No. 15-1873

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LESLIE RAE YOUNG,

Plaintiff - Appellant,

v.

PETE RICKETTS, et al.,

Defendants - Appellees.

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

APPELLANT'S OPENING BRIEF

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SUMMARY OF CASE & ORAL ARGUMENT REQUEST

This is a First and Fourteenth Amendment challenge to a Nebraska law that requires Leslie Young to get a real estate broker license when she is not a real estate broker, only an advertiser. Her business consists solely of helping people advertise their homes "For Sale By Owner" (FSBO). She does not negotiate sales, advise parties, show homes, handle client funds, receive a commission, etc. *See* 5 Joint Appendix [J.A.] 1187, 1196. Instead, she is paid by an advertising company to place information about FSBO homes into a database from which websites draw information to show to people who are searching for homes to buy. *Id.* at 1198. State law defines this as "real estate brokerage," and requires her to get a real estate broker license to do it. Young contends that this is an unconstitutional prior restraint and a content- and identity-based speech restriction—and also that the licensing requirements are vague and overbroad, and also that the licensing requirements bear no rational relationship to her business. In fact, license-holders are *forbidden* to advertise FSBO homes. 299 Neb. Admin. Code § 2-004. As a result, the licensing requirement violates the Fourteenth Amendment.

Given the complexity of the constitutional claims here, and the fact that the District Court did not even rule on most of Appellant's causes of action before issuing judgment, Appellant respectfully requests 15 minutes of oral argument time.

CORPORATE DISCLOSURE STATEMENT

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

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Leslie Young (Young) brought this civil rights action in the United States District Court for the District of Nebraska pursuant to 42 U.S.C. § 1983, to vindicate rights guaranteed by the First and Fourteenth Amendments. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2201, 1331, and 1343(a)(3). The District Court granted summary judgment against Young on January 28, 2015. Young filed her notice of appeal on April 28, 2015. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Neb. Rev. Stat. §§ 81-885.01(2) & 81-885.02, which require anyone who "negotiates . . . [a] listing," "assists in procuring prospects," or "holds himself . . . out" as "negotiat[ing] . . . [a] listing" or "assist[ing] in procuring prospects" to obtain a real estate broker license, are unconstitutional content-based and speaker-based prior restraints on speech.

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

• *Skynet Corp. v. Slattery*, No. 06-CV-218-JM, 2008 WL 924531 (D.N.H. Mar. 31, 2008)

• *Books, Inc. v. Pottawattammie Cnty., Iowa*, 978 F. Supp. 1247 (S.D. Iowa 1997)

• *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)

2. Whether Neb. Rev. Stat. § 81-885.01(2) is overly broad and unconstitutionally vague.

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

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

• *Van Allsburg v. City of Kansas City, Mo.*, 600 F. Supp. 1226 (W.D. Mo. 1984)

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

3. Whether Defendants' application of Neb. Rev. Stat. § 81-885.01(2) to Leslie Young, who is engaged in advertising homes that are For Sale by Owner, but who does not negotiate sales, show homes, or perform any duties related to the closing of escrow, violates the First Amendment.

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

• *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85 (1977)

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

• *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997)

• 299 Neb. Admin. Code § 2-004

4. Whether requiring Young to obtain a real estate broker license violates the Due Process or Privileges or Immunities Clauses of the Fourteenth Amendment.

• *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999)

• *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd* 312 F.3d 220 (6th Cir. 2002)

• *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013)

• *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008)

• 299 Neb. Admin. Code § 2-004

5. Whether requiring Young to obtain a real estate broker license, but not requiring the same of newspapers, websites, or other advertising media, violates the Equal Protection Clause.

• *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)

• *Saenz v. Roe*, 526 U.S. 489 (1999)

• *Greene v. McElroy*, 360 U.S. 474 (1959)

• *Schware v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232 (1957)

STATEMENT OF THE CASE

A. Leslie Young's Advertising Brokerage Business

Young's California-based internet business, called eList.me, helps people advertise their FSBO homes on the internet. Young has a California real estate license, 3 J.A. 727 ¶ 3, but she does not work as a real estate broker in California or

elsewhere. *Id.* Instead, pursuant to a contract she signed with Forsalebyowner.com—a business owned by the Chicago *Tribune*—she works as an advertising broker, helping FSBO sellers communicate truthful information to the public via the internet. *Id.*

The business works this way: FSBO sellers go to Forsalebyowner.com and buy from that company a "package" of advertising services. *Id.* at 728 ¶ 5. When they buy the "MLS Entry Only Showcase" package, they are given a link where they can download documents, including an advertisement contract, a disclosure form,[1] and a questionnaire which asks for information about the house the FSBO seller wishes to sell—such as the asking price, square footage, etc.—and requests digital photos. *Id.* ¶¶ 5, 6. FSBO sellers sign and return the contract and requested information electronically—either by email or fax—to Young. She then uploads this information into a database called a Multiple Listing Service (MLS). Young uses an MLS based in California.[2] *Id.* at 729 ¶ 8. She occasionally advises FSBO sellers on how they can

[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, agent-brokered sale. Cal. Civ. Code § 2079.14.

[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. 3 J.A. 729 ¶ 8.

make their ads more attractive to potential buyers, or answers questions about their ads. *Id.* at 731 ¶ 19.

The District Court correctly found that Young "does not show homes in person, that she does not negotiate terms of purchase and sale, that she does not arrange or attend meetings between buyers and sellers, that she does not answer questions about properties for sale, and that she does not handle earnest money or other client funds." 5 J.A. 1196. It also found that she "does not receive a percentage of the sale price as a commission, but instead she is paid a flat fee of $95.00, and her payment apparently comes from the Chicago *Tribune* and not the sellers." *Id.* at 1198. She is paid even if a property does not sell. 3 J.A. 731 ¶ 17.

She does not serve in any fiduciary capacity, and there is no evidence that any buyer or seller ever thought she did. *Id.* ¶ 16. On the contrary, she makes clear to customers that she is not offering any services other than advertising. Her advertising contracts, based on form contracts originally designed for brokerage services, are altered to say in clear, boldfaced type that she is not entering into a principal-agent relationship with the FSBO seller. *Id.* at 728 ¶ 6, 735. Each contract states, "Non-Exclusive Authorization to Advertise through the MLS For Realtor.com Showcase." *Id.* They also state, 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.**

Id. at 735.

The contract specifies that 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.* Young added these provisions to ensure that FSBO sellers understood she was providing nothing more than advertising services. *Id.* at 729 ¶ 7.

B. The Advertisements

Once Young inputs information about an FSBO property into the MLS, websites such as Realtor.com connect to that MLS and others, and display the information contained in MLSes in the form of advertisements. *Id.* ¶ 9. Prospective buyers can search those sites based on square footage, location, price, etc. The search results will then include ads for FSBO homes that Young has placed in the MLS. *Id.*

Young has little control over how these websites display the information that comes from an MLS. *Id.* at 729-30 ¶¶ 10-11. As a result, different websites display information about Young's FSBO customers in different ways, adding or subtracting material that the website template itself provides. *Id.* For example, Forsalebyowner.com and Realtor.com sometimes display banner ads at the top and on the margins 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.*

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 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. *Id.* at 730 ¶ 11. Likewise, the phrase "Email Agent," appears as a clickable weblink that connects to whatever email address Young provides. *Id.* at 730-31 ¶¶ 12, 15. So, in an effort to avoid confusion, 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.* at 730 ¶ 13.

If an FSBO seller wishes, Young can also put into the advertisement a phone number that automatically connects to the seller's phone line, or that plays an automated recording that provides the seller's phone number. Young inputs into the database *only* the FSBO seller's telephone number and email address—*never* her own.

Id. at 730-31 ¶¶ 12-15.[3] In no case can a prospective buyer obtain Ms. Young's email address or telephone number from the ad. *Id.* at 731¶ 15.

Young's ads are labeled "eList.me," the web address of her business. *Id.* at 748. 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." *Id.* at 788. It states at the bottom: "We are a Leading Online Advertiser providing UNSURPASSED internet exposure!" *Id.* There is no evidence that any member of the public ever believed, or that Young ever tried to make anyone believe, that she was offering any service other than advertising. *Id.* at 731 ¶ 16; 4 J.A. 823:11-18.

C. The Real Estate Licensing Law And How It Is Enforced

Nebraska law requires anyone practicing the trade of real estate brokerage to obtain a real estate broker license. Neb. Rev. Stat. § 81-885.02. Practicing without a license is a misdemeanor carrying a penalty of up to six months in prison and a $1,000 fine, *id.* §§ 81-885.45, 28-106(1), and civil penalties of up to $2,500 per complaint. *Id.* § 81-885.10.

[3] For example, one of Young's FSBO ads was for property located on Leon Drive in Lincoln. 3 J.A. 748. The telephone number provided in the ad was an (877) number, 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. *Id.* at 730 ¶ 14.

The statute defines "real estate broker" as anyone who "for any form of compensation . . . [1] negotiates or attempts to negotiate the listing[4] . . . for any real estate . . . or [2] assists in procuring prospects or . . . [3] holds himself or herself out as engaged in any of the foregoing." *Id.* § 81-885.01(2).

The terms "listing," "procuring," and "prospects" are not defined in any statute or regulation. Nor does the Commission use any handbook or guideline to determine what a "listing" is or what other statutory terms mean. 4 J.A. 801:17-22, 804:8-13, 807:1-4. Commission Director Greg Lemon testified[5] that the Commission decides what constitutes "brokerage" on an *ad hoc* basis at disciplinary hearings. *Id.* at 819:3-18. Still, the undisputed evidence below showed that the Commission applies the law to ban any and all unlicensed advertising, on the grounds that advertising alone qualifies as "real estate brokerage." Since 2005, it has issued at least 14 Cease and Desist Orders to persons advertising real estate in Nebraska on these grounds. *See* 3 J.A. 742, 759; 4 J.A. 833, 868, 872, 877, 879, 885, 897, 899, 909, 990, 995, 997.

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[4] Under California law, Young's FSBO ads are not "listings," because listings are contracts which authorize an agent to sell a property on behalf of the seller. Cal. Civ. Code § 1086(a). But Nebraska law does not define "listing"—and the terms "listing" and "advertisement" are typically used interchangeably, even in California. Indeed, in *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 877-79 (E.D. Cal. 2004), the court referred to FSBO ads as "listings," and concluded that "soliciting or obtaining listings . . . for compensation" is protected First Amendment speech. "Listing" and "advertisement" are therefore used interchangeably herein.

[5] Director Lemon testified as the "person most knowledgable" and testified on behalf of the Commission under Fed. R. Civ. P. 30(b)(6). *See* 2 J.A. 406.

D. Proceedings Below

Young's amended complaint was filed on September 14, 2012, alleging First and Fourteenth Amendment causes of action. 2 J.A. 289. On July 31, 2014, the parties filed cross motions for summary judgment. 2 J.A. 409; 3 J.A. 724. On January 28, 2015, the District Court ruled for the Commission, holding that Young had acted as a real estate broker without a license in the past. 5 J.A. 1184. That, however, was not in dispute; Young repeatedly conceded that fact. Rather, she sought prospective relief to bar future enforcement of the prohibition on advertising. On that issue, the court declared that "[t]he Nebraska statutory scheme regulates licensing, hence conduct, but does not prohibit protected speech." *Id.* at 1195. It did not explain the reasoning behind this conclusion, and made no reference to Young's vagueness and overbreadth causes of action, or to her Fourteenth Amendment arguments. Young therefore moved for reconsideration on February 4, 2015, asking for a ruling on these claims, *id.* at 1201, but the court denied that motion on April 8, 2015, stating that it had "clearly addressed these claims in its memorandum and order." *Id.* at 1205. This timely appeal followed.

SUMMARY OF THE ARGUMENT

Nebraska's licensing law, both facially and as applied, defines constitutionally-protected communication as "real estate brokerage" and requires a person to have a license before engaging in such communication. An unlicensed person violates that

law whenever he or she "procures prospects" or "attempts to negotiate a listing" or "holds herself out" as doing either of those things. Neb. Rev. Stat. § 81-885.01(2). But each of these are acts of communication. Thus, a person who does nothing more than assist people in preparing and disseminating FSBO ads must get a real estate broker license before engaging in acts of communication.

A law that imposes a licensing requirement on speech is a prior restraint, *Books, Inc. v. Pottawattammie Cnty., Iowa*, 978 F. Supp. 1247, 1254 (S.D. Iowa 1997), and because that requirement applies only to advertisements for real property, and only to those who advertise for money, the requirement is also a content- and identity-based speech restriction. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011).

Even if the law is constitutional as applied to Leslie Young, it is still overly broad, because it burdens substantially more protected speech than is necessary to protect the public from fraudulent or misleading real estate advertising. In fact, Nebraska law *prohibits* people who *do* have licenses from advertising FSBO real estate. *See* 299 Neb. Admin. Code § 2-004. Yet people who provide FSBO advertising for free, and various other classes of individuals, are exempt from the licensing requirement.

The law also violates the Fourteenth Amendment because it requires Young, who only offers advertising services, and does not work as a real estate broker, to undergo extensive education and training requirements in subjects that only relate to

real estate brokerage services that she does not provide. The law does *not* require education or training about advertising that *would* relate to her business. *Cf. Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-27 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013). That, in addition to the fact that licensees are *prohibited* from advertising FSBO property, means that forcing her to get a license in order to advertise FSBO property is self-contradictory and irrational. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, viewing all facts in favor of Young, and giving her the benefit of any inference from the undisputed facts. *Riedl v. Gen. Am. Life Ins. Co.*, 248 F.3d 753, 756 (8th Cir. 2001); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993). There were no disputes of material fact below.

ARGUMENT

I

THE LICENSING REQUIREMENT IS AN UNCONSTITUTIONAL PRIOR RESTRAINT AND A CONTENT-BASED AND SPEAKER-BASED SPEECH RESTRICTION

A. Advertising FSBO Homes Is Fully-Protected First Amendment Speech

FSBO advertising is fully-protected First Amendment speech. In *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868 (E.D. Cal. 2004), as in this case, state officials claimed that advertising FSBO property qualified as real estate brokerage, and prohibited such advertising by anyone other than a licensed real estate broker. *Id.* at 879. The court ruled that FSBO advertising is fully protected by the First Amendment and that the state could not require a person to become a licensed real estate broker to engage in such speech. *Id.*; *see also Skynet Corp. v. Slattery*, No. 06-CV-218-JM, 2008 WL 924531, at *9 (D.N.H. Mar. 31, 2008) (construing a licensing requirement narrowly so as to *not* apply to on-line FSBO advertising, because otherwise it would infringe on First Amendment rights).

Young's FSBO ads are *not* commercial speech. They are fully-protected "pure" speeech. *Forsalebyowner.com*, 347 F. Supp. 2d at 876. As this Court has observed, speech "is not commercial simply because someone pays for it." *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998). If "[t]he speech itself is what the

'client' is paying for," it is entitled to full First Amendment protection. *Id.* Young offers advertising services, so speech is the service her customers pay for. Her advertisements do not propose a commercial transaction *with the speaker*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984), but are offers *by FSBO sellers* to engage in transactions with potential buyers, not with her. She helps customers design advertisements and place them into the MLS for ultimate publication on websites. She is therefore more like an advertising agency that designs ads and provides them to TV networks to play on behalf of retailers.[6] Thus, Young is entitled to full First Amendment protection. *Forsalebyowner.com*, 347 F. Supp. 2d at 876.[7]

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[6] To be precise, Young 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 Chron., *available at* http://work.chron.com/become-advertising-broker-17173.html (last visited June 2, 2015).

[7] Even if Young's ads did 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 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.* This is addressed below, Section II.

B. The Nebraska Law Regulates Speech by Calling It "Conduct" and Requiring a License for Advertising

The state may not regulate speech by calling it conduct. *Cf. Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication."). But that is exactly what the Nebraska law does. The district court ruled that the licensing requirement regulates conduct, 5 J.A. 1195, but the conduct consists entirely of speech: (1) "procuring prospects," (2) "attempting to negotiate a listing," or (3) "holding oneself out" as willing to procure prospects or to negotiate listings. Neb. Rev. Stat. § 81-885.01(2). All are acts of communication.

1. *Procuring prospects*. To "procure a prospect" means to communicate. Although the term is not defined in any controlling legal authority or Commission policy, it appears on its face to refer to expressive activity. *See Skynet*, 2008 WL 924531, at *2 (inputting information about FSBO properties into a database was "brokerage" because it was intended "to assist or direct in the procuring of prospects to result in the sale" of property). Director Lemon testified that it means speech: "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.'" 4 J.A. 806:15-25. He explained that "active[] one-on-one contact, you know, targeted individual mailings"

of advertisements would constitute "procuring prospects." *Id.* at 812:3-6. 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. *Id.* at 808:1-20, 810:23-811:7. 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.

The record shows that in practice, the Commission considers advertising alone to qualify as "procuring prospects." In March, 2012, it asserted that Owners.com was "procuring prospects," 4 J.A. 833, even though that company offered only advertising services, provided no representation, and did not negotiate sales. Another time, it declared that All Around Home Finders was "procuring prospects" for rental property, solely because the company's website advertised homes for rent. *Id.* at 868. It also claimed that Jack Keller was "assisting in the procurement of a buyer," based solely on an advertisement he published on Realtor.com. *Id.* at 872. 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." *Id.* at 879.

2. *Negotiating listings.* To "negotiate a listing" means to communicate. The statute does not prohibit negotiating *sales*, but negotiating *listings—i.e.*, it prohibits

agreeing with another person to communcate to the public the fact that a property is for sale. Director Lemon testified that it means "to go to a potential seller and discuss the terms under which they would assist someone in selling property." *Id.* at 803:21-23. As demonstrated by the Commission's orders to All Around Home Finders, Jack Keller, John Fothergill, and others cited below, the Commission has consistently maintained that advertising FSBO properties constitutes "attempting to negotiate a listing."

3. *Holding oneself out.* The statute declares that anyone who "holds herself out" as willing to procure prospects or to negotiate listings is a broker, Neb. Rev. Stat. § 81-885.01(2), but this, too, means to communicate. Because procuring prospects and negotiating listings are speech, to hold oneself as willing to do these things is also speech. If one states that one is willing to negotiate a listing or procure prospects—that is, willing to *advertise*—one is statutorily defined as a real estate broker. The Commission interprets this as prohibiting Young from using such terms as "advertising broker" or "Leslie Young Real Estate Advertising Services" to describe her business. As explained below, Section II, that restriction on self-descriptive terms implicates commercial speech—and the Commission may not prohibit that speech either.

In short, the District Court was *correct* to find that Young's business "met the definition" of a real estate broker in the statute, 5 J.A. 1197, *because the statute*

classifies constitutionally protected speech as the "practice" of real estate brokerage and imposes a licensing requirement on that speech. That explains why the Commission's Cease and Desist Orders regularly 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.*, 4 J.A. 990, 995, 997.

It ordered Owners.com, Jack Keller, and John Fothergill, to cease advertising property on the grounds that this constituted unlicensed real estate brokerage. *Id.* at 833, 872, 990. In 2007, when an attorney asked the Commission if he could advertise FSBO property and then draft purchase agreements in his capacity as an attorney, the Commission answered no, because "advertising . . . property for sale" requires a real estate broker license. *Id.* at 894. In 2009, it ordered the Real Estate Disposition Company to cease "advertising Nebraska real estate for auction" on the grounds that such advertisement constituted brokerage. *Id.* at 877. That same year, it 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." *Id.* at 897, 899, 909. The Commission later argued before a state court that Wuestehube violated the statute solely by distributing FSBO advertisements. *Id.* at 925-27. And in 2011, it ordered Lawrence Bunnell to cease advertising FSBO properties, on the grounds that this constituted brokerage. *Id.* at 885. The March 11, 2010, Cease and Desist Order

the Commission sent to Young declared that she had violated the statute by "*advertising* for sale, real property located in the State of Nebraska . . . without having first secured a Nebraska real estate broker license." 3 J.A. 742 (emphasis added).

In short, the Commission *rightly* interprets "procuring prospects," "negotiating listings," and "holding oneself out" to refer to expressive activity: speaking about, calling, emailing, or otherwise informing people that a property is for sale. Nebraska law defines advertising alone as real estate brokerage and requires a license for it. Young has never disputed that her business qualifies as real estate brokerage under the statute. By contracting to advertise an FSBO property—to "assist someone in the sale of property," 4 J.A. 804:2-4—she does practice real estate brokerage simply by speaking. The District Court's conclusion that she "met the definition" in the statute, 5 J.A. 1197, is therefore both correct and beside the point. This case is not about whether she violated the statute in the past, but whether that statute violates the First Amendment.

C. Requiring Young to Get a License to Speak About Specified Subjects Is a Prior Restraint

The First Amendment forbids prior restraints on speech in all but the rarest cases. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). This applies also to speech related to economic transactions. "[A]ny licensing that places a prior restraint on the exercise of protected expression" is presumptively unconstitutional.

Books, Inc., 978 F. Supp. at 1254. Here, the licensing law is a prior restraint because "it makes the exercise of protected expression contingent upon obtaining permission from government officials." *Id.*

Books, Inc., ruled that a licensing requirement for businesses offering nude dancing "clearly act[ed] as a prior restraint." *Id. See also United Youth Careers, Inc. v. City of Ames, Iowa*, 412 F. Supp. 2d 994, 1003 (S.D. Iowa 2006) (permit requirement for financial solicitors 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.

But Nebraska's licensing requirement contains no clear and definite standards to guide the Commission in enforcing it. Neither the statute nor any regulation, caselaw, or other authority, defines such crucial words as "procure," "prospects," or "listing." Instead, Director Lemon alone decides without any oversight whether to issue a Cease and Desist Order to advertisers, and, as he also testified, the Commission decides on an *ad hoc* basis, at its rare disciplinary hearings, whether a person has actually violated the statute. 4 J.A. 799:1-13, 819:8-18. The licensing requirement is therefore a prior restraint that lacks the constitutionally required

guidelines limiting official discretion. *Cf. Van Allsburg v. City of Kansas City, Mo.*, 600 F. Supp. 1226, 1233 (W.D. Mo. 1984) (even where agency guidelines existed, they were insufficient under prior restraint doctrine because they were vague).

D. The Licensing Requirement Is a Content- and Identity-Based Speech Restriction

The licensing requirement is also a content-based speech restriction. The District Court ruled that it is content-neutral because "it 'regulate[s] people without regard to speech on any particular topic,'" 5 J.A. 1197 (quoting *Phelps-Roper v. Koster*, 713 F.3d 942, 950 (8th Cir. 2013)), but that is erroneous: the restriction applies only when a person advertises real property for sale. A person who advertises anything else is not subject to the requirement. In *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85, 93-94 (1977), the Supreme Court found that a city ordinance banning "For Sale" signs in people's front yards was a content-based burden because it applied to signs "based on their content"—that is, only real estate "For Sale" signs were banned. *See also Forsalebyowner.com*, 347 F. Supp. 2d at 874-77 (requiring FSBO advertisers to get broker licenses was content-based restriction).

Nebraska's licensing requirement is also identity-based. In *Sorrell*, 131 S. Ct. at 2663, the Court found that a law "disfavor[ed] specific speakers," because only persons with economic motives were banned from communicating, while others could

freely communicate the same information. Here, too, the licensing requirement only applies to persons who receive money for advertising. Anyone who receives no money may advertise without a license. Neb. Rev. Stat. § 81-885.01(2). The law also specifically exempts other speakers, including people or corporations that advertise their own property, and also their employees, relatives, and trustees. *Id.* § 81-885.04(3). The licensing requirement is therefore triggered by the speaker's identity: only people who are paid to advertise, and do not qualify for an exemption, must be licensed.

Even if the statutory criteria did not classify speech as the "conduct" of real estate brokerage, heightened scrutiny would *still* apply because speech alone triggers the licensing requirement. In *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 370 (2002), the Supreme Court struck down, on First Amendment grounds, provisions of a federal law that only required FDA approval of compounded drugs if pharmacists advertised those drugs. Absent that speech, the approval requirement did not apply. *Id.* The Supreme Court found that First Amendment scrutiny applied, and that the government failed to demonstrate that the restriction 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 court below erred by failing to apply First Amendment scrutiny. The law is a prior restraint because it requires a license to speak; it is content-based because it only applies to speech about real estate; it is identity-based because it only applies to speakers with commercial motives; and the licensing requirement is triggered by speech alone. Yet the District Court did not apply First Amendment scrutiny because it concluded that Young's business qualifies as "brokerage" under the statute. 5 J.A. 1197. This is illogical. Such scrutiny applies *because* she qualifies as a "broker"—solely by virtue of communicating messages. The law must therefore be narrowly tailored, meaning it must be no broader than necessary to achieve a compelling government interest. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("the conduct triggering coverage under the statute consists of communicating a message.").

The licensing requirement fails this test. First, it does not serve an important government interest. Protecting consumers against fraud or misrepresentation is certainly an important interest, but the licensing requirement does not restrict fraud or misrepresentation. It prohibits truthful advertising, as well as any effort to negotiate a contract to engage in truthful advertising, by anyone who does not have a license. Yet the requirements for getting and keeping a license, as detailed below, Section IV.B, include virtually no training or teaching regarding proper advertising techniques. The licensing requirements instead evaluate a person's capacity to

negotiate deals, show houses, prepare closing paperwork, etc., none of which Young does. 5 J.A. 1196. The licensing requirements do not ensure that a person who advertises FSBO property is trained, however, because the law also *prohibits* people who *do* have licenses from advertising FSBO properties. 299 Neb. Admin. Code § 2-004. Thus the licensing requirement in no way serves the state's interest in preventing fraudulent or misleading advertising.

Second, the licensing law is not narrowly tailored because it is both overinclusive and underinclusive. It is overinclusive because it applies to persons like Ms. Young who have no interaction with buyers, and who do not negotiate sales or serve as fiduciaries. The statute therefore reaches far more broadly than necessary, because it requires people not engaged in real estate brokerage to obtain real estate broker licenses, and to learn skills and take tests that have no relationship to advertising. (*See below* Section IV.B.) It is also underinclusive in that it does not apply to people who advertise their own homes on an FSBO basis, Neb. Rev. Stat. § 81-885.01(2), even though, as Director Lemon acknowledged, they might also misrepresent their homes in ads. 4 J.A. 827:23-828:4. Trustees, family members, and any person acting without pay, are also exempt, although they, too, might confuse consumers or misrepresent properties. Neb. Rev. Stat. § 81-885.04(4). Indeed, these exempt parties may have more incentive to misrepresent the facts.

Finally, Nebraska prohibits people *with* broker licenses from advertising FSBO properties. *See* 299 Neb. Admin. Code § 2-004. Young's business would be illegal even if she *did* obtain a license. The licensing requirement therefore fails narrow tailoring. Because it fails First Amendment scrutiny, Young is entitled to judgment in her favor.

II

THE STATE MAY NOT PROHIBIT YOUNG FROM USING WORDS LIKE "ADVERTISING BROKER" ON HER ADS

The Commission failed to address Young's First Amendment arguments below, and must therefore be deemed to have conceded them. *Tran v. United of Omaha Life Ins. Co.*, 780 F. Supp. 2d 965, 971-72 (D. Neb. 2011). They alone entitled Young to judgment in her favor, and the court below erred in failing to address these arguments. However, the District Court granted judgment against her on the grounds that she had used the term "advertising broker" to describe her business. 5 J.A. 1197. This was in error because Young cannot be constitutionally prohibited from describing her business as advertising brokerage.

Unlike the FSBO ads, which are fully protected speech, *Forsalebyowner.com*, 347 F. Supp. 2d at 874-75, this aspect of the case *does* turn on commercial speech, because it involves a business's self-descriptive term. The Commission may not ban truthful commercial speech that is not actually or inherently misleading, *Peel v.*

Attorney Registration & Disciplinary Comm'n of Illinois, 496 U.S. 91, 102 (1990), and Young is, in fact, an advertising broker. Nor may it impose a regulation on an activity that is triggered solely by expression. *Holder*, 561 U.S. at 28.

A. The State May Not Prohibit Young from Calling Herself an Advertising Broker

Young refers to her profession with various terms, including "Leslie Young Real Estate Advertising Services," "Advertising Broker," and so forth. These qualify as commercial speech, because they are self-descriptive business terms like "CPA," *see Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997), or "certified trial specialist," *see Peel*, 496 U.S. at 102. The Commission has broader authority to restrict commercial speech than non-commercial speech, but it still may not prohibit commercial speech that is not actually or inherently misleading. *Thompson*, 535 U.S. at 367. If commercial speech is truthful or only potentially misleading, the Commission may not prohibit it— though it may regulate it by requiring additional disclosures. *Id.* The Commission bears the burden of proving that any restriction directly advances a substantial government interest, and is no more extensive than necessary. *Id.* It may not satisfy this burden by relying on "speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). It must instead prove that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.*

Young *is* an "advertising broker"—a phrase commonly used for people who prepare and disseminate advertisements for publication elsewhere. *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). While it is possible that someone might be confused by the word "broker" appearing in "advertising broker" and "real estate broker," there is no evidence that anyone was ever misled, and the mere *possibility* that words might be misleading is insufficient grounds for censoring those words.

Nobody has ever thought Young was a real estate broker. There is no evidence that buyers thought Young represented sellers—indeed, buyers have no way of contacting her, and none ever has. The website for eList.me states repeatedly that she works only as an advertiser.[8] 3 J.A. 788. Nor is there any evidence that sellers were misled into thinking she only provides real estate brokerage services in Nebraska, since Young's contracts with them explicitly and repeatedly state that she provides only advertising services, *id.* at 735-39, and FSBO sellers can only contact her by first purchasing an advertising package from "Forsalebyowner.com." *Id.* at 728 ¶ 5.

[8] The District Court stated that Young's ads "have no disclaimer stating that she is not a real estate agent or broker," 5 J.A. 1197-98, but the ads included a hyperlink to the eList.me website, which did and still does contain such a disclaimer. And in any event, the Board could require disclosure rather than banning Young's use of the term outright.

Indeed, the premise of her business is that she helps people who want to sell their homes *for sale by owner, without* the help of a licensed real estate broker. Director Lemon testified that he had no reason to believe any information in her ads was inaccurate, 4 J.A. 829:11-16, and he could not recall receiving any complaints from consumers. *Id.* at 823:11-18.

Not only is there no evidence the public was ever confused, there is also no evidence Young ever tried to fool anyone into thinking she offered any services other than advertising. 3 J.A. 729 ¶¶ 7, 16; 4 J.A. 823:11-18. On the contrary, she made every effort to avoid causing people to think she was a real estate broker. 3 J.A. 728 ¶¶ 6-7, 730 ¶ 13, 731 ¶¶ 15-16. She labeled her company "Leslie Young, Advertising Services," *id.* at 748, and stated on the eList.me website that she only offered advertising services. *Id.* at 788. The terms "advertising broker," "Presented by Leslie Young Real Estate Advertising Services," etc., are not actually or inherently misleading. Therefore the Commission may not *per se* prohibit her from using the word "broker."

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. The state contended that it was potentially misleading because consumers might think the certification had been issued by the state, but the Court found no evidence that the term was inherently or actually

misleading. *Id.* at 100-01. 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 . . . would be confused with formal state recognition." *Id.* at 104-05. Therefore, even if the term were potentially misleading, the Court held that the state could not "satisfy [its] heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information." *Id.* at 109. Where speech is only potentially misleading, the Commission 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. 191, 204-07 (1982) (attorney may truthfully state that he is admitted to the Supreme Court Bar even if this is potentially misleading).

In *Miller*, 117 F.3d at 1379-81, the plaintiff was a licensed CPA, but was not allowed to say so on his business cards or letterhead, because he worked for a firm owned by non-CPAs. The state argued that his use of the designation could potentially mislead because it might "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 "relied solely on 'speculation and conjecture' to support its assertion" that calling himself a CPA could mislead consumers into thinking he provided regulated accounting services. *Id.* at 1383. Nor did the state prove 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.* 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 reasoning applies here. Young's truthful 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 that a consumer might be misled into thinking she sells homes—only the Commission's speculation and conjecture. Young does offer "Real Estate Advertising Services," and she is an advertising broker. 3 J.A. 727 ¶¶ 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, not to Young. *Id.* at 730 ¶ 12, 731

¶¶ 14-15. The same is true of the "eList.me" logo that appears on the ads, since anyone going to that website would see several disclaimers saying that Young only offers advertising services. *Id.* at 788. 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 sees the words 'advertising broker,' or when he clicks on a weblink, and follows it to a webpage explaining that Ms. Young only provides advertising services, that she is only publishing advertisements, not selling real estate.

The Commission can require some form of disclosure—and in fact, Young's use of terms like "advertising broker" and "Advertising Services," and her link to the eList.me website with its many disclaimers, already are a form of additional disclosure. But the Commission may not prohibit her from publishing FSBO ads with these terms on the theory that they constitute "holding herself out." The Commission's ban on the use of the term "advertising broker" therefore violates the First Amendment. It relies solely on "speculation or conjecture" that consumers might be misled, *Edenfield*, 507 U.S. at 770, and it has failed to 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.

B. Imposing the Licensing Requirement Solely in Consequence of the Use of the Word "Broker" Is an Unconstitutional Speech Trigger

Not only is the Commission's *per se* ban on the use of the word "broker" a violation of Young's right to commercial speech, it also is an unconstitutional "speech trigger." In *Thompson*, 535 U.S. at 370, the Supreme Court applied First Amendment scrutiny to provisions of a federal law that required FDA approval of compounded drugs, if and only if pharmacists advertised the drugs. *Id.* Because communication alone triggered the requirement, the Court found that the law burdened speech. *Id.* at 374. The government could not explain why "forbidding advertising was a necessary as opposed to merely convenient means of achieving its interests," *id.* at 373, so the Court held that the burden was unconstitutional. *Accord*, *Holder*, 561 U.S. at 28. Forcing Young to obtain a Nebraska real estate broker license simply because she truthfully labels herself an "advertising broker" or uses terms such as "Leslie Young Real Estate Advertising Services" is to impose a speech trigger that requires First Amendment scrutiny.

That is what differentiates this case from *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 697 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 950 (2015), on which the District Court relied. There, the statute prohibited not speech, but actions. The court found that the Ohio law applied "regardless of whether [precious metals dealers] advertise[d]." *Id.* For instance, the law barred them from "hav[ing] a storefront . . .

without signage," or "function[ing] as an open, public, and visible business," or "making its wares available." *Id.* But here, *all* Young does is advertise. There was no dispute that the plaintiff in *Liberty Coins* did deal in precious metals—but Young does not deal in real estate. She only prepares advertisements and helps people communicate messages to the public, and truthfully labels her business "advertising brokerage." Unlike in *Liberty Coins*, the mere use of words, nothing more, subjects her to the licensing requirement. Thus the statute includes a "speech trigger," and First Amendment scrutiny must apply.[9]

By defining "holding oneself out" solely in terms of "trigger words," and without relation to a course of conduct, the Commission is imposing a restriction on commercial speech that is content-based. *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."). And it is unconstitutional. While the state may regulate the *practice* of brokerage, and *regulate* the use of self-descriptive professional terms like "broker," it may not *ban* such terms by imposing a regulatory burden triggered solely by those magic words. Those terms are, at most, only potentially misleading, and there is no evidence anyone was ever misled. *Peel*, 496 U.S. at 103-05.

[9] And in any event, *Liberty Coins* did not involve an as-applied challenge, 748 F.3d at 691 n.3, which this case does.

And the *per se* prohibition on Young's commercial speech is not narrowly tailored, because it is simply a blanket prohibition. If a term is only potentially misleading, the state may not completely ban its use. *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). The District Court's conclusion that the Commission may ban Young's use of terms like "advertising broker" is contrary to controlling law and must be reversed.

III

EVEN IF THE LICENSING REQUIREMENT IS NOT A PRIOR RESTRAINT, AND A CONTENT- AND IDENTITY-BASED SPEECH RESTRICTION, IT IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

The District Court failed to address Young's vagueness and overbreadth claims. Even if her arguments relating to prior restraint and content- and identity-based restrictions are unavailing, she would still be entitled to judgment on these points.

A. The Law Is Vague Because a Person of Ordinary Intelligence Must Necessarily Guess at Its Meaning

Any restriction on speech must be sufficiently specific that officials and the public can know what is allowed and what is prohibited. A restriction on speech that

is not drawn with "narrow specificity" is unconstitutional. *Hynes v. Mayor & Council of the Borough of Oradell*, 425 U.S. 610, 620-22 (1976).

Here the statute is extraordinarily vague. It defines brokerage as "procuring prospects," "attempting to negotiate a listing," or "holding oneself out," but no statute, regulation, caselaw, or other authority defines any of these terms. Consequently, officials cannot say precisely what is and is not allowed to unlicensed persons. The Commission decides what constitutes brokerage at its disciplinary hearings, 4 J.A. 819:3-13, but it employs no guidance other than the statute itself. *Id.* at 799:1-6, 801:17-22. 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—which is what Young does—Director Lemon answered, "[W]e haven't—haven't had a policy determination on that particular question." *Id.* at 814:25-815:5. *See also* 801:3-22, 813:23-814:4, 816:15-19, 821:4-6. Director Lemon issues Cease & Desist Orders by himself, without any oversight or review, and he consults no objective guidelines when doing so. *Id.* at 799:1-13. And the transcript of the Wuestehube disciplinary hearing—the only disciplinary hearing held in the past five years, *id.* at 800:1-3—reveals that Commissioners themselves do not know what constitutes "procuring

prospects," "attempting to negotiate a listing," or "holding oneself out," although the Commission generally holds that advertising alone qualifies.[10] *See id.* at 952-957.[11]

In short, the Commission does not know, and the public cannot know, what kind of advertising is, or is not, legal—except that in practice the Commission prohibits all advertising. Director Lemon, in his unbridled discretion, issues Cease and Desist Orders that command people to cease advertising because he deems this to violate the statute. Such a prohibition on speech is unconstitutionally vague.

B. The Law Is Overbroad Because It Restricts Substantially More Speech Than Necessary

Even if the advertising prohibition *is* lawful as applied to Young, it is still unconstitutionally overbroad, because it restricts a substantial amount of

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[10] 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).

[11] 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." 4 J.A. 976. 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 979. 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 980. 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 984. The Commission ultimately found Wuestehube liable because he had "held himself out" as a broker. *Id.* at 988.

constitutionally protected speech by others. *United States v. Williams*, 553 U.S. 285, 292 (2008).

The first step in overbreadth analysis is to determine what the statute prohibits, *id.* at 293; next, the Court must determine whether it burdens a substantial amount of speech. *Id.* at 297. Here, it does, because it forbids an unlicensed person from "procuring prospects," which the law does not define, but which, according to Director Lemon, means such speech acts "[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.'" 4 J.A. 806:20-25. 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 810:23-811:7, 809:14-21.

The state also prohibits *licensed* brokers from publishing FSBO advertisements. 299 Neb. Admin. Code § 2-004; 4 J.A. 805:10-12. This prohibition on FSBO advertising *even by licensees* is plainly broader than necessary. The state's entire defense in this case rests on the premise that the licensing requirement prevents fraud and confusion by ensuring that real estate is only advertised by people who satisfy stringent education and training requirements. For example, Director Lemon explained that the Commission requires people to undergo the education requirement to get a real estate broker license before advertising because:

> One of the things a licensee would learn about in their classes 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.

4 J.A. 826:7-14. Yet *the Commission prohibits licensed brokers from advertising FSBO properties*. Therefore, even if the licensing requirement for advertising can be constitutionally applied to Young, it is still unconstitutionally overbroad because it applies more broadly than necessary.

IV

EVEN IF THE LICENSING REQUIREMENT SATISFIES THE FIRST AMENDMENT, THE DISTRICT COURT ERRED BY IGNORING YOUNG'S FOURTEENTH AMENDMENT CAUSES OF ACTION

Even apart from her First Amendment claims, Young alleged that forcing her to get a real estate broker license simply to help people prepare and disseminate FSBO ads lacks any rational connection to a legitimate government interest and violates the Due Process Clause of the Fourteenth Amendment. In addition, she argued that requiring her to get a license in order to publish advertisements, and not requiring similarly situated others to do so, violated the Equal Protection Clause. Finally, she contended that the licensing requirement violates the Privileges or Immunities Clause of the Fourteenth Amendment. The District Court should have addressed these causes of action, and Young is entitled to judgment on these separate grounds.

The Fourteenth Amendment protects every person's constitutional right to earn a living without unreasonable government interference. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). States have broad discretion to require people to obtain licenses before entering a trade, but any licensing and testing requirements they impose must rationally relate to a person's "fitness and capacity to practice" the profession. *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 relationship violate the Due Process Clause. Thus the state may not impose a licensing requirement on a trade that has nothing to do with that trade, or is only trivially connected to it. *Craigmiles*, 312 F.3d at 228; *Castille*, 712 F.3d at 223-27; *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999). A licensing requirement also violates the rational basis test if it is inherently self-contradictory, *Merrifield*, 547 F.3d at 991, or if it arbitrarily treats businesses that are the same as though they were different, or businesses that are different as though they were the same. *Cornwell*, 80 F. Supp. 2d at 1103. The statute fails all of these tests.

A. Forcing Young to Get a License to Advertise FSBO Homes Is Irrational Since Licensees Are *Prohibited* from Advertising FSBO Homes

Young does not offer any of the services normally associated with real estate brokerage: she does not show homes, negotiate deals, sign contracts, arrange meetings, answer questions about properties, handle client funds, or receive commissions; she is paid a flat fee for advertising, by the publisher, not by sellers, and

she is paid whether or not a property sells. 5 J.A. 1187, 1196, 1198. She only advertises FSBO homes. To require her to get a real estate broker license would be irrational because *Nebraska regulations make it illegal for a person with a license to advertise FSBO property*.

The regulation, 299 Neb. Admin. Code § 2-004, expressly prohibits a broker from "advertis[ing] to sell . . . real property in a manner indicating that the offer . . . is being made by a private party not engaged in the real estate business." Director Lemon was asked in deposition, "Is it legal for a licensed broker to advertise for-sale-by-owner properties?" His answer was simply, "No." 4 J.A. 805:10-12. To force Young to get a broker's license to advertise, when getting a license would make it illegal for her to advertise, would "undercut[] the principle of non-contradiction," in violation of the rational basis test. *Merrifield*, 547 F.3d at 991.

B. Requiring Young to Undertake Education and Training on Matters Unrelated to Her Business Violates the Rational Basis Test

A licensing requirement is irrational if it requires training and education about matters that are totally unrelated to the business in question. *Craigmiles*, 312 F.3d at 228; *Cornwell*, 80 F. Supp. 2d at 1118.

Cornwell involved a California law that required hair braiders to undergo hundreds of hours of education and testing to obtain a cosmetologist's license, when the cosmetology curriculum devoted only "a small number of overall hours" to

subjects relevant to hair braiders. *Id*. at 1110. Indeed, only about six percent of the curriculum related to what braiders actually do. *Id.* at 1111. Also, the education and testing requirements did *not* teach information that *was* relevant to hair braiding. *See id*. at 1110 ("braiding is minimally taught in this course."). Thus "requiring [them] to participate in this curriculum in order to be able to practice their profession" was irrational and unconstitutional. *Id.* at 1115. *Accord*, *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214-16 (D. Utah 2012).

Similarly, in *Craigmiles*, 312 F.3d at 225-26, 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). That decision 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); *accord*, *Castille*, 712 F.3d at 223-27.

Here, the training and education required to get a real estate broker license bear practically no relation to the business of advertising FSBO property. To get a license, Young would have to (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) prove she has 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). In other words, she would have to spend time and money learning skills and information related almost exclusively to showing homes, negotiating sales and commissions, handling client funds, and other acts that, as the District Court rightly concluded, she does not do.

The mandatory Commission-approved real estate courses and exams are concerned with preparing brokers to represent buyers or sellers. They bear no relationship to FSBO advertising. For example, one Commission-approved course, 4 J.A. 1009, consists of three parts: (1) the source of the Board's authority to promulgate the Rules and Regulations that govern licensees, *id.* at 1012-16, (2) the licensing requirements and what licensees are authorized to do, *id.* at 1017-55, and (3) agency relationships. *Id.* at 1056-70. 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 they need 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. *See id.* at 1009-74. But Young does not even meet sellers or buyers, let alone represent

either in transactions. 3 J.A. 731 ¶¶ 15-16. Therefore the majority of the course is irrelevant to her advertising business.

Where the required course *does* mention advertising, it does not teach advertising skills. It merely repeats the Real Estate Act's regulation of advertising by licensed brokers *who are representing sellers* in transactions. The course teaches only that licensees: (1) must include their business names in all their ads, 4 J.A. 1051-52, (2) must disclose that they are licensed when they advertise property they personally own, *id.* at 1039-40, (3) may not advertise a property without the owner's consent, *id.* at 1040, and (4) may not publish intentionally misleading ads. *Id.* at 1035-36.

None of these requirements pertain to Young's business, except for the prohibition on false advertising—which is already provided for by the state's ordinary laws against fraud, applicable to everyone regardless of licensure, and which Young does not challenge here. Candidates for broker licenses are taught that licensed brokers must include their business names in their ads so that buyers will not be misled into thinking that a home is for sale by owner, when the seller is actually represented by a broker. *Id.* at 1057-62. But this obviously cannot apply to Young, because she *only* advertises homes that are for sale by owner. 3 J.A. 727. She need not inform consumers that she is representing the seller, because she is not representing them. Certainly it makes no sense to force 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. 4 J.A. 1039-1040. This requirement is designed to ensure that consumers are aware that the seller is a broker. But, again, Young is not a Nebraska-licensed broker, and does not sell her own properties. She only helps FSBO owners advertise their own properties. 5 J.A. 1196.

The licensing course emphasizes that brokers may not advertise homes without an owner's permission, or publish intentionally misleading ads. 4 J.A. 1040, 1035-36. 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 Young has ever published misleading ads, or advertised property without an owner's consent. In fact, she is not able to do so; under her business model, she is contacted by people who seek out her services, and who provide her with all 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 *for sale by owner* advertising, there is no rational reason to make Young take the course and get a license before operating her advertising business.

Finally, the required exam does *not* test matters that *are* relevant to advertising. The Commission provided a practice exam and two tests in discovery—which

together total 91 questions. Of these, only *two questions* relate to advertising. 4 J.A. 991-1008. 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 question underscores the irrationality of requiring Young to undertake the educational requirement and obtain a license: licensees cannot advertise homes without putting their names on the ads, because such advertisements might look like FSBO ads. But 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. But that *is* Young's business. The answer to the second question is also irrelevant to Young's business, because she *only* advertises properties in Nebraska that are owned by people other than herself.

The requirements for *maintaining* a real estate broker license also bear no relationship to Young's work. 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; to keep a separate trust account for client funds, *id.* § 81-885.21, to be fingerprinted, and to undergo a criminal background check, *id.* § 81-885.13. These requirements are imposed because real estate brokers serve as their clients' fiduciaries. *See Vogt v. Town & Country Realty of Lincoln*, 194 Neb. 308, 315 (1975). Clients entrust them to negotiate on their behalf, handle

confidential financial information, and bind them to agreements for which they are ultimately responsible. But as the District Court found, Ms. Young does none of these things, 5 J.A. 1196, and she undertakes no fiduciary duties on behalf of her customers. 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. *Id.*

In sum, the training and examination requirements are wholly unrelated to Young's business. As in *Cornwell*, *Craigmiles*, *Castille*, and *Clayton*, the licensing requirement simply does not fit what Young does. They are both under- and over-inclusive. The Commission-approved courses and exams train prospective licensees how to represent buyers and sellers, which Young does not do, and they only trivially address advertising, which is what she does. Thus, even if 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 relate almost exclusively to matters *unrelated* to her business. *Cornwell*, 80 F. Supp. 2d at 1110-11; *Craigmiles*, 110 F. Supp. 2d at 663. Forcing her to satisfy the education, testing, and licensing requirements for real estate brokers is an "attempt[] to squeeze two professions into a single, identical mold." *Cornwell*, 80 F. Supp. 2d at 1103. This fails the rational basis test.

C. The Arbitrary Exemptions to the Licensing Requirement Contradicts the Rationale for That Requirement

A licensing requirement also fails the rational basis test if it contains exemptions that contradict the consumer protection purpose of the licensing requirement. *Merrifield* involved a California law that required pest control workers to undergo extensive training and testing to get licenses, unless the person did not use pesticides. Yet that exemption was *not* available for anyone engaged in work involving pigeons, rats, or mice. 547 F.3d. at 990. In other words, the licensing requirement applied to a person who installed spikes on buildings to keep pigeons from roosting there, but *not* if the person put the same spikes on the same building to keep seagulls or sparrows away. The court found this irrational because it "undercut[] the principle of non-contradiction." *Id.* at 991. It was self-contradictory to impose a licensing requirement to ensure that pest control workers were trained, while arbitrarily exempting some people from the licensing requirement and not exempting similarly situated others. The court found that it "[could] not simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale." *Id.* Where the exemptions to the licensing requirement "undercut [the] rational basis for the licensing scheme," *id.* at 992, that was a strong indication that the law violated the rational basis test.

Here, the exemptions to the licensing rules for real estate advertisers are irrational for the same reason. The Commission purports to require licensure of people who advertise because doing so protects the public from false or misleading advertisements. Director Lemon testified that educational and licensing requirements ensure that advertisers will not advertise properties as up to code when they are not: "a person without a license," he said, would be unaware of the building codes and "might advertise something as being a bedroom" even though it was "nonconforming" because it "doesn't have proper egress in case of a fire or emergency." 4 J.A. 826:6-14. Yet property owners—either individuals or corporations—are *not* required to get licenses before they advertise their own property for sale, Neb. Rev. Stat. § 81-885.04(1), even though they might commit precisely this misrepresentation. Indeed, they have the strongest incentive to do so, and there is no reason to think they know the building codes better than any other layperson. Director Lemon essentially acknowledged the irrationality of this exemption when he testified that property owners are likely to make "some sort of misrepresentation because of limited knowledge of—of how to represent real estate." *Id.* at 826:24-827:7. Yet they are not required to get licenses before advertising their property on an FSBO basis—while Young is.

The arbitary exemptions in the statute cannot be excused on the grounds that the state may legitimately allow a person to advertise his own property but regulate

him when he regulates property owned by another, because the statute does allow *anyone at all* to advertise another person's property so long as that person receives no compensation. Neb. Rev. Stat. § 81-885.01(2). Young's business would be perfectly legal if she received no money.

But the exemption also does not turn on compensation, because anyone who serves as a trustee for a property owner may, without a license, advertise property he does not own even if he *is* paid, *id.* § 81-885.04(3), and a property owner's "employee[s], parent[s], child[ren], brother[s], or sister[s]" are also exempt, even if they are paid. *Id.* § 81-885.04(4).

If the Commission requires people to obtain licenses to advertise real estate in order to prevent untrained people from advertising, these exemptions "undercut [the] rational basis for the licensing scheme." *Merrifield*, 547 F.3d at 992. There is no basis for believing that the "general dangers of misrepresentation" resulting from "limited knowledge . . . of how to represent real estate," 4 J.A. 826:24-827:7, are in any degree lessened if a person advertises his own property, or assists in advertising a stranger's property without being compensated, or serves as a trustee or employee. If requiring FSBO advertisers like Young to get real estate broker licenses is a rational way to prevent harm to the public, then it is irrational to exempt homeowners, who have the most incentive to lie about their property, from the licensing requirement.

To uphold the laws challenged in this case would require the Court to "simultaneously uphold the licensing requirement under due process based on one rationale and then uphold [Young]'s exclusion from the exemption based on a completely contradictory rationale," which would "undercut[] the principle of non-contradiction." *Merrifield*, 547 F.3d at 991. That fails the rational basis test.

V

THE LICENSING REQUIREMENT VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE

In addition to the Overbreadth, Vagueness, Due Process, and Equal Protection causes of action, the District Court also ignored Young's Fourth Claim for Relief: that the licensing requirement abridges her privileges or immunities, as secured by the Fourteenth Amendment.

The Privileges or Immunities Clause prohibits states from infringing on those rights which appertain to a person's federal citizenship. *Saenz v. Roe*, 526 U.S. 489, 503 (1999); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78-79 (1873). Although it is widely believed that the Clause was essentially nullified in *Slaughter-House*, that overlooks the significant legal developments in the years since that decision was announced.

First, *Slaughter-House* declared that the Fourteenth Amendment was not intended to "protect[] . . . the citizen of a State against the legislative power of his own

State," *id.* at 74, because this would "radically change[] the whole theory of the relations of the State and Federal governments." *Id.* at 78. But in the years since 1873, the Court has come to hold that the Fourteenth Amendment *does* protect citizens of states against harms by their states of residence. Although this has been largely accomplished through the incorporation doctrine of the Due Process Clause, *see, e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925), the Court in *Saenz*, 526 U.S. at 503, acknowledged that the Privileges or Immunities Clause does also protect individuals against wrongs by their own states. In fact, it observed that even *Slaughter-House* conceded that the Clause protects *some* rights against state interference. *Id.* Modern law has already abandoned that aspect of the *Slaughter-House* decision.

The second relevant holding in *Slaughter-House* was that it declared that the right to pursue an occupation of one's choice—which it acknowledged as a long-standing right protected by common law[12]—was a right incident to *state* citizenship, and not federal citizenship. The Court held that only the latter are secured by the Fourteenth Amendment. *See* 83 U.S. (16 Wall.) at 78-79. But that holding, too, has been abrogated by subsequent decisions, which make clear that the right to engage in a profession without unreasonable government interference is a right of *federal*

[12] This right was a cherished individual right at common law as far back as the seventeenth century—*see, e.g.*, *The Case of Monopolies*, (1603) 77 Eng. Rep. 1260 (K.B.); *The Ipswich Tailor's Case*, (1615) 77 Eng. Rep. 1218 (K.B.)—and on that account, was long considered one of the privileges and immunities of United States citizens. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3,230).

citizenship protected by the Constitution. *See, e.g.*, *Greene*, 360 U.S. at 492 ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *Schware*, 353 U.S. at 238-39 ("A State cannot exclude a person from . . . [an] occupation in a manner or for reasons that contravene . . . the Fourteenth Amendment."); *Habhab v. Hon*, 536 F.3d 963, 968 (8th Cir. 2008) ("'The Constitution . . . protects [the] liberty [to follow a chosen profession free from unreasonable governmental interference] from state actions that threaten to deprive persons of the right to pursue their chosen occupation.'" (citation omitted)). In these and other cases, federal courts recognized that the right to pursue a lawful calling without unreasonable government interference is a right of federal citizenship, with which states may not arbitrarily interfere.

Thus both aspects of *Slaughter-House* relevant here—that the Fourteenth Amendment does not protect citizens against their own states, and that the right to pursue a lawful calling free of irrational government monopolies is not a federal citizenship right protected by the Amendment—have been abrogated, and on those points the case is no longer controlling.

For the reasons listed above, forcing Leslie Young to become a licensed real estate broker in order to advertise FSBO homes—especially when getting a license would make it illegal for her to advertise FSBO homes—is arbitrary and irrational,

and violates the Privileges or Immunities Clause in addition to the other provisions of the Fourteenth Amendment.

CONCLUSION

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

DATED: June 8, 2015.

Respectfully submitted,

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