

1 **FEDERAL ELECTION COMMISSION**

2  
3 **FIRST GENERAL COUNSEL'S REPORT**

4  
5 **MUR: 7681**

6 DATE COMPLAINT FILED: 1/21/2020

7 DATE SUPPLEMENTS FILED: 2/14/2020; 3/09/2020

8 DATE OF NOTIFICATIONS: 1/22/2020; 2/14/2020;  
9 3/13/2020; 7/17/2020

10 LAST RESPONSE RECEIVED: 4/20/2020

11 DATE ACTIVATED: 4/29/2020

12  
13 EXPIRATION OF SOL: 12/24/2024 – 2/18/2025

14 ELECTION CYCLE: 2020

15  
16 **COMPLAINANT:**

Foundation for Accountability and Civic Trust

17  
18 **RESPONDENTS:**

VoteVets and Rick Hegdahl in his official capacity as  
19 treasurer

VoteVets Action Fund

20 Cal for NC and Steve Mele in his official capacity as  
21 treasurer

22 Cal Cunningham

23  
24  
25 **MUR: 7715**

26 DATE COMPLAINT FILED: 3/09/2020

27 DATE OF NOTIFICATIONS: 3/13/2020

28 LAST RESPONSE RECEIVED: 4/15/2020

29 DATE ACTIVATED: 4/29/2020

30  
31 EXPIRATION OF SOL: 2/03/2025 – 2/07/2025

32 ELECTION CYCLE: 2020

33  
34 **COMPLAINANT:**

Foundation for Accountability and Civic Trust

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36 **RESPONDENTS:**

VoteVets and Rick Hegdahl in his official capacity as  
37 treasurer

38 MJ for Texas and Adam Reiser in his official capacity  
39 as treasurer

40 Mary Jennings Hegar

41  
42 **RELEVANT STATUTES  
43 AND REGULATIONS:**

52 U.S.C. § 30104(b)(3)

52 U.S.C. § 30116(a), (f)

11 C.F.R. § 104.3

11 C.F.R. § 109.21

44  
45  
46 11 C.F.R. § 109.23

1 11 C.F.R. § 110.1(b)(1)  
2 11 C.F.R. § 110.2(b)(1)  
3 11 C.F.R. § 110.9  
4

5 **INTERNAL REPORTS CHECKED:** Disclosure Reports  
6

7 **FEDERAL AGENCIES CHECKED:** None  
8

9 **I. INTRODUCTION**

10 The Complaints allege that VoteVets Action Fund, a 501(c)(4) non-profit corporation,  
11 and VoteVets, a multicandidate, hybrid political action committee (“VoteVets PAC”), made  
12 prohibited in-kind contributions to Cal for NC, the principal campaign committee of Cal  
13 Cunningham, and MJ for Texas, the principal campaign committee of Mary Jennings Hegar, by  
14 paying to distribute television advertisements that republished campaign materials, in violation  
15 of the Federal Election Campaign Act of 1971, as amended (the “Act”). Moreover, the  
16 Complaints allege that Respondent candidates and their committees coordinated with VoteVets  
17 Action Fund and VoteVets PAC in connection with the television ads and thus accepted the  
18 prohibited in-kind contributions.

19 Respondents deny the allegations. VoteVets Action Fund and VoteVets PAC both  
20 acknowledge incorporating video and photographs obtained from Cunningham’s and Hegar’s  
21 YouTube and Flickr pages into their ads. However, they contend that the video and photographs  
22 comprised only portions of the ads and that the messaging was their own, and therefore did not  
23 constitute “republication.” They further argue that photographs created prior to the 2020 election  
24 used in the ads were not “campaign materials.” VoteVets Action Fund and VoteVets PAC also  
25 contend that they did not coordinate with the candidates or their committees. Cunningham and  
26 Cal for NC argue that the ads do not satisfy the definition of republication and that the

1 MUR 7681 Complaint fails to allege facts suggesting coordination. Hegar and MJ for Senate  
2 similarly argue that the MUR 7715 Complaint fails to allege facts suggesting coordination.

3 As discussed below, we recommend that the Commission find reason to believe that  
4 VoteVets Action Fund and VoteVets PAC impermissibly republished campaign materials and  
5 therefore violated 52 U.S.C. § 30116(a) and 11 C.F.R. §§ 110.1(b)(1), 110.2(b)(1) by making  
6 excessive in-kind contributions, and that VoteVets PAC violated 52 U.S.C. § 30104(b) and  
7 11 C.F.R. § 104.3(b) by failing to report the in-kind contributions. In addition, we recommend  
8 that the Commission enter into pre-probable cause conciliation with them. Finally, we  
9 recommend that the Commission dismiss the allegations that Cunningham, Cal for NC, Hegar,  
10 and MJ for Texas violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting  
11 the excessive in-kind contributions, and that Cal for NC and MJ for Texas violated 52 U.S.C.  
12 § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report the in-kind contributions.

## 13 **II. FACTUAL BACKGROUND**

14 VoteVets Action Fund is a 501(c)(4) corporation.<sup>1</sup> VoteVets PAC is a multicandidate,  
15 hybrid political committee.<sup>2</sup> Cal Cunningham is a 2020 candidate for U.S. Senate in North  
16 Carolina, and Cal for NC and Steve Mele in his official capacity as treasurer is his principal  
17 campaign committee.<sup>3</sup> Mary Jennings Hegar is a 2020 candidate for U.S. Senate in Texas, and

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<sup>1</sup> MUR 7681 VoteVets Action Fund Resp. at 1 (Mar. 13, 2020) (“MUR 7681 VoteVets Resp.”).

<sup>2</sup> MUR 7681 VoteVets Action Fund & VoteVets PAC Supp. Resp. at 1 (Apr. 20, 2020) (“MUR 7681 VoteVets Supp. Resp.”) (submitted jointly, incorporating initial, March 13, 2020, response); VoteVets, Statement of Org. at 2 (Dec. 6, 2019). As a hybrid PAC, VoteVets PAC maintains a non-contribution account, from which it can deposit and withdraw funds raised in unlimited amounts from individuals, corporations, labor organizations, and other political committees. VoteVets Misc. Text (Form 99) (July 5, 2016); *see* Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.

<sup>3</sup> Cal Cunningham, Amended Statement of Candidacy (July 15, 2020); Cal for NC, Amended Statement of Org. (July 15, 2020).

1 MJ for Texas and Adam Reiser in his official capacity as treasurer is her principal campaign  
2 committee.<sup>4</sup>

3 **A. Television Ads Featuring Cunningham**

4 1. VoteVets Action Fund

5 On or about December 25, 2019, VoteVets Action Fund began running a television ad  
6 titled “Stood Up.”<sup>5</sup> The ad used five photographs of Cunningham from Cal for NC’s Flickr page  
7 (each depicting Cunningham prior to his candidacy, including four in uniform and one from  
8 college); a photograph of Cunningham from a still shot of a video on Cal for NC’s YouTube  
9 page; and three photographs of Cunningham from the Flickr page of his 2010 Senate campaign.<sup>6</sup>  
10 These sources comprise approximately 22 seconds, or 73%, of the 30-second ad.<sup>7</sup>

11 On or about January 14, 2020, VoteVets Action Fund began running a second television  
12 ad in North Carolina, titled “Answered the Call.”<sup>8</sup> The ad used four photographs of Cunningham  
13 from Cal for NC’s Flickr page (including one in uniform prior to his candidacy); five video clips  
14 depicting Cunningham from a “B-roll” video on Cal for NC’s YouTube page; and a headshot of

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<sup>4</sup> Mary Jennings Hegar, Amended Statement of Candidacy (Oct. 3, 2020); MJ for Texas, Amended Statement of Org. (Oct. 3, 2020).

<sup>5</sup> MUR 7681 Compl. at 2 (Jan. 21, 2020); *see* MUR 7681 VoteVets Resp. at 4; *see also* VoteVets.org Action Fund, *Cal Cunningham: Stood Up*, YOUTUBE (Dec. 24, 2019), <https://www.youtube.com/watch?v=vI8IXe4YtOw>. We note that the ad is alternatively titled “Cal Cunningham: 9/11,” but is referred to in this Report as “Stood Up.”

<sup>6</sup> Exhibit A at 1 (listing “Stood Up” visuals); MUR 7681 VoteVets Resp., Attach. B (same). Cunningham’s principal campaign committee in 2010 was Cunningham for U.S. Senate. Cunningham for U.S. Senate, Amended Statement of Org. (Apr. 21, 2010); Cunningham for U.S. Senate, Termination Report (Oct. 1, 2018). The 2010 committee’s Flickr page is still publicly available at <https://www.flickr.com/photos/calforcn/>. The page is titled “Cal for NC” despite being created in connection with the Cunningham’s 2010 campaign. It is unclear who, if anyone, currently controls the page.

<sup>7</sup> Our calculation differs slightly from the amounts listed in the Response. *Compare* Exhibit A at 1 (22 seconds or 73%), *with* MUR 7681 VoteVets Resp., Attach. B (21 seconds or 70%).

<sup>8</sup> MUR 7681 Supp. Compl. at 1-2 (Feb. 14, 2020); *see* MUR 7681 VoteVets Resp. at 4; *see also* VoteVets.org Action Fund, *Answered the Call*, YOUTUBE (Jan. 14, 2020), [https://www.youtube.com/watch?v=KGB\\_CBn-Qf8](https://www.youtube.com/watch?v=KGB_CBn-Qf8).

1 Cunningham from the Flickr page of his 2010 Senate campaign.<sup>9</sup> These sources comprise  
 2 approximately 25 seconds, or 83%, of the 30-second ad.<sup>10</sup>

3 VoteVets Action Fund reportedly spent at least \$2 million and as much as \$3.3 million to  
 4 air “Stood Up” and “Answered the Call.”<sup>11</sup> VoteVets Action Fund, in its Response, does not  
 5 address the precise spending, but also does not dispute these figures.

## 6 2. VoteVets PAC

7 On June 19, 2019, two days after Cunningham announced his candidacy, VoteVets PAC  
 8 issued a press release endorsing Cunningham, which included two sentences on Cunningham’s  
 9 background nearly identical to his biography on the Cal for NC website.<sup>12</sup>

Cal for NC Website	VoteVets PAC Press Release
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.	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>9</sup> Exhibit A at 2 (listing “Answered the Call” visuals); MUR 7681 VoteVets Resp., Attach. D (same).

<sup>10</sup> Our calculation differs slightly from the amounts listed in the Response. *Compare* Exhibit A at 2 (25 seconds or 83%), *with* MUR 7681 VoteVets Resp., Attach. D (28 seconds or 93%).

<sup>11</sup> Zach Montellaro, *Cunningham Gets Outside Boost in North Carolina*, POLITICO (Jan. 21, 2020), <https://subscriber.politicopro.com/campaigns/article/2020/01/cunningham-gets-outside-boost-in-north-carolina-senate-primary-1865804> (cited by MUR 7681 Supp. Compl. at 2). The article states that, based on ad buys captured by media tracking company Advertising Analytics, VoteVets Action Fund had “already” spent \$2.2 million on two ads (which can be identified as “Stood Up” and “Answered the Call” based on the timing) and, based on “future reservations through the end of January,” planned to ultimately spend \$3.3 million. However, it is unclear whether the additional spending was for the same or new ads, or whether the spending occurred.

<sup>12</sup> MUR 7681 Compl. at 6; *compare Meet Cal*, CUNNINGHAM FOR U.S. SENATE, <https://web.archive.org/web/20191116212816/https://www.californc.com/meet-cal/> (most recent archived version from November 16, 2019), *with* VoteVets Endorses Cal Cunningham for Senate, VoteVets (June 19, 2019, 10:00 AM), <https://twitter.com/votevets/status/1141344940926132230>; Cal Cunningham for Senate | VoteVets.org, Cal Cunningham for Senate, VOTEVETS.ORG, <https://www.votevets.org/candidates/cal-cunningham-for-senate>.

1 On or about February 7, 2020, VoteVets PAC began running an ad in North Carolina,  
 2 titled “Won’t Let That Happen.”<sup>13</sup> The ad used two video clips depicting Cunningham from a  
 3 B-roll video on Cal for NC’s YouTube page; a photograph of Cunningham in uniform prior to  
 4 his candidacy from Cal for NC’s Flickr page; and a headshot of Cunningham from the Flickr  
 5 page of Cunningham’s 2010 Senate campaign.<sup>14</sup> These sources comprise approximately  
 6 13 seconds, or 43%, of the 30-second ad. VoteVets PAC reported an independent expenditure  
 7 (“IE”) of \$2,551,906, which appears to have been for “Won’t Let That Happen.”<sup>15</sup>

8 On or about February 24, 2020, VoteVets PAC began running a second television ad in  
 9 North Carolina, titled “Fought.”<sup>16</sup> The ad used a photograph of Cunningham from Cal for NC’s  
 10 Flickr page and a video clip depicting Cunningham from a B-roll video posted on Cal for NC’s  
 11 YouTube page.<sup>17</sup> These sources comprise approximately 14 seconds, or 47%, of the 30-second  
 12 ad.<sup>18</sup> VoteVets PAC reported an IE of \$1,563,402, which appears to have been for “Fought.”<sup>19</sup>

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<sup>13</sup> MUR 7681 Second Supp. Compl. at 3 (Mar. 9, 2020); *see also* VoteVets, *Won’t Let That Happen*, YOUTUBE (Feb. 7, 2020), <https://www.youtube.com/watch?v=Jv7L-6bN7yU>. VoteVets PAC does not dispute the alleged date.

<sup>14</sup> Exhibit A at 3 (listing “Won’t Let That Happen” visuals).

<sup>15</sup> VoteVets, 24/48 Hour IE Report, FEC Sched. E at 1-2 (Feb. 7, 2020) (reporting disbursements to its media vendor, Waterfront Strategies, for a TV ad supporting Cunningham disseminated on February 7, 2020, including \$12,892 for production of the ad and \$2,551,906 for placing the ad), <https://docquery.fec.gov/pdf/393/202002079186487393/202002079186487393.pdf>; Zach Montellaro, *Chaos in Iowa Looms Over the New Hampshire Debate*, POLITICO (Feb. 7, 2020), <https://www.politico.com/newsletters/morning-score/2020/02/07/chaos-in-iowa-looms-over-new-hampshire-debate-785161> (“VoteVets . . . is spending \$2.5 million on a new ad campaign launching Friday and running for two weeks, according to information shared with [*Politico* journalist James Arkin]”) (quotations omitted) (cited by MUR 7681 Second Supp. Compl. at 3 n.9).

<sup>16</sup> *See* MUR 7681 Second Supp. Comp. at 3; VoteVets, *Fought*, YOUTUBE (Feb. 18, 2020), <https://www.youtube.com/watch?v=qpZLIGpXiWU>. The Complaint suggests VoteVets PAC began airing “Fought” on February 18, 2020, but the available information suggests that it was February 24, 2020. *See infra* note 19.

<sup>17</sup> Exhibit A at 4 (listing “Fought” visuals).

<sup>18</sup> Our calculation differs slightly from the amounts listed in the Response. *Compare* Exhibit A at 4 (14 seconds or 47%), *with* MUR 7681 VoteVets Supp. Resp. at 6 (implying the two VoteVets PAC ads used “*at most* 13 seconds of campaign materials” or 43%) (emphasis in original).

<sup>19</sup> *See* VoteVets, 2020 Mar. Monthly Report at 149-50 (Mar. 20, 2020), <http://docquery.fec.gov/cgi-bin/fecimg/?202003209204669802> (reporting disbursements to Waterfront Strategies for a TV ad supporting

1           **B.       Television Ad Supporting Hegar**

2           On or about February 4, 2020, VoteVets PAC began running a television ad in Texas,  
 3           titled “Fight of Her Life.”<sup>20</sup> The ad used three video clips depicting Hegar from a B-roll video  
 4           on MJ for Texas’s YouTube page, comprising approximately 13 seconds, or 43%, of the 30-  
 5           second ad.<sup>21</sup> VoteVets PAC reported IEs totaling \$3,282,181, which appear to have included  
 6           “Fight of Her Life.”<sup>22</sup>

7           **C.       Alleged Coordination**

8           1.       Cunningham

9           The MUR 7681 Complaint alleges that Cunningham and Cal for NC coordinated with  
 10          VoteVets Action Fund and VoteVets PAC in connection with the four television ads. First, the  
 11          Complaint points to the short period of time between when Cal for NC made certain videos and  
 12          photographs publicly available and when VoteVets Action Fund and VoteVets PAC made ads  
 13          using those materials.<sup>23</sup> Second, the Complaint argues that, because the Cal for NC Flickr page

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Cunningham disseminated on February 24, 2020, including \$20,977.56 for production of the ad and \$1,563,402 for placing the ad); Zach Montellaro, *Trump’s Counterprogramming Democrats with Campaign Blitz*, POLITICO (Feb. 19, 2020), <https://www.politico.com/newsletters/morning-score/2020/02/19/trumps-counterprogramming-democrats-with-campaign-blitz-785528> (stating, based on FCC filings, that “VoteVets is dumping another \$1.5 million” on TV ad identified as “Fought”).

<sup>20</sup> MUR 7715 Compl. at 1, 5 (Mar. 9, 2020); Patrick Svitek, *Hegar Gets Heavy Outside Support in Crowded Democratic Primary to Challenge Cornyn*, TEXAS TRIBUNE (Feb. 3, 2020), <https://www.texastribune.org/2020/02/03/mj-hegar-backed-votevets-texas-2020-us-senate-democratic-primary/> (cited by MUR 7715 Compl. at 5 n.15); VoteVets, *Fight of Her Life – MJ Hegar*, YOUTUBE, <https://www.youtube.com/watch?v=Teh-UhQtn-s> (Feb. 3, 2020).

<sup>21</sup> Exhibit A at 5 (listing “Fight of Her Life” visuals).

<sup>22</sup> VoteVets, 2020 Mar. Monthly Report at 145-47 (Mar. 20, 2020), <http://docquery.fec.gov/cgi-bin/fecimg/?202003209204669798> (reporting disbursements to Waterfront Strategies for a TV ad supporting Hegar disseminated on February 4, 2020, including \$15,661.42 for production of the ad and \$599,325 for placing the ad, with another disbursement to Waterfront Strategies of \$2,682,856 for placing a TV ad supporting Hegar disseminated on February 8, 2020); Svitek, *supra* note 20 (stating that, “VoteVets . . . is launching a \$3.3. million TV ad buy [including for an ad identified as “Fight of Her Life”]. . . according to details first shared with The Texas Tribune”).

<sup>23</sup> The Complaint identifies two instances — first, on December 20, 2019, Cal for NC uploaded photographs to its Flickr page and approximately five days later, VoteVets Action Fund used several of them in “Stood Up”; and

1 labeled the images as “All Rights Reserved,” VoteVets PAC and VoteVets Action Fund must  
2 have sought permission from the committee to use them in their ads.<sup>24</sup> Third, the Complaint  
3 points to email blasts sent by Cal for NC and VoteVets PAC, within 30 minutes of each other on  
4 December 27, 2019, each soliciting contributions to VoteVets PAC and four Senate candidates,  
5 including Cunningham.<sup>25</sup>

6 Finally, the Complaint points to a pair of tweets by Lauren Passalacqua, Communications  
7 Director for the Democratic Senatorial Campaign Committee (“DSCC”). On February 5, 2020,  
8 Passalacqua issued a tweet from her personal account containing a link to Cal for NC’s website  
9 which, in turn, linked to a video that Cal for NC had uploaded to its YouTube page earlier that  
10 day. Her tweet stated: “As North Carolinians see more and more ads leading up to the March 3  
11 primary, it is critical that voters statewide immediately see and hear much more about Cal  
12 Cunningham.”<sup>26</sup> Two days later, on February 7, 2020, VoteVets PAC began airing “Won’t Let  
13 That Happen,” which used clips from the Cal for NC video linked in Passalacqua’s tweet. On  
14 February 13, 2020, she issued another tweet: “In the immediate future, it is important voters see  
15 and hear more about what they are currently hearing about Cal Cunningham.”<sup>27</sup> On February 24,

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second, on February 5, 2020, Cal for NC uploaded a video to its YouTube page and approximately two days later VoteVets PAC used clips from the video in “Won’t Let That Happen.” MUR 7681 Compl. at 2, 10; MUR 7681 Second Supp. Compl. at 2-3. The February video was also tweeted out by the communications director for the Democratic Senatorial Campaign Committee. *See infra* at pp. 8-9.

<sup>24</sup> MUR 7681 Compl. at 2.

<sup>25</sup> MUR 7681 Compl. at 3; *id.*, Exs. at 2-3 (screenshots of emails). The text of the emails is different, but each links to contribution pages on ActBlue.

<sup>26</sup> MUR 7681 Second Supp. Compl. at 2 (citing Lauren Passalacqua (@laurenvpass), TWITTER (Feb. 5, 2020, 8:53PM), <https://twitter.com/laurenvpass/status/1225236095727734784>).

<sup>27</sup> MUR 7681 Second Supp. Compl. at (citing Lauren Passalacqua (@laurenvpass), TWITTER (Feb. 13, 2020, 4:19PM), <https://twitter.com/laurenvpass/status/1228066247901880320>).



1 VoteVets PAC began airing “Fought.” The Complaint asserts that each of Passalacqua’s tweets  
2 were a “request or suggestion” on behalf of Cunningham, “answered” by VoteVets PAC.<sup>28</sup>

3 2. Hegar

4 The MUR 7715 Complaint similarly alleges that Hegar and MJ for Texas coordinated  
5 with VoteVets PAC in connection with “Fight of Her Life,” based on the apparent short period  
6 of time (approximately eight days) between MJ for Texas posting B-roll and VoteVets PAC  
7 disseminating its ad using clips from the B-roll.<sup>29</sup>

8 **III. LEGAL ANALYSIS**

9 **A. Relevant Law**

10 The Act prohibits any person from making, and any candidate or committee from  
11 knowingly accepting, an excessive contribution.<sup>30</sup> For the 2020 election cycle, contributions by  
12 persons other than multicandidate committees to any candidate and his or her authorized political  
13 committees are limited to \$2,800 per election.<sup>31</sup> Multicandidate committees may contribute to a  
14 candidate and his or her authorized committee up to \$5,000 per election.<sup>32</sup>

15 Committee treasurers are required to disclose the identification of each person who  
16 makes one or more contributions to the committee aggregating in excess of \$200 within the  
17 calendar year (or election cycle, in the case of an authorized committee), together with the date

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<sup>28</sup> MUR 7681 Second Supp. Compl. at 2-4.

<sup>29</sup> MUR 7715 Compl. at 1, 6-7. MJ for Texas uploaded B-roll on January 27, 2020, and “Fight of Her Life,” which incorporated some of that B-roll, began airing on or about February 4, 2020. MJ for Texas, *Texas Tough*, YOUTUBE (Jan. 27, 2020), <https://www.youtube.com/watch?v=4xvfWx1Mj00>; *see also* Exhibit A at 5.

<sup>30</sup> 52 U.S.C. §§ 30116(a), (f); 11 C.F.R. §§ 110.1(b)(1), 110.2(b)(1), 110.9.

<sup>31</sup> 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

<sup>32</sup> 52 U.S.C. § 30116(a)(2)(A); 11 C.F.R. § 110.2(b)(1).

1 and amount of any such contribution.<sup>33</sup> Committee treasurers are also required to disclose the  
2 identification of each political committee that makes a contribution to the reporting committee  
3 during the reporting period, along with the date and amount of any such contribution.<sup>34</sup> If a  
4 committee makes a contribution, it shall disclose the name and address of the recipient.<sup>35</sup>

5 Under the Act, “the financing by any person of the dissemination, distribution, or  
6 republication, in whole or in part, of any broadcast or any written, graphic, or other form of  
7 campaign materials prepared by the candidate, his campaign committees, or their authorized  
8 agents shall be considered to be an expenditure.”<sup>36</sup> Commission regulations further provide that  
9 the republication of campaign materials “shall be considered a contribution for the purposes of  
10 contribution limitations and reporting responsibilities of the person making the expenditure.”<sup>37</sup>  
11 Under Commission regulations, however, the candidate who prepared the materials is not  
12 considered to have received an in-kind contribution and is not required to report an expenditure  
13 unless the dissemination, distribution, or republication of campaign materials is a coordinated  
14 communication or a party coordinated communication.<sup>38</sup>

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<sup>33</sup> 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a).

<sup>34</sup> 52 U.S.C. § 30104(b)(3)(B); 11 C.F.R. § 104.3(a).

<sup>35</sup> 52 U.S.C. § 30104(b)(6)(B)(i); 11 C.F.R. § 104.3(b).

<sup>36</sup> 52 U.S.C. § 30116(a)(7)(B)(iii); *accord* 11 C.F.R. § 109.23. Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his or her authorized political committees, or their agents, shall be considered to be a contribution to such candidate. 52 U.S.C. § 30116(a)(7)(B)(i).

<sup>37</sup> 11 C.F.R. § 109.23(a).

<sup>38</sup> *Id.*; *see also id.* § 109.21 (coordinated communications); *id.* § 109.37 (party coordinated communications).

1           **B.       The Commission Should Find Reason to Believe that VoteVets Action Fund**  
2                   **and VoteVets PAC Made Excessive In-Kind Contributions by Republishing**  
3                   **Campaign Materials**

4           VoteVets Action Fund incorporated materials from Cal for NC's YouTube and Flickr  
5 pages and Cunningham's 2010 campaign Flickr page into its television ads. These materials  
6 comprised 22 seconds of the 30-second "Stood Up" (73%) and 25 seconds of the 30-second  
7 "Answered the Call" (83%). VoteVets Action Fund reportedly spent between \$2 and \$3.3  
8 million to disseminate the ads.

9           VoteVets PAC incorporated materials obtained from Cal for NC's YouTube and Flickr  
10 pages, Cunningham's 2010 campaign Flickr page, and MJ for Texas's YouTube page into its  
11 television ads. These materials comprised 13 seconds of the 30-second "Won't Let That  
12 Happen" (43%) and 14 seconds of the 30-second "Fought" (47%), supporting Cunningham, and  
13 13 seconds of the 30-second "Fight of Her Life" (43%), supporting Hegar. VoteVets PAC spent  
14 \$4.1 million on the Cunningham ads and \$3.3 million on the Hegar ads.

15           Because VoteVets Action Fund and VoteVets PAC republished campaign materials, their  
16 payments to disseminate the ads containing the republished materials were in-kind contributions  
17 for the purposes of their contribution limitations and reporting responsibilities. The amounts of  
18 the apparent in-kind contributions exceed the applicable limitations. In addition, VoteVets PAC  
19 did not report the contributions.

20           VoteVets Action Fund and VoteVets PAC (referred to, collectively, for the remainder of  
21 this section as "VoteVets") argue that their use of the candidate committees' photographs and  
22 footage did not constitute republication. None of these arguments is persuasive.

23           First, VoteVets argues that certain photographs of Cunningham were not "campaign  
24 materials" subject to the republication provision because they were not "prepared by a candidate

1 or [a] candidate's authorized committee."<sup>39</sup> VoteVets points to two sets of photographs,  
2 (1) those of Cunningham obtained from his still-existing 2010 campaign Flickr page; and  
3 (2) those of Cunningham from when he was in college and in the military before becoming a  
4 candidate, which Cal for NC posted on its Flickr page.<sup>40</sup> As to the first set, the Commission  
5 previously determined in MUR 6535 (Restore Our Future, Inc.), that materials prepared by a  
6 candidate's authorized committee from a previous election cycle fall within the meaning of  
7 "campaign materials."<sup>41</sup> Accordingly, the materials VoteVets obtained from Cunningham's  
8 2010 campaign Flickr page are subject to the republication provision. Regarding the second set  
9 of materials created when Cunningham was in the military and in college, before Cunningham  
10 ever became a federal candidate, as the Commission observed in MUR 6535, neither the statute  
11 nor regulation provides a temporal limitation regarding when the materials were created.<sup>42</sup>  
12 Further, the use of the words "prepared by" in the republication provision indicates a scope that  
13 covers not simply the creation of materials but also the act of making them available for use.<sup>43</sup>  
14 Thus, we conclude these materials also are subject to the republication provision.

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<sup>39</sup> See MUR 7681 VoteVets Resp. at 7-8 (quoting 11 C.F.R. § 109.2(c)(2)).

<sup>40</sup> MUR 7681 VoteVets Resp. at 7; *see* Exhibit A.

<sup>41</sup> Factual & Legal Analysis at 6, MUR 6535 (Restore Our Future, Inc.) ("F&LA") (explaining that "the Act defines republication to include materials prepared by the candidate's 'campaign committees,' in the plural form and there is nothing in the statute or Commission regulations or precedent that limits republication to within the same election cycle").

<sup>42</sup> F&LA at 5, MUR 6535 (Restore Our Future, Inc.) (recognizing that the statute and regulation "do not state whether there is any temporal limitation").

<sup>43</sup> See 52 U.S.C. § 30116(a)(7)(B)(iii) (providing that "republication" applies to "campaign materials prepared by the candidate, [their] campaign committees, or their authorized agents"); 11 C.F.R. § 109.23(a) (same); Prepare, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prepare> (defining "prepare" to mean "to make ready beforehand for some purpose, use, or activity"); *Chapman v. United States*, 500 U.S. 453, 461-62 (1991) (holding that terms undefined by a statute "must be given their ordinary meaning" and, accordingly, looking to the dictionary definition of those terms to obtain their meaning).

1           Second, VoteVets argues that “an independent communication may, at a minimum,  
2     utilize approximately 50% of its imagery from sources that would be defined as ‘campaign  
3     materials.’”<sup>44</sup> VoteVets asserts that each of the five ads at issue in this matter contained 50% or  
4     less campaign materials.<sup>45</sup> That assertion, however, presumes the materials created prior to  
5     Cunningham’s 2020 candidacy are not “campaign materials,” which, as discussed above, is  
6     erroneous. In any event, the Commission has not established a 50% threshold with respect to a  
7     potential republication violation. Rather, the Commission has determined that materials are  
8     considered republished even when the republished portion is only an incidental part of the  
9     communication.<sup>46</sup> Indeed, the statute and regulation both expressly include “republication, *in*  
10    *whole or in part, of any . . . campaign materials.*”<sup>47</sup>

11           Though the Commission has carved out a regulatory exemption for “a brief quote of  
12    materials that demonstrate a candidate’s position as part of a person’s expression of its own  
13    views,”<sup>48</sup> it does not apply here. The use of campaign materials in the ads disseminated by  
14    VoteVets does not appear to have been brief because each incorporated a significant amount of  
15    campaign materials (between 43% and 83%).<sup>49</sup> Moreover, the Commission explained that the

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<sup>44</sup> MUR 7681 VoteVets Resp. at 8-9; *see also* MUR 7715 VoteVets Resp. at 4, 6 (Apr. 15, 2020) (arguing that the copied materials were “incidental background to the core message of the communication,” developed by VoteVets).

<sup>45</sup> *See* MUR 7681 VoteVets Supp. Resp. at 7-10; *see also* Cal for NC Resp. at 7.

<sup>46</sup> In such cases, the incidental nature of the republication is considered in determining the appropriate Commission response to the violation, not whether the violation occurred. *See, e.g.*, F&LA at 7-8, MUR 5996 (Tim Bee) (exercising prosecutorial discretion to dismiss regarding republished photo that comprised two seconds of 30-second ad); *see also infra* note 53 (listing reason-to-believe recommendations in republication matters, including those involving instances using less than 50% campaign materials).

<sup>47</sup> 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added); 11 C.F.R. § 109.23(a) (same).

<sup>48</sup> *See* 11 C.F.R. § 109.23(b)(4).

<sup>49</sup> The VoteVets Action Fund ads featuring Cunningham comprised 73% and 83% campaign materials. The VoteVets PAC ads supporting Cunningham comprised 43% and 47%, and its ad supporting Hegar comprised 43%.

1 exemption is designed to “illustrate a candidate’s position on an issue.”<sup>50</sup> But the materials that  
2 VoteVets incorporated into the ads were devoid of anything expressing the candidates’ positions  
3 on any issue. Accordingly, the brief quote exemption does not apply.

4 Finally, VoteVets PAC’s June 19, 2019 press release included two sentences from  
5 Cunningham’s biography apparently copied from Cal for NC’s website.<sup>51</sup> In past matters, the  
6 Commission has “determined that a person may create a communication using sentences similar  
7 to those appearing in a campaign’s publications, as long as the sentences use different words or  
8 phrasing.”<sup>52</sup> There is no indication that VoteVets PAC paid to disseminate the press release,  
9 which it published on its website and Twitter. Thus, to the extent VoteVets PAC republished  
10 campaign materials, this particular republication was unlikely to have implicated VoteVets  
11 PAC’s contribution limitations or reporting obligations.

12 In conclusion, because VoteVets PAC and VoteVets Action Fund paid to republish  
13 campaign materials incorporated into each of the five television ads, their payments to  
14 disseminate the ads should be treated as in-kind contributions for the purposes of their  
15 contribution limitations and reporting responsibilities. Therefore, we recommend that the  
16 Commission find reason to believe that VoteVets Action Fund and VoteVets PAC violated  
17 52 U.S.C. § 30116(a) and 11 C.F.R. §§ 110.1(b)(1), 110.2(b)(1) by making excessive in-kind

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<sup>50</sup> Coordinated and Independent Expenditures Explanation and Justification, 68 Fed. Reg. 421, 443 (Jan. 8, 2003) (“Coordination E&J”).

<sup>51</sup> The allegedly copied sentences contain purely biographical facts on Cunningham’s service, and his receipt of two awards. *Supra* note 12.

<sup>52</sup> *E.g.*, F&LA at 11, MUR 7124 (Katie McGinty for Senate). The Commission has also found there was no republication when a person created ads repeating the same phrase used by a campaign when the phrase was “commonly used in political discourse,” and the communication “also contained significant additional language that differed from the campaign materials.” F&LA at 10-11, MUR 6502 (Nebraska Democratic State Central Committee).

1 contributions,<sup>53</sup> and that VoteVets PAC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b)  
 2 by failing to report the in-kind contributions.

3 **C. The Commission Should Dismiss the Allegations that Cunningham, Cal for**  
 4 **NC, Hegar, and MJ for Texas Accepted Excessive In-Kind Contributions**

5 As noted above, the candidate, candidate's authorized committee, or an agent of either  
 6 who prepared the campaign materials does not accept an in-kind contribution, and is therefore  
 7 not required to report an in-kind contribution, unless, as relevant here, the republication of  
 8 candidate campaign materials is a "coordinated communication."<sup>54</sup>

9 Commission regulations provide a three-part test for determining when a communication  
 10 is a "coordinated communication."<sup>55</sup> The communication must: (1) be paid for by a third party;  
 11 (2) satisfy one of the enumerated "content" standards; and (3) satisfy one of the five enumerated  
 12 "conduct" standards.<sup>56</sup> All three prongs are required to be satisfied for a communication to be  
 13 considered a coordinated communication.<sup>57</sup>

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<sup>53</sup> This Office has made this recommendation in cases with similar facts. *See, e.g.* First Gen. Counsel's Rpt. at 7-11, MUR 6357 (American Crossroads) (10-15 seconds of 30-second ad); First Gen. Counsel's Rpt. at 9-12, MUR 6603 (Ben Chandler for Congress) (10-13 seconds of multiple 30-second ads); First Gen. Counsel's Rpt. at 8-9, MUR 6777 (House Majority PAC) (14 seconds of 29-second ad); First Gen. Counsel's Rpt. at 6-8, MUR 7185 (Sheriff Scott Jones for Congress) (17 seconds of a 30-second ad); First Gen. Counsel's Rpt. at 5-8, MUR 6801 (Senate Majority PAC) (16 seconds of a 30-second ad). The recommendations in these matters have resulted in split votes by the Commission.

<sup>54</sup> 11 C.F.R. § 109.23(a) (citing *id.* § 109.21).

<sup>55</sup> *Id.* § 109.21(a).

<sup>56</sup> *Id.* (referencing content and conduct standards at 11 C.F.R. § 109.21(c) and (d), respectively). With respect to communications that satisfy the content standard by republication of campaign materials, three of the conduct prong standards — request or suggestion, material involvement, and substantial discussion — may be satisfied only on the basis of conduct between the campaign and third party "that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished." *Id.* § 109.21(d)(6).

<sup>57</sup> *Id.* § 109.21(a).

1                   1.     Payment

2                   The payment prong is satisfied where a communication “[i]s paid for, in whole or in part,  
3 by a person other than [the] candidate, authorized committee, or political party committee.”<sup>58</sup> It  
4 is satisfied here because VoteVets Action Fund and VoteVets PAC paid to distribute the ads.

5                   2.     Content

6                   The content prong is satisfied if, *inter alia*, the communication is a “public  
7 communication” that “disseminates, distributes, or republishes in whole or in part, campaign  
8 materials prepared by a candidate or the candidate’s authorized committee.”<sup>59</sup> The term “public  
9 communication” includes a communication “by means of any broadcast, cable, or satellite  
10 communication.”<sup>60</sup> Since the ads republished campaign materials and were broadcast on  
11 television, the content prong appears to be satisfied.

12                   3.     Conduct

13                   The conduct prong is satisfied by one of five types of interactions between the payor and  
14 the candidate or authorized committee regarding the communication: a request or suggestion,  
15 material involvement, substantial discussion, use of a common vendor, or involvement of a  
16 former employee or independent contractor.<sup>61</sup>

17                   a.     Cunningham Ads

18                   The MUR 7681 Complaint alleges that Cunningham and Cal for NC coordinated with  
19 VoteVets Action Fund and VoteVets PAC. First, the Complaint points to the short period of

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<sup>58</sup> *Id.* § 109.21(a)(1).

<sup>59</sup> 11 C.F.R. § 109.21(c)(2).

<sup>60</sup> 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

<sup>61</sup> *See* 11 C.F.R. § 109.21(d)(1)-(5); *see also id.* § 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).



1 time between when Cal for NC made campaign materials publicly available and the creation of  
2 resulting ads using those materials.<sup>62</sup> However, the mere posting of materials by a committee on  
3 a public webpage and subsequent use of those materials by supportive groups does not provide a  
4 reasonable basis to conclude there was any communication between the entities.<sup>63</sup> Further, the  
5 Commission has previously determined, in analogous matters, that temporal proximity, absent  
6 indicators that respondents engaged in any of the activities outlined in the conduct standards, was  
7 not sufficient to support a finding of reason to believe.<sup>64</sup>

8         Second, the Complaint alleges that because the photographs on Cal for NC's Flickr page  
9 were listed with the designation "All Rights Reserved," VoteVets Action Fund and VoteVets  
10 PAC may have requested, and Cal for NC presumably granted, permission to use the images in  
11 the resulting ads.<sup>65</sup> Respondents specifically deny requesting or providing any such permission,  
12 and we have no information to the contrary.<sup>66</sup> Based on these circumstances, there is not a  
13 sufficient basis to conclude that VoteVets Action Fund or VoteVets PAC requested or received  
14 permission from Cal for NC to use the images.

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<sup>62</sup> MUR 7681 Compl. at 2, 10; MUR 7681 Second Supp. Compl. at 2-3; *see supra* note 23 (stating how, in several instances, VoteVets Action Fund and VoteVets PAC used video and photographs days after Cal for NC posted them on its YouTube and Flickr pages).

<sup>63</sup> Coordination E&J, 68 Fed. Reg. at 432 (explaining that "a request that is posted on a web page that is available to the general public and does not trigger the [request or suggestion] conduct standard"); *see also* F&LA at 9, MUR 7124 (Katie McGinty for Senate) (citing F&LA at 7-8, MUR 6821 (Shaheen for Senate)) ("[T]he use of publicly available information, including information on a candidate's campaign website, does not satisfy the 'conduct' standards.").

<sup>64</sup> *See* F&LA at 8, MUR 6821 (Shaheen for Senate); F&LA at 9-10, MUR 6613 (Prosperity for Michigan); F&LA at 5-6, MUR 5963 (Club for Growth PAC).

<sup>65</sup> MUR 7681 Compl. at 2, 10. In its 2003 Explanation and Justification on the republication provision, the Commission stated that where a third party republishes campaign materials over which the campaign retained a license, the "republisher would presumably have to obtain permission," thus "raising issues of authorization or coordination." Coordination E&J, 68 Fed. Reg. at 442-43.

<sup>66</sup> Cal for NC Resp. at 7 (Apr. 15, 2020); MUR 7681 VoteVets Resp. at 14.

1           Third, the Complaint alleges that the December 27, 2019, fundraising emails Cal for NC  
2 and VoteVets PAC sent within approximately 30 minutes of each other, both of which solicited  
3 contributions to VoteVets PAC, Cunningham, and the same additional candidates, is evidence of  
4 coordination between VoteVets PAC and Cal for NC.<sup>67</sup> However, to the extent that Cal for NC  
5 and VoteVets PAC communicated regarding the email, this does not give rise to an inference that  
6 they communicated about the ads in question.<sup>68</sup>

7           Finally, the Complaint alleges that the tweets of DSCC's Communications Director,  
8 Lauren Passalacqua, were each a "request or suggestion" answered by VoteVets PAC in the form  
9 of ads disseminated several days afterwards supporting Cunningham.<sup>69</sup> The Commission has  
10 explained that a request or suggestion is the "most direct form of coordination" whereby "the  
11 candidate or political party committee communicates desires to another person who effectuates  
12 them," and that the determination of whether a third party acted in response to a request or  
13 suggestion must be "based on specific facts, rather than presumed."<sup>70</sup> Additionally, the

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<sup>67</sup> MUR 7681 Compl. at 3-4, 10. The Complaint also argues that VoteVets PAC's apparent use of sentences from the NC for Cal website in a press release is evidence of coordination. *Id.* at 4, 10. However, again, this does not indicate any communication related to the ads at issue.

<sup>68</sup> The Complaint raises allegations that Cal for NC and VoteVets PAC coordinated their fundraising activity, given solicitation emails sent in close proximity and the ActBlue pages of Cal for NC and VoteVets PAC which apparently contain similar language. MUR 7681 Compl. at 7. However, the emails and ActBlue pages are exempt from the meaning of "coordinated communication," under the "internet exemption." Specifically, under the content prong, pursuant to the definition of "public communication," coordinated communications shall not include communications over the internet, except for those placed for a fee on another person's website. The available information suggests that no amount was paid for the ActBlue pages. ActBlue — Pricing, <https://secure.actblue.com/pricing>. The Commission has previously determined that emails are not public communications. F&LA at 5, MUR 6657 (Akin for Senate) (determining that payments to send emails were not within the meaning of "placed for a fee on another person's website" and thus within the internet exemption); Advisory Op. 2011-14 at 5 (Utah Bankers Ass'n Action PAC) (concluding that a communication via email is not a public communication).

<sup>69</sup> MUR 7681 Second Supp. Compl. at 3.

<sup>70</sup> Coordination E&J, 68 Fed. Reg. at 431-32.

1 Commission has explained that the standard “is intended to cover requests or suggestions made  
2 to a select audience, but not those offered to the public generally.”<sup>71</sup>

3 At the outset, based on the available information, it is unclear whether Passalacqua was  
4 an agent for Cal for NC or Cunningham.<sup>72</sup> The Complaint states, without submitting any factual  
5 support, that “[t]he only reasonable interpretation of the video upload along with the tweet is that  
6 Cunningham with the DSCC requested or suggested that [VoteVets] broadcast advertisements on  
7 behalf of Cunningham statewide in North Carolina.”<sup>73</sup> In any event, notwithstanding whether  
8 Passalacqua was an agent of the Cunningham campaign, the available information does not give  
9 rise to a reasonable inference that Passalacqua’s tweets satisfy the meaning of “request or  
10 suggestion.” As described above, she issued a tweet from her personal account with a link to a  
11 video Cal for NC had uploaded to its YouTube page earlier that day, stating: “As North  
12 Carolinians see more and more ads leading up to the March 3 primary, it is critical that voters  
13 statewide immediately see and hear much more about Cal Cunningham.”<sup>74</sup> Passalacqua also  
14 tweeted: “In the immediate future, it is important voters see and hear more about what they are  
15 currently hearing about Cal Cunningham.”<sup>75</sup>

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<sup>71</sup> *Id.* at 432.

<sup>72</sup> Under the coordination regulations, an individual is an agent of a federal candidate when he or she has actual authority, whether express or implied, to engage in certain activities on behalf of the candidate, including authority to “request or suggest that a communication be created, produced, or distributed,” to “make or authorize a communication that meets one or more of the content standards set forth in 11 C.F.R. § 109.21(c),” or “request or suggest that any other person create, produce, or distribute any communication.” *Id.* § 109.3(b) (listing qualifying activities).

<sup>73</sup> MUR 7681 Second Supp. Compl. at 3. Cal for NC states that the Complaint “does not allege that [Cal for NC] was in any way involved in Passalacqua’s statements.” Cal for NC Resp. at 6. VoteVets PAC more directly addresses the issue in denying that it had been in communication with Cal for NC or was influenced by the DSCC tweet. MUR 7681 VoteVets Supp. Resp. at 3-4.

<sup>74</sup> MUR 7681 Second Supp. Compl. at 2.

<sup>75</sup> *Id.* at 3.

1           In MUR 6821 (Shaheen for Senate), the Commission found no reason to believe when an  
2 authorized committee posted a message and related document on its public website with  
3 information on the candidate and allegations about her opponent; the message was not targeted at  
4 a specific audience and did not advocate for or mention advertising or media.<sup>76</sup> In MUR 7124  
5 (Katie McGinty for Senate), the Commission similarly found no reason to believe when an  
6 authorized committee published a “Notice” page on its public website that contained a list of  
7 specific messages about the candidate and her opponents, specified who needed to know them  
8 (*e.g.*, “[v]oters in Philadelphia”), and offered a general sense of timing (*e.g.*, “[a]t this point of  
9 the campaign”); the page did not appear to target a specific audience and did not advocate for or  
10 mention advertising or media.<sup>77</sup> Passalacqua’s tweets likewise appear to have been “general  
11 requests” outside the purview of the conduct standard. They were publicly available, not clearly  
12 targeted at a specific audience, and did not advocate for or mention advertising.

13           In sum, the available information does not indicate that the conduct prong is satisfied  
14 with respect to the Cunningham ads.

15           b.       Hegar Ad

16           The MUR 7715 Complaint alleges that Hegar and MJ for Texas coordinated with  
17 VoteVets PAC based on the temporal proximity (approximately eight days) between when MJ  
18 for Texas posted a video on its YouTube page and when VoteVets PAC disseminated “Fight of

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<sup>76</sup> F&LA at 2-3, MUR 6821 (Shaheen for Senate).

<sup>77</sup> F&LA at 1-2, 4-5, MUR 7124 (Katie McGinty for Senate).

1 Her Life,” containing clips from that video.<sup>79</sup> As explained above, the mere posting of materials  
2 by a campaign on a public webpage and subsequent use of those materials by a supportive group  
3 does not provide a reasonable basis to conclude that the campaign and groups communicated  
4 about the resulting ad.<sup>80</sup> Thus, because the facts do not indicate a “request or suggestion” within  
5 the meaning of the regulation, the conduct prong is not satisfied.

6 \* \* \*

7 In conclusion, the available information is insufficient to support a reasonable inference  
8 that all three prongs of the coordinated communication test are satisfied with respect to the ads  
9 featuring Cunningham, disseminated by VoteVets Action Fund and VoteVets PAC, and the ad  
10 supporting Hegar, disseminated by VoteVets PAC. Under these circumstances, we recommend  
11 that the Commission dismiss the allegations that Cunningham, Cal for NC, Hegar, and MJ for  
12 Texas knowingly accepted an excessive in-kind contribution in violation of 52 U.S.C. § 30116(f)  
13 and 11 C.F.R. § 110.9, and dismiss the allegations that Cal for NC and MJ for Texas violated  
14 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report the contributions.

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<sup>79</sup> MUR 7715 Compl. at 1, 6-7. VoteVets PAC states that it “did not communicate with Hegar in any way regarding the [a]dvertisement.” MUR 7715 VoteVets Resp. at 7.

<sup>80</sup> *Supra* notes 63-64 and accompanying text.

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**V. RECOMMENDATIONS**

1. Find reason to believe that VoteVets and Rick Hegdahl in his official capacity as treasurer violated 52 U.S.C. § 30116(a)(2)(A) and 11 C.F.R. § 110.2(b)(1) by making excessive in-kind contributions and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by failing to report in-kind contributions;

- 1           2. Find reason to believe that VoteVets Action Fund violated 52 U.S.C.  
2           § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making excessive in-kind  
3           contributions;
- 4  
5           3. Dismiss the allegations that Cal Cunningham and Cal for NC and Steve Mele in his  
6           official capacity as treasurer violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by  
7           knowingly accepting excessive in-kind contributions;
- 8  
9           4. Dismiss the allegations that Mary Jennings Hegar and MJ for Texas and Adam Reiser  
10          in his official capacity as treasurer violated 52 U.S.C. § 30116(f) and 11 C.F.R.  
11          § 110.9 by knowingly accepting excessive in-kind contributions;
- 12  
13          5. Approve the attached Factual and Legal Analyses;
- 14  
15          6. Enter into pre-probable cause conciliation with VoteVets;
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17          7. Enter into pre-probable cause conciliation with VoteVets Action Fund;
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19          8. Approve the attached proposed Conciliation Agreements; and  
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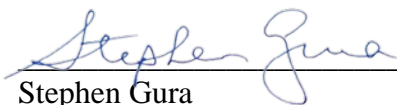
9. Approve the appropriate letters.

Lisa J. Stevenson  
Acting General Counsel

Charles Kitcher  
Acting Associate General Counsel for Enforcement

October 22, 2020

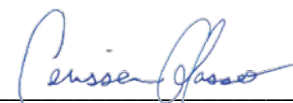
Date



Stephen Gura  
Deputy Associate General Counsel for Enforcement



Claudio J. Pavia  
Acting Assistant General Counsel



Cerissa Cafasso  
Attorney

Attachments:

1. Exhibit A (sources for visuals in the television advertisements)



## Exhibit A

### “Stood Up” (VoteVets Action Fund)<sup>1</sup>

Campaign Materials – 22 seconds (73%)

Non-Campaign Materials – 8 seconds (27%)

Time	Type	Description	Source
:01	Still	Cunningham with woman	2010 Campaign Flickr page <sup>2</sup>
:02-:04	<i>Non-campaign source</i>		
:05-:07	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>3</sup>
:08-:09	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>4</sup>
:10-:11	<i>Non-campaign source</i>		
:12-:13	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>5</sup>
:14	<i>Non-campaign source</i>		
:15-:16	Still	Cunningham in college	2020 Campaign Flickr page <sup>6</sup>
:17-:18	<i>Non-campaign source</i>		
:19-:22	Still	Cunningham with children	2010 Campaign Flickr page <sup>7</sup>
:23-:25	Still	Cunningham with people	2010 Campaign Flickr page <sup>8</sup>
:26	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>9</sup>
:27-:30	Still	Cunningham with people	Cal for NC YouTube page <sup>10</sup>

<sup>1</sup> <https://www.youtube.com/watch?v=vI8IXe4YtOw>

<sup>2</sup> <https://www.flickr.com/photos/calformc/4266416209/>

<sup>3</sup> <https://www.flickr.com/photos/186140610@N06/49249707683/>

<sup>4</sup> <https://www.flickr.com/photos/186140610@N06/49250175916/>

<sup>5</sup> <https://www.flickr.com/photos/186140610@N06/49250176146/>

<sup>6</sup> <https://www.flickr.com/photos/186140610@N06/49249707818/>

<sup>7</sup> <https://www.flickr.com/photos/calformc/4158127659/>

<sup>8</sup> <https://www.flickr.com/photos/calformc/4394053162/>

<sup>9</sup> <https://www.flickr.com/photos/186140610@N06/49249708153/>

<sup>10</sup> <https://youtu.be/OEuSxzUSCqA?t=102>

**“Answered the Call” (VoteVets Action Fund)<sup>11</sup>**

Campaign Materials – 25 seconds (83%)

Non-Campaign Materials – 5 seconds (17%)

<b>Time</b>	<b>Type</b>	<b>Description</b>	<b>Source</b>
:01	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>12</sup>
:02-:03	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>13</sup>
:04-:05	<i>Non-campaign source</i>		
:06	Video	Cunningham in restaurant with man	Cal for NC YouTube page <sup>14</sup>
:07-:08	<i>Non-campaign source</i>		
:09-:10	Still	Cunningham with farmer	2020 Campaign Flickr page <sup>15</sup>
:11-:14	Still	Headshot of Cunningham	2010 Campaign Flickr page <sup>16</sup>
:15	Video	Cunningham with seniors	Cal for NC YouTube page <sup>17</sup>
:16-:20	Video	Cunningham with senior man	Cal for NC YouTube page <sup>18</sup>
:21-:22	Still	Cunningham with children	2020 Campaign Flickr page <sup>19</sup>
:23	<i>Non-campaign source</i>		
:24-:26	Video	Cunningham with woman	Cal for NC YouTube page <sup>20</sup>
:27-:30	Video	Cunningham outside of plant	Cal for NC YouTube page <sup>21</sup>

<sup>11</sup> [https://www.youtube.com/watch?v=KGB\\_CBn-Qf8](https://www.youtube.com/watch?v=KGB_CBn-Qf8)

<sup>12</sup> <https://www.flickr.com/photos/186140610@N06/49249707683>

<sup>13</sup> <https://www.flickr.com/photos/186140610@N06/49249707998/>

<sup>14</sup> <https://youtu.be/9tuigjTKQg0?t=13>

<sup>15</sup> <https://www.flickr.com/photos/186140610@N06/49250383297/>

<sup>16</sup> <https://www.flickr.com/photos/californic/4158127195/>

<sup>17</sup> <https://youtu.be/9tuigjTKQg0?t=95>

<sup>18</sup> <https://youtu.be/9tuigjTKQg0?t=84>

<sup>19</sup> <https://www.flickr.com/photos/186140610@N06/49249707978/>

<sup>20</sup> <https://youtu.be/9tuigjTKQg0?t=55>

<sup>21</sup> <https://youtu.be/9tuigjTKQg0?t=103>

**“Won’t Let That Happen” (VoteVets PAC)<sup>22</sup>**

Campaign Materials – 13 seconds (43%)

Non-Campaign Materials – 17 seconds (57%)

<b>Time</b>	<b>Type</b>	<b>Description</b>	<b>Source</b>
:01-:08		<i>Non-campaign source</i>	
:09		<i>Non-campaign source</i>	
:10-:11	Video	Cunningham with doctor	Cal for NC YouTube page <sup>23</sup>
:12-:15		<i>Non-campaign source</i>	
:16-:19		<i>Non-campaign source</i>	
:20-:22	Video	Cunningham in church with woman	Cal for NC YouTube page <sup>24</sup>
:23-:24	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>25</sup>
:25-:30	Still	Headshot of Cunningham	2010 Campaign Flickr page <sup>26</sup>

<sup>22</sup> <https://www.youtube.com/watch?v=Jv7L-6bN7yU>

<sup>23</sup> [https://youtu.be/nCgG29-3h\\_Y?t=109](https://youtu.be/nCgG29-3h_Y?t=109)

<sup>24</sup> [https://youtu.be/nCgG29-3h\\_Y?t=57](https://youtu.be/nCgG29-3h_Y?t=57)

<sup>25</sup> <https://www.flickr.com/photos/186140610@N06/49250176146/>

<sup>26</sup> <https://www.flickr.com/photos/calformc/4158127195/>

**“Fought” (VoteVets PAC)<sup>27</sup>**

Campaign Materials – 14 seconds (47%)

Non-Campaign Materials –16 seconds (53%)

<b>Time</b>	<b>Type</b>	<b>Description</b>	<b>Source</b>
:01	<i>Non-campaign source</i>		
:02-:05	Still	Cunningham in college	2020 Campaign Flickr page <sup>28</sup>
:06-:08	<i>Non-campaign source</i>		
:09-:11	<i>Non-campaign source</i>		
:12-:14	<i>Non-campaign source</i>		
:15	<i>Non-campaign source</i>		
:16	<i>Non-campaign source</i>		
:17	<i>Non-campaign source</i>		
:18-:20	<i>Non-campaign source</i>		
:21-:30	Video	Cunningham outside of plant	Cal for NC YouTube page <sup>29</sup>

<sup>27</sup> <https://www.youtube.com/watch?v=qpZLlGpXiWU>

<sup>28</sup> <https://www.flickr.com/photos/186140610@N06/49249707818/>

<sup>29</sup> <https://youtu.be/9tuigjTKQg0?t=103>

**“Fight of Her Life” (VoteVets PAC)<sup>30</sup>**

Campaign Materials – 13 seconds (43%)

Non-Campaign Materials – 17 seconds (57%)

<b>Time</b>	<b>Type</b>	<b>Description</b>	<b>Source</b>
:01-:03	Video	Hegar riding motorcycle	MJ for Texas YouTube page <sup>31</sup>
:04-:09	<i>Non-campaign source</i>		
:10-:16	<i>Non-campaign source</i>		
:17	Video	Hegar with family	MJ for Texas YouTube page <sup>32</sup>
:18-:20	Video	Hegar kissing child	MJ for Texas YouTube page <sup>33</sup>
:21-:23	Video	Hegar with man in restaurant	MJ for Texas YouTube page <sup>34</sup>
:24-:26	Video	Hegar riding motorcycle	MJ for Texas YouTube page <sup>35</sup>
:27-:30	<i>Non-campaign source</i>		

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<sup>30</sup> <https://www.youtube.com/watch?v=Teh-UhQtn-s>

<sup>31</sup> <https://youtu.be/4xvfWx1Mj00?t=321>

<sup>32</sup> <https://youtu.be/4xvfWx1Mj00?t=4>

<sup>33</sup> <https://youtu.be/4xvfWx1Mj00?t=22>

<sup>34</sup> <https://youtu.be/4xvfWx1Mj00?t=213>

<sup>35</sup> <https://youtu.be/4xvfWx1Mj00?t=280>





























































































































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**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Cal for NC and Steve Mele MUR 7681  
in his official capacity as treasurer  
Cal Cunningham

**I. INTRODUCTION**

This matter was generated by a Complaint filed with the Federal Election Commission by the Foundation for Accountability and Civic Trust alleging that VoteVets Action Fund, a 501(c)(4) non-profit corporation, and VoteVets, a multicandidate, hybrid political action committee (“VoteVets PAC”), made prohibited in-kind contributions to Cal for NC and Steve Mele in his official capacity as treasurer, the principal campaign committee of Cal Cunningham, by paying to distribute television advertisements that republished campaign materials, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). Moreover, the Complaint alleges that Cunningham and Cal for NC coordinated with VoteVets Action Fund and VoteVets PAC in connection with the television ads and thus accepted prohibited in-kind contributions.

Cunningham and Cal for NC deny the allegations. They argue that the ads do not satisfy the definition of “republication” and that the Complaint fails to allege facts suggesting coordination.

As discussed below, the Commission finds no reason to believe that Cunningham and Cal for NC violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting excessive in-kind contributions. The Commission also finds no reason to believe that Cal for NC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report in-kind contributions.

## 1 II. FACTUAL BACKGROUND

2 VoteVets Action Fund is a 501(c)(4) corporation. VoteVets PAC is a multicandidate,  
3 hybrid political committee.<sup>1</sup> Cal Cunningham was a 2020 candidate for U.S. Senate in North  
4 Carolina, and Cal for NC and Steve Mele in his official capacity as treasurer was his principal  
5 campaign committee.<sup>2</sup>

### 6 A. Television Ads Featuring Cunningham

#### 7 1. VoteVets Action Fund

8 On or about December 25, 2019, VoteVets Action Fund began running a television ad  
9 titled “Stood Up.”<sup>3</sup> The ad used five photographs of Cunningham from Cal for NC’s Flickr page  
10 (each depicting Cunningham prior to his candidacy, including four in uniform and one from  
11 college); a photograph of Cunningham from a still shot of a video on Cal for NC’s YouTube  
12 page; and three photographs of Cunningham from the Flickr page of his 2010 Senate campaign.<sup>4</sup>  
13 These sources comprise approximately 22 seconds, or 73%, of the 30-second ad.<sup>5</sup>

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<sup>1</sup> VoteVets, Statement of Org. at 2 (Dec. 6, 2019). As a hybrid PAC, VoteVets PAC maintains a non-contribution account, from which it can deposit and withdraw funds raised in unlimited amounts from individuals, corporations, labor organizations, and other political committees. VoteVets Misc. Text (Form 99) (July 5, 2016); see Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.

<sup>2</sup> Cal Cunningham, Amended Statement of Candidacy (July 15, 2020); Cal for NC, Amended Statement of Org. (July 15, 2020).

<sup>3</sup> MUR 7681 Compl. at 2 (Jan. 21, 2020); see also VoteVets.org Action Fund, *Cal Cunningham: Stood Up*, YOUTUBE (Dec. 24, 2019), <https://www.youtube.com/watch?v=vI8lXe4YtOw>. The ad is alternatively titled “Cal Cunningham: 9/11,” but is referred to hereinafter as “Stood Up.”

<sup>4</sup> Exhibit A (listing “Stood Up” visuals). Cunningham’s principal campaign committee in 2010 was Cunningham for U.S. Senate. Cunningham for U.S. Senate, Amended Statement of Org. (Apr. 21, 2010); Cunningham for U.S. Senate, Termination Report (Oct. 1, 2018). The 2010 committee’s Flickr page is still publicly available at <https://www.flickr.com/photos/calfornc/>. The page is titled “Cal for NC” despite being created in connection with the Cunningham’s 2010 campaign. It is unclear who, if anyone, currently controls the page.

<sup>5</sup> See Exhibit A.

1 On or about January 14, 2020, VoteVets Action Fund began running a second television  
 2 ad in North Carolina, titled “Answered the Call.”<sup>6</sup> The ad used four photographs of Cunningham  
 3 from Cal for NC’s Flickr page (including one in uniform prior to his candidacy); five video clips  
 4 depicting Cunningham from a “B-roll” video on Cal for NC’s YouTube page; and a headshot of  
 5 Cunningham from the Flickr page of his 2010 Senate campaign.<sup>7</sup> These sources comprise  
 6 approximately 25 seconds, or 83%, of the 30-second ad.<sup>8</sup>

7 VoteVets Action Fund reportedly spent at least \$2 million to air “Stood Up” and  
 8 “Answered the Call.”<sup>9</sup>

9 2. VoteVets PAC

10 On June 19, 2019, two days after Cunningham announced his candidacy, VoteVets PAC  
 11 issued a press release endorsing Cunningham, which included two sentences on Cunningham’s  
 12 background nearly identical to his biography on the Cal for NC website.<sup>10</sup>

Cal for NC Website	VoteVets PAC Press Release
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.	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>6</sup> MUR 7681 Supp. Compl. at 1-2 (Feb. 14, 2020); *see also* VoteVets.org Action Fund, *Answered the Call*, YOUTUBE (Jan. 14, 2020), [https://www.youtube.com/watch?v=KGB\\_CBn-Qf8](https://www.youtube.com/watch?v=KGB_CBn-Qf8).

<sup>7</sup> Exhibit A (listing “Answered the Call” visuals).

<sup>8</sup> *See id.*

<sup>9</sup> Zach Montellaro, *Cunningham Gets Outside Boost in North Carolina*, POLITICO (Jan. 21, 2020), <https://subscriber.politicopro.com/campaigns/article/2020/01/cunningham-gets-outside-boost-in-north-carolina-senate-primary-1865804> (cited by MUR 7681 Supp. Compl. at 2).

<sup>10</sup> MUR 7681 Compl. at 6; *compare Meet Cal*, Cunningham for U.S. Senate, <https://web.archive.org/web/20191116212816/https://www.calfornia.com/meet-cal/> (most recent archived version from November 16, 2019), *with* VoteVets Endorses Cal Cunningham for Senate, VoteVets.org, VoteVets (June 19, 2019, 10:00 AM), <https://twitter.com/votevets/status/1141344940926132230>; Cal Cunningham for Senate | VoteVets.org, Cal Cunningham for Senate, VoteVets.org, <https://www.votevets.org/candidates/cal-cunningham-for-senate>.

1           On or about February 7, 2020, VoteVets PAC began running an ad in North Carolina,  
2 titled “Won’t Let That Happen.”<sup>11</sup> The ad used two video clips depicting Cunningham from a B-  
3 roll video on Cal for NC’s YouTube page; a photograph of Cunningham in uniform prior to his  
4 candidacy from Cal for NC’s Flickr page; and a headshot of Cunningham from the Flickr page of  
5 Cunningham’s 2010 Senate campaign.<sup>12</sup> These sources comprise approximately 13 seconds, or  
6 43%, of the 30-second ad. VoteVets PAC reported independent expenditures (“IEs”) totaling  
7 \$2,551,906, which appear to have been for “Won’t Let That Happen.”<sup>13</sup>

8           On or about February 24, 2020, VoteVets PAC began running a second television ad in  
9 North Carolina, titled “Fought.”<sup>14</sup> The ad used a photograph of Cunningham from Cal for NC’s  
10 Flickr page and a video clip depicting Cunningham from a B-roll video posted on Cal for NC’s  
11 YouTube page.<sup>15</sup> These sources comprise approximately 14 seconds, or 47%, of the 30-second  
12 ad. VoteVets PAC reported IEs of \$1,563,402, which appear to have been for “Fought.”<sup>16</sup>

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<sup>11</sup> MUR 7681 Second Supp. Compl. at 3 (Mar. 9, 2020); *see also* VoteVets, *Won’t Let That Happen*, YOUTUBE (Feb. 7, 2020), <https://www.youtube.com/watch?v=Jv7L-6bN7yU>.

<sup>12</sup> Exhibit A (listing “Won’t Let That Happen” visuals).

<sup>13</sup> VoteVets, 24/48 Hour IE Report, FEC Sched. E at 1-2 (Feb. 7, 2020) (reporting disbursements to its media vendor, Waterfront Strategies, for TV ad supporting Cunningham disseminated on February 7, 2020, including \$12,892 for production of the ad and \$2,551,906 for placing the ad), <https://docquery.fec.gov/pdf/393/202002079186487393/202002079186487393.pdf>.

<sup>14</sup> *See* MUR 7681 Second Supp. Comp. at 3; VoteVets, *Fought*, YOUTUBE (Feb. 18, 2020), <https://www.youtube.com/watch?v=qpZLlGpXiWU>. The Complaint suggests VoteVets PAC began airing “Fought” on February 18, 2020, but the available information suggests that it was February 24, 2020. *See infra* note 16.

<sup>15</sup> Exhibit A (listing “Fought” visuals).

<sup>16</sup> *See* VoteVets, 2020 Mar. Monthly Report at 149-50 (Mar. 20, 2020), <http://docquery.fec.gov/cgi-bin/fecimg/?202003209204669802> (reporting disbursements to Waterfront Strategies for a TV ad supporting Cunningham disseminated on February 24, 2020, including \$20,977.56 for production of the ad and \$1,563,402 for placing the ad).



1           **B.       Alleged Coordination**

2           The Complaint alleges that Cunningham and Cal for NC coordinated with VoteVets  
3   Action Fund and VoteVets PAC in connection with the four television ads. First, the Complaint  
4   points to the short period of time between when Cal for NC made certain videos and photographs  
5   publicly available and when VoteVets Action Fund and VoteVets PAC made ads using those  
6   materials.<sup>17</sup> Second, the Complaint argues that, because the Cal for NC Flickr page labeled the  
7   images as “All Rights Reserved,” VoteVets PAC and VoteVets Action Fund must have sought  
8   permission from the committee to use them in their ads.”<sup>18</sup> Third, the Complaint points to email  
9   blasts sent by Cal for NC and VoteVets PAC, within 30 minutes of each other on December 27,  
10   2019, each soliciting contributions to VoteVets PAC and four Senate candidates, including  
11   Cunningham.<sup>19</sup>

12           Finally, the Complaint points to a pair of tweets by Lauren Passalacqua, Communications  
13   Director for the Democratic Senatorial Campaign Committee (“DSCC”). On February 5, 2020,  
14   Passalacqua issued a tweet from her personal Twitter account containing a link to Cal for NC’s  
15   website which, in turn, linked to a video that Cal for NC had uploaded to its YouTube page  
16   earlier that day. Her tweet stated: “As North Carolinians see more and more ads leading up to  
17   the March 3 primary, it is critical that voters statewide immediately see and hear much more

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<sup>17</sup>       The Complaint identifies two instances — first, on December 20, 2019, Cal for NC uploaded photographs to its Flickr page and approximately five days later, VoteVets Action Fund used several of them in “Stood Up”; and second, on February 5, 2020, Cal for NC uploaded a video to its YouTube page and approximately two days later VoteVets PAC used clips from the video in “Won’t Let That Happen.” MUR 7681 Compl. at 2, 10; MUR 7681 Second Supp. Compl. at 2-3. The February video was also tweeted out by the communications director for the Democratic Senatorial Campaign Committee. *See infra* at pp. 5-6.

<sup>18</sup>       MUR 7681 Compl. at 2.

<sup>19</sup>       *Id.* at 3 (Jan. 21, 2020); *id.*, Exs. at 2-3 (screenshots of emails). The text of the emails is different, but each links to contribution pages on ActBlue.

1 about Cal Cunningham.”<sup>20</sup> Two days later, on February 7, 2020, VoteVets PAC began airing  
2 “Won’t Let That Happen,” which used clips from the Cal for NC video linked in Passalacqua’s  
3 tweet. On February 13, 2020, she issued another tweet: “In the immediate future, it is important  
4 voters see and hear more about what they are currently hearing about Cal Cunningham.”<sup>21</sup> On  
5 February 24, 2020, VoteVets PAC began airing “Fought.” The Complaint asserts that each of  
6 Passalacqua’s tweets were a “request or suggestion” on behalf of Cunningham, “answered” by  
7 VoteVets PAC.<sup>22</sup>

### 8 III. LEGAL ANALYSIS

9 The Act prohibits any person from making, and any candidate or committee from  
10 knowingly accepting, an excessive contribution.<sup>23</sup> For the 2020 election cycle, contributions by  
11 persons other than multicandidate committees to any candidate and his or her authorized political  
12 committees were limited to \$2,800 per election.<sup>24</sup> Multicandidate committees may contribute to  
13 a candidate and his or her authorized committee up to \$5,000 per election.<sup>25</sup>

14 Committee treasurers are required to disclose the identification of each person who  
15 makes one or more contributions to the committee aggregating in excess of \$200 within the  
16 calendar year (or election cycle, in the case of an authorized committee), together with the date

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<sup>20</sup> MUR 7681 Second Supp. Compl. at 2 (citing Lauren Passalacqua (@laurenvpass), TWITTER (Feb. 5, 2020, 8:53PM), <https://twitter.com/laurenvpass/status/1225236095727734784>).

<sup>21</sup> MUR 7681 Second Supp. Compl. at 3 (citing Lauren Passalacqua (@laurenvpass), TWITTER (Feb. 13, 2020, 4:19PM), <https://twitter.com/laurenvpass/status/1228066247901880320>).

<sup>22</sup> MUR 7681 Second Supp. Compl. at 2-4.

<sup>23</sup> 52 U.S.C. §§ 30116(a), (f); 11 C.F.R. §§ 110.1(b)(1), 110.2(b)(1), 110.9.

<sup>24</sup> 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

<sup>25</sup> 52 U.S.C. § 30116(a)(2)(A); 11 C.F.R. § 110.2(b)(1).

1 and amount of any such contribution.<sup>26</sup> Committee treasurers are also required to disclose the  
2 identification of each political committee that makes a contribution to the reporting committee  
3 during the reporting period, along with the date and amount of any such contribution.<sup>27</sup>

4 Under the Act, “expenditures made by any person in cooperation, consultation, or  
5 concert, with, or at the request or suggestion of, a candidate, his authorized political committees,  
6 or their agents, shall be considered to be a contribution to such candidate.”<sup>28</sup> Commission  
7 regulations further provide, “[a] payment for a coordinated communication is made for the  
8 purpose of influencing a Federal election, and is an in-kind contribution ... to the candidate,  
9 authorized committee, or political party committee with whom or which it is coordinated” and  
10 must be reported as an expenditure by the candidate, authorized committee, or political party  
11 committee.<sup>29</sup>

12 Commission regulations provide a three-part test for determining when a communication  
13 is a “coordinated communication,” and thus treated as an in-kind contribution.<sup>30</sup> The  
14 communication must: (1) be paid for by a third party; (2) satisfy one of the enumerated “content”  
15 standards; and (3) satisfy one of the five enumerated “conduct” standards.<sup>31</sup> All three prongs are  
16 required to be satisfied for a communication to be considered a coordinated communication.<sup>32</sup>

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<sup>26</sup> 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a).

<sup>27</sup> 52 U.S.C. § 30104(b)(3)(B); 11 C.F.R. § 104.3(a).

<sup>28</sup> 52 U.S.C. § 30116(a)(7)(B)(i).

<sup>29</sup> 11 C.F.R. § 109.21(b)(1).

<sup>30</sup> 11 C.F.R. § 109.21(a).

<sup>31</sup> *Id.* (referencing content and conduct standards at 11 C.F.R. § 109.21(c) and (d), respectively)).

<sup>32</sup> *Id.* § 109.21(a).

1                   1.     Payment

2                   The payment prong is satisfied where a communication “[i]s paid for, in whole or in part,  
3 by a person other than [the] candidate, authorized committee, or political party committee.”<sup>33</sup> It  
4 is satisfied here because VoteVets Action Fund and VoteVets PAC paid to distribute the ads.

5                   2.     Content

6                   The content prong is satisfied if, *inter alia*, a public communication “refers to a clearly  
7 identified House or Senate candidate and is publicly distributed or otherwise publicly  
8 disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the clearly  
9 identified candidate’s general, special, or runoff election, or primary or preference election, or  
10 nominating convention or caucus.”<sup>34</sup> The term “public communication” includes a  
11 communication “by means of any broadcast, cable, or satellite communication.”<sup>35</sup> Cunningham  
12 and Cal for NC concede that the communications at issue meet the content prong.<sup>36</sup>

13                   3.     Conduct

14                   The conduct prong is satisfied by one of five types of interactions between the payor and  
15 the candidate or authorized committee regarding the communication: a request or suggestion,  
16 material involvement, substantial discussion, use of a common vendor, or involvement of a  
17 former employee or independent contractor.<sup>37</sup>

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<sup>33</sup> *Id.* § 109.21(a)(1).

<sup>34</sup> 11 C.F.R. § 109.21(c)(4)(i).

<sup>35</sup> 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

<sup>36</sup> Cal for NC Resp. at 4.

<sup>37</sup> *See* 11 C.F.R. § 109.21(d)(1)-(5); *see also id.* § 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

1           The Complaint alleges that Cunningham and Cal for NC coordinated with VoteVets  
2 Action Fund and VoteVets PAC. First, the Complaint points to the short period of time between  
3 when Cal for NC made campaign materials publicly available and the creation of resulting ads  
4 using those materials.<sup>38</sup> However, the mere posting of materials by a committee on a public  
5 webpage and subsequent use of those materials by supportive groups does not provide a  
6 reasonable basis to conclude there was any communication between the entities.<sup>39</sup> Further, the  
7 Commission has previously determined, in analogous matters, that temporal proximity, absent  
8 indicators that respondents engaged in any of the activities outlined in the conduct standards, was  
9 not sufficient to support a finding of reason to believe.<sup>40</sup>

10           Second, the Complaint alleges that because the photographs on Cal for NC's Flickr page  
11 were listed with the designation "All Rights Reserved," VoteVets Action Fund and VoteVets  
12 PAC may have requested, and Cal for NC presumably granted, permission to use the images in  
13 the resulting ads.<sup>41</sup> Respondents specifically deny requesting or providing any such permission,  
14 and the Commission has no information to the contrary.<sup>42</sup> Based on these circumstances, there is  
15 not a sufficient basis to conclude that VoteVets Action Fund or VoteVets PAC requested or  
16 received permission from Cal for NC to use the images.

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<sup>38</sup> MUR 7681 Compl. at 2, 10; MUR 7681 Second Supp. Compl. at 2-3; *see supra* note 17 (stating how, in several instances, VoteVets Action Fund and VoteVets PAC used video and photographs days after Cal for NC posted them on its YouTube and Flickr pages).

<sup>39</sup> Coordination E&J, 68 Fed. Reg. at 432 (explaining that "a request that is posted on a web page that is available to the general public and does not trigger the [request or suggestion] conduct standard"); *see also* Factual & Legal Analysis at 9, MUR 7124 (Katie McGinty for Senate) ("F&LA") (citing F&LA at 7-8, MUR 6821 (Shaheen for Senate)) ("[T]he use of publicly available information, including information on a candidate's campaign website, does not satisfy the 'conduct' standards.").

<sup>40</sup> *See* F&LA at 8, MUR 6821 (Shaheen for Senate); F&LA at 9-10, MUR 6613 (Prosperity for Michigan); F&LA at 5-6, MUR 5963 (Club for Growth PAC).

<sup>41</sup> MUR 7681 Compl. at 2, 10.

<sup>42</sup> Cal for NC Resp. at 7.

1 Third, the Complaint alleges that the December 27, 2019, fundraising emails Cal for NC  
2 and VoteVets PAC sent within approximately 30 minutes of each other, both of which solicited  
3 contributions to VoteVets PAC, Cunningham, and the same additional candidates, is evidence of  
4 coordination between VoteVets PAC and Cal for NC.<sup>43</sup> However, to the extent that Cal for NC  
5 and VoteVets PAC communicated regarding the email, this does not give rise to an inference that  
6 they communicated about the ads in question.<sup>44</sup>

7 Finally, the Complaint alleges that the tweets of DSCC’s Communications Director,  
8 Lauren Passalacqua, were each a “request or suggestion” answered by VoteVets PAC in the form  
9 of ads disseminated several days afterwards supporting Cunningham.<sup>45</sup> The Commission has  
10 explained that a request or suggestion is the “most direct form of coordination” whereby “the  
11 candidate or political party committee communicates desires to another person who effectuates  
12 them,” and that the determination of whether a third party acted in response to a request or  
13 suggestion must be “based on specific facts, rather than presumed.”<sup>46</sup> Additionally, the

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<sup>43</sup> MUR 7681 Compl. at 3-4, 10. The Complaint also argues that VoteVets PAC’s apparent use of sentences from the NC for Cal website in a press release is evidence of coordination. *Id.* at 4, 10. However, again, this does not indicate any communication related to the ads at issue.

<sup>44</sup> The Complaint raises allegations that Cal for NC and VoteVets PAC coordinated their fundraising activity, given solicitation emails sent in close proximity and the ActBlue pages of Cal for NC and VoteVets PAC which apparently contain similar language. MUR 7681 Compl. at 7. However, the emails and ActBlue pages are exempt from the meaning of “coordinated communication,” under the “internet exemption.” Specifically, under the content prong, pursuant to the definition of “public communication,” coordinated communications shall not include communications over the internet, except for those placed for a fee on another person’s website. The available information suggests that no amount was paid for the ActBlue pages. ActBlue — Pricing, <https://secure.actblue.com/pricing>. The Commission has previously determined that emails are not public communications. F&LA at 5, MUR 6657 (Akin for Senate) (determining that payments to send emails were not within the meaning of “placed for a fee on another person’s website” and thus within the internet exemption); Advisory Op. 2011-14 at 5 (Utah Bankers Ass’n Action PAC) (concluding that a communication via email is not a public communication).

<sup>45</sup> MUR 7681 Second Supp. Compl. at 3.

<sup>46</sup> Coordination E&J, 68 Fed. Reg. at 431-32.

1 Commission has explained that the standard “is intended to cover requests or suggestions made  
2 to a select audience, but not those offered to the public generally.”<sup>47</sup>

3 At the outset, the available information does not suggest Passalacqua was an agent for  
4 Cal for NC or Cunningham.<sup>48</sup> The Complaint states, without submitting any factual support, that  
5 “[t]he only reasonable interpretation of the video upload along with the tweet is that Cunningham  
6 with the DSCC requested or suggested that [VoteVets] broadcast advertisements on behalf of  
7 Cunningham statewide in North Carolina.”<sup>49</sup> In any event, notwithstanding whether Passalacqua  
8 was an agent of the Cunningham campaign, the available information does not give rise to a  
9 reasonable inference that Passalacqua’s tweets satisfy the meaning of “request or suggestion.”  
10 As described above, she issued a tweet from her personal account with a link to a video Cal for  
11 NC had uploaded to its YouTube page earlier that day, stating: “As North Carolinians see more  
12 and more ads leading up to the March 3 primary, it is critical that voters statewide immediately  
13 see and hear much more about Cal Cunningham.”<sup>50</sup> Passalacqua also tweeted: “In the  
14 immediate future, it is important voters see and hear more about what they are currently hearing  
15 about Cal Cunningham.”<sup>51</sup>

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<sup>47</sup> *Id.* at 432.

<sup>48</sup> Under the coordination regulations, an individual is an agent of a federal candidate when he or she has actual authority, whether express or implied, to engage in certain activities on behalf of the candidate, including authority to “request or suggest that a communication be created, produced, or distributed,” to “make or authorize a communication that meets one or more of the content standards set forth in 11 C.F.R. § 109.21(c),” or “request or suggest that any other person create, produce, or distribute any communication.” *Id.* § 109.3(b) (listing qualifying activities).

<sup>49</sup> MUR 7681 Second Supp. Compl. at 3. Cal for NC states that the Complaint “does not allege that [Cal for NC] was in any way involved in Passalacqua’s statements.” Cal for NC Resp. at 6.

<sup>50</sup> MUR 7681 Second Supp. Compl. at 2.

<sup>51</sup> *Id.* at 3.

1           In MUR 6821 (Shaheen for Senate), the Commission found no reason to believe when an  
2 authorized committee posted a message and related document on its public website with  
3 information on the candidate and allegations about her opponent; the message was not targeted at  
4 a specific audience and did not advocate for or mention advertising or media.<sup>52</sup> In MUR 7124  
5 (Katie McGinty for Senate), the Commission similarly found no reason to believe when an  
6 authorized committee published a “Notice” page on its public website that contained a list of  
7 specific messages about the candidate and her opponents, specified who needed to know them  
8 (*e.g.*, “[v]oters in Philadelphia”), and offered a general sense of timing (*e.g.*, “[a]t this point of  
9 the campaign”); the page did not appear to target a specific audience and did not advocate for or  
10 mention advertising or media.<sup>53</sup> Passalacqua’s tweets likewise appear to have been “general  
11 requests” outside the purview of the conduct standard. They were publicly available, not clearly  
12 targeted at a specific audience, and did not advocate for or mention advertising.

13           In conclusion, the available information is insufficient to support a reasonable inference  
14 that all three prongs of the coordinated communication test are satisfied with respect to the ads  
15 featuring Cunningham, disseminated by VoteVets Action Fund and VoteVets PAC. Under these  
16 circumstances, the Commission finds no reason to believe that Cunningham and Cal for NC  
17 knowingly accepted excessive in-kind contributions in violation of 52 U.S.C. § 30116(f) and  
18 11 C.F.R. § 110.9, or that Cal for NC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) by  
19 failing to report the contributions.

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<sup>52</sup> F&LA at 2-3, MUR 6821 (Shaheen for Senate, *et al.*).

<sup>53</sup> F&LA at 1-2, 4-5, MUR 7124 (Katie McGinty for Senate, *et al.*).



## Exhibit A

### “Stood Up” (VoteVets Action Fund)<sup>54</sup>

Campaign Materials – 22 seconds (73%)

Non-Campaign Materials – 8 seconds (27%)

Time	Type	Description	Source
:01	Still	Cunningham with woman	2010 Campaign Flickr page <sup>55</sup>
:02-:04	<i>Non-campaign source</i>		
:05-:07	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>56</sup>
:08-:09	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>57</sup>
:10-:11	<i>Non-campaign source</i>		
:12-:13	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>58</sup>
:14	<i>Non-campaign source</i>		
:15-:16	Still	Cunningham in college	2020 Campaign Flickr page <sup>59</sup>
:17-:18	<i>Non-campaign source</i>		
:19-:22	Still	Cunningham with children	2010 Campaign Flickr page <sup>60</sup>
:23-:25	Still	Cunningham with people	2010 Campaign Flickr page <sup>61</sup>
:26	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>62</sup>
:27-:30	Still	Cunningham with people	Cal for NC YouTube page <sup>63</sup>

<sup>54</sup> <https://www.youtube.com/watch?v=vI8IXe4YtOw>

<sup>55</sup> <https://www.flickr.com/photos/calformc/4266416209/>

<sup>56</sup> <https://www.flickr.com/photos/186140610@N06/49249707683/>

<sup>57</sup> <https://www.flickr.com/photos/186140610@N06/49250175916/>

<sup>58</sup> <https://www.flickr.com/photos/186140610@N06/49250176146/>

<sup>59</sup> <https://www.flickr.com/photos/186140610@N06/49249707818/>

<sup>60</sup> <https://www.flickr.com/photos/calformc/4158127659/>

<sup>61</sup> <https://www.flickr.com/photos/calformc/4394053162/>

<sup>62</sup> <https://www.flickr.com/photos/186140610@N06/49249708153/>

<sup>63</sup> <https://youtu.be/OEuSxzUSCqA?t=102>

**“Answered the Call” (VoteVets Action Fund)<sup>64</sup>**

Campaign Materials – 25 seconds (83%)

Non-Campaign Materials – 5 seconds (17%)

Time	Type	Description	Source
:01	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>65</sup>
:02-:03	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>66</sup>
:04-:05	<i>Non-campaign source</i>		
:06	Video	Cunningham in restaurant with man	Cal for NC YouTube page <sup>67</sup>
:07-:08	<i>Non-campaign source</i>		
:09-:10	Still	Cunningham with farmer	2020 Campaign Flickr page <sup>68</sup>
:11-:14	Still	Headshot of Cunningham	2010 Campaign Flickr page <sup>69</sup>
:15	Video	Cunningham with seniors	Cal for NC YouTube page <sup>70</sup>
:16-:20	Video	Cunningham with senior man	Cal for NC YouTube page <sup>71</sup>
:21-:22	Still	Cunningham with children	2020 Campaign Flickr page <sup>72</sup>
:23	<i>Non-campaign source</i>		
:24-:26	Video	Cunningham with woman	Cal for NC YouTube page <sup>73</sup>
:27-:30	Video	Cunningham outside of plant	Cal for NC YouTube page <sup>74</sup>

<sup>64</sup> [https://www.youtube.com/watch?v=KGB\\_CBn-Qf8](https://www.youtube.com/watch?v=KGB_CBn-Qf8)

<sup>65</sup> <https://www.flickr.com/photos/186140610@N06/49249707683>

<sup>66</sup> <https://www.flickr.com/photos/186140610@N06/49249707998/>

<sup>67</sup> <https://youtu.be/9tuigjTKOg0?t=13>

<sup>68</sup> <https://www.flickr.com/photos/186140610@N06/49250383297/>

<sup>69</sup> <https://www.flickr.com/photos/calformc/4158127195/>

<sup>70</sup> <https://youtu.be/9tuigjTKOg0?t=95>

<sup>71</sup> <https://youtu.be/9tuigjTKOg0?t=84>

<sup>72</sup> <https://www.flickr.com/photos/186140610@N06/49249707978/>

<sup>73</sup> <https://youtu.be/9tuigjTKOg0?t=55>

<sup>74</sup> <https://youtu.be/9tuigjTKOg0?t=103>

MUR 7681 (Cal for NC, *et al.*)  
 Factual and Legal Analysis  
 Exhibit A

### “Won’t Let That Happen” (VoteVets PAC)<sup>75</sup>

Campaign Materials – 13 seconds (43%)

Non-Campaign Materials – 17 seconds (57%)

Time	Type	Description	Source
:01-:08		<i>Non-campaign source</i>	
:09		<i>Non-campaign source</i>	
:10-:11	Video	Cunningham with doctor	Cal for NC YouTube page <sup>76</sup>
:12-:15		<i>Non-campaign source</i>	
:16-:19		<i>Non-campaign source</i>	
:20-:22	Video	Cunningham in church with woman	Cal for NC YouTube page <sup>77</sup>
:23-:24	Still	Cunningham in uniform	2020 Campaign Flickr page <sup>78</sup>
:25-:30	Still	Headshot of Cunningham	2010 Campaign Flickr page <sup>79</sup>

<sup>75</sup> <https://www.youtube.com/watch?v=Jv7L-6bN7yU>

<sup>76</sup> [https://youtu.be/nCgG29-3h\\_Y?t=109](https://youtu.be/nCgG29-3h_Y?t=109)

<sup>77</sup> [https://youtu.be/nCgG29-3h\\_Y?t=57](https://youtu.be/nCgG29-3h_Y?t=57)

<sup>78</sup> <https://www.flickr.com/photos/186140610@N06/49250176146/>

<sup>79</sup> <https://www.flickr.com/photos/calfornc/4158127195/>

MUR 7681 (Cal for NC, *et al.*)  
 Factual and Legal Analysis  
 Exhibit A

**“Fought” (VoteVets PAC)<sup>80</sup>**

Campaign Materials – 14 seconds (47%)

Non-Campaign Materials –16 seconds (53%)

Time	Type	Description	Source
:01		<i>Non-campaign source</i>	
:02-:05	Still	Cunningham in college	2020 Campaign Flickr page <sup>81</sup>
:06-:08		<i>Non-campaign source</i>	
:09-:11		<i>Non-campaign source</i>	
:12-:14		<i>Non-campaign source</i>	
:15		<i>Non-campaign source</i>	
:16		<i>Non-campaign source</i>	
:17		<i>Non-campaign source</i>	
:18-:20		<i>Non-campaign source</i>	
:21-:30	Video	Cunningham outside of plant	Cal for NC YouTube page <sup>82</sup>

<sup>80</sup> <https://www.youtube.com/watch?v=qpZLIGpXiWU>

<sup>81</sup> <https://www.flickr.com/photos/186140610@N06/49249707818/>

<sup>82</sup> <https://youtu.be/9tuigjTKOg0?t=103>