UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LESLIE YOUNG, Plaintiff, v. DAVE HEINEMAN, et al., Defendants.	)	Civil Case No.: 4:10-cv-03147-JFB-TDT **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Court should reject the Defendants' renewed argument for dismissal, as it has three times already. (*See* below, Section I.) Leslie Young seeks declaratory and prospective injunctive relief to bar the Real Estate Commission[1] from penalizing her in the future for exercising her First and Fourteenth Amendment rights. The Commission has twice ordered her to cease and desist from operating her advertising business without first obtaining a real estate broker license; if she were to continue operating without obtaining a license, she would be subject to civil and criminal penalties. Any such prosecution would violate her First and Fourteenth Amendment rights. Her suit for prospective relief, to preclude any such prosecution, is therefore properly before the Court. *See Wooley v. Maynard*, 430 U.S. 705, 711 (1977). She was not required to exhaust any state administrative remedies before filing suit. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982); *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592-94 (2013).

As to the merits, no facts are in dispute, but the Commission's motion for summary judgment ignores or misrepresents crucial undisputed facts and fails to address essential legal issues.

First, it ignores Ms. Young's contention that the licensing requirement imposed by Neb. Rev. Stat. § 81-885.01(2), and 299 Neb. Admin. Code § 2-004, is a prior restraint, and a content- and identity-based burden on speech, because it prohibits certain people from communicating certain messages without first obtaining government permission. (*See* below, Section II.) Information about homes for sale is non-commercial "pure" speech entitled to the full protection of the First Amendment. *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 877-79 (E.D. Cal. 2004). Yet the licensing statute defines the practice of real estate brokerage as "attempt[ing] to

[1] Defendant members of the Nebraska Real Estate Commission are herein referred to collectively as "the Commission."

negotiate . . . listing[s]" and "procuring prospects"—terms that refer solely to the communication of information.[2] *Cf. Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (disseminating information for marketing purposes is protected by the First Amendment). Restricting the communication of that information based on its content and based on whether the person who communicates it does so for compensation is a content- and identity-based speech restriction. *Id.* Also, requiring a person to obtain a license before communicating information is a prior restraint on speech. *Books, Inc. v. Pottawattammie Cnty., Iowa*, 978 F. Supp. 1247, 1254 (S.D. Iowa 1997).

The Commission quotes Director Greg Lemon's assertion that "for sale by owner" (FSBO) advertising is not a violation. *See* Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment (Def's MSJ) at 26. But the evidence shows that this is not true. Director Lemon's testimony makes clear that advertising alone would constitute "procuring prospects" or "negotiating listings," *see* below, Section II.B, and the Commission routinely issues Cease and Desist Orders to advertisers on this basis. *See* Exhibits 2, 7-11, 15-17, 22-24 to Declaration of Anastasia Boden in Support of Plaintiff's Motion for Summary Judgment (Boden Dec.); Exhibits 2 and 3 to Declaration of Leslie Young in Support of Plaintiff's Motion for Summary Judgment (Young Dec.).

The Commission acknowledges in its motion that "negotiating the listing of properties"—*i.e.*, contracting to help a person advertise an FSBO home—is "brokerage activit[y]" which requires a license. Def's MSJ at 44. And although the Commission claims in its brief that the website Forsalebyowner.com "would not be in violation of the challenged laws," *id*. at 54, in fact one of the two Cease and Desist Orders that the Commission sent to Ms. Young was *for her advertisements on that very website*. *See* Young Dec., Ex. 2.

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[2] A person also practices real estate brokerage if he or she "holds himself or herself out as engaged in any of the foregoing." Neb. Rev. Stat. § 81-885.01(2). *See* below, Section IV.

Even if Ms. Young were to obtain a license, her business would be illegal, since the Commission also prohibits *licensed brokers* from advertising FSBO properties. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12. The licensing requirement is therefore a prior restraint and a content-based speech restriction. Yet, as explained below, it is not narrowly tailored to advance a compelling government interest, and is therefore unconstitutional. Director Lemon's mere assertion that the Commission does not restrict FSBO advertising—contrary to plentiful undisputed evidence in the record—is not sufficient to raise a dispute of fact for purposes of summary judgment. *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691 (8th Cir. 2001).

Still, the Commission's apparent confusion about whether Ms. Young's business qualifies as brokerage or not is understandable, because the licensing laws are so vague that even Director Lemon cannot decipher whether various ordinary activities would or would not be proscribed. The key statutory terms, "attempt[ing] to negotiate a listing," and "assist[ing] in procur[ing] prospects," are not defined in any statute, regulation, court decision, or other document. Boden Dec. Ex. 1 at 21:8-13; 24:1-4; 18:17-22. The Commission therefore decides at its disciplinary hearings, on an *ad hoc* basis, without any written guidelines, what conduct violates the statute. *Id*. at 61:3-18. Given that the Commission has held only a single disciplinary hearing for practicing without a license since 2009, *id*. at 15:1-3, this provides no real guidance as to what the law prohibits. Indeed, at that one hearing, the Commissioners themselves expressed much confusion as to what is and is not legal. *See* Boden Dec. Ex. 20. The only exception to this vagueness is that the Commission routinely issues Cease and Desist Orders to advertisers based solely on the fact that they advertise. Neb. Rev. Stat. § 81-885.01(2) is therefore unconstitutionally vague. (*See* below, Section III.A.)

The licensing requirement is also overly broad, since it prohibits even licensees from advertising FSBO properties, and would also prohibit a wide variety of communication—such as

emailing one's colleagues to inform them of a property for sale, or putting one's telephone number on an FSBO flier for a friend. Boden Dec. Ex. 1 at 27:1-20; 30:23-31:7; 31:13-16. The restriction therefore limits far more protected speech than necessary. (*See* below, Section III.B.)

Further, the Commission violates the First Amendment by prohibiting Ms. Young from describing herself with the term "advertising broker," Def's MSJ at 15, even though this is a common and truthful term for a person who assists others in placing advertisements in media where they will be most effective. *See, e.g., Ad Associates, Inc. v. Coast to Coast Classifieds, Inc.*, No. 04-3418, 2005 WL 3372968, at *1 (D. Minn. Dec. 12, 2005). The Commission bases its prohibition on pure speculation that the term "*might* confuse the public." Def's MSJ at 37 (emphasis added). But the Commission may not prohibit Ms. Young from using this term on the theory that it is *potentially* misleading. *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 109-10 (1990). There is no evidence that anyone was ever misled into thinking that Ms. Young is a real estate broker. Young Dec. ¶¶ 7, 16; Boden Dec. Ex. 1 at 73:11-14. On the contrary, she makes clear to FSBO sellers and prospective buyers that she offers only advertising services. She says so in her contracts with FSBO sellers, and she labels her ads "Leslie Young Real Estate Advertising Services" and takes other steps to ensure that buyers do not mistake her for a real estate broker. Young Dec. ¶¶ 6, 7, 12, 13, 14. For the Commission to prohibit her from using the term "advertising broker," or allowing phrases like "Presented by Leslie Young Real Estate Advertising Services," "view agent's other listings," and so forth to appear on her ads, on the theory that this constitutes "holding herself out" as a broker, thus violates her First Amendment right to commercial speech. (*See* below, Section IV.)

Finally, the Commission misconstrues Ms. Young's Due Process, Equal Protection, and Privileges or Immunities arguments. (*See* below, Section V.) She contends that requiring someone

to undergo extensive education and training regarding real estate brokerage—education which includes no instruction or training whatsoever relating to FSBO advertising—in order to engage in mere advertising is not rationally related to a legitimate government interest. *Cf. Craigmiles v. Giles*, 312 F.3d 220, 227-29 (6th Cir. 2002); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1117 (S.D. Cal. 1999). The licensing statute's arbitrary exemptions—for example, exempting homeowners themselves, Neb. Rev. Stat. § 81-885.04(1), as well as trustees, relatives of homeowners, and any person at all who is not paid, *see id.* §§ 81-885.01(2), 81-885.04(3), (4)—undermine the state's purported interest in consumer protection and render the licensing requirement irrational. *Merrifield v. Lockyer*, 547 F.3d 978, 990-92 (9th Cir. 2008). The Commission's arguments that its "enforcement policy" provides *procedural* due process rights, Def's MSJ at 41, are irrelevant.

None of the facts are in dispute. But they establish that the Commission regards real estate advertising as "negotiating listings" and "procuring prospects," and prohibits Ms. Young from using such terms as "advertising broker," "Presented by Leslie Young Real Estate Advertising Services," etc., on her advertisements. The licensing requirement therefore violates the First Amendment. And by requiring Ms. Young to undertake education and testing requirements that bear no relationship to the practice of FSBO advertising, Neb. Rev. Stat. § 81-885.01 and its implementing regulations also violate the Fourteenth Amendment.

ARGUMENT

I

THE COURT SHOULD ONCE AGAIN REJECT DEFENDANTS' FLAWED ARGUMENTS FOR DISMISSAL

The Commission repeats yet again its arguments for dismissal which this Court has rejected three times (*see* Memorandum & Order Denying Motion to Dismiss, Docket No. 102; Memorandum

& Order Granting Motion for Relief from Stay, Docket No. 110; Memorandum & Order Denying Motion to Dismiss, Docket No. 118). There has been no material change in the circumstances since those decisions were rendered. It is not proper for the Commission, absent clear error or new facts, to "rehash[] arguments previously rejected by the court." *Kelly v. Omaha Hous. Auth.*, Nos. 8:10CV245 & 8:11CV192, 2012 WL 2192295, at *4 (D. Neb. June 14, 2012).

This Court has already correctly ruled that Ms. Young was not required to exhaust any state remedies before filing suit. In *Patsy*, 457 U.S. at 516, the Supreme Court made clear that administrative exhaustion is never a prerequisite to seeking federal court relief under 42 U.S.C. § 1983. The Commission claims that "developments in the case law" since *Patsy* have changed that rule, so that litigants are now required to exhaust state remedies, Def's MSJ at 11, but they cite no authority for this proposition, and there is none. *Patsy* remains valid law. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (reaffirming *Patsy*); *Jones v. Bock*, 549 U.S. 199, 212 (2007); *Porter v. Nussle*, 534 U.S. 516, 523 (2002) (same).

Ironically, the only "development" in this area of the law is that in *Jacobs*, 134 S. Ct. at 589, the Supreme Court *overruled* "Eighth Circuit precedent [which] effectively required a plaintiff to exhaust state remedies before proceeding to federal court." The Court of Appeals had previously suggested that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required federal courts to abstain from hearing cases whenever some state remedial proceeding was available, even if that administrative proceeding was not obligatory. *See Jacobs*, 134 S. Ct. at 590. But the Supreme Court overruled the Eighth Circuit, and explained that a plaintiff may go to federal court to challenge the constitutionality of a state administrative act even if state remedies are available, so long as those administrative proceedings are not coercive or ongoing. *Id*. at 592-94. Since no ongoing or coercive

administrative proceeding is involved here, *Jacobs* makes clear once again that there is no ground for this Court to refuse to decide Ms. Young's case.

The issuance of a Cease and Desist Order is a formal threat of future prosecution. The two orders issued by the Commission are now final, and no further process is necessary to finalize them. *See* Order Granting Motion for Relief, Docket No. 110 at 5-6. Ms. Young is therefore in the same position as the plaintiffs in *Wooley*, who were ticketed for covering up their license plate. 430 U.S. at 708. They chose not to pursue available state remedies, but instead of challenging those citations, sought an injunction to bar the state from citing them again in violation of their constitutional rights. *Id.* at 707-10. The Court held that this was a proper procedure, and granted the requested injunction. *Id.* at 711-12, 717; *accord, Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975).

Here, the Commission's two Cease and Desist Orders make clear that Ms. Young will be prosecuted for unlicensed brokerage if she continues to operate her business without obtaining a Nebraska real estate broker license. Young Dec. Exhibits 2 and 3. It is therefore appropriate for her to seek federal injunctive relief to prevent the Commission from future enforcement of the licensing requirement in violation of her First Amendment rights. As the Fourth Circuit has observed, "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time . . . to bring [a] First Amendment challenge[] in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost." *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989); *accord*, *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490-91 (5th Cir. 1995).

This Court has properly rejected the Commission's exhaustion arguments three times, and should do so again.

II

THE STATUTE UNCONSTITUTIONALLY PROHIBITS FOR-SALE-BY-OWNER ADVERTISING

A. FSBO Advertising Is Protected by the First Amendment

The Commission relegates the most on-point precedent, *Forsalebyowner.com*, to page 53 of its brief, claiming that it is irrelevant. Actually, that case sets out the bedrock principles for understanding this case. *Forsalebyowner.com* held that advertising FSBO properties is protected First Amendment speech, 347 F. Supp. 2d at 879—*not* commercial speech, *see id*. at 876—and that it was irrational to require a person to obtain a real estate broker license to engage in FSBO advertising. *Id*. at 879. *See also Skynet Corp. v. Slattery*, No. 06-cv-218, 2008 WL 924531, at *9 (D.N.H. Mar. 31, 2008) (requiring licensure for publishing FSBO ads would be "absurd").

Although the Commission purports to distinguish *Forsalebyowner.com*, its basis for doing so is illusory. First, it claims that Ms. Young "has [no] similarities to [the Forsalebyowner.com website], which, as Director Lemon pointed out, would not be in violation of the Challenged Laws." Def's MSJ at 54. But the first Cease and Desist Order the Commission sent to Ms. Young was based on advertisements that appeared on *that very website*. That March 11, 2010, Order said that Ms. Young had violated the licensing requirement by "advertising for sale, real property . . . on www.ForSaleByOwner.com . . . without having first secured a Nebraska real estate broker's license." Young Dec. Ex. 2. That Order was accompanied by printouts of Ms. Young's advertisements appearing on Forsalebyowner.com.[3]

[3] The Commission claims that "the state action taken here was the issuance of the C&D Orders based upon Plaintiff's Nebraska listings on Realtor.com, wherein she called herself an 'agent' and a 'broker.'" Def's MSJ at 47. This is false. The Commission issued *two* Cease and Desist Orders, the first (March 11, 2010) specified the advertisements on Forsalebyowner.com. The printouts from Forsalebyowner.com did not include the words "agent" or "broker." Young Dec. Ex. 2 (continued...)

Second, the Commission tries to distinguish *Forsalebyowner.com* on the grounds that it involved the owner of the website itself, while Ms. Young's business consists of helping people to put their advertisements on that website and other websites. But that is no real distinction, because the Constitution protects the expressive rights of those who help others to communicate, including those who prepare and broadcast advertisements. In *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), the Court upheld the First Amendment rights of professional solicitors, not merely of the charities for whom they were paid to solicit. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), it upheld the First Amendment rights of book publishers, not just of authors. In *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), it upheld the First Amendment rights of broadcasters, not just of the people or businesses whose ads were aired. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court protected the expressive rights of the newspapers that printed ads. Even book sellers are protected by the First Amendment, although they only sell expression by others. *Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 564-68 (E.D. La. 2003).

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[3] (...continued)
at NREC00742-45. The second Order (July 20, 2010), specified the Realtor.com advertisements. Young Dec. Ex. 3. On those, Ms. Young did *not* "call[] herself an 'agent' and a 'broker.'" She called herself "Leslie Young Real Estate Advertising Services." *Id*. Although the words "brokered by eList.me" appeared on the Realtor.com ads, the words "brokered by" were added by the Realtor.com template automatically, not by Ms. Young, and linked to the website eList.me, which explains in prominent lettering that Ms. Young offers only advertising, not real estate brokerage services. Young Dec. ¶ 23. The word "agent" only appeared in the phrases "email agent" and "view agent's other listings," which also were added by the Realtor.com template. *Id*. ¶¶ 11, 12. A person clicking on "email agent" would be connected, not to Ms. Young's email address, but to the address of the FSBO seller. *Id*. ¶ 12. In any event, as explained below, Section IV, the statute does not prohibit Ms. Young *per se* from using these terms, and in the absence of any evidence that consumers were actually misled, the Commission may not do so.

These cases reveal the flaw in the Commission's argument that "the only 'speech' at issue [here] is the speech made by the actual property sellers." Def's MSJ at 17. "[M]edia businesses that relay the commercial speech from speaker to hearer for a fee," like Ms. Young's advertising business, are also protected by the First Amendment. *Lamar Outdoor Adver., Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 319 n.7 (5th Cir. 1983).

In *Riley*, 487 U.S. 781, the Supreme Court upheld the First Amendment rights of professional solicitors, who were paid to speak about, and to raise money for, charitable foundations. 487 U.S. at 787. The solicitors challenged various restrictions on their *own* speech, including a licensing requirement, and the Court held that the First Amendment protects the rights of the professional solicitors themselves, not merely of the organizations on whose behalf they speak. *Id*. at 795-802. "[A] speaker's rights are not lost merely because compensation is received," the Court said, and "a speaker is no less a speaker because he or she is paid to speak." *Id*. at 801. People whose profession it is to assist others in communicating, whether they be in-person solicitors or advertising brokers like Ms. Young, "[g]enerally . . . need not obtain a license." *Id*. at 802. *See also Sorrell*, 131 S. Ct. at 2666-67 (First Amendment applied to business engaged in "sales, transfer, and use of . . . information" about third parties).

In-person solicitors, newspaper and book publishers, broadcasters, and booksellers do not "[fall] . . . squarely into the 'do-it-yourself' arena," Def's MSJ at 53, yet the First Amendment still protects their right to communicate messages and advertisements on behalf of others. The same is true of advertising brokers like Leslie Young.

Moreover, although the Commission draws the term "do-it-yourself" from the *Forsalebyowner.com* opinion, 347 F. Supp. 2d at 876, it ignores the context: the court was saying that Forsalebyowner.com was *not* a purely do-it-yourself forum. Instead, the company "cultivate[d]

'market relationships' with other retailers, as opposed to a newspaper's provision of 'more traditional advertising services,'" and even "accept[ed] fees from mortgage brokers for business generated through a website referral process." *Id*. at 879. *Nevertheless*, the court upheld the company's right to advertise, and found no evidence that forcing the company to obtain a license would "do anything to prevent or regulate any resulting improprieties." *Id*. Without some showing that requiring the company to become a licensed real estate broker was narrowly tailored to advance an important government interest, such a requirement was unconstitutional. *Id.*

Finally, the Commission claims—contrary to *Forsalebyowner.com*, 347 F. Supp. 2d at 876—that all of Ms. Young's speech is commercial speech[4] rather than pure speech, because it consists of advertisements. Def's MSJ at 31. But as the Supreme Court has explained, not all advertising qualifies as "commercial speech." Commercial speech is "speech intended and used to promote a commercial transaction *with the speaker*," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (emphasis added), which Ms. Young's advertisements are not. Where, as here, the person is *paid for speech*—where "speech itself is what the 'client' is paying for"—commercial speech analysis does not apply. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998).

In *Forsalebyowner.com*, the district court ruled that the publication of advertisements on behalf of other people is fully protected speech because such advertisements "propose[] no commercial transaction directly between the publisher[] and any prospective customers." 347 F. Supp. 2d at 875 (citing *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 686 (7th Cir. 1998), and *Taucher v. Born*, 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999)).

[4] Ms. Young concedes that her use of terms like "advertising broker" or "Leslie Young Real Estate Advertising Services" to describe her business is commercial speech under *Peel*, 496 U.S at 109-10, and *In re R. M. J.*, 455 U.S. 191, 204-07 (1982). Prohibiting her from using these terms still violates the First Amendment. *See* below, Section IV.

The Forsalebyowner.com website did not propose transactions between *itself* and prospective buyers; it provided only "information in the form of real estate listings, and . . . other non-specific informational materials," and its "services [were] informational in nature and not tailored to the needs of any specific buyer." 347 F. Supp. 2d at 876. It was therefore engaged in pure speech, not commercial speech.

For the same reasons, Ms. Young—who takes information provided to her by FSBO sellers and enters it into a database for publication on a website—is in the business of communicating information.[5] Her FSBO ads propose a transaction between the reader and *the FSBO seller*, not with Ms. Young. Thus they are subject to pure speech, and not commercial speech, analysis.

It is true that, unlike the plaintiffs in *Forsalebyowner.com*, Ms. Young does not *publish* the websites on which her ads appear. Instead, she assists people in placing their advertisements onto websites. But that does not change the First Amendment interests at issue. Helping people to communicate information is just what advertising businesses *do*. Just as the solicitors in *Riley* used their First Amendment rights to communicate on behalf of others, so Ms. Young's business is entitled to full constitutional protection. *Riley*, 487 U.S. at 801.

[5] The Commission repeatedly emphasizes its claim that a person must be a licensed broker to input an advertisement into an MLS, as if putting property information into an MLS requires a real estate broker's license. *See, e.g.*, Def's MSJ at 5. But Director Lemon admitted that it does not. *See* Exhibit 1 to Declaration of Timothy Sandefur in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Sandefur Dec.) at 42:19-25 (Q: "If you are paid to put a Nebraska property on a MLS in another state where you are licensed to practice real estate, does that constitute the practice of real estate brokerage under Nebraska law?" A: "To put the property on the MLS. You're paid to put the—no."). *See also id.* at 41:25-42:5 (Q: "Does getting paid to put a Nebraska property on the MLS require a Nebraska real estate broker's license?" A: "No."). In any event, Ms. Young *does* have a California broker's license, Young Dec. ¶ 3, which she legally uses to put properties into a California-based MLS. *Id.* ¶ 8.

B. The Commission Restricts Speech by Calling it Conduct

The Commission insists that it does not require Ms. Young to get a license before speaking, but only before "engaging in brokerage activities." Def's MSJ at 44. But this is misleading because the Commission defines "brokerage activities" as speaking.

The statute requires a person to obtain a license before "assisting in procuring prospects" or "attempting to negotiate [a] listing," Neb. Rev. Stat. § 81-885.01(2). But "procuring prospects" means *promoting the sale of a property by communicating information to the public*, and "negotiating listings" means *making an agreement to advertise a property*. Thus when the Commission says that the law "forbid[s]" Ms. Young from "engaging [in] brokerage activities, *such as negotiating the listing of properties*," Def's MSJ at 44 (emphasis added), what it means is that Ms. Young must get a license to engage in the "activity" of speech.

The government may not regulate speech by calling it conduct. As *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010), made clear, First Amendment scrutiny applies when the "conduct triggering coverage under the statute consists of communicating a message." *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370 (2002) (First Amendment scrutiny applies to statute that "use[s] advertising as the trigger" for imposing regulatory requirements). Given that the "conduct" at issue here is "the fact of communication," *Cohen v. California*, 403 U.S. 15, 18 (1971), the Commission cannot escape First Amendment scrutiny by calling that communication "brokerage activity" and then requiring a license for it.[6]

Since 2005, the Commission has issued at least 14 Cease and Desist Orders to persons who advertised real estate for sale in Nebraska. Young Dec., Exhibits 2, 3; Boden Dec., Exhibits 2, 7-11,

[6] The Commission relies on *United States v. O'Brien*, 391 U.S. 367 (1968), but the Court clarified in *Holder*, 561 U.S. at 27-28, that the *O'Brien* test does *not* apply to cases where, as here, the government classifies speech as "conduct" and regulates it.

15-17, 22-24. These Orders routinely declare that simply advertising property for sale qualifies as the practice of real estate brokerage, because advertising qualifies as "negotiating listings" or "procuring prospects." Thus even aside from the question of whether Ms. Young "holds herself out" as a broker (discussed below, Section IV), advertising FSBO property is itself illegal without a license.[7]

Director Lemon defined "procuring prospects" as "[h]elping somebody find a potential purchaser or potential lessor of property, specifically assisting—you know, perhaps calling or—or talking to people, saying, 'I have this property for sale you may be interested in.'" Boden Dec. Ex. 1 at 23:20-25. He testified that a person who accepted money in exchange for calling a friend or emailing her work colleagues to tell them that her neighbor's house is for sale would be "procuring prospects." *Id.* at 27:1-20, 30:23-31:7. Thus "If . . . [you] say, 'I can find prospects, and I would like to be paid for that,' then . . . that would be procuring prospects." *Id*. at 28:14-21. And if a person distributed fliers on behalf of a neighbor who is selling his house, and "in the advertising the person assisting was mentioned as the—as the third-party intermediary or contact for that transaction," the person would be in violation. Sandefur Dec. Ex. 1 at 38:15-23.

The Commission has ordered several advertisers to cease and desist on the grounds that advertising alone qualifies as "procuring prospects." In 2012, it sent a Cease and Desist Order to Owners.com, on the grounds that it was engaged in "procuring prospects." Boden Dec., Ex. 2. When the company protested, Director Lemon wrote that paying a broker to upload information into an MLS constituted "assisting in the procurement of prospects." Boden Dec., Ex. 4. Owners.com answered that it was "an advertising website for for-sale-by-owner property sellers," and was "not [paid] . . . to sell . . . properties," Boden Dec., Ex. 5, but Director Lemon replied that this

[7] It is also illegal *with* a license. *See* 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12.

nevertheless constituted "'assisting in the procurement of prospects for the listing of real estate.'" Boden Dec., Ex. 6. The Commission also issued Cease and Desist Order to advertiser Jack Keller in 2011, on the grounds that his advertisements qualified as "assisting in the procurement of a buyer." Boden Dec., Ex. 8. And its 2010 Cease and Desist Order to All Around Home Finders was based on the allegation that a website listing homes for rent qualified as "procuring prospects." Boden Dec., Ex. 7.

The Commission also defines "negotiating a listing" to mean making a contract to advertise a property for sale. Director Lemon had difficulty defining the term in his deposition, but testified that it would prohibit "go[ing] to a potential seller and discuss[ing] the terms under which [one] would assist someone in selling property," Boden Dec. Ex. 1 at 20:21-23. He defined a "listing" as "a situation where a real estate broker has a contract to assist someone in the sale of property or lease," *id.* at 21:2-4, and defined "negotiating" as "the conversations that take place discussing the terms under which the listing would occur," *id.* at 23:9-11, which would include "assist[ing] in marketing" the property. *Id.* at 21:17. Under this broad definition, an agreement to advertise a property qualifies as "negotiating a listing," and accordingly in 2009, the Commission issued a Cease and Desist Order to the Real Estate Disposition Company for "advertising Nebraska real estate for auction," on the grounds that this constituted "negotiating . . . Listing Agreements." Boden Dec., Ex. 9.

The Commission regularly declares that advertising alone constitutes the practice of real estate brokerage. In addition to the examples cited above, the Commission has declared that "marketing properties" and "advertising . . . property for sale" require a real estate broker license. Boden Dec., Ex. 14. It issued a Cease and Desist Order to John Fothergill in 2010 on the grounds that "advertising for sale . . . real property located in the State of Nebraska" requires a license, and

threatened "criminal prosecution" against him if he did not "remov[e] all advertising for sale of such Nebraska properties from the Internet and other forms of communication to the public." Boden Dec., Ex. 10. It initiated proceedings against Carl Wuestehube in 2011 on the grounds that he was advertising FSBO properties, and declared that "advertising the Nebraska real estate for sale in any form or media" was brokerage activity that "requires a real estate broker's . . . license." Boden Dec., Exhibits 15-17. At Wuestehube's subsequent disciplinary hearing, several Commissioners expressed their view that Wuestehube had violated the licensing requirement by contracting to advertise FSBO properties. *See* Boden Dec., Ex. 20 at NREC001434, NREC001437-38, NREC001442. After that hearing, the Commission persisted in its view, declaring before a state court that Wuestehube had broken the law by "advertis[ing] that [he] [would] advertise properties." Boden Dec., Ex. 18 at NREC002129.

The two Cease and Desist Orders to Ms. Young are further proof. The first, on March 11, 2010, specified that her FSBO ads appearing on Forsalebyowner.com were a violation of the law because "advertising for sale, real property located in the State of Nebraska" constituted the practice of real estate brokerage. That Order included printouts of the Forsalebyowner.com ads in question (none of which included the words "broker," or "Leslie Young Real Estate Advertising Services," or Ms. Young's name or contact information). Both it and the July 20, 2010, Cease and Desist Order, which concerned the Realtor.com ads, stated that the basis for the Order was the fact that she was "*advertising* for sale, real property located in the State of Nebraska . . . without having first secured a Nebraska real estate broker's license." Young Dec. Ex. 2, 3 (emphasis added). The Commission's repeated assertion that the only reason it issued the Cease and Desist Order was because Ms. Young used the term "broker" in her ads is just not true.

The evidence therefore demonstrates that the Commission interprets Neb. Rev. Stat. § 81-885.01(2)—specifically "procuring prospects" and "negotiating listings"—as prohibiting unlicensed advertising *per se*—that is, prohibiting *the communication of information about property for sale to the public* without a license.

The Commission recognizes this fact in its motion for summary judgment, when it says that Ms. Young is "forbid[den] . . . from holding herself out as a broker *or* engaging [in] brokerage activities, *such as negotiating the listing of properties*, without a license." Def's MSJ at 44 (emphasis added). Since "negotiating listings" means making an agreement to help an FSBO seller to advertise, and "procuring prospects" means to communicate information in hopes that a member of the public will be interested in buying the property, this means that speech is prohibited to non-licensees. The Commission's enforcement history demonstrates this fact emphatically.

The Commission quotes Director Lemon's claim in deposition that "[i]f you're simply conveying information as a newspaper or a website . . . that doesn't require a license." Def's MSJ at 26 (quoting Lemon Deposition at 37:1-4). But the uncontroverted evidence proves the contrary. Director Lemon's "general statements in . . . deposition testimony . . . [are] conclusory and . . . are insufficient to withstand a properly-supported motion for summary judgment." *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); *LaCroix*, 240 F.3d at 691. The Commission may not rest upon its mere allegations or denials, but must set forth affirmative evidence to defeat Ms. Young's motion for summary judgment in her favor. *Cooper v. Martin*, 634 F.3d 477, 480 (8th Cir. 2011). It has not done so.

In short, the Commission interprets "procuring prospects" and "negotiating listings" as referring to the acts of communicating information and/or making a contract to advertise.[8] Ms. Young does not dispute this interpretation: that is, indeed, what the terms plainly mean. To procure a prospect does mean to speak to people—*i.e.*, to disseminate information about property for sale, in hopes that one or more might be interested in buying the property in question. To negotiate a listing means to make a contract to help advertise or promote that property. In other words, these terms mean "calling or—or talking to people." Boden Dec. Ex. 1 at 23:23. That is why the licensing requirement is an unconstitutional content-based speech restriction and a prior restraint on speech.

C. The Prohibition on "Procuring Prospects" and "Negotiating Listings" Is a Content-Based Speech Restriction and a Prior Restraint on Speech

1. The Prohibition Is a Content-Based Speech Restriction

Although the government may regulate conduct, it may not climb over the wall of the First Amendment by classifying speech as conduct and regulating it that way. *Holder*, 561 U.S. at 4; *Thompson*, 535 U.S. at 370; *Cohen*, 403 U.S. at 18; *Sorrell*, 131 S. Ct. at 2666. Ms. Young creates advertisements and disseminates information about FSBO property, by placing that information into

[8] This is why *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), is inapplicable. That case involved a regulation of precious metals dealers, and the court ruled that the "case does not turn on advertising or solicitation," but "on whether the business in question holds itself out to the public, which can occur by posting a sign, placing goods in an open window, *simply conducting business in a manner that is visible to the public, or otherwise making its wares available*." *Id.* at 697 (emphasis added). Here, by contrast, the business *is* advertising. Thus while the regulation in *Goodman* would apply even to a person who did not speak—who simply placed its goods in a store window—the licensing requirement in this case *does* "turn on advertising or solicitation" alone. Advertising or solicitation simply *are* the business; they are what customers pay for. *Cf. Argello*, 143 F.3d at 1153 ("speech itself is what the 'client' is paying for."). Ms. Young's "goods" and "wares" are *advertisements*. As Director Lemon testified, the Commission issued Ms. Young the two Cease and Desist Orders based solely on the advertisements. Boden Dec. Ex. 1 at 19:6-23.

a computer database from which advertisements are created by websites like Forsalebyowner.com and Realtor.com. The Commission regards this as conduct—specifically, as "procuring prospects" and "negotiating listings"—but that cannot satisfy the First Amendment.

In *Sorrell*, Vermont businesses that assembled and sold information about medical prescriptions challenged the constitutionality of a law that prohibited the sale of such information, or the disclosure or use of that information for "marketing purposes." *Id*. at 2660. The state claimed that it was only regulating conduct. *Id*. at 2666. But the Supreme Court held that First Amendment scrutiny was appropriate because "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id*. at 2667. The restriction was a content- and speaker-based restriction on the availability and use of information, which violated the First Amendment. *Id.* at 2667, 2672. Although the state claimed that the restriction advanced important interests in protecting patient privacy and regulating the medical profession, the Court found that the law was not sufficiently narrowly tailored, because it allowed the businesses to share the information "for any reason save one: They must not allow the information to be used for marketing." *Id*. at 2668. This meant that the information could be exchanged "by all but a narrow class of disfavored speakers." *Id.* This meant that the restriction was a content- and identity-based burden on speech, and subject to strict scrutiny.

The licensing requirement here works the same way. Although the Commission claims that it is only regulating conduct, the prohibition on "procuring prospects" and "negotiating listings" means that it is illegal for a person to email one's work colleagues about a neighbor's house for sale, Boden Dec. Ex. 1 at 30:23-31:3, or (in Director Lemon's words) "call[] or—or talk[] to people, saying, 'I have this property for sale you may be interested in.'" *Id*. at 23:20-25. The *Sorrell* Court concluded that the Vermont law was "a content-based rule akin to a ban on the sale of cookbooks,

laboratory results, or train schedules," because it prohibited the transmission of information by reference to the content of that information—*i.e.*, whether it was information about drug prescriptions that identified the prescriber. 131 S. Ct. at 2666. And in *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1404 (8th Cir. 1995), the Court of Appeals found that a sign ordinance was unconstitutionally content-based where it imposed various limits on political signs, but not on signs with other content.

Likewise here, the statute prohibits a person from "attempt[ing] to negotiate the listing . . . [of] any real estate" for sale in Nebraska, Neb. Rev. Stat. § 81-885.01(2), or from "procuring prospects . . . for the listing . . . of any real estate" for sale in Nebraska. The licensing requirement applies only to the sale of real estate, and not to any other subject matter a person might speak about. Thus, for example, a person may "procure prospects" for other items, by advertising, say, a car or a mobile home for sale, without being licensed. A person could email her work colleagues about furniture for sale, or Girl Scout cookies for sale, without being licensed, *cf.* Boden Dec. Ex. 1 at 30:23-31:3, and could call a friend who's looking for a television set or a cell phone and tell him that a neighbor is selling his television or cell phone, and would not be required to get a license. *Cf. id.* at 27:1-20. But to do these same acts with regard to real property for sale is illegal without a license. Thus the licensing requirement is a content-based speech restriction "because it makes impermissible distinctions based *solely* on the content or message conveyed." *Whitton*, 54 F.3d at 1404. *See also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (Arizona law prohibiting people from soliciting work by standing on the sidewalk with signs was a "classic example[] of [a] content-based restriction" because it "target[ed] one type of speech—day labor solicitation . . . but [said] nothing about other types of roadside solicitation and nonsolicitation speech.").

The *Sorrell* Court also found that the Vermont law was an *identity*-based restriction on speech because it applied only to persons who exchanged information for compensation or for marketing purposes. 131 S. Ct. at 2665. The licensing restriction here does the same thing—a person is only required to get a license if he or she communicates information to the public about real property *for compensation*. A person who communicates the very same information about property for sale—whether FSBO or not—is allowed to do so if that person is not paid. Likewise, close relatives or trustees, or FSBO owners themselves, may advertise property even if they *are* compensated. But a person like Ms. Young, who is paid to promote the sale of property, is prohibited from doing so. And licensed real estate brokers are also forbidden to promote the sale of FSBO properties. 299 Neb. Admin. Code § 2-004. Therefore, like the Vermont law, the Nebraska statute is akin to—no, in fact, it *is*—a ban on real estate advertising that applies only to specific persons, but allows others to communicate the same information for the same purposes. The prohibition turns entirely on the identity of the speaker. It is therefore an identity-based speech restriction.

2. The Statute Imposes a Prior Restraint on Speech

Prior restraints—laws which require a license before a person may engage in speech—are subject to the strictest form of First Amendment scrutiny. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). Requiring a person to obtain a license before speaking is a prior restraint on speech because "it makes the exercise of protected expression contingent upon obtaining permission from government officials." *Books, Inc.*, 978 F. Supp. at 1254; *see also United Youth Careers, Inc. v. City of Ames, Iowa*, 412 F. Supp. 2d 994, 1003 (S.D. Iowa 2006).

Such pre-approval requirements "are the form of regulation most difficult to sustain under the First Amendment." *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F.3d 1128,

1134 (8th Cir. 1999). They are constitutional only where it is narrowly tailored to serve an important public interest, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002), and only if they provide "narrow, objective, and definite standards to guide licensing authorities." *City of Ames*, 412 F. Supp. 2d at 1003-04. The licensing requirement here fails these tests.

The law is not narrowly tailored because it prohibits more speech than necessary to accomplish the state's interest in protecting consumers from improper real estate brokerage practices. It prohibits speech even by non-brokers like Ms. Young and the many other recipients of Cease and Desist Orders—even where they make it clear to consumers that they are not real estate brokers and do not provide brokerage services. The prohibition applies regardless of the accuracy and truthfulness of the speech, or the honesty or reliability of the speaker. The Commission also forbids licensed professional real estate brokers from publishing FSBO advertisements. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12.

The licensing requirement also prohibits *less* speech than necessary, because FSBO homeowners themselves are allowed to advertise their own property without a license, and trustees or relatives of property owners can advertise the property of *another* person for sale without obtaining a license. Neb. Rev. Stat. § 81-885.04(1), (3), (4). If, as the Commission claims, the purpose of licensure is to protect the public from false or misleading advertising, these exemptions are irrational, since these people could all publish false or misleading information about homes for sale.

Finally, the prior restraint does not include narrow, objective, and definite standards to guide licensing authorities. As explained in the next section, the licensing statute is vague and

unintelligible even to the Commission itself, which cannot define "procuring prospects" or "negotiating a listing"—and which therefore simply bars advertising across the board.

III

THE LICENSING REQUIREMENT IS VAGUE AND OVERBROAD

A. A Person Exercising Common Sense Cannot Decipher What Is "Negotiating a Listing" or "Procuring Prospects"

The Commission is correct in saying that a law is unconstitutionally vague if "[a] person exercising common sense [can] not decipher whether his or her activities are proscribed." Def's MSJ at 29. The undisputed evidence here shows that not only is an ordinary person unable to decipher what activities are not proscribed, but neither can the Director of the Nebraska Real Estate Commission.

A licensing requirement "which operates to restrain the exercise of First Amendment freedoms must have narrow, objective and definite standards to guide the licensing authority. Precision of regulation must be the touchstone where First Amendment rights are involved." *Int'l Soc'y for Krishna Consciousness, Inc. v. Engelhardt*, 425 F. Supp. 176, 180 (W.D. Mo. 1977) (citations omitted). In deciding whether a law is unconstitutionally vague, courts consult "the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct." *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1255 (8th Cir. 1981) (citation omitted). Here, the statute does not define the terms "procure prospects" or "negotiate listings"; nor does any regulation, court decision, or other written authority. *Cf. id.* (law was unconstitutionally vague where "[n]o legislative or administrative definitions ha[d] been made of the [statutory] phrase[s]," and where there were no "interpretation[s] of the phrase[s] by . . . state courts.").

In deposition, Director Lemon was asked a series of questions about what constitutes real estate brokerage under the statute, and he was unable to answer them. For example, when he was asked "If a licensed real estate broker is paid to put a for-sale-by-owner house on a MLS, did he or she violate the law?" he answered, "I don't know that we've ever—if we've ever—I don't know. We—that's a policy question we have not—we have not provided a ruling on." Boden Dec. Ex. 1 at 44:23-45:4. When he was asked whether a it is illegal for a person to accept money to call a friend and tell the friend that a house is for sale, Director Lemon answered "Possibly, but, once again, we haven't—we haven't made a determination on a fact scenario in—in that particular, you know, family of facts." *Id*. at 50:15-25. Presented with a series of hypothetical advertisements, Director Lemon repeatedly said he could not answer whether or not they constituted "real estate brokerage," because the Commission had not made formal determinations about such matters. Boden Dec. Ex. 1 at 45:25-46:5, 44:23-45:4, 47:15-19, 49:15-22, 70:4-6; Sandefur Dec. Ex. 1 at 63:10-24. Indeed, Director Lemon could not even made an educated guess as to what activities are or are not proscribed:

> Q: If my neighbor is selling his house on a for-sale-by-owner basis and he pays me to call up a friend and tell him that my neighbor's house is for sale, then did I act as a referral agent . . . ?
>
> A: I don't know that we've made a policy determination on that particular issue.
>
> Q: Okay. You don't have an opinion on that?
>
> A: No. I—no.

Boden Dec. Ex. 1 at 49:16-24. The Defendants identified Director Lemon as the "person most knowledgeable" about the licensing requirements pursuant to Fed. R. Civ. P. 30(b)(6), and he testified on behalf of the Commission itself. He is the Commission's Executive Director and the chief enforcement officer for the licensing requirement. He is alone responsible for issuing Cease

and Desist Orders when, in his judgment, he determines that a person is in violation of the licensing law. *Id.* at 14:1-10.

Yet Director Lemon's inability to decipher what activities are proscribed is unremarkable, given the lack of definitions in the statute. The Commission purportedly decides what the statute proscribes at its rare disciplinary hearings, but it does so in an *ad hoc* fashion, without any written guidance, *id.* at 18:3-22, and the record shows that the Commission itself cannot decipher what activities are proscribed. At the disciplinary hearing for Carl Wuestehube—the only hearing it has convened in five years—the Commissioners expressed confusion about what conduct violates the law. Boden Dec. Ex. 20. Director Lemon himself disagreed with some of these views in his deposition. For example, Commissioner Barton stated at the Wuestehube hearing that a person must have a license in order to put an advertisement into an MLS, but Director Lemon disagreed, saying that a license would not be required for this. Sandefur Dec. Ex.1 at 40:18-42:25.[9]

Even in its summary judgment motion, the Commission is confused about what activities the licensing requirement proscribes. Although it insists that Ms. Young "is not prevented from speaking or advertising," that is not true. Def's MSJ at 37. The Commission has repeatedly ordered mere advertisers to cease advertising property on the grounds that (to quote language that appears in many Cease and Desist Orders), "*advertising for sale* . . . real property located in the State of Nebraska" requires a license. Boden Dec., Ex. 10 (emphasis added); *see also* Boden Dec., Exhibits 9, 14, 15, 16, 17; Young Dec., Exhibits 2 and 3. And although the Commission's motion says that "*[i]f licensed, [Ms. Young's] speech would not violate the Act*," Def's MSJ at 37, this is

[9] The Wuestehube litigation ended without resolving this question; a state court held that Wuestehube was procedurally barred from challenging the Commission's determination that he had violated the statute. Boden Dec. Ex. 19.

also not true. Nebraska law prohibits a person with a license from advertising FSBO properties. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12.

A law is unconstitutionally vague if it fails to "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Berger v. United States*, 200 F.2d 818, 821 (8th Cir. 1952). Thus in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980), the court found a city ordinance prohibiting the sale or possession of "drug-related" devices to be unconstitutionally vague. That ordinance included an extensive definition section, *see id*. at 28-29, but the characteristics identified in the ordinance's definition "[did] not have a common understanding developed at law." *Id*. at 29. As a result, it was unclear what sorts of devices and what sort of behavior was proscribed. Because the ordinance "fail[ed] to provide definiteness," it was unconstitutional. *Id*. In *Postscript Enterprises*, 658 F.2d at 1251, the court found a prohibition on the sale of "sex-inciting device[s] or contrivance[s]" and prophylactics was unconstitutional because these terms were undefined, so that "'[persons] of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Id*. at 1256 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).[10]

Courts apply even stricter standards in vagueness challenges that, like this one, involve First Amendment rights. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 474 (8th Cir. 1991) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). Thus in *Bell v. Keating*, 697 F.3d 445 (7th Cir. 2012), the court held that a city's disorderly conduct ordinance was unconstitutionally vague because it failed to specify what types of expression were prohibited. As a result, the ordinance caused a chilling effect on speech. The ordinance's vagueness

[10] *Geiger*, *Berger*, and *Postscript Enterprises* involved criminal laws, but a violation of Neb. Rev. Stat. § 81-885.01 is also a criminal offense punishable by fines and incarceration. Neb. Rev. Stat. §§ 81-885.10; 81-885.45, 28-106(1).

"compound[ed] [the Plaintiff's] chilling claim," the court explained, because "when one cannot know what triggers the ordinance such that it will be enforced, he may fairly assume that . . . total abstention from the protected activity is necessary to avoid . . . prosecution." *Id.* at 455. This is the chilling effect the First Amendment proscribes.

Here, the licensing statutes make it illegal to "procure prospects" or "negotiate listings" without having a license, yet these terms are undefined and have no ordinarily accepted common meaning, so that persons of ordinary intelligence cannot know what qualifies as "procuring prospects" or "negotiating listings." Even the Commission members and Director Lemon do not know what these terms mean, and have differed as to their application. Sandefur Dec. Ex. 1 at 40:18-42:25.[11]

The licensing statute is therefore unconstitutionally vague—except in the sense that the Commission, in practice, interprets the statute to prohibit advertising, so that a person considering whether to publish a real estate advertisement in Nebraska would be best advised to simply remain silent, rather than risk punishment. This is exactly the sort of "chilling effect" that results from unconstitutionally vague restrictions on speech. *Cornerstone Bible*, 948 F.2d at 474; *Bell*, 697 F.3d at 455.

Nowhere in its Motion does the Commission make any effort to define "negotiate a listing" or "procure prospects." Instead, it focuses on the question of whether Ms. Young's use of the term "advertising broker" is legal. That question—which is subject to the much different commercial speech analysis discussed below, Section IV—is not relevant here. Here, the question is whether the statute's prohibitions on "negotiating listings" or "procuring prospects" are sufficiently clear that a

[11] The Commission has never issued any policy determinations defining the statutory terms, and even if it did, such determinations would not cure the law's vagueness, since they have no precedential effect in Nebraska. *State ex. rel. Stenberg v. Murphy*, 247 Neb. 358, 367 (1995).

person can predict what conduct is and is not proscribed. The record reveals that the answer is no. The statute is unconstitutionally vague.

B. The Overbroad Speech Restriction Chills Speech by Others Not Before the Court

A restriction on speech is unconstitutionally overbroad if in addition to its plainly legitimate reach, it also prohibits constitutionally protected free speech. *Grayned*, 408 U.S. at 114. The overbreadth doctrine "permits 'an individual whose own speech or conduct may be prohibited . . . to challenge a statute on its face because it also threatens others not before the court," so as "[t]o prevent the chilling of protected First Amendment interests." *SOB, Inc. v. Cnty. of Benton*, 317 F.3d 856, 864 (8th Cir. 2003).

The Commission may regulate the real estate profession to protect consumers against unfair business practices, to ensure lawful competition and honest dealing, and the other purposes listed in its motion. But the Commission may not do so in a manner that chills constitutionally protected speech.

In determining whether a speech restriction is overly broad, courts consider the statutory terms, any formal interpretations of those terms by administrative agencies, and the possibility of a narrowing construction based on "consistent enforcement history." *United Food & Commercial Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 432 (8th Cir. 1988). The Court will also consider whether the state's legitimate goals could be accomplished in a way that would impose less of a restriction on speech. *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221 (8th Cir. 1998).

Here, there is no formal administrative interpretation in the form of a regulation which defines the statute or narrows its terms. The consistent enforcement history demonstrates that the Commission interprets the statute extremely broadly. Director Lemon testified that "[p]rocuring

prospects" is a "broad[]" concept that "can [refer to] procuring prospects; procuring potential business for a—for a licensee, whether that be listing property, a—a purchaser, a seller, a lessor. Anybody on any side of the transaction could be a prospect." Sandefur Dec. Ex. 1 at 25:19-24. And the state's legitimate goals could be accomplished by less restrictive means, such as enforcing existing prohibitions against fraud, or regulating the practice of real estate brokerage instead of speech about it, or imposing a disclosure requirement instead of censoring advertising.

In *Village of Stratton*, 536 U.S. 150, the Supreme Court held that a licensing requirement for door-to-door solicitors was unconstitutionally overbroad because it barred far more speech than necessary to advance the city's legitimate interest in protecting citizens from harassment or crime. 536 U.S. at 168. "Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions," the Court held, "that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes." *Id*. Like the licensing requirement in that case, Neb. Rev. Stat. § 81-885.01 and its accompanying regulations prohibit far more speech than necessary to achieve the state's legitimate interests in protecting consumers, and the law threatens to sweep in a broad range of speech that has nothing to do with real estate brokerage.

As noted above, Section II, the Commission interprets "procuring prospects" and "negotiating listings" as referring to speech activities—as communicating with others about properties for sale. Thus the Commission prohibits people who are not engaged *at all* in the practice of real estate brokerage from advertising property for sale.

For example, in 2007, an attorney asked the Commission if he could advertise FSBO property and then draft purchase agreements in his capacity as an attorney. The attorney never proposed to call himself a licensed broker. Yet the Commission answered that he would still need a real estate

broker license because "customers would be solicited through advertising . . . . The [statute] . . . would be violated because the advertising done at your website is not done under the supervision of [a licensee]." Boden Dec., Ex. 14. The Commission declared that "[t]he marketing of properties" and "advertising . . . property for sale" required a real estate broker license. *Id.*

Director Lemon testified that "[h]elping somebody find a potential purchaser," by, for example, "calling or—or talking to people, saying, 'I have this property for sale you may be interested in,'" would constitute "procuring prospects" and would be illegal without a license. Boden Dec., Ex. 1 at 23:20-25. He testified that a person who telephones a friend about a property for sale, or emails colleagues at work about a property for sale (and accepts money for doing so) would be in violation of the law. *Id.* at 30:23-31:7, 27:23-28:21, 23:23-25. And he testified that other speech acts "might" violate the statute, although he was unable to say for certain, given the law's vagueness. For example, a person who distributes fliers advertising an FSBO property, with a third party's name and telephone number on the flier, "might on its face be a—a violation." Sandefur Dec. Ex. 1 at 28:22-30:20. Also, a person who posts an FSBO property on her Facebook page "might" be in violation. *Id*. at 64:10-18. *See also id*. at 56:21-57:16; Boden Dec. Ex. 1 at 27:1-17.

But the statute is actually *even broader than this*. It prohibits not only "procuring prospects" but "*assist[ing] in* procuring prospects," and prohibits not only "negotiating listings," but also "*attempt[ing]* to negotiate a listing." Neb. Rev. Stat. § 81-885.01(2) (emphasis added). Thus simply *contacting* a person *in an effort* to arrange an advertising agreement would be a violation, even if no such agreement is ever made. And helping a person who is seeking prospects—by informing that person of where a prospect might be found—would also be prohibited. *Cf.* Boden Dec. Ex. 1 at 23:9-11 (defining "negotiating" as "the conversations that take place discussing the terms under

which the listing would occur."). Given that the terms "negotiating listings" and "procuring prospects" are already vague and undefined, these expansive "attempt" provisions stretch the already overly broad statute to sweep in speech activities far beyond the statute's legitimate reach.

When asked what "assist" means, Director Lemon answered that it would be illegal "[t]o assist in marketing, to assist in negotiations, to assist in many of the things that are referenced in the statute here . . . to assist with the necessary paperwork with—which a typical member of the public would not be—would not have or be aware of what they needed." Boden Dec. Ex. 1 at 21:14-23. Asked to clarify, he answered that it might even be illegal to help a person to prepare an advertisement for his own FSBO property. If a person "provid[es] general advice and assistance on the sale . . . of property," Sandefur Dec. Ex. 1 at 37:12-13, or "if in the advertis[ement] the person assisting was mentioned as the—the third-party intermediary or contact for that transaction or potential transaction," *id*. at 38:20-23, the person could be in violation of the licensing statute, even if that person is not engaged in real estate brokerage.

Consequently, if a person who can hear assists a deaf friend by putting his own phone number on a flier that advertises the friend's property for sale, *see* Sandefur Dec. Ex. 1 at 38:15-23, or if a person helps a neighbor who does not have a computer by putting his own email address on the neighbor's real estate advertisement, *see* Boden Dec. Ex. 1 at 31:8-16, such a person could be subject to civil and criminal penalties. A person who "call[s] or—or talk[s] to people, saying, 'I have this property for sale you may be interested in,'" *id*. at 23:20-25, or who emails work colleagues that her neighbor's house is for sale, would be in violation. *Id*. at 27:1-20, 30:23-31:7. A person who provides "general advice" to a seller could be in violation. Sandefur Dec. Ex. 1 at 37:12-13. The Commission even says in its motion for summary judgment that in its view, "a newspaper could not post properties for sale on Realtor.com unless the newspaper had a broker's license." Def's MSJ

at 54. And, again, *licensed* brokers are also banned from publishing FSBO advertisements. Boden Dec. Ex. 1 at 22:10-12. Commission regulations prohibit licensees from advertising a property "in a manner indicating that the offer to sell . . . is being made by a private party not engaged in the real estate business." 299 Neb. Admin. Code § 2-004. If the purpose of restricting the advertisement of real estate is to ensure that people who advertise it are licensed and educated as real estate brokers and thus to protect consumers from incompetence or dishonesty, then the restriction goes further than necessary.

The Commission could advance its legitimate interest in consumer protection by imposing disclosure requirements or prosecuting false advertising. Indeed, false advertising is already illegal. *See* Neb. Rev. Stat. § 28-1477. Instead, the licensing requirement prohibits an indefinite and vaguely defined range of activities, all having to do with communicating information to the public—including merely putting one's email address on a friend's FSBO flier, *see* Sandefur Dec. Ex. 1 at 38:15-23, or even just "talking to people." *See* Boden Dec. Ex. 1 at 23:20-25. The licensing requirement is therefore unconstitutionally overbroad.

IV

LESLIE YOUNG HAS THE RIGHT TO CALL HERSELF AN ADVERTISING BROKER

A. The Commission May Not Ban Ms. Young's Commercial Speech on the Theory That It "Might" Be Confusing

While the FSBO ads Ms. Young helps publish are pure speech and not commercial speech, *see Forsalebyowner.com*, 347 F. Supp. 2d at 875-6, her use of the term "advertising broker," and the appearance of words like "Leslie Young Real Estate Advertising Services," or "presented by" on the ads are commercial speech, because they are self-descriptive terms which refer to Ms. Young's own business. *See In re R. M. J.*, 455 U.S. at 207 (attorney's self description as licensed to practice

before the Supreme Court was commercial speech); *Peel*, 496 U.S. at 99-100 (self-descriptor "CPA" was commercial speech); *Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) (same).

The Commission correctly notes that the First Amendment protects commercial speech under a four-part test: (1) if the speech concerns lawful activity and not actually or inherently misleading, then the state may regulate it if (2) the state's interest in doing so is substantial, (3) the restriction directly advances that interest, and (4) the regulation is no more restrictive than necessary to achieve that interest. *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 842 (8th Cir. 2006) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). The Commission, not Ms. Young, bears the burden of justifying its restrictions. *Id*.

The Commission claims that it is "unlawful and misleading" for Ms. Young to describe herself as an "advertising broker" and for terms such as "view agent's other listings," or "email agent," or "Presented by Leslie Young Real Estate Advertising Services," etc., to appear on her advertisements. *See* Def's MSJ at 33. But this is incorrect. Except insofar as the Commission unconstitutionally forbids FSBO advertising, it is not "unlawful activity" to advertise real estate. It is undisputed that a property owner, at least, may advertise his own home for sale. Neb. Rev. Stat. § 81-885.04(1). And although the Commission prohibits people from assisting in such advertising, that prohibition is unconstitutional. So the Commission cannot rely on it to establish that Ms. Young's advertising business is "unlawful."

In *Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009), the state offered a similar argument in defense of a law that required interior designers to obtain a license before describing themselves as "interior designers." It argued that because the state had created a licensing requirement for interior designers, the use of that term would mislead the public into thinking the person was licensed; therefore such speech concerned unlawful activity. The court held that this was a "circular

argument," which "prove[d] too much, as it would authorize legislatures to license speech and reduce its constitutional protection by means of the licensing alone." *Id*. at 447. So, too, the Commission cannot rely on the unconstitutional prohibition on real estate advertising to contend that Ms. Young engages in unlawful activity when she refers to herself as an advertising broker. That argument would prove too much, as it would allow the state to censor speech and then use that very prohibition as proof of the constitutionality of the censorship.

The Commission complains that Ms. Young "feels it is perfectly acceptable to label herself as an 'advertising broker.'" Def's MSJ at 15. But she has a constitutional right to accurately describe her business, *Peel*, 496 U.S. at 99-100; *Byrum*, 566 F.3d at 447, and she is, in fact, an advertising broker. Advertising brokers obtain orders for advertising and then place advertisements in publications. *See, e.g.*, *Ad Associates*, 2005 WL 3372968, at *1. Their customers are people who wish to place advertisements, and who hire the advertising broker to gain a larger audience for those advertisements. *Id*. *See also In re Berman*, 629 F.3d 761, 764 (7th Cir. 2011) (case involving "advertising broker"); *Meek Co. v. Rohlff*, 91 Neb. 298, 301 (1912) (same); *see also* Anders Olsson, *Understanding Changing Telecommunications: Building a Successful Telecom Business* 116 (2003) ("[t]he advertising broker is the link between the advertiser and the user that makes sure that the right advert reaches the right user.").

Still, the Commission argues that Ms. Young may not use the word "broker" because doing so could *potentially* mislead consumers. For example, the Commission states that it "*might* confuse the public." Def's MSJ at 37 (emphasis added) (citing Lemon Deposition 57:24).[12] But there is no evidence that any person was ever *actually* confused about Ms. Young's services. Young Dec. ¶¶ 7,

[12] Director Lemon testified that he "[didn't] know" whether the term "advertising broker" is misleading "'cause I don't know what that means." Sandefur Dec. Ex. 1 at 57:17-20.

16. Director Lemon testified that he was aware of no consumer complaints. Boden Dec. Ex. 1 at 73:15-18. When asked directly, "Have you ever received complaints that somebody was misled into thinking that Leslie was a real estate broker?" he answered, "Not that I'm aware of." *Id.* at 73:11-18.

Potentially misleading commercial speech is treated differently than *actually* misleading commercial speech. The Supreme Court has made clear that "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R. M. J.*, 455 U.S. at 203. Indeed, where the consumer is likely to clear up any confusion on his own, the Court has even held that imposing a disclosure or disclaimer requirement is unnecessary. *Peel*, 496 U.S. at 110.

In *Miller*, 117 F.3d 1376, an accountant was prohibited from employing the term "CPA" to describe himself because state law prohibited anyone who worked for a firm owned by non-CPAs from practicing "public accountancy"—although such a person was still allowed to perform accountancy services. 117 F.3d at 1379-80. In other words, while a person could practice accountancy, he could not say so to the public. When the plaintiff challenged this restriction on his commercial speech rights, the state argued that it would be misleading for him to use the CPA designation because it could lead consumers to think that he was "providing regulated public accounting services associated with CPAs when in fact he is providing services that any non-CPA can provide." *Id*. at 1383. But the state "failed to produce any empirical evidence showing consumers will be misled," and "relied solely on 'speculation and conjecture' to support its assertion" that using the term CPA was misleading. *Id*. The court found that this was insufficient. "[A] disclaimer or some other form of additional disclosure," the court found, would be "a narrower

limitation that would allow [the] Plaintiff . . . to hold himself out as a CPA in a non-misleading manner." *Id.*

So, too, in this case, Ms. Young's truthful description of herself as an "advertising broker" and the appearance of terms like "Presented by Leslie Young Real Estate Advertising Services," or "view agent's other listings" or "email agent"[13] on the ads are at most only *potentially* misleading, and the Commission has produced no empirical evidence showing that consumers were or will be misled. On the contrary, not only was Director Lemon aware of no evidence of any actual confusion, but it is extremely unlikely that anyone *would* be confused, since Ms. Young's contracts with FSBO sellers make clear that she provides only advertising services, and potential buyers have no way to contact her. Young Dec. ¶¶ 7, 15. The advertisements connect potential buyers directly to FSBO sellers, either through a weblink that directs emails to the FSBO seller, or through a telephone number that connects directly to the FSBO seller. *Id.* ¶¶ 12-15. If a prospective buyer wanted to contact Ms. Young for brokerage services, that person would be unable to do so—he or she would be directed to Ms. Young's website, eList.me, which prominently displays the words "Advertising Services," and says "We provide advertising for Seller's [*sic*] and their Attorneys in fact, Attorneys at law and their local licensed agent or broker," Young Dec., Ex. 4, and "We are a Leading Online Advertiser providing UNSURPASSED internet exposure!" *Id*. Ms. Young linked to eList.me and used the terms "advertising broker" and "Leslie Young Real Estate Advertising Services" on her ads precisely to *prevent* any possible confusions. *Id.*

In defending its restriction on her commercial speech, the Commission *explicitly* "relie[s] solely only speculation and conjecture" *Miller*, 117 F.3d at 1383, that a consumer "*might*" be misled.

[13] This phrase appeared as a clickable weblink which emailed directly to the FSBO seller, not Ms. Young. Young Dec. ¶ 12.

Def's MSJ at 37 (emphasis added). This is insufficient to justify its total prohibition on her use of the terms in question—especially when one considers the unlikelihood of confusion, in light of the foregoing facts. *Cf. Peel*, 496 U.S. at 110 (where "the consuming public understands" that certification is issued by private entity, use of the term "certified" was not sufficiently misleading to justify ban).

The Commission's prohibition on Ms. Young's advertising also fails the rest of the test for commercial speech protections. Although the state has a substantial interest in regulating the practice of real estate brokerage, it does not have a substantial interest in regulating online advertising by persons who do not practice real estate brokerage. This is shown by the fact that the law allows people to sell their own homes without a license, Neb. Rev. Stat. § 81-885.04(1),[14] and allows people to advertise other people's homes for sale if they are trustees, or close relatives, or if they are unpaid. Neb. Rev. Stat. § 81-885.01(2); § 81-885.04(3), (4).

The state's interest in protecting consumers is also not substantially advanced by imposing a licensing requirement on Ms. Young. The Commission lists the state's interests on page 35 of its brief, and they all relate to the practice of real estate brokerage: to "insure clean competition" and "honest square dealing," to "be sure that capable and honorable persons handle the business of the Real Estate Profession," to "license only trustworthy legitimate agencies and brokers," etc. None of these purposes are advanced by requiring someone who is engaged only in the advertising business to obtain a real estate broker's license. The state cannot advance its interest in regulating the real estate profession by regulating a different profession; to paraphrase *Forsalebyowner.com*,

[14] The exemption also allows corporations to sell corporate real property without a license, and imposes no dollar restriction or limit on the number of times a person or corporation may do so. *Id.*

347 F. Supp. 2d at 879, the Commission has not shown that imposing a licensing requirement on FSBO advertisers will do anything to prevent or regulate any potential improprieties.

Finally, forcing Ms. Young to obtain a real estate broker's license is more restrictive than necessary, for two reasons. First, if she were to obtain a license, *she would be prohibited from advertising FSBO properties*. 299 Neb. Admin. Code § 2-004. The Commission's claim that "*[i]f licensed, her speech would not violate the Act*," Def's MSJ at 37, is just not true, as Director Lemon made clear in deposition:

Q: "Is it legal for a licensed broker to advertise for-sale-by-owner properties?"

A: "No."

Boden Dec. Ex. 1 at 22: 10-12.

Second, prohibiting Ms. Young from using terms like "advertising broker," "Leslie Young, Real Estate Advertising Services," "brokered by eList.me," and so forth, restricts substantial truthful speech. In *Byrum*, the court found that for the state to prohibit a person from calling himself an "interior designer" when he did practice interior design was unconstitutional because that prohibition "prohibits significant truthful speech." 566 F.3d at 448. The designers "[did] not propose to claim training, certification, or licenses they do not possess," but "merely wish[ed] to use the words 'interior designer' or 'interior design' to accurately describe what they do." *Id*. Although the state could prohibit unlicensed persons from representing themselves as "licensed," *id*. at 449, banning the use of the term "interior designer" was not a reasonable fit between the regulation and the state's consumer-protection interest. *See also Parker v. Commonwealth of Ky., Bd. of Dentistry*, 818 F.2d 504, 511 (6th Cir. 1987) ("an outright ban on the use of specific, nonmisleading terms is simply not narrowly tailored to meet the state's [consumer protection] concern."). In the same way, Ms. Young does not describe herself as a licensed real estate broker, but merely wishes to describe herself,

truthfully, as an "advertising broker," and allow words like "Presented by Leslie Young Real Estate Advertising Services" to appear on her advertisements. She does not claim to practice real estate brokerage, but merely to accurately describe eList.me as an advertising business, and to allow her name to appear on her FSBO ads. The outright ban on her advertising is not narrowly tailored to meet the state's concerns.

The Commission's ban on Ms. Young's commercial speech is therefore unconstitutional.

B. The State May Not Confiscate the Use of Her Name or the Word "Broker"

The Commission repeats so often its claim that Ms. Young "called herself an 'agent' and a 'broker,'" Def's MSJ at 47; *see also id.* at 44, 48, 53, that one might assume that the law prohibits a person from using these words. It does not. The statute prohibits a person from "negotiat[ing] . . . listing[s]," "procuring prospects," or from "hold[ing] . . . herself out as engaged in any of the foregoing." Neb. Rev. Stat. § 81-885.01(2). But the statute is not a "titling" statute which prohibits a person *per se* from using a certain word, such as "broker," without a license. *See Byrum*, 566 F.3d at 448-49.[15]

Obviously it would be improper for Ms. Young to call herself a licensed Nebraska real estate broker when she is not. See Def's MSJ at 15. She does not do so. But to forbid Ms. Young from calling herself an advertising broker simply because the word "broker" appears in both phrases is illogical. That would be like saying that a person with a Ph.D. is practicing medicine without a license if she calls herself "Doctor," or that a person is engaged in the unlicensed practice of law if he says that he holds a person's "power of attorney."

[15] Even if it were, titling statutes violate the First Amendment. *See id.* (citing cases).

The real question here is whether the term "advertising broker" and other such terminology are actually or inherently misleading. A common-sense reading of the statute shows that it was intended to prevent a person from leading consumers to believe that he negotiates real estate transactions, shows homes, gives tailored advice to clients, auctions property, receives commissions, or engages in other traditional real estate broker activities, if that person is not licensed to do so. Ms. Young does none of these things, and has never misled the public into thinking she did. Her contracts with FSBO sellers make plain, in boldfaced capital letters, that **"THIS AGREEMENT IS FOR AN MLS ENTRY LISTING ONLY for the sole purpose of advertising. Broker does not perform real estate services outside the State of California. Broker is performing data entry into the MLS system. NO OTHER CONTRACT, FIDUCIARY RELATIONSHIP, AND/OR OBLIGATION IS BEING CREATED HEREIN."** Young Dec. Ex. 1. Thus FSBO sellers were not misled. Nor were potential buyers. The advertisements were labeled "Leslie Young Real Estate Advertising Services," or similar, and they contained not her email address or telephone number, but the email addresses and telephone numbers of the FSBO sellers themselves. Young Dec. Ex. 2 at NREC00753. The the eList.me website itself—which a viewer would go to if he or she wondered whether Ms. Young was a real estate broker—explains that she is not and that she provides only advertising services. Young Dec. Ex. 4. The Commission can only intimate that Ms. Young does something improper by going out of its way to isolate the words "broker" and "agent" completely from their context—words which never did appear in isolation on any of Ms. Young's advertisements—and make it seem that she deceived the public. Yet even Director Lemon admitted that there is no evidence that anyone was deceived or even that anyone complained. Boden Dec. Ex. 1 at 73, 15-22.

V

REQUIRING MS. YOUNG TO OBTAIN A REAL ESTATE BROKER LICENSE WOULD VIOLATE HER DUE PROCESS AND EQUAL PROTECTION RIGHTS

A. Requiring an FSBO Advertiser to Obtain a Real Estate Broker License Is Not Rationally Related to a Legitimate Government Interest

The Commission argues that its typical enforcement proceeding provides sufficient procedural due process. Def's MSJ at 41. That is not at issue. Instead, Ms. Young contends that the licensing requirement deprives her of her right to pursue her chosen occupation as an advertiser, but is not rationally related to a legitimate government interest. *See Craigmiles v. Giles*, 110 F. Supp. 2d 658, 663 (E.D. Tenn. 2000), *aff'd* 312 F.3d 220 (6th Cir. 2002); *Cornwell*, 80 F. Supp. 2d at 1106.

Although the state can impose a licensing requirement on a trade to protect the public from dangerous or incompetent practitioners, such requirements must be rationally related to the person's "fitness or capacity to practice" that trade. *Schware v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232, 239 (1957). The Commission's claim that "[i]t cannot possibly be facially unconstitutional" to require Ms. Young to undergo the training and educational requirements to obtain a license, Def's MSJ at 40, is false. For over a century, courts have held that if a state imposes education, training, and testing requirements on a trade that are not related to that trade, or to the practitioner's skills, then those requirements violate the Due Process Clause. *Dent v. State of W. Va.*, 129 U.S. 114, 122 (1889) (licensing laws are unconstitutional "when they have no relation to [the] calling or profession."); *Schware*, 353 U.S. at 239 (same). In *Craigmiles*, the Sixth Circuit affirmed the district court's conclusion that it was irrational to require people who sold coffins to become licensed as funeral directors, when licensing required extensive training in embalming, grief

counseling, and other skills totally unrelated to the mere sale of coffins. 110 F. Supp. 2d at 663 ("the purpose of promoting public health and safety is not served by requiring two years of training to sell a box."). In *Cornwell*, the court found that it was unconstitutional to require people who braided hair to become licensed hairdressers—which required extensive education and training in hairstyling skills that hairbraiders never practiced. 80 F. Supp. 2d at 1106-18. The court observed that "while the State . . . has the undoubted latitude to define the practice and necessary skills of law and architecture," it would be "irrational" for the state "to require would-be lawyers and architects to take course work and pass a licensing exam in cosmetology." *Id.* at 1106. *See also St. Joseph Abbey v. Castille*, 712 F.3d 215, 225 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013) (extensive educational and testing requirements for coffin sellers violated due process).

For the same reason, it is irrational to require a person engaged in FSBO advertising to undergo education and testing requirements that have nothing to do with FSBO advertising before engaging in that trade. As detailed in Plaintiff's motion for summary judgment (pages 46-51), the educational curriculum for obtaining a Nebraska real estate broker's license includes virtually nothing relating to advertising, and literally nothing relating to FSBO advertising. Nor do the examples of licensing exams provided in discovery include any questions that relate to FSBO advertising. Boden Dec. Ex. 26. Finally, while the training does not include matter that *would* be relevant to Ms. Young's advertising business, it does include extensive study and testing on matters that are *not* related to her business. The curriculum and the examination are overwhelmingly devoted to matters relating to negotiating transactions, showing houses, holding client funds in escrow, and other real estate brokerage practices which Ms. Young does not perform. This is unsurprising, since the curriculum and the test are for *real estate brokers*, and Ms. Young is not a real estate broker. It therefore is irrational to require her to obtain a real estate broker's license.

The irrationality of the requirement is further highlighted by two facts: first, a person with a real estate broker license is not allowed to advertise FSBO properties. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12. Second, the exceptions to the licensing requirement are irrational.

Where a licensing requirement is riddled with exceptions that undermine the consumer-protection rationale for the licensing requirement itself, then the requirement may violate the rational basis test. *Merrifield*, 547 F.3d at 990-92. Under Neb. Rev. Stat. § 81-885.04(1), a person may advertise his own home on a for-sale-by-owner basis without having a license, and under Neb. Reb. Stat. § 81-885.01(2), he may advertise the home of another person, so long as he receives no compensation. Trustees, close relatives, and others, are also exempt from the licensing requirement even if they are paid. Neb. Rev. Stat. § 81.885.04(3), (4). Yet if the purpose of the licensing requirement is to protect consumers against false or misleading advertising, or other improper practices, it is irrational to include such exemptions. As the Court in *Merrifield* explained, "[w]e cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold . . . the exemption based on a completely contradictory rationale." 547 F.3d at 991.

Director Lemon testified that the reason for requiring people to obtain licenses in order to advertise homes for sale was because the education and training requirements would teach them what sorts of information is proper in an advertisement:

> I'll give you an example. One of the things a licensee would learn about in their classes is—is conforming and nonconforming bedrooms in a house . . . . Many times a house may have a bedroom in a basement that doesn't have proper egress in case of a fire or emergency; so a person without a license that wasn't aware of that might advertise something as being a bedroom.

Boden Dec. Ex. 1 at 77:6-14. Yet a homeowner—who might have a strong financial incentive to misrepresent his home in an FSBO ad—is nevertheless allowed to advertise without a license, as is any other person who receives no compensation. Neb. Rev. Stat. § 81-885.01(2); § 81-885.04(1). The statute also exempts corporations when selling corporate real property, regardless of the value. Thus a multimillion-dollar real estate transaction may have no licensee involved, in spite of the consumer protection rationale the Commission has advanced—while a person who simply distributes fliers advertising a neighbor's house with his own phone number on the flier would be in violation. Sandefur Dec. Ex. 1 at 38:15-23; Boden Dec. Ex. 1 at 31:8-16. Meanwhile, licensed Nebraska real estate brokers are *prohibited* from FSBO advertising. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12. If protecting consumers justifies restricting advertising to licensees, these exemptions—and the prohibition on FSBO advertising by licensees—demonstrates the irrationality of the licensing requirement in light of that legitimate state interest.

B. Imposing the Licensing Requirement on Ms. Young But Not on Others Similarly Situated Violates the Equal Protection Clause

Forcing Ms. Young to become a licensed real estate broker, but not requiring other people who publish FSBO advertisements to do so, is arbitrary and irrational and violates the Equal Protection Clause.

The licensing requirement specifically exempts people who are selling their own homes. Neb. Rev. Stat. § 81-885.04(1). Yet there is no reason to believe that such people are less likely to engage in illegal, deceptive, or otherwise improper activities than are advertisers like Ms. Young. Director Lemon testified that the licensing requirement was intended to ensure that people who advertise properties for sale are familiar with such things as building codes, and therefore that they do not falsely or erroneously describe properties. Boden Dec. Ex. 1 at 77:6-14. But there is no

reason to suppose that homeowners themselves are more familiar with building codes, or less likely to engage in deceptive advertising.

Nor does the exemption turn simply on the fact that the seller himself owns the property, because any person may advertise *another* person's property without a license, so long as he or she receives no compensation for doing so. Neb. Rev. Stat. § 81-885.01(2). There is no reason to suppose that such people are better qualified or are more honest or more knowledgeable about such matters as building codes.

Nor can the statute's arbitrary exemptions be justified by the question of *compensation*, because trustees and close relatives of property owners are exempt from the licensing requirement, and may advertise other people's property for sale, even if they *are* compensated. Neb. Rev. Stat. § 81-885.04(3). Again, there is no reason to believe that such persons are better qualified than Ms. Young or other paid advertising brokers.

Finally, applying a licensing requirement to Ms. Young, while not imposing the same requirement on newspapers, radio stations, television stations, or websites that publish FSBO advertisements, is irrational. As an advertising broker, Ms. Young receives information about FSBO homes, and puts it into a database from which websites draw the information in the form of advertisements. Radio and television broadcasters do the same thing when they read on the air or act out scripts provided to them by retailers. Newspaper and magazine publishers also do this when they help design print advertisements, place those advertisements onto a page layout, and then print and distribute them.

It is true, as the Commission argues, that there are differences between Ms. Young's business and that of a newspaper. That was also true in *Forsalebyowner.com*, but the court there explained that such differences were not a reasonable basis for the differential treatment accorded newspapers

and internet publishers. 347 F. Supp. 2d at 879. And although the Commission tries to differentiate Ms. Young from websites like Forsalebyowner.com on the grounds that she places the advertisements on a website run by others, instead of on her own website, Def's MTD at 54, that is hardly a distinction: a newspaper reporter, or the author of a book, also puts information together for publication by others, and this does not alter their constitutional protections. In short, the statute unconstitutionally distinguishes between some people who may advertise FSBO properties and some who may not—for reasons that are not rationally related to protecting the consumer or any other public interest.

C. The Privileges or Immunities Clause Protects the Right to Engage in a Trade Without Unreasonable Interference

The Commission argues that "no such right[]" as the right to engage in a trade without unreasonable state interference, "exist[s]" under the Privileges or Immunities Clause of the Fourteenth Amendment. Def's MSJ at 50. This is incorrect. The right to engage in trade or a common calling is a federally protected right. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *Schware*, 353 U.S. at 238-39 ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) ("Under [the Fourteenth A]mendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" (citation omitted)); *Chernin v. Lyng*, 874 F.2d 501, 505 (8th Cir. 1989); *VanHorn v.*

Nebraska State Racing Comm'n, 304 F. Supp. 2d 1151, 1167 (D. Neb. 2004). In all these cases, federal courts recognized that the right to pursue a lawful calling without unreasonable government interference is a right of *federal* citizenship, with which states may not arbitrarily interfere. Although in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873), the Court found that the right to engage in a trade is a right "which belong[s] to citizens of the States as such, and [thus this right is] left to the State governments for security and protection," that aspect of *Slaughter-House* is no longer good law.

Because the right to pursue a trade such as advertising is now recognized as a right "which owe[s] [its] existence to the Federal government, its National character, its Constitution, or its laws," *id.* at 79, the *Slaughter-House* holding requires that it be protected against state interference. The plurality in *McDonald v. Chicago*, 130 S. Ct. 3020, 3030 (2010), found "no need" to address the question of whether or not *Slaughter-House* should be overruled entirely, but that is irrelevant to the question presented here. If the right to engage in an ordinary occupation is a right of federal citizenship, then *Slaughter-House* holds that that right *is* protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Because Ms. Young's right to engage in the trade of advertising is one of the rights appurtenant to federal citizenship, the Privileges or Immunities Clause provides Ms. Young with another basis for constitutional protection.

VI

THE COMMISSION'S REMAINING ARGUMENTS ARE UNAVAILING

The Commission tries to give the impression that all Ms. Young needs to do is take a few *pro forma* classes and get a real estate broker's license, and the problem would go away. This is disingenuous. First, if she were to obtain a license, she would still be prohibited from advertising

FSBO properties. 299 Neb. Admin. Code § 2-004; Boden Dec. Ex. 1 at 22:10-12. Second, Ms. Young cannot get a license, because the Commission denies license applications to people who it claims have practiced real estate without a license in the past. *See* Sandefur Dec. Ex. 2 (citing Neb. Rev. Stat. § 81-885.12(3)). Because the Commission has concluded that Ms. Young's past advertising qualified as unlicensed brokerage, it would not grant her a license even if she wanted one.

But Ms. Young does not want one. She is an advertising broker, who runs a home-based business in California, and she has no interest in showing homes in Nebraska. Young Dec. ¶¶ 2, 3, 20. She has never claimed to be anything other than an advertising broker. The Commission repeatedly insinuates that she does something other than this. For example, it says that in *Forsalebyowner.com*, the properties were "not surprisingly, *actually* for sale by owner," Def's MSJ at 53 (emphasis added), apparently trying to imply that the properties Ms. Young advertises are not actually for sale by owner—when there is no evidence of that. Elsewhere it claims that Ms. Young "targeted" FSBO sellers, *id*. at 30, as if she victimized innocent consumers. In fact, FSBO sellers always initiate contact with Ms. Young by purchasing internet advertising services, and there is no basis for imagining that they were victimized in any way. Director Lemon testified that he was "not . . . aware of" any complaints from consumers. Boden Dec. Ex. 1 at 73:11-14. When asked if any of Ms. Young's ads contained inaccurate information about the properties, Director Lemon again answered, "not that I'm aware of." *Id.* at 80:15. And when asked if the ads were fraudulent or deceptive, he once again answered "[n]ot that I'm aware of." *Id.* at 80:10.[16]

The Commission also implies that there was something illegal about Ms. Young changing or improving customers' advertisements at their request. For example, it quotes emails with a

[16] Except for his view that the ads "presented her as a broker." *Id.* at 73.6-10.

customer who thanked Ms. Young for an advertisement that blinked the words "Great Location, Great Value." Def's MSJ at 4. But, again, as an advertiser, it is perfectly natural for her to make an advertisement eye-catching at the customer's request.

The only example the Commission puts forward that might arguably be called real estate brokerage is Ms. Young's email exchange with an FSBO seller named Jeff Berggren. Sandefur Dec. Ex. 3.[17] But this exchange was in fact an ordinary conversation between an *advertiser* and a customer. It contained no tailored, individual counseling, no negotiations, and no marketing. Mr. Berggren was advertising his FSBO property through eList.me, and wrote to Ms. Young to ask why realtors were unable to see his property on the local MLS. *Id.* Ms. Young replied with an explanation that he had not purchased that type of advertisement. *Id.* In the course of explaining that agents use a variety of internet sources when seeking for-sale properties, she told Mr. Berggren that most prospective buyers who contact FSBO sellers through internet advertisements are unrepresented and that he would want to respond to any such inquiry quickly, before the prospective buyer hires a local agent. *Id.*

This conversation was not real estate brokerage, but the sort of generic advice any advertiser would provide, and which is readily available to the public. *Cf.*, *e.g.*, Eric Tyson & Ray Brown, *House Selling for Dummies* 93 (3d ed. 2008) (explaining how to "increase your chances of success" when running an FSBO sale). Ms. Young's email was not "individualized advice attuned to any client's particular needs," *Lowe v. S.E.C.*, 472 U.S. 181, 208 (1985), but was "entirely impersonal." *Id.* at 210. Her suggestion was not a market analysis or a price opinion—Mr. Berggren did not have

[17] Even if the Commission is correct that this incident qualified as unlicensed practice of real estate brokerage, it would be irrelevant to this case. Ms. Young does not contest the validity of any previous Cease and Desist Order. She seeks declaratory and prospective injunctive relief to bar the Commission from punishing her in the future for engaging in the advertising business without a real estate broker's license.

a prospective buyer and did not ask about such matters—or even advice about how to make the available property appear more attractive. Instead, Ms. Young gave Mr. Berggren generic, "impersonal . . . advice concerning the [FSBO real property] market," and was not "personalized [brokerage] services or [real estate] advice tailored to [his] individual needs." *Forsalebyowner.com*, 347 F. Supp. 2d at 875. The *Forsalebyowner.com* court found that the company was not engaged in real estate brokerage, despite the fact that it provided interactive software for calculating mortgage payments and interest rates, *id.* at 870, because it "provide[d] only generalized information concerning real estate and [did] not participate directly in particular real estate transactions." *Id.* at 871. Likewise, Ms. Young's suggestion was generalized advice, which is not the practice of real estate brokerage—except insofar as that statute's unconstitutionally vague terms prohibit speech. *See* Sandefur Dec. Ex. 1 at 37:12-13 (Director Lemon testifying that "providing general advice and assistance" would qualify as practice of real estate brokerage).

That Ms. Young is actually an advertiser is what distinguishes this case from the Vermont and Illinois cases on which the Commission relies, *Office of Prof'l Regulation v. McElroy*, 175 Vt. 507 (2003), and *Gruwell v. Illinois Dep't of Fin. & Prof'l Regulation*, 406 Ill. App. 3d 283 (2010). In both of those cases, the individuals practiced real estate brokerage. McElroy contacted potential buyers, showed properties, and participated in the closing of sales. 175 Vt. at 507. Gruwell referred prospective buyers, updated signs on properties, described properties in the radio in the first person, and gave out her own contact information instead of the contact information for the property owners. 406 Ill. App. 3d at 286-87, 292. The business she worked for also conceded that it was engaged in the unlicensed practice of real estate. *Id*. at 285. None of this is true of Ms. Young. She is an advertising broker: she receives information and helps disseminate it. Her business consists of the communication of information, and is protected by the First Amendment. *See Riley*, 487 U.S.

at 795-802; *Sorrell*, 131 S. Ct. at 2666-67. She is an advertising broker, and has the right to call herself that. *Miller*, 117 F.3d at 1379-83. The only reason Ms. Young's business qualifies as the practice of real estate brokerage under Neb. Rev. Stat. § 81-885.01(2) is because that law violates the First Amendment.

CONCLUSION

The Commission has not shown its entitlement to judgment as a matter of law. To prevail, the Commission bears the burden of proving that, given the undisputed facts, it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). It also bears the burden of showing that the prior restraint and the content- and identity-based burden on speech created by the licensing requirement for FSBO advertising are narrowly tailored to achieve a compelling government interest. It has failed to do so. (*See* above, Section II). It has made no effort to show that the terms "negotiate listings" and "procure prospects" are not vague or overbroad. (Section III.) The Commission also bears the burden of showing that Ms. Young's commercial speech is unlawful or inherently misleading, and that its restriction on that speech directly advances an important government interest and is no broader than necessary to achieve that interest; it has failed to show this. (Section IV.) Finally, it makes no attempt to show that forcing Ms. Young to undergo the educational and testing requirements for a real estate broker's license is rationally related to the state's interest in preventing misleading FSBO advertising, and thus that Ms. Young's Fourteenth Amendment challenge fails as a matter of law. (Section V.)

The Defendants' motion for summary judgment should therefore be *denied*, and Plaintiff's motion for summary judgment should be *granted*.

DATED: August 25, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system.

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