not
7 bragging. That's interviewing for a job. In fact, the job ~~I~~ we want is to be your
8 realtor for life. For more information, visit ~~my~~ our website at leighsells.com or
9 call anytime at 704-705-7036, that's 705-7036. There is a difference when you
10 call Leigh Brown & Associates.

11 *Radio Ad #2 – Alternate Script:*

12 I believe it's a natural human reflex to see a realtor and ask, "Hey, how's the
13 market?" ~~I'm~~ We're Leigh Brown & Associates with RE/MAX and I can tell
14 y'all that is the number one question ~~I'm~~ we're being asked right now by folks
15 considering buying or selling real estate in the Charlotte market. Sellers should
16 know that while prices are still creeping upward, so are days on market. That's
17 reducing the number of multiple offer situations although frankly it all depends on
18 what zip code you're in and your price point. Now, let's look at those factors
19 differently and realize it creates a favorable situation for buyers. Add great
20 interest rates to the normalization of the market and you probably should consider
21 calling ~~me~~ us for an evaluation on buying and selling. You can always get
22 information on ~~my~~ our website at leighsells.com and find out why ~~my~~ our team
23 sells a house every two days. ~~I'm~~ We're not bragging about that statistic,
24 y'all, ~~I'm~~ we're interviewing for a job. ~~I~~ We want to be your realtor. Call ~~me~~ us
25 anytime at 704-705-7036, that's 705-7036. There is a difference when you call
26 Leigh Brown & Associates.

27 AOR008-09.

28 Brown's campaign committee has engaged a political media vendor for campaign
29 advertising and media strategy, and this vendor has played no role in the creation or
30 airing of the above radio ads for Leigh Brown & Associates. AOR003.

31 ***Questions Presented***

32 1. *Are Radio Ads #1 and #2 exempt from the definition of "electioneering*
33 *communication" when aired during the upcoming pre-primary period?*²

² The Commission has combined the first two of the requestor's questions because they rely on identical analysis.

1 2. *Would the references to “Leigh Brown & Associates” in the alternate*
2 *scripts of Radio Ads #1 and #2 be construed as the name of a business rather than the*
3 *name of a candidate such that the advertisements do not refer to a clearly identified*
4 *candidate and thus are not “electioneering communications”?*

5 3. *Does the presence of Ms. Brown’s voice alone in the alternate versions of*
6 *Radio Ads #1 and #2 constitute a reference to a clearly identified candidate?*

7 ***Legal Analysis and Conclusions***

8 1. *Are Radio Ads #1 and #2 exempt from the definition of “electioneering*
9 *communication when aired during the upcoming pre-primary period?*

10 Yes, the existing versions of Radio Ads #1 and #2 are exempt from the definition
11 of “electioneering communication.”

12 The Act and Commission regulations define “electioneering communication” as
13 any broadcast, cable, or satellite communication that (1) refers to a clearly identified
14 federal candidate; (2) is publicly distributed within 30 days before a primary election or a
15 convention or caucus of a political party or 60 days before a general election; and (3) is
16 targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(a).
17 In the case of a candidate for the House of Representatives, “targeted to the relevant
18 electorate” means that the communication can be received by 50,000 or more persons in
19 the district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i). For purposes of
20 the electioneering communication definition, “[r]efers to a clearly identified candidate”
21 means that the candidate’s name, nickname, photograph, or drawing appears, or the
22 identity of the candidate is otherwise apparent through an unambiguous reference such as
23 ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’ or through an unambiguous

1 reference to his or her status as a candidate such as ‘the Democratic presidential nominee’
2 or ‘the Republican candidate for Senate in the State of Georgia.’” 11 C.F.R.
3 § 100.29(b)(2). *See also* 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17. Brown
4 acknowledges, and the Commission agrees, that during the 30-day period before the
5 primary election, “these advertisements will satisfy the basic statutory definition of
6 ‘electioneering communication.’”

7 Brown’s question, therefore, is whether the existing ads qualify for exemption
8 from the definition of “electioneering communications.” Congress authorized the
9 Commission to exempt, through regulation, certain communications from the definition
10 of “electioneering communications,” but limited that authority, providing that “a
11 communication may not be exempted if it meets the requirements of this section and is
12 described in section 30101(20)(A)(iii) of this title.” 52 U.S.C. § 30104(f)(3)(B). The
13 referenced section includes any communication that “refers to a clearly identified
14 candidate for [f]ederal office . . . and that promotes or supports a candidate for that office,
15 or attacks or opposes a candidate for that office” 52 U.S.C. § 30101(20)(A)(iii).
16 *See also* Electioneering Communications, 67 Fed. Reg. 65,190, 65,196 (Oct. 23, 2002).
17 Representative Shays, a sponsor of the legislation that introduced the definition of
18 “electioneering communications,” explained that the Commission’s “limited discretion”
19 to exempt some communications was based on the fact that “it is possible that there could
20 be some communications that will fall within this [electioneering communication]
21 definition even though they are plainly and unquestionably not related to the election,”
22 and that the Commission could “issue regulations to exempt such communications from
23 the definition of ‘electioneering communications’ because they are wholly unrelated to an

1 election.” 148 Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). When
2 the Commission adopted its regulations on electioneering communications, it considered
3 but declined to create a blanket exemption for situations where a federal candidate shares
4 a name with a business entity or where the candidate is referred to in the context of
5 promoting a business, because “it is likely that, if run during the period before an
6 election, such communications could well be considered to promote or support the clearly
7 identified candidate, even if they also serve a business purpose unrelated to the election.”
8 Electioneering Communications, 67 Fed. Reg. at 65,202.

9 However, Rep. Shays also stated that Congress “expect[ed] the Commission to
10 use its Advisory Opinion process to address these situations both before and after the
11 issuance of regulations.” *Id.* at 411; *see also* 148 Cong. Rec. E178-03 (Feb. 13, 2002)
12 (statement of Rep. Meehan). The Commission considered the extent of its authority to
13 grant exemptions in Advisory Opinion Request 2012-20 (Mullin), and although it did not
14 issue an advisory opinion as to whether an exemption was appropriate in that particular
15 circumstance, a majority of Commissioners did indicate their agreement that the
16 Commission was authorized to grant exemptions through advisory opinions, in addition
17 to blanket exemptions within its regulations. *See* Advisory Opinion Request 2012-20
18 (Mullin), Draft B (citing legislative history for the Commission’s authority to exempt
19 communications from the definition of “electioneering communication through the
20 advisory opinion process, and approved by Commissioners Hunter and McGahn II); Draft
21 C (same, approved by Commissioners Bauerly, Walther, and Weintraub). *See also*

1 Advisory Opinion 2012-20 (Mullin), Statement of Vice Chair Ellen L. Weintraub and
2 Commissioner Cynthia L. Bauerly (May 31, 2012).

3 Under the factual circumstances presented in the request—including that the ads
4 do not promote or support Brown’s candidacy or attack or oppose her opponents, and that
5 Leigh Brown & Associates has been distributing similar ads for the past 13 years—the
6 Commission concludes that it should exercise its discretion to exempt the existing ads
7 from the definition of an “electioneering communication.”

8 As described above, the Act provides that the Commission may exempt
9 communications from the definition of “electioneering communication” so long as they
10 do not refer to a clearly identified candidate for federal office and promote, support,
11 attack, or oppose (“PASO”) that candidate or another candidate for the same office, 52
12 U.S.C. § 30104(f)(3)(B), and the statute’s legislative history indicates that the provision
13 was intended to allow the Commission to exempt communications that are “plainly and
14 unquestionably not related to the election.” 148 Cong. Rec. H410-411 (Feb. 13, 2002)
15 (statement of Rep. Shays). The existing ads refer to a clearly identified candidate
16 because they include Brown saying “I’m Leigh Brown.” Therefore the existing ads may
17 qualify for an exemption only if they do not PASO Brown or any of her opponents, and if
18 they are plainly and unquestionably unrelated to her election.

19 Although the existing ads clearly identify Brown, the Commission has previously
20 determined that the mere identification of an individual who is a federal candidate does
21 not, in itself, PASO that candidate. *See* Advisory Opinion 2009-26 (Coulson), Advisory
22 Opinion 2007-34 (Jackson), Advisory Opinion 2007-21 (Holt), Advisory Opinion 2006-
23 10 (Echostar), and Advisory Opinion 2003-25 (Weinzapfel). In the scripts for the

1 existing ads, phrases such as “I can give a more accurate ballpark than a website can” and
2 “there is a difference when you call Leigh Brown” could be construed to PASO Brown,
3 but these phrases promote Brown as a real estate agent, not as a candidate, including
4 expressly referring to her real estate expertise. Moreover, the existing ads do not include
5 any references to Brown’s qualifications for office, or even mention the fact of Brown’s
6 candidacy. The Commission concludes that the existing ads do not PASO Brown.

7 Finally, the existing ads plainly and unquestionably are not related to the election.
8 They will be consistent in medium, timing, content, and geographic distribution with the
9 company’s ads prior to Brown’s candidacy. The existing ads are for real estate services,
10 wholly unrelated to an election, and they are designed only to promote Brown’s real
11 estate services in the same manner as she has done for 13 years before running for
12 office. The existing ads do not say anything about Brown’s qualifications for election or
13 even the fact that she is a candidate, and they focus entirely and exclusively on the
14 provision of real estate services. The ads include the address for her business’s website
15 but not that of her campaign website. The existing ads, thus, are wholly unrelated to the
16 election.

17 On these unique facts, the Commission concludes that it should exercise its
18 limited discretion to exempt from the definition of “electioneering communications” the
19 commercial communications here to avoid reaching a result that would be inconsistent
20 with Congress's intent. Congress did not intend the electioneering communication
21 provision to encompass genuine commercial communications like those presented here.
22 Accordingly, the Commission concludes that the existing ads described in the request are
23 exempt from the definition of “electioneering communication.”

1 2. *Would the references to “Leigh Brown & Associates” in the alternate*
2 *scripts of Radio Ads #1 and #2 be construed as the name of a business rather than the*
3 *name of a candidate such that the advertisements do not refer to a clearly identified*
4 *candidate and thus are not “electioneering communications”?*

5 3. *Does Ms. Brown’s voice alone constitute a reference to a clearly identified*
6 *candidate?*

7 Under the circumstances described in the request, the Commission is unable to
8 conclude that Brown’s voice *alone* constitutes a reference to a clearly identified
9 candidate. However, considered in their overall context, which includes references to the
10 name of the business “Leigh Brown & Associates” and do not specifically identify the
11 speaker, the alternate versions of the ads would not reference a clearly identified
12 candidate and, therefore, would not be electioneering communications.

13 For purposes of the electioneering communication definition, “[r]efers to a
14 clearly identified candidate’ means that the candidate’s name, nickname, photograph, or
15 drawing appears, or the identity of the candidate is otherwise apparent through an
16 unambiguous reference such as ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’
17 or through an unambiguous reference to his or her status as a candidate such as ‘the
18 Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of
19 Georgia.’” 11 C.F.R. § 100.29(b)(2). *See also* 52 U.S.C. § 30101(18); 11 C.F.R.
20 § 100.17.

21 As the court noted in *Hispanic Leadership Fund, Inc. v. FEC*, when a speaker is
22 not otherwise identified, whether the voice alone is sufficient to constitute a reference to
23 a clearly identified candidate turns on whether the audience actually recognizes the voice.

1 897 F. Supp. 2d 407, 429-30 (E.D. Va. 2012) (finding that whether an ad contained an
2 unambiguous reference to President Obama when it included an audio clip of him
3 speaking an eight-word sentence but identified only as “the government” depended
4 “entirely on whether the viewer actually recognizes the voice of the person speaking,”
5 and that no evidence had been offered to show that an average listener would recognize
6 President Obama’s voice solely from the clip).

7 Here, Brown has been advertising her business to radio audiences in the Charlotte
8 area for many years. These ads have all included Brown’s voice and have clearly
9 identified her as the speaker, and as a result her voice may well be familiar to some
10 listeners. However, in the context of the alternate ads presented in the request, which do
11 not specifically identify Leigh Brown as the speaker of the ads, there is no evidence that
12 the presence of Brown’s voice is sufficiently recognizable to constitute an unambiguous
13 reference to her. The alternate ads do contain the name “Leigh Brown & Associates,”
14 which may help listeners connect the voice with the name of the speaker if the voice is
15 familiar to them from previous ads, but the Commission has insufficient information to
16 conclude that listeners would be familiar with the voice itself or that the average listener
17 would make that connection between the voice and the identity of the speaker.

18 However, as the court noted in *Hispanic Leadership Fund*, whether “the identity
19 of the candidate is apparent by unambiguous reference” must be determined by looking
20 “both to the context of the reference as well as to the meaning of the reference itself.”
21 897 F. Supp. 2d at 427. Therefore, in determining whether the alternate ads would be

1 electioneering communications, the Commission considers the entire context of the ads,
2 including the language used, not only the voice of the speaker.

3 The Commission previously considered an instance in which a company's name
4 contained the name of a federal candidate, in Advisory Opinion 2004-31 (Darrow).
5 There, a U.S. Senate candidate, Russ Darrow, Jr., had founded a group of car dealerships,
6 each of which bore his name as part of the name of the dealership (*e.g.*, Russ Darrow
7 West Bend, Russ Darrow Appleton Chrysler). Advisory Opinion 2001-31 (Darrow) at 1.
8 The company had worked to develop "Russ Darrow" as a brand name for its dealerships
9 for a decade. *Id.* At the time of the advisory opinion, the candidate's son, Russ Darrow
10 III, was primarily responsible for all day-to-day operations, plans, and advertising
11 decisions of the business, and had been the public face of the company in all advertising
12 for over 10 years. *Id.* at 1-2. The Commission concluded that in those circumstances,
13 references to "Russ Darrow" in the company's advertising would not be a reference to a
14 clearly identified candidate, because they referred to the car dealerships or Russ Darrow
15 III, and not to the candidate Russ Darrow, Jr. The Commission's conclusion was based
16 on the ambiguity inherent in the facts of that particular case, where both the candidate
17 and his son shared the same name but only the candidate's son appeared in the ads, and
18 most of the references to "Russ Darrow" also included the full name of a particular
19 dealership, such as "Russ Darrow Toyota" or "Russ Darrow Kia." *See id.* at 3.

20 Here, although not all of the same facts are present, there are sufficient
21 overlapping facts to support a similar conclusion: that the alternate ads refer to a
22 business entity, Leigh Brown & Associates, and not to Leigh Brown herself. Although
23 Brown plans to voice the alternate versions of the ads herself, and no contention is made

1 that there is another individual involved named Leigh Brown to whom the alternate ads
2 might refer, the alternate ads would refer to the full name of the business, similar to the
3 references to “Russ Darrow Toyota” and other dealership names used by Darrow’s
4 business. In fact, Brown’s proposed alternate ads refer to the name of a business less
5 ambiguously than some of the Darrow ads did, because a few of the Darrow ads included
6 references to “Russ Darrow” rather than the full name of a business. *See* Advisory
7 Opinion 2004-31 (Darrow) at 3. Taken together with the references to “we” and “our
8 team” in the alternate ads and the absence of any references to Brown as an individual or
9 identification of her as the speaker, the references to “Leigh Brown & Associates” refer
10 to the business entity and not the candidate.

11 After considering the entire context of the alternate ads, the Commission
12 concludes that the alternate ads do not contain references to a clearly identified federal
13 candidate. Accordingly, the alternate ads would not be electioneering communications if
14 aired within 30 days of the May 14 special election.

15 ***Conclusion***

16 The Commission concludes that Radio Ads #1 and #2 are exempt from the
17 definition of “electioneering communication” because they do not promote, support,
18 attack, or oppose a candidate and they are plainly and unquestionably not related to an
19 election. The proposed alternate ads would not be electioneering communications.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
23 in any of the facts or assumptions presented, and such facts or assumptions are material to

1 a conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub
Chair