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Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

Re: MUR 7681

Dear Mr. Jordan:

We write as counsel to Cal Cunningham and his principal campaign committee, Cal for NC (the “Campaign”) (together, “Respondents”) in response to the complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on January 21, 2020 (the “Complaint”), the supplement to the Complaint filed February 14, 2020 (the “Supplemental Complaint”),¹ and the second supplement to the Complaint filed on March 9, 2020 (“Supplement #2”) (together, the “Complaints”).

The Complaints falsely allege that Respondents coordinated with VoteVets.org Action Fund in connection with a number of television advertisements in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). The facts alleged to support this claim are that the advertisements include photographs and b-roll video clips which were also posted on the Campaign’s publicly available websites. As FACT is well aware, the Federal Election Commission (“FEC” or the “Commission”) has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. The Complaints also allege that fundraising activities of the Campaign and VoteVets, a federal political committee (hereinafter referred to as “VoteVets PAC”), provide evidence of coordination. However, nothing in the information provided by the Complaints regarding the online fundraising activity of the Campaign and VoteVets PAC provides any evidence whatsoever of illegal coordination under the Act.

As the Complaints do not allege any facts to demonstrate that the Campaign engaged in illegal coordination with VoteVets.org Action Fund or VoteVets PAC, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaints.

¹ The Supplemental Complaint does not allege any specific violation by Respondents, however we are including the facts alleged in the Supplemental Complaint in this response out of an abundance of caution.

FACTUAL BACKGROUND

Cal Cunningham is a candidate for U.S. Senate in North Carolina in 2020.² Cal for NC is his principal campaign committee.³ Cal for NC's website is www.calfornc.com.⁴ Cal for NC uses that website to communicate with the general public about Cal's background, his candidacy, his policy positions and more. Cal for NC also maintains a publicly available Flickr page at <https://www.flickr.com/photos/186140610@N06>. The Flickr page is also used by Cal for NC to communicate with the general public and currently has over 70,000 views.⁵ Cal for NC also operates a YouTube page with over 35,000 views, which it similarly uses to communicate with the public.⁶

VoteVets Action Fund, Inc. is a non-profit organization organized under Section 501(c)(4) of the Internal Revenue Code.⁷ VoteVets PAC is a separate multicandidate political committee that is registered with the Federal Election Commission.⁸ VoteVets PAC maintains both a hard money "contribution" account, which accepts and spends funds within federal contribution limits and source restrictions, and a soft money "non-contribution" account, which may accept and spend funds raised in unlimited amounts from individuals, corporations, labor organizations, and/or other political committees.⁹ As stated on VoteVets.org, "VoteVets Political Action and Vote Vets Action Fund are separate organizations."¹⁰

Lauren Passalacqua is the Communications Director for the DSCC, the national Democratic political party committee dedicated to electing Democrats to the U.S. Senate.¹¹ She maintains a public Twitter account with over three thousand followers.¹² Her tweets frequently relate to U.S. Senate candidates and campaigns, including Cal Cunningham and the election for U.S. Senate in North Carolina.¹³

On December 27, 2019, the Campaign sent a fundraising email to its campaign list that provided a link where donors could split a contribution among the Campaign, VoteVets PAC, and three other

² Cal Cunningham, FEC Form 2 Statement of Candidacy (Feb. 20, 2020) <https://docquery.fec.gov/pdf/354/202002209186577354/202002209186577354.pdf>.

³ Cal for NC, FEC Form 1 Statement of Organization (Feb. 20, 2020) <https://docquery.fec.gov/pdf/542/202002209186576542/202002209186576542.pdf>.

⁴ *Id.*

⁵ Flickr, Cal for NC, "About," <https://www.flickr.com/photos/186140610@N06/>.

⁶ Cal Cunningham, "About," YouTube, <https://www.youtube.com/channel/UCr2Loh98VkJAhFp6gFnO4dQ/about>.

⁷ VoteVets Action Fund, Inc., 2017 IRS Form 990 (filed May 15, 2019) https://apps.irs.gov/pub/epostcard/cor/510596352_201806_99O_2019073016530792.pdf; VoteVets.org, <https://www.votevets.org/about> (last visited March 10, 2020).

⁸ VoteVets, FEC Form 1 Statement of Organization (December 6, 2019)

<https://docquery.fec.gov/pdf/525/201912069166160525/201912069166160525.pdf>;

⁹ VoteVets, FEC Form 99 (filed July 5, 2016)

<https://docquery.fec.gov/pdf/244/201607059020114244/201607059020114244.pdf>.

¹⁰ No entity entitled "VoteVets Political Action" appears to exist; this appears to be a reference to VoteVets PAC.

¹¹ Lauren Passalacqua (@laurenvpass), Twitter, <https://twitter.com/laurenvpass>; <https://docquery.fec.gov/pdf/029/202003039203741029/202003039203741029.pdf>.

¹² Lauren Passalacqua (@laurenvpass), Twitter, <https://twitter.com/laurenvpass>.

¹³ Supplement #2 at 2-3; Lauren Passalacqua (@laurenvpass), Twitter, <https://twitter.com/laurenvpass>.

Democratic candidates for U.S. Senate. VoteVets PAC also sent an email to its fundraising lists on December 27, which provided a link to an ActBlue page set up by VoteVets PAC that allowed donors to split a contribution among VoteVets PAC and the same four campaigns, including Cal for NC.¹⁴ The Compliant incorrectly states that VoteVets.org Action Fund took part in these fundraising efforts, however the VoteVets PAC fundraising page clearly states that contributions will be divided between VoteVets PAC and the four candidates.¹⁵

In December 2019 and January 2020, VoteVets.org Action Fund ran two advertisements featuring Cal Cunningham on broadcast television. These advertisements used the disclaimer “Paid for by VoteVets.org Action Fund,” indicating they were paid for by VoteVets’ 501(c)(4), and not VoteVets PAC:

- In December of 2019, VoteVets.org Action Fund began running “Cal Cunningham: 9/11.”¹⁶ The advertisement uses certain photographs which are also available on the Campaign’s publicly available Flickr account.¹⁷
- In January of 2020, VoteVets.org Action Fund began running “Answered the Call.”¹⁸ This advertisement uses some of the same photographs used in the first advertisement, as well as some brief clips from a video that is available on the Campaign’s public YouTube page.¹⁹

In February 2020, VoteVets PAC distributed two advertisements featuring Cal Cunningham on broadcast television. Although FACT’s Supplement #2 alleges these advertisements were paid for by VoteVets.org Action Fund,²⁰ according to the disclaimer on these two advertisements, both were paid for by VoteVets PAC, not VoteVets.org Action Fund:

- On February 7, 2020, VoteVets PAC distributed an advertisement entitled “Won’t Let That Happen.”²¹ This advertisement uses photographs available on the Campaign’s Flickr Page and brief clips from the video that is available on the Campaign’s public YouTube page.²²

¹⁴ Complaint at 4-5.

¹⁵ *Id.*; ActBlue, “Stand with Mark Kelly, Amy McGrath, MJ Hegar, Cal Cunningham and VoteVets today,” <https://secure.actblue.com/donate/ww-em-dec-senate-split>.

¹⁶ iSpot.tv, VoteVets TV Commercial, “Cal Cunningham: 9/11,” <https://www.ispot.tv/ad/ZS4L/votevets-cal-cunningham-9-11>; Steven Shepard, Morning Score, Politico (Dec. 23, 2019) <https://www.politico.com/newsletters/morning-score/2019/12/23/the-year-in-review-783961>.

¹⁷ See Complaint, Exhibit A; Flickr, Cal for NC, <https://www.flickr.com/photos/186140610@N06/with/49250383247/>

¹⁸ Votevets, “Cal Cunningham | Answered the Call | VoteVets NC Ad” YouTube (Jan. 14, 2020)

https://www.youtube.com/watch?v=KGB_CBn-Qf8; Zach Montellaro, “Cunningham Gets Outside Boost in North Carolina,” Politico (Jan. 21, 2020) <https://www.politico.com/newsletters/morning-score/2020/01/21/cunningham-gets-outside-boost-in-north-carolina-784529>.

¹⁹ Cal for NC, “Cal traveling across North Carolina,” YouTube (Dec. 20, 2019) <https://www.youtube.com/watch?v=9tuigjTKQg0>.

²⁰ Supplement #2 at 3-4.

²¹ VoteVets, “Won’t Let That Happen,” YouTube (Feb. 7, 2020), <https://www.youtube.com/watch?v=Jv7L-6bN7yU>.

²² Supplement #2, Exhibit 4.

- On February 18, 2020, VoteVets PAC distributed an advertisement entitled “Fought.”²³ This advertisement use one photograph available on the Campaign’s Flickr Page and a brief clip from the video that is available on the Campaign’s public YouTube page.²⁴

LEGAL ANALYSIS

The Complaints allege that Respondents solicited and accepted illegal in-kind contributions by coordinating with VoteVets.org Action Fund in connection with the airing of paid television advertisements featuring Cal Cunningham.²⁵ However, the Complaints do not provide any facts that, even if taken as true, establish that any such illegal coordination occurred. Therefore, there is no basis for the Commission to find reason to believe that Respondents have violated the Act.

A communication is a “coordinated communication,” and thus an in-kind contribution to the benefitting candidate under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the coordinated communication regulation: (1) the payment prong, (2) the content prong and (2) the conduct prong.²⁶ The advertisements in question met the payment prong because they were paid for by an entity other than the Campaign, VoteVets.org Action Fund and VoteVets PAC. They also met the content prong because they were “public communications” which referred to Cal Cunningham and were aired within Cunningham’s jurisdiction within 90 days of his primary election.²⁷ However, the Complaints fail to allege any facts that demonstrate that the conduct prong was satisfied in connection with the referenced advertisements. Thus, the Complaints fail to allege any facts which, if true, would constitute a violation of the Act or FEC regulations and must be dismissed.²⁸

A. The Complaints Allege No Facts to Support the Claim that the Advertisements meet the Conduct Standard.

The Complaints allege that the advertisements meet the conduct standard because they were “created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee.”²⁹ However, they allege no facts that indicate any such request or suggestion occurred within the meaning of Commission regulations.

1. Posting Campaign Information on a Public Website does not meet the Conduct Standard.

The majority of the Complaints’ coordination allegations rely on the fact that the Campaign, like most political campaigns, uploaded campaign photographs and video onto a publicly available

²³ VoteVets, “Fought,” YouTube (Feb. 18, 2020) <https://www.youtube.com/watch?v=qpZL1GpXiWU>.

²⁴ Supplement #2, Exhibit 4.

²⁵ Complaint at 8; Supplemental Complaint at 1.

²⁶ 11 CFR § 109.21.

²⁷ See *id.* § 109.21(c)(2)(i).

²⁸ See *id.* § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

²⁹ Complaint at 10; *see also* Supplement #2 at 4.

website.³⁰ However, the Commission’s regulations, and the Commission’s interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign’s publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a “request or suggestion” that a third party disseminate a communication on its behalf.³¹ In the accompanying Explanation and Justification, the Commission clarified that “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”³² A request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.”³³

The Commission has re-affirmed this basic principle repeatedly through the enforcement process.³⁴ For example, in MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when Senate Majority PAC began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”³⁵ Further, in MUR 7124, the Commission dismissed a complaint filed by FACT against Katie McGinty, a candidate for U.S. Senate. The complaint alleged that coordinated communications occurred when Women Vote! and Majority Forward paid to air three separate television advertisements supporting McGinty that contained themes similar to those posted on McGinty’s publicly available campaign site. The Commission voted 5-0 to dismiss the complaint and made clear once again that “the ‘request or suggestion’ ‘conduct’ standard refers to requests or suggestions ‘made to a select audience, but not

³⁰ See Complaint at 2.

³¹ 11 C.F.R. § 109.21(d)(1).

³² Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

³³ Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

³⁴ See, e.g., MUR 7136 (Strickland for Senate); MUR 6603 (Ben Chandler for Congress); MUR 6357 (American Crossroads).

³⁵ See MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

those offered to the public generally” and therefore a request that is posted on a web page that is available to the general public does not trigger the request or suggestion conduct standard.³⁶

In MUR 6902, the Commission faced equally speculative claims that coordination occurred based on similarity in the use of campaign materials between a campaign and an outside group.³⁷ There, the complainant alleged that an outside group used materials posted by Al Franken’s campaign to produce a communication, and that the timing of the materials being posted, and the similarities in the content of the ads, indicated that coordination had occurred.³⁸ The Commission found no reason to believe any violation occurred in this instance, and clarified that the allegations of coordination that are “wholly speculative based primarily on the proximity of time between placement of the footage online and airing of the ads, as well as thematic similarities of the communications” cannot sustain an allegation of coordination.³⁹

FACT’s allegations here similarly rely on information posted via prominent links on the Campaign’s publicly available Flickr and YouTube page, both of which are commonly visited by members of the public, as evidenced by the tens of thousands of views on each page. None of the content posted by the Campaign could possibly be construed as a request or suggestion for VoteVets.org Action Fund to make an expenditure in support of the Campaign. The photographs and video were not accompanied by any text or messaging that could indicate a desire for any outside group to engage in specific advertising on the Campaign’s behalf. However, even if the posting of these photographs and video could be interpreted as a request or suggestion to engage in a particular communication, because they were posted on a public website and were not sent to a select audience, their posting would not constitute “request or suggestion,” and would not be evidence of coordination under 11 CFR § 109.21(d)(1).

For the same reasons, the DSCC communications director’s public comments related to Cal Cunningham’s election referenced in the Complaints cannot constitute a request or suggestion for a communication to be made. Ms. Passalacqua commented on her public Twitter page that she believed North Carolina voters need to “see and hear more” about Cal Cunningham - a public posting available to thousands of people on the internet. Further, Supplement #2 does not allege that the Campaign was in any way involved in Ms. Passalacqua’s statements. Accordingly, the allegations in the Complaints cannot be a basis to find that the advertisements at issue satisfy the conduct prong.

2. The Remaining Facts Alleged do not Support a Finding that the Conduct Standard was Met

Perhaps because the complainant knows that the posting of photos and video on a public website is insufficient to establish coordination, the Complaint alleges without providing any evidence that private communications must have occurred because the photographs were posted with an “All

³⁶ MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

³⁷ See MUR 6902 (Al Franken for Senate 2014), General Counsel’s Report at 12.

³⁸ *Id.*

³⁹ See MUR 6902 (Al Franken for Senate 2014), Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

Rights Reserved” license.⁴⁰ The claim that the Cunningham campaign must have granted VoteVets.org Action Fund permission to use the photographs is utterly speculative. The Complaint offers no evidence that VoteVets.org Action Fund requested, or that the Campaign granted, permission before using the photographs, or that any private communications related to the advertisements or the campaign occurred. In fact, no such permission was sought or granted, and no such communications occurred.

Finally, the Complaint alleges that the existence of contribution pages allowing donors to split contributions between VoteVets PAC and multiple candidates for U.S. Senate, including the Campaign, as well as emails by both entities directing donors to those pages, are evidence of coordination. However, these fundraising activities are wholly unrelated to the subsequent television ads aired by VoteVets.org Action Fund and VoteVets PAC. None of the facts in the complaint support an allegation that this activity met the conduct prong of the coordinated communication regulation as relates to the advertisements at issue.⁴¹ The complaint does not allege, and the facts do not suggest, that the Campaign, in the process of setting up its fundraising page or sending a fundraising email, engaged in any activity that would meet the conduct prong, and thus these allegations cannot support finding reason to believe that illegal coordination occurred.

B. The Complaints Allege No Facts That Establish the Advertisements Impermissibly Republished Campaign Materials

The Complaint appears to misunderstand - or willfully ignore - the FEC’s precedent regarding the republication of candidate campaign materials. FACT’s claim that “[a]ny republication of photographs or video prepared by a campaign is a contribution, even if the campaign materials are only a small part of a larger advertisement” is simply incorrect as a matter of law.⁴² The regulation itself includes an exception to the republication rule in instances where “the campaign material used consists of a brief quote of materials . . .”⁴³ And the Commissioners have repeatedly stated that “[t]he Act’s republication provision is designed to capture situations where third parties, in essence, subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.” It is not intended to address situations where Respondents “did not repeat verbatim the [candidate’s] message” but instead create their own message, using publicly available materials.⁴⁴ Here, VoteVets.org Action Fund and VoteVets PAC used publicly available materials and biographical information to create its own advertisements, with their own messages.

⁴⁰ Complaint at 7.

⁴¹ In addition, because they do not meet the definition of a “public communication” or “electioneering communication” under Commission regulations, neither the emails or the fundraising page can themselves constitute coordinated communications under the Act. *See* 11 CFR §§ 100.26; 100.29.

⁴² Supplement #2 at 4.

⁴³ 11 CFR § 109.23(b)(4).

⁴⁴ FEC Matter Under Review 6603, Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman (Dec. 17, 2015) *citing* FEC Matter Under Review 6357.

Even if VoteVets.org Action Fund or VoteVets PAC had republished campaign materials within the scope of the republication regulation at 11 CFR § 109.23, the Campaign would not have received or accepted an in-kind contribution. As explained by 11 C.F.R. § 109.23(a), “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.”⁴⁵

As discussed above, the Complaint does not allege any facts that, even if taken as true, establish that the Campaign coordinated with VoteVets.org Action Fund or VoteVets PAC on the advertisements at issue. Therefore, the complaint does not state facts which support a finding that the Campaign received an in-kind contribution in the form of the dissemination, distribution, or republication of candidate campaign materials.

CONCLUSION

The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation.⁴⁶ In turn, the Commission may find “reason to believe” only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of the Act.⁴⁷ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.⁴⁸ The Complaint has not alleged facts that provide a sufficient basis for the Commission to find “reason to believe” that Respondents have violated the Act or Commission regulations. Accordingly, the Commission must reject the Complaint’s request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,



Marc E. Elias
 Jacquelyn K. Lopez
 Elizabeth P. Poston
 Counsel to Respondents

⁴⁵ 11 CFR § 109.23(a).

⁴⁶ 52 U.S.C. § 30109(a)(2).

⁴⁷ See 11 CFR § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

⁴⁸ *Id.*