

NO. 18-1157

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

LIBERTY COUNSEL, INC.

Plaintiff-Appellant,

v.

GUIDESTAR USA, INC.,

Defendant-Appellee

**On Appeal from the United States District Court for the
Eastern District of Virginia**

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendant-Appellee GuideStar USA, Inc. (“GuideStar”) claims that Liberty Counsel brought this lawsuit as “an effort to silence GuideStar USA, Inc.’s speech on a matter of public concern.” (Dkt. 20, GuideStar Brief, “GS Brief,” at 1). This contention is astounding in light of the well-pleaded allegations of Liberty Counsel’s Complaint, the record before this Court, the partnerships that GuideStar has formed, and the admittedly targeted actions that GuideStar has taken. GuideStar attempts to claim victim status, and yet it is GuideStar’s actions that were designed to silence the speech of Liberty Counsel.

As Liberty Counsel’s Complaint demonstrated, GuideStar has partnered with the Southern Poverty Law Center (“SPLC”) and adopted its false and misleading “hate group” designation of Liberty Counsel based on nothing more than Liberty Counsel’s viewpoint and advocacy on certain matters of public concern. Indeed, it is GuideStar – not Liberty Counsel – that has partnered with an organization, the SPLC, to advance its publicly proclaimed mission to “completely destroy” the speech and advocacy of organizations like Liberty Counsel. (Joint Appendix, “JA,” at 011, ¶62). Thus, it is GuideStar and its ideological partner the SPLC that admittedly see the “hate group” designation as a strategy in a “political struggle” and that are admittedly “very clear in [their] head [that] as a political matter,” they want to destroy Liberty Counsel. (*Id.*, ¶61).

Indeed, GuideStar's political ally, the SPLC, has admitted numerous times that the adoption and publication of the false and misleading "hate group" label is:

- (1) "strictly ideological," (*id.*, ¶ 60);
- (2) intentionally aimed at destroying Liberty Counsel, (*id.*, ¶¶ 61-62);
- (3) has "nothing to do criminality or violence or any kind of guess we're making about this group could be dangerous," (*id.*, ¶60);
- (4) is aimed at "wreck[ing]" groups like Liberty Counsel and silencing their message and speech, (*id.*, ¶61); and
- (5) that it believes it is "cool" to try to "completely destroy" Liberty Counsel. (*Id.*, ¶63).

Additionally, GuideStar, itself, admitted that it was adopting the SPLC's false and misleading "hate group" despite the fact that GuideStar:

- (1) knew that there "are legitimate critiques of SPLC's analysis," (*id.* at 009, ¶48);
- (2) knew that the SPLC is "politically bias[ed]" against groups Liberty Counsel, (*id.*, ¶48);
- (3) knew that the SPLC data was "flawed," (*id.*, ¶49);
- (4) knew that its decision was "highly politicized in a highly politicized moment in history," (*id.*, ¶51); and

- (5) saw its decision as a response to allegedly “hateful rhetoric” in the United States. (*Id.*, ¶ 50).

Finally, and contrary to the claims GuideStar makes throughout its brief, GuideStar admitted that its decision to adopt and republish the false and misleading “hate group” designation was:

- (1) financially and economically motivated, (*id.* at 008, ¶ 43);
- (2) was based on the financial and economic motivations of its consumers, (*id.*, ¶ 43); and
- (3) was intended to influence the economic decisions of its consumers. (*Id.*, ¶ 44).

Liberty Counsel brought this lawsuit to protect and defend its right to advocate in the public square, to advance its viewpoint on matters of public concern, and to fulfill its mission without being falsely and misleadingly labeled a “hate group.” No one (and certainly not Liberty Counsel, a First Amendment champion) disputes that GuideStar has a right to express its viewpoint on public matters in the public square, but the Lanham Act prohibits it from doing so in a manner that portrays other organizations in a false and misleading manner, while advertising its own services and proposing economic transactions. Indeed, GuideStar “has the full panoply of protections available to its direct comments on public issues,” but as the Supreme Court has recognized, “there is no reason for providing similar constitutional

protections when such statements are made in the context of commercial transactions.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983). GuideStar now admits that its profile of Liberty Counsel included advertisements and that those advertisements stand to bring economic benefit to GuideStar. (GS Brief at 25-26). The district court was in error to hold that GuideStar’s profile of Liberty Counsel was not commercial speech, when that profile unquestionably and admittedly included **two** separate advertisements for paid subscriptions and was rooted in GuideStar’s economic motivations. This Court should reverse.

ARGUMENT

GuideStar’s attempt to salvage the erroneous decision of the district court fails for three separate and independent reasons. First, GuideStar’s profile of Liberty Counsel constitutes an advertisement and promotion under the Lanham Act, constitutes commercial speech and was economically motivated. Second, GuideStar’s attempt to have this Court address in the first instance elements of Liberty Counsel’s Lanham Act claim which were not adjudicated by the district court is improper. Third, GuideStar admits that the district court impermissibly drew inferences in GuideStar’s – rather than Liberty Counsel’s – favor at the motion to dismiss stage.

I. GUIDESTAR'S PROFILE OF LIBERTY COUNSEL CONSTITUTES AN ADVERTISING AND PROMOTION UNDER THE LANHAM ACT.

GuideStar's countless attempts to circumscribe the analysis of its profile of Liberty Counsel to just the SPLC's "hate group" designation ignores the proper review under the Lanham Act. GuideStar's profile of Liberty Counsel did much more than merely provide informative statements, and in fact, included advertisements and proposals for economic transactions. GuideStar admitted, and Liberty Counsel's Complaint plainly alleged, that GuideStar had an economic motivation for its inclusion of the false and misleading "hate group" designation on its profile of Liberty Counsel. GuideStar admitted, and Liberty Counsel's Complaint plainly alleged, that GuideStar's profile of Liberty Counsel was likely to be perceived as attempting to influence consumer transactions. GuideStar's profile of Liberty Counsel was thus commercial speech and represented an advertisement and promotion under the Lanham Act.

A. GuideStar's Attempt To Circumscribe Its Profile Of Liberty Counsel To Only The "Hate Group" Designation Ignores The Proper Analysis Under The Lanham Act.

Throughout its brief, GuideStar continuously attempts to improperly circumscribe this Court's analysis of its profile of Liberty Counsel to just a microcosm of the relevant considerations. Indeed, **ninety-five (95) times** GuideStar claims that the only thing this Court may look at in determining whether GuideStar's

profile of Liberty Counsel constitutes commercial speech is the “SPLC Notation” itself. The district court also employed this erroneously narrow focus of the inquiry. (JA at 278-279). This is contrary to binding precedent.

The Lanham Act requires that GuideStar’s profile of Liberty Counsel be viewed **in its entirety**. As the Fourth Circuit has unequivocally held, when determining whether an advertisement violates the Lanham Act, “**a court must analyze the message conveyed within its full context.**” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 275 (4th Cir. 2002) (quoting *United Indus. Corp. v. Clorox Corp.*, 140 F.3d 1175, 1180 (8th Cir. 1998)) (emphasis added); *see also Design Res., Inc. v. Leather Indus. of Am.*, 789 F.3d 495, 503 (4th Cir. 2015) (holding that a court must analyze the entire “face of the ad” when determining whether it violates the Lanham Act); *Adventure Commc’ns, Inc. v. Ky. Registry of Election Finance*, 191 F.3d 429, 441 (4th Cir. 1999) (“Consideration of the full context of the speech is therefore critical.”).

Numerous other circuits, too, have held that the allegedly offending statement must be viewed in full context. *See, e.g., Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (Lanham Act claims “**must always be analyzed in [the advertisement’s] full context**” (emphasis added)); *Rhone-Poulenc Rorer Pharm., Inc. v. Marian Merrell Dow, Inc.*, 93 F.3d 511, 516 (8th Cir. 1996) (court must analyze allegedly offending statements in “full context”); *Castrol Inc. v.*

Pennzoil Co., 987 F.2d 939, 946 (3d Cir. 1993) (same); *F.T.C. v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (same).

GuideStar claims that the other aspects of its profile of Liberty Counsel are irrelevant to the analysis because the allegedly offending “SPLC Notation” **itself** could not be commercial speech. But, GuideStar’s assertions ignore the fact that this Court must view the face of GuideStar’s profile “in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other.” *Cuisinarts, Inc. v. Robot-Coupe Int’l. Corp.*, No. 81 Civ. 731-CSH, 1982 WL 1211559, *2 (S.D.N.Y. June 9, 1982). GuideStar cannot separate its false and misleading “hate group” designation on its profile of Liberty Counsel from the two advertisements for paid subscriptions in an effort to mask the fact that its profile of Liberty Counsel as a whole unquestionably proposes economic transactions for its subscription services. GuideStar’s attempt is nothing more than “disputatious dissection.” *Sterling Drug*, 317 F.2d at 674. The proper analysis under the Lanham Act does not permit such dissection and isolation. Indeed, “[t]he entire mosaic [of Liberty Counsel’s profile] should be viewed rather than each tile separately.” *Id.* (emphasis added).

Thus, to determine whether GuideStar’s profile of Liberty Counsel constitutes commercial speech, this Court must view **all aspects** of the profile rather than splitting them up into individual pieces. That proper examination can lead to only

one conclusion: that GuideStar's profile of Liberty Counsel constitutes commercial speech. Here, GuideStar's profile of Liberty Counsel contains **both** the false and misleading "hate group" designation at the top **and two separate advertisements for paid subscriptions** to GuideStar's comprehensive profiles. (JA at 037, 041, 042). Thus, the "entire mosaic" includes tiles that publish false and misleading statements in violation of the Lanham Act and tiles that advertise and propose economic transactions with GuideStar. Viewed through the proper lens, GuideStar's profile of Liberty Counsel is thus commercial speech.

B. GuideStar's Profile Of Liberty Counsel Did Much More Than Merely Provide Informative Statements.

Consistent with its erroneous contention that this Court can only look at the "SPLC Notation" itself, GuideStar claims that it cannot be commercial speech because all it did was "provide information" for its consumers. (GS Brief at 23). The district court, too, impermissibly constrained its analysis to the false and misleading "hate group" designation. (JA at 279).¹ When viewed through the correct analysis, however, GuideStar's profile of Liberty Counsel did much more than merely provide informative statements. GuideStar's profile of Liberty Counsel specifically advertised paid subscriptions. But, even if GuideStar publication had not explicitly

¹ The district court's constrained analysis was also erroneous for another important reason: it impermissibly drew favorable inferences about GuideStar's intention in including the false and misleading "hate group" designation. *See infra* at Section III; *see also* (Dkt. 14, Plaintiff-Appellant's Opening Brief, "LC Brief," at 44-46).

advertised paid subscriptions, which it did, commercial speech includes much more than the traditional advertising campaign. Additionally, GuideStar profile of Liberty Counsel need not have explicitly sought immediate commercial transactions to constitute commercial speech.

1. GuideStar Admits That Its Profile Of Liberty Counsel Included Advertisements For Paid Subscription Services.

In determining whether GuideStar's profile of Liberty Counsel represents commercial speech, this Court must look at whether the "communication, at bottom, proposes a commercial transaction." *Adventure Commc'ns, Inc. v. Ky. Registry of Election Finance*, 191 F.3d 429, 441 (4th Cir. 1999). GuideStar makes much of the fact that the "text of the SPLC Notation" did not propose an economic transaction. (GS Brief at 23). This, too, falls far short of the mark. When viewed as a whole, as it must be, GuideStar's profile of Liberty Counsel represents commercial speech because it included an advertisement for paid subscriptions **twice**: "*Need the ability to download nonprofit data and more advanced search options? Consider a Premium or Pro Search Subscription.*" (JA at 041, 042) (italics original; bold emphasis added)).

Remarkably, GuideStar **concedes** that its profile of Liberty Counsel includes advertisements for paid subscriptions. (GS Brief at 25-26) ("GuideStar sells 'Premium' and 'Pro Search' subscriptions to its website, and a link to purchase these subscriptions **appeared on the Liberty Counsel profile page.**" (emphasis added)).

That admission is fatal to GuideStar's contentions that its profile of Liberty Counsel is not commercial speech. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (information pamphlets that include advertisements for non-profit organization's products and issued with an economic motivation are commercial speech); *Handsome Brook Farm LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 256 (4th Cir. 2017) (same).

Stuck with its admission, GuideStar now attempts to dodge it by contending that “[n]oncommercial speech does not become commercial just because of its proximity to an advertisement for paid subscriptions.” (GS Brief at 25). GuideStar's reliance on *Radiance Foundation, Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2011), *CPC International, Inc. v. Skippy, Inc.*, 214 F.3d 456 (4th Cir. 2015), and *Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017) (GS Brief at 27-29) is badly misplaced. In fact, all three authorities demonstrate that GuideStar's profile of Liberty Counsel was commercial speech.

While **the website** on which the article at issue in *Radiance Foundation* did include an offer for paid subscriptions and other services, it was “displayed on a **different page altogether.**” *Radiance Found.*, 786 F.3d at 326 (emphasis added). It did not appear on the same page or in the article that included the offending language. *Id.* Thus, this Court held that the challenged language was “too attenuated” from the advertisements to constitute a proposal to engage in economic transaction.

Id. Here, by contrast, the false and misleading “hate group” designation did appear on the very same page as GuideStar’s advertisements, and the profile as a whole did include the offending language. Thus, *Radiance Foundation* actually compels a finding that GuideStar’s profile of Liberty Counsel was commercial speech.

Similarly, the website at issue in *CPC* was quite different than GuideStar’s profile of Liberty Counsel. There, while the website did include a “legal notice” that mentioned the possibility of licensing certain images, it did not specifically advertise or promote such licensing opportunities. *CPC*, 214 F.3d at 462. Indeed, as this Court explicitly stated, “**the original website did not offer any products for sale**” and “**did not propose a commercial transaction.**” *Id.* (emphasis added). Instead, and unlike GuideStar’s two advertisements for paid subscriptions on its profile of Liberty Counsel, the website at issue in *CPC* “simply told one woman’s story about her family” and discussed the view that her family was the victim of allegedly unfair treatment by CPC International. *Id.* at 462-63. In fact, the website was essentially only an “editorial and historical commentary.” *Id.* Here, GuideStar’s profile of Liberty Counsel certainly does not contain only commentary – it explicitly advertises and solicits economic transactions. (JA at 041, 042). *CPC* thus compels a finding of commercial speech here.

Finally, GuideStar’s contention that *Tobinick* “rejected the very theory that Liberty Counsel advances here,” (GS Brief at 29), flies in the face of the issue and

holding in that appeal. There, plaintiffs alleged “a complex funneling scheme” to generate profit for the alleged infringer and argued that the two articles containing the offending language were “**connected to other websites through hyperlinks**” and allegedly took readers to websites where the defendant generated revenue. *Tobinick*, 848 F.3d at 951 (emphasis added). The articles containing the offending language **did not include proposals for economic transactions**, as GuideStar’s profile of Liberty Counsel does here. *Id.*

In fact, plaintiffs in *Tobinick* had to create a “funneling theory” to even “connect the articles to revenue sources.” *Id.* at 951. The offers for paid subscriptions or membership subscriptions **were on different websites altogether**, and not on the same pages of the same website. *Id.* Similar to this Court’s conclusion in *Radiance Foundation*, the Eleventh Circuit held that the “funneling theory” “relies on such a level of attenuation that it fails to demonstrate economic motivation in the commercial speech context.” *Id.* Here, as already demonstrated, there is no attenuation at all. GuideStar’s profile of Liberty Counsel included **both** the false and misleading “hate group” designation **and** the two explicit advertisements proposing economic transactions. (JA at 041, 042).²

² It is also noteworthy that plaintiffs’ theory in *Tobinick* failed for a separate and independent reason, namely that they failed to include the necessary allegations concerning proposals for economic transactions in their complaint against Dr. Novella. *Tobinick*, 848 F.3d at 951 n.13. In fact, plaintiffs were seeking to have the Eleventh Circuit credit their “funneling theory” based on “websites and factual

GuideStar’s profile of Liberty Counsel included two advertisements for paid subscriptions to GuideStar’s services, and GuideStar admits that it advertised on Liberty Counsel’s profile. (GS Brief at 25-26). The well-pleaded allegations of Liberty Counsel’s Complaint also demonstrate that GuideStar had a financial and economic motivation for including the false and misleading “hate group” designation on its profile of Liberty Counsel. (JA at 008, ¶¶ 43-44). “The combination of *all* these factors... provides strong support for [the] conclusion that [GuideStar’s profile of Liberty Counsel is] properly characterized as commercial speech.” *Bolger*, 463 U.S. at 67 (emphasis original) (holding that the combination of a defendant admitting to advertising on the pamphlet at issue, referring to its own product and services on the pamphlet, and having an economic motivation for the distribution of the pamphlet compel a finding that the defendant engaged in commercial speech). Indeed, GuideStar’s admission that it included advertisements on its profile of Liberty Counsel mandates a finding that its speech was commercial. *See, e.g., Semco, Inc. v. Amcast, inc.*, 52 F.3d 108, 113 (6th Cir. 1995) (“A company’s admission that the speech in question is advertising may strongly indicate

allegations that the Tobinick Appellants sought to add to their complaint” but that were not in the complaint at issue on appeal. *Id.* Here, Liberty Counsel’s well-pleaded allegations demonstrate plainly that GuideStar’s profile of Liberty Counsel included both the false and misleading “hate group” designation and the two offers for paid subscriptions. (JA at 041, 042).

that it is commercial.”). GuideStar’s profile of Liberty Counsel constitutes commercial speech.

2. Commercial Speech Includes Much More Than The Traditional Advertising Campaign.

Even if GuideStar had not admitted that it advertised its paid subscriptions on its profile of Liberty Counsel, and even if that admission was not fatal to GuideStar’s contention that its speech is not commercial, the context surrounding GuideStar’s profile of Liberty Counsel also compels a finding that it is commercial speech. Indeed, commercial speech includes much more than the traditional advertising campaign. *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App’x 251, 256 (4th Cir. 2017) (noting that commercial speech “may include more informal types of promotion” that do not mirror the “classic advertising campaign.”).

Even academic articles and informational pamphlets that would be protected in the first instance of distribution under the First Amendment can (and do) become commercial speech when distributed by an organization that has a financial and economical motivation for furthering their distribution. *See, e.g., Semco*, 52 F.3d at 112-14 (article submitted to trade magazine that included references to author organization’s products and services constituted commercial speech); *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 458-459 (D.N.J. 2009) (secondary distribution of academic research and articles can constitute commercial speech when included with an advertisement or promotion of

organization's goods or services); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 63 (D.D.C. 2009), *rev'd in part on other grounds Washington Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000) (secondary distribution of non-commercial speech can still constitute commercial speech when disseminated with goal of enticing consumer to purchase speaker's product); *Gordon & Breach Science Publishers S.A. v. Am. Institute of Physics*, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (holding that a non-profit's use of non-commercial speech can transform it to commercial speech when used for the economic purposes of the non-profit organization). Thus, GuideStar's use of the allegedly "comprehensive information on hate groups" that the SPLC provided to GuideStar (JA at 009, ¶47), when coupled with its economic motivation for using such information and its economic motivation in influencing its consumers' financial decisions – **all of which Liberty Counsel clearly alleged and must have been presumed true** – unquestionably transformed GuideStar's profile of Liberty Counsel into commercial speech.

3. GuideStar's Advertisement For Paid Subscriptions Need Not Have Sought Immediate Commercial Transactions To Constitute Commercial Speech.

GuideStar contends that the only potential economic benefit GuideStar stands to receive from its profile of Liberty Counsel arises from its "*advertisements for subscriptions*," not the "SPLC Notation" on its profile of Liberty Counsel. (GS Brief at 26 (emphasis original)). Yet again, this ignores the fact that the entire profile of

Liberty Counsel must be viewed as a whole when determining whether its constitutes commercial speech. *See supra* Section I.A. But, GuideStar's claim fails for two additional, separate and independent reasons as well: (1) GuideStar's profile of Liberty Counsel includes eight additional offers to join GuideStar and receive its services and (2) GuideStar's reputational interests are unquestionably tied to its financial and economic interests.

First, in addition to the two advertisements proposing an immediate economic transaction of purchasing GuideStar's paid subscription services, GuideStar included **eight** additional solicitations for its free accounts that permit limited review of non-profit profiles. (JA at 037-041). As its profile of Liberty Counsel demonstrates, GuideStar limits the number of profiles a consumer can receive without signing up for an account and joining GuideStar's membership. (*Id.*). Upon joining, a consumer is then permitted to view the limited information available for free and then receives the same advertisements for paid subscriptions on such profiles. (*Id.*).

While this might not immediately contemplate an economic transaction or consummate an economic benefit to GuideStar, it still represents commercial speech. Indeed, "a communication need not be an attempt to consummate a transaction *immediately* in order to be commercial in nature; advocating the benefits of the speaker's commercial product or service in hopes of later 'sealing the deal' is

sufficient.” *Aitken v. Commc ’ns Workers of Am.*, 496 F. Supp. 2d 653, 666 (E.D. Va. 2007) (emphasis original); *see also Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1043 (E.D. Wisc. 1997) (noting that commercial speech can be “statements encouraging future economic transaction”). GuideStar’s inclusion of eight additional transaction proposals constitute commercial speech because they were designed and intended to foster or facilitate potential future economic transactions—*i.e.*, paid subscriptions.

Second, GuideStar’s reputational incentive for including the false and misleading “hate group” designation at the alleged interest of its consumers’ financial considerations also warrants a finding of commercial speech. This Court’s decision in *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App’x 251 (4th Cir. 2017) and the district court decision in that same matter, 193 F. Supp. 3d 556 (E.D. Va. 2016), are instructive. There, the question was whether a non-profit organization’s email to consumers could be considered commercial speech even though it included some allegedly informational statements. *Handsome Brook*, 700 F. App’x at 258. This Court stated that “[w]here a **non-profit organization has a direct economic stake in the provision of its product or service**, and structures its message in the hopes of realizing an economic gain,” it has an economic interest in its speech. *Id.* at 259 (emphasis added).

For non-profits, reputation and goodwill are often vital to the longevity and effectiveness of the organization. (*See, e.g.*, JA at 006, ¶¶26-27). If consumers do not believe they can rely on the non-profit's good name, affiliation, membership, subscriptions, and donations would disappear. (*Id.*). Thus, as GuideStar portrays itself as the "hub of information about nonprofit organizations," (*Id.* at 008, ¶41), maintaining its reputation among its consumers is vital. Liberty Counsel's well-pleaded allegations demonstrate – and GuideStar has admitted – that GuideStar adopted the false and misleading "hate group" designation because of the financial concerns of its customers. (*Id.*, ¶ 43). Maintaining such rapport with its consumers constitutes an economic motivation for GuideStar's profile of Liberty Counsel. Indeed, as the district court said in *Handsome Brook*, "[t]his creates an organizational **and economic incentive** for [GuideStar] to protect and promote [GuideStar's] brand." *Handsome Brook*, 193 F. Supp. 3d at 569 (emphasis added).

C. GuideStar Admitted, And Liberty Counsel's Complaint Plainly Alleged, That GuideStar Had An Economic Motivation For Its Profile Of Liberty Counsel, Including the Advertisements And The False and Misleading "Hate Group" Designation.

Liberty Counsel's well-pleaded allegations, which must be taken as true at this stage of the litigation, demonstrate beyond peradventure that GuideStar had an economic motivation for its profile of Liberty Counsel including both the advertisements and the false and misleading "hate group" designation. (JA at 008, ¶ 43) (alleging that GuideStar's motivation for inclusion of the "hate group"

designation was financial and economic); (*id.*) (alleging that GuideStar was economically motivated in its profile of Liberty Counsel because it decided to include the information based on the financial and economic concerns of its consumers); (*id.*, ¶44) (alleging that GuideStar was seeking to influence the economic transactions of its consumers); (*id.* at 025, ¶145) (alleging that GuideStar was seeking to influence its consumers' financial decisions). Liberty Counsel's well-pleaded allegations also demonstrate that GuideStar admitted its motivations for its profile of Liberty Counsel, including the false and misleading "hate group" designation, was financially and economically motivated. (*Id.*, ¶¶ 43-44).

Moreover, GuideStar has admitted in this Court that it has an economic motivation for the advertisements on its profile of Liberty Counsel. (GS Brief at 26) (admitting, as it must, that "GuideStar sells subscriptions to its website" and that "a link to purchase these subscriptions appeared on the Liberty Counsel profile page"); (*id.*) (admitting that such advertisements on GuideStar's profile of Liberty Counsel demonstrate an economic benefit to GuideStar from such advertisements for subscriptions).

Given both the well-pleaded allegations of Liberty Counsel's Complaint, which must be taken as true, *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2005), and GuideStar's admission that it receives economic benefit from including advertisements for subscriptions on its profile of Liberty Counsel, there

can be no question that GuideStar has an economic motivation for its profile of Liberty Counsel.

D. GuideStar Admitted, And Liberty Counsel's Complaint Plainly Alleged, That GuideStar's Constituents Were Likely To Perceive Its Profile Of Liberty Counsel As Attempting To Influence Consumer Decisions.

GuideStar's attempt to avoid the plain import of this Court's precedent on the perception of GuideStar's consumers also fails as a matter of law. While GuideStar claims that Liberty Counsel "sets up and tackles a strawman" in its argument that consumers are likely to perceive its profile of Liberty Counsel as attempts to influence consumer decisions (GS Brief at 38), it is yet again GuideStar that tackles its **95-times-repeated** strawman that only the "SPLC Notation" is relevant to the consumer's perception analysis. This, of course, is yet again incorrect. *See supra* Section I.A. As this Court has said, and as GuideStar acknowledges, the seminal question is "whether the listener would perceive the speech as proposing a transaction." *Radiance Found.*, 786 F.3d at 331. Here, there can be no question that a consumer of GuideStar's profile of Liberty Counsel would perceive it as proposing a transaction. Indeed, to view the full profile of Liberty Counsel, the consumer has to accept one of the **two explicit advertisements for paid subscriptions**. (JA at 041, 042). Given that GuideStar's profile unquestionably proposes an economic transaction (**twice**), it is hard to fathom how a reasonable consumer would not view

that a proposal for economic transaction (*i.e.*, purchasing paid subscriptions) as proposing an economic transaction.

GuideStar again misreads *Radiance Foundation*. GuideStar seeks refuge in this Court's notation that even "scathing speech" and commentary in the article at issue was "highly unlikely" to be viewed as proposing an economic transaction. (GS Brief at 38) (citing *Radiance Found.*, 786 F.3d at 332. But *Radiance Foundation* is different because the **article** there "did not offer the reader anything for sale," "was not an advertisement," and "did not even mention Radiance's services." 786 F.3d at 332. Here, however, GuideStar has admitted that it advertised on the **profile** at issue here (GS Brief at 26), admitted that it offered subscription services for sale on that profile (*id.*), and admitted that its profile of Liberty Counsel mentions GuideStar's services. (*Id.*). Thus, contrary to this Court's finding in *Radiance Foundation*, it is **highly likely** (if not certain) that consumers of GuideStar's profile of Liberty Counsel would view it as proposing an economic transaction.

II. GUIDESTAR'S ATTEMPT TO HAVE THIS COURT ADDRESS IN THE FIRST INSTANCE THE OTHER LANHAM ACT FACTORS, WHICH WERE NOT ADJUDICATED BY THE DISTRICT COURT, IS IMPROPER.

GuideStar also attempts to have this Court address elements of Liberty Counsel's Lanham Act claim that were never adjudicated, considered, or even mentioned by the district court. (GS Brief at 40-45). This request is plainly improper. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of

course, that a federal appellate court does not consider an issue not passed upon below.”); *Statoil USA Onshore Prop. Inc. v. Pine Res., LLC*, 675 F App’x 285, 296 (4th Cir. 2017) (declining to consider issue based solely on “short passages in the parties’ briefs” and remanding to district court to address on remand); *Hodges v. Federal-Mogul Corp.*, 621 F. App’x 735, 743 (4th Cir. 2015) (declining to address issue not passed upon by the district court in the first instance).

The district court here addressed only **one** of three elements in the **threshold** requirement of whether GuideStar’s allegedly false or misleading representation was made in a commercial advertisement or promotion. *See Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556, 567 (E.D. Va. 2007) (discussing three-part test for threshold commercial speech determination under Lanham Act). GuideStar is now asking this Court to skip over the other two elements of the threshold determination which the district court never addressed, and then leap over the **five** other substantive elements of Lanham Act claims, which the district court also never addressed. *See PMB Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 126 (discussing five substantive requirements for Lanham Act claims) (quoting *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264 (4th Cir. 2002)).

This Court is “a court of review, not of first view,” *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006), and “[t]he district court is in a better position to consider the parties’ arguments in the first instance, which can be presented at length rather

than being discussed in appellate briefs centered on issues the district court did decide.” *Goldfarb v. Mayor and City Council of Balt.*, 791 F.3d 500, 515 (4th Cir. 2015). GuideStar’s contention that this Court should affirm the district court’s dismissal without ever giving it the opportunity to consider the numerous remaining elements, and to consider those issues in the first instance, must fail. This Court should reverse the erroneous dismissal of Liberty Counsel’s claims and remand to the district court for further consideration.

Even if this Court were to consider the other Lanham Act factors in the first instance, which it should not do, Liberty Counsel has demonstrated that the district court’s dismissal was improper on all counts. GuideStar’s “hate group” designation of Liberty Counsel is a false and misleading representation of fact under the Lanham Act. (JA at 179-186). GuideStar’s false and misleading representation of fact that Liberty Counsel is a “hate group” was commercial in nature (*id.* at 181-182), was material and likely to influence consumer decisions (*id.* at 182-183), has the tendency to deceive consumers (*id.* at 183-185), actually deceives consumers (*id.*), and was placed in interstate commerce. (*Id.* at 186). Additionally, because of GuideStar’s false and misleading representation of fact, Liberty Counsel has suffered injury to its good name, reputation, standing among its donors, and actual economic injury. (*Id.* at 186-187).

As the record cited in the preceding paragraph demonstrates, the parties devoted numerous pages to briefing each one of these issues for the district court. Space constraints in the briefing of this appeal do not allow the parties to do justice to even one, let alone all, of those issues never considered by the district court. This is reason alone for this Court to reject GuideStar's improper invitation and defer merits consideration until after the district court is first given that chance. *Goldfarb*, 791 F.3d at 515.

III. GUIDESTAR ADMITS THAT THE DISTRICT COURT IMPERMISSIBLY DREW INFERENCES IN GUIDESTAR'S FAVOR AT THE MOTION TO DISMISS STAGE.

GuideStar also contends that the district court did not err in drawing inferences in GuideStar's favor at the motion to dismiss stage. (GS Brief at 45). Curiously, while contending that this is a "last-gasp" argument on the part of Liberty Counsel, **GuideStar admits that the district court drew inferences in favor of the defendant at the motion to dismiss stage.** (*Id.*). As a matter of black letter law, a district court "does not resolve contests surrounding the facts" at the motion to dismiss stage. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). Yet, here, the district court ignored the well-pleaded allegations of Liberty Counsel's Complaint and resolved a contested issue in GuideStar's favor. (JA at 279) (resolving the question and drawing a favorable inference regarding GuideStar's intent in defendant GuideStar's favor at the motion

to dismiss stage). As Liberty Counsel pointed out in its Opening Brief, the district court's determination of this issue was improper at this stage of the proceedings because it involves a question of fact. (Dkt. 14, LC Brief at 44-46).

GuideStar claims that the district court was permitted to draw inferences in its favor at the motion to dismiss stage because those inferences were supported by the allegations of the Complaint. (GS Brief at 45). This is not correct. For example, the district court's inference regarding GuideStar's supposedly non-commercial intent in adopting the false and misleading "hate group" designation is **directly contrary** to the plain allegations of Liberty Counsel's Complaint. (*See* JA at 008, ¶43) ("GuideStar has admitted that its purpose and motivation for the adoption of the SPLC's designation was financial and economic."); (*id.*, ¶44) ("GuideStar admitted that it was seeking to influence consumers."); (*id.* at 021, ¶122) (alleging that GuideStar shares the SPLC's admitted "intention to 'completely destroy' Liberty Counsel"); (*id.* at 025, ¶145) (alleging that GuideStar's intention was financial and economic and aimed at influencing consumer decisions).

The district court was required to "draw all reasonable inferences from [the] facts in [**Liberty Counsel's**] favor," not GuideStar's. *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2006). As GuideStar has admitted (GS Brief at 45) and the record plainly demonstrates (JA at 279), the district court failed to follow that clear mandate. Its decision is therefore in error, and must be reversed.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING LIBERTY COUNSEL'S COMPLAINT WITH PREJUDICE PRIOR TO GIVING IT AT LEAST ONE CHANCE TO AMEND.

GuideStar also contends that the district court did not err in refusing to grant Liberty Counsel leave to amend because Liberty Counsel never sought such leave. (GS Brief at 47). But, GuideStar ignores the fact that Rule 15 provides for very liberal amendment and that it should be “freely given.” Fed. R. Civ. P. 15(a)(2). GuideStar also ignores that numerous courts have held that leave to amend should be freely given “*even if the plaintiff does not seek leave to amend.*” *Brown v. Matauszak*, 415 F. App'x 608, 615 (6th Cir. 2011) (italics original, bold emphasis added); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[I]n a line of cases dating back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), a district court should grant leave to amend **even if no request to amend was made.**”) (emphasis added); *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007) (holding that “leave to amend **must** be granted **sua sponte**,” even where no leave to amend was sought) (emphasis added).

Indeed, “when a more carefully crafted complaint might state a claim, a plaintiff **must** be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.” *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (emphasis added); *U.S. ex re. Bledsoe v. Cmty. Health Sys., Inc.*,

342 F.3d 634, 644 (6th Cir. 2003) (same); *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 409 (8th Cir. 1999) (under Rule 15, “parties should usually be given at least one chance to amend their complaint”). Even if this Court were to conclude that Liberty Counsel’s Complaint was deficient in some aspects, permitting Liberty Counsel to amend would afford it the first-time opportunity to address those concerns (or those of the district court). While Liberty Counsel does not concede that any deficiency exists, if deemed necessary Liberty Counsel could include additional allegations concerning GuideStar’s financial and economic motivations in adopting the false and misleading “hate group” designation, to demonstrate that GuideStar’s advertisement and promotion of its services was commercial in nature. Liberty Counsel could more clearly and exhaustively allege that GuideStar’s reliance upon paid subscriptions, which are advertised and promoted on GuideStar’s profile of Liberty Counsel, is critical to GuideStar’s longevity and mission. Opportunity to amend would also permit Liberty Counsel to bolster allegations demonstrating that GuideStar’s advertisements and promotions were not merely informational.

The district court’s failure to permit Liberty Counsel at least one opportunity to amend its complaint before dismissing it with prejudice was an abuse of discretion, and should be reversed.

CONCLUSION

For these reasons and those detailed in Liberty Counsel's Opening Brief, the district court was in error to dismiss Liberty Counsel's Complaint, and this Court should reverse.

Respectfully submitted,

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/s/ Daniel J. Schmid

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Dated: June 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2018, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via the Court's ECF/electronic notification system.

/s/ Daniel J. Schmid

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Counsel, Inc.*