No. 15-1873

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LESLIE RAE YOUNG,

Plaintiff - Appellant,

v.

PETE RICKETTS, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Nebraska
Honorable Joseph F. Bataillon, District Judge

APPELLANT'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Eighth Cir. R. 26.1A, Plaintiff affirms that she is an individual and neither she nor her unincorporated business, e-List.me, have issued any stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In her Opening Brief (AOB) at 38, Young explained that, even aside from her First Amendment allegations, forcing her to get a real estate broker license to run her advertising business lacks any rational relationship to a legitimate government interest because:

(a) the licensing requirements are not rationally related to her fitness or capacity to practice FSBO advertising, *see Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957);

(b) if she got a license, she would be prohibited from running her business, 299 Neb. Admin. Code § 2-004; and

(c) the licensing requirement contains self-contradictory exemptions that let people advertise real estate without a license for reasons that contradict the state's justifications for requiring Young to become licensed. If the requirement exists to ensure that only trained brokers advertise real estate, it is senseless to exempt property owners from the requirement (when they have the strongest incentive to misrepresent properties), and exempt their employees, trustees, and relatives—and exempt *anyone at all* who advertises property without compensation. *See* Neb. Rev. Stat. §§ 81-885.01(2); 81-885.04(3). Where exemptions contradict the purpose of licensure, a licensing requirement fails the rational basis test. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

The Commission does not address these arguments. This constitutes a concession. *Tran v. United of Omaha Life Ins. Co.*, 780 F. Supp. 2d 965, 971-72 (D. Neb. 2011). Young is entitled to reversal on these points alone.

As to her First Amendment claims, the Commission's argument that the statute regulates conduct, not speech, must fail because it defines the "conduct" of real estate brokerage solely by reference to speech. Brokerage is "attempting to negotiate . . . listing[s]," and "assist[ing] in procuring prospects," Neb. Rev. Stat. § 81-885.02, but these things consist solely of communicating information. The statute is therefore a content- and speaker-based burden on speech. *See Sorrell v. IMS*, 131 S. Ct. 2653, 2663 (2011); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226-27 (2015). The record shows that the Commission regularly applies the licensing requirement to people who, like Young, only communicate information to the public, and are not involved in transactions. AOB at 15-19.

The Commission's argument that Young is only engaged in *commercial* speech is incorrect, because "commercial speech" refers only to advertising by the speaker. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998). Young's FSBO ads are not invitations to engage in transactions with her, but are ads she helps others publish. Such speech is fully protected speech. *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 877 (E.D. Cal. 2004).

Young's use of such terms as "advertising broker" and "Presented By Leslie Young Real Estate Advertising Services" *are* commercial speech, but they are truthful and not inherently misleading, so the Commission's total prohibition on these terms violates the First Amendment. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 103-06 (1990).

I

THE LICENSING REQUIREMENT DEPRIVES YOUNG OF HER LIBERTY TO WORK AS AN ADVERTISER WITHOUT DUE PROCESS OF LAW

The Commission simply ignores Young's Due Process arguments. She is entitled to reversal on those grounds alone. Even if the statute does not violate the First Amendment, forcing her to get a broker license to prepare and disseminate FSBO advertisements lacks any rational connection a legitimate state interest.

First, any rational basis for the licensing requirement is undercut by the many arbitrary exemptions from that requirement. Second, the licensing requirement is irrational as applied to Young because *licensees are prohibited from advertising FSBO homes.* 299 Neb. Admin. Code § 2-004. Those facts alone mean the licensing requirement is self-contradictory and fails rational basis. *Merrifield*, 547 F.3d at 991. Finally, the education and training requirements have no relationship to FSBO advertising. They relate solely to preparing brokers to represent buyers or sellers in transactions. AOB at 40. The Commission's only response to these arguments is its

repeated, conclusory assertion that the Commission "acted rationally." Opposition (Opp.) at 51.[1]

A. Any Rationale For the Licensing Requirement Is Undercut by Its Many Exemptions

There is no rational basis for letting unlicensed persons advertise their own properties for sale, and letting people advertise *other* people's properties for sale if they are not paid, and allowing employees or relatives to advertise people's properties even if they *are* paid—all while prohibiting Young from advertising FSBO properties. Any consumer-protection rationale for the licensing requirement is contradicted by these exemptions. *See* AOB at 47-50.

Director Lemon essentially conceded this irrationality when he admitted that property owners need not get licensed before advertising their own property, even though they are likely to commit "misrepresentation[s] because of limited knowledge of—of how to represent real estate." 4 J.A. 826:24-827:7. In fact, *anyone at all* may advertise real estate in Nebraska without a license, so long as they are not paid. Neb.

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[1] The Commission says Young "overstate[s]" the meaning of its Cease and Desist Orders (CDOs). Opp. at 49. But it is undisputed that the CDOs accurately conveyed the Commission's position that Young's advertising constitutes unlicensed real estate brokerage. The CDOs commanded her to cease "advertising for sale, real property . . . in . . . Nebraska." 3 J.A. 742, 759. The Commission says in its brief that "the prohibition on unlicensed brokerage activity, forbids Young from . . . negotiating the listing of properties without a license." Opp. at 51. It is no "overstatement" to say that Young is forbidden from helping FSBO sellers advertise real property, because that would be "negotiating listings" and "procuring prospects."

Rev. Stat. § 81-885.01(2). This contradicts the Commission's justification for requiring licensure. If the reason is to protect consumers from fraudulent or misleading advertisements, there is no sense in letting unlicensed persons advertise property for sale, so long as they are not paid, or own the property themselves, or are employed by or related to the owner. And if the reason for requiring licensure is to prevent consumers from being confused about whether Young offers brokerage services when she doesn't, it makes no sense to force her to become a broker when *brokers are prohibited from advertising FSBO property.* 299 Neb. Admin. Code § 2-004.

Where the exemptions to a licensing law "undercut [the] rational basis for the licensing scheme," the law is irrational. *Merrifield*, 547 F.3d at 992. This Court "cannot simultaneously uphold the licensing requirement . . . based on one rationale and then uphold . . . the exemption[s] based on a completely contradictory rationale," when that would "undercut[] the principle of non-contradiction." *Id.* at 991.

B. The Licensing Requirements Are Both Over- and Under-Inclusive

The Commission makes no effort to show that the education and testing requirements for a license have any relationship to FSBO advertising. The state may impose licensing requirements on professions only if those requirements "have a rational connection with the [person's] fitness or capacity to practice [the business]."

Schware, 353 U.S. at 239. It may not force people to learn skills that have nothing to do with the business they practice. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999).

Cornwell held that a state could not require people who only braided hair to get cosmetology licenses, when only a small percentage of the cosmetology curriculum and licensing exam bore any relationship to their business. The court likened this to forcing "would-be lawyers and architects to take course work and pass a licensing exam in cosmetology." *Id.* at 1106. That failed the rational basis test. *Id.* at 1111; *accord*, *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012).

Likewise, here, the education and training requirements for licensure bear no reasonable connection to Young's advertising business. AOB at 40-46. They are devoted overwhelmingly to things Young does not do: representing parties, negotiating terms of sale, handling client funds, etc.[2] In fact, the only thing in the

[2] The Commission identifies only a single occasion in which Young arguably engaged in conduct other than advertising: she suggested that a customer contact a buyer before the buyer hired an agent. Opp. at 5. Even if this qualifies as the "practice of real estate brokerage," it is irrelevant, because this case is not about *past* incidents, but about what Young is allowed to do in the future: she seeks *prospective* relief to bar future enforcement of the licensing requirement against her when she practices pure advertising. *Cf. Wooley v. Maynard*, 430 U.S. 705, 711 (1977). The Commission admits it was unaware of that incident when it issued the CDOs, and sent the CDOs *solely* because Young "entered into agreements . . . to list (*or 'advertise,'* in Ms. Young's words) Nebraska real estate." Opp. at 4 (emphasis added). Thus even if that incident qualified as brokerage, it is irrelevant: the question here is (continued...)

coursebook and examination that relates to her business is teaching that licensed brokers *may not advertise FSBO property*. *See id.* at 45. The Commission therefore fails to refute Young's argument that the licensing requirement lacks a rational basis.

C. The Licensing Requirement Is a Substantial Burden on Young's Rights

The Commission claims it would be "simpl[e]" for Young to get a license. Opp. at 38. This is disingenuous, since $300+ in fees, plus the cost of "errors and omissions insurance,"[3] are substantial. The insurance requirement is particularly harsh, since that insurance would have no relationship whatsoever to her business. As the District Court found, 5 J.A. 1196, she engages in *none* of the practices with which errors and omissions insurance is concerned: negotiating sales, handling client funds, etc.

If she were to become licensed, Young would also have to satisfy biennial "continuing education" requirements, Neb. Rev. Stat. § 81-885.51, which are also expensive; one website charges $99 to $180 per course.[4] And, the information

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[2] (...continued)
whether the prohibition on advertising is constitutional.

[3] The Commission offers insurance for $140 per year. *See* http://www.nrec.ne.gov/pdf/forms/eobrochure14.pdf (last visited July 20, 2015).

[4] VanEd, Nebraska Real Estate Continuing Education (CE) Courses, *available at* http://www.nebraskarealestatelicensing.com/index.cfm?fa=ce (last visited July 20, 2015).

provided in these courses also has no connection to FSBO advertising. AOB at 40-46.

Most importantly, if Young got a license, she would be legally forbidden from practicing her trade. Commission regulations bar licensed brokers from "advertis[ing] . . . real property in a manner indicating that the offer to sell [or] buy . . . such real property is being made by a private party not engaged in the real estate business." 299 Neb. Admin. Code § 2-004. It cannot be rational to require Young to obtain a license to run her business when getting a license would prohibit her from running her business. That would "undercut[] the principle of non-contradiction, [and] fail[] . . . rational basis review." *Merrifield*, 547 F.3d at 991.

The Commission has repeatedly tried to misrepresent this matter. For instance, it claims that Young "is not prohibited from . . . advertising," but "simply must obtain a broker's license." Opp. at 38. But the Commission is well aware that its own regulations make it illegal for licensees to advertise FSBO property. Director Lemon acknowledged this. 4 J.A. 805:10-12. The Commission's claim that Young could advertise FSBO property if only she would get a license is knowingly false—and easily dispelled by consulting the regulation itself.

It is irrational to force Young to obtain a license to advertise FSBO property when (a) the licensing requirement is riddled with exemptions that allow all sorts of untrained people to advertise real estate without a license; (b) getting a license would

make it illegal for Young to advertise FSBO property; and (c) the education and testing requirements for a license have nothing to do with advertising FSBO property. The Commission has not answered these arguments, and should therefore be taken as having conceded them. *Tran*, 780 F. Supp. 2d at 971-72. In any event, they show that the licensing requirement has no rational relationship to any legitimate government interest.

II

THE LICENSING REQUIREMENT RESTRICTS SPEECH BY CALLING IT CONDUCT

A. "Attempting to Negotiate Listings," "Procuring Prospects," and "Holding Oneself Out As Negotiating Listings or Procuring Prospects" Is Speech Disguised As Conduct

Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988), held that forcing professional solicitors to get licenses was a restriction on free speech. The Court refused to regard that restriction as "simply an economic regulation with no First Amendment implication." *Id.* at 790. On the contrary, although the solicitors engaged in speech as a business, their speech was fully protected, and strict scrutiny applied. *Id.* at 795-96.

Likewise, Nebraska's licensing requirement "burdens speech, and must be considered accordingly." *Id.* at 790. It restricts speech by calling it conduct: defining a person as a real estate broker if she "attempts to negotiate . . . listing[s],"

or to "procur[e] prospects," or "holds . . . herself out as engaged in any of the foregoing"—when these are all acts of communication.

No legal authority defines these terms, *see* AOB at 35, but their commonsense meaning refers to speech: to "attempt to negotiate" seems to mean discussing with someone the possibility of a transaction, and "procure prospects" suggests speaking or writing to people about their interest in buying property. Director Lemon interprets it that way. He testified that "negotiate a listing," means "to go to a potential seller and discuss the terms under which they would assist someone in selling property." 4 J.A. 803:21-23. He defined "negotiating" as "the conversations that take place discussing the terms under which the listing would occur," *id.* at 806:9-11, and 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.'" *Id.* at 806:20-25. 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 809:14-21. Thus it is illegal to accept money in exchange for calling friends or emailing work colleagues to tell them that one's neighbor's house is for sale. *Id.* at 808:1-20, 810:23-811:7.

The Commission interprets the statute as defining advertising as real estate brokerage.[5] Its Cease and Desist Orders (CDOs) routinely state that "*advertising* . . . real property" is brokerage and requires a license. 4 J.A. 879 (emphasis added); *see also id.* at 877, 894, 897, 899, 909; 3 J.A. 742, 759. The Commission admits it issued CDOs to Young solely because of her advertisements, Opp. at 4, and it did the same to others. 4 J.A. 879, 877, 894, 897, 899, 909. In short, the "conduct" of real estate brokerage is advertising—*i.e.*, speech.

FSBO advertisements are fully-protected speech. *Forsalebyowner.com*, 347 F. Supp. 2d at 876-77. The state may not restrict speech by calling it conduct. *Sorrell*, 131 S. Ct. at 2666-67 ("the creation and dissemination of information are speech"); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (giving someone an audiotape "might be regarded as conduct," but the purpose of that conduct is to communicate information, and therefore "it is the kind of 'speech' that the First Amendment protects."). As in *Riley*, 487 U.S. at 796, the government may not subject speech to

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[5] The Commission disingenuously says it "cannot be accused of prohibiting advertisements" because "countless Nebraska properties are listed on dozens of sites." Opp. at 49-50. It provides no examples, but the record shows that all real estate advertising in Nebraska is either (a) not FSBO ads, or (b) FSBO ads placed by people who are statutorily exempt from the licensing requirement, such as owners themselves. But FSBO ads published by anyone else (including any FSBO ads published by licensed brokers) are illegal, and the record demonstrates that the Commission routinely shuts down businesses engaged *solely* in FSBO advertising, including Owners.com, Jack Keller, and All Around Home Finders. 4 J.A. 833, 872, 868.

a prior restraint simply because it is a business. As in *Riley*, 487 U.S. at 796, strict scrutiny applies.

B. *Liberty Coins* Is Inapposite

The Commission relies on *Liberty Coins v. Goodman*, 748 F.3d 682 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 950 (2015), but that decision has little in common with this case. There the statute regulated precious metal dealing—non-expressive activity—and there was no dispute that Liberty Coins was, in fact, a precious metals dealer. The licensing requirement turned not on speech, but on whether the person "simply conduct[ed] business in a manner that is visible to the public, or otherwise ma[de] its wares available," and applied "regardless of whether [dealers] advertise or post signage." *Id.* at 697. The court emphasized that it was not deciding whether the licensing requirement would be constitutional if it applied to speech alone, because the plaintiff did not bring an as-applied challenge, which Young does. *Id.* at 690-91.

By contrast, Young is engaged *solely* in the communication of information. She is not acting as a dealer of real estate—she merely advertises it. And unlike the Ohio precious metals dealer law, Nebraska's statute defines real estate brokerage solely in terms of communication.

This case is therefore less like *Liberty Coins* and more like *Riley*, 487 U.S. at 790, and *Sorrell*, 131 S. Ct. at 2665, in which the government prohibited the furnishing of information for "economic" purposes. In those cases, as here, the

government argued that it was only prohibiting conduct, not speech, but the Court rejected that argument, because in both cases, the "conduct" at issue was *speaking*.

Nebraska defines the creation and dissemination of information about real estate for sale as the "conduct" of brokerage, and requires a license for it. But "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 2667. As in *Sorrell*, and *Riley*, Nebraska's licensing law forbids the use of particular words by particular people. It is therefore a content- and identity-based burden on speech subject to strict scrutiny.

C. The State Cannot Simply Label Young's Speech as "Unprotected" by *Ipse Dixit*

The Commission claims that "advertising is protected by the First Amendment, but only when the speaker is duly licensed to engage in that protected speech." Opp. at 15. This bizarre idea is contrary to *Riley*, 487 U.S. at 790, *Sorrell*, 131 S. Ct. at 2666-67, *Argello*, 143 F.3d at 1153, and virtually every other relevant precedent. The *government* bears the burden of justifying restricting Young's speech—not the other way around. It may not simply proclaim speech off-limits to anyone who is not "duly licensed."

Indeed, that is exactly the same argument the Fifth Circuit rejected in *Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009), when it struck down a law that prohibited interior designers from truthfully describing themselves as interior designers. The

state argued that unlicensed persons were forbidden to use that term, so it was misleading for unlicensed people to use it, and therefore the state could ban such speech as "misleading." *See id.* at 447. The court rightly called this argument "circular" because "[i]t runs: [the state] created a licensing regime; therefore, unlicensed interior designers who refer to themselves as interior designers will confuse consumers who will expect them to be licensed." *Id.* This "would authorize legislatures to license speech and reduce its constitutional protection by means of the licensing alone." *Id.*

The Commission's claim that the First Amendment only applies when government gives someone permission to speak, Opp. at 15, is contrary to the basic rule that the government must satisfy strict scrutiny *before* requiring people to obtain permission before speaking. *Riley*, 487 U.S. at 790; *Argello*, 143 F.3d at 1153; *Books, Inc. v. Pottawattamie Cnty.*, 978 F. Supp. 1247, 1254-58 (S.D. Iowa 1997); *United Youth Careers, Inc. v. City of Ames*, 412 F. Supp. 2d 994, 1003 (S.D. Iowa 2006).

The importance of Young's free speech is not lessened by the fact that it relates to the sale of property.[6] The speakers in *Sorrell*, *Riley*, and *Argello*, were all paid for

[6] As the Court recognized in *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85, 96 (1977), such information "is of vital interest . . . since it may bear on one of the most important decisions [people] have a right to make: where to live and raise their (continued...)

speaking, too, but they were entitled to full First Amendment protection. *See Sorrell*, 131 S. Ct. at 2665 ("economic motive" does not reduce the First Amendment protection scrutiny applicable to burdens on speech); *Riley*, 487 U.S. at 788-90 (the fact that charitable solicitors are paid for speaking does not mean restrictions on their speech is subject to rational basis review; it is subject to full First Amendment protection); *Argello*, 143 F.3d at 1153 (speech "is not commercial simply because someone pays for it."). The Commission simply may not ban non-licensees from advertising FSBO properties (or advising customers on how to do so) by declaring it "unprotected" for people who don't have government permission to speak.

D. Young's Legal Use of Her California License Does Not Make Her Advertising Business Illegal Under Nebraska Law

The Commission argues that Young is engaged in brokerage because she "used her California broker's license to obtain an MLS number for Nebraska customers and list their properties." Opp. at 45. But it is legal under California law for Young to place Nebraska properties into a California-based MLS. Nor does it violate Nebraska law for her to do so (except insofar as it constitutes "attempting to negotiate a listing," etc., but that restriction is unconstitutional for reasons given herein). Director Lemon admitted that Young's business is not illegal in Nebraska merely

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[6] (...continued)
families."

because she uses her California license to do it. *See* 5 J.A. 1096:19-25, 1095:25-1096:5, and when asked whether advertising that one will put a Nebraska property on an MLS constituted real estate brokerage, he answered, "We haven't had a policy determination on that particular question." 3 J.A. 650:4-5. Simply put, the reason Young's business is illegal is *not* because she uses her California license to place properties into an MLS—that is legal. Instead, her business is illegal because Nebraska law forbids advertising without a license.

Even if Young posted the FSBO ads on her own website, she would still be violating Nebraska law. After all, that is exactly what Owners.com, Jack Keller, and All Around Home Finders did, and the Commission ordered them to Cease and Desist. *See* 4 J.A. 833, 872, 868; *see also id.* at 894-95. (Commission advising attorney that this would be "procuring prospects."). As the Commission's brief says, "the prohibition on unlicensed brokerage activity forbids Young from . . . negotiating the listing of properties without a license." Opp. at 51. Since "negotiating the listing of properties" is protected First Amendment speech, the licensing requirement is unconstitutional.

III

PROHIBITING "ATTEMPTING TO NEGOTIATE LISTINGS" AND "ASSISTING IN PROCURING PROSPECTS" WITHOUT A LICENSE VIOLATES THE FIRST AMENDMENT

A. Young's Business Consists of Fully Protected Speech, Not Commercial Speech

The FSBO ads Young helps publish are *not* commercial speech, because they do not propose a transaction *with her*. This Court has held that speech "is not commercial simply because someone pays for it." *Argello*, 143 F.3d at 1153. *Argello* refused to apply commercial speech doctrine to a ban on fortune-telling, because the speech "[did] not simply propose a commercial transaction. Rather, it *is* the transaction. The speech itself is what the 'client' is paying for." *Id.* The same applies here: Young's customers pay her to speak, and, as in *Argello*, the prohibition on her speech is subject to strict scrutiny.

Forsalebyowner.com found that FSBO ads are not commercial speech, because the ads "provide[d] information in the form of real estate listings," but did not "propose or encourage a direct sales transaction between [the company] and a prospective real estate purchaser." 347 F. Supp. 2d at 876. Young's advertisements, too, propose an economic transaction between the reader and *the FSBO seller*, not *Young*. Self-descriptive terms such as "Leslie Young Real Estate Advertising

Services" and "advertising broker," are commercial speech, as discussed below, Section IV, but the FSBO ads are not.

The Commission rejects *Forsalebyowner.com*'s holding that FSBO ads are not commercial speech on the grounds that under that theory, "*all* advertisements advanced by third parties . . . would fall outside of the commercial speech realm." Opp. at 28-9. This is overstated. The Supreme Court has held that speech does *not* "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796. Where speech includes both commercial and non-commercial elements, courts "cannot parcel out the speech, applying one test to one phrase and another test to another phrase," but must "apply [the] test for fully protected expression." *Id.* Accordingly, *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012), held that telephone books are not commercial speech, even though they are produced for commercial purposes and contain advertisements. Courts must analyze "'the nature of the speech taken as a whole' to determine what level of First Amendment protection" applies, *id.* at 957 (quoting *Riley*, 487 U.S. at 796), and because "the phone books contain components of both commercial and noncommercial speech," commercial speech analysis did not apply. *Id.*

The fact that a person publishes or broadcasts ads does cannot mean she is engaged in commercial speech, *id.* at 961-62, otherwise, all speakers who convey

commercial messages would be classified as "commercial" and deprived of full First Amendment protection—a position this Court rejected in *Argello*, 143 F.3d at 1153. Thus, many important First Amendment cases involve advertisements that fall outside the commercial speech realm because they are advanced by third parties. *See*, *e.g.*, *Riley*, *supra*; *Dex Media*, 696 F.3d at 961-62; *New York Times v. Sullivan*, 376 U.S. 254 (1964).

This Court must review the speech "as a whole, not simply the individual advertisements." *Dex Media*, 696 F.3d at 957. And the licensing requirement burdens far more than advertising. It also forbids Young from providing customers with general information and advice *about* advertising. In its briefing, the Commission says that "provid[ing] . . . sellers with information, advice, and transactional forms concerning the sale of . . . real estate" is "conduct . . . which requires a . . . license." Opp. at 9. But the company in *Forsalebyowner.com* also gave customers "non-specific informational materials," including sample real estate forms, interest rates, and "other general information." 347 F. Supp. 2d at 870. This was only "impersonal . . . advice," and did not encourage an "economic transaction directly between the party asserting its speech rights and potential customers," *id.* at 877, and was therefore fully protected speech. The Commission also complains that Young suggested adding flashing words ("Great Location! Great Value!") to one

advertisement, Opp. at 5-6, but this is *just what advertisers do:* make ads more likely to attract attention.

Director Lemon testified that if someone "provid[es] general advice and assistance on the sale . . . of property," that would violate the law. 5 J.A. 1092:12-13. Presumably "any for-profit book, newspaper or periodical in the 'do-it-yourself' arena," *Forsalebyowner.com*, 347 F. Supp. 2d at 876, would also be illegal, since they also provide information, advice, and forms concerning the sale of real estate. The statute even forbids telephoning friends or emailing colleagues about a neighbor's property for sale, *see* 4 J.A. 810:23-811:7, 808:23-809:21, 806:23-25, or distributing fliers, *see* 5 J.A. 1089:22-1090:20, or "[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.'" *see* 4 J.A. at 806:20-25.

In short, the statute forbids not just advertising, but also other speech. This Court must therefore "apply [the] test for fully protected expression." *Riley*, 487 U.S. at 796.

B. Prohibiting "Negotiat[ing] . . . [A] Listing" and "Assist[ing] in Procuring Prospects" Without a License Is a Content- and Speaker-Based Speech Restriction Subject to Strict Scrutiny

Any law that bars people from speaking based on the content of the speech, *Reed*, 135 S. Ct. at 2227, or the identity of the speaker, *Sorrell*, 131 S. Ct. at 2665, is subject to strict scrutiny. Here, the licensing restriction is both content- and identity-

based. It is content-based because it only applies to speech about real estate for sale, but not speech relating to other subjects.

A content-based restriction is any restriction that burdens speech because of its content. In *Reed*, the town's sign code imposed different rules on signs based on whether they were "ideological," "political," etc. 135 S. Ct. at 2224-25. The government argued that this was not content-based because it was not meant to censor any viewpoint. The Court rejected this argument, holding that "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas.'" *Id.* at 2228. Rather, a restriction is content-based if it "draws distinctions based on the . . . communicative content." *Id.*

The Court gave an example: "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* at 2230. Nebraska's real estate licensing requirement does just that: it bans the advertising of real estate—and only real estate—and is therefore content-based. If Young helped people advertise (*i.e.*, attempted to negotiate the listing of, or procured prospects for) *cars* for-sale-by-owner, or *refrigerators* for-sale-by-owner, or held herself out as willing to do so, she would not be subject to the statute. But because she helps people advertise FSBO real estate, she is. Director Lemon testified that the

statute forbids "calling or—or talking to people, saying, 'I have this property for sale you may be interested in,'" *see* 4 J.A. 806:20-25—but calling or talking to people, saying "I have a *car* or *refrigerator* you might be interested in" is legal. Because the statute "singles out specific subject matter for differential treatment," it is content-based, and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2230.

The statute is also speaker-based, because it is triggered by the speaker's *identity*: only people paid to advertise, and not exempted, must be licensed. *Sorrell* found that a prohibition on disseminating medical information was speaker-based because it only barred speakers with a "commercial motive" from communicating the information. 131 S. Ct. at 2667. The Court again found that strict scrutiny applied. Strict scrutiny must apply here, too, because only particular speakers are forbidden from "calling or—or talking to people." 4 J.A. 806:20-25.

The Commission claims the law is not content- or speaker-based because the state may legitimately distinguish between licensees and non-licensees. Opp. at 27. That misunderstands Young's argument. The point here is that the licensing requirement only applies to particular speakers, and only when they communicate particular information. *Reed* and *Sorrell* hold that speech burdens triggered by the topic and/or the speaker's identity are subject to strict scrutiny. The Commission's excuses for picking what information may be communicated without a license, or who

may speak without its approval, only reinforce Young's point that strict scrutiny applies.

C. The Prohibition on "Negotiat[ing] . . . [a] Listing" and "Assist[ing] in Procuring Prospects" Without a License Fails Strict Scrutiny

The statute fails strict scrutiny. First, it does not serve an important government interest. Protecting consumers from fraud is obviously an important interest, but the licensing requirement does not prohibit fraud. It prohibits *truthful* advertising. The Commission admits there is no evidence that Young's FSBO ads were false or deceptive. 4 J.A. 829:8-16. Second, the requirement's many exemptions show that it does not actually serve that consumer-protection interest. AOB at 47-50.

Nor is the statute narrowly tailored, because it is both overinclusive and underinclusive. It is *over*inclusive because it applies to persons like Young who have no interaction with buyers, and who do not negotiate sales or serve as fiduciaries. 5 J.A. 1187, 1196. The statute therefore reaches far more broadly than necessary, because it requires people not engaged in brokerage to obtain broker licenses, which in turn requires them to learn skills and take tests that have nothing to do with their business. It is also *under*inclusive because it does *not* apply to many people who *do* advertise FSBO properties, including owners and their relatives and employees, even though, as Director Lemon testified, they might also misrepresent properties. 4 J.A.

826:23-827:4. Finally, the restriction fails narrow tailoring because the Commission forbids licensed and trained real estate brokers from advertising FSBO properties. See 299 Neb. Admin. Code § 2-004. Young's business would therefore be illegal even if she were licensed. The licensing requirement fails strict scrutiny.

IV

THE BAN ON TRUTHFUL, NON-MISLEADING TERMS SUCH AS "ADVERTISING BROKER" IS AN UNCONSTITUTIONAL RESTRICTION ON COMMERCIAL SPEECH

The Commission may not prohibit Young from using terms like "advertising broker" to describe herself, because that is what she is. The use of a name, logo, or similar self-identifying information is commercial speech. *See, e.g., Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 94-101 (2d Cir. 1998). And the use of one's name, or a truthful descriptive term for a person's business practice, is protected by the First Amendment. *Peel*, 496 U.S. at 106; *Byrum*, 566 F.3d at 449; *Parker v. Kentucky Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987).

As Young is an advertising broker, her use of such terminology is truthful. So is her use of terms like "Leslie Young Real Estate Advertising Services" or her link to her website, eList.me. Just as the beer company in *Bad Frog* had the right to use a frog symbol on bottles, 134 F.3d at 94-101, and the interior designers in *Byrum*, 566 F.3d at 449, had the right to truthfully call themselves interior designers, so Young

has the right to describe herself with her name, the logo for eList.me, and terms like "Leslie Young Real Estate Advertising Services" and "advertising broker."

A. The Commission's Speculation and Conjecture About Potential Confusion Cannot Justify Prohibiting Commercial Speech

The Commission "may prohibit actually or inherently misleading commercial speech," but "may not . . . ban potentially misleading commercial speech if narrower limitations could be crafted to ensure that the information is presented in a nonmisleading manner." *Peel*, 496 U.S. at 111. It bears the burden of showing that these terms taken together are actually or inherently misleading. It may not rely on "mere speculation or conjecture," but "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Commission employs *only* speculation and conjecture. The only argument it offers to support its "absolute prohibition," *Peel*, 496 U.S. at 100, is that the "possibility of deception" is "self-evident." Opp. at 32 (quoting *Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602, 606 (4th Cir. 1988)). But it is *not* self-evident, given the fact that she makes clear to FSBO sellers (in her contracts), potential buyers (in the ads), and the general public (on eList.me), that she only offers advertising services. AOB at 27-28. *Bowman* is thus inapplicable. That case involved people who used the term "public accountant," which was obviously so similar to "certified

public accountant" as to be confusing. The term "advertising broker" is not equally similar to the term "real estate broker," especially considering that the ads never featured this phrase in isolation, but only along with other terms, such as "Leslie Young Real Estate Advertising Services," 3 J.A. 730 ¶ 13; *id.* at 755, and a link to eList.me—a website which prominently displays the words "Advertising Services," and says "We provide advertising for Seller's [*sic*]," *id.* at 788, and "We are a Leading Online Advertiser providing UNSURPASSED internet exposure!" *Id.* The accountants in *Bowman* took no analogous steps to prevent confusion.

The Commission cannot "demonstrate that the harms it recites are real," *Fane*, 507 U.S. at 770, because it is exceedingly unlikely that anyone *could* be misled into thinking that Young offered brokerage services. She explicitly declares to customers in her contracts that she only offers advertising services. 3 J.A. 735. The ads contain, not her contact information, but the contact information of FSBO sellers, as well as links to eList.me. *Id.* at 730 ¶¶ 12-14. All this information clearly identifies her company as engaged in advertising. There is no evidence that anyone was ever misled, and Director Lemon testified that he was "[n]ot . . . aware of" any evidence that anyone ever thought Young was a real estate broker. 4 J.A. 11-15.

The Commission says that for Young to call herself an "advertising broker" would be like calling oneself an "advertising attorney," Opp. at 13, but the difference is that "advertising broker" is a real profession, known to the law. *See Gabriel v.*

Superstation Media, Inc., No. CIV.A. 13-12787-NMG, 2015 WL 1648723, at *1 (D. Mass. Apr. 14, 2015); *DFSB Kollective Co. v. Bing Yang*, No. C 11-1051 CW, 2013 WL 1294641, at *2 (N.D. Cal. Mar. 28, 2013); *Ad Associates, Inc. v. Coast to Coast Classifieds, Inc.*, No. CIV.04-3418(RHK/JSM), 2005 WL 3372968, at *1 (D. Minn. Dec. 12, 2005). The Commission cannot simply declare it illegal to use the word "broker." That word just means promoter or salesperson, and there are many kinds of brokers (merchandise brokers, insurance brokers, grain brokers). By the Commission's logic, a state could forbid these uses of "broker," or bar use of the phrase "power of attorney," because it includes the word "attorney."

Courts cannot focus on one word out of context. The question is whether, *taken as a whole*, Young's speech—including the use of her name and terms like "Leslie Young Real Estate Advertising Services," "advertising broker," and the eList.me logo—is actually or inherently misleading. *Peel*, 496 U.S. at 101-02. It is not.

B. The Ban on Self-Identifying Terms Is Not Narrowly Tailored

Even if Young's speech were *potentially* misleading, the Commission may not ban it if it can employ less restrictive means to prevent confusion. *Id.* at 110. For example, it could impose a disclaimer requirement instead. But it just prohibits the speech, which is unconstitutional.

Passions Video, Inc. v. Nixon, 458 F.3d 837 (8th Cir. 2006), on which the Commission relies, supports Young's position, not the Commission's. It held that "the 'critical inquiry' is whether a 'complete suppression of speech . . . is *no more extensive than necessary*.'" *Id.* at 842-43 (emphasis added). While a restriction on commercial speech need not satisfy strict scrutiny, the government "cannot 'curtail substantially more speech than is necessary . . . .' The availability of obvious and numerous less-burdensome alternatives . . . factors into the consideration of whether the 'fit' is reasonable." *Id.* at 843 (citations omitted). That case struck down the speech restriction because "the state . . . 'failed to make a showing that a more limited speech regulation would not have adequately served [its] interest.'" *Id.* (citations omitted). The prohibition on Young's speech fails the same test. If her commercial speech is potentially confusing, the Commission can resolve that by imposing a disclosure or disclaimer requirement, or taking steps short of prohibiting Young from using her name or the word "broker" on advertisements.

This case is like *Peel* and *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997), in which states banned the use of accurate self-descriptive commercial speech on the theory that it might confuse people, without any evidence that anyone was actually confused. *Miller* rejected the state's effort to rely "solely on 'speculation and conjecture'" that consumers might be confused, and held that a person who was, in fact, a CPA, could use that term. *Id.* at 1383. *Peel* held that an attorney certified as

a specialist in an area of the law could advertise that fact even though the state speculated that consumers might think he was certified by the state (which he was not). The Court held that because "the consuming public understands" that certificates are often issued by private organizations, or could easily learn that fact, there was no need for "the paternalistic assumption" that the state should ban the commercial speech. 496 U.S. at 103-06.

This Court should reject the Commission's "mere speculation or conjecture," *Fane*, 507 U.S. at 770-71, and strike down the Commission's ban on constitutionally-protected commercial speech.

V

THE LICENSING LAWS ARE UNCONSTITUTIONALLY VAGUE

The statute classifies people as real estate brokers if (for money) they "attempt to negotiate . . . listing[s]," or "procure[s] prospects," or "hold . . . [themselves] out as engaged in" either of those. No statute, regulation, or case law defines these terms, nor does any internal Commission document, and Director Lemon testified that the Commission essentially decides what they mean on an *ad hoc* basis. 4 J.A. 819:3-18. His testimony underscores the statute's unintelligibility. Asked a series of questions about what conduct it forbids, he was repeatedly unable to answer. AOB 35-38. In short, a person "of common intelligence must necessarily guess at [the statute's]

meaning," *Geiger v. City of Eagan*, 618 F.2d 26, 28 (8th Cir. 1980), and the Commission does just that—or rather, it just bans all FSBO advertising.

The Commission's only answer to this is to say that Young "is not confused about whether she is covered by the Challenged Laws," because she concedes that she is barred from running her business. Opp. at 45. But she concedes this because the statute is so vague that *all advertising qualifies as brokerage.*

Bell v. Keating, 697 F.3d 445 (7th Cir. 2012), struck down on vagueness grounds an ordinance that required people to leave the scene when instructed by a police officer, if three or more people were engaged in "disorderly conduct" nearby. The plaintiff was a protestor arrested while participating in a disruptive protest. He had no doubt that his conduct was prohibited, but that was because the ordinance was so vague that he "[could] not know what [would] trigger[] [it]," and therefore had to "assume . . . that total abstention from the protected activity [was] necessary to avoid . . . prosecution." *Id.* at 455. The same is true here. The statute is so vague that Young must assume that only totally abstaining from speech can avoid prosecution.

CONCLUSION

The judgment should be reversed, and judgment entered in favor of Appellant.

DATED: July 21, 2015.

Respectfully submitted,

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