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April 17, 2020

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, D.C. 20463

Re: MUR 7681, Supplement #2

Ms. Dennis:

The undersigned serves as counsel to:

- VoteVets Action Fund (“**VoteVets Action Fund**”), a 501(c)(4) social welfare organization; and
- VoteVets, a “PAC with Non-Contribution Account” registered with the Commission, C00418897 (“**VoteVets PAC**”, collectively for the purposes of this response, “**VoteVets**”).

This letter responds on behalf of VoteVets to the Commission’s notification of a complaint from the Foundation for Accountability and Civic Trust (the “**Foundation**”, the “**Complaint**”) alleging that VoteVets violated the Federal Election Campaign Act (the “**Act**”) and Commission regulations.

The Foundation filed the original Complaint against VoteVets Action Fund, a 501(c)(4) social welfare organization related to VoteVets PAC in January of 2020, then a supplement in February again solely regarding VoteVets Action Fund. The Foundation’s second supplement is in regards to VoteVets PAC (the “**Supplement**”) – *even though the Foundation mistakenly attributes those actions to VoteVets Action Fund in the Supplement.*

This response will solely respond to the second supplement filed by the Foundation in March of 2020 against VoteVets PAC (but not VoteVets Action Fund, as the advertisements described in the Supplement were *only* disseminated by VoteVets PAC). While this response is separate, we incorporate the legal analysis from our original response on behalf of VoteVets Action Fund filed on March 13, 2020, addressing the Complaint and its first supplement.

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

The first advertisement is entitled “Won’t Let that Happen.”² The second advertisement is entitled “Fought” (collectively, the “PAC Advertisements”).³

The Supplement attempts to make two separate arguments –that the DSCC “requested or suggested” that VoteVets PAC engage in the PAC Advertisements, and that the PAC Advertisements “republished” Cunningham’s campaign materials.

Neither argument holds water in this case. Regarding “request or suggestion,” Commission precedent is clear that a public request or suggestion *cannot* meet the “conduct standard” in 11 C.F.R. § 109.21. As a sophisticated political organization with over a decade of work in politics, VoteVets simply did not need a campaign or a national party committee to tell it how to conduct its advertising – VoteVets PAC, using its own expertise, messaging, and targeting, created the PAC Advertisements.

VoteVets PAC also did not “republish campaign materials” under the Commission’s extensive precedent on the issue – as the PAC Advertisements’ use is equivalent to others where the Commission did not find reason to believe. *Most importantly, VoteVets did not communicate with Cunningham in any way regarding the PAC Advertisements.*

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

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

The PAC Advertisements do not meet the FEC’s conduct standard for “coordination communications,” despite the Supplement’s attempts to jury-rig the facts into potential violations. The PAC Advertisements are “public communications,” as they were disseminated on television. VoteVets PAC is “a person other than that candidate, authorized committee, or political party committee” under 11 C.F.R. § 109.21(a)(1). The PAC Advertisements meet the

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

² VoteVets, “Won’t Let that Happen” (February 7, 2020), [available at https://www.youtube.com/watch?v=Jv7L-6bN7yU](https://www.youtube.com/watch?v=Jv7L-6bN7yU) (last accessed April 17, 2020).

³ VoteVets, “Fought” (February 18, 2020), [at https://gmmmb.app.box.com/s/a2ifvc91yea5w8x26pbjmh0vcigxabc64/file/618730516760?sb=/details](https://gmmmb.app.box.com/s/a2ifvc91yea5w8x26pbjmh0vcigxabc64/file/618730516760?sb=/details) (last accessed April 17, 2020).

content standard. *However*, the PAC Advertisements *do not meet* the FEC’s conduct standard, as described extensively below.

a. “Request or Suggestion”

The Supplement’s core allegation is based on tweets sent by the DSCC’s Communications Director, which it claims is a “request or suggestion” for VoteVets to engage in independent expenditures:

February 5, 2020: *As North Carolinians see more and more ads leading up to the March 3 primary, it is critical that voters statewide immediately see and hear much more about Cal Cunningham.*⁴

February 13, 2020: *In the immediate future, it is important voters see and hear more about what they are currently hearing about Cal Cunningham.*⁵

There is clear Commission precedent to the contrary. The FEC has previously found that a website posting cannot “request or suggest” particular activity from a viewer, making the Supplement’s assertions in this area hollow. The Office of General Counsel stated in its analysis of MUR 6821 that:

*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.*⁶

This case precisely matches the Office of General Counsel’s analysis – the intent of the DSCC’s general request to the public is irrelevant. *VoteVets did not communicate with Cunningham in any way regarding the tweet, and was in no way involved in the DSCC’s tweeting.*

⁴ Twitter, @laurenvpass (February 5, 2020), available at <https://twitter.com/laurenvpass/status/1225236095727734784> (last accessed April 17, 2020).

⁵ Twitter, @laurenvpass (February 13, 2020), available at <https://twitter.com/laurenvpass/status/1228066247901880320> (last accessed April 17, 2020).

⁶ 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 April 17, 2020).

Acting independently – without any discussion or consultation with the campaign or the DSCC, devising its own messages and selecting its own audiences – VoteVets PAC created the PAC Advertisements to support Cunningham. The DSCC’s tweet did not influence VoteVets’ in any way, including their decision to run the Advertisement, or the timing, content or targeting of the Advertisement.

Any similarities in messaging or timing between the DSCC’s tweets and VoteVets’ PAC Advertisements are also irrelevant. The Office of General Counsel’s analysis in MUR 6849 on the subject is 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 Tiahr 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 Tiahr’s website was publicly available, KRG did not necessarily need to discuss its own advertisement with Tiahr 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.”⁷

⁷ FEC MUR 6849 (Kansans for Tiahr), 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>.

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 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>;
- 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

The Office of General Counsel found the same in MUR 6821:

“[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.”⁸

VoteVets PAC – a sophisticated political organization which has been in existence for well over a decade – used its independent expertise and judgment to produce its PAC Advertisements, and did not otherwise communicate or “coordinate” the PAC Advertisements with Cunningham. Any similarities between the PAC Advertisements and websites created by Cunningham do not in and of themselves give rise to a finding of “coordination,” ***and the Supplement presents no evidence that VoteVets coordinated its Advertisements with Cunningham – likely because it does not exist.***

While there is no specific exemption for a public “request or suggestion” as there are in other parts of the Commission’s coordination rule, Commission precedent and the Office of General Counsel’s opinions clearly indicate that a public “request or suggestion” ***does not*** meet the conduct standard. As such, the PAC Advertisements are ***not*** “coordinated communications,” and are ***not*** in-kind contributions to Cunningham.

b. Republication of Campaign Materials

The PAC Advertisements also do not “republish” Cunningham’s campaign materials. While the PAC Advertisements make use of materials that Cunningham’s campaign has publicly disseminated, they do so in a manner consistent with FEC precedent – only using brief segments of materials from the campaign’s website. Most importantly, as above, ***VoteVets did not communicate with Cunningham in any way regarding the PAC Advertisements.***

“Republication of candidate materials” is a legal term of art that the Commission has opined on in multiple different situations.⁹ While the Commission has not set out one test as to

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> (last accessed April 17, 2020).

The Supplement’s reliance on MUR 6357 continues to be misplaced given the Republican Commissioners’ strong Statement of Reasons running contrary to their argument.

⁸ 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 April 17, 2020).

⁹ 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:

the extent to which a third-party *can* “republish” campaign materials, recent enforcement actions indicate that there is not a consensus on the Commission on whether communications containing 50 percent candidate materials or less (based on time and space) are “republishing”.¹⁰

VoteVets’ PAC Advertisements are safety within circumstances where the Commission has *not* found “republishing” or a “coordinated communication,” using *at most* 13 seconds of campaign materials even under the most restrictive reading of the “republishing” rule.¹¹ This situation precisely matches the facts of MUR 6603, where the FEC did not find reason to believe on a communication using *13 seconds of campaign materials in a 30-second advertisement*.¹²

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- 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>;
 - 6535 (Restore Our Future) (an independent expenditure committee was fined \$50,000 for republishing *nearly 100%* of 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>, Vote (November 16, 2015) at <https://www.fec.gov/files/legal/murs/6535/15044382269.pdf> (last accessed April 17, 2020).

¹⁰ See Footnote 9, above.

¹¹ As noted in VoteVets’ original response, biographical photos or materials created *before* a person’s current federal campaign *could not* be considered “campaign materials” for the purposes of “republishing,” as the content standard requires republication of “campaign materials *prepared by* a candidate or the candidate’s authorized committee.” 11 C.F.R. §§ 109.21(c)(1) (content standard, emphasis added), (d)(6) (conduct standard); 109.23(a).

¹² FEC MUR 6603 (Ben Chandler for Congress) 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> (last accessed April 17, 2020).

VoteVets also did not communicate with Cunningham in any way regarding the PAC Advertisements. While the Supplement continues to cite MUR 6357 (American Crossroads) for its own purposes – it conveniently disregards that the Commission split 3-3 on this MUR – 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.¹³

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

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

As argued above, the Supplement 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.¹⁴

¹³ 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> (last accessed April 17, 2020).

¹⁴ 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 April 17, 2020).

As the Supplement does not do so – and only speculates and assumes wrongdoing on the part of VoteVets (and mixes *which* entity actually disseminated the communications discussed in the Supplement) – we request that the Commission determine that there is no reason to believe that VoteVets committed any violation alleged in the Supplement, and close the file in this matter.

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 (PAC) and
VoteVets Action Fund