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March 13, 2020

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, D.C. 20463RECEIVED
FEDERAL ELECTION
COMMISSION
2020 MAR 13 PM 2:35
CELA

Re: MUR 7681

Ms. Dennis:

The undersigned serves as counsel to VoteVets Action Fund (“VoteVets”), a 501(c)(4) social welfare organization. This letter responds on behalf of VoteVets to the Commission’s notification of a complaint from the Foundation for Accountability and Civic Trust (the “Complaint”, which includes the supplement dated February 10, 2020) alleging that VoteVets violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

As described below, the allegations made in the Complaint do not give rise to a violation of the Act. The Complaint makes one core allegation regarding two television advertisements disseminated by VoteVets – that it “coordinated” (as defined in Commission rules and precedent) the two advertisements with Senate candidate Cal Cunningham and his campaign committee, Cal for North Carolina (collectively “Cunningham”).¹

The first advertisement is entitled “9/11”, and also referred to as “Stood Up” (script attached as **Attachment A**).² The second advertisement is entitled “Answered the Call” (script attached as **Attachment C**, collectively, the “Advertisements”).³

The Complaint’s allegations fall short of a violation of the Act. The “Stood Up” advertisement does not expressly advocate for Cunningham’s election, and merely discuss Cunningham’s views and accomplishments. The Complaint does not claim that “Answered the

¹ Allegations that are specific to Cunningham are not addressed in this response.

² See VoteVets.org, “Cal Cunningham: Stood Up” (December 24, 2019), available at <https://www.youtube.com/watch?v=vI8IXe4YtOw> (last accessed March 13, 2020).

³ VoteVets.org, “Answered the Call” (January 14, 2020), at https://www.youtube.com/watch?v=KGB_CBn-Qf8 (last accessed March 13, 2020).

Call” is express advocacy, and instead argues that it “republishes” Cunningham’s campaign materials. While VoteVets did utilize photos from Cunningham’s website and Flickr page, they only did so to augment its own message.

Most importantly, VoteVets did not communicate with Cunningham in any way regarding the Advertisements. As such, the Complaint’s analysis of a “request or suggestion” (or of the conduct standard for “coordinated communications” in general) is moot, even though the Advertisements were disseminated within 90 days of North Carolina’s primary election.

The Commission should find no reason to believe that VoteVets committed a violation, and should close the file.

1. The Advertisements do not meet the criteria for a “coordinated communication” under 11 C.F.R. § 109.21.

a. “Coordinated Communications”

Under the FEC’s rules, a “coordinated communication” and an in-kind contribution results when a communication meets ***all of the following criteria:***

- I. ***[Public Communication]*** the communication is a “public communication” – a paid medium;⁴
- II. ***[Third Party]*** the communication is paid for by a third party (other than that candidate or party);
- III. ***[Content Standard]*** it contains certain content;
- IV. ***[Conduct Standard]*** was produced as a result of certain conduct; and
- V. ***[Safe Harbor]*** is not protected by a safe harbor, such as a firewall.⁵

The Advertisements are “public communications,” as they were both disseminated on television. VoteVets is “a person other than that candidate, authorized committee, or political party committee” under 11 C.F.R. § 109.21(a)(1).

⁴ 52 U.S.C. § 30101(22); 11 C.F.R. §§ 100.26 (definition of “public communication”, spacing added), 100.27 (definition of “mass mailing”), 100.28 (definition of “telephone bank”).

⁵ See 11 C.F.R. §§ 109.20-23.

While each of the two Advertisements *do* meet the FEC’s content standard, they do so for a different reason than the Complaint cites –they were both disseminated within 90 days of the North Carolina primary election. Despite the fact that the Advertisements do meet the content standard, *the conduct standard is not met*, as VoteVets did not coordinate its Advertisements with Cunningham in any way.

b. Analysis of Content Standard

i. Overview

Under the FEC’s rules, only certain communications can be considered coordinated:

- a) *[Electioneering Communications]* television, satellite, or radio advertisements that mention a clearly identified candidate within 30 days of a primary or 60 days of a general election;⁶
- b) *[Reference Test]* Public Communications that reference candidates or parties – for House or Senate, within 90 days of their primary or general election, or nominating convention or caucus.⁷
- c) *[Express Advocacy]* Public Communications that contain express advocacy, or the functional equivalent of express advocacy for a candidate *at any time*;⁸ or
- d) *[Republication of Candidate Materials]* Public Communications that disseminate, or republish campaign materials prepared by a candidate.⁹

⁶ 11 C.F.R. § 100.29 (definition of “electioneering communication”)

⁷ 11 C.F.R. § 109.21(c)(4).

⁸ 11 C.F.R. § 109.21(c)(3), (c)(5). It should be noted that the Commission previously provided a definition of “functional equivalent of express advocacy” in its electioneering communications regulations, but removed this regulation in 2015. See 76 Fed. Reg. 80814 – 80815.

Therefore, there is no statutory or regulatory definition of the “functional equivalent of express advocacy” such that the regulated community can discern between the Commission’s definition of “express advocacy” and section (c)(5), which appears to derive from the Commission’s deleted regulation. See 11 C.F.R. § 114.15 (effective December 26, 2007 to January 26, 2015); 75 Fed. Reg. 55952 – 55957.

Given this, our analysis in this response is solely confined to the Commission’s regulatory guidance found in 11 C.F.R. § 100.22 and related opinions.

⁹ 11 C.F.R. § 109.21(c).

ii. Timing of the Advertisements – “Stood Up” and “Answered the Call”

Neither Advertisement is an “electioneering communication” as they were not disseminated within 30 days of Cunningham’s primary election on March 3, 2020.¹⁰

However, as the Advertisements were disseminated after December 4, 2019 (90 days before the primary) – they do meet the content standard in the coordination rule. Despite this, VoteVets will focus this analysis on express advocacy, and republication of candidate materials, as these are the factors of the content standard discussed in the Complaint.

iii. Express Advocacy – “Stood Up” Advertisement

The Complaint claims that VoteVets’ “Stood Up” advertisement contains express advocacy.¹¹ To the contrary, “Stood Up” does not contain any express advocacy, or its functional equivalent. The Complaint contends that “Stood Up” contains express advocacy based on factors that differ from, and go beyond, those set forth in established judicial and Commission precedent. The Complaint contends that:

“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.”

Neither of these contentions reflects the relevant factors in determining whether a communication constitutes “express advocacy.” Intent is irrelevant in the examination of express advocacy, clearly evidenced by Commission precedent and the Supreme Court’s opinions on the matter – and the Complaint solely relies on VoteVets’ intent (“*can only be understood*” and “*is clearly*”, opposed to the specific words used in “Stood Up.”¹²

¹⁰ See Commission’s “2020 Preliminary Presidential and Congressional Primary Dates” (August 8, 2019), available at <https://transition.fec.gov/pubrec/fe2020/2020pdates.pdf> (last accessed March 13, 2020).

¹¹ A similar claim is *not* made regarding the “Answered the Call” advertisement in the Complaint’s supplement. Nevertheless, based upon legal analysis below, “Answered the Call” does not contain express advocacy.

¹² See *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. at 474 n.7 (“emphasiz[ing] that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech”).

The FEC's regulations provide two tests to determine whether a communication is express advocacy":

- a) [***"Magic Words" and their "functional equivalents"***]— clear exhortations to vote for or against a candidate, such as “vote for the President,” “Smith for Congress,” “defeat” accompanied by a picture of a candidate, or communications “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate” such as “Jeb!”, “Reagan/Bush”, or “Obama ‘08”.¹³

- b) [***"No Other Reasonable Interpretation"***]— “when taken as a whole and with limited reference to external event, such as proximity to the election, [the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because -
 - (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
 - (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.”¹⁴

In addition to these regulatory tests, the FEC and the courts have extensive precedent on *which* communications are and are not express advocacy. While these judicial determinations and FEC opinions and enforcement actions have varying views on the scope of “express advocacy”, there is one common thread throughout them all – that at the very least, there must be *some* exhortation to elect or defeat a candidate to qualify as “express advocacy.”¹⁵

¹³ 11 C.F.R. § 100.22(a) (emphasis added); see Buckley v. Valeo, 424 U.S. 1, at 44 fn. 52 (1976).

¹⁴ 11 C.F.R. § 100.22(b); see Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

¹⁵ Buckley v. Valeo, 424 U.S. 1 at 44 fn. 52 (1976); Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449, 470-473 (2007) (rejecting that an ad that simply promotes or criticizes a candidate could be express advocacy without other factors present); see also Free Speech v. Federal Election Commission, 720 F.3d 788, 793-95 (10th Cir. 2013); Real Truth About Abortion v. Federal Election Commission, 681 F.3d 544 (4th Cir. 2012); Maine Right to Life Committee, Inc. v. Federal Election Commission, 98 F.3d 1 (1st Cir. 1996); Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987);

No such exhortation – or call-to-action – is present in “Stood Up.” The advertisement simply provides the viewer with information about a candidate for office, stating “*Cal Cunningham has never backed down from doing the right thing, and now he’s running for US Senate.*” While “Stood Up” does reference the election, it **does not** specifically indicate that viewers should vote for or against Cunningham, only informing the viewer that Cunningham is running for Senate. ***As such, it is not express advocacy.***

Federal Election Commission, Advisory Opinions:

- 2012-27 (National Defense Committee) at 4 (finding that an ad stating “Veterans and service men and women know better than to trust Harry Reid. This November: support new voices, support your military, support Nevada values” **did not** constitute express advocacy), [available at https://www.fec.gov/files/legal/aos/2012-27/AO-2012-27.pdf](https://www.fec.gov/files/legal/aos/2012-27/AO-2012-27.pdf);
- 2012-11 (Free Speech) (evaluating multiple advertisements for express advocacy), [at https://www.fec.gov/files/legal/aos/2012-11/AO-2012-11.pdf](https://www.fec.gov/files/legal/aos/2012-11/AO-2012-11.pdf), also Statement by Republican Commissioners Hunter, McGahn and Petersen (an in-depth history on express advocacy), [at https://www.fec.gov/files/legal/aos/2012-11/1209339.pdf](https://www.fec.gov/files/legal/aos/2012-11/1209339.pdf), and Statement by Democratic Commissioners Weintraub, Bauerly, and Walther, [at https://www.fec.gov/files/legal/aos/2012-11/1209340.pdf](https://www.fec.gov/files/legal/aos/2012-11/1209340.pdf);
- See also 1977-42 (Hechler) [at https://www.fec.gov/files/legal/aos/1977-42/1977-42.pdf](https://www.fec.gov/files/legal/aos/1977-42/1977-42.pdf); 1984-17 (NRLC) (regarding voter guides), [at https://www.fec.gov/files/legal/aos/1984-17/1984-17.pdf](https://www.fec.gov/files/legal/aos/1984-17/1984-17.pdf).

Federal Election Commission Matters Under Review:

- 5831 (Softer Voices), Statement of Reasons of Republican Commissioner McGahn (an extensive history of the caselaw and FEC actions on the express advocacy standard, arguing that intent is irrelevant in an analysis of express advocacy), [at https://www.fec.gov/files/legal/murs/5831/11044284676.pdf](https://www.fec.gov/files/legal/murs/5831/11044284676.pdf);
- 6402 (American Future Fund), Statement of Reasons of Republican Commissioners Hunter and Petersen at 12-14 (analysis of express advocacy standard), [at https://www.fec.gov/files/legal/murs/6402/14044364910.pdf](https://www.fec.gov/files/legal/murs/6402/14044364910.pdf);
- 6346 (Cornerstone Action), Statement of Reasons of Republican Commissioners McGahn, Hunter, and Petersen at 9-18, [available at https://www.fec.gov/files/legal/murs/6346/13044342645.pdf](https://www.fec.gov/files/legal/murs/6346/13044342645.pdf), also Statement of Reasons of Democratic Commissioners Bauerly, Walther, and Weintraub, [at https://www.fec.gov/files/legal/murs/6346/11044304055.pdf](https://www.fec.gov/files/legal/murs/6346/11044304055.pdf);
- See also 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Republican Commissioners Goodman, Hunter, and Petersen (also regarding the internet exemption), [at https://www.fec.gov/files/legal/murs/6729/14044363864.pdf](https://www.fec.gov/files/legal/murs/6729/14044363864.pdf); 6391 and 6471 (The Commission on Hope, Growth, and Opportunity); 6543 (Unknown Respondents), Statement of Reasons of Democratic Commissioner Weintraub, [at https://www.fec.gov/files/legal/murs/6543/13044331493.pdf](https://www.fec.gov/files/legal/murs/6543/13044331493.pdf), and Republican Commissioner McGahn, [at https://www.fec.gov/files/legal/murs/6543/13044342690.pdf](https://www.fec.gov/files/legal/murs/6543/13044342690.pdf) (last accessed March 13, 2020).

Advisory Opinions 2012-27 and 2012-11 are best illustrative of this, finding that the below were *not* express advocacy as they do not contain specific electoral exhortations:

*Nydia Velazquez. Ethically challenged. A key supporter of the Troubled Asset Relief Program. Calls bailed-out Wall Street greedy one day, but takes hundreds of thousands from it the next. A leader you can believe in? Call Nydia Velazquez and let's make sure we end the bailouts that bankrupt America.*¹⁶

*President Obama supports socialized medicine, but socialized medicine kills millions of people worldwide. Even as Americans disapproved of ObamaCare, he pushed ahead to make socialized medicine a reality. Put an end to the brutality and say no to socialized medicine in the United States.*¹⁷

The Complaint's contention that "Stood Up" contains express advocacy flies in the face of judicial and Commission precedent, and is meritless.

iv. **Republication of Candidate Materials – "Stood Up" and "Answered the Call"**

Neither Advertisement "republishes" campaign materials "prepared by a candidate or [a] candidate's authorized committee" within the meaning of 11 C.F.R. § 109.21(c)(2). While the Advertisements make use of photos and video publicly posted on Cunningham's website and Flickr page, only a portion of those materials were "*prepared*" by *Cunningham as a candidate or by Cunningham's campaign*. The portion of materials that should be considered "campaign materials prepared by a candidate or the candidate's" campaign is insufficient, as to both advertisements, to fall within the scope of section 109.21(c).

Multiple photos used in the Advertisements from Cunningham's website and Flickr page are of Cunningham before he became a candidate for federal office, or from a previous run for United States Senate. These photos show Cunningham's time in the military, during a previous federal campaign, and as the student body president at the University of North Carolina.

Biographical photos or materials created *before* a person's current federal campaign – like the photos described above – *could not* be considered "campaign materials" for the purposes of " republication," as the content standard requires republication of "campaign materials *prepared by* a candidate or the candidate's authorized committee" (while the conduct standard

¹⁶ FEC Advisory Opinion 2012-27 (National Defense Committee) at 3, available at <https://www.fec.gov/files/legal/aos/2012-27/AO-2012-27.pdf> (last accessed March 13, 2020).

¹⁷ FEC Advisory Opinion 2012-11 (Free Speech) at 5 available at <https://www.fec.gov/files/legal/aos/2012-11/AO-2012-11.pdf> (last accessed March 13, 2020).

requires the republication of “campaign material” in the same vein).¹⁸ 11 C.F.R. § 109.23 mirrors the content standard’s “*prepared by* the candidate, the candidate’s authorized committee, or an agent of either of the foregoing.”¹⁹ Simply put, only a portion of the materials integrated into the Advertisements were “prepared by” Cunningham or his campaign.

The republication of that portion is not sufficient to fall within the scope of section 109.21(c)(2). Recent enforcement actions indicate that the Commission permits an independent communication to use a certain amount of materials obtained from campaign sources.²⁰ While the Commission has never specified a particular percentage of a communication that can consist of “materials prepared by” a candidate or their campaign, Commission precedent indicates that an independent communication may, at a minimum, utilize approximately 50% of its imagery from sources that would be defined as “campaign materials.”

¹⁸ 11 C.F.R. § 109.21(c)(1) (content standard, emphasis added), (d)(6) (conduct standard); see also 68 Fed. Reg. 439 (January 3, 2003) (discussion of difference between “republication” content and conduct standards), at <https://sers.fec.gov/fosers/showpdf.htm?docid=11375#page=19> (last accessed March 13, 2020).

¹⁹ 11 C.F.R. § 109.23(a).

²⁰ See 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23;

See also, e.g., Federal Election Commission Matters Under Review:

- 6902 (Al Franken for Senate 2014) (FEC did not find reason to believe on an independent communication that utilized *similar themes and branding* as a campaign advertisements), Certification (November 9, 2015), available at <https://www.fec.gov/files/legal/murs/6902/15044382611.pdf>, Statement of Reasons of Republican Commissioners Petersen, Hunter, and Goodman in MURs 6603, 6777, 6801, 6870, 6902 (December 17, 2015), at <https://www.fec.gov/files/legal/murs/6902/15044382837.pdf>;
- 6801 (Senate Majority PAC) (FEC did not find reason to believe on a communication using *16 seconds of campaign materials in a 30-second advertisement*), Certification (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6801/15044382446.pdf>, First General Counsel’s Report (October 31, 2014) at <https://www.fec.gov/files/legal/murs/6801/15044382435.pdf>;
- 6603 (Ben Chandler for Congress) (FEC did not find reason to believe on a communication using *13 seconds of campaign materials in a 30-second advertisement*), Certification (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6603/15044382398.pdf>, First General Counsel’s Report (August 22, 2014), at <https://www.fec.gov/files/legal/murs/6603/15044382376.pdf>;
- 7185 (Sheriff Scott Jones for Congress) (FEC did not find reason to believe on a communication using *16 or 17 seconds of campaign materials in a 30-second advertisement*), Certification (October 20, 2017), at <https://www.fec.gov/files/legal/murs/7185/17044431573.pdf>; First General Counsel’s Report (August 7, 2017), at <https://www.fec.gov/files/legal/murs/7185/17044431550.pdf> (last accessed March 13, 2020).

Close analysis of the facts of this case demonstrates that the materials that Cunningham or his campaign actually prepared for the 2020 campaign – only make up 4 seconds of “Stood Up” (13%), and 15 seconds of “Answered the Call” (50%).

The Advertisements’ images and video were taken from multiple sources, with full Source Sheets attached as **Attachments B (“Stood Up”) and D (“Answered the Call”)**. On information and belief, the Advertisements are made up of:

“Stood Up”

- 9 seconds of stock footage and images;
- 10 seconds of biographical images;
- 7 seconds of images from Cunningham’s previous 2010 campaign for United States Senate; and
- 4 seconds of footage from Cunningham’s current 2020 campaign for United States Senate.

“Answered the Call”

- 2 seconds of stock footage and images;
- 9 seconds of biographical images;
- 4 seconds of images from Cunningham’s previous 2010 campaign for United States Senate; and
- 15 seconds of images and footage from Cunningham’s current 2020 campaign for United States Senate.

Stock footage and images would not be considered “campaign materials,” certainly not ones “prepared by the candidate, the candidate’s authorized committee, or an agent of either.” Biographical materials – in this case, photos of Cunningham in uniform, as the student body president at the University of North Carolina, and as a state legislator – *not prepared for his 2020 Senate campaign were not “prepared” by Cal Cunningham, nor by his 2020 campaign committee, Cal for NC.*

Cal Cunningham is an active member of the United States Army Reserves.²¹ As such, images of Cunningham in uniform are regulated by the Department of Defense’s Directive

²¹ See Cal for NC (“Cal Cunningham is a member of the Army Reserve and is a veteran of operations in Iraq and Afghanistan”), available at <https://www.calfornc.com/meet-cal/> (last accessed March 13, 2020).

1344.10.²² Members of the armed forces not on active are prohibited from engaging in political activities while in uniform.²³ ***Given this, any current images of Cunningham in uniform would be prohibited by Department of Defense directives from being “campaign materials.”***²⁴ The photo of Cunningham as the student body president of the University of North Carolina could in no way have been “prepared by” Cunningham or his current campaign for United States Senate, as it was taken decades ago.²⁵

As to materials previously prepared for Cunningham’s 2010 run for the United States Senate and 2020 campaign materials, that 2010 Senate campaign committee, “Cunningham for U.S. Senate” terminated on October 1, 2018 – as such, it is no longer an “authorized committee” of Cunningham for the purposes of “prepared by a candidate or the candidate’s authorized committee.”²⁶

While the Advertisements *do* make use of photos that Cunningham’s 2020 Senate campaign had publicly disseminated, VoteVets only did so to augment their own messages regarding Cunningham’s effectiveness as a state legislator, as described below. As former Commissioners Petersen and Goodman (as well as Commissioner Hunter) stated in their Statement of Reasons in MURs 6603, 6777, 6801, 6870 and 6902:

*“republishing requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates.”*²⁷

²² See United States Department of Defense, Directive Number 1344.10 (February 19, 2008), available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/134410p.pdf> (last accessed March 13, 2020).

²³ Directive Number 1344.10 at 4.1.1, 4.1.4.

²⁴ Of note, limited uses of previous materials, even in uniform, are permissible under the Directive.

²⁵ See Cal for NC Flickr, “Cal as UNC Student Body President”, available at <https://www.flickr.com/photos/calfornc/4158127069/> (last accessed March 13, 2020).

²⁶ See Cunningham for U.S. Senate, FEC Form 3 (filed October 1, 2018), at <https://docquery.fec.gov/cgi-bin/forms/C00471557/1264462/> (last accessed March 13, 2020). This situation contrasts with MUR 6535, as it does not involve the same authorized committee. FEC MUR 6535 (Restore Our Future) (an independent expenditure committee was fined \$50,000 for republishing a 2008 Romney campaign advertisement in 2012), First General Counsel’s Report (February 26, 2013) at <https://www.fec.gov/files/legal/murs/6535/15044382228.pdf>, Conciliation Agreement (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6535/15044382292.pdf>, Certification (November 16, 2015) at <https://www.fec.gov/files/legal/murs/6535/15044382269.pdf> (last accessed March 13, 2020).

²⁷ FEC MURs 6603 (Ben Chandler for Congress), 6777 (Kirkpatrick for Arizona), 6801 (Senate Majority PAC), 6870 (American Crossroads), 6902 (Al Franken for Senate 2014), Statement of Reasons of Commissioners Petersen, Hunter, Goodman (December 17, 2015), at <https://www.fec.gov/files/legal/murs/6870/15044382832.pdf> (last accessed March 13, 2020).

An earlier Statement of Reasons by former Commissioners McGahn and Petersen (as well as Commissioner Hunter) stated that “republication” does not occur when a third-party “adds its own text, graphics, audio, and narration to create its own message. In other words, the . . . advertisement – neither in whole nor in substantial part – is anything close to a carbon copy of the [candidate’s] footage. . . the [independent spender] did not repeat verbatim the [candidate’s] message; rather, it created its own.”²⁸

Similarly, Commissioner Weintraub and former Commissioner von Spakovsky described the use of public materials in MUR 5743:

“The downloading a photograph from a candidate’s website that is open to the world, for incidental use in a large mailer that is designed, created, and paid for by a political committee as part of an independent expenditure without any coordination with the candidate, does not constitute the ‘dissemination, distribution, or republication of candidate campaign materials.’”²⁹

In this case, ***VoteVets did not communicate with Cunningham in any way regarding the Advertisement.*** Cunningham’s 2020 campaign footage was integrated into the “Stood Up” for 4 seconds (13%) and into “Answered the Call” for 15 seconds (50%). These incidental uses do not mean that VoteVets legally “republished” campaign materials.

While the Complaint attempts to cite MUR 6357 (American Crossroads) and 5879 (Harry Mitchell for Congress) for its own purposes – it conveniently disregards that the Commission split 3-3 on both MURs – and that the Republican Commissioners in MUR 6357 specifically cite the lack of communication between the campaign and the third-party as crucial to the analysis.³⁰ This Commission should adopt the previous logic of Commissioners McGahn, Petersen, and Hunter in MUR 6357.

²⁸ FEC MUR 6357 (American Crossroads), Statement of Reasons of Commissioners McGahn, Petersen, and Hunter (February 22, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf>; First General Counsel’s Report (August 31, 2011), at <https://www.fec.gov/files/legal/murs/6357/12044312188.pdf>; Certification (3-3 vote, January 26, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312209.pdf> (last accessed February 27, 2012).

²⁹ FEC MUR 5743 (Betty Sutton for Congress), Statement of Reasons of Commissioners Weintraub and Spakovsky (January 23, 2007), at <https://www.fec.gov/files/legal/murs/5743/00005AE4.pdf> (last accessed March 13, 2020).

³⁰ FEC MUR 6357 (American Crossroads), Statement of Reasons of Commissioners McGahn, Petersen, and Hunter (February 22, 2012) (“Like MUR 5743 (Betty Sutton for Congress) and MUR 5996 (Tim Bee), the video footage of Rob Portman at issue was obtained without direct contact with the campaign; in this case, it was obtained from a publicly available Internet website”), at <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf>; Certification (3-3 vote, January 26, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312209.pdf>; MUR 5879, Certification (3-3 vote, April 15, 2020) at <https://www.fec.gov/files/legal/murs/5879/10044264855.pdf> (last accessed March 13, 2020).

To demonstrate the requisite coordination, the Complaint also seeks to tie the similarities between the Advertisements and Cunningham’s website, as well as the timing of the posting of Cunningham’s materials on its Flickr page to its use by VoteVets, the FEC’s Office of General Counsel has previously stated that *similarities and timing are irrelevant in the analysis of “republishing”*:

“[T]he alleged similarities of the two communications at issue and their rough temporal proximity do not give rise to a reasonable inference that any of the conduct standards were satisfied under the facts presented here, particularly where no other information indicating that the Respondents engaged in any of the activities outlined in the relevant conduct standards.”³¹

The Office of General Counsel’s analysis in MUR 6849 on the subject is also persuasive (of note, the FEC dismissed the allegations in this matter 6-0) – that similarities in theme, promotion, and messaging between candidates and third-parties spending to their benefit *do not in and of themselves give rise to “coordination”*:

Although there are similarities in the themes and words used in the Tiahrt campaign website and the radio advertisement, under the circumstances presented here, such similarity does not on its own sufficiently show that the content of the radio advertisement was coordinated.

Because the information on Tiahrt’s website was publicly available, KRG did not necessarily need to discuss its own advertisement with Tiahrt in order to include similar themes in its own advertisement and thus, absent other information, the similarities alone do not sufficiently establish that the conduct prong is met.³²

³¹ FEC MUR 6821 (Shaheen for Senate), First General Counsel’s Report at 8-9 (January 21, 2015), at <https://www.fec.gov/files/legal/murs/6821/15044382919.pdf> (last accessed March 13, 2020).

³² FEC MUR 6849 (Kansans for Tiahrt), First General Counsel’s Report at 7-8 (May 13, 2015) at <https://www.fec.gov/files/legal/murs/6849/15044385448.pdf>; Vote (December 23, 2015) at <https://www.fec.gov/files/legal/murs/6849/15044385470.pdf> (last accessed March 13, 2020).

See also, as cited in FEC MUR 6357 (American Crossroads), Statement of Reasons of Commissioners McGahn, Petersen, and Hunter (February 22, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf>:

- MUR 2272 (American Medical Association). Statement of Reasons, Commissioner Josefiak (“the regulations do not convert independent expenditures for those communications into contributions based upon a similarity or even identity of themes within the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or copying”), pages 216-240 (June 26, 1987), at <https://www.fec.gov/files/legal/murs/2272.pdf>;
- MUR 2766 (Auto Dealers and Drivers for Free Trade PAC), Statement of Reasons of Commissioner Josefiak (“A generalized observance of ‘similarity’ in advertising by a candidate’s

In this case, photos and footage of Cunningham were used to supplement VoteVets' communication regarding his effectiveness as a state legislator, as incidental background to the core message of the communication. As a military veteran running for Senate, it is "common sense," as Commissioners Mason, Smith, and Toner stated in MUR 5369, that VoteVets would anchor its Advertisements on Cunningham's military service.

These similarities do not in and of themselves give rise to a finding of "coordination," ***and the Complaint presents no evidence that VoteVets coordinated its Advertisements with Cunningham – likely because it does not exist.*** From this, the FEC should find that VoteVets did not "republish" campaign materials "prepared by" Cunningham or Cal for NC, his 2020 authorized committee.

c. Analysis of Conduct Standard

While the Advertisements do meet the content standards outlined in 11 C.F.R. § 109.21(c), they ***do not meet the conduct standard. As such, they are not "coordinated communication[s]," nor in-kind contributions.*** In order to find a "coordinated communication," Cunningham and VoteVets would have been required to engage in certain conduct:

- a) ***[Request or Suggestion]*** Cunningham would have needed to request or suggest that VoteVets engage in a communication meeting the content standards. No such request or suggestion exists, despite the Complaint's claims.
- b) ***[Material Involvement]*** Cunningham would have needed to have material involvement in the communication. VoteVets created its Advertisements without any involvement whatsoever from Cunningham. Despite this, there is an exception from this prong if the "information material to the creation, production, or distribution of the communication was obtained from a publicly available source."

campaign and an independent expenditure effort should not be the starting point for analysis or the primary basis for finding a violation, nor should it solely create an inference of coordination. The practical reality is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate"), pages 243-269 (June 13, 1990), [at https://www.fec.gov/files/legal/murs/2766.pdf](https://www.fec.gov/files/legal/murs/2766.pdf)

- MUR 5369 (Rhode Island Republican Party), Statement for the Record, Commissioners Mason, Smith, and Toner ("[it is] reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination") (August 15, 2003), [at https://www.fec.gov/files/legal/murs/5369/000001A1.pdf](https://www.fec.gov/files/legal/murs/5369/000001A1.pdf) (last accessed March 13, 2020).

- c) **[Substantial Discussion]** Cunningham and VoteVets would have needed to engage in substantial discussions regarding the communication. VoteVets created its Advertisements without involvement from Cunningham. Despite this, there is an exception from this prong if “information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”
- d) **[Common Vendor and Former Campaign Employees]** Use of a common vendor between VoteVets and Cunningham working on the communication, or a former employee of Cunningham worked on VoteVets’ communication. This is not the case.
- e) **[Republication of Candidate Materials]**, solely based on the conduct standards as above.³³ As described above, VoteVets did not “republish” campaign materials beyond the use of materials supporting the Advertisement’s broader message, without actual coordination with Cunningham.

Furthermore, VoteVets had no involvement whatsoever in the posting of photographs by Cunningham’s campaign onto its Flickr page.

None of these conduct standards are met in this situation – there was simply no coordination nor involvement by Cunningham in VoteVets’ Advertisements.

The Complaint’s discussion of copyright licenses on Cunningham’s Flickr page are unfounded – stating that “the licenses for all the photographs were listed as ‘All Rights Reserved,’ which would require VoteVets.Org Action Fund to request permission from the campaign to use the photographs.” ***This is simply untrue.*** VoteVets was ***not*** required to seek Cunningham’s permission to use the images in the Advertisements, and it did not. “All rights reserved” on a photo page is legally meaningless and essentially unenforceable.³⁴ VoteVets made use of an amount of materials from Cunningham’s publicly disseminated photos incidental to the remainder of its communication, as described above – ***without communication or coordination with Cunningham.***

Similar unfounded claims are made about VoteVets and Cunningham coordinating their “earned media messaging” since VoteVets “repeats the same sentences from Cunningham’s biography on his website.” This accusation does not have any legal basis, as it is permissible for

³³ 11 C.F.R. § 109.21(d).

³⁴ See, e.g. Copyright Alliance, “What does it mean when a creative work has “All Rights Reserved” attached with the work?” (“Failure to use this phrase has no legal implications as it is not required by copyright law”), available at https://copyrightalliance.org/ca_faq_post/what-does-it-mean-when-a-creative-work-has-all-rights-reserved-attached-with-the-work/ (last accessed March 13, 2020).

outside groups like VoteVets to reference publicly disseminated candidate materials (such as on Cunningham’s website).

The Complaint makes the same logical fallacy about online fundraising, purposefully conflating and manufacturing the facts for its own ends. Any tandem fundraising with candidates would have been conducted by a separate organization, VoteVets (separate from VoteVets Action Fund), a political committee registered with the FEC. VoteVets Action Fund has not engaged in joint fundraising with Cunningham. We blanketly deny this accusation.

Finally, the Complaint hangs its hat on the accusation that Cunningham “requested or suggested”, that VoteVets run the Advertisements. However, the Complaint’s reliance on the timing of Cunningham posting photos to its website (Flickr page) is misplaced. The FEC has previously found that a website posting cannot “request or suggest” particular activity from a viewer, making the Complaint’s assertions in this area hollow:

*The Commission has expressly stated, however, 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 campaign website, does not satisfy the conduct standards.*³⁵

VoteVets used materials “obtained from a publicly available source” – Cunningham’s website – to produce its Advertisements, and did not otherwise communicate or “coordinate” its Advertisements with Cunningham. The Complaint has presented no facts to the contrary, outside of mere speculation.

The Complaint has simply failed to state any additional information that would indicate that Cunningham and VoteVets “coordinated” the Advertisements – because it does not exist – and grasps at straws that “could” indicate coordination.

2. The Commission should dismiss the Complaint and close the file.

It has become commonplace for groups disseminating communications, including issue advocacy not otherwise regulated by the Act as in this case, to utilize photos and video footage that are made public by candidates on Flickr pages, YouTube videos, and even their own websites and social media accounts.³⁶

³⁵ See, e.g., FEC MUR 6821 (Shaheen for Senate), First General Counsel’s Report at 8-9 (January 21, 2015) citing Coordinated and Independent Expenditures, 68 Fed. Reg. 421,432 (Jan. 3, 2003) (explanation and justification); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification), at <https://www.fec.gov/files/legal/murs/6821/15044382919.pdf> (last accessed March 13, 2020).

³⁶ See, e.g., Roll Call, “What is McConnelling? How campaigns skirt coordination laws to help PACs make ads” (June 6, 2019), available at <https://www.rollcall.com/2019/06/06/what-is-mcconnelling-how-campaigns-skirt-coordination-laws-to-help-pacs-make-ads/> (last accessed March 3, 2020).

In the area of protected First Amendment speech, the Commission must avoid delineating the narrow lines between permissible and impermissible speech by way of the enforcement process. Thus, to the extent that the Commission determines that a communication's use of publicly available imagery that is sourced, in part, from online publicly available photographs posted online by a candidate, the Commission must provide guidance through the regulation process that would provide the regulated community with clear guidance on whether and under what circumstances such activity would be deemed to be impermissible.

At this time, those who wish to utilize such materials are at the mercy of both conflicting Commission precedent and no clear guidance as to its use.

As argued above, the complaint and supplement filed in this matter does not provide facts that would lead to a violation of the Act. A complaint is required to allege facts that give rise to a violation of the Act or Commission regulations.³⁷

As the Complaint does not do so – and only speculates and assumes wrongdoing on the part of VoteVets – we request that the Commission determine that there is no reason to believe that VoteVets committed any violation alleged in the Complaint, and close the file in this matter.

³⁷ See FEC MUR 7135 (Donald J. Trump for President, et. al.), Statement of Reasons of Commissions Hunter and Petersen at fn 31 (September 6, 2018, spacing for clarity), citing MURs 6296, 6056, 5467 (“We have on multiple occasions shown that the reason to believe standard found at 52 U.S.C. § 30109(a)(2) means more than merely a reason to suspect.

See, e.g., MUR 6296 (Buck for Colorado), Statement of Reasons of Vice-Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 7 (“[T]he Act's complaint requirements and limits on Commission investigative authority serve no purpose if the Commission proceeds anytime it can imagine a scenario under which a violation may have occurred.”).

MUR 5467 (Michael Moore), First Gen. Counsel's Rpt. at 5 (“Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the [Act] has occurred.”); see also FEC v. Machinists Non-Partisan Political League, 655 F.2d 380,388 (D.C. Cir. 1981) (“[M]ere 'official curiosity' will not suffice as the basis for FEC investigations”); id. at 387 (distinguishing the Commission from other administrative agencies that are “vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices the FEC has no such roving statutory functions”), available at https://eqs.fec.gov/eqsdocsMUR/7135_2.pdf (last accessed March 13, 2020).

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Reiff".

Neil Reiff

A handwritten signature in blue ink, appearing to read "David Mitrani".

David Mitrani

Counsel for VoteVets Action Fund

Attachment A







Script for "Stood Up" Advertisement

<https://www.youtube.com/watch?v=v18IXe4YtOw>

Visual	Audio
Open on young Cal Cunningham.	ANNCR: He was twenty-eight when it happened...
Simple super over black screen fades up. September 11, 2001	SFX: <i>9/11 chaos sounds.</i>
Cal in uniform. Cuts to shots of Iraq / Afghanistan.	ANNCR: After the towers came down, Cal Cunningham stepped up.
	He enlisted in the Army reserves...
Photo of Obama and Cal in uniform. Awarded the Bronze Star	Served in Iraq and Afghanistan where he was awarded the bronze star.
State house	He served us here too...
Cal as state senator	The progressive state senator who fought
Kids in classroom Cal Cunningham: Fought for smaller class sizes	for smaller class sizes...
Cal with kids Cal Cunningham: 20,000 North Carolina kids eligible for health coverage	and helped get health coverage for twenty thousand North Carolina kids
Cal with people	Cal Cunningham has never backed down from doing the right thing.
Split cal and U.S. Capitol Cal Cunningham is running for U.S. Senate End on Cal hero shot. VoteVets logo	And now he's running for U.S. Senate.

Attachment B

Source Sheet for "Stood Up" Advertisement

Spot Title: "Stood Up"						
#	Time	Visual	Visual Type	Description	Source	VoteVets Categorization
1	0:00		Still	Cunningham	Flickr - 2010 Cal for NC	2010 Campaign
2	:03		Video	9/11 street footage	YouTube - ABC 7 NY	Stock Footage
3	:05		Still	Cunningham in uniform	Flickr - 2020 Cal for NC	Biographical
4	:08		Still	Cunningham in uniform	Flickr - 2020 Cal for NC	Biographical
5	:09		Video	Combat footage	YouTube - G MP	Stock Footage
6	:12		Still	Cunningham with Obama	Flickr - 2020 Cal for NC	Biographical

7	:14		Video	NC State Capitol	License Footage	Stock Footage
8	:15		Still	Cunningham	Flickr - 2020 Cal for NC	Biographical
9	:17		Video	Teacher and students in class	Getty Images	Stock Footage
10	:20		Still	Cunningham with kids	Flickr - 2010 Cal for NC	2010 Campaign
11	:23		Still	Cunningham with people	Flickr - 2010 Cal for NC	2010 Campaign
12	:25		Still	Cunningham in training	Flickr - 2020 Cal for NC	Biographical
13	:27		Video	U.S. Capitol	Getty Images	Stock Footage
14	:27		Still	Cunningham with people	YouTube - 2020 Cal Cunningham	2020 Campaign

Attachment C

Script for "Answered the Call" Advertisement




https://www.youtube.com/watch?v=KGB_CBn-Qf8

Visual	Audio
Open on Cal in uniform overseas.	ANNCR: From tours of duty in Iraq and Afghanistan...
NC capital building	To the corridors of our Capitol here at home.
Card – Cal Cunningham Answered the Call to Serve	Cal Cunningham has always answered the call to serve.
Cal as a state Senator. Transition to... Cal Cunningham Took on Insurance Companies	As a progressive state Senator, he took on insurance companies denying life-saving treatments
Cal Cal Cunningham Stood Up for NC Seniors	Stood up for North Carolina seniors struggling with the high cost of prescription drugs
Kids Cal Cunningham Expanded Coverage for 20,000 NC Kids	And expanded health coverage for twenty thousand kids.
NOW ...Cut back to Cal..	...now Cal Cunningham is answering the call to serve once more.
Cal Cunningham Democrat for U.S. Senate Hero shot on Cal VoteVets logo Paid for by VoteVets.org Action Fund	He's running for the United States Senate.

Attachment D

Source Sheet for "Answered the Call" Advertisement

Spot Title: "Answered the Call"						
#	Time	Visual	Visual Type	Description	Source	VoteVets Categorization
1	0:00		Still	Cunningham in uniform	Flickr - 2020 Cal for NC	Biographical
2	:02		Still	Cunningham in uniform	Flickr - 2020 Cal for NC	Biographical
3	:03		Still	Interior of North Carolina State Capitol	Alamy	Stock Footage
4	:05		Video	Cunningham in diner	YouTube - 2020 Cal for NC	2020 Campaign
5	:09		Still	Cunningham with farmer	Flickr - 2020 Cal for NC	Biographical
6	:11		Still	Shot of Cunningham	Flickr - 2010 Cal for NC	2010 Campaign

 <p>7 :15</p>	Video	Cunningham speaking at event	YouTube - 2020 Cal for NC	2020 Campaign
 <p>8 :16</p>	Video	Cunningham speaking at event	YouTube - 2020 Cal for NC	2020 Campaign
 <p>9 :20</p>	Still	Cunningham with students	Flickr - 2020 Cal for NC	Biographical
 <p>10 :24</p>	Video	Cunningham with constituent	YouTube - 2020 Cal for NC	2020 Campaign
 <p>11 :26</p>	Video	Broll of Cunningham	YouTube - 2020 Cal for NC	2020 Campaign