UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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<tr><td>LESLIE YOUNG,

Plaintiff,

v.

DAVE HEINEMAN, et al.,

Defendants.</td><td>)
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4:10-cv-03147-JFB-TDT

PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT</td></tr>
</table>

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

INTRODUCTION 1

I. STATEMENT OF UNDISPUTED MATERIAL FACTS 3

A. Leslie Young's Advertising Business 3

B. The Advertisements Based on Ms. Young's Data Entry 5

C. The Commission's Enforcement of the Licensing Laws 8

D. Enforcement Against Leslie Young 11

E. Educational Requirements for Licensure 13

F. Director Lemon's Testimony 14

II. THE CHALLENGED LAWS 16

ARGUMENT 18

III. STANDARD OF REVIEW 18

IV. MS. YOUNG'S BUSINESS CONSISTS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT 19

V. THE LICENSING LAWS VIOLATE THE FIRST AMENDMENT 21

A. The Commission Defines Publication of FSBO Ads as "Procuring Prospects" and "Negotiating Listings," Which Is an Unconstitutional Content-Based and Speaker-Based Burden on Free Speech 21

1. Section 81-885.01's Prohibition on "Procuring Prospects" Burdens Speech Based on Its Content and the Identity of the Speaker 23

2. By Defining "Attempting to Negotiate a Listing" to Prohibit Advertising, the Statute Constitutes a Content-Based Speech Restriction in Violation of the First Amendment 28

B. The Licensing Law and Its Implementing Regulations Are Unconstitutionally Overbroad and Vague 30

Page

1. The Statute Is Unconstitutionally Overbroad Because It Burdens a Substantial Amount of Protected Speech 30

2. The Statute Is Unconstitutionally Vague 31

C. The Commission Unconstitutionally Defines "Holding Oneself out as a Broker" Solely by Reference to Speech Acts, in Violation of the First Amendment 33

1. Ms. Young's Description of Her Services as "Advertising Brokerage" Is Protected Commercial Speech 34

2. The Words Appearing on Ms. Young's Ads Are Not Inherently or Actually Misleading 36

3. Ms. Young's Use of Terms Like "Advertising Broker" and "Leslie Young Advertising Services" Cannot Be Censored Even If It Is Potentially Misleading 37

4. The Commission May Not Use Speech as the Sole Trigger for Imposing the Licensing Requirement on Ms. Young 41

D. The Licensing Requirement Is an Unconstitutional Prior Restraint 43

VI. THE LICENSING REQUIREMENTS ARE ARBITRARY AND IRRATIONAL AS APPLIED TO MS. YOUNG'S BUSINESS, AND THEREFORE VIOLATE THE DUE PROCESS CLAUSE 45

A. The Education and Testing Requirements Bear No Rational Relationship to Ms. Young's Advertising Business 46

B. The Requirements for Maintaining a License Also Bear No Relationship to Ms. Young's Business 51

C. There Is No Rational Reason for the Law's Exemptions 52

VII. FORCING MS. YOUNG TO OBTAIN A LICENSE BUT NOT OTHERS SIMILARLY SITUATED VIOLATES THE EQUAL PROTECTION CLAUSE 55

A. The Licensing Requirement Violates the Equal Protection Clause by Treating Similarly Situated People Differently for No Rational Reason 55

Page

B. The Licensing Requirement Unconstitutionally Requires a Person Engaged in One Profession to Obtain a License Appropriate for a Different Profession 56

VIII. THE LICENSING SCHEME VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE 57

CONCLUSION 58

CERTIFICATE OF SERVICE 60

TABLE OF AUTHORITIES

Page

Cases

1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014) 22-23

Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) 33, 35

Ad Associates, Inc. v. Coast to Coast Classifieds, Inc.,
No. 04-3418, 2005 WL 3372968 (D. Minn. Dec. 12, 2005) 36

Argello v. City of Lincoln, 143 F.3d 1152 (8th Cir. 1998) 21

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 38

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 34

Books, Inc. v. Pottawattamie Cnty., Iowa, 978 F. Supp. 1247 (S.D. Iowa 1997) 44

Byrum v. Landreth, 566 F.3d 442 (5th Cir. 2009) 33-35

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 18

Chapin v. Neuhoff Broadcasting-Grand Island, Inc., 268 Neb. 520 (2004) 17

Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) 46-47, 50, 55, 57

Country v. Parratt, 684 F.2d 588 (8th Cir. 1982) 55

Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) 47

Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) 2, 46-47, 50, 55

Edenfield v. Fane, 507 U.S. 761 (1993) 34

Ex parte Young, 209 U.S. 123 (1908) 11

Ford v. Am. Med. Int'l, Inc., 228 Neb. 226 (1988) 17

Forsalebyowner.com Corp. v. Zinnemann, 347 F. Supp. 2d 868 (E.D. Cal. 2004) . . . . passim

Gabriel v. Superstation Media, Inc.,
No. 13-12787-NMG, 2014 WL 551009 (D. Mass. Feb. 7, 2014) 36

Page

Greene v. McElroy, 360 U.S. 474 (1959) 45, 58

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) 34, 41

Hynes v. Mayor & Council of the Borough of Oradell, 425 U.S. 610 (1976) 31

In re R. M. J., 455 U.S. 191 (1982) 34, 38, 40-41, 43

Jenness v. Fortson, 403 U.S. 431 (1971) 55

Linmark Associates, Inc. v. Willingboro Twp., 431 U.S. 85 (1977) 22, 26, 29

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 18

Meek Co. v. Rohlff, 91 Neb. 298 (1912) 37

Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) 46, 52, 54

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 22

Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997) 26, 29, 39

N.C. Real Estate Licensing Bd. v. Aikens, 228 S.E.2d 493 (N.C. 1976) 19

New York Times Co. v. United States, 403 U.S. 713 (1971) 22, 43

Office of Prof. Regulation v. McElroy, 824 A.2d 567 (Vt. 2003) 41

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 42

Parker v. Commonwealth of Kentucky, Bd. of Dentistry,
818 F.2d 504 (6th Cir. 1987) 33-35

Peel v. Attorney Registration & Disciplinary Comm'n of Illinois,
496 U.S. 91 (1990) . . . . passim

Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013) 22

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) 23

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 21

Romer v. Evans, 517 U.S. 620 (1996) 55

Page

Saenz v. Roe, 526 U.S. 489 (1999) 57-58

Schware v. Bd. of Bar Exam'rs of the State of N.M., 353 U.S. 232 (1957) 45-46, 58

SEIU, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010) 43

Skynet Corp. v. Slattery,
No. 06-CV-218-JM, 2008 WL 924531 (D.N.H. Mar. 31, 2008) 19-20, 23, 51

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 57

Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) 22, 27-28

State ex rel. Med. Licensing Bd. of Indiana v. Stetina,
477 N.E.2d 322 (Ind. Ct. App. 1985) 41

State ex rel. Stenberg v. Murphy, 247 Neb. 358 (1995) 32

Strang v. Satz, 884 F. Supp. 504 (S.D. Fla. 1995) 43

Thomas v. Jarvis, 213 Kan. 671 (1974) 17

Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002) 34, 41, 43

Tsatsos v. Zollar, 943 F. Supp. 945 (N.D. Ill. 1996) 43

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) 22

United States v. Williams, 553 U.S. 285 (2008) 30

United Youth Careers, Inc. v. City of Ames, 412 F. Supp. 2d 994 (S.D. Iowa 2006) 44-45

Vogt v. Town & Country Realty of Lincoln, 194 Neb. 308 (1975) 51-52

Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton,
536 U.S. 150 (2002) 44

State Statutes

Cal. Civ. Code § 1086(a) 16-17

§ 2079.14 3

Neb. Rev. Stat. § 28-106(1) 1, 16

Page

Neb. Rev. Stat. § 28-1477 29

§ 59-1602 49

§ 81-885.01(2) . . . . passim

§ 81-885.02 16

§ 81-885.03(2) & (3) 12

§ 81-885.04(1) 52

§ 81-885.04(3) 27, 53

§ 81-885.04(4) 44, 53-54, 56

§ 81-885.10 16

§ 81-885.13 51

§ 81-885.13(3)-(5) 13

§ 81-885.13(4) 47

§ 81-885.21 51

§ 81-885.45 . . . . 1, 16

§ 81-885.51 47

§ 81-885.55 51

§ 87-302 49

§§ 81-885.01, *et seq.* 1

State Regulation

299 Neb. Admin. Code § 2-004 . . . . 30, 45, 50-51

Page

Rules of Court

Fed. R. Civ. P. 30(b)(6) 14

Fed. R. Civ. P. 56(c) 18

Miscellaneous

Vulcan, Nicole, *How to Become an Advertising Broker*,
Houston Chronicle, *available at* http://work.chron.com/become-advertising-broker-17173.html (last visited July 29, 2014) 21

INTRODUCTION

Leslie Young started an internet advertising business to help people sell their homes on a "For Sale By Owner" (FSBO) basis, without the aid of a real estate agent. Although she holds a California real estate license, *see* Declaration of Leslie Young in Support of Motion for Summary Judgment (Young Dec.) ¶ 3, she does not work as a real estate broker in California or anywhere else. *Id.* Instead, she works as an advertiser, inputting information provided by FSBO sellers into a computer database that feeds that information to websites where prospective buyers can find FSBO properties. *Id.* ¶¶ 2, 5, 8-9. She does not negotiate offers or sales, represent parties, advise buyers or sellers on deals, or receive a commission. *Id.* ¶¶ 16-18. She does not serve in any fiduciary capacity, and is paid a flat fee for each ad she inputs into the database, regardless of whether it sells. *Id.*

Yet the Nebraska Real Estate Commission holds that Ms. Young's business makes her a real estate broker under Neb. Rev. Stat. §§ 81-885.01, *et seq.*, and that it is illegal for her to conduct this business without a brokerage license. *See* Young Dec., Exhibits 2-3.

Unlicensed real estate brokerage is subject to criminal and civil prosecution. *See* Neb. Rev. Stat. §§ 81-885.45, 28-106(1). The licensing law defines a broker as, *inter alia*, one who "assists in the procurement of prospects" or "attempts to negotiate listings"—in other words, one who, for a fee, distributes information about homes for sale. This means the law prohibits a person from engaging in constitutionally protected speech without first obtaining a license. Neb. Rev. Stat. § 81-885.01(2). The law is therefore a prior restraint on speech, and is not narrowly tailored to advance an important state interest. Even if it is not a prior restraint, the law is an unconstitutional content- and identity-based speech restriction because it subjects Ms. Young to penalties if, and only if, she expresses information to the public related to homes for sale in Nebraska. *See*

Forsalebyowner.com Corp. v. Zinnemann, 347 F. Supp. 2d 868, 879 (E.D. Cal. 2004). The law is also unconstitutionally vague and overbroad, and limits substantially more speech than necessary. It lacks definitions of crucial terms (such as "procure" and "listing") and thus provides no guidance to enforcement officials, and even licensed brokers are prohibited from publishing FSBO ads.

In addition, the law unconstitutionally burdens Ms. Young's right to commercial speech because it defines brokerage as "holding oneself out" as a broker, Neb. Rev. Stat. § 81-885.01(2), which the Commission interprets as prohibiting her from using terms like "advertising broker" or "Leslie Young Real Estate Advertising Services" to describe her business. These terms are common, and accurate, terms for one who—like Ms. Young—is engaged solely in the advertising business. Young Dec. ¶ 3. They are not inherently misleading and there is no evidence any consumer was ever misled. *Id.* ¶¶ 7, 16; Exhibit 1 to Declaration of Anastasia P. Boden in Support of Plaintiffs' Motion for Summary Judgment (Boden Dec.) at 73:11-18. Even if a court were to construe them as potentially misleading, the Commission may not impose a blanket ban on potentially misleading commercial speech. *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 109-10 (1990).

Ms. Young also contends that the licensing requirement violates the Due Process and Privileges or Immunities Clauses by imposing an arbitrary licensing requirement on her, which does not rationally relate to protecting the public from any realistic danger, and that the enforcement of the statute against her, but not against similarly situated others—such as newspapers or websites that publish FSBO ads—violates the Equal Protection Clause of the Fourteenth Amendment. *See Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002). No facts are in dispute, and Ms. Young is entitled to summary judgment as a matter of law.

I

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Leslie Young's Advertising Business

1. Leslie Young owns a business called eList.me, which she operates out of her California home, and which offers advertising services to people who wish to sell their homes on an FSBO basis. Young Dec. ¶¶ 2, 3.

2. Although she holds a California real estate broker license, Ms. Young does not work as real estate broker, but only as an advertiser. *Id.* ¶ 3.

3. In 2008, Ms. Young contracted with Forsalebyowner.com, a business owned by the *Chicago Tribune*, to provide advertising services for FSBO sellers. *Id.* ¶ 4.

4. Interested FSBO sellers use their computers to go to the Forsalebyowner.com website and buy from that company a "package" of services. *Id.* ¶ 5. When they purchase the "MLS Entry Only Showcase" package, they are provided with links to download documents, including an advertisement contract, a disclosure form,[1] and an information questionnaire which asks for information about the house that the FSBO seller wishes to sell, such as asking price, square footage, and digital photos. *Id.*

5. FSBO sellers sign and return the contract and the requested information electronically—either by email or fax—and do not ever meet Ms. Young in person. *Id.* ¶¶ 5, 19.

6. Ms. Young uses contracts based on form contracts originally designed for brokerage services, but which Ms. Young altered as follows: her form advertising contract states in clear, boldfaced type that it does not create a principal-agent relationship with the FSBO seller. *Id.* ¶ 6.

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[1] California-licensed brokers are required to provide a disclosure form to any seller before inputting a property into an MLS, regardless of whether the ad is for an FSBO sale or a traditional, brokered sale. Cal. Civ. Code § 2079.14.

It states "Non-Exclusive Authorization to Advertise through the MLS For Realtor.com Showcase." Young Dec., Ex. 1. It also states, in boldface:

> **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.**

7. The contract specifies that Ms. Young "is not agreeing to find or obtain a Buyer for the purchase of Seller's Property and that the only service provided by it are those listed herein." *Id.*

8. Ms. Young added these provisions to ensure that FSBO sellers understood that she was not providing anything more than advertising services. Young Dec. ¶ 7.

9. Once the FSBO seller signs the contract and submits the information sheet, Forsalebyowner.com forwards the information to Ms. Young, who uploads this information into a database called a Multiple Listing Service (MLS). *Id.* ¶ 8. Ms. Young uses an MLS based in California.[2] *Id.*

10. Ms. Young does on occasion correspond with FSBO sellers regarding their advertisements—answering questions about their ads, or ensuring that the information that appears in the ads is correct. *Id.* ¶ 19.

11. Ms. Young does not serve in any fiduciary capacity, and there is no evidence that any seller has ever thought that she was serving in any such capacity. *Id.* ¶¶ 7, 16, 18, 20.

12. Ms. Young does not receive commissions. *Id.* ¶ 17. She is paid a flat $95 fee per ad for inputting information into the computer database—and she is paid regardless of whether the

[2] California law allows a person with a California real estate license (which Ms. Young has) to place information about available property into an MLS, regardless of where it is located, and to promote the sale of property on an FSBO basis. Young Dec. ¶ 8.

property sells or not. *Id.* She is not paid directly by the sellers, but is paid by the *Chicago Tribune*, owner of Forsalebyowner.com. *Id.*

13. Ms. Young does not show homes. *Id.* ¶ 18. She does not negotiate terms of purchase and sale. *Id.* She does not arrange or attend meetings between sellers and buyers. *Id.* She does not answer questions about properties for sale. *Id.* She does not advise buyers or sellers on negotiations. *Id.* There is no evidence that she ever offered to provide any of these services. *Id.* ¶¶ 16, 18, 20. She does not handle earnest money or any other client funds other than the flat fee transmitted to her through Forsalebyowner.com. *Id.* ¶ 17-18.

B. The Advertisements Based on Ms. Young's Data Entry

14. Once Ms. Young inputs the information she receives about an FSBO property into the MLS, websites such as Realtor.com connect to that MLS and others, and display the information contained in the MLSes in the form of advertisements. *Id.* ¶ 9.

15. These websites enable prospective buyers to search for homes based on size, location, price, etc. The search results will then include ads for FSBO homes that Ms. Young has entered into the MLS. *Id.*

16. Ms. Young has only very limited control over how these websites display the information that comes from an MLS. *Id.* ¶ 10-11. As a result, different websites display information about Ms. Young's FSBO customers in different ways, adding or subtracting material that the website template itself provides. *Id.* ¶ 10. For example, Forsalebyowner.com and Realtor.com sometimes display banner advertisements at the top and on the margins of advertisements that are totally unrelated to real estate. *Id.* Advertisements for properties of Ms. Young's FSBO customers have therefore appeared next to advertisements for (to take one

example, cosmetic Botox injections). *Id.* FSBO sellers have sometimes complained about this, but Ms. Young has no control over these "template" parts of the displays. *Id.*

17. Ms. Young also cannot control the appearance of terms such as "Presented By," "This Listing is Brokered By," or "View Agent's Other Listings," on the Realtor.com template, so that when Realtor.com displays an ad for one of Ms. Young's FSBO customers, the words "Presented By" appear next to her name (which is drawn from her MLS entry); the phrase "This Listing Is Brokered By" appears above "eList.me"; and "Agent's Other Listings" automatically indexes any other advertisements drawn from her MLS entries. Young Dec. ¶ 11. Likewise, the phrase "Email Agent," appears as a clickable weblink that connects to whatever email address Ms. Young provides. *Id.* ¶¶ 12, 15.

18. In an effort to avoid confusion, Ms. Young entered her name in the "Presented By" field as "Leslie Young, Advertising Broker" or "Leslie Young, Real Estate Advertising Services," to alert readers that she was acting solely as an advertiser and not as a traditional broker. *Id.* ¶ 13.

19. At the seller's option, the telephone number appearing in Ms. Young's FSBO ads either automatically connects to the FSBO seller's phone, or plays an automated recording that provides the seller's phone number. *Id.* ¶ 14. In no case can a prospective buyer obtain Ms. Young's email address or telephone number. *Id.* ¶ 15.

20. Ms. Young inputs into the database only the FSBO seller's telephone number and email address, not her own. *Id.* ¶¶ 12-15.

21. For example, one of Ms. Young's FSBO ads was for property located on Leon Drive in Lincoln. Young Dec., Ex. 2 at NREC00746.[3] The telephone number provided in the ad was (877) 353-5478 ext. 8192. A person dialing that number would either be automatically connected to the FSBO seller's telephone, or would hear an automated recording that recited only the FSBO seller's telephone number. Young Dec. ¶ 14.

22. Ms. Young does not speak with prospective buyers, and they have no way of contacting her. *Id.* ¶ 15.

23. Ms. Young's ads are labeled "eList.me," the web address of her business. Young Dec., Ex. 2 at NREC00746. The eList.me website prominently displays the words "Advertising Services," and states: "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. It states at the bottom: "We are a Leading Online Advertiser providing UNSURPASSED internet exposure!" *Id.*

24. Ms. Young took these steps to distinguish her FSBO ads from ads for traditional, agent-listed properties, and to ensure that buyers and sellers understood that she provided only advertising services and was not operating as a real estate broker. Young Dec. ¶¶ 7, 13. There is no evidence that any member of the general public ever believed, or that Ms. Young ever tried to make anyone believe, that she was offering real estate brokerage services. *Id.* ¶¶ 7, 16; Boden Dec., Ex. 1 at 73:11-18.

25. Ms. Young has never claimed to be a Nebraska real estate broker, or offered to serve as a broker, show homes, negotiate sales, or serve in any fiduciary capacity with regard to Nebraska

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[3] For the Court's convenience, citations herein to specific page numbers of exhibits use Bates Stamp numbers provided by the Defendants.

properties. Young Dec. ¶¶ 16, 18, 20. Her contracts specifically disclaim that she will do so. Young Dec., Ex. 1.

26. Indeed, she has no desire to do so, and has no interest in working as a real estate broker in Nebraska, California, or any other state. Young Dec. ¶ 20. She is solely in the business of transmitting information—specifically, entering information into databases used by websites that publish information about homes for sale, in the form of advertisements to the public. *Id.* ¶ 3.

C. The Commission's Enforcement of the Licensing Laws

27. Since 2005, the Commission has issued at least 14 Cease and Desist Orders to persons who have advertised real estate for sale in Nebraska. Young Dec., Exhibits 2, 3; Boden Dec., Exhibits 2, 7-11, 15-17, 22-24. The Commission issues about five to ten such Orders per year. Boden Dec., Ex. 1 at 14:18. Commission Director Greg Lemon has sole discretion to issue these Orders himself, when in his opinion a person has engaged in unlicensed brokerage. *Id.* at 14:7-10. No other established procedure is involved. *Id.* at 12:10-15, 13:3-22.

28. In 2007, an attorney asked the Commission if he could advertise FSBO property and then draft purchase agreements in his capacity as an attorney. Boden Dec., Ex. 14. The Commission answered no, because "[u]nder the plan you are proposing, 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]." *Id.* It further stated that "[t]he marketing of properties" and "advertising . . . property for sale" required a real estate broker license. *Id.*

29. In 2009, the Commission issued several Cease and Desist Orders to Carl Wuestehube on the grounds that he was "advertising Nebraska real estate for sale . . . without . . . a Nebraska real estate license," and warned him to cease "any and all conduct which requires a . . . license . . .

includ[ing] . . . advertising the Nebraska real estate for sale in any form or media." Boden Dec., Exhibits 15-17.

30. In 2011, the Commission held a disciplinary hearing regarding Carl Wuestehube. Boden Dec., Ex. 20. This is the only disciplinary hearing it has held in the past five years. Boden Dec., Ex. 1 at 15:1-3. At that hearing, Special Assistant Attorney General Ekeler argued that "even if the seller chose to do a for-sale-by-owner service, [Wuestehube's] service still includes a listing service agreement," and therefore "required a Nebraska license." Boden Dec., Ex. 20 at NREC001434. Special Assistant Attorney General Barton stated that "even if [Wuestehube's service] was just limited to, like, doing an MLS listing for the Nebraska property . . . [he's] getting paid for that, and the statute says if you receive any compensation for marketing real estate for sale, that's brokerage services under Nebraska law." *Id.* at NREC001437. Commissioner Barton further stated that "even if you hold yourself as being willing" to place a property into an MLS, including FSBO property, "you're offering real estate brokerage services." *Id.* at NREC001438. Commissioner Dover stated that Wuestehube was "facilitating the sale of the property, and I believe he's not allowed to do that without a Nebraska real estate license." *Id.* at NREC001442. The Commission ultimately found Wuestehube liable because he had "held himself out" as a broker. Boden Dec., Ex. 21.

31. In later legal proceedings against Wuestehube, the Commission contended that he had violated the statute because he "clearly and unequivocally advertise[d] that [he] [would] advertise properties on the website Realtor.com" and that he "caused those listings to appear." Boden Dec., Ex. 18 at NREC002129. The Commission contended that Wuestehube violated the statute even if he "never received a commission for the sale," because "the only material question [was] whether Wuestehube 'attempt[ed] to neogtiate the listing . . . or assist[ed] in procuring

prospects or [held] himself . . . out as a referral agent." *Id.* at NREC002128-30. A state court later held that for procedural reasons, it was unnecessary to resolve the question of whether Wuestehube's advertisements violated the statute. Boden Dec., Ex. 19.

32. In 2009, the Commission issued a Cease and Desist Order to the Real Estate Disposition Company for "advertising Nebraska real estate for auction," and ordered it to cease "negotiating . . . Listing Agreements with owners of Nebraska real estate," or "advertising the Nebraska real estate for sale on Auction.com." Boden Dec., Ex. 9.

33. In 2010, the Commission issued a Cease and Desist Order to All Around Home Finders on the grounds that it was engaged in "procuring prospects" without a license. The basis for this Order was a website listing homes for rent. Boden Dec., Ex. 7.

34. In 2010, the Commission issued a Cease and Desist Order to John Fothergill on the grounds that "advertising for sale . . . real property located in the State of Nebraska" required a license and ordered him to "remov[e] all advertising for sale of such Nebraska properties from the Internet and other forms of communication to the public," on pain of "criminal prosecution." Boden Dec., Ex. 10.

35. In 2011, the Commission issued a Cease and Desist Order to Jack Keller on the grounds that he was "assisting in the procurement of a buyer." The basis for this Order was an advertisement by Mr. Keller on Realtor.com. Boden Dec., Ex. 8.

36. In 2011, the Commission issued a Cease and Desist Order to Lawrence Bunnell. Boden Dec., Ex. 11. Mr. Bunnell objected that his company only "provide[d] online classified advertising services to 'for sale by owner' property sellers." Boden Dec., Ex. 12. Director Lemon replied that Bunnell's firm was nevertheless "holding itself out" as a broker because the website, included the phrases "Presented by bloomkey.com," included a telephone number, and because the

website was affiliated with Realtor.com. Boden Dec., Ex. 13. Director Lemon further stated that "[i]f you were to assist someone in putting their home on Craigslist or the Omaha World Herald without having your companies [sic] name and number listed on the materials," the Commission "would have no interest or jurisdiction over your activities." *Id.*

37. In 2012, the Commission issued a Cease and Desist Order to Owners.com, on the grounds that it was engaged in "procuring prospects." Boden Dec., Ex. 2. Owners.com responded that it was engaged only in FSBO advertising, not brokerage services, Boden Dec., Ex. 5, and that it paid Nebraska-licensed brokers to upload information about FSBO properties into an MLS. Boden Dec., Ex. 3. Director Lemon replied 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. Director Lemon answered, "based upon our review of the website and the information you have provided the issue is 'assisting in the procurement of prospects for the listing of real estate.'" Boden Dec., Ex. 6.

D. Enforcement Against Leslie Young

38. On March 11, 2010, and again on July 20, 2010, the Commission[4] issued Young a Cease and Desist Order, on the grounds that she was engaged in the practice of real estate brokerage without a license. Young Dec., Exhibits 2 and 3.

39. The March 11 Order stated that Ms. Young was "advertising for sale, real property located in the State of Nebraska on www.ForSaleByOwner.com . . . without having first secured a

[4] Defendants are sued in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908), but for convenience are herein referred to collectively as the Commission.

Nebraska real estate broker license," and included printouts of FSBO ads from that website. None of these ads included the word "broker," or Ms. Young's contact information. Young Dec., Ex. 2.

40. The July 20 Cease and Desist Order stated that Ms. Young "continue[d] to advertise for sale, real property in the State of Nebraska on Realtor.com, without having first secured a Nebraska real estate broker license," and included printouts of FSBO ads from that site. Young Dec., Ex. 3.

41. A Cease and Desist Order requires the recipient to cease engaging in unlicensed brokerage on pain of civil and criminal penalties, and becomes final 10 days after issuance. Neb. Rev. Stat. § 81-885.03(2) & (3).

42. Ms. Young is now legally barred from assisting Nebraska homeowners in publishing FSBO ads on the internet. Were she to do so, she would be subject to civil and criminal penalties up to and including incarceration. *Id.*

43. The Commission contends that Ms. Young "holds herself out" as a broker because the words "advertising broker," "view agent's other listings," "email agent," and "presented by Elist.me," appeared on Realtor.com advertisements drawn from her data entries. Young Dec., Ex. 3 at NREC00769-795; Boden Dec., Ex. 1 at 86:8-21, 86:8-87:1/72:25-73:10.

44. On March 26, 2010, Director Lemon stated in a letter to Ms. Young's former attorney that "[o]n the Nebraska property in question Ms. Young is listed as the broker on the website as well as showing her 'presenting' property . . . and listing her contact information . . . . It logically follows from this that Ms. Young is holding herself out as the broker for the sale of the Nebraska real estate in question here." Young Dec., Ex. 5.

45. Director Lemon testified that the Commission issued Ms. Young the cease and desist order solely on the basis of the content of her advertisements. Boden Dec., Ex. 1 at 19:17-23.

46. Director Lemon testified that he had no reason to believe that any information in her advertisements was inaccurate, or erroneous. Boden Dec., Ex. 1 at 79:25-80:16. The Commission received no consumer complaints about Ms. Young. *Id.* at 73:11-22.

E. Educational Requirements for Licensure

47. To obtain a brokerage license, a person must have a high school diploma or equivalent, and must (a) complete 18 credit hours in subjects related to real estate at an accredited college, or (b) complete 180 class hours in a Commission-approved real estate course, or (c) must have served as a licensed real estate sales person or broker for two years and complete 120 hours of Commission-approved class study. All applicants must also take and pass a Commission-approved written exam "covering generally the matters confronting real estate brokers," and undergo fingerprinting and a criminal background check. Neb. Rev. Stat. § 81-885.13(3)-(5).

48. A sample Commission-approved educational coursebook, Boden Dec., Ex. 26, consists of three parts: (1) the source of the Board's authority to promulgate the Rules and Regulations that govern licensees, *id.* at NREC00105-108, (2) the licensing requirements and what licensees are authorized to do, *id.* at NREC00109-147, (3) agency relationships. *Id.* at NREC00148-164.

49. The coursebook is 66 pages long. *Id.* at NREC 00101-166. Advertising homes is mentioned on a total of 7 pages. Boden Dec., Ex. 26 at NREC00127-28, 131-32, 143-44, 160. None of these refers to FSBO advertising. The practice exam and two tests provided by the Commission in discovery together total 91 questions, of which two relate to advertising homes that are for sale. Exhibits 25 and 26 at NREC0094-100, 00122-123, 00163-165.

50. The overwhelming majority of the course teaches licensed brokers skills necessary to represent buyers or sellers in the transfer of property. Boden Dec., Ex. 26. For example, the course discusses negotiating the terms of sale, preparing and relaying offers, handling client funds, keeping a trust account, closing escrow, and maintaining proper paperwork. *Id.*

51. With regard to advertising, the course teaches only that: (1) licensees must include their business names in all of their advertisements, *id.* at NREC00143-144; (2) licensees must disclose that they are licensed when they advertise property that they personally own, *id.* at NREC00131-132 and 160; (3) licensees may not advertise a property without the consent of the owner, *id.* at NREC00132; and (4) brokers may not publish intentionally misleading ads. *Id.* at NREC00127-128.

F. Director Lemon's Testimony

52. Director Lemon was identified by defendants, and testified pursuant to Fed. R. Civ. P. 30(b)(6), as the Person Most Knowledgeable regarding the licensing requirements. His answers must therefore be taken as those of the Commission.

53. Director Lemon testified that the Commission decides at its monthly meetings whether certain activities would qualify as brokerage. Boden Dec., Ex. 1 at 18:3-6. It relies on no written guidelines when deciding whether a purported violation constitutes the practice of real estate brokerage. *Id.* at 18:17-22.

54. Director Lemon testified that "procuring prospects" means: "Helping 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 23:20-25. He testified that a person would be "procuring prospects" if she accepted money

in exchange for calling a friend or emailing her work colleagues to tell them that her neighbor's house is for sale. *Id.* at 27:1-20, 30:23-31:7.

55. Director Lemon defined "procuring prospects" as "active[] one-on-one contact, you know, targeted individual mailings" of advertisements, *id.* at 39:3-6, and as "[h]elping somebody find a potential purchaser . . . you know, perhaps calling or—or talking to people, saying, 'I have this property for sale you may be interested in.'" *Id.* at 23:20-25.

56. Director Lemon defined "negotiating a listing" as "Negotiate the listing would be to go to a potential seller and discuss the terms under which they would assist someone in selling property," *id.* at 20:21-23, and said "negotiating a listing" "would occur between the person desiring to transfer their property in some way." *Id.* at 24:7-9.

57. Director Lemon testified that the term "listing" "refers to 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. Asked to differentiate between a listing and the type of advertisement for which a license would not be required, he testified: "Well, I don't—a listing is what I—I—I just explained to you as being. An advertisement is information about some service or good being offered." *Id.* at 22:6-9.

58. No statute, regulation, or court decision defines the terms "procure prospects," "negotiate a listing," or "hold oneself out." The Commission is not aware of any written guidelines that define these terms. The Commission decides whether a person's conduct qualifies as brokerage at its disciplinary hearings. *Id.* at 61:8-12. It has no guidance other than the statute itself in making that determination. *Id.* at 18:17-22, 21:8-13, 24:1-4.

59. Director Lemon testified that the Commission requires a person to undertake educational and licensing requirements before advertising real estate because, among other things, "there might be general dangers of misrepresentation if somebody doesn't understand how to

measure square feet or—or that type of thing, a misrepresentation; although we allow owners to–to represent themselves in the sale of property, but there—there certainly could be danger or some sort of misrepresentation because of limited knowledge of—of how to represent real estate." *Id.* at 77:23-78:4.

60. Director Lemon also testified: "One of the things a licensee would learn about in their classes is—is conforming and nonconforming bedrooms . . . . 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." *Id.* at 77:7-14. He testified that it was not dangerous for an advertiser to post an advertisement if she receives the content of the ad directly from the owner. *Id.* at 78:17-20.

II

THE CHALLENGED LAWS

Nebraska law requires a person to obtain a real estate broker license in order to "engage in or conduct, or to advertise or hold himself or herself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker." Neb. Rev. Stat. § 81-885.02. Practicing without a license is a Class II misdemeanor, which carries a penalty of up to six months in prison and a $1,000 fine, Neb. Rev. Stat. §§ 81-885.45, 28-106(1), and also carries civil penalties of up to $2,500 per complaint. Neb. Rev. Stat. § 81-885.10.

Central to this case is the statute's definition of "real estate broker." Section 81-885.01(2) reads in relevant part: "Broker means any person who, for any form of compensation . . . [1] negotiates or attempts to negotiate the listing[5] . . . for any real estate . . . or [2] assists in procuring

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[5] Under California law, Ms. Young's FSBO ads are not technically "listings," because listings are contracts which authorize an agent to sell a property on behalf of the seller. Cal. Civ. Code (continued...)

prospects or [3] holds himself or herself out as a referral agent for the purpose of securing prospects for the listing, sale, purchase, exchange . . . of any real estate . . . ."

Unfortunately, the terms "listing," "procuring," "prospects," and "referral agent" are not defined in any statute or regulation.[6] Nor does the Commission use any handbook or objective guidelines to determine what a "listing" is or what "procuring prospects" means. Boden Dec., Ex. 1 at 18:17-22, 21:8-13, 24:1-4. Nebraska Real Estate Commission Director Greg Lemon testified that the Commission decides what constitutes "brokerage" on an *ad hoc* basis at disciplinary hearings. *Id.* at 61:3-18. As a result, neither the Commission nor the general public can determine ahead of time whether certain conduct is or is not legal. For example, when asked whether various activities qualified as "real estate brokerage" under Nebraska law, Director Lemon said he could not answer because the Commission had not made a determination as to those hypotheticals. *Id.* at 45:25-46:5, 44:23-45:4, 47:15-19, 49:15-22, 50:15-25, 70:4-6.

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[5] (...continued)
§ 1086(a). But Nebraska law does not define "listing" to refer to an agency relationship—indeed, it does not define the term at all—and the terms "listing" and "advertisement" are typically used interchangeably, even in California. Indeed, in *Forsalebyowner.com*, the court referred to FSBO ads as "listings," and concluded that "soliciting or obtaining listings . . . for compensation" is protected speech under the First Amendment, and that imposing a licensing requirement on persons who engage in such speech was an unconstitutional content-based speech restriction. 347 F. Supp. 2d at 872, 877-79. Thus "listing" and "advertisement" are used interchangeably herein.

[6] Nebraska courts have not provided an interpretation of the statute that would assist in deciding this case. In *Chapin v. Neuhoff Broadcasting-Grand Island, Inc.*, 268 Neb. 520, 525-26 (2004), and *Ford v. Am. Med. Int'l, Inc.*, 228 Neb. 226, 229 (1988), the state supreme court held that a person would "procure prospects" by approaching buyers and sellers, arranging meetings between them, or negotiating the terms of an acquisition—but neither case addressed whether simply publishing an advertisement on someone else's behalf, as Leslie Young does, would also qualify as "procur[ing] prospects." Other states have interpreted "procuring prospects" to require active one-on-one contact with prospective buyers, *see*, *e.g.*, *Thomas v. Jarvis*, 213 Kan. 671, 672 (1974) ("procuring" defined as "contact[ing] various prospective purchasers across the country to generate interest" in available property), but Nebraska courts have not spoken on the question. In any event, Ms. Young does not approach clients, arrange meetings, or negotiate terms of acquisitions, but only assists sellers in publishing advertisements to the general public. Young Dec.¶¶ 5, 8, 16-18.

Despite this vagueness, the record shows that the Commission interprets Neb. Rev. Stat. § 81-885.01(2) as prohibiting any person without a Nebraska real estate broker license from publishing, disseminating, or expressing information about homes for sale, if that person is paid for that service, and that it has issued many Cease and Desist Orders to individuals who advertised property for sale, on the grounds that advertising property without a license is unlawful. Young Dec., Exhibits 2, 3; Boden Dec., Exhibits 2, 7-11, 15-17, 22-24. Thus, both facially and as applied, the statute prohibits a person from engaging in expressive activity without first obtaining a broker license.

ARGUMENT

III

STANDARD OF REVIEW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). To prevail, Young must demonstrate the absence of a genuine dispute of material fact. *Id.* at 323. The burden then shifts to the nonmoving party to show that there is a factual dispute for trial. *Id.* The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex*, 477 U.S. at 323. The issue here—whether requiring people who advertise FSBO homes for sale to first obtain real estate broker licenses violates the First Amendment—is a legal question appropriate for summary judgment.

IV

MS. YOUNG'S BUSINESS CONSISTS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT

Conveying information about homes for sale is expression protected by the First Amendment. *Forsalebyowner.com*, 347 F. Supp. 2d at 879; *Skynet Corp. v. Slattery*, No. 06-CV-218-JM, 2008 WL 924531 (D.N.H. Mar. 31, 2008). *Forsalebyowner.com* and *Skynet* provide helpful guidelines for understanding this case.

In *Forsalebyowner.com*, a company operated a website that published FSBO ads, but did not represent buyers or sellers, did not negotiate or make contacts between customers, and did not receive commissions. 347 F. Supp. 2d at 871. But California law defined the term "broker" as a person who "solicits prospective sellers or purchasers of, [or] solicits or obtains listings of . . . real property," or who "contract[s] for the collection of an advance fee in connection with any employment undertaken to promote the sale . . . of real property." *Id.* The court found that the advertising website "[fell] squarely within the definition of 'real estate broker.'" *Id.* at 879. But the licensing requirement violated the First Amendment. It was a content-based speech restriction, and the state failed to show that the publication of FSBO ads was "improper," or that licensing would "do anything to prevent or regulate any resulting improprieties." *Id.* In addition, newspapers publishing "virtually identical" FSBO ads were not required to obtain licenses. *Id.* at 877. The licensing requirement therefore violated the First Amendment. *Id.* *See also N.C. Real Estate Licensing Bd. v. Aikens*, 228 S.E.2d 493, 496 (N.C. 1976) (state could not require real estate broker license to distribute information about property for rent).

Skynet involved a Massachusetts-based business that published FSBO ads on the internet. 2008 WL 924531, at *2. It, too, charged a fixed fee instead of commissions, identified itself as an advertiser instead of as an agency, offered no negotiating or advising services, and was paid

regardless of whether a property sold. *Id.* But under New Hampshire law, this qualified as brokership, because that state, like Nebraska, defined a "broker" as one who "[l]ists, offers, attempts or agrees to list real estate," or "[a]ssists or directs in the procuring of prospects," or "charge[s] an advance fee in connection with any contract whereby the person undertakes to promote the sale . . . of real estate," whether through publication, or "listing in a . . . database," or "through referral." *Id.*

Unlike in the *Forsalebyowner.com* case, the state argued in *Skynet* that the business was entitled to a statutory exemption that applied to newspapers and other publishers. The court agreed. The plaintiff "[did] not conduct its business as any sort of agency arrangement," and "[did] not advance the interests of either the seller or buyer, other than by facilitating the transmission of information." *Id.* at *8. Thus the court found that the plaintiff's business was "a 'web-based publisher of real estate advertising and information,'" *id.* at *11, performing essentially the same role as the classified ads section of a newspaper, and thus entitled to the statutory exemption for newspapers. The court refused to "construe the exemption to reach the absurd result of exempting one form of classified advertising but not another." *Id.* at *9.

Forsalebyowner.com and *Skynet* show that a business that simply publishes FSBO ads, and which does not represent the parties to a transaction, negotiate sales, obtain a commission, or advise clients about prospective deals, should not be required to obtain a brokerage license—and that if no statutory exemption protects those who only disseminate information, the statute runs afoul of the First Amendment. Ms. Young's expressive activities do—as the Commission claims—fall within the statutory definition of "brokerage," and the statute provides no exemption for her. Thus requiring her to obtain a license violates the First Amendment.

It is worth emphasizing that Ms. Young's FSBO ads are not subject to commercial speech analysis, but to the broader protections of pure speech analysis. *Forsalebyowner.com*, 347 F. Supp.

2d at 876; *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998) (speech "is not commercial simply because someone pays for it . . . . [Where t]he speech itself is what the 'client' is paying for," it is entitled to full First Amendment protection). Although the speech in question consists of advertisements, "commercial speech" is defined as speech that proposes a commercial transaction *with the speaker*. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984). Ms. Young's ads do not do this. They are offers *by FSBO sellers* to engage in commercial transactions with potential buyers, not with Ms. Young. She serves only as a conduit, through whom information is placed into the MLS for ultimate publication on websites. She is therefore more akin to a newspaper, or, more precisely, to an advertising agency that designs ads and provides them to a newspaper to publish on behalf of retailers.[7] Because the ads do not propose a commercial transaction with her, Ms. Young is not engaged in commercial speech and is therefore entitled to full First Amendment protection. *Forsalebyowner.com*, 347 F. Supp. 2d at 876.

V

THE LICENSING LAWS VIOLATE THE FIRST AMENDMENT

A. The Commission Defines Publication of FSBO Ads as "Procuring Prospects" and "Negotiating Listings," Which Is an Unconstitutional Content-Based and Speaker-Based Burden on Free Speech

Under Neb. Rev. Stat. § 81-885.01(2), a person engages in "brokerage" in any of three ways: first, if the person "procures prospects"; second, if the person "attempts to negotiate a listing" of real estate; and third, if the person "holds herself out" as a broker. Each of these three elements is defined in terms of speech activities, and the Commission interprets the term "broker" solely by

[7] To be precise, she is an advertising broker—a person who helps advertisers to place ads in the most effective medium. *See* Nicole Vulcan, *How to Become an Advertising Broker*, Houston Chronicle, *available at* http://work.chron.com/become-advertising-broker-17173.html (last visited July 29, 2014).

reference to speech activities. In short, the Commission holds that a person who, for a fee, conveys information about properties for sale, is engaged in "procuring prospects" or "negotiating listings," and is therefore acting as a broker. The Commission also holds that a person who describes herself with certain truthful terminology, such as "advertising broker," is engaged in brokerage because she is "holding herself out" as a broker, solely because of the words she uses, and not because of the actual activities in which she is engaged.

Under the pure speech analysis applicable here, *see Forsalebyowner.com*, 347 F. Supp. 2d at 874-77, a restriction on expression must be narrowly tailored to advance a compelling government interest. Otherwise, the state may not impose restrictions that are based on the content of speech. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000). For example, it may not restrict the expression of commercial speech, while allowing the expression of noncommercial speech, *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977), or vice versa. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-17 (1981) (plurality opinion). The government bears the burden of showing that any restrictions it imposes are essential to the accomplishment of a crucial government objective, and are no broader than necessary to achieve that objective. *Phelps-Roper v. Koster*, 713 F.3d 942, 949-53 (8th Cir. 2013). Finally, requiring a person to obtain a license before speaking constitutes a "prior restraint" on speech, which bears a "heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

Even if Ms. Young's ads do constitute "commercial speech," the state may not censor the publication of truthful commercial messages, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014), or impose a content-based restriction on the expression of commercial speech. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-64 (2011). Nor may the state impose an

unjustified licensing requirement on commercial speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988). Even in the commercial speech context, the Court must apply heightened scrutiny, and determine "(1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest." *Otto*, 744 F.3d at 1055. The government, and not Ms. Young, bears the burden of establishing these factors. *Id.*

1. Section 81-885.01's Prohibition on "Procuring Prospects" Burdens Speech Based on Its Content and the Identity of the Speaker

The statute defines "brokerage," and requires a license, by reference to whether the person "procures prospects" for the sale of real estate. Neb. Rev. Stat. § 81-885.01(2). Neither that statute, nor any other law, regulation, or court opinion, defines the term "procure prospects." The Commission identified no written handbook, guideline, or other policy that defines what "procuring prospects" means. Boden Dec., Ex. 1 at 18:17-22, 24:1-4. But taken on its face, the phrase refers to expressive activity. To "procure" a prospective buyer means to communicate to another person that a seller wishes to sell, or that a potential buyer might be interested in buying; it means to provide information about a property for sale to someone likely to be interested. *See Skynet*, 2008 WL 924531, at *2 (inputting information about FSBO properties into a database qualified as brokerage because it was intended "to assist or direct in the procuring of prospects to result in the sale" of property).

The Commission defines "procuring prospects" on an *ad hoc* basis, so that no member of the public can know whether her conduct will be deemed "procuring prospects." This alone renders the statutory limit on speech unconstitutionally vague. (*See below* Section V.B.2.). But, absent any guidelines, the Commission considers speech activity alone, and advertising in particular, to qualify

as "procuring prospects." It regularly issues Cease and Desist Orders to advertisers on the grounds that they are engaged in "procuring prospects" simply by advertising. *See above*, Undisputed Facts ¶¶ 33-35, 37.

In March, 2012, the Commission asserted that Owners.com was "procuring prospects," Boden Dec., Ex. 2, even though the company offered only advertising services, provided no representation services, and did not negotiate sales. On another occasion, the Commission declared that All Around Home Finders was "procuring prospects" for rental property, solely because the company's website advertised homes for rent. Boden Dec., Ex. 7. It also claimed that Jack Keller was "assisting in the procurement of a buyer," based solely on an advertisement published on Realtor.com. Boden Dec., Ex. 8. And its 2010 Order to John Fothergill asserted that "advertising for sale . . . real property located in the State of Nebraska" required a license and ordered him to "remov[e] all advertising for sale of such Nebraska properties from the Internet and other forms of communication to the public," or face "criminal prosecution." Boden Dec., Ex. 10.

Indeed, the Commission routinely issues Cease and Desist Orders that declare that no unlicensed person may advertise for-sale property *at all*; such orders declare that "conduct which requires you to possess a real estate license in the State of Nebraska . . . include[s] . . . advertising of Nebraska real estate for sale." *See*, *e.g.*, Boden Dec., Exhibits 22-24.

In 2009, the Commission issued Cease and Desist Orders to Carl Wuestehube for "advertising Nebraska real estate for sale . . . without . . . a Nebraska real estate license," and warned him to cease "advertising the Nebraska real estate for sale in any form or media." Boden Dec.,

Exhibits 15-17. The Commission later argued before a state court that Wuestehube violated the statute solely by distributing FSBO advertisements. Boden Dec., Ex. 18 at NREC002128-30.[8]

The March 11, 2010, Cease and Desist Order the Commission sent to Ms. Young declared that she had violated the statute by "*advertising* for sale, real property located in the State of Nebraska on www.ForSaleByOwner.com . . . without having first secured a Nebraska real estate broker license. See attachments." Young Dec., Ex. 2 (emphasis added). Attached was a printout from that website, consisting solely of a list of properties in Lincoln which were offered on an FSBO basis. *Id.* at NREC00742-56. None of these ads even included the word "broker," or Ms. Young's contact information. Yet because the Commission holds advertising alone to constitute "procuring prospects," it issued the March 11 Cease and Desist Order based on the mere fact of her advertisements.

In deposition, Director Lemon defined "procuring prospects" solely by reference to speech activities: "Helping 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. A person would be "procuring prospects" if she called a friend or emailed her work colleagues to tell them that her neighbor's house was for sale, he said. *Id.* at 27:1-20; 30:23-31:7. He explained that "active[] one-on-one contact, you know, targeted individual mailings" of advertisements would constitute "procuring prospects." *Id.* at 39:3-6. And the record demonstrates that the Commission in fact routinely declares even general advertisements on the Internet to be violations.

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[8] The Commission alleged that Wuestehube had violated the statute in other ways, as well, and the court ultimately held that for procedural reasons, it was unnecessary to resolve the question of whether Wuestehube's advertisements violated the statute. Boden Dec., Ex. 19.

In short, the Commission interprets "procuring prospects" to refer to expressive activity—to speaking about, calling, emailing, or otherwise informing people that a property is for sale (for a fee). Such speech acts constitute "procuring prospects," and therefore as brokerage, without regard to the actual conduct in which the person is engaged. Thus the licensing requirement is triggered solely by the content of a person's speech.

The First Amendment protects the rights of advertising and solicitation, and the state may not impose a content-based licensing restriction on these activities. *See Forsalebyowner.com*, 347 F. Supp. 2d at 877-79. In *Linmark Associates*, the Court struck down a city ordinance that prohibited "For Sale" signs in people's front yards, but allowed other types of signs. 431 U.S. at 93-94. The restriction was unconstitutionally content-based because it did not "prohibit[] all lawn signs or all lawn signs of a particular size or shape," but instead "proscribed particular types of signs based on their content," namely, only real estate "For Sale" signs were banned. *Id.* at 93-94.

The Nebraska licensing requirement is also a content-based speech restriction, since only speech about property for sale by owner is prohibited to unlicensed persons. The Commission's asserted interests in preventing consumers from being confused or defrauded is not served by prohibiting all advertisements of real estate by non-license holders on the theory that such ads constitute "procuring prospects." The Commission could more effectively protect consumers by requiring that ads disclose relevant information, *Miller v. Stuart*, 117 F.3d 1376, 1383 (11th Cir. 1997), or by itself informing the public of matters significant to real estate transactions. *Cf. Peel*, 496 U.S. at 104-05. The Commission's asserted consumer protection interest is also significantly undermined by the fact that the Commission does not require licensure of people who advertise their own property on an FSBO basis, even though consumers could be harmed. (*See below* Section VI.C.) Nor can a total prohibition on unlicensed advertising satisfy the required narrow tailoring.

The Commission could achieve the same goal of consumer protection by regulating the practices of representation, negotiation, and other fiduciary duties, instead of speech.

Finally, the licensing requirement is also an identity-based speaker restriction. In *Sorrell*, 131 S. Ct. at 2663, the Court found that a law "disfavor[ed] specific speakers," by prohibiting persons with economic motives from engaging in free speech. This meant that some speakers "cannot obtain . . . information, even though the [same] information may be purchased or acquired by other speakers." Here, too, the licensing requirement applies only to persons who receive money in exchange for publishing advertisements, and also exempts certain specific other speakers. Thus any person may publish a real estate advertisement when the speaker is not paid, Neb. Rev. Stat. § 81-885.01(2), and property owners who advertise their own homes for sale, or trustees selling property held in trust, may advertise without a license. Neb. Rev. Stat. § 81-885.04(3). The licensing requirement is therefore triggered by the speaker's identity: only persons receiving money to publish advertisements on behalf of others, but who do not qualify for an exemption, are forced to obtain a license. "Both on its face and in its practical operation," the law "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell*, 131 S. Ct. at 2665.

The Commission may not restrict the expression of information based on the speaker's identity, or simply because that information is expressed for "marketing" purposes. Such a restriction is also a content-based limit on free speech. In *Sorrell*, the Supreme Court invalidated a Vermont law that prohibited businesses from selling information about prescription drugs for purposes of marketing, while it allowed them to sell the information for other purposes. "The statute thus disfavors marketing, that is, speech with a particular content," the Court held, and therefore had the effect of barring certain people "from communicating . . . in an effective and informative manner." *Id.* at 2663. It was irrelevant that the law in question was a "commercial regulation," *id.*

at 2664, because the law imposed a "speaker- and content-based burden on protected expression," which violated the First Amendment. *Id.* at 2667. Here, too, barring people from advertising FSBO properties on the grounds that the publication of such information constitutes procuring prospects, or on the basis of the advertiser's commercial identity, is an unconstitutional restriction of free speech.

2. By Defining "Attempting to Negotiate a Listing" to Prohibit Advertising, the Statute Constitutes a Content-Based Speech Restriction in Violation of the First Amendment

The Commission declared that Ms. Young's business constitutes "attempting to negotiate a listing," which an unlicensed person may not do.[9] Young Dec., Exhibits 2 and 3. As with "procuring prospects," no statute, regulation, court decision, handbook, or other written guideline defines "negotiate a listing," but the Commission considers any advertisement to be a listing for purposes of Neb. Rev. Stat. § 81-885.01(2). Boden Dec., Ex. 1 at 20:21-23 ("Negotiate the listing would be to go to a potential seller and discuss the terms under which they would assist someone in selling property.").

The Commission has consistently maintained that receiving compensation for an agreement to advertise FSBO properties constitutes "attempting to negotiate a listing." *See above* Undisputed Facts ¶¶ 28, 32. Director Lemon acknowledged that Nebraska law does not define a "listing," but testified that the term "refers to a situation where a real estate broker has a contract to assist someone in the sale of property or lease." Boden Dec., Ex. 1 at 21:2-4. Asked to differentiate between a listing and the type of advertisement for which a license would not be required, he could not:

> Q. Okay. So what's—what's the difference between an advertisement and a listing?

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[9] Note that the statute does not prohibit merely the negotiation of a sale, but the *negotiation of a listing*—*i.e.*, the negotiation of a contract to advertise.

> A. Well, I don't—a listing is what I—I—I just explained to you as being. An advertisement is information about some service or good being offered.

Id. at 22:4-9. "Negotiating a listing," he later explained, "would occur between the person desiring to transfer their property in some way." *Id.* at 24:7-9.

Ms. Young's advertising business is therefore prohibited by the statute, since by arranging a contract to advertise an FSBO property—to "assist someone in the sale of property or lease," *id.* at 21:2-4—she "negotiates listings." The statute prohibits Ms. Young from negotiating an agreement to disseminate information or communicate to people that a property is for sale. She is paid to provide advertising services, through Forsalebyowner.com, by placing information into an MLS for ultimate publication on websites; thus she "negotiates" "listings."

The First Amendment protects the right to advertise. *Linmark Associates*, 431 U.S. at 97; *Forsalebyowner.com*, 347 F. Supp. 2d at 874-77. The Commission may not impose a licensing requirement on advertisers that amounts to a content-based burden on speech which is not narrowly tailored to advance a compelling state interest. *Id.* at 877. The licensing requirement is not narrowly tailored, because it imposes a far greater burden than necessary to advance the state's interest in protecting consumers. The state can constitutionally protect consumers against fraudulent or deceptive advertising by punishing fraud. Indeed, it does so already, as everyone in Nebraska is already subject to the state's laws against misleading or fraudulent advertising. Neb. Rev. Stat. § 28-1477. The state could also adopt carefully drafted disclosure requirements for advertisements. *Miller*, 117 F.3d at 1383. Instead, it has chosen to force a person to undergo hours of unnecessary training and irrelevant testing to obtain a license before being allowed to publish any such advertisement. This restriction on freedom of speech is unconstitutional. *Forsalebyowner.com*, 347 F. Supp. 2d at 877.

By defining "attempting to negotiate a listing" to include contracting to help a person advertise a for-sale home, the Commission has imposed a content- and identity-based speech restriction on the dissemination of information which fails strict scrutiny.

B. The Licensing Law and Its Implementing Regulations Are Unconstitutionally Overbroad and Vague

1. The Statute Is Unconstitutionally Overbroad Because It Burdens a Substantial Amount of Protected Speech

The statutory and regulatory restrictions on FSBO advertising are unconstitutionally overbroad. A restriction on speech is unconstitutionally overbroad when it restricts a substantial amount of constitutionally protected speech. *United States v. Williams*, 553 U.S. 285, 292 (2008). The first step in overbreadth analysis is to construe the statute to see what it prohibits, *id.* at 293; next, the Court must determine whether it burdens a substantial amount of speech, or only a relatively minor amount. *Id.* at 297.

The licensing requirement prohibits an unlicensed person from "procuring prospects," a term which is not defined in any statute or regulation, and which plainly applies to speech activities. Director Lemon testified that it means "Helping somebody find a potential purchaser . . . 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. Thus even a person who telephones a friend or emails colleagues at work about a property for sale—and accepts money for doing so—would be "procuring prospects." *Id.* at 30:23-31:7, 27:23-28:21, 23:23-25.

Indeed, the Commission even prohibits *licensed* brokers from publishing FSBO advertisements. *Id.* at 22:10-12. The Commission's regulations forbid a broker from advertising a property "in a manner indicating that the offer to sell, buy, exchange, rent, or lease such real property is being made by a private party not engaged in the real estate business." 299 Neb. Admin.

Code § 2-004. Thus, even a person who does have a license is prohibited from advertising FSBO properties. This prohibition is content-based, as it allows a licensee to publish an advertisement that states that the offer is being made by a represented party, while forbidding the publication of FSBO ads. That prohibition applies without regard to whether such a statement is true. The Commission's prohibition on licensees publishing FSBO ads is also a speaker-based restriction on speech, since it applies only to licensed brokers; property owners themselves may publish FSBO ads.

The statute and its implementing regulations therefore prohibit a substantial amount of protected speech. Because the Commission views every advertisement for real estate as "procuring prospects" or "attempting to negotiate a listing," the prohibition presumptively applies to everyone who publishes an FSBO ad—and even licensees are prohibited from posting such ads. Since 2005, the Commission has issued at least 14 Cease and Desist Orders to persons who have advertised real estate for sale in Nebraska, routinely asserting that no unlicensed person may advertise real estate. *See above* Undisputed Facts ¶¶ 27-37. The licensing requirement is thus unconstitutionally overbroad.

2. The Statute Is Unconstitutionally Vague

Any restriction on speech must be sufficiently clear that government officials and the public can know what is allowed and what is prohibited. Vague speech restrictions chill protected speech, give officials excessive power to control what speakers say, and distort the messages the public receives. *Hynes v. Mayor & Council of the Borough of Oradell*, 425 U.S. 610, 620-22 (1976). A restriction on speech that is not drawn with "narrow specificity" is unconstitutional. *Id.*

The statute at issue here is extraordinarily broad and unclear. Although it defines brokerage as "procuring prospects," "attempting to negotiate a listing," or "holding oneself out," no statute,

regulation, caselaw, or other authority defines any of these terms.[10] Consequently, officials do not know and cannot say precisely what is and is not allowed to unlicensed persons. Director Lemon testified that the Commission decides what constitutes brokerage at its disciplinary hearings, Boden Dec., Ex. 1 at 61:3-13, but the Commission has no guidance other than the statute itself in making that determination. *Id.* at 18:17-22. For instance, when asked whether a person qualifies as a broker if she advertises that she will put Nebraska property on an MLS for a fee, he answered, "[W]e haven't—haven't had a policy determination on that particular question." *Id.* at 45:25-46:5. *See also* 18:3-22, 44:23-45:4, 47:15-19, 61: 8-12, 70:4-6. And the transcript of the Wuestehube disciplinary hearing—the only such hearing held in the past five years, *id*. at 15:1-3—reveals that Commissioners themselves are unsure what constitutes "procuring prospects," "attempting to negotiate a listing," or "holding oneself out," but regularly holds that advertising alone qualifies. *See above* Undisputed Facts ¶ 30. And in any event, decisions at the Commission's hearings cannot cure the statute's vagueness, because the Commission is an "extrajudicial bod[y]" and its proceedings have no precedential effect. *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 367 (1995). Nor does the Commission publish transcripts of its hearings or its written decisions, to give the public notice of what it has decided regarding the statute's reach. Boden Dec., Ex. 1 at 83:18-19.

Turning due process on its head, the Commission enforces the statute first, and only afterwards determines what constitutes a violation. There is no pre-enforcement proceeding; Director Lemon alone chooses when to send a Cease and Desist Order to an offender. That Order is an official command from the Commission to "cease all conduct which requires a Nebraska's real estate license," including "advertising," on pain of civil and criminal penalties. *See*, *e.g.*, Boden

[10] Although the Commission occasionally issues "guidances" on certain regulatory questions, it has never issued a guidance to explain what "procuring prospects" or "attempting to negotiate a listing" or "holding oneself out" means.

Dec., Ex. 15. Although the Commission provides an appeal process, that process consists of the Commissioners deciding, informally, by majority vote, without any pre-announced guidelines or standards, whether the conduct at issue constituted "procuring prospects," "attempting to negotiate a listing," or "holding oneself out."

Thus the Commission does not know, and the public can not know, what kind of advertising is, or is not, legal—before Director Lemon, in his unbridled discretion, issues a Cease and Desist Order that compels the person to cease advertising. Such a prohibition on speech is unconstitutionally vague.

C. The Commission Unconstitutionally Defines "Holding Oneself out as a Broker" Solely by Reference to Speech Acts, in Violation of the First Amendment

The Commission contends that Ms. Young "holds herself out" as a broker, not because she engages in a course of conduct intended to persuade consumers to think she is a broker, or because consumers ever thought she was a broker, but solely because she uses certain words—such as "advertising broker"—to describe herself, and because words like "view agent's other listings," and "email agent" appeared on Realtor.com advertisements drawn from her data entries. Boden Dec., Ex. 1 at 86:8-87:1; Young Dec., Ex. 3 at NREC00769-795. While the state obviously may prohibit people from engaging in fraud or misrepresentation, the First Amendment does not allow it to forbid Ms. Young from truthfully describing her services, or to impose a licensing requirement on her solely on the basis of her use of certain words. *Abramson v. Gonzalez*, 949 F.2d 1567, 1574 (11th Cir. 1992); *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009); *Parker v. Commonwealth of Kentucky, Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987). Even if a law purports to regulate conduct, the First Amendment bars the state from defining speech as conduct and thus regulating

it. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010) (First Amendment applies when "the conduct triggering coverage under the statute consists of communicating a message.").

1. Ms. Young's Description of Her Services as "Advertising Brokerage" Is Protected Commercial Speech

Unlike the ads themselves, which are pure speech, *see Forsalebyowner.com*, 347 F. Supp. 2d at 874-77, Ms. Young's self-description as an "advertising broker," as "Leslie Young Real Estate Advertising Services," and her use of her name and the eList.me logo are commercial speech. *Parker*, 818 F.2d at 506. Even under commercial speech analysis, the First Amendment prohibits the state from proscribing the use of these terms. *See Peel*, 496 U.S. at 109; *In re R. M. J.*, 455 U.S. 191, 206-07 (1982).

The first step in deciding whether a regulation of commercial speech is constitutional is to determine whether the language at issue is inherently misleading, or is truthful or only potentially misleading. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002). If the speech concerns unlawful activity or is inherently misleading, it receives no First Amendment protection. *Id.* If the speech is truthful or only potentially misleading, the government may not simply prohibit it—though it may regulate it by requiring further disclosures. *Id.* The state must then prove that any restrictions on the speech directly advance a substantial government interest, and are no more extensive than necessary to serve that interest. *Id.* The government carries the burden of justifying any such restriction. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). It may not satisfy this burden by relying on "speculation or conjecture," but instead must show that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

In *Byrum*, *supra*, the court held that the state could not prohibit unlicensed people from calling themselves "interior designers" when that description was truthful. The designers "[did] not

propose to claim training, certification, or licenses they do not possess; they merely wish to use the words 'interior designer' or 'interior design' to accurately describe what they do." 566 F.3d at 448. Likewise, *Abramson*, *supra*, held that Florida could not bar people from describing themselves as psychologists, when no license was required to actually practice psychology. "[A]pparently anyone may currently practice psychology or the allied fields in Florida," the court noted, "but only those who have met the examination/academic requirements of the statutes can say that they are doing so." 949 F.2d at 1574. This violated the First Amendment because the license in question was "not a permit to practice psychology, but a permit to advertise and to hold oneself out as a psychologist . . . . It allows all to practice, but few to speak." *Id.* at 1573. The law therefore "limit[ed] the content of their speech and the scope of their free expression." *Id.* And in *Parker*, 818 F.2d at 506, the Sixth Circuit held that the state could not prohibit a person from describing himself as a specialist in certain dental services even though he did not hold a specialty license from the state when he could legally perform speciality services.

Here, while it is legal for a property owner to advertise his own home, or for an advertiser or publisher to print or distribute FSBO ads, the law prohibits Ms. Young from including her name, or terms like "advertising broker" on the advertisements, because this constitutes "holding herself out as a broker." In a letter to Ms. Young's former attorney, Director Lemon stated that "Ms. Young is listed as the broker on the website as well as showing her 'presenting' property . . . and listing her contact information[[11]]," so that "Ms. Young is holding herself out as the broker." Young Dec., Ex. 5. Also, Director Lemon testified that any use of the word "broker," even if modified as

[11] This was an error; Ms. Young's contact information never appeared on the FSBO ads. Young Dec. ¶ 15. Instead, the telephone number and/or email addresses provided were solely those of the FSBO sellers, and not Ms. Young. *Id.* Buyers have no way of contacting Ms. Young. *Id.* The Commission does not contend otherwise, and Director Lemon testified that the Commission issued the Cease and Desist Order based solely on the text of the ads. Boden Dec., Ex. 1 at 19:21-23.

"advertising broker" or "Leslie Young, Real Estate Advertising Services," constituted "holding oneself out as a broker" under Nebraska law, regardless of whether the speaker is or purports to be engaged in real estate brokerage services. Boden Dec., Ex. 1 at 72:20-73:10. Thus the law allows Ms. Young to practice FSBO advertising—but not to say that she is doing so unless she has a license. Yet the First Amendment protects Ms. Young's right to describe herself and her business in whatever truthful manner she chooses; any restriction on that right must satisfy the heightened scrutiny of the First Amendment. The restriction here fails that test.

2. The Words Appearing on Ms. Young's Ads Are Not Inherently or Actually Misleading

The record reveals no evidence that Ms. Young's advertisements are inherently or actually misleading. While the Commission concluded that Ms. Young violated Nebraska law, Director Lemon testified that he had no reason to believe that any of the information in her advertisements was inaccurate, Boden Dec., Ex. 1 at 80:11-16, and could not recall receiving a complaint from a consumer about her. *Id.* at 73:11-18. There is no evidence that any consumer was ever actually misled. Young Dec. ¶¶ 7, 16. There is no evidence that buyers thought she represented sellers—indeed, buyers have no way of contacting Ms. Young, and none ever has. *Id.* ¶¶ 13-15. The ads do not contain her phone number or email address, but connect instead to the phone or email address of the FSBO seller directly. *Id.* And although "eList.me" appears on the ads, that website states repeatedly that she works as an advertiser only. Young Dec., Ex. 4.

While she uses the term "advertising broker," this phrase is commonly used to describe persons engaged solely in advertising. *See*, *e.g.*, *Gabriel v. Superstation Media, Inc.*, No. 13-12787-NMG, 2014 WL 551009, at *1 (D. Mass. Feb. 7, 2014); *Ad Associates, Inc. v. Coast to Coast Classifieds, Inc.*, No. 04-3418, 2005 WL 3372968, at *1 (D. Minn. Dec. 12, 2005); *see*,

e.g., *Meek Co. v. Rohlff*, 91 Neb. 298, 301 (1912). It is therefore unlikely that buyers *could be* misled.

There is also no evidence that *sellers* were misled, since Ms. Young's contracts with them explicitly state that she provides only advertising services and not brokerage services, Young Dec. ¶ 6, and FSBO sellers can only reach Ms. Young by first purchasing an advertising package from "Forsalebyowner.com." *Id.* ¶ 5. Sellers provide the property descriptions and photographs of the properties themselves, *id.*, and receive no personalized advice from Ms. Young. *Id.* ¶¶ 16-18.

Finally, there is no evidence that the general public was ever confused, or that Ms. Young ever tried to fool anyone into thinking she offered brokerage services. *Id.* ¶¶ 7, 16; Boden Dec., Ex. 1 at 73:11-18. In fact, she made every effort to avoid causing people to think she was a Nebraska broker. Young Dec. ¶¶ 6, 7, 13, 15, 16. She labeled her company "Leslie Young, Advertising Services," Young Dec., Ex. 2 at NREC00746, and stated on the eList.me website that she offered only advertising services. Young Dec., Ex. 4. The Commission cannot therefore claim that Ms. Young's use of terms like "advertising broker," "Presented by Leslie Young Real Estate Advertising Services," etc., were actually or inherently misleading.

3. Ms. Young's Use of Terms Like "Advertising Broker" and "Leslie Young Advertising Services" Cannot Be Censored Even If It Is Potentially Misleading

Even if a court were to construe terms like "advertising broker" or "Leslie Young Real Estate Advertising Services" as *potentially* misleading, the Commission may not prohibit Ms. Young from using these words to describe her services. The government may not completely ban potentially misleading commercial speech. While it may regulate such speech to some degree, it must err on the side of more, rather than less speech.

Peel, 496 U.S. at 101, held that the state could not prohibit an attorney from placing the term "Certified Civil Trial Specialist" on his letterhead, when he was, in fact, certified by a private organization. There was no evidence the term was inherently or actually misleading, but the state contended that it was potentially misleading because consumers might think the certification had been issued by the state. *Id.* at 100-01. This, the lower court held, "might be so likely to mislead as to warrant restriction." *Id.* at 101 (citation and quotation marks omitted).

The Supreme Court reversed. There was "no basis for belief" that consumers would be misled, *id.* at 103, because the context of the speech in question and the general level of understanding among consumers was enough to minimize confusion: "[T]he consuming public understands that . . . a host of certificates . . . are issued by private organizations," *id.*, and it was "unlikely that petitioner's statement about his certification . . . would be confused with formal state recognition." *Id.* at 104-05. Even if the term were potentially misleading, the Court held that this potential could not "satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information." *Id.* at 109. Where speech is only potentially misleading, the state may not categorically ban it, but should instead "'assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.'" *Id.* at 110 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). *Accord*, *In re R. M. J.*, 455 U.S. at 204-07 (attorney may truthfully state that he is admitted to the Supreme Court Bar even if this is potentially misleading).

In this case, the words which the Commission bars non-licensees from using are not inherently misleading. Ms. Young does, in fact, offer "Real Estate Advertising Services," and is an advertising broker. Young Dec. ¶¶ 2, 3. The term "Presented by Leslie Young" is not inherently misleading, since she is the advertiser responsible for the ad. Nor are the terms "Email Agent," and

"Visit Agent's Website,"or the presence of a telephone number and email address inherently misleading, since any person who clicked on the link provided, or called the phone number, would be connected to the FSBO seller, and not to Ms. Young. *Id.* ¶¶ 12, 14, 15. The same is true of the "eList.me" logo that appears on the ads, since a person going to the eList.me website would see that it repeatedly explains that Ms. Young offers only advertising services. Young Dec., Ex. 4. Finally, the terms "Presented By," "View Agent's Other Listings," and "Email Agent," are imposed on the Realtor.com ads by the website's template, and not by Ms. Young. Young Dec. ¶¶ 10-12. A consumer using the website can be presumed to be familiar with this fact. In any event, a consumer who, for example, sees the phrase "email agent," and clicks on it to discover that the email goes directly to the FSBO seller instead of to an agent, would understand that Ms. Young is not representing the seller. Just as the *Peel* Court could be confident that the public understands that private institutions can certify attorneys, 496 U.S. at 103, so this Court can be confident that the consumer understands, when he clicks on a weblink, and follows it to a webpage explaining that Ms. Young provides only advertising services, that she is an advertiser and not a broker.

In *Miller*, *supra*, the plaintiff was a licensed CPA, but was not allowed to state that fact on his business cards or letterhead, because he worked for a firm that was owned by non-CPAs, which under state law meant that he could provide accountancy services, but could not disclose to the public that he was a CPA. 117 F.3d at 1379-81. The state argued that his use of the designation was potentially misleading because it would "impress[] the consumer that he is providing regulated public accounting services associated with CPAs when in fact he is providing services that any non-CPA can provide." *Id.* at 1383. Yet the state "failed to produce any empirical evidence showing consumers will be misled," and instead "relied solely on 'speculation and conjecture' to support its assertion" that calling himself a CPA "would mislead the public into believing that he

is providing regulated public accounting services." *Id.* at 1383. Nor had the state proven that its *per se* ban on the use of the term "CPA" was narrowly tailored. "[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.* Although the state claimed that it had "created the title" of CPA and "imbued it with meaning," so that it could "decide the terms and conditions under which the title can be used," *id.* at 1384, the court found this unpersuasive. Restricting the truthful use of the term "CPA" would mean "impos[ing] as a condition of licensure a requirement that is violative of the First Amendment." *Id.*

The same analysis applies here. Ms. Young's accurate description of herself as "Presented by Leslie Young Real Estate Advertising Services," and "advertising broker," her use of the eList.me logo and other terminology, are not inherently misleading, and there is no evidence, but only speculation and conjecture, that a consumer might be misled into thinking she offers services which she does not. While the state might impose some form of disclosure (and in fact, her use of terms like "advertising broker" and "Advertising Services," and her link to the eList.me website with its many disclaimers, already serve as a form of additional disclosure) it may not simply prohibit her from publishing FSBO ads with these terms on the theory that they constitute "holding herself out as a broker."

In sum, there is no basis for believing that consumers will be misled, *cf. Peel*, 496 U.S. at 103, and it is "unlikely that Ms. Young's statement that the FSBO ads are "presented by Leslie Young Real Estate Advertising Services" will be confused with brokerage practice in Nebraska. *Cf. id.* at 104-05. Nor can the Commission show "that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception." *In re R. M. J.*, 455 U.S. at 207. Thus its interpretation of the statute as imposing a *per se* ban the use of such terms as "Presented by Leslie

Young Real Estate Advertising Services," "View agent's other listings," etc., cannot be sustained. "The absolute prohibition on [Ms. Young's] speech, in the absence of a finding that [her] speech was misleading, does not meet [the] requirements [of the First Amendment]." *Id.*

4. The Commission May Not Use Speech as the Sole Trigger for Imposing the Licensing Requirement on Ms. Young

The Commission also holds that any appearance of words like "broker," "View Agent's Other Listings," or the appearance of Ms. Young's name, on the ads are alone sufficient to trigger the licensing requirement. In its view, the appearance of these words constitutes "holding oneself out" as a broker, notwithstanding the facts that buyers cannot and do not ever speak to Ms. Young, Young Dec. ¶ 15, that her contracts with FSBO sellers declare clearly that she is providing only advertising services, Young Dec., Ex. 1, and that she identifies herself as "Leslie Young, Advertising Services." Young Dec., Ex. 2 at NREC00746.

The government may not impose a regulation on an activity that is triggered solely by expression. *Holder*, 561 U.S. at 28. In *Thompson*, 535 U.S. at 370, the Supreme Court struck down, on First Amendment grounds, provisions of a federal law that required FDA approval of compounded drugs, but only when pharmacists advertised the drugs. Absent that speech, the requirement did not apply. *Id.* The Supreme Court found that this imposed a burden on commercial speech, and that the government failed to demonstrate that it was narrowly tailored. *Id.* at 374. The government could not explain why it "believed forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests." *Id.* at 373. The government can, of course, require a license for a person who holds himself out *through acts and behaviors*, which may include speech. *Cf. State ex rel. Med. Licensing Bd. of Indiana v. Stetina*, 477 N.E.2d 322, 327 (Ind. Ct. App. 1985) (holding oneself out means being "prepared to provide . . . services to the general public"); *Office of Prof. Regulation v. McElroy*, 824 A.2d 567, 571 (Vt. 2003) (holding oneself out

means "publishing misleading statements about his own status"). The state may thus prohibit "a course of conduct." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). But here, the Commission holds that the mere use of the words, without more—*i.e.*, without regard to the context in which those words are used, and without regard to any of Ms. Young's other conduct—subjects a person to the licensing requirement.

The Commission holds that the licensing requirement is triggered solely by the appearance of certain "trigger words" on the ads. Regardless of any other factor, once the words "advertising broker" or "View Agent's Other Listings," or Ms. Young's name, appear on her advertisements, the licensing requirement applies. Boden Dec., Ex. 1 at 86:8-87:1, 72:20-73:8. In a declaration submitted earlier in this case, Director Lemon stated that Ms. Young "held herself out" as a broker due solely to the appearance of the terms "Presented By," "View Agent's Other Listings," "Email Agent," and the presence of her name on the Realtor.com ads. *See* Declaration of Greg Lemon in Opposition to Motion for Preliminary Injunction (Docket No. 30) ¶¶ 3-4.

The Commission has consistently clung to this "trigger words" view of the licensing requirement. Its 2011 Cease and Desist Order to Lawrence Bunnell, for example, was based solely on Director Lemon's view that Bunnell's company was "holding itself out" due to the fact that the company's website included the phrases "Presented by bloomkey.com," included a telephone number, and was affiliated with Realtor.com. Boden Dec., Ex. 13. Director Lemon stated that the Commission "would have no interest or jurisdiction" over the matter if Bunnell's company "were to assist someone in putting their home on Criagslist or the Omaha World Herald without having your companies [sic] name and number listed on the materials." *Id.* The Commission's interpretation of "holding oneself out" therefore is based solely on trigger words: if the advertiser

includes his name and number in an advertisement for an FSBO property, that person is subject to the licensing requirement.

By defining "holding oneself out" solely in terms of "trigger words," and without relation to a course of conduct, the Commission imposes a content-based speech restriction. *See SEIU, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) ("A regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based regardless of its motivating purpose."). This is unconstitutional. While the Commission may regulate the *practice* of brokerage, which might include *incidentally* regulating speech, it may not regulate *speech acts alone*, by defining a business practice solely in terms of speech, ignoring the actual conduct and context. *Thompson*, 535 U.S. at 374. Nor may it bar Ms. Young from accurately describing herself as an "advertising broker" when that term is, at most, only potentially misleading, and there is no evidence that any person was ever misled. *Peel*, 496 U.S. at 103-05.

Finally, the Commission's prohibition is unconstitutional because it is not narrowly tailored. The fact that a term may be potentially misleading cannot justify a complete ban on the use of that word. *In re R. M. J.*, 455 U.S. at 203. The favored remedy is more speech, not less. *Id.* This is especially true where the speaker uses terms that he or she is qualified to use. *See*, *e.g.*, *id.*; *Peel*, 496 U.S. at 94; *Strang v. Satz*, 884 F. Supp. 504, 510 (S.D. Fla. 1995); *Tsatsos v. Zollar*, 943 F. Supp. 945, 950 (N.D. Ill. 1996).

D. The Licensing Requirement Is an Unconstitutional Prior Restraint

The First Amendment prohibits a state from imposing a prior restraint on speech, including commercial speech, by forbidding a person from speaking without first obtaining a license. *New York Times*, 403 U.S. at 714. While it may punish those who abuse the freedom of speech, it may not impose a prior restraint in any but the rarest circumstances. "[A]ny licensing that places a prior

restraint on the exercise of protected expression" is presumptively unconstitutional. *Books, Inc. v. Pottawattammie Cnty., Iowa*, 978 F. Supp. 1247, 1254 (S.D. Iowa 1997). Here, the licensing requirement is a prior restraint because "it makes the exercise of protected expression contingent upon obtaining permission from government officials." *Id.*

In *Books, Inc.*, the court found that a law that required businesses to obtain a license if they offered nude dancing "clearly act[ed] as a prior restraint." *Id. See also United Youth Careers, Inc. v. City of Ames*, 412 F. Supp. 2d 994, 1003 (S.D. Iowa 2006) (permit requirement for expressive activity was a prior restraint). The government can overcome the heavy burden of justifying a prior restraint only by showing that it is narrowly tailored to serve an important public interest, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165 (2002), and that it provides "narrow, objective, and definite standards to guide licensing authorities." *City of Ames*, 412 F. Supp. 2d at 1003-04.

The licensing requirement fails all of these tests. First, it does not serve an important government interest. While protecting consumers against fraud or misrepresentation is an important government interest, the licensing requirement does not serve that interest because it exempts FSBO sellers who advertise their own homes, Neb. Rev. Stat.§ 81-885.01(2), even though, as Director Lemon acknowledged, they may just as easily misrepresent homes for sale. Boden Dec., Ex. 1 at 77:23-78:4. Trustees, family members, and any person acting without pay, are also allowed to advertise the property of another without a license, which undercuts whatever consumer protection rationale the licensing requirement might have. Neb. Rev. Stat. § 81-885.04(4).

Second, the licensing law is not narrowly tailored because it applies even to persons like Ms. Young who have no interaction whatsoever with buyers, and do not negotiate sales or serve as fiduciaries. Thus the statute reaches far more broadly than necessary. Moreover, obtaining a license

requires a person to undertake education and testing requirements that bear no relationship to FSBO advertising. (*See below* Section VI.) The licensing requirement is therefore overinclusive, since it requires people to obtain a broker license who have no interest in acting as brokers, and overly burdensome in that obtaining a license requires substantial training in matters that bear no relationship to the activity in which Ms. Young engages. Finally, the licensing requirement fails the narrow tailoring test, since *even licensees are prohibited from advertising FSBO properties*. Under 299 Neb. Admin. Code § 2-004, Ms. Young's business would be illegal even if she *did* obtain a license.

Nor does the licensing requirement contain clear and definite standards to guide the Commission. To satisfy the First Amendment, a prior restraint must provide "narrow, objective, and definite standards to guide licensing authorities," *City of Ames*, 412 F. Supp. 2d at 1003-04, yet neither the statute nor any regulation, caselaw, or other authority, defines such crucial words as "procure," "prospects," or "listing." This leaves Director Lemon alone free to decide whether to order someone to Cease and Desist advertising, and leaves the Commission members free to decide on an *ad hoc* basis, at its rare disciplinary hearings, whether a person has actually violated the statute. The licensing requirement is therefore unconstitutional.

VI

THE LICENSING REQUIREMENTS ARE ARBITRARY AND IRRATIONAL AS APPLIED TO MS. YOUNG'S BUSINESS, AND THEREFORE VIOLATE THE DUE PROCESS CLAUSE

Every person has a constitutional right to earn a living without unreasonable government interference. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). While states have broad discretion to require people to obtain licenses before entering a trade, any licensing and testing requirements must rationally relate to a person's "fitness and capacity to practice" the trade in question. *Schware v. Bd.*

of Bar Exam'rs of the State of N.M., 353 U.S. 232, 239 (1957). Laws that lack such a rational basis are unconstitutional. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Craigmiles*, 312 F.3d at 229. The licensing requirement for people who help advertise FSBO properties is arbitrary, unreasonable, and bears no relation to public health, safety, or general welfare. That requirement forces Ms. Young to take classes and master skills wholly unrelated to her business and simultaneously ignores matters that *are* related to her business. In addition, the law exempts similarly situated individuals from having to comply with the same licensing requirement.

A. The Education and Testing Requirements Bear No Rational Relationship to Ms. Young's Advertising Business

Real estate brokerage and advertising FSBO homes are two entirely different professions. The former involves licensed brokers who represent parties to a transaction; the latter involves individuals who aid others who wish to sell their homes *without* the use of a broker. Yet the licensing statute challenged here treats both professions the same. As a result, the Commission demands Ms. Young to spend time and money learning skills and information completely unrelated to her advertising business, in order to obtain a license, and then to operate as a broker by maintaining a trust account, buying errors or omissions insurance, and following continuing education requirements—none of which relates to her advertising business and none of which will protect the public health, safety, or welfare in any way.

Licensing requirements that impose excessive, unnecessary, and irrelevant education and training requirements on people who wish to practice an occupation violate the Due Process and Equal Protection Clauses. *Craigmiles*, 312 F.3d at 225-29; *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999). In *Cornwell*, the district court held that it was unconstitutional to require hair braiders to undergo extensive education and training and obtain a cosmetologist's license, because the cosmetology curriculum included only "a small number of overall hours . . .

devoted to relevant subjects." *Id.* at 1110. Indeed, "just over six percent of the curriculum [was] relevant" to what the hair braiders actually did. *Id.* at 1111. Thus "requiring [them] to participate in this curriculum in order to be able to practice their profession" was irrational and unconstitutional. *Id.* at 1115. And the education and testing requirements did not teach information that would be relevant to hair braiding. *See id.* at 1110 ("braiding is minimally taught in this course.").

Similarly, in *Craigmiles*, the Sixth Circuit held that it was irrational to require people engaged in selling coffins to obtain funeral director licenses—which required two years of extensive training in skills that were not germane to the occupation of selling caskets (*e.g.*, embalming). 312 F.3d at 225-26. The Court of Appeals thus affirmed the District Court's conclusion that "the purpose of promoting public health and safety is not served by requiring two years of training to sell a box." *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 663 (E.D. Tenn. 2000).

The same conclusion applies here. In order to obtain a brokerage license, as the Commission insists Ms. Young must, she would be required to complete (a) complete 18 credit hours in subjects related to real estate at an accredited college, or (b) complete 180 class hours in a Commission-approved real estate course, or (c) must have served as a licensed real estate sales person or broker for two years and complete 120 hours of Commission-approved class study. She would then be required to pass an examination "covering generally the matters confronting real estate brokers." Neb. Rev. Stat. § 81-885.13(4). Every two years, licensees are also required to complete 12 hours of continuing education courses and six hours of broker-approved training. Neb. Rev. Stat. § 81-885.51.

The Commission-approved real estate courses and accompanying exams are concerned with preparing individuals with the knowledge necessary to represent buyers or sellers, and thus bear no relationship to FSBO advertising.

For example, one Commission-approved course, Boden Dec., Ex. 26, consists of three parts: (1) the source of the Board's authority to promulgate the Rules and Regulations that govern licensees, NREC00105-108, (2) the licensing requirements and what licensees are authorized to do, NREC00109-147, and (3) agency relationships. NREC00148-164. Notably, advertising is only mentioned a handful of times throughout the 66-page course, and when it is, it is discussed in contexts wholly unrelated to advertising FSBO homes.

The overwhelming majority of the course teaches licensed brokers skills necessary to represent buyers or sellers in the transfer of property. For example, it discusses negotiating the terms of sale, preparing and relaying offers, handling client funds, keeping a trust account, closing escrow, and maintaining proper paperwork. Boden Dec., Ex. 26. But Ms. Young does none of these things—she does not even meet sellers or buyers, let alone represent either in transactions. Ms. Young does not communicate offers, negotiate sales, write purchase contracts, handle clients' earnest money, or perform any duties relating to the closing of escrow. Young Dec. ¶¶ 17, 18. Therefore the majority of the course is irrelevant to her business.

Where the required course does mention advertising, it does not actually teach any advertising skills. Rather, it simply repeats the Real Estate Act's regulation of advertising *by licensed brokers*. The course makes four main points with regard to advertising: (1) licensees must include their business names in all of their advertisements, Boden Dec., Ex. 26 at NREC00143-44, (2) licensees must disclose that they are licensed when they advertise property that they personally own, *id.* at NREC00131-32, (3) licensees may not advertise a property without the consent of the owner, *id.* at NREC00132, and (4) brokers may not publish intentionally misleading ads. *Id.* at NREC00127-28. Not one of these requirements pertain to Young's business, except for the prohibition on false advertising—which is already applicable to Ms. Young under the state's

ordinary laws against fraud, which apply to everyone regardless of licensure and are not challenged here.

Licensed brokers must include their business names in their advertisements so that buyers will not be misled into thinking that a home is for sale by owner, when in fact, the seller is represented by a broker. This disclosure requirement ensures that consumers are not misled about the broker's participation in the transaction. *Id.* at NREC00149-154. But this rationale cannot apply to Ms. Young, who is not a broker and who does not represent parties. The concern that a consumer will be misled into thinking a property is for sale by owner when it is not will cannot be a concern with regard to Ms. Young's business, because she only advertises homes that are for sale by owner. Young Dec. ¶ 2. She need not inform consumers that she is representing the seller, because she does not represent sellers. Certainly it makes no sense to require her to *become* a broker in order to ensure that consumers are aware of a broker's participation in a transaction, when absent that requirement, no broker would be involved. The course also teaches brokers that they must disclose that they are licensed when they advertise properties that they own. Boden Dec., Ex. 26 at NREC00131-132. This requirement is designed to ensure that consumers are aware that the seller is a broker. But, again, Ms. Young is not a broker, and does not sell her own property. She only advertises FSBO properties owned and sold by others. Young Dec. ¶ 2.

Finally, the course emphasizes that licensees may not advertise homes without an owner's permission, or publish intentionally misleading ads. Boden Dec., Ex. 26 at NREC00132, 00127-28. These are legitimate state interests, but they are already served by Nebraska's laws against misleading or untruthful advertising, which apply to everyone, whether licensed or not. Neb. Rev. Stat. §§ 59-1602, 87-302. It bears emphasis that there is no evidence that Ms. Young has ever published misleading ads, or advertised property without an owner's consent. Nor could she, since,

under her business model, she is contacted by people who seek out her services, and provide her with all of the information she helps publish. Because the majority of the course teaches matters unrelated to advertising, and what little does pertain to advertising has nothing to do with FSBO advertising, there is no rational reason to make Ms. Young take the course and obtain a license before operating her business.

The required exam also does *not* test matters that *are* relevant to Ms. Young's business. Of the practice exam and two tests which the Commission provided in discovery—and which together total 91 questions—just *two questions* relate to advertising. Boden Dec., Ex. 25. One asks whether brokers can advertise properties without including their names, and the other asks whether brokers can advertise homes they own without disclosing that they are licensed. The answer to the first questions underscores the irrationality of requiring Ms. Young to undertake the educational requirement and obtain a license. Licensees cannot advertise homes without their names because such advertisements might appear to be FSBO ads when they are not. But Ms. Young's ads *are all* FSBO ads. Also, brokers are not allowed to leave their names off ads because they are not allowed to engage in FSBO advertising, 299 Neb. Admin. Code § 2-004, which is Ms. Young's business. Thus, if she were to become licensed she could no longer continue operating. The answer to the second question is also irrelevant to Ms. Young's business, because she *only* advertises properties in Nebraska that are owned by people other than herself.[12]

Therefore, as in *Cornwell* and *Craigmiles*, the training and examination requirements are wholly unrelated to Ms. Young's business; indeed they are both under- and over-inclusive. The Commission-approved courses and exams train prospective licensees how to represent buyers and

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[12] When asked whether the courses teach any matters related to advertising, Director Lemon answered that the courses "touch[] on advertising in a few instances," but he did not know any further details. Boden Dec., Ex. 1 at 74:24-75:4.

sellers in the purchase of property, which Ms. Young does not engage in, and only barely address advertising, which is her business. But what little does relate to advertising has nothing to do with FSBO advertising, and cannot, given that licensed brokers are prohibited from engaging in FSBO advertising. 299 Neb. Admin. Code § 2-004. Thus, even if Ms. Young's business posed some kind of threat to the public, the required courses and exams cannot be said to prevent that harm because they do not teach skills related to her business, but address matters *not* related to her business. Accordingly, requiring Ms. Young to satisfy the education, testing, and licensing requirements violates her due process rights.

B. The Requirements for Maintaining a License Also Bear No Relationship to Ms. Young's Business

Nebraska law requires licensees to maintain errors or omissions insurance that covers "all activities contemplated under the Nebraska Real Estate Act," Neb. Rev. Stat. § 81-885.55; 299 Neb. Admin. Code § 2-004, to keep a separate trust account for client funds, Neb. Rev. Stat. § 81-885.21, to be fingerprinted, and to undergo a criminal background check, Neb. Rev. Stat. § 81-885.13.

These requirements are imposed on real estate brokers because they serve as their clients' fiduciaries. *See Vogt v. Town & Country Realty of Lincoln*, 194 Neb. 308, 315 (1975). Clients entrust brokers to negotiate on their behalf, handle confidential financial information and bind them to agreements for which they are ultimately responsible. Ms. Young does none of these things, and undertakes no fiduciary duties on behalf of clients.[13] Her contract with her customers explicitly states, in all capital letters and boldface, that "NO . . . CONTRACT, FIDUCIARY RELATIONSHIP, AND/OR OBLIGATION" is created; only an agreement for advertising services. Young Dec., Ex. 1. It states that, unlike a real estate broker-client relationship, Ms. Young will not

[13] Technically, Ms. Young does not have "clients," a term which implies a fiduciary or consultative relationship. *Cf. Skynet*, 2008 WL 924531, at *7-9. She has customers.

"represent[] Seller as a full-service Real Estate Agency," and instead "has limited obligations to Seller." *Id.*

Moreover, Ms. Young does not need errors and omissions insurance that covers all of the conduct under the licencing law, or to obtain an escrow account, because she does not handle client funds. Young Dec. ¶ 18. In sum, forcing Ms. Young to comply with these licensing requirements is irrational, because they have no bearing on her business, and serve no public health, safety, or welfare rationale.

C. There Is No Rational Reason for the Law's Exemptions

A licensing requirement violates the Due Process Clause when it contains exceptions or exemptions that undermine the consumer protection purposes of licensure. *See Merrifield*, 547 F.3d at 992 (licensing requirement was unconstitutional when it contained "exemption[s] [which] undercut [the] rational basis for the licensing scheme."). Here, the irrationality of the requirement that Ms. Young obtain a real estate broker license is all the more obvious when one considers the exemptions to this requirement.

First, property owners—including individuals or businesses—are not required to obtain licenses before they advertise their own property for sale. Neb. Rev. Stat. § 81-885.04(1). If the Commission imposes the licensing requirement in order to prevent misleading or defrauding the public, there is no reason to exempt owners—who have the strongest incentive to engage in dishonest advertising.

Director Lemon offered no explanation for this exemption for property owners. He asserted that educational and licensing requirements ensure that advertisers will not advertise properties as being up to code when they are not: "One of the things a licensee would learn about in their classes is—is conforming and nonconforming bedrooms . . . . 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. But the owner of a house could just as easily not know about code requirements and could just as easily advertise something as a bedroom that falls short of those requirements. Indeed, the exempt property owner may even be more ignorant of the building code and may have a strong incentive to misrepresent property in this way, for personal profit. Director Lemon acknowledged that property owners are likely to make "some sort of misrepresentation because of limited knowledge of—of how to represent real estate." Boden Dec., Ex. 1 at 77:24-78:7.

This difference in treatment does *not* turn on the difference between advertising one's own property and advertising the property of another. Another exemption allows any person who serves as a trustee for a property owner to advertise property he does not own for sale without a license. Neb. Rev. Stat. § 81-885.04(3). Also, a property owner's "employee[s], parent[s], child[ren], brother[s], or sister[s]" are exempt from the licensing requirement. Neb. Rev. Stat. § 81-885.04(4). There is no rational basis for this differential application. If imposing the licensing requirement on FSBO sellers is a rational way to prevent harm to the public, it is irrational to exempt the parties with the most incentive to lie from the licensing laws. There is no basis for concluding that such persons are more trustworthy advertisers than FSBO advertisers like Ms. Young.

Finally, no licensing requirement applies to any person who advertises homes without being paid. Neb. Rev. Stat. § 81-885.01(2). There is no basis for believing that the "general dangers of misrepresentation" due to "limited knowledge . . . of how to represent real estate," Boden Dec., Ex. 1 at 77:24-78:7, are in any degree lessened if a person assists in advertising without being compensated. The exemption for people who are unpaid is entirely arbitrary.

In *Merrifield*, the court held that a licensing requirement for pest control workers was irrational because it forced workers to obtain licenses if they dealt with pigeon, rat, or mouse infestations, but not if they eradicated any other kind of pest. While a legislature has broad discretion to tailor licensing requirements, it cannot arbitrarily impose requirements on some and then exempt others: "We cannot simultaneously uphold the licensing requirement under due process based on one rationale," the court held, while "uphold[ing] . . . the exemption based on a completely contradictory rationale . . . . [W]hile a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive rational basis review by resorting to irrationality." 547 F.3d at 991.

The same is true here. If it is rational for the Commission to require a person who simply advertises property to obtain a real estate broker license on the grounds that the licensing requirement protects the public against the "general dangers of misrepresentation" or ads written by persons with "limited knowledge . . . of how to represent real estate," Boden Dec., Ex. 1 at 77:24-78:7, then it is irrational to simultaneously exempt property owners themselves, as well as their relatives or trustees, Neb. Rev. Stat § 81-885.04(4), or any person who engages in advertisement without compensation, *id.* § 81-885.01(2), from the same requirements. The licensing exemptions—which allow the very property sellers who stand to benefit most from misrepresenting their properties to advertise property without a license—are based on "a rationale so weak that it undercuts the principle of non-contradiction," and thus violates the rational basis test. *Merrifield*, 547 F.3d at 991.

VII

FORCING MS. YOUNG TO OBTAIN A LICENSE BUT NOT OTHERS SIMILARLY SITUATED VIOLATES THE EQUAL PROTECTION CLAUSE

A law violates the Equal Protection Clause if it arbitrarily treats similarly-situated people differently, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996)—that is, where it differentiates between people for reasons that are not "relevant . . . to the statute's goal." *Country v. Parratt*, 684 F.2d 588, 590 (8th Cir. 1982). A law also violates the Equal Protection Clause if it combines groups who are differently situated into a single category and ignores their constitutionally relevant distinctions. In short, "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). *See also Craigmiles*, 312 F.3d at 229 (treating casket sellers as though they are funeral directors is unconstitutional); *Cornwell*, 80 F. Supp. 2d at 1003 (unconstitutional to treat hair braiders like cosmetologists).

The Commission imposes the licensing requirement on Ms. Young while simultaneously exempting others engaged in substantially the same advertising. Yet this difference in treatment bears no rational connection to a legitimate state interest. At the same time, the requirement treats FSBO advertisers like Ms. Young as though they are real estate brokers, thereby irrationally imposing a licensing requirement on both groups without regard to their relevant differences.

A. The Licensing Requirement Violates the Equal Protection Clause by Treating Similarly Situated People Differently for No Rational Reason

As explained above, the licensing requirement imposes a burden on Ms. Young that is not imposed on others similarly situated. Although she obtains information about FSBO property and inputs that information into a computer database that websites then use to publish FSBO ads, the Commission has demanded that she obtain a real estate broker license in order to operate her business. Yet the statute allows property owners to advertise their own property without obtaining

a license, and allows their trustees or relatives to advertise on their behalf, and also allows any person to advertise any other person's property for sale, so long as that person is not paid. Neb. Rev. Stat. §§ 81-885.01(2), 81-885.04(4). Nor does the Commission require institutions that publish advertisements—such as newspapers, billboard owners, or websites like Craigslist—to obtain licenses. There is no justification for this difference in treatment.

In *Forsalebyowner.com*, the district court held that a real estate broker licensing law arbitrarily exempted newspapers from the licensing requirement while imposing that requirement on an internet publisher engaged in "virtually identical" activities. 347 F. Supp. 2d at 877. It rejected the defendants' argument that the differential treatment was justified because newspapers engage in "more traditional advertising services," while the online publisher engaged in a "'synergistic' effort to cultivate 'market relationships' with other retailers.'" *Id.* at 878. Both companies engaged in the same exact behavior—receiving and publishing information—and there was no reason to compel either to obtain a real estate broker license. *Id.* at 879. Likewise, it violates the Equal Protection Clause to require Ms. Young to obtain a brokerage license when she helps publish advertisements of FSBO properties while not also requiring licenses for newspapers or websites—or property owners and others who enjoy statutory exemptions—that are engaged in essentially the same business of assembling information and helping to publish it.

B. The Licensing Requirement Unconstitutionally Requires a Person Engaged in One Profession to Obtain a License Appropriate for a Different Profession

It is irrational to treat Ms. Young, who is engaged only in advertising FSBO property, as a broker and to impose on her the same licensing rules that apply to people engaged in a wholly different profession. Although she does not show homes, represent parties, or negotiate transactions, the Commission demands that she obtain a brokerage license, and thus undergo extensive education

and training requirements that have nothing to do with her business. In *Cornwell*, the court observed that if the state "were to require that all professionals—be they budding architects, lawyers, or cosmetologists—attend a cosmetology training program," such a requirement would unconstitutionally "draw[] the classification so broadly that the requirement for such a license is irrational because the professions are different." 80 F. Supp. 2d at 1103. Likewise, requiring a real estate broker license for someone engaged only in FSBO advertising, who performs no brokerage tasks, ignores the constitutionally relevant differences between these trades and imposes an irrational statutory classification.

Ms. Young's business consists of compiling information given to her from sellers, and placing it in a computer database. She does not show homes, advise clients, or handle offers. Any overlap with real estate brokerage is superficial: her business is related to homes for sale. But in Ms. Young's case, these homes are for sale by owner. Her business has nothing to do with the practice of real estate brokerage, because her clients have intentionally chosen not to be represented by a broker. Because the real estate broker license examination, courses, and other requirements are almost entirely geared toward establishing an applicant's expertise with regard to negotiations and representations, it is irrational to classify FSBO advertisers as real estate brokers. The licensing requirement therefore violates the Equal Protection Clause.

VIII

THE LICENSING SCHEME VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE

The licensing requirement also violates Ms. Young's privileges and immunities, in violation of the Fourteenth Amendment's Privileges or Immunities Clause.

That Clause prohibits states from abridging rights which derive from federal citizenship. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873); *Saenz v. Roe*, 526 U.S. 489, 503 (1999).

The right to engage in an ordinary occupation is a right inhering in federal citizenship. *Greene*, 360 U.S. at 492; *Schware*, 353 U.S. at 239. In *Saenz*, the Court indicated that the Clause continues to prohibit states from interfering with federal constitutional rights. 526 U.S. at 503-04. Therefore, while the Due Process and Equal Protection Clauses protect the right to earn a living without irrational government interference, the Privileges or Immunities Clause provides Ms. Young with a further basis for relief. As explained above, the real estate broker license requirement abridges her right to earn a living with no rational connection to protecting the public health and safety. It therefore violates the Privileges or Immunities Clause of the Fourteenth Amendment.

CONCLUSION

Plaintiff's motion for summary judgment should be *granted*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system.

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