

**BEFORE THE FEDERAL ELECTION COMMISSION**

Foundation for Accountability and Civic Trust  
1717 K Street NW, Suite 900  
Washington, D.C. 20006

RECEIVED  
GENERAL CENTER  
2020 JAN 21 AM 10:43

v.

MUR No. 7681

Cal Cunningham  
Cal for NC  
PO Box 309  
Raleigh, NC 27602

OFFICE OF  
GENERAL COUNSEL  
2020 JAN 21 PM 1:07

and

VoteVets.Org Action Fund  
2201 Wisconsin Ave NW #320  
Washington, DC 20007

**COMPLAINT**

The Foundation for Accountability and Civic Trust (FACT) is a nonprofit organization dedicated to promoting accountability, ethics, and transparency in government and civic arenas. We achieve this mission by hanging a lantern over public officials who put their own interests over the interests of the public good. This complaint is submitted, upon information and belief, to request the Federal Election Commission (FEC) investigate and take appropriate enforcement actions to address apparent violations of the Federal Election Campaign Act by VoteVets.Org Action Fund (a 501(c)(4) non-profit organization), Cal Cunningham, and his campaign committee, Cal for NC.<sup>1</sup>

**I. Facts**

Several United States Senate candidates have used their campaign websites to request advertisements be produced and run by outside organizations with which the campaign is prohibited from coordinating, in particular VoteVets.Org Action Fund.<sup>2</sup> FACT recently filed a

<sup>1</sup> This complaint is filed pursuant to 52 U.S.C. § 30109(a)(1).

<sup>2</sup> See Ryan Lovelace, 'Dark Money' Ad Raises Questions Over Peters Campaign for Senate, Washington Times, Nov. 18, 2019, available at: <https://www.washingtontimes.com/news/2019/nov/18/dark-money-ad-raises-questions->

similar FEC complaint against VoteVets.Org Action Fund for illegally coordinating with Gary Peters and his campaign and for republishing Peters' campaign materials.<sup>3</sup> That complaint alleges Peters' campaign committee published advertisement messaging and market information, candidate photos, and a link to download b-roll video to his campaign website. The purpose of publishing this specific campaign material is clear: to give explicit instructions and materials to outside organizations to produce and run advertisements on behalf of the campaign. In addition to coordinating with the campaign, VoteVets.Org Action Fund also republished campaign materials. VoteVets.Org Action Fund has continued with this scheme for another U.S. Senate candidate, Cal Cunningham.

On December 25, 2019, VoteVets.Org Action Fund began running TV advertisements on broadcast stations across North Carolina supporting Cunningham and emphasizing his service in the military and time as a state senator.<sup>4</sup> The advertisement's visual content consisted primarily of photographs.<sup>5</sup> Just days earlier, on December 20, 2019, the Cunningham campaign uploaded five photographs used in the advertisement to a public Flickr account created that month.<sup>6</sup> The timing and use of the photographs demonstrate the photographs were uploaded to be used in VoteVets.Org Action Fund's advertisement. Moreover, the licenses for all the photographs were listed as "All Rights Reserved," which would require VoteVets.Org Actions Fund to request permission from the campaign to use the photographs.<sup>7</sup>

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[over-gary-peters-ca/](#); see also Maggie Severns, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, Politico (July 15, 2016).

<sup>3</sup> *Foundation for Accountability and Civic Trust v. Gary Peters, Peters for Michigan, and VoteVets.Org Action Fund*, MUR 7666.

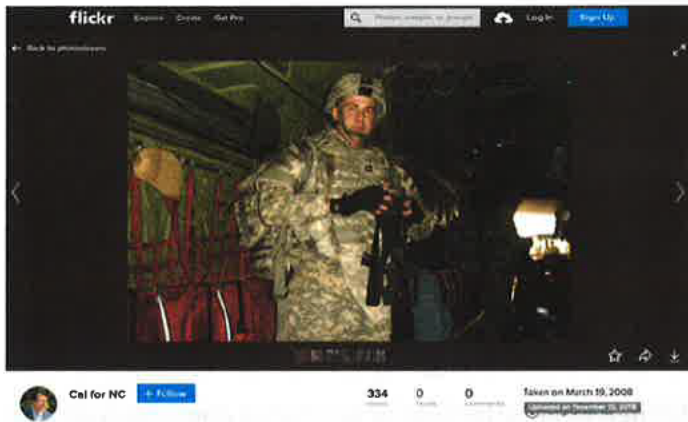
<sup>4</sup> See VoteVets.Org Action Fund, *Cal Cunningham: 9/11*, available at <https://www.ispot.tv/ad/ZS4L/votevets-cal-cunningham-9-11#>. On December 24, 2019, VoteVets.Org Action Fund also posted the advertisement on its YouTube page. VoteVets.Org Action Fund, *Cal Cunningham: Stood Up*, available at <https://www.youtube.com/watch?v=vI8lXe4YtOw> (Exhibit A). See also Steven Shepard, *The Morning Score*, Politico, Dec. 23, 2019, available at <https://www.politico.com/newsletters/morning-score/2019/12/23/the-year-in-review-783961> ("Democrat Cal Cunningham might be getting some backup ahead of the March primary in North Carolina. . . . VoteVets Action Fund has booked nearly \$400,000 for a broadcast TV buy, according to data from Advertising Analytics.").

<sup>5</sup> *Id.*

<sup>6</sup> Cal for NC, Flickr, <https://www.flickr.com/photos/186140610@N06/>. On December 20, 2014, the campaign uploaded thirty-eight photographs to its page, which were the only photographs on the page as of January 15, 2020. *Id.*

<sup>7</sup> *Id.* (Exhibit B).

For example, the image on the left is from the Cunningham campaign Flickr page and the image on the left is from VoteVets.Org Action Fund's advertisement for Cunningham:



VoteVets.Org Action Fund and the Cunningham campaign also are coordinating on online fundraising with both organizations sending simultaneous fundraising solicitations that benefit both organizations collectively through a “contribution split.” These nearly identical fundraising solicitations arrived in inboxes mere minutes apart on December 27, 2019. The email from VoteVets.Org Action Fund was sent on December 27, 2019, at 8:04 PM EST.<sup>8</sup> The email from the Cunningham campaign was sent on December 27, 2019, at 8:31 PM EST.<sup>9</sup> Furthermore, the actual fundraising pages from these solicitations exhibit identical “contribution splits” between the four VoteVets.Org Action Fund endorsed candidates and VoteVets.Org Action Fund, on both Cal Cunningham’s campaign and VoteVets.Org Action Fund pages.<sup>10</sup> Also, VoteVets.Org Action Fund’s disclaimer on its fundraising page is clearly copied from Cunningham’s page as it states: “Contributions or gifts to Cal for NC are not tax deductible” even though this is the VoteVets.Org Action Fund’s page.<sup>11</sup> Interestingly enough, the disclaimer

<sup>8</sup> VoteVets Senate Campaign Alert Email, December 27, 2019 at 8:04 PM EST.

<sup>9</sup> Team Cal Email, December 27, 2019 at 8:31 PM EST.

<sup>10</sup> See VoteVets.Org, *Stand with Mark Kelly, Amy McGrath, MJ Hegar, Cal Cunningham and VoteVets today >>*, <https://secure.actblue.com/donate/ww-em-dec-senate-split?refcode=em191227-resend>; see also, Cal for NC, *Support These Veterans Running for Senate*, <https://secure.actblue.com/donate/jcc-em191227-vv?refcode=em191227-vv&recurring=yes&amounts=4%2c10%2c25%2c50%2c100%2c150%2c250&firstname=&lastname=&email=&address1=&city=&state=&zip=&phone=&employer=&occupation=&amount=4>.

<sup>11</sup> VoteVets.Org, *Stand with Mark Kelly, Amy McGrath, MJ Hegar, Cal Cunningham and VoteVets today >>*, <https://secure.actblue.com/donate/ww-em-dec-senate-split?refcode=em191227-resend>.

for the other three candidates does not appear on the VoteVets.Org Action Fund's page, further demonstrating which candidate was likely managing the solicitation.

VoteVets.Org Action Fund and the Cunningham campaign are additionally coordinating on their earned media messaging.<sup>12</sup> VoteVets.Org Action Fund's endorsement press release repeats the same sentences from Cunningham's biography on his website.<sup>13</sup>

## II. Law

Under federal law, candidates for federal office are subject to regulations that limit or prohibit contributions from and interactions with individuals, groups, and organizations. Among these regulations, federal candidates are prohibited from soliciting or accepting contributions from an individual or a non-multicandidate PAC in excess of \$2,800, from a multicandidate PAC in excess of \$5,000, or from any corporation or labor organization in any amount.<sup>14</sup> Federal candidates are also prohibited from accepting contributions from entities that accept contributions from corporations or labor organizations.<sup>15</sup> On the other hand, individuals, groups, and organizations are also prohibited from making any illegal contribution.<sup>16</sup> Contributions are broadly defined to include cash donations, but also "anything of value . . . for the purpose of influencing any election for Federal office."<sup>17</sup>

Additionally, federal law sets forth three specific expenditures that are defined as contributions:

(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

<sup>12</sup> Cal for NC, *Meet Cal: A North Carolina Story*, <https://www.calfomc.com/meet-cal/>.

<sup>13</sup> VoteVets.Org, *VoteVets Endorses Cal Cunningham for Senate*, <https://www.votevets.org/press/votevets-endorses-cal-cunningham-for-senate>; About Cal, CalforNC.com, <https://www.calfomc.com/meet-cal/>, accessed on Jan. 14, 2020.

<sup>14</sup> 52 U.S.C. §§ 30116, 30118.

<sup>15</sup> 52 U.S.C. §§ 30101, 30118.

<sup>16</sup> *See, e.g.*, 52 U.S.C. § 30116(a)(7)(B).

<sup>17</sup> 52 U.S.C. § 30101(8)(A).

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for the purpose of this paragraph[.]<sup>18</sup>

In order to determine whether a communication was made in cooperation with a candidate under subsection (i), a three-part test applies: (1) the communication is paid for by a third-party; (2) the communication satisfies a “content” standard of 11 C.F.R. § 109.21(c); and (3) the communication satisfies one of the “conduct” standards of 11 C.F.R. § 109.21(d).<sup>19</sup>

In order to determine whether a communication was a dissemination, distribution, or republication of campaign materials under subsection (iii), the “general rule” applies:

a. General Rule. The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.<sup>20</sup>

The contributions specified in subsections (i) and (iii) are separate and distinct ways to make an illegal contribution.

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<sup>18</sup> 52 U.S.C. § 30116(a)(7)(B).

<sup>19</sup> 11 C.F.R. § 109.21.

<sup>20</sup> 11 C.F.R. § 109.23(a).

### III. Analysis

#### A. Illegal Contribution of Dissemination, Distribution, or Republication of Campaign Materials (52 U.S.C. § 30116(a)(7)(B)(iii))

VoteVets.Org Action Fund has made illegal contributions by financing “the dissemination, distribution, or republication, in whole or part” of Cunningham for U.S. Senate campaign materials.<sup>21</sup> Specifically, VoteVets.Org has replicated Cunningham campaign materials in endorsements, advertisements, and solicitations.

First, VoteVets.Org Action Fund’s endorsement press release repeats sentences verbatim from Cunningham’s biography on his campaign website.

Cunningham’s Website: “After the attacks on September 11, 2001, Cal volunteered to join the U.S. Army Reserve and has since served three active duty tours, including overseas in Iraq and Afghanistan. He was awarded the Bronze Star and the prestigious General Douglas MacArthur Leadership Award, in part for groundbreaking work prosecuting contractors for criminal misconduct.”<sup>22</sup>

VoteVets.Org’s Endorsement Press Release: “After the attacks on September 11, 2001, Cunningham volunteered to join the U.S. Army Reserve and has since served three active duty tours, including overseas in Iraq and Afghanistan...He was awarded the Bronze Star and the prestigious General Douglas MacArthur Leadership Award, in part for groundbreaking work prosecuting contractors for criminal misconduct.”<sup>23</sup>

While VoteVets.Org Action Fund added a few sentences in the middle of the paragraph that speak further to Cunningham’s military service, it is clear that VoteVets.Org Action Fund replicated the majority of Cunningham’s written biography that was prepared by Cunningham’s campaign.

More troublingly, VoteVets.Org Action Fund created an advertisement entitled “Cal Cunningham: 9/11,” which simply republished Cunningham for U.S. Senate campaign materials from its Flickr account. Photographs posted to Cunningham’s new Flickr account on December 20, 2019, were used in the VoteVets.Org Action Fund advertisement that began running five days

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<sup>21</sup> 11 C.F.R. § 109.23.

<sup>22</sup> About Cal, CalforNC.com, <https://www.calfornc.com/meet-cal/>, accessed on Jan. 14, 2020.

<sup>23</sup> VoteVets.Org Action Fund Endorses Cal Cunningham for Senate, VoteVets.org, <https://m.votevets.org/press/votevets-endorses-cal-cunningham-for-senate>, June 19, 2019.

later on December 25, 2019. The licenses for all the campaign photographs used by VoteVets.Org Action Fund was specified as “All Rights Reserved,” which would require VoteVets.Org Action Fund to request permission and the Cunningham campaign to grant permission to use the photographs.<sup>24</sup> The timing of the photographs being posted and the advertisement being run demonstrates the photographs were posted for VoteVets.Org Action Fund’s use.

Further, the advertisement is substantially similar to the advertisement Cunningham used in 2010 when he initially ran for Senate. It appears VoteVets.Org Action Fund wanted to replicate Cunningham’s 2010 advertisement, which they achieved by using several same photographs from the 2010 advertisement, which were uploaded to Cunningham’s Flickr page days before VoteVets.Org Action Fund began airing the replicated ad in 2019.<sup>25</sup> The advertisements from 2010 and 2019 also used an identical message: both contained footage from September 11<sup>th</sup>, and discussed Cunningham’s service in the Army Reserves and his time as a state legislator.

Finally, this coordination between both groups is apparent by their fundraising activity. VoteVets.Org Action Fund and the Cunningham campaign replicated their online fundraising with both organizations sending simultaneous fundraising solicitations that benefit both organizations collectively through a “contribution split.” Both pages promote fundraising not just for Cunningham and VoteVets.Org Action Fund, but also for three other Senate candidates: Mark Kelly (AZ-Sen), Amy McGrath (KY-Sen), and MJ Hager (TX-Sen). Further, the actual fundraising pages from the solicitation exhibit identical “contribution splits” between the four VoteVets.Org Action Fund endorsed candidates, on both Cal Cunningham’s campaign and VoteVets.Org Action Fund’s pages. What makes it even more obvious is that VoteVets.Org Action Fund’s disclaimer on its fundraising page is clearly copied from Cunningham’s page as it states: “Contributions or gifts to Cal for NC are not tax deductible” even though this is the VoteVets.Org Action Fund’s page. Given that no other candidate’s disclaimer language is on the page, it suggests that Cunningham had particular involvement with the page. Put simply, this is clearly a scheme between the Cunningham campaign and VoteVets.Org Action Fund.

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<sup>24</sup> Cal for NC, Flickr, <https://www.flickr.com/photos/186140610@N06/> (Exhibit B).

<sup>25</sup> Cal Cunningham: Different War (TV Ad), <https://www.youtube.com/watch?v=0Duc2UINAw0>, Uploaded 4/12/10.

None of the exceptions of 11 CFR § 109.23 allow VoteVets.Org Action Fund to republish the campaign materials. Only the exceptions expressly listed permit republication of campaign materials, and none of the five narrow circumstances<sup>26</sup> are even remotely applicable here.<sup>27</sup> Unlike the analysis under subsection (i) below, there is no requirement the candidate knew of or requested the dissemination, distribution, or republication and there is no exception for publicly available information.

**B. Illegal Contribution of Coordinated Communication (52 U.S.C. § 30116(a)(7)(B)(i)).**

Cunningham and Cunningham for U.S. Senate have solicited and accepted an illegal contribution from VoteVets.Org Action Fund by coordinating communications valued at over \$1.5 million. It is clear they have coordinated as there are multiple communications that are not only extremely similar, but also incredibly timely and the campaign provided campaign assets (photographs) used in the television advertisements. Specifically, it is established by applying the three-prong “coordinated communication” test: (1) the communication satisfies the “payment” standard with a third-party payment; (2) the communication satisfies a “content” standard of 11 C.F.R. § 109.21(c); and (3) the communication satisfies one of the “conduct” standards of 11 C.F.R. § 109.21(d).<sup>28</sup>

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<sup>26</sup> The exceptions are:

1. The campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material;
2. The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;
3. The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;
4. The campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views; or
5. A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

11 C.F.R. § 109.23.

<sup>27</sup> 11 C.F.R. § 109.23. *See also*, Federal Election Commission, First General Counsel's Report, MUR 6357 (Aug. 31, 2011) (finding the use of a video clip does not fall under the exception 11 C.F.R. § 109.23(b)(4) of consisting of a brief quote).

<sup>28</sup> 11 C.F.R. § 109.21.



**1. Payment Standard.** The “payment” standard is satisfied when a communication is paid for by an entity “other than that candidate, authorized committee, or political party committee.”<sup>29</sup> Here, the “Cal Cunningham: 9/11” advertisement disclaimer states, “Paid for by VoteVets.Org Action Fund.” Thus, from the face of the communication, it is clear the advertisement was paid for by VoteVets.Org Action Fund, and not Cunningham for U.S. Senate.

**2. Content Standard.** The advertisement meets multiple “content” standards under 11 C.F.R. § 109.21: (c)(2) the communication is a public communication that “disseminates, distributes or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee;”<sup>30</sup> (c)(3) is a public communication that expressly advocates for the election or defeat of a clearly identified candidate for Federal office;<sup>31</sup> and (c)(5) “is the functional equivalent of express advocacy.”<sup>32</sup> All three of these standards are demonstrated by the advertisement: The advertisement republishes campaign materials, i.e. photographs owned by the Cunningham for U.S. Senate committee and posted on Flickr.<sup>33</sup> The photographs were campaign assets with legal intellectual property protections, which could not be used without the campaign granting permission.<sup>34</sup> The advertisement contains information that can only be understood to be providing information to convince a citizen to vote for Cunningham. The ad is clearly “an appeal to vote for or against a clearly identified Federal candidate.” All three of these standards are demonstrated by the advertisement—the advertisement reproduces campaign material and contains information that can only be understood to be providing information to convince a citizen to vote for Cunningham.

**3. Conduct Standard.** The communication meets the “conduct” standard of 11 C.F.R. § 109.21(d): “The communication is created, produced, or distributed at the request or suggestion of

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<sup>29</sup> *Id.*

<sup>30</sup> 11 C.F.R. § 109.21(c)(2).

<sup>31</sup> 11 C.F.R. § 109.21(c)(3).

<sup>32</sup> 11 C.F.R. § 109.21(c)(5). The advertisements are clearly “an appeal to vote for or against a clearly identified Federal candidate.”

<sup>33</sup> 11 C.F.R. § 109.21(c)(2).

<sup>34</sup> Cal for NC, Flickr, <https://www.flickr.com/photos/186140610@N06/> (Exhibit B).

a candidate, authorized committee, or political party committee.”<sup>35</sup> Evidenced by the campaign providing assets for the television commercial, the advertisement is clearly in response to a request by Cunningham to disseminate, distribute, and republish the campaign materials.

VoteVets.Org Action Fund was only able to use the photos because they were provided by the campaign. Also, the close proximity in time between the campaign providing the materials and VoteVets.Org Action Fund running the television advertisement demonstrates this was a scheme designed to help Cunningham. Further, as clearly stated on the campaign’s Flickr page, the photographs had “All Rights Reserved”—copyright protection and the photographs could not legally be used without the Cunningham campaign granting permission. Given that this type of scheme is already taking place in Michigan with one of these parties, it is clear that Cunningham’s creation of the Flickr page and publication of the photographs evidences a “request or suggestion” was made to place an advertisement with that material. Moreover, given the close temporal proximity between the campaign posting the photographs and the outside organization immediately using the photographs demonstrates there was some other type of communication.

In addition, the online fundraising solicitation also shows that both entities are coordinating with each other. The solicitations are so similar that not only are the pages laid out the exact same way with identical vote splits of four of the same candidates, but also, VoteVets.Org uses the Cunningham campaign’s disclaimer that “Contributions or gifts to Cal for NC are not tax deductible.” Importantly, the nearly identical fundraising solicitations arrived in inboxes mere minutes apart on the same day, December 27, 2019.<sup>36</sup> In sum, this solicitation was nearly identical in content, recipients, “contribution split,” timing, while strangely singling out the Cal for NC disclaimer. Finally, the identical Cunningham biography language establishes the fact the Cunningham campaign coordinated with VoteVets.Org Action Fund and, therefore, received an illegal contribution.

Additionally, the coordination between the Cunningham campaign and VoteVets.Org Action Fund is not excused because they used a public avenue to transfer campaign materials. The

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<sup>35</sup> 11 C.F.R. § 109.21(d)(1).

<sup>36</sup> VoteVets Senate Campaign Alert Email, December 27, 2019 at 8:04 PM EST; Team Cal Email, December 27, 2019 at 8:31 PM EST.

“publicly-available-**information** safe harbor” does not apply to the facts of this case. It only applies to “information”—not a request or suggestion and not the transfer of other types of campaign assets and materials, i.e. campaign written materials and photographs.<sup>37</sup> Although the “request or suggestion conduct standard” does not include the public information safe harbor, the conduct standards that do state: “This paragraph . . . is not satisfied if the **information** material to the creation, production, or distribution of the communication was obtained from a publicly available source.”<sup>38</sup> As discussed below, the Commission recognized “information” was not appropriately applied to a “request or suggestion” because they are not the same thing.<sup>39</sup> Moreover, the law generally recognizes the difference between “information” and “assets,” including “campaign materials.”<sup>40</sup> The written content and photographs were prepared and paid for by Cunningham’s campaign and have copyright protections, and thus would be an “item of value” or an “asset.”<sup>41</sup> The advertisement created by VoteVets.Org Action Fund used campaign assets and

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<sup>37</sup>See, e.g., 11 C.F.R. § 109.21(d)(2).

<sup>38</sup> See, e.g., 11 C.F.R. § 109.21(d)(2) (emphasis added). Information is defined as “(1) knowledge obtained from investigation, study, or instruction; (2) intelligence, news; (3) facts, data.” “Information,” Merriam-Webster Online Dictionary 2019, available at <https://www.merriam-webster.com/dictionary/information>, last accessed Dec. 18, 2019.

<sup>39</sup> Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explaining the plain language of the statute did not contain an exception for the use of publicly available information and it would be inappropriate to include this type of exception: “Moreover, the four conduct standards that are being revised to include a safe harbor for the use of publicly available information all concern conduct that conveys material information that is subsequently used to create a communication, whereas the “request or suggestion” conduct standard concerns only a candidate’s or political party’s request or suggestion that a communication be created, produced or distributed, and is not dependent upon the nature of information conveyed.”).

<sup>40</sup> For example, where the “publicly-available-information safe harbor” applies, the regulations states it is in the context of “decisions,” “discussion,” or knowledge of common employees or vendors—all applications are to conveyance of knowledge or facts. Compare 11 C.F.R. § 109.21(d) (applying the “publicly-available-information safe harbor” to “decisions,” “discussion,” and knowledge of a common employee or vendor), with 11 C.F.R. § 109.21(d)(6) (providing certain conduct standards are only satisfied “that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished”). On the other hand, the regulations distinguish “information” from “campaign materials” that are prepared by the campaign. *Id.* The content standards are based upon republication of campaign materials and the conduct standards are based upon the communication of information. See 11 C.F.R. § 109.21(d)(6).

<sup>41</sup> “Asset,” Merriam-Webster Online Dictionary 2019, available at: <https://www.merriam-webster.com/dictionary/asset>, last accessed Dec. 19, 2019 (defining “asset” as an “item of value owned”); 11 C.F.R. § 100.51(a) (“The term contribution includes payment, services, or other things of value . . .”); 11 C.F.R. § 100.52(d)(1) (stating that in-kind contributions include “the provisions of goods or services” including “securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists”).

not “information” and thus, the “publicly-available-information safe harbor” does not apply in this case.

The “publicly-available-information safe harbor” also does not apply generally to the “request or suggestion” conduct standard. The language of the “request or suggestion” conduct standard does **not** state it is not satisfied if the “information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”<sup>42</sup> This is unlike every other conduct standard, which does explicitly provide for a publicly-available-information safe harbor.<sup>43</sup> To interpret the “request or suggestion” standard as not applying if information was obtained from a publicly available source is directly contrary to the plain language of the regulation, and unreasonable and contrary to the statute.<sup>44</sup>

The 2006 E&J notes the Commission decided that the publicly-available-information-safe-harbor “more appropriately applies to only four of the five conduct standards, and is being added to the paragraphs currently containing those four conduct standards.”<sup>45</sup> The “request or suggestion” conduct standard is only applicable to a candidate’s request or suggestion that a communication be created, produced, or distributed, whereas the four standards to which the publicly-available-

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<sup>42</sup> Compare 11 C.F.R. § 109.21(d)(1) (stating in full: “Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section: 1. REQUEST OR SUGGESTION. i. The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or ii. The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.”), with 11 C.F.R. § 109.21(d)(2) (“This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”), 11 C.F.R. § 109.21(d)(3) (“This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”), 11 C.F.R. § 109.21(d)(4) (“This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source.”), and 11 C.F.R. § 109.21(d)(5) (“This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source.”).

<sup>43</sup> *Id.*

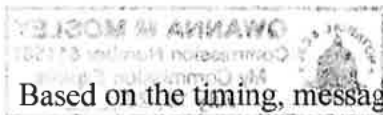
<sup>44</sup> Compare Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explaining the plain language of the statute did not contain an exception for the use of publicly available information and it would be inappropriate to include this type of exception); with FEC, Factual and Legal Analysis, Shaheen for Senate, MUR 6821 (Dec. 2, 2015) (stating “that a communication resulting from a general request to the public or the use of publicly available information, including information contained on a candidate’s website, does not satisfy the content standard.”) and FEC, First General Counsel’s Report, MUR 7136 (Oct. 24, 2017) (same).

<sup>45</sup> Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

information-safe-harbor was added “all concern conduct that conveys material information that is subsequently used to create a communication.”<sup>46</sup> The request or suggestion standard is different than the other four because it simply is the request or ask, whereas the other four require conveyance of **information** material to the creation of the communication. Thus, by its plain language a “request or suggestion” is not “information” and the publicly-available-information-safe-harbor could not apply.

In addition to the fact that it was not technically applicable, it was noted that one concern commentators expressed was if the publicly-available-information-safe-harbor was added to the “request or suggestion” conduct standard, it may allow for a loophole that could be exploited by precluding “certain communications from satisfying the coordinated communications test simply because a portion of a given communication was based on publicly available information, even if a candidate privately conveyed a request that a communication be made.”<sup>47</sup> The choice not to apply the publicly-available-information safe harbor to the request or suggestion conduct standard was to make the regulation stronger—it was intended to prevent any argument the communication was based upon some information or statement that was publicly available—it did not allow for a request or suggestion to be made publicly. In fact, the concerns addressed ensured that no part of the ask could be made publicly. The language of the statute prevails—the request or suggestion conduct standard does not contain a safe harbor for publicly available information.

The advertisement was paid for by VoteVets.Org Action Fund, the content of the advertisement republished campaign photographs days after the campaign made the photographs available, the campaign and outside group have shown they are coordination of messaging and fundraising, all demonstrate the coordination in this case.



#### IV. Conclusion

Based on the timing, messaging, and photographs, Cunningham is coordinating with VoteVets.Org Action Fund. This conduct has resulted in what likely constitutes multiple illegal in-kind contributions to Cunningham’s campaign. Further, VoteVets.Org Action Fund is clearly engaged in a scheme with multiple campaigns. There are consistencies with campaigns posting

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

photos and messaging to their online webpages or accounts and within days, VoteVets.Org Action Fund puts out an advertisement that uses the information the campaign posted. If the Commission does not act and punish such a clear violation, candidates will continue to coordinate with outside groups in violation of federal law. FACT respectfully requests the Commission immediately investigate and hold the Respondents accountable.

Respectfully submitted,

*Karnold*

Kendra Arnold, Executive Director  
Foundation for Accountability & Civic Trust  
1717 K Street NW, Suite 900  
Washington, D.C. 20006

STATE OF IOWA )  
 ) ss.  
COUNTY OF POLK )

Subscribed and sworn to before me on January 16, 2020.

*Gwanne Mosley*

Notary Public in and for the State of Iowa

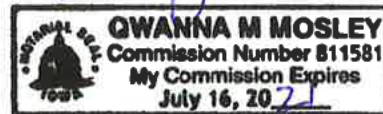
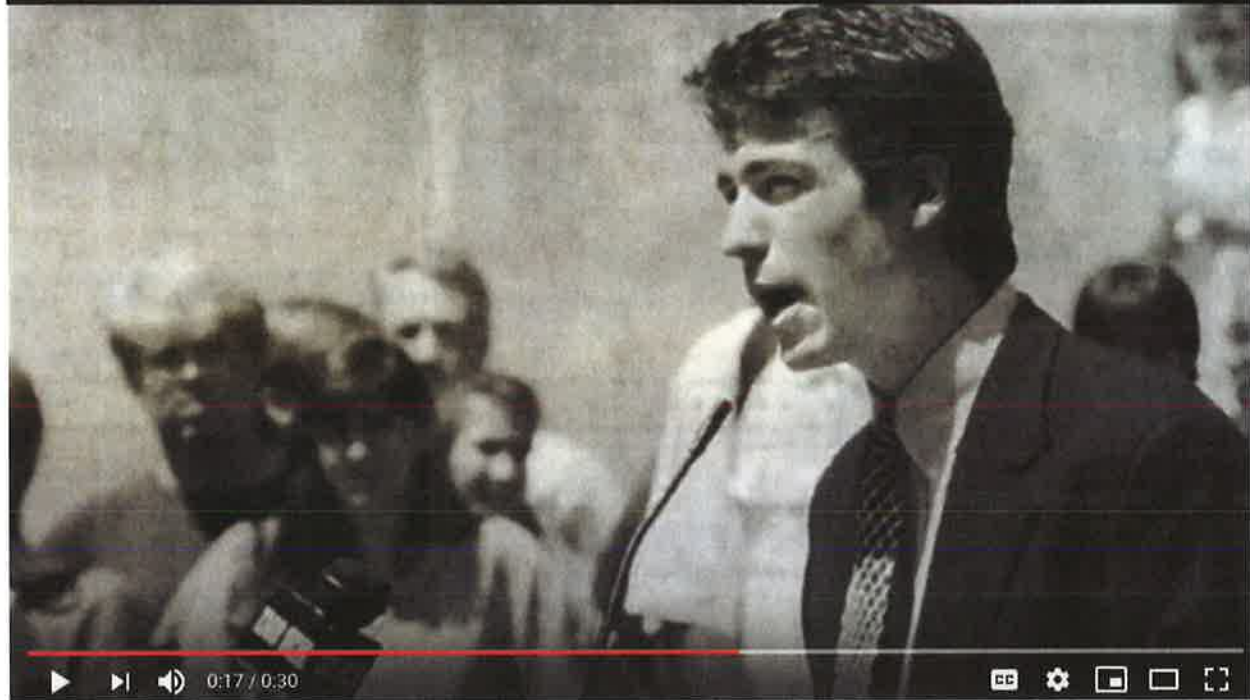


Exhibit A: Cunningham Campaign Photographs Used in VoteVets.Org Action Fund's Advertisement









PAID FOR BY VOTEVETS.ORG ACTION FUND.


▶ ⏪ 🔊 0:26 / 0:30

CC ⚙️ 📺 🖥️ 🗉


Exhibit B: Cal for NC, Flickr, <https://www.flickr.com/photos/186140610@N06/>.

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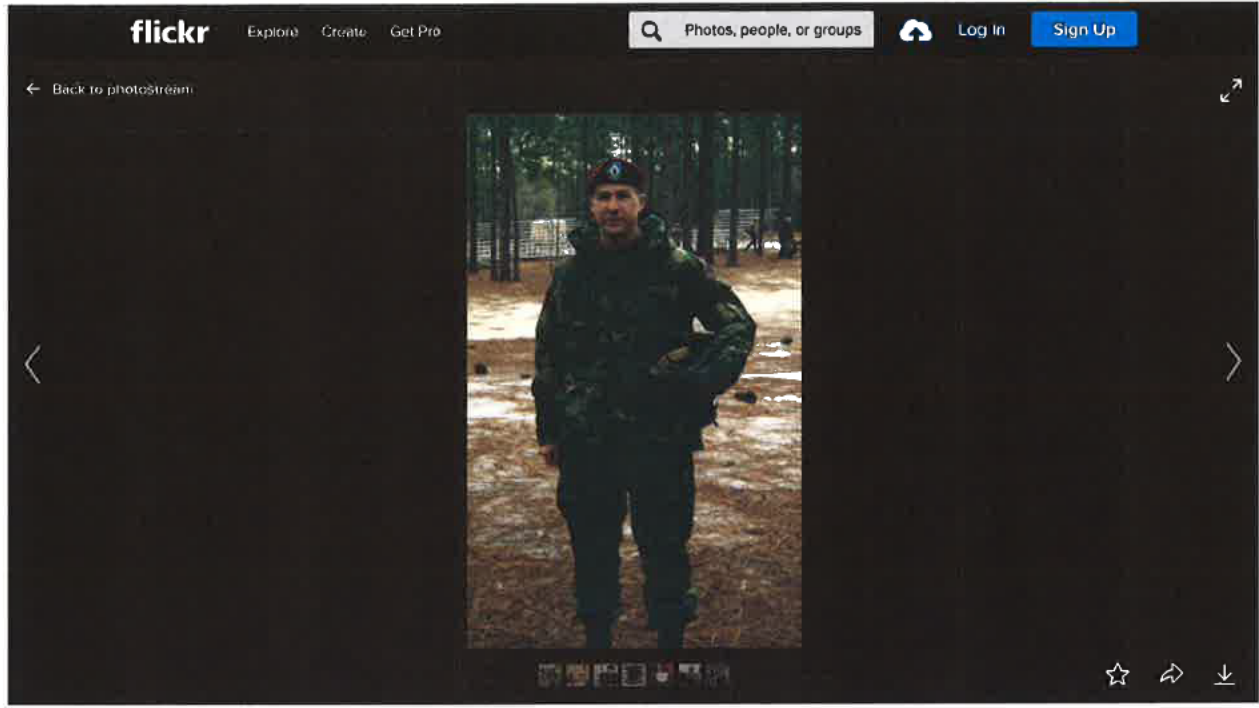
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