



U.S. District Court for D.C.

ELECTION LAW

CAMPAIGN FINANCE / FEDERAL ELECTION CAMPAIGN ACT OF 1971 / POLITICAL COMMITTEE / BIPARTISAN CAMPAIGN REFORM ACT OF 2002 / ELECTIONEERING COMMUNICATIONS / ELECTION-RELATED MAJOR PURPOSE

Federal Election Commission (FEC) erred when finding that Intervenor Defendant was not a political committee. The FEC’s blank slate test for considering election ads violated the Bipartisan Campaign Reform Act of 2002’s directive that electioneering communications presumptively have an election-related purpose. Motion for summary judgment granted.

**CITIZENS FOR RESPONSIBILITY AND ETHICS
IN WASHINGTON, et al. v. FEDERAL ELECTION
COMMISSION**

D.D.C. No. 16-cv-2255 (CRC). Decided on March 20, 2018. (Hon. Christopher R. Cooper, J.). [Counsel not given in published opinion.]

MEMORANDUM OPINION

COOPER, Judge: This is the second in a series of cases involving the Federal Election Commission and its (non)regulation of American Action Network, Inc. (“AAN”), a self-described “issue-oriented action tank” that ran nearly \$18 million in television advertisements just before the 2010 federal midterm elections. Citizens for Responsibility and Ethics in Washington—a watchdog group known as “CREW”—contends that AAN’s spending on these ads rendered it a “political committee” as defined in the Federal Election Campaign Act of 1971. And, according to CREW, because AAN did not register as a political committee during the relevant time period, it evaded the Act’s recordkeeping and disclosure requirements that apply to those groups.

In 2012, CREW filed an administrative complaint with the Commission to that effect. By an evenly divided vote, the Commission dismissed CREW’s complaint because a majority of the Commissioners did not find “reason to believe” that AAN violated the Act. 52 U.S.C. § 30109(a)(2). Specifically, the three controlling Commissioners concluded that AAN did not qualify as a political committee because it lacked a “major purpose” of nominating or electing a candidate for federal office, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). This Court in a previous decision held that dismissal “contrary to law” because it rested on an erroneous premise regarding *Buckley’s*

U.S. District Court for D.C.

COPYRIGHT LAW

COPYRIGHTABILITY / COPYRIGHT ACT / LITERARY WORK / ADMINISTRATIVE PROCEDURE ACT / ARBITRARY AND CAPRICIOUS / FEIST STANDARD / PICTOGRAM

Copyright Office’s determination that a mug containing the phrases “people pleaser in recover” and “refill” along with a pictogram of a hand displaying its middle finger was not copyrightable was not error. Decision was not arbitrary and capricious since Defendant clearly described its findings and reasoning in its Final Decision, explaining that the work was too short to merit copyright protection. Defendant was not required to address every single point in Plaintiff’s arguments and those points left unaddressed where immaterial to the inquiry. The *Feist* standard applies to more than just factual compilations. Contrary to Plaintiff’s contention, Defendant assumed that a pictogram of a hand displaying its middle finger was a literary work but determined it was insufficiently creative. Defendant’s conclusion that there is “nothing inherently original about placing text or symbols on a mug” is not arbitrary. Defendant’s motion for summary judgment granted.

**WESLEY SCOTT ASHTON v. UNITED STATES
COPYRIGHT OFFICE, et al.**

D.D.C. No. 16-cv-02305 (APM). Decided on March 8, 2018. (Hon. Amit P. Mehta, J.). [Counsel not given in published opinion.]

MEMORANDUM OPINION

MEHTA, Judge: In her now iconic song “Sorry,” Beyoncé Knowles references the universally understood “middle finger” to express her hostility and feelings of betrayal over what listeners widely believe to be her husband’s infidelity. Plaintiff Wesley Scott Ashton makes use of the middle finger for a different reason: He has placed a “pictogram” of an extended middle finger on a coffee mug, along with

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CREW *Continued from page 769*

“major purpose” requirement. On remand, the Commission again dismissed CREW’s complaint in a deadlocked decision.

CREW then filed this suit challenging the Commission’s second dismissal as contrary to law. Because the Court finds that the Commission’s analysis was inconsistent with the governing statutes, it will grant summary judgment in favor of CREW and remand this matter to the Commission.

I. Background

A. Legal Background

The Federal Election Campaign Act of 1971 (“FECA”), as substantially amended in 1974, regulates federal elections in two key ways. First, the law sets monetary limits on contributions to political parties and candidates. *See* 52 U.S.C. § 30116. Second, it imposes disclosure requirements on entities that spend money for the purpose of influencing elections, even when that spending does not go directly to a candidate’s coffers. *See id.* § 30104.

This case is about FECA’s disclosure requirements—specifically, those triggered by spending on political advertisements. In broad terms, these disclosure requirements serve “three important interests: providing the electorate with relevant information about the candidates and their supporters; deterring actual corruption and discouraging the use of money for improper purposes; and facilitating enforcement of the prohibitions in the Act.” *McConnell v. FEC*, 540 U.S. 93, 121 (2003) (controlling opinion of Stevens & O’Connor, J.J.).

Some of FECA’s disclosure requirements are triggered by certain types of communications. For example, an entity that makes “independent expenditures”—that is, a communication “expressly advocating the election or defeat of a clearly identified candidate,” 52 U.S.C. § 30101(17)—of over \$250 in a calendar year must file a report with the Commission containing information about itself and its contributors, *id.* § 30104(c).

FECA also imposes more pervasive disclosure requirements on entities based on their campaign-related spending patterns. As relevant here, “political committees”—commonly referred to as “political action committees” or “PACs”—are subject to extensive, ongoing disclosure requirements. They must appoint a treasurer, keep records with the names and addresses of contributors, and file regular reports during a

general election year with accounting information, including the amounts spent on contributions and expenditures. *Id.* §§ 30102–04. They must also register with the Federal Election Commission or face penalties. *Id.* §§ 30104(a)–(b), 30109(d)(1).

An entity qualifies as a political committee when it satisfies two separate conditions. The first was imposed by Congress in the text of FECA: the entity must receive or spend more than \$1,000 in a calendar year for the purpose of influencing a federal election. *Id.* § 30101(4)(A), (8)(A)(i), (9)(A)(i). The second condition was imposed by the Supreme Court in *Buckley v. Valeo* as a narrowing construction of the statutory definition. Under *Buckley*, political committees are limited to those “organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate.*” 424 U.S. at 79 (emphasis added). A broader definition of “political committee,” the Court explained, could raise problems of vagueness under the First Amendment by threatening the speech of “groups engaged purely in issue discussion” and not just those engaged in “campaign related” activity. *Id.*

Several decades after *Buckley*, Congress in the Bipartisan Campaign Reform Act of 2002 (“BCRA”) amended FECA to add important new disclosure requirements. BCRA was aimed, among other targets, at the post-*Buckley* rise of corporate and union spending on ads that were nominally related to political issues but were clearly intended to sway voters in upcoming federal elections. *See McConnell*, 540 U.S. at 126–32. To capture these “so-called issue ads,” *id.* at 126, Congress created a new category of communications called “electioneering communications”—television advertisements that air within 60 days of a federal election, clearly identify a candidate running for federal office, and target the relevant electorate. 52 U.S.C. § 30104(f)(3)(A)(i). Corporations spending over \$10,000 on those communications in a calendar year must file a statement with the Commission that discloses information about the entity, the candidates identified in the communications, the recipients of any disbursements, and any donors who gave over \$1,000 toward electioneering communications since the beginning of the preceding calendar year. *Id.* § 30104(f)(2); 11 C.F.R. § 104.20(c)(9).² Ads that qualify as electioneering communications must also include disclaimers with information like the name of the entity that paid for the ad and whether the ad was authorized by a candidate. 52 U.S.C. § 30120(a); *see* 11 C.F.R. § 100.11(c)(3).

The Federal Election Commission (“FEC”), an

independent agency with six Commissioners, is responsible for enforcing FECA's disclosure requirements. See 52 U.S.C. § 30106(b) (1). The Commission has not adopted a rule that further clarifies the meaning of *Buckley's* "major purpose" limitation. Rather, it has taken a case-by-case approach by deciding whether particular entities have a major purpose of nominating or electing a candidate. See *Shays v. FEC*, 511 F. Supp. 2d 19, 30 (D.D.C. 2006). This approach was ultimately upheld by a fellow judge in this District against challenge under the Administrative Procedure Act. See *id.*

Any person or entity may file a complaint with the Commission asserting a FECA violation. 52 U.S.C. § 30109(a)(1). If four or more Commissioners find "reason to believe" that FECA was or will soon be violated, then the Commission must investigate. *Id.* § 30109(a)(2). Otherwise, the complaint is dismissed. See *id.* § 30106(c). In the event of dismissal, the controlling group of Commissioners—here, those voting against enforcement—must provide a statement of reasons explaining the dismissal decision. See *FEC v. Nat'l Republican Senatorial Comm.* ("NRSC"), 966 F.2d 1471, 1476 (D.C. Cir. 1992). "Any party aggrieved" by an FEC dismissal decision may petition for this Court's review. 52 U.S.C. § 30109(a)(8)(A). If the Court finds the statement of reasons to be contrary to law, it can direct the FEC to take action within 30 days that "conforms with" the Court's ruling. *Id.* § 30109(a)(8)(C).

B. Factual and Procedural Background

1. The FEC's First Dismissal

American Action Network ("AAN") is a tax-exempt § 501(c)(4) civic organization. Joint Appendix ("J.A.") 1490–91 (ECF No. 46). The group's stated mission is to "create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security." J.A. 1490. To advance that mission, AAN has sponsored educational activities and grassroots events. But the majority of its spending throughout the period at issue in this case—July 23, 2009 through June 30, 2011—was on political advertisements. Of its \$27.1 million in total spending over that period, just over \$4 million was devoted to independent

expenditures—*i.e.*, ads expressly advocating for or against a federal candidate. J.A. 1765. An additional \$13.7 million was devoted to electioneering communications—*i.e.*, ads run near an election that identify a candidate and target the relevant electorate. *Id.*

In June 2012, CREW and its then-executive director filed a complaint with the FEC alleging that AAN's spending near the 2010 midterms rendered it an unregistered political committee. J.A. 1480–88. The FEC's Office of General Counsel reviewed the complaint and recommended that the Commission investigate it because there was reason to believe that AAN was indeed a political committee. *Id.* at 1659. Nevertheless, in June 2014, the Commissioners deadlocked three-to-three on whether to commence an investigation and, accordingly, the Commission dismissed CREW's complaint. *Id.* at 1689.

The three controlling Commissioners—those voting against investigation—issued a Statement of Reasons explaining that AAN was not a political committee because it did not have a major purpose of nominating or electing a federal candidate. J.A. 1690–723. The Commissioners first explained that, based on AAN's organizational documents, its official public statements, and its tax-exempt status, AAN appeared to have a "central organizational purpose" that was "issue-centric" and not focused on electing candidates. *Id.* at 1706–07. They then turned to the heart of CREW's complaint: that AAN's spending on advertisements rendered it a political committee. *Id.* at 1708. In this part of their analysis, the Commissioners relied on a rigid distinction between "express advocacy" for a candidate—which properly counted toward an electoral major purpose—and "issue advocacy"—which categorically did not. See *id.* at 1709–10. In the Commissioners' view, the Supreme Court had interpreted the First Amendment to require such a categorical distinction—first in *Buckley* and more recently in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449 (2007), which held that a statute prohibiting corporations from funding electioneering communications could not, consistent with the First Amendment, be applied to forbid the funding of "genuine issue ads" that are

not "the functional equivalent of express advocacy," *id.* at 480–81.4 See J.A. 1704–05, 1709.

Relying on the dichotomy between express and issue advocacy from *WRTL II*, the Commissioners characterized all of AAN's ads that did not expressly advocate for a candidate (*i.e.*, its electioneering communications) as "genuine issue advertisements," the \$13.7 million cost of which could not be counted toward an election-related major purpose. J.A. 1709–10. They made this determination wholesale, without discussing the content of any individual ad. *Id.* The Commissioners also considered AAN's spending over its lifetime—mid-2009 to mid-2011—instead of year-to-year and, in total, found that only the \$4.1 million that AAN spent on express advocacy between 2009 and 2011 was aimed to elect a candidate. *Id.* at 1709. In their view, because that spending accounted for only 15% of AAN's total expenses during that period, the group necessarily lacked a major purpose of nominating or electing a candidate. *Id.* at 1709–10, 1716.

CREW filed suit in this Court challenging the FEC's dismissal of the complaint against AAN, as well as the dismissal of a similar complaint against another organization, Americans for Job Security ("AJS"). *CREW v. FEC*, 209 F. Supp. 3d 77, 80–81 (D.D.C. 2016). CREW alleged that both dismissals violated FECA. AAN and AJS intervened as additional defendants and the parties filed cross-motions for summary judgment. *Id.* at 85.

In a September 2016 decision, this Court held that both dismissals were contrary to law and remanded them to the Commission for reconsideration. *Id.* at 95. As the Court explained, the FEC's reliance on a hard distinction between express advocacy and issue advocacy depended on an erroneous premise: that the First Amendment required it to exclude from its consideration all non-express advocacy in the context of disclosure requirements. *Id.* at 93. While the Supreme Court in *WRTL II* had concededly drawn such a distinction in evaluating a ban on corporate-sponsored electioneering communications, in *McConnell and Citizens United v. FEC*, 558 U.S. 310 (2010), it had expressly declined to take that approach

in evaluating disclosure requirements triggered by those communications. *Id.* at 89–90 (quoting *Citizens United*, 558 U.S. at 369). And in the wake of those cases, “federal appellate courts ha[d] resoundingly concluded that *WRTL II*’s constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context.” *Id.* at 90.

This Court nevertheless declined to adopt CREW’s proposed rule that, to comply with FECA, the Commission must treat *all* electioneering communications as indicative of an election-related major purpose. As the Court explained:

CREW’s citations to legislative history, past FEC precedent, and court precedent certainly support the conclusion that *many* or even *most* electioneering communications indicate a campaign-related purpose. Indeed, it blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race. However, particularly given the FEC’s judicially approved case-by-case approach to adjudicating political committee status, the Court will refrain from replacing the Commissioners’ bright-line rule with one of its own.

Id. at 93 (citations omitted).

2. The FEC’s Second Dismissal

On remand, the FEC again divided three-to-three and dismissed CREW’s complaint against AAN. J.A. 1763. The controlling Commissioners’ Statement of Reasons acknowledged that, in light of this Court’s decision, it could no longer categorically exclude AAN’s electioneering communications from its major-purpose calculation. *Id.* at 1767–68. Rather, the Commissioners explained that they would proceed ad-by-ad and weigh several factors in deciding whether each electioneering communication should count toward an election-related major purpose. These factors included (1) the extent to which the ad’s language focuses on “elections, voting, political parties,” and the like; (2) “the extent to which the ad focuses on issues important to the group or merely the candidates referenced in the ad”; (3) the context of the ad (but “only

to the extent necessary . . . to understand better the message being conveyed”); and (4) whether the ad “contains a call to action and, if so, whether the call relates to the . . . issue agenda or, rather, to the election or defeat of federal candidates.” *Id.* at 1768.

Before they turned to each ad, the Commissioners explained that all of the ads ran in a time period that—while admittedly near the federal midterm elections—also preceded an anticipated “lame duck” congressional session. J.A. 1768–70. During that session, Congress was expected to “consider several pieces of major legislation, many involving policy issues of great importance to AAN” like “Bush-era tax cuts, federal spending, health care, and energy.” *Id.* at 1769. And, as the Commission noted, Congress did ultimately convene a lame duck session in December 2010 and considered some of those issues. *Id.* at 1769–70.

“With that context in mind,” the controlling Commissioners then evaluated AAN’s twenty electioneering communications. J.A. 1770. They concluded that four of the ads indicated an election-related major purpose: those titled “Bucket,” “New Hampshire,” “Order,” and “Extreme.” *Id.* at 1779. “Order” and “Extreme,” for example, sought to criticize two Democratic congressional candidates—Mike Oliverio and Annie Kuster, respectively—by linking them with Nancy Pelosi in unfavorable ways. *Id.* at 1778. As the Commissioners explained, “[n]either ad contains a call to action, nor do they focus on changing the voting behavior or policy stances of the named individuals.” *Id.* Thus, in their view, those ads were best understood as aiming to defeat reelection of the named representatives.

On the other hand, the Commissioners found that AAN’s sixteen other electioneering communications did not evince an election-related purpose. Conceding that these ads were critical of the incumbent representatives they identified, the Commissioners focused on the fact that each ad instructed viewers to call the representative and urge him to change his vote on a political issue, if not an actual pending bill. *See id.* at 1770–79. For example, the Commissioners declined to count the cost of an ad titled “Quit Critz,” which accused then- Pennsylvania

representative Mark Critz of supporting “the Obama-Pelosi agenda that’s left us fourteen trillion in debt.” J.A. 1770. The ad concluded with an exhortation to “[t]ell Congressman Critz that Pennsylvania families need tax relief this November, not more government,” and it superimposed text that instructed viewers to call Representative Critz and tell him to vote “Yes on H.R. 4746,” the House tax-cut bill introduced earlier that year. *Id.* In evaluating that ad and several similar to it, the Commissioners explained that the ads’ references to “November” were “best understood as a reference to the time period in which the lame-duck session would commence” instead of a reference to the November midterm election, and that “the express point of [their] criticism” was “to marshal public sentiment to persuade the officeholders to alter their voting stances.” J.A. 1772.

Combining AAN’s spending on the four election-related ads with the \$4.1 million it spent on express advocacy yielded a sum of \$5.97 million, or 22% of AAN’s total spending between mid-2009 and mid-2011. J.A. 1779. The Commissioners ran an alternative calculation by adding the cost of an ad called “Read This”¹¹—which they considered issue-focused but close to the line—and by counting AAN’s spending over only the most recent year in question (mid-2010 to mid-2011). *Id.* Under that approach, “the amount of spending that indicate[d] a purpose to nominate or elect federal candidates would constitute less than 28% of [AAN’s] total spending in that time period.” *Id.* As a result, the Commissioners concluded that AAN did not have the requisite major purpose of nominating or electing a candidate, and they therefore voted to dismiss CREW’s complaint against AAN.¹² *Id.* at 1779–80.

Soon thereafter, CREW filed a motion for an order to show cause why the FEC’s dismissal on remand did not contravene this Court’s prior decision. Pls.’ Mot. Show Cause, No. 14-cv-1419 (Nov. 14, 2016) (ECF No. 57). The Court denied the motion. Memo. Op. & Order, *id.* (Apr. 6, 2017) (ECF No. 74). To the extent that CREW’s motion relied on new legal arguments—for example, that the Commissioners relied on a misreading of McConnell—the Court explained that those

new arguments were “properly taken up in a separate suit.” *Id.* at 5. The Court further found that nothing in the Commissioners’ dismissal violated the letter of its prior decision:

[T]he Court never ordered the FEC to reach a particular result, or to consider any particular ad—or any proportion of electioneering communications—election- related. Instead, the Court directed the FEC to reconsider its decision without “exclud[ing] from its [major purpose] consideration all non-express advocacy.” The FEC did just that.

Id. at 6 (citation omitted).

CREW then filed this suit against the FEC. AAN and AJS again intervened as defendants. The parties stipulated to dismissal of the claims against AJS, and thus all that remains is the allegation that the FEC’s dismissal of the complaint against AAN was contrary to law. The parties’ cross-motions for summary judgment are now ripe.

II. Legal Standards

Where a party challenges an FEC dismissal decision, this Court will grant summary judgment to the challenger only if the agency’s decision was “contrary to law,” 52 U.S.C. § 30109(a)(8)(C), meaning either that “the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA],” or that “the FEC’s dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.” *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). This same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote. *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). This is because the Commissioners voting for dismissal “constitute a controlling group for purposes of the decision,” and so their statement of reasons “necessarily states the agency’s reasons for acting as it did.” *NRSC*, 966 F.2d at 1476.

In evaluating whether a group has an election-related major purpose, the Commission is construing the term “political committee” as it appears in FECA—a statute that the Commission is charged with enforcing. The Court thus reviews the

Commission’s determination of whether an entity is a political committee using the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See, e.g., Orloski*, 795 F.2d at 161–62. Under *Chevron*, the Court at “Step 1” must use “traditional tools of statutory interpretation” to decide “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 842–43 & n.9; *see also Pharm. Research & Mfrs. Of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (examining “text, structure, purpose, and legislative history”). If so, then Congress’s resolution must be given legal effect no matter what the agency says to the contrary. *Chevron*, 467 U.S. at 843. If, on the other hand, the statute is silent or ambiguous on an issue, the Court proceeds to “Step 2” and decides whether the agency’s resolution of the issue was “a reasonable policy choice for the agency to make.” *Id.* at 845. While the Court’s review at Step 1 is plenary, at Step 2 it is “highly deferential.” *Nat’l Rifle Ass’n of Am., Inc. v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000).

This Court also reviews whether the FEC’s dismissal was “arbitrary or capricious, or an abuse of discretion.” *Orloski*, 795 F.2d at 161. This standard largely overlaps with *Chevron* Step 2; the same core question is whether the agency analyzed the problem reasonably. *See Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 209 (D.C. Cir. 2015). The Court will hold an FEC decision unlawful if it “entirely failed to consider an important aspect of the problem,” it “offered an explanation for its decision that runs counter to the evidence before [it],” or “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Autom. Ins. Co.*, 463 U.S. 29, 43 (1983).

III. Analysis

CREW contends that the controlling Commissioners’ analysis on remand rested on legal errors—some repeated and some new. It first claims that the Commissioners “fabricated” a multifactor test that allowed it to disregard nearly all of AAN’s electioneering advertisements, in violation of this Court’s prior decision. Pls.’ Mot. Summ. J. at 22. More fundamentally, says CREW, the Commission’s dismissal rested on

a misinterpretation of *Buckley* and *McConnell* because it invoked those cases as a reason to *exclude* electioneering communications from its major purpose analysis. *Id.* at 28–33. In CREW’s view, those cases require just the opposite “because every electioneering communication, by reason of its being an electioneering communication, is ‘specifically intended to affect election results.’” Pls.’ Reply at 13–14 (quoting *McConnell*, 540 U.S. at 127). Finally, CREW argues that the Commission’s analysis was arbitrary and capricious because it ignored contextual evidence highly relevant to the ads’ purpose and instead “cherry picked information” in order to “excus[e] AAN from political reporting.” Pls.’ Mot. Summ. J. at 41.

As the Court explained in denying CREW’s motion for a show-cause order, the controlling Commissioners did not repeat their mistake of drawing a bright line between express and issue advocacy. The Court nevertheless finds legal error in the Commission’s approach to analyzing AAN’s status as a political committee. While the controlling Commissioners did not categorically refuse to count AAN’s electioneering advertisements as indicative of an election- related major purpose, the Commissioners used a multifactor test that started from a blank slate in considering the content of each ad, with no apparent regard for the highly relevant fact that each ad fell cleanly within Congress’s definition of an “electioneering communication.” In the Court’s view, that approach violates the unambiguous directive of Congress—made clear in the Bipartisan Campaign Reform Act of 2002—that electioneering communications *presumptively* have an election-related purpose. In turn, to the extent that the Commission considers an entity’s spending in assessing its major purpose, it must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate.

A. In FECA and BCRA, Congress Made Clear that Electioneering Ads Presumptively Have a Purpose of Nominating or Electing a Federal Candidate

To understand the Court’s conclusion, begin with the plain text of FECA. Its definition of “political committee” is

unambiguously broad: it covers any entity that receives or spends over \$1,000 within one calendar year for the purpose of influencing an election. If this is all the Court had to go on—and if it could disregard *Buckley*'s constitutional concerns—it would conclude that AAN is a political committee under the clear terms of FECA, and therefore that the Commission was bound to determine as much. See *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (with respect to the definition of “political committee,” “it cannot be[] contended that the statutory language itself is ambiguous” (emphasis added)), *vacated on other grounds*, 524 U.S. 11 (1998).

Of course, after *Buckley* the Commission is not free to rely on this broad statutory definition alone. The question, then, is how the Supreme Court's imposition of the major purpose requirement changes things. Here, the context of *Buckley*'s holding is important. The *Buckley* Court faced a wide-ranging constitutional challenge to FECA after it was amended in 1974. Before reaching the Act's disclosure requirements, the Court first confronted the Act's \$1,000 annual limit on expenditures “relative to a clearly identified candidate during a calendar year.” 424 U.S. at 39. The Court attempted to narrow this language to avoid vagueness problems under the First Amendment by construing it “to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. Even with that narrowing construction, however, the Court found the provision invalid because the government's purported interest “in preventing corruption and the appearance of corruption” did not support such a broad speech restriction. *Id.* at 45.

By contrast, the Court upheld several of FECA's disclosure requirements. But it imposed narrowing constructions on those requirements to avoid problems of vagueness and overbreadth under the First Amendment. For the disclosure requirements triggered by independent expenditures, the Court worried that the Act's definition of “expenditure”—which required only a purpose of “influencing” an election or nomination—could be read to cover “both issue discussion and advocacy of a political

result.” *Id.* at 79. So “[t]o insure that the reach of the [provision] is not impermissibly broad,” the Court construed the term “expenditure” “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Id.* at 80. This meant that, to trigger the Act's disclosure requirements, a communication would need to contain “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject,’” *Id.* at 44 n.52; see *id.* at 80 & n.108. These expressions have since been called *Buckley*'s “magic words.” *McConnell*, 540 U.S. at 126.

The *Buckley* Court then reached a similar conclusion with respect to disclosure requirements triggered by “political committee” status. As the Court explained:

The general requirement that “political committees” and candidates disclose their expenditures could raise similar vagueness problems, for “political committee” is defined only in terms of amount of annual “contributions” and “expenditures,” and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words “political committee” more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.

424 U.S. at 79. Thus, the “major purpose” requirement was born.

Absent any congressional action in the decades since *Buckley*, this Court might find it unclear whether ads (1) mentioning candidates and (2) airing near elections but (3) not using *Buckley*'s “magic words” should count toward an election-related major purpose. But in passing the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Congress unambiguously expressed its will on this issue and foreclosed the approach that the Commission took here.

In BCRA, Congress sought to mitigate two perceived problems with federal election financing that were prompted (at least in part) by *Buckley*. Title I of the Act was “Congress' effort to plug the soft-money loophole”—that

is, the ability to have money contributed to state and local political parties effectively channeled to national parties while evading FECA's contribution limits and disclosure requirements. *McConnell*, 540 U.S. at 133. Title II, the provision relevant here, aimed to stem the tide of advertisements nominally targeted at issues but airing near elections—a tide that swelled after *Buckley*. *Id.* at 122. Specifically, “[a]s a result of [*Buckley*]'s strict reading of the statute, the use or omission of ‘magic words’ such as ‘Elect John Smith’ or ‘Vote Against Jane Doe’ marked a bright statutory line separating ‘express advocacy’ from ‘issue advocacy.’” *Id.* at 126. Yet, in Congress's view, those “two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words.” *Id.* And, far more than a theoretical problem, the collapsed distinction between express advocacy and issue advocacy allowed entities—mostly corporations and unions—to spend “hundreds of millions of dollars” on ads leading up to elections that “were unregulated under FECA.” *Id.* at 127–28. “Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns.” *Id.* at 131. The Senate Committee on Governmental Affairs conducted “an extensive investigation into the campaign practices in the 1996 federal elections” and—while divided along party lines regarding some of these practices—agreed that the proliferation of so-called issue ads was a serious problem. *Id.* at 129.

In response, BCRA created a new category of political communications called “electioneering communications.” The statute's definition of these communications “replace[d] the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*” by providing three clear criteria that triggered regulation. *Id.* at 189. Instead of covering only “communications expressly advocating the election or defeat of particular candidates,” the new disclosure requirements covered ads that (1) referenced to a candidate for federal office, (2) ran within 60 days of a federal election, and (3) targeted

the relevant electorate. And the Act imposed disclosure requirements on entities who funded those communications. *Id.* at 190–91.

This legislative history leaves little doubt that Congress saw electioneering communications as generally aimed at swaying voters. The Supreme Court relied heavily on this history in *McConnell*, where it upheld BCRA's disclosure requirements against First Amendment challenge. 540 U.S. at 189–202 (controlling opinion of Stevens & O'Connor, JJ.). The Court's reasons for doing so further suggest that electioneering communications presumptively have an electioneering purpose. In rejecting the argument that BCRA's definition of "electioneering communications" was unconstitutionally vague and overbroad, the Court explained that *Buckley's* distinction between express and issue advocacy "was the product of statutory interpretation rather than a constitutional command." *Id.* at 192. In the Court's view, BCRA's definition of electioneering communications created no similar issues of vagueness or overbreadth—its requirements were "easily understood and objectively determinable." *Id.* at 194. Moreover, putting aside *Buckley* and starting from first principles, the Court explained that the notion of "a rigid barrier between express advocacy and so-called issue advocacy" could not be "squared with [its] longstanding recognition that the presence or absence of magic words [*i.e.*, "vote for Jane Doe" or "vote Jane Doe out of office"] cannot meaningfully distinguish electioneering speech from a true issue ad." *Id.* at 193. As evidenced by their timing, their identification of a specific candidate, and their targeting of the relevant electorate, it was clear that electioneering communications—magic words or not—"were specifically intended to affect election results." *Id.* at 127. In short, the Supreme Court's reading of BCRA corroborates that Congress deemed electioneering communications as paradigmatically aimed at swaying voters.

Even ignoring all of this legislative history and Supreme Court analysis, Congress's intent regarding these ads is manifest in its very choice of labelling them "electioneering communications." Instead of using a neutral term like "communications made near

federal elections," Congress chose a label that by its plain meaning deems the ads to "take part actively and energetically in a campaign to be elected to public office." Electioneer, *Oxford Dictionary of English* 565 (3d ed. 2010); *see also* Electioneer, *American Heritage Dictionary* (5th ed. 2018) ("To work actively for a candidate or political party."). Congress's terms, like its statutory headings, surely "supply clues" about its intent. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015); *see also, e.g., Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947) (explaining that "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt"). Here, the clue is hardly subtle: Why would Congress call something an "electioneering communication" if that thing did not generally have a "purpose to nominate or elect a candidate," in the sense meant by *Buckley*?

It is true that BCRA did not touch the text of FECA's definition of "political committee." But a later congressional act can inform the meaning of an earlier one and, importantly here, can clarify existing ambiguities. "At the time a statute is enacted, it may have a range of plausible meanings," but "subsequent acts can shape or focus those meanings. . . . This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *see also United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of the priority statute, even though it had not been expressly amended."). Here, by declaring that (by and large) electioneering communications have an inherent purpose of influencing a federal election, Congress has clarified that the broad term "political committee"—even after *Buckley*—should presumptively include organizations that are primarily in the business of funding electioneering communications.

Why only "presumptively"? Despite the foregoing evidence of Congress's intent regarding electioneering ads, the Court is not convinced that Congress intended to *categorically* foreclose the Commission from

declining to treat a particular electioneering ad as supporting an election-related major purpose. In rejecting a facial challenge to BCRA's electioneering restrictions, *McConnell* recognized that some ads falling within BCRA's definition of "electioneering advertisements" may not have a true "electioneering purpose," even if "the vast majority of ads clearly had such a purpose." 540 U.S. at 206 ("The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court [below].").

In other words, Congress seems to have left open a small interpretive gap after BCRA: one that allows the Commission, using its case-by-case approach, to deem an extraordinary "electioneering communication" as lacking an election-related purpose. The following ad, for example, would seem to fall within the letter of BCRA's definition: It runs 60 days before a midterm election; it does not mention the election or even indirectly reference it (*e.g.*, by cabining the message's timeframe to "this November"); the meat of the ad discusses the substance of a proposed bill; the ad urges the viewer to call a named incumbent representative and request that she vote for the bill; but it does not make any reference to the incumbent's prior voting history or otherwise criticize her. *See* 52 U.S.C. § 30104(f)(3)(A). That might be the sort of electioneering communication that could, under the Commission's case-by-case approach, properly be deemed lacking an election-related purpose under *Buckley* despite meeting BCRA's definition of "electioneering communication."

But the Court expects such an ad to be a rare exception. Congress has made a judgment that run-of-the-mill electioneering communications have the purpose of influencing an election; an ad meeting the statutory definition of an electioneering communication generally indicates a purpose of nominating or electing a candidate.

B. The Commission's Analysis Did Not Give Effect to Congress's Clear Intent

The controlling Commissioners' multifactor analysis ignores Congress's expressed intent

regarding electioneering advertisements. The very first sentence of their multifactor test speaks volumes: “In evaluating major purpose, our starting point is the language of the communication itself.” J.A. 1767. Starting with the language of a political ad might be justifiable if the ad aired nowhere near a federal election, or if it did not mention a candidate. But, as just explained, when it comes to electioneering communications Congress has already determined that they are presumptively designed to influence elections. The remainder of the Commission’s test in no way accounts for that fact:

[W]e look at the ad’s specific language for references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should be counted towards a determination that the organization’s major purpose is to nominate or elect candidates. We also examine the extent to which the ad focuses on issues important to the group or merely on the candidates referenced in the ad. Additionally, we consider information beyond the content of the ad only to the extent necessary to provide context to understand better the message being conveyed. Finally, we ascertain whether the communication contains a call to action and, if so, whether the call relates to the speaker’s issue agenda or, rather, to the election or defeat of federal candidates.

J.A. 1767–68. The Commission may be permitted to use these or similar factors in assessing whether an electioneering ad *overcomes* the presumption that it is aimed to elect a candidate. But engaging in a holistic, *de novo* review of the ad based on those factors allows the Commission to treat run-of-the-mill electioneering ads—those highly critical of a candidate’s positions but lacking the “magic words” directing viewers to vote him out of office—as not indicating an electioneering purpose. That framework cannot be squared with Congress’s views on the issue.

Indeed, the controlling Commissioners’ analysis of AAN’s ads in this case is strong evidence that their multifactor approach, if anything, builds in a presumption that runs in the *opposite* direction of what Congress intended—*i.e.*, that it tilts the balance in favor

offinding that electioneering communications do *not* have an electioneering purpose. Take the ad titled “Skype,” which identified Congresswoman Dina Titus, a Democrat from Nevada who was narrowly defeated in her 2010 reelection bid:

Person 1: Hey, what’s up?

Person 2: Hey. You have to check out the article I just sent you. Apparently convicted rapists can get Viagra paid for by the new health care bill.

Person 1: Are you serious?

Person 2: Yep. I mean, Viagra for rapists? With my tax dollars? And Congresswoman Titus voted for it.

Person 1: Titus voted for it?

Person 2: Yep. I mean, what is going on in Washington?

Person 1: In November, we need to tell Titus to repeal it. [Superimposed text: “Tell Congresswoman Titus to vote for repeal in November. Vote Yes on H.R. 4903. (202) 225-3252.”]

J.A. 1776.

The controlling Commissioners did not find that this ad (nor any others mentioning healthcare) had an election-related purpose. “The criticisms contained in the ads,” they explained, “are couched in terms of past votes taken by the named officeholder and are accompanied by calls to action designed to influence the officeholders’ votes in the lame-duck session.” J.A. 1776. Seriously? Is it really plausible that the attack on Titus’s past vote for the Affordable Care Act—for supplying “Viagra to rapists” no less—was designed to mobilize Titus’s constituents to change her view on the Obama Administration’s signature legislative initiative, rather than to oust her from office for casting that vote? And would a sophisticated organization like AAN conceivably invest millions of dollars on ads in an effort to get the Democratic-controlled House that had just passed the Act to turn around and repeal it only months later? Perhaps the ad could be charitably read as having a dual purpose—maybe some viewers would indeed be motivated to call Titus and tell her to vote for a healthcare repeal bill if it came up in the anticipated lame-duck session. (That turned out to be a big “if”—the Commission cites no evidence, and

the Court is aware of none, that the House actually considered a repeal bill during the December lame-duck session.) But surely the primary purpose of this ad was to convince viewers to vote against Titus. Indeed, the ad is awfully close to the hypothetical posed by the Supreme Court in *McConnell* to highlight the illusory distinction between express advocacy and issue advocacy: An ad that, instead of urging viewers to “vote against Jane Doe,” “condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’” 540 U.S. at 127 (quoting 251 F. Supp. 2d 176, 304 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part)). That the Commissioners readily characterized “Skype” and similar ads as unrelated to elections demonstrates the mismatch between their framework and Congress’s understanding of electioneering ads. Their approach in fact flirts with a *reverse* “magic words” test: electioneering communications that harangue a candidate are exempt so long as they instruct the viewer to “call” her representative rather than to “vote against” him.

None of the Commission’s arguments in favor of its approach are availing. As it did when justifying its first dismissal, the Commission cites *WRTL II*, which (again) found that *spending* on electioneering communications could be restricted only if the ads were, as an objective matter, “the functional equivalent of express advocacy,” *id.* at 469. Relying on that case, the Commission insists that even if it may not apply a categorical rule that turns on whether the ad contains express advocacy (or the functional equivalent), it may *consider* whether the ad resembles express advocacy in deciding whether it has an election-related purpose. FEC’s Mot. Summ. J. at 40 (“[The Court’s] determination did not preclude Commissioners from analyzing AAN’s communications by reference to their content, consistent with the Supreme Court’s analysis in *WRTL*, when considering whether the ads were electoral in nature.”). That’s true so far as it goes: the Commission is not outright forbidden from considering the content of an electioneering communication. But because of BCRA, that consideration

must follow a strong presumption that an electioneering communication indicates a purpose of electing a candidate.

More fundamentally, the Commission continues to overread *WRTL II* for the idea that the primary goal in evaluating AAN's ads should be to determine whether the ads' content bears "indicia of express advocacy." FEC's Mot. Summ. J. at 39 (quoting *WRTL II*, 551 U.S. at 470). *WRTL II* focused narrowly on an electioneering communication's content, to the exclusion of "contextual factors" like the ad's timing, for a particular reason: the First Amendment demanded an objective, narrowly tailored standard for bans on speech. 551 U.S. at 473; *see id.* at 469–70 (examining whether ad's content had "indicia of express advocacy"). But, again, *McConnell* and *Citizens United v. FEC*—the latter of which came after *WRTL II*—foreclose any argument that *in the disclosure setting* the First Amendment requires that a regulated communication contain the functional equivalent of express advocacy. *See also Independence Institute v. FEC*, 216 F. Supp. 3d 176, 193 (D.D.C. 2016) (Millett, J.) (in rejecting a constitutional challenge to the donor disclosure requirement as applied to a particular electioneering communication, explaining that the challenger's "proposed constitutional exception for 'genuine' issue advocacy is entirely unworkable as a constitutional rule"). In other words, the Supreme Court has seen no problem with disclosure requirements triggered solely by an electioneering communication's context: its timing, its reference to a candidate, and its viewership. And Congress's view, made plain in BCRA, is that the presence of those contextual factors inherently suggests an election-related purpose.

The Commission falls back on *Buckley*. In the Commission's view, the fact that *Buckley* read FECA to avoid regulating "groups engaged purely in issue discussion," 424 U.S. at 79, means that the Commission must evaluate the content of an entity's political ads to determine whether the ads are, in fact, "issue discussion." But again, Congress in BCRA cabined some of the Commission's discretion by defining a subset of political ads—electioneering communications—that by definition are related to federal elections.

After BCRA, the Commission cannot review electioneering communications *de novo* to determine whether they qualify as pure issue discussion. The statute emphatically placed electioneering advertisements on the election-related side of *Buckley*'s line, and the Commission must pay heed to that placement when evaluating the major purpose of an entity that spends money on electioneering communications.

Finally, the Commission emphasizes this Court's prior refusal to impose a bright-line rule—one that would require it to count all electioneering communications toward an election-related major purpose. According to the Commission, that refusal implicitly endorsed its approach to electioneering communications. FEC's Mot. Summ. J. at 36. Not so. To be sure, the Court continues to believe that an inflexible rule would be incompatible with the FEC's recognized power to resolve major-purpose questions on a case-by-case basis. Such a rule would also conflict with the Supreme Court's recognition in *McConnell* that some "issue ads" might really be just that, even if run near elections. That does not mean, though, that the Commission has unfettered discretion to judge electioneering ads. Rather, FECA and BCRA make clear that Congress intended to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on electioneering ads as indicating an election-related major purpose. The Commission may in special circumstances conclude that an electioneering ad does not have such a purpose. But given Congress's recognition that the "vast majority" of electioneering ads have the purpose of electing a candidate, the Commission's exclusion of electioneering ads from its major-purpose analysis should be the rare exception, not the rule. *McConnell*, 540 U.S. at 206; *see also CREW*, 209 F. Supp. 3d at 93 ("[I]t blinks reality to conclude that many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race.").

Having found a legal error in the Commissioners' approach, the appropriate remedy here is to remand this matter to the

Commission. The Court appreciates that the Commission may, on remand, yet again exclude from its analysis some of the ads that it previously excluded. But because the controlling Commissioners did not begin with a presumption that an electioneering ad evinces an election-related purpose, the Court is not so confident that they would reach the same outcome on remand to warrant affirming their decision under the

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 Mar. 30 - Citizens for Responsibility & Ethics in Washington v. Trump

* D.C. Superior Court opinion

Reports

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principle of “harmless error.”

IV . Conclusion

The Court recognizes that the Commission, like all executive agencies, must comply with directives from the two other branches of government—directives that sometimes push the agency in opposite directions. The problem here is that the FEC has equated two directives that are plainly unequal in their relevance to the issue at hand. Congress decades ago laid down a clear, broad definition of the term “political committee” in FECA that would obviously capture AAN; the Supreme Court in *Buckley* then cabined that definition in a way that requires the Commission to conduct a major purpose analysis. But Congress later clarified, through BCRA, that it viewed the vast majority of electioneering communications as corroborating a purpose of electing candidates to federal office. And while the Supreme Court in several cases has struck down *other* aspects of FECA and BCRA, it has never suggested that its constitutional concerns apply in the realm of disclosure requirements. Indeed, the Supreme Court has now twice reaffirmed that there is no constitutional distinction between issue-based and express advocacy in the disclosure context. Absent such a distinction, FECA and BCRA require the agency to presume that spending on electioneering communications contributes to a “major purpose” of nominating or electing a candidate for federal office, and, in turn, to presume that such spending supports designating an entity as a “political committee” under FECA.

Because the Commission failed to apply those presumptions, its dismissal of CREW’s complaints against AAN was “contrary to law.” The Court, accordingly, will grant CREW’s motion for summary judgment, deny the FEC’s and AAN’s cross-motions, and direct the Commission to conform with this declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the FEC does not timely conform with the Court’s declaration, CREW may bring “a civil action to remedy the violation involved in the original complaint.” *Id.* A separate Order accompanies this Memorandum Opinion.



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First Insertions

IN THE SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA
CIVIL DIVISION

Civil Action No. 2017 CA 004627 L(RP)(Action Involving Real Property)

Ryan Arnold Donahue,

Plaintiff

vs.

Marrion Bailey, also known as Marion Bailey, and John Bailey; Shirley V. Bailey, Rose Marie Russell Bailey, Alvin Ray Bailey, MaryAnn Vincente, Marsha Barton, William Bailey, Jr., Debra Jo Jennings, Glenda C. Guy, Donna F. Gibson, Ronald L. Spaulding, Elmer Gordon Spalding, Jr., The District of Columbia; and All unknown owners of the property described below, their heirs, devisees, personal representatives, and executors, administrators, grantees, assigns or successors in right, title, interest, and any and all persons having or claiming to have any interest in the leasehold or fee simple in the property and premises situate, lying and being in the District of Columbia described as: Square 1100, Lot 110 (no street address), located on a block bounded by SE Massachusetts Ave, SE C St., SE 17th St., SE D St., and SE 18th St.

Defendants.

AMENDED ORDER OF PUBLICATION

In accordance with D.C. Code Section 47-1375, the object of this proceeding is to secure the foreclosure of the right of redemption in the real property described as Square 1100, Lot 110 (no street address), located on a block bounded by SE Massachusetts Ave, SE C St., SE 17th St., SE D St., and SE 18th St., which property was sold by the Mayor of the District of Columbia to the Plaintiff in this action.

The Amended Complaint states, among other things, that the amounts necessary for redemption have not been paid.

Accordingly, it is this 19th day of March, 2018, hereby

ORDERED by the Superior Court of the District of Columbia, that notice be given by the insertion of a copy of this Order in the *Daily Washington Law Reporter*, a newspaper having a general circulation in the District of Columbia, once a week for three (3) successive weeks, notifying all persons interested in the real property described above to appear in this Court by the 30th day of May, 2018, and redeem the real property by payment of \$1,562.51, together with interest from the date the real property tax certificate was purchased; court costs; reasonable attorney’s fees; expenses incurred in the publication and service of process; and all other amounts in accordance with the provisions of D.C. Official Code §§ 47-1361 through 1377, *et seq.*, or answer the Amended Complaint, or, thereafter, a final judgment will be entered foreclosing the right of redemption in the real property and vesting in the Plaintiff

a title in fee simple. /s/ Magistrate Judge Rainey Brandt. Pub Dates: Apr 2, 9, 16, 2018.

Second Insertions

IN THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 2015 CA 003450 L(RP)

(Action Involving Real Property)

Laree K. Martin

Plaintiff

vs.

City Builders, LLC, Daniel Johnson, Estate of Moses H. Karkenny, Laura Rogers, and District of Columbia and All unknown owners of the property described below, their heirs, devisees, personal representatives, and executors, administrators, grantees, assigns or successors in right, title, interest, and any and all persons having or claiming to have any interest in the leasehold or fee simple in the property and premises situate, lying and being in the District of Columbia described as: Square: 1003, Lot: 0145, which may also be known as 824 13th Street, N.E., Washington, D.C.

Defendants.

THIRD AMENDED ORDER OF PUBLICATION

In accordance with D.C. Code § 47-1375, the object of this proceeding is to secure the foreclosure of the right of redemption in the real property, described as Square: 1003, Lot: 0145, which may also be known as 824 13th Street, N.E., Washington, D.C., which property was sold by the Mayor of the District of Columbia to the Plaintiff in this action.

The Third Amended Complaint states, among other things, that the amounts necessary for redemption have not been paid.

Accordingly, it is this 7th day of February, 2018, hereby

ORDERED by the Superior Court of the District of Columbia, that notice be given by the insertion of a copy of this Order in the *Daily Washington Law Reporter*, a newspaper having a general circulation in the District of Columbia, once a week for three (3) successive weeks, notifying all persons interested in the real property described above to appear in this Court by the 18th day of April, 2018, and redeem the real property by payment of \$47,742.50, together with interest from the date the real property tax certificate was purchased; court costs; reasonable attorney’s fees; expenses incurred in the publication and service of process; and all other amounts in accordance with the provisions of D.C. Official Code §§ 47-1361 through 1377, *et seq.*, or answer the Third Amended Complaint, or, thereafter, a final judgment will be entered foreclosing the right of redemption in the real property and vesting in the Plaintiff a title in fee simple. /s/ Magistrate Judge Rainey Brandt. Pub Dates: Mar 26, Apr 2, 9, 2018.



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Ashton *Continued from page 769*

the phrase “People Pleaser in Recovery,” to communicate a satirical message about overcoming obsequious behavior—quite literally an act of “mean mugging.” Plaintiff seeks to copyright the combination of words and image, claiming it is a “highly creative poetic literary work.” Defendant United States Copyright Office⁴ viewed Plaintiff’s work differently. The agency determined that the combination of the words “People Pleaser in Recovery” and “Refill,” with an image of a raised middle finger, is not sufficiently creative to constitute a copyrightable literary work.

Plaintiff filed this suit pro se to challenge Defendant’s denial of his copyright application. He contends that Defendant failed to consider certain evidence he presented in his application and, furthermore, that Defendant’s decision that his work is not sufficiently creative to warrant copyright protection is wrong as a matter of law. Both parties have moved for summary judgment. Finding no violation in Defendant’s decision-making process or the substance of its decision, the court denies Plaintiff’s Motion for Summary Judgment and grants Defendant’s Cross-Motion for Summary Judgment.

II. BACKGROUND

A. Administrative Proceedings

In March 2012, Plaintiff Wesley Scott Ashton submitted an application to the United States Copyright Office (“Defendant”) to register a work he titled “People Pleaser” (“the Work” or “mug”). Admin. R., ECF No. 19 [hereinafter AR], at 2. Plaintiff’s Work is a hand-painted coffee mug that contains text and images. See AR at 3, 12–13. The exterior cylindrical surface of the mug reads “People Pleaser in Recovery” and is adorned with three butterflies, a yellow flower, and a lizard. See AR at 3–4, 7, 35. The bottom exterior of the mug contains an image of the back of a fist with a middle finger extended. See AR at 13. Below it is the hand-written text:

“2008 (c) WSA.” The word “Refill” is written on the bottom interior of the mug. See AR at 12. Images of the Work appear below.



On his application, Plaintiff indicated that he wanted two different copyrights: one for “2- Dimensional artwork” and another for “Text.” See AR at 1. Defendant rejected Plaintiff’s application on July 3, 2013, reasoning that the Work “lacks the authorship necessary to support a copyright claim.” AR at 43–44. The decision stated that the text of Plaintiff’s Work “will not support a claim to copyright under the [legal] standards” because it lacked the minimum amount of text needed for protection. AR at 43. Defendant noted that Plaintiff’s “artwork on the cup is copyrightable,” but because Plaintiff had “refused to have the claim in text” removed, Defendant was denying Plaintiff’s application in full. AR at 43.

Plaintiff sought reconsideration of the denial, but this, too, was unsuccessful. In a letter dated September 20, 2013,

Plaintiff asked Defendant to revisit its decision, contending that it was “flawed on its face” because it did not provide a rational explanation for its rejection of his application. AR at 47. Plaintiff seemingly sought both a copyright for the Work’s text and a copyright for the artwork. See AR at 49 (arguing that his Work is “copyrightable as a combined composition of art and text.”). In addition, Plaintiff argued that the “text” on the mug constituted a “literary work,” as that term is defined in the Copyright Act. AR at 51; see also 17 U.S.C. § 101 (defining “literary work”). He identified the “text” of his Work as “three phrases”: two “script phrases”—“People Pleaser in Recovery” and “Refill”—and a “pictogram of the raised middle finger.” AR at 51–52. Plaintiff argued that “the three phrases together include the requisite minimum degree of creativity to merit copyright protection because even shorter, less expressive one line sentences” have received such protection. For support, he cited to *Universal City Studios, Inc. v. Kamar Industries, Inc.*, No. H-82-2377, 1982 WL 1278 (S.D. Tex. Sept. 20, 1982). AR at 52. And to buttress his position that a “raised middle finger” is copyrightable text, he cited and submitted a copy of a 82-page law review article, Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403 (2008), for the proposition that the gesture has “particularly vulgar connotations.” AR at 52.

These arguments did not persuade Defendant, who denied Plaintiff’s request for reconsideration in a letter dated January 9, 2014, which expanded on its initial decision. AR at 149– 50. This second decision stated that Defendant had “carefully reviewed this work in light of the points raised in your letter” and acknowledged some specific points Plaintiff had raised in his reconsideration request, e.g. AR at 149 (“[Y]ou note that . . .”), but concluded that “the simple combination and arrangement of the short phrase and word simply does not contain any authorship that would support a copyright registration in text” under the law. AR at 150. In reaching this decision, Defendant excluded from the “text” it considered for copyrightability the middle finger drawing; Defendant said that it considered that image to be “2D artwork, not

text.” AR at 150. At the end of the decision, Defendant invited Plaintiff to proceed with registering the artwork on his mug. AR at 150.

Plaintiff again sought reconsideration in a letter dated April 4, 2014. In this final request to the agency, Plaintiff asserted that the middle finger is “text,” because it is a word, indicia, or symbol and, therefore, meets the definition of a “literary work” in the Copyright Act, 17 U.S.C. § 101, and possesses “a sufficient amount of originality . . . to merit copyright protection as text.” AR at 155–56. Again, he directed Defendant to the law review article *Digitus Impudicus*. AR at 155. Building on his argument that the middle finger drawing constituted “literary work,” Plaintiff asserted that his Work’s “text” contained “three phrases working together . . . to express an idea in a poetic manner that possesses a sufficient amount of creativity to merit copyright protection as a text.” AR at 157. Defendant explained that the “text” of his mug, “when property construed,” constitutes a three-line poem:

The two script phrases are “People Pleaser in Recovery” located on the side wall of the work and “Refill” located inside the cup on its upper floor surface. The middle finger pictogram is arranged on the bottom of the cup so that it is flashed whenever the cup is tilted to drink from, for example. And, more specifically, the middle finger pictogram is juxtaposed with the “People Pleaser in Recovery” phrase so that the pictogram may be flashed while the audience is reading the “People Pleaser in Recovery” phrase. The word “Refill” located inside the mug is there to remind the reader that one must “refill” one’s cup to recover from people pleasing.

AR at 157. These phrases, words, and images, when combined with their arrangement on the mug, Plaintiff asserted, constitute sufficient creativity to warrant copyright protection. AR at 157. Moreover, he once again argued that “even shorter, less expressive one line sentences have merited copyright protection,” citing *Universal City Studios*, and also contended that important literary works, such as William Carlos Williams’ sixteen-word poem “The Red Wheelbarrow,” “may consist of a single short phrase.” AR

at 157–58. Plaintiff concluded by asking for both text and artwork copyrights. AR at 160.

Defendant denied, in part, this second request for reconsideration on September 27, 2016. AR at 209–13. The five-page decision (“Final Decision”) stated that the work “is not copyrightable as a literary work,” but that the two-dimensional artwork elements “remain copyrightable.” AR at 209. The Final Decision focused on the requirements for a text copyright. After describing the work and the administrative history of Plaintiff’s request, Defendant set forth the requirements for a copyright—namely, that the work must be “original.” AR at 209–11. The “originality” requirement, Defendant explained, has two components: the work must “have been independently created by the author” and it “must possess sufficient creativity.” AR at 210 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). It elaborated on these components by describing case law concerning the “sufficient creativity” requirement and citing the Copyright Office’s regulations, 37 C.F.R. §§ 202.1(a), 202.10(a), containing the relevant standards. See AR at 210–12.

In a section titled “Analysis of the Work” that followed a summary of the governing law, Defendant examined Plaintiff’s Work under the applicable rules. AR at 212–13. Defendant concluded that “the individual textual elements of the Work and the selection, coordination, and arrangement of those elements fail to satisfy the requirement of creative authorship necessary to sustain a claim to copyright in text.” AR at 212.

In reaching this decision, Defendant made three findings. First, Defendant concluded that the Work’s individual textual elements were not sufficiently creative because “[w]ords and short phrases’ and ‘familiar symbols’ are not copyrightable.” AR at 212 (quoting 37 C.F.R. § 202.1(a)). The accompanying discussion gave special attention to the middle finger, noting that, “[a]s for the pictogram that appears on the bottom of the mug, your argument that it constitutes a literary work, *even if correct*, does not persuade the [Defendant] Board that it is individually copyrightable.” AR at 212 (emphasis added). Defendant continued by finding, “[t]o the degree the pictogram is

considered an expressive symbol, and thus a literary work . . . the content of the expression is certainly *de minimis*.” AR at 212. Next, Defendant addressed Plaintiff’s argument that the three elements—the two text phrases and the middle finger drawing—as a whole formed a literary work that was eligible for a copyright. See AR at 212. It concluded that “even assuming these three elements could qualify as a literary work—which is doubtful—taken as a whole they fail to meet the creativity threshold set forth in [the Supreme Court’s decision] in *Feist* for a work of authorship of any kind, literary or otherwise.” AR at 212 (citing *Feist Publ’ns*, 499 U.S. at 359). Defendant elaborated by noting, in response to Plaintiff’s argument that his work embodied the requisite creativity because of the elements’ arrangement, that “[t]here is . . . nothing inherently original about placing text or symbols on a mug” and that “any effect that these elements are intended to create or actually do create in an observer is wholly irrelevant to the intrinsic creativity of the Work itself.” AR at 213. Third, Defendant concluded that Plaintiff’s mug’s artwork elements—including the flower, the butterflies, and the middle finger—met the relevant creativity standards and thus could be registered, as it had before. AR at 213. This second denial of Plaintiff’s request for reconsideration constituted final agency action. See 37 C.F.R. § 202.5.

B. Procedural History

Plaintiff filed this action on November 18, 2016, challenging the denial of his application for a text copyright under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. See Compl., ECF No. 1; see also 17 U.S.C. § 701(e) (providing that actions taken by the Register of Copyrights under the Copyright Act are subject to the provisions of the APA). Plaintiff argues that the decision-making process Defendant used in rejecting his application for a text copyright was flawed because: (1) Defendant failed to consider Plaintiff’s evidence, and (2) its denial is contrary to law. See generally Compl. Because the court’s review under the APA is limited to the administrative record, the parties conducted no discovery and filed cross-motions for summary judgment. See 5 U.S.C. § 706 (in reviewing an agency action

under the APA, “the court shall review the whole record or those parts of it cited by a party”). Now before the court are Plaintiff’s Motion for Summary Judgment, ECF No. 13, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 14.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when the moving party demonstrates that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). However, in a case involving review of a final agency action, the standard set forth in Rule 56 does not apply because of the limited role of the court in reviewing the administrative record. See *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 81 (D.D.C. 2007). The court’s role, in an APA action, “is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Charter Operators of Alaska v. Blank*, 844 F. Supp. 2d 122, 127 (D.D.C. 2012) (quoting *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985)). Summary judgment “serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review.” *Id.*

Under the APA, a court must set aside an agency action if it is “arbitrary, capricious, an abuse of the discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2) (A). When deciding whether an agency’s action violates this standard, the court “must consider whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Oregon Nat’l Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted). Agency action is arbitrary or capricious if, as is relevant in this case, the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S.

29, 43 (1983). So long as the agency has examined the relevant data and identified a basis for its action, the court will uphold the agency’s action. See *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Judicial review in APA cases is “[h]ighly deferential” and “presumes the validity of agency action,” permitting reversal only when “the agency’s decision is not supported by substantial evidence, or if the agency has made a clear error in judgment.” *Hagelin v. Fed. Election Comm’n*, 411 F.3d 237, 242 (D.C. Cir. 2005) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000)).

IV. DISCUSSION

A. Procedural Challenge

Plaintiff first contends that Defendant’s decision was arbitrary and capricious because Defendant failed to consider various arguments he made and to evaluate evidence that he presented. Specifically, Plaintiff asserts that Defendant “made no intelligent account for the ruling as it provides no analysis of creativity, and provides no reasons for its decision, when it comes to the creative content of the poem as a whole.” Pl.’s Mot. for Summ. J., ECF No. 13, Pl.’s Mem. in Supp. of Mot., ECF No. 13-1 [hereinafter Pl.’s Mem.], at 16; see also *id.* at 17 (arguing that Defendant “never considered” the “creative aspect” of the text of his mug, which he argues incorporates a “pictogram”); *id.* at 19 (arguing that Defendant “never proffer[ed] any explanation as to why the 3-D arrangement of the pictogram text sandwiched between English text in order to emphasize the pictogram is not substantially creative”). In addition, Plaintiff takes issue with the fact that Defendant did not expressly address various case citations and arguments he raised. *Id.* at 18. The court finds no error in the agency’s decision-making process.

An agency is required to consider relevant data and articulate an explanation that bears “a rational connection between the facts found and the choice made.” *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 626 (1986) (internal quotation marks omitted). An agency action is arbitrary and capricious if the agency relied on inappropriate considerations, failed to consider “an important aspect of the problem,” explained its decision in a way that “runs counter to the evidence before the

agency,” or is “so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise.” *State Farm Auto Ins. Co.*, 463 U.S. at 43. In an arbitrary and capricious challenge, the court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Id.* (quoting *Bowman Transp.*, 419 U.S. at 286).

Defendant’s Final Decision did not violate the process requirements of the APA. The court begins with Plaintiff’s argument that Defendant provided neither “reasons” nor an “intelligent account” of its decision that the text of his mug lacked the requisite creativity. The reasons and intelligent account that Plaintiff claims are missing are clearly set forth in the section titled “Analysis of the Work” in the Final Decision. See AR at 212. There, Defendant stated that it “finds that the individual textual elements of the Work and the selection, coordination, and arrangement of those elements fail to satisfy the requirement of creative authorship to sustain a claim to copyright in text.” *Id.* Further to this point, Defendant explicitly found that: (1) “none of [Plaintiff’s] Work’s constituent textual elements, considered individually, is sufficiently creative” to receive protection; and (2) that “even assuming” the two lines of text and “pictogram” formed a literary work, as Plaintiff had argued, the elements “taken as a whole . . . fail to meet the creativity threshold set forth in *Feist*.” AR at 212–13. Put another way, Defendant concluded that the text of Plaintiff’s Work—whether composed solely of the word and the phrase, or whether it also included the middle finger “pictogram”—was too short to merit copyright protection under the creativity standards for copyrightability. It was on this basis that Defendant denied Plaintiff a copyright. Thus, contrary to what Plaintiff alleges, Defendant unquestionably made an “intelligent account” for its decision.

To the extent Plaintiff is challenging Defendant’s decision on grounds that it failed to address every component of his argument, Plaintiff’s claim also falls flat. Plaintiff identifies a litany of items and arguments he cited in his correspondence in favor of his application, all of which he contends Defendant failed to consider, namely: (1)

Universal City Studios, No. H-82- 2377, 1982 WL 1278, Pl.'s Mem. at 17; (2) the law review article that discusses criminal penalties for the use of the middle finger, *id.* 16–17; (3) the “creative contribution of the pictogram to [Plaintiff’s] literary work,” *id.* at 22; and (4) William Carlos Williams’s poem, “The Red Wheelbarrow,” which Plaintiff submitted as an exhibit, *id.* at 18. But Plaintiff’s insistence that Defendant’s decision is arbitrary and capricious because Defendant did not expressly address these (and other) specific points has no support in the law. An agency is required to consider every “important aspect of the problem” and explain its decision in a way that is in line with the evidence. *State Farm Auto Ins. Co.*, 463 U.S. at 43. This command implicitly sets limits on the agency’s obligation: while the agency must weigh the evidence and provide a reasoned decision, it is under no obligation to consider all non-dispositive or tangential aspects of the issue before it. The court has no trouble concluding, based on its review of the administrative record, that even though the Final Decision does not specifically reference each of the above-listed points, Defendant satisfied its duty under the APA to provide a reasoned decision on every important aspect of the problem.

In any event, none of the items Plaintiff contends Defendant skipped over were material to the creativity inquiry that Defendant undertook to address Plaintiff’s second request for reconsideration. A brief review of the items cited by Plaintiff in his Motion makes this plain. First, the case Plaintiff cited in his second reconsideration request, *Universal City Studios*, 1982 WL 1278, does not discuss whether the three- or four-word phrases at issue in that case were eligible for copyright protection, *see id.* at *4–5, and is further distinguished by the fact that, in that copyright *infringement* case, there was evidence and a presumption that the defendant in that case had copied the plaintiff’s work, *id.* at *4. Next up is the 16-word poem “The Red Wheelbarrow,” which Plaintiff cited for proposition that “important literary works may consist of a short phrase,” AR 158. But if Plaintiff is suggesting that Defendant did not appreciate that proposition, he is clearly wrong. *See*,

e.g., AR at 211 (stating that words and short phrases are not eligible for protection, but acknowledging that some combinations of otherwise uncopyrightable material may be registered). Finally, the meaning and the offensive nature of the middle finger is well-known. Thus, the law review article submitted by Plaintiff presents no new information that Defendant should have considered in adjudicating this dispute. Moreover, as Defendant noted, the “espoused intentions of the author” and “any effect that [Plaintiff’s Work’s] elements are intended to create” are not relevant to the creativity inquiry. *See* AR at 211, 213. Finding no error in Defendant’s decision-making process, the court turns to Plaintiff’s substantive challenge to Defendant’s Final Decision.

B. Substantive Challenge

The second part of Plaintiff’s challenge concerns the merits of Defendant’s decision. Plaintiff argues that his Work “is sufficiently creative to merit copyright registration.” Pl.’s Mem. at 14. Defendant’s decision to the contrary, he contends, is flawed because Defendant: (1) applied an inappropriate standard for determining “originality,” *id.* at 15–16; (2) did not consider the “middle finger pictogram” to be a literary element, *id.* at 20–22; (3) wrongfully concluded the middle finger’s creativity was “de minimis,” *id.* at 22; and (4) inappropriately ignored the arrangement of the words on his Work, *id.* at 18–20. None of these arguments are well taken.

Only works that are “original” receive the protections of copyright. 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 345 (stating that originality is the “sine qua non” of copyright). The originality requirement has two components: (1) the work must have been independently created by the author; and (2) the work must possess a “minimal degree of creativity.” *Feist*, 499 U.S. at 345. The “requisite level” of creativity “is ‘extremely low; even a slight amount will suffice.’” *Id.* Though the bar is low, not every work that exhibits some degree of creativity is copyrightable. Regulations accompanying the Copyright Act reflect this rule. As is relevant here, the regulations provide that “[w]ords and short phrases such as names, titles, and slogans” and “familiar symbols or designs” are not eligible for a

copyright. *See* 37 C.F.R. § 202.1(a). Courts regularly apply this rule. *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 269–71 (2d Cir. 2001); *Ward v. Andrews McMeel Publ’g, LLC*, 963 F. Supp. 2d 222, 232–34 (S.D.N.Y. 2013); *Prunte v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 25–26 (D.D.C. 2010).

The court quickly disposes of Plaintiff’s first contention that *Feist* does not supply the relevant standard for “creativity,” because that case “pertains to whether a compilation of data possesses sufficient creativity to merit copyright protection,” whereas his work is a poem. Pl.’s Mem. at 16.5 Plaintiff is correct that *Feist* concerned a compilation of facts—residential entries in a telephone book—but that does not render its standard inapplicable here. Indeed, courts routinely apply the creativity standard articulated in *Feist* to a variety of works, not just factual compilations. *See Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 281–82, 285–86 (3d Cir. 2004) (citing *Feist* and applying the case’s standard for originality to determine whether product part numbers were eligible for copyright protection); *Urantia Found. v. Maaherra*, 114 F.3d 955, 958–59 (9th Cir. 1997) (applying *Feist* to analyze whether a book of revelations allegedly received from non-human spiritual beings was eligible for copyright protection); *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977, 979 (7th Cir. 1997) (applying *Feist* to analyze the copyrightability of a taxonomy of dental procedures which included descriptions and a numbering system); *CMM Cable Rep. Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1516 (1st Cir. 1996) (applying *Feist* and its originality standard when examining the copyrightability of a phrase in commercial promotional materials in an enforcement action). Without question, the creativity standard articulated in *Feist* is applicable here.

Next up is Plaintiff’s claim that Defendant’s refusal to treat the “pictogram” of the middle finger as a “literary work” constitutes error. That argument, however, misconstrues Defendant’s Final Decision. The Final Decision actually *assumes* that the pictogram is a literary work, but nevertheless rejects its copyright-worthiness because it and the rest of the Work’s text, considered together, is

insufficiently creative. As Defendant wrote: “To the degree the pictogram is considered an expressive symbol, and thus a literary work, . . . the content of the expression is certainly *de minimis*.” AR at 212. The court therefore need not consider the legal question whether the pictogram of the middle finger meets the statutory definition of “literary work.” See 17 U.S.C. § 101 (“Literary works’ are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia . . .”).

Relatedly, Plaintiff argues that Defendant misapplied the law when it found that the three elements of the Work lacked sufficient creativity. Pl.’s Mem. at 18–22. But under the deferential review the court must give Defendant in this APA action, see *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346, 348 (D.C. Cir. 1991), the court cannot conclude that Defendant’s decision was arbitrary and capricious. It has long been the position of the Copyright Office that some works are too short to receive the protections of copyright. See *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (“The Copyright Office does not regard as sufficient to warrant copyright registration ‘familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listings of ingredients or contents.’ . . . [This statement] is a fair summary of the law.”). Indeed, courts consistently have applied that rule to short words or phrases. See, e.g., *Prunte*, 699 F. Supp. 2d at 22–23, 26–30 (applying the originality standard articulated in *Feist* and concluding that various phrases in plaintiff’s songs, including “I’m a maniac” and “that’s what’s up,” are unprotectable); *Peters v. West*, 776 F. Supp. 2d 742, 749–50 (N.D. Ill. 2011) (applying the originality standard articulated in *Feist* in a copyright infringement action against rapper Kanye West, and concluding that the well-known phrase “[t]hat which does not kill me makes me stronger” is not protectable). In view of this well-settled law, and according weight to the Copyright Office’s application of its own regulations in this case, the court finds no “clear error of judgment” in Defendant’s decision that combined elements of Plaintiff’s Work are not sufficiently creative to receive copyright

protection. *Marsh*, 490 U.S. at 378.

Finally, as to Plaintiff’s contention that Defendant afforded no weight to the “arrangement” of the components on the mug, once more, he is wrong. Defendant properly recognized that “a combination of unprotectable elements may be eligible for copyright protection if the elements are ‘selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work.’” AR at 213 (quoting 17 U.S.C. § 101). Applying that rule, Defendant ruled that “[t]here is, of course, nothing inherently original about placing text or symbols on a mug, and the simplistic relations of the elements to one another in the Work does not transform this arrangement into something copyrightable.” *Id.* The court finds nothing arbitrary about that conclusion.

V. CONCLUSION

Accordingly, Plaintiff’s Motion for Summary Judgment, ECF No. 13, is denied, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 14, is granted. A separate Order accompanies this Memorandum Opinion.

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