

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR 8009**

4 DATE COMPLAINT FILED: June 6, 2022

5 DATE OF NOTIFICATION: June 13, 2022

6 DATE OF LAST RESPONSE: Aug. 9, 2022

7 DATE ACTIVATED: Oct. 24, 2022

8 [REDACTED]
 9 EXPIRATION OF SOL: July 29, 2026-
 10 Apr. 28, 2027

11 ELECTION CYCLE: 2022

12 **COMPLAINANTS:**

Campaign Legal Center
 End Citizens United PAC
 Roger G. Wieand

15 **RESPONDENTS:**

Protect Ohio Values PAC and Vicki J. Hoffman in
 her official capacity as treasurer
 JD Vance for Senate, Inc., and Lisa Lisker in her
 official capacity as treasurer

19 **RELEVANT STATUTES
 20 AND REGULATIONS:**

52 U.S.C. § 30104(b)
 52 U.S.C. § 30116(a), (f)
 52 U.S.C. § 30118(a)
 11 C.F.R. § 104.8
 11 C.F.R. § 104.9
 11 C.F.R. § 110.1(b)
 11 C.F.R. § 110.9
 11 C.F.R. § 114.2(b), (d)

28 **INTERNAL REPORTS CHECKED:** Disclosure Reports

29 **FEDERAL AGENCIES CHECKED:** None

30 **I. INTRODUCTION**

31 The Complaint alleges that Protect Ohio Values PAC (“POV PAC”), a hybrid political
 32 action committee (“hybrid PAC”), spent over \$1 million on polling and voter-targeting
 33 information and provided that information for free through an “obscure website” to JD Vance for
 34 Senate, Inc., and Lisa Lisker in her official capacity as treasurer (the “Vance Committee”) during
 35 the 2022 Republican primary for U.S. Senate in Ohio. The Complaint further alleges that the

1 Vance Committee used this information to make strategic decisions during the 2022 primary
2 election. Thus, the Complaint claims that POV PAC made, and the Vance Committee accepted,
3 an in-kind contribution of information and other valuable strategic material, which neither
4 committee disclosed, and that both committees therefore violated the Federal Election Campaign
5 Act of 1971, as amended (the “Act”).

6 POV PAC denies the allegations. In its Response, which includes a signed affidavit from
7 Lucas Thompson, POV PAC’s Executive Director, POV PAC states that it created an “online
8 blog” to communicate directly and effectively with donors, potential donors, influencers, and
9 supporters and never communicated directly with the Vance Committee. Thompson further
10 asserts that the close monitoring of POV PAC’s content by news media and Vance’s opponents
11 demonstrates that the information it was communicating was publicly available.

12 The Vance Committee denies that it received prohibited in-kind contributions from POV
13 PAC because POV PAC’s information was publicly available and there is no information to
14 suggest that the Vance Committee used or acted on information from POV PAC.

15 As set forth below, in light of the public and uncoded nature of the communications at
16 issue, we recommend that the Commission (1) dismiss the allegation that POV PAC made and
17 failed to report prohibited and excessive in-kind contributions in violation of 52 U.S.C.
18 §§ 30104(b), 30116(a), and 30118(a) and 11 C.F.R. §§ 104.9, 110.1(b)(1), and 114.2(b) by
19 making and failing to report prohibited and excessive in-kind contributions in the form of
20 information posted on *Medium*; (2) dismiss the allegation that that the Vance Committee
21 knowingly accepted and failed to report prohibited and excessive in-kind contributions in
22 violation of 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and 11 C.F.R. §§ 104.8, 110.9, and
23 114.2(d) by knowingly accepting and failing to report prohibited and excessive in-kind

1 contributions in the form of information posted on *Medium*; (3) dismiss as an exercise of
2 prosecutorial discretion the allegation that POV PAC violated 52 U.S.C. §§ 30104(b), 30116(a),
3 and 30118(a) and 11 C.F.R. §§ 104.9, 110.1(b)(1), and 114.2(b) by making and failing to report
4 prohibited and excessive in-kind contributions in the form of services provided by Deep Root
5 Analytics; and (4) dismiss as an exercise of prosecutorial discretion the allegation that the Vance
6 Committee violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a) and 11 C.F.R. §§ 104.8,
7 110.9, and 114.2(d) by knowingly accepting and failing to report prohibited and excessive in-
8 kind contributions in the form of services provided by Deep Root Analytics.

9 **II. FACTUAL BACKGROUND**

10 POV PAC registered with the Commission as an independent expenditure-only political
11 committee (“IEOPC”) on February 24, 2021.¹ On November 15, 2021, POV PAC amended its
12 Statement of Organization to declare itself a hybrid PAC.² Through the 2022 general election, POV
13 PAC raised just under \$19.8 million and disclosed nearly \$16 million in independent expenditures
14 in support of U.S. Senate candidate J.D. Vance.³ POV PAC has received funds into its non-
15 contribution account in amounts exceeding the Act’s limits and from sources the Act prohibits.⁴

¹ POV PAC, Statement of Organization (Feb. 24, 2021), <https://docquery.fec.gov/pdf/840/202102249428874840/202102249428874840.pdf>.

² POV PAC, Amended Statement of Organization (Nov. 15, 2021), <https://docquery.fec.gov/pdf/029/202111159468499029/202111159468499029.pdf>.

³ *Protect Ohio Values PAC: Financial Summary*, FEC.GOV, <https://www.fec.gov/data/committee/C00770495/?tab=summary> (last visited Mar. 18, 2024). According to 24- and 48-Hour Reports of Independent Expenditures filed the day before the primary election, POV PAC spent \$11,880,698.25 in support of Vance’s primary election candidacy. POV PAC, 24-Hour Report of Independent Expenditures at 1 (May 2, 2022), <https://docquery.fec.gov/pdf/090/202205029502508090/202205029502508090.pdf> (reporting \$11,880,698.25 spent “calendar year to date per election for office sought” in support of J.D. Vance).

⁴ POV PAC, 2021 Year-End Report, Sched. A at 12 (Jan. 29, 2022), <https://docquery.fec.gov/pdf/113/202201299475487113/202201299475487113.pdf> (showing corporate contribution); POV PAC, 2021 Mid-Year Report, Sched. A at 9-10 (July 30, 2021), <https://docquery.fec.gov/pdf/194/202107309452400194/202107309452400194.pdf> (showing individual contributions in the amount of \$50,000, \$100,000, and \$10,000,000).

1 J.D. Vance was a candidate for the U.S. Senate in Ohio in 2022 and filed his Statement of
2 Candidacy with the Commission on July 2, 2021.⁵ The Vance Committee is his authorized
3 committee.⁶

4 The Complaint in this matter alleges that POV PAC made unreported excessive and
5 prohibited contributions to the Vance Committee when it published documents and information
6 vital to the Vance Committee on *Medium*, an online publishing platform that allows registered
7 users to create and publish content.⁷ The published information allegedly included polling data,
8 an opposition research notebook, and POV PAC memoranda assessing the strengths and
9 weaknesses of Vance's opponents.⁸ POV PAC also published potential scripts for Vance to use
10 in campaign materials as well as advice on gaining the endorsement of former President Donald
11 Trump.⁹ The Complaint acknowledges that POV PAC's material "was theoretically accessible
12 to the public," but alleges its existence was not widely known or advertised and that it was not
13 discoverable by a Google search.¹⁰ The Complaint cites a news report describing POV PAC's

⁵ J.D. Vance, Statement of Candidacy (July 1, 2021), <https://docquery.fec.gov/pdf/454/202107019450893454/202107019450893454.pdf>.

⁶ J.D. Vance for Senate, Inc., Statement of Org. (July 1, 2021), <https://docquery.fec.gov/pdf/450/202107019450893450/202107019450893450.pdf>. Vance won the Ohio Senate Republican primary election on May 3, 2022, and subsequently won the November general election. *See 2022 Election Results*, OHIO SEC'Y OF STATE, <https://www.ohiosos.gov/elections/election-results-and-data/2022-official-election-results/> (last visited Mar. 18, 2024).

⁷ Compl. ¶¶ 8-9, 14-15 (June 6, 2022). The Complaint describes POV PAC's material as a "website"; the POV PAC Response refers to it as a "blog." *See, e.g.*, Compl. ¶¶ 7, 8, 10; POV PAC Resp. at 2-5 (Aug. 10, 2022).

⁸ Compl. ¶¶ 7, 10-16.

⁹ *Id.* ¶¶ 14-15. POV PAC made 21 entries to its *Medium* blog beginning on July 29, 2021, with an entry that includes internal polling information and ending on May 4, 2022, the day after the primary election, with an entry that thanks POV PAC supporters. *See* POV, *POV Poll Update*, MEDIUM (July 29, 2021), <https://medium.com/@protectohiovaluesforms/pov-poll-update-948b14d8caee>; POV, *Thank you Ohio!*, MEDIUM (May 4, 2022), <https://medium.com/@protectohiovaluesforms/thank-you-ohio-852ac7d2611d>. The entries include POV PAC polling information, descriptions of the PAC's activities, including attendance at events featuring Vance, and information regarding Vance's media appearances.

¹⁰ Compl. ¶¶ 8-9, 19, 46. *Medium* describes itself as "a new model for digital publishing" and states on its website that it "supports . . . vital storytelling without giving in to the incentives of advertising." *Medium* states that "anyone can write on Medium" including "thought-leaders, journalists, experts, and individuals with unique

1 *Medium* blog and the circumstances surrounding the 2022 Ohio Republican U.S. Senate primary,
2 much of which is incorporated into the allegations in the Complaint.¹¹

3 The Complaint further alleges that the Vance Campaign used POV PAC's information to
4 guide its campaign messages and strategy.¹² For example, the Complaint alleges that in a
5 February 17, 2022 post to *Medium* entitled "The Next Step," POV PAC counseled that Vance
6 should "own a critical issue," specifically "the question of immigration," and pointed to specific
7 biographical details and policy positions Vance should highlight in advertisements on the topic.¹³
8 The Complaint then alleges that, beginning April 5, 2022, the Vance Committee "adopted [POV
9 PAC]'s suggested campaign expenditures when it reportedly spent \$1 million to air immigration-
10 focused ads that directly drew on the ideas and language" included in POV PAC's February 17,
11 2022 *Medium* post.¹⁴

12 In its Response, POV PAC denies that it made an in-kind contribution to the Vance
13 Committee when it published the information at issue.¹⁵ POV PAC asserts that a private website
14 or a mailing list was insufficient to reach its audience of donors, donor prospects, and large
15 teams of surrogates and advisors, so POV PAC created a publicly accessible blog on the *Medium*
16 platform that was fully open to everyone.¹⁶ POV PAC also posted links to each of its *Medium*

perspectives." See *About*, MEDIUM, <https://medium.com/about> (last visited Mar. 18, 2024). Although the Complaint alleges POV PAC's *Medium* blog was not discoverable by a Google search, searches made at the time of this Report returned the site on the first page of results. See *infra* note 58.

¹¹ Compl. ¶¶ 7 (citing Alex Isenstadt, *A Mole Hunt, a Secret Website and Peter Thiel's Big Risk: How J.D. Vance Won His Primary*, POLITICO (May 3, 2022, 11:08 PM), <https://www.politico.com/news/2022/05/03/jd-vance-win-ohio-primary-00029881>).

¹² Compl. ¶ 34.

¹³ *Id.* ¶¶ 14-15.

¹⁴ *Id.* ¶ 18.

¹⁵ POV PAC Resp. at 1.

¹⁶ *Id.* at 2.

1 posts to its X (formerly Twitter) account, “@pov2022,” which was also publicly accessible.¹⁷
2 POV PAC states that it communicated with donors and convinced prospective donors that POV
3 PAC was the “right place to invest money to support J.D. Vance.”¹⁸ POV PAC Executive
4 Director Lucas Thompson avers in an affidavit attached to the POV PAC Response that POV
5 PAC published its blog entries containing significant information about the internal workings of
6 the PAC “with awareness that Politico and other campaigns” were able to view the blog entries
7 and access the posted information.¹⁹ Finally, Thompson declares that “[a]t no time did the
8 Vance Campaign request that POV [PAC] conduct a poll or provide any other goods or services”
9 and that POV PAC “had no indication that the Vance Campaign used the polling data or other
10 material” published on the *Medium* blog.²⁰ Thompson acknowledges the *Politico* article
11 detailing POV PAC’s posts on *Medium* and states that publication of the article — accompanied
12 by increased spending by groups supporting other candidates — “pushed” POV PAC to proceed
13 with its first media buys.²¹

14 POV PAC’s Response attaches as an Exhibit a memorandum from POV PAC to
15 “Interested Parties,” described in the Response and attached declaration as a “confidential
16 memorandum to key donors and other stakeholders” regarding the Ohio Senate race,²² dated,

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 3.

¹⁹ *Id.*, Ex. H, ¶¶ 19, 21.

²⁰ *Id.* ¶ 22.

²¹ *Id.* ¶¶ 12-15. POV PAC made its first expenditure in support of Vance on July 1, 2021, when it paid Flexpoint Media, Inc., \$235,000 for “digital advertising.” POV PAC, 48-Hour Report of Independent Expenditures (July 2, 2021), <https://docquery.fec.gov/pdf/742/202107029450978742/202107029450978742.pdf>.

²² POV PAC Resp. at 3; *id.*, Ex. H ¶ 6 (Declaration of POV PAC Executive Director Lucas Thompson) [hereinafter Thompson Decl.].

1 September 28, 2021.²³ The memorandum outlines POV PAC's work to "amplify JD's unique
2 strengths while lightening the challenges he face[d] as a rookie candidate."²⁴ Under the heading
3 "Research Support," it states:

4 In April, we hired pollster Tony Fabrizio and the industry-leading
5 opposition researchers at Prospect Strategic. Our researchers
6 compiled extensive dossiers on JD and his opponents. Tony then
7 conducted a series of four polls, from April to August, to inform
8 our thinking about the race. We tested a set of policy positions and
9 messages based on JD's public statements, JD's vulnerabilities,
10 and the vulnerabilities of our leading opponents.

11 Using these insights, we hired the data science company DeepRoot
12 to build a series of models and segments around different issue
13 concerns and messages. The campaign is also hiring DeepRoot to
14 provide data services. The campaign will therefore be able to
15 access the modeled universes POC has created, and POV will be
16 able to access voter contact data uploaded into the database by the
17 campaign. This arrangement allows POV to bring presidential-
18 level targeting sophistication to JD's campaign without expecting
19 the campaign to shoulder the cost of audience construction.²⁵

20 POV PAC posted the memorandum on its Medium page on October 4, 2021, in response to
21 donor pressure to "do more to support Vance immediately,"²⁶ and the *Medium* post contains
22 some of the data alleged by the Complaint to constitute in-kind contributions to the Vance
23 Committee.²⁷ "DeepRoot" appears to refer to Deep Root Analytics, a political consulting firm
24 focusing on "audience building and media data analysis."²⁸ POV PAC's disclosure reports

²³ POV PAC Resp., Ex. C [hereinafter POV PAC Memo].

²⁴ *Id.* at 1.

²⁵ *Id.* at 4-5.

²⁶ POV PAC Resp. at 3; see POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920>.

²⁷ Compl. ¶¶ 11-13; see POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920>.

²⁸ *About Deep Root Analytics*, DEEP ROOT, <https://www.deeprootanalytics.com/about-us-0> (last visited Mar. 18, 2024).

1 reflect \$909,450 in disbursements to Fabrizio, Lee, & Associates LLC (“Fabrizio LLC”),
2 composed of \$484,950 for “polling” and \$424,500 for “research/focus groups” and
3 “research/polling,”²⁹ as well as \$160,050 to Prospect Strategic Communications for “research
4 consulting.”³⁰ The reports reflect no disbursements to Deep Root Analytics.³¹

5 The Vance Committee also denies the allegations and asks the Commission to dismiss the
6 Complaint.³² The Vance Committee argues that the Complaint generally fails to allege the
7 Vance Committee accessed and used any of the information on POV PAC’s blog, with the
8 exception of one claim concerning drugs and immigration. Disputing that more specific claim,
9 the Vance Committee denies that the candidate spoke about this particular drug issue and
10 inveighed against drugs and open borders at the direction or instruction of POV PAC.³³ The
11 Response asserts that Vance disclosed information about his family member’s addiction in a
12 book published in 2016, authored a “tweetstorm” (a series of sequential posts on the social media
13 platform X, formerly known as Twitter) about these issues months before declaring his
14 candidacy, and spoke about “drugs and open borders” in his campaign announcement.³⁴

²⁹ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00770495&recipient_name=Fabrizio&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting all disbursements by POV PAC to “Fabrizio” during the 2022 election cycle).

³⁰ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00770495&recipient_name=prospect&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting all disbursements by POV PAC to “Prospect” during the 2022 election cycle).

³¹ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00770495&recipient_name=Deep&recipient_name=Root&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting no disbursements by POV PAC to “Deep” or “Root” during the 2022 election cycle).

³² Vance Comm. Resp. at 1 (Aug. 5, 2022).

³³ *Id.* at 3.

³⁴ *Id.*

1 The Vance Committee's disclosure reports reflect \$204,450 in disbursements to Fabrizio
2 LLC for "research" and \$250 in disbursements to Prospect Strategic Communications for the
3 same.³⁵ They reflect no disbursements to Deep Root Analytics.³⁶

4 Finally, both the Vance Committee and POV PAC argue that the material at issue is
5 uncompensated internet activity and is therefore exempt from the definition of contribution or
6 expenditure and exempt from the applicable regulations.³⁷

7 **III. ANALYSIS**

8 **A. Applicable Law**

9 The Act's definition of "contribution" includes "any gift, subscription, loan, advance, or
10 deposit of money or anything of value" made by any person for the purpose of influencing any
11 election for Federal office.³⁸ Similarly, the Act's definition of "expenditure" includes "any
12 purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value,
13 made by any person for the purpose of influencing any election for Federal office."³⁹ The phrase
14 "anything of value" includes in-kind contributions, defined as the provision of any goods or
15 services without charge or at a charge that is less than the usual and normal charge for such
16 goods and services.⁴⁰ The Act and Commission regulations prohibit any person from making a

³⁵ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00783142&recipient_name=Fabrizio&recipient_name=prospect&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting all disbursements by the Vance Committee to "Fabrizio" and "Prospect" during the 2022 election cycle).

³⁶ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00783142&recipient_name=Deep&recipient_name=Root&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting no disbursements by the Vance Committee to "Deep" or "Root" during the 2022 election cycle).

³⁷ Vance Comm. Resp. at 5-7; POV PAC Resp. at 12.

³⁸ 52 U.S.C. § 30101(8)(A)(i).

³⁹ *Id.* § 30101(9)(A)(i).

⁴⁰ 11 C.F.R. § 100.52(d)(1).

1 contribution to an authorized committee in connection with an election in excess of \$2,900 for
2 the 2022 election cycle.⁴¹ Further, no candidate or committee may knowingly accept excessive
3 contributions.⁴²

4 The Act and Commission regulations bar corporations and labor organizations from
5 making, and federal candidates and their authorized committees from accepting, contributions or
6 expenditures related to any election for any political office.⁴³ However, IEOPCs and hybrid
7 PACs (in the latter's non-contribution account) may receive funds from corporations and labor
8 organizations, and they may also receive funds in amounts in excess of applicable federal
9 limits.⁴⁴ IEOPCs and hybrid PACs are prohibited from using these funds to make contributions
10 to candidates and their authorized committees; hybrid PACs may only make contributions to
11 candidates and their authorized committees from their hard-money contribution accounts.⁴⁵

12 The Act requires political committees to timely report and disclose funds they raise and
13 spend.⁴⁶ The Act and Commission regulations further set forth bright-line requirements for

⁴¹ 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

⁴² 52 U.S.C. § 30116(f); 11 C.F.R. § 110.9.

⁴³ *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), (d).

⁴⁴ *See* Advisory Opinion 2010-11 at 2-3 (Commonsense Ten) (stating that IEOPCs may receive unlimited funds and funds from corporations and labor organizations).

⁴⁵ Advisory Opinion 2017-10 at 2 (Citizens Against Plutocracy) (“An [IEOPC] ‘may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.’” (quoting Advisory Opinion 2016-21 at 3-4 (Great Am. PAC))); Factual & Legal Analysis (“F&LA”) at 6, MUR 7813 (Iowa Democratic Party, *et al.*) (“[IEOPCs] . . . are prohibited from making contributions to candidates and their authorized committees.”); F&LA at 4, MUR 7168 (Catherine Cortez Masto, *et al.*) (“[IEOPCs] are prohibited from making contributions to candidates and their authorized committees.”); F&LA at 8, MUR 7124 (Katie McGinty for Senate, *et al.*) (“IEOPCs and nonprofit corporations are prohibited from making contributions to candidates and their authorized committees.”).

⁴⁶ *See generally* 52 U.S.C. § 30104.

1 reporting receipts and disbursements in excess of \$200 within the calendar year or election cycle
2 along with select information about the contributor or the recipient of the given disbursement.⁴⁷

3 Uncompensated internet activities are exempted from the definition of contribution or
4 expenditure.⁴⁸ When an individual or a group of individuals, acting independently or in
5 coordination with any candidate, authorized committee, or political party committee, engages in
6 internet activities for the purpose of influencing a federal election, uncompensated personal
7 services related to such internet activities, or the use of equipment or services for uncompensated
8 internet activities, regardless of who owns the equipment and services, are not “contributions” or
9 “expenditures.”⁴⁹ Exempted activities include, but are not limited to, sending or forwarding
10 electronic messages; providing a hyperlink or other direct access to another person’s website;
11 blogging; creating, maintaining, or hosting a website; paying a nominal fee for the use of another
12 person’s website; and any other form of communication distributed over the Internet.⁵⁰

13 **B. The Commission Should Dismiss the Allegation That Respondents Violated**
14 **the Act’s Contribution Limits and Prohibitions or Reporting Requirements**
15 **Through POV PAC’s Publication of Information and Materials Online**

16 One of the central questions in this matter is whether the strategy documents and
17 information POV PAC published on *Medium* resulted in in-kind contributions made to and
18 accepted by the Vance Committee. The Complaint relies on MUR 5409 (Grover Norquist, *et al.*)
19 to support its claim that a third party that uses its resources to provide materials to a campaign

⁴⁷ See *id.* §§ 30104(b)(6)(A), 30104(b)(6)(B)(v); 11 C.F.R. §§ 104.8(a), 104.9(a); see also Advisory Opinion 2015-12 at 4 (Ethiq) (“The Act requires each political committee to report the name, mailing address, occupation, and employer name of any individual who contributes more than \$200 to the committee in a calendar year.”).

⁴⁸ Internet Communications, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (adopting 11 C.F.R. §§ 100.94 and 100.155, which exempt uncompensated internet activities from the definition of contribution and expenditure).

⁴⁹ 11 C.F.R. §§ 100.94, 100.155.

⁵⁰ *Id.* §§ 100.94, 100.155.

1 committee free of charge has made an in-kind contribution, even if some of the materials
2 provided are based on publicly available information.⁵¹ In that matter, the Commission
3 determined that a third-party organization that had compiled lists of its meeting attendees —
4 using its resources to obtain and compile a variety of valuable campaign materials — and
5 provided those lists to a campaign had thereby made an in-kind contribution.⁵² However, the
6 clear distinction between that matter and the instant matter is that the third party in MUR 5409
7 directly provided the materials, which were based in part on publicly available information, to
8 the candidate's committee; by contrast, anything of value at issue here was not initially based on
9 publicly available information, but it was ultimately made public after it was published to an
10 online blog, where it was accessible to the candidate's committee. There is no allegation or
11 information indicating that POV PAC gave any information or materials directly to the Vance
12 Committee, as occurred in MUR 5409. Thus, the actual crux of the Commission's determination
13 here is whether POV PAC's act of publishing the materials online — where the materials were
14 *accessible* to the Vance Committee and others, but not necessarily *provided* to them — is similar
15 enough to providing the materials directly to the Vance Committee to thereby result in an in-kind
16 contribution.

17 Another illustrative matter is MUR 6908 (National Republican Congressional Committee
18 (“NRCC”)), in which the complaint alleged the NRCC posted polling results for certain
19 congressional races on two anonymous X (then-Twitter) accounts, and employees of two third-

⁵¹ Compl. ¶ 31 n.41.

⁵² First Gen. Counsel's Rpt. (“First GCR”) at 10 & Certification (“Cert.”) (Oct. 19, 2004), MUR 5409 (Grover Norquist, *et al.*) (approving the Office of General Counsel's (“OGC”) recommendation to find reason to believe that a nonprofit corporation made prohibited in-kind contributions by providing a campaign with its private lists of conservative organizations and individuals, which the corporation “utilized its resources to obtain and compile”). Simultaneous with its finding reason to believe, the Commission voted to take no further action and close the file. Cert. ¶ 2 (Oct. 19, 2004), MUR 5409.

1 party groups allegedly relied on the posts when spending millions of dollars in connection with
2 the races in question.⁵³ The complaint alleged that the two groups made unreported in-kind
3 contributions to the NRCC via coordinated communications when the NRCC provided the
4 groups with the polling results and the groups made supposedly independent expenditures to the
5 benefit of the NRCC's preferred candidates.⁵⁴ Critically, even though the polling data was on a
6 publicly available website, it was alleged to be non-public information because it was "encoded
7 in a format that only members of [the] scheme could understand."⁵⁵

8 Although the Commission was unable to garner four votes regarding the reason-to-
9 believe recommendation in MUR 6908, we nonetheless distinguish that matter from the instant
10 circumstances. First, the information at issue in here was much more accessible and, thus, much
11 more public: POV PAC posted on a publicly available platform, *Medium*, where any
12 information is searchable and available at no cost to the viewer.⁵⁶ Further, any member of the
13 public can subscribe to posts by any content creator on the site and receive notifications when

⁵³ Compl. at 2, 3 (Dec. 4, 2014), MUR 6908 (Nat'l Republican Congressional Comm., *et al.*); First GCR at 3-4, MUR 6908. The complaint in that matter was based on a press article that cited to a source with knowledge of the activities and that revealed the Twitter accounts, alleging that tweets containing polling information regarding various campaigns were deleted after they were supposedly used by the two groups. Compl. at 2, MUR 6908 (citing Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014), <https://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/index.html>).

⁵⁴ Compl. at 6-8, MUR 6908. The Commission was divided by a vote of 2-2 on OGC's reason to believe recommendations. *See* Cert. ¶ 1 (Mar. 29, 2019), MUR 6908. Commissioners Petersen and Hunter wrote that the Twitter posts at issue were publicly available or offered to the public generally and were likely exempt from the coordinated communication regulation and thus would not have comprised a contribution to the NRCC. Statement of Reasons ("SOR"), Comm'rs. Petersen & Hunter at 4, MUR 6908; *see also* SOR, Comm'r Weintraub at 3, MUR 6908 (stating it was reasonable to infer that NRCC had made the two groups aware of the Twitter accounts and that without context the messages would not be understood by even the most experienced campaign operative). In a related matter, MUR 6958 (Claire McCaskill, *et al.*), the complaint alleged a Democratic candidate committee made an in-kind contribution when it provided polling data directly to the authorized committee of a Republican primary candidate, and the latter committee spoke directly with the pollster and revised its advertising strategy in accordance with polling data. First GCR at 7, MUR 6958 (Claire McCaskill, *et al.*). The Commission was divided 3-3 on OGC's reason-to-believe recommendations in that matter. *See* Cert. ¶ 1 (Sept. 16, 2016), MUR 6958.

⁵⁵ First GCR at 1-2, MUR 6908.

⁵⁶ POV, <https://medium.com/@protectohiovaluesforms> (last visited Mar. 18, 2024).

1 new content is posted.⁵⁷ A Google search for “POV PAC JD Vance” as of the date of the
2 circulation of this Report results in a link to the *Medium* site on the first page of results.⁵⁸
3 Although searches conducted at different times and by different users may not produce exactly
4 the same results, POV PAC’s material appears to have been available to those who sought it.

5 Additionally, the information POV PAC posted online was legible and understandable to
6 those who did find it. In contrast to the highly technical and deliberately encrypted messages in
7 MUR 6908, the information and documents POV PAC posted were written in plain English and
8 in a style and manner that made their meaning facially apparent. This fact alone separates this
9 matter from the *sui generis* circumstances at issue in MUR 6908.⁵⁹ There is also no information
10 indicating that anyone associated with the Vance Committee or POV PAC communicated with
11 one another about the existence of the *Medium* platform or otherwise privately prearranged for
12 use of the platform as a means of transmitting secret information.

13 Moreover, the available information does not indicate that the Vance Committee made
14 use of POV PAC’s information. Indeed, the only specific example alleged in the Complaint of
15 the Vance Committee making use of POV PAC’s materials is the Vance campaign’s subsequent
16 discussion of drugs and immigration. But the available information, including POV PAC’s and
17 the Vance Committee’s Responses, indicates that the candidate had spotlighted those issues in
18 his 2016 book, in statements before he announced his candidacy, and in his campaign
19 announcement well before POV PAC exhorted him to do so.

⁵⁷ *Id.*

⁵⁸ *Google Search Results: POV PAC JD Vance*, GOOGLE, <https://www.google.com/search?q=POV+PAC+JD+Vance> (last visited Mar. 18, 2024).

⁵⁹ *Cf.* SOR, Comm’r. Weintraub at 1-2, MUR 6908 (“To most readers, [the information] looks like gibberish. The . . . information does not make sense at a glance.”).

1 Further, POV PAC's polling results appear to have been made public by POV PAC
2 without any alleged request by the Vance Committee and thus would not be treated as an in-kind
3 contribution under the Commission's regulations for the allocation of polling expenses.⁶⁰

4 In light of our analysis that POV PAC's publishing of information and materials online
5 does not constitute a contribution to the Vance Committee, we do not address Respondents'
6 arguments that the underlying conduct may also fall within the uncompensated internet activity
7 exemption to the definition of contribution.⁶¹

8 Accordingly, we recommend that the Commission dismiss the allegation that that POV
9 PAC made and failed to report prohibited and excessive in-kind contributions to the Vance
10 Committee in the form of information posted on *Medium* in violation of 52 U.S.C. §§ 30104(b),
11 30116(a), and 30118(a) and 11 C.F.R. §§ 104.9, 110.1(b)(1), and 114.2(b); and dismiss the
12 allegation that the Vance Committee knowingly accepted and failed to report prohibited and
13 excessive in-kind contributions in violation of 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a)
14 and 11 C.F.R. §§ 104.8, 110.9, and 114.2(d).⁶²

⁶⁰ See 11 C.F.R. § 106.4(c).

⁶¹ See *id.* §§ 100.94, 100.155; Vance Comm. Resp. at 5-7; POV PAC Resp. at 12. Moreover, although the Complaint contains detailed allegations concerning POV PAC's expenditures on the materials and data underlying the content featured on *Medium*, the Complaint does not allege that POV PAC paid any individual to post those materials. See Compl. ¶¶ 11, 13, 30, 34, 36, 44-45. POV PAC asserts in its Response that "complainants have not shown that POV [PAC] paid any fees to publish its communications on another person's website." POV PAC Resp. at 9. POV PAC does not assert, however, that it did *not* pay any individual to post those materials, stating only that anyone is able to post on *Medium* for free. See *id.* at 3 ("POV [PAC] did not pay any fees to [*Medium*] . . . for the posting of any of the blog's content."). POV PAC's reported disbursements during the relevant period are also inconclusive, leaving open the possibility that the posts could have been made by either a paid consultant or an unpaid volunteer. See POV PAC, 2022 April Quarterly Report at 14, 18, 19 (Apr. 13, 2022), <https://docquery.fec.gov/pdf/652/202204139496096652/202204139496096652.pdf> (showing a total of \$30,000 in disbursements to two vendors for "communications consulting" from January through March 2022). The Commission recently adopted the Technological Modernization final rule, which impacts the uncompensated internet activity exemption, but that rule did not take effect until March 1, 2024. See Technological Modernization, 89 Fed. Reg. 196 (Jan. 2, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-01-02/pdf/2023-27908.pdf>.

⁶² Separately from POV's alleged in-kind contributions in form of materials on the *Medium* website, POV PAC made two \$1,000 direct contributions to the Vance Committee: one on August 12, 2021, while POV PAC was

1 **C. The Commission Should Dismiss as an Exercise of Prosecutorial Discretion**
 2 **the Allegation That Respondents Violated the Act's Contribution Limits and**
 3 **Prohibitions or Reporting Requirements Through In-Kind Contributions**
 4 **Made by POV PAC in the Form of Services Provided by DeepRoot Analytics**

5 The Complaint alleges that POV PAC made potentially prohibited or excessive in-kind
 6 contributions to the Vance Committee in the form of data services provided by Deep Root
 7 Analytics, based on a *Medium* post in which POV PAC published voter targeting maps bearing
 8 Deep Root's logo and referencing an arrangement under which POV PAC would benefit the
 9 Vance Committee via services provided by a common vendor.⁶³ The *Medium* post, and the
 10 internal POV PAC memorandum from which it originated, state that POV PAC had hired Deep
 11 Root Analytics, and that the Vance Committee "is also hiring DeepRoot to provide data services.
 12 The campaign will therefore be able to access the modeled universes POV has created, and POV
 13 will be able to access voter contract data uploaded into the database by the campaign."⁶⁴ The
 14 memorandum indicates that this arrangement will benefit the Vance Committee by relieving it of
 15 the "cost of audience construction."⁶⁵

16 While the described arrangement reflects conduct that would constitute the provision of
 17 an in-kind contribution by POV PAC to the Vance Committee, it is unclear whether the conduct

still an IEOPC, and the second on November 24, 2021, after POV PAC became a hybrid PAC. *See* JD Vance for U.S. Senate, 2021 Amended October Quarterly Report at 65 (Apr. 21, 2022), <https://docquery.fec.gov/pdf/450/202204219502248450/202204219502248450.pdf#navpanes=0>; JD Vance for U.S. Senate, 2021 Amended Year-End Report at 30 (Apr. 21, 2022), <https://docquery.fec.gov/pdf/118/202204219502249118/202204219502249118.pdf#navpanes=0>. Although the earlier contribution appears to have been an impermissible IEOPC contribution to a candidate committee, *see supra* note 45, POV PAC appears to have been segregating contributions in excess of the federal contribution limits into a non-contribution fund even before it amended its Statement of Organization to be a hybrid PAC. Under these circumstances, and given the small size of the contributions, we make no recommendation regarding POV PAC's direct contributions to the Vance Committee.

⁶³ Compl. ¶¶ 36-37.

⁶⁴ POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920>; POV PAC Memo at 5.

⁶⁵ *Id.*

1 described actually occurred. As noted above, though it appears that POV PAC received some
2 services from Deep Root, given that some of the data included in the October 4 *Medium* post and
3 underlying memorandum bears Deep Root's logo,⁶⁶ neither POV PAC nor the Vance Committee
4 disclosed any disbursements to Deep Root Analytics during the 2022 election cycle.⁶⁷ Indeed,
5 sharing information and resources via the use of a common vendor may have been planned but
6 never implemented for a number of reasons: First, the memorandum is described by the
7 Response and POV PAC's Executive Director as a "confidential memorandum to key donors and
8 other stakeholders."⁶⁸ In the context of attempting to inspire further contributions to POV PAC,
9 the potential for synergy with the Vance Committee in the method described, which was written
10 so as to indicate that the Vance Committee was in the process of hiring Deep Root Analytics
11 ("[t]he campaign is also hiring DeepRoot") may have been aspirational rather than descriptive of
12 past or present conduct. Second, POV PAC published the memorandum publicly on October 4,
13 2021, less than a week after the date shown on the version attached to the Response.⁶⁹ Given
14 that the scheme described in the memorandum and subsequent *Medium* post appears to reflect
15 circumstances that would result in a violation of the Act, POV PAC, the Vance Committee, or
16 both may have been advised not to engage in the proposed conduct.

⁶⁶ Compare POV PAC Memo at 7-9 (depicting graphics bearing a small, green-and-black logo in the lower right-hand corner), and POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920> (same), with Deep Root, <https://www.deeprootanalytics.com> (last visited Mar. 18, 2024) (depicting same green-and-black logo).

⁶⁷ See *supra* notes 31, 36 and accompanying text.

⁶⁸ POV PAC Resp. at 3; *id.*, Thompson Decl. ¶ 6.

⁶⁹ Compare POV PAC Memo (dated September 28, 2021), with POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920>.

1 Following the broad dissemination of the memorandum, it is possible that Respondents
2 disguised the conduct described therein by engaging Deep Root as a subvendor to one of their
3 other common vendors, such as Fabrizio LLC, which is mentioned in the memorandum in
4 conjunction with the proposed common-vendor scheme.⁷⁰ However, while both POV PAC and
5 the Vance Committee engaged Fabrizio LLC during the 2022 election cycle, they never did so at
6 the same time: POV PAC disbursed a total of \$909,450 to this vendor between April 21, 2021,
7 and May 2, 2022, while the Vance Committee's disbursements, totaling \$204,450, occurred
8 between June 17, 2022, and November 4, 2022.⁷¹

9 While the fact that the Vance Committee engaged Fabrizio LLC immediately after POV
10 PAC stopped making disbursements to this entity could raise questions, we do not recommend
11 that the Commission pursue an investigation of these circumstances. Regardless of whether
12 POV PAC and the Vance Committee both engaged Deep Root, either as primary vendors as
13 contemplated in the memorandum or as a subvendor, or through the successive hirings of
14 Fabrizio LLC, it appears that the information POV PAC hoped to provide to the Vance
15 Committee via Deep Root is essentially the information it included in its October 4, 2021
16 *Medium* post: The post refers to the Vance Committee gaining access to the “modeled universes
17 POV has created,” and the post goes on to provide a series of graphics apparently produced by
18 Deep Root regarding the Vance Committee's “key audience,” “market share” of Republican

⁷⁰ POV PAC Memo at 4-5.

⁷¹ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00770495&committee_id=C00783142&recipient_name=Fabrizio&two_year_transaction_period=2022 (last visited Mar. 18, 2024) (reflecting all disbursements by POV PAC and the Vance Committee to Fabrizio, Lee, & Associates LLC during the 2022 election cycle).

1 voters by metropolitan area within Ohio, and “top messages” on a county-by-county basis.⁷²
2 These circumstances suggest that a version of a potentially more legally risky contemplated plan
3 to share information directly was overtaken by the action of making the proposed information to
4 be shared public. Although it is possible that information was shared both privately and
5 publicly, the public sharing would seem to make the described plan less likely. As discussed in
6 Part III.B, above, in matters where a respondent made valuable information publicly available,
7 the Commission has not found reason to believe that an in-kind contribution occurred.⁷³

8 Accordingly, given the overall information suggesting that POV PAC contemplated
9 making an excessive or prohibited in-kind contribution to the Vance Committee in the form of
10 services provided by Deep Root Analytics, as well as the fact that POV PAC published the
11 information it allegedly intended to provide to the Vance Committee via common engagement of
12 Deep Root Analytics, and the resources that would be needed to investigate these circumstances,
13 we recommend the Commission dismiss as an exercise of prosecutorial discretion⁷⁴ the
14 allegation that POV PAC and the Vance Committee violated 52 U.S.C. §§ 30104(b), 30116(a),

⁷² POV, *Breaking New Ground: How POV Is Changing the Super PAC Game*, MEDIUM (Oct. 4, 2021), <https://medium.com/@protectohiovaluesforms/breaking-new-ground-da38fd904920>.

⁷³ See First GCR at 3-4, MUR 6908 (recommending the Commission find reason to believe where a respondent made encoded Tweets that were indecipherable to the public but contained polling information that recipient committees, which had been informed of how to read the Tweets, allegedly subsequently used); Cert. ¶ 1 (Mar. 29, 2019), MUR 6908 (voting 2-2 on the reason-to-believe recommendation); *cf.* Statement of Reasons of Chairman Dickerson, Comm’rs Cooksey, Trainor & Weintraub, MUR 7700 (*VoteVets, et al.*) (writing in a four-Commissioner Statement of Reasons that a public Tweet in which an authorized committee stated that it was “critical [that Nevada voters see the candidate’s military experience] on the air through the caucus” “could have been a generalized call for other independent Buttigieg supporters to get off the sidelines and full-throatedly support the candidate ahead of the Nevada caucuses” and thus did not constitute coordination that would give rise to an in-kind contribution); F&LA at 9, MUR 7124 (*Katie McGinty for Senate, et al.*) (holding, in the context of allegations regarding coordinated communications, that “the Commission has provided that ‘a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the [request or suggestion] conduct standard’” (quoting *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003))).

⁷⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

1 30116(f), and 30118(a) and 11 C.F.R. §§ 104.8, 104.9, 110.1(b)(1), 110.9, and 114.2(b), (d) by
2 making, knowingly accepting, and failing to report prohibited and excessive in-kind
3 contributions in the form of services provided by Deep Root Analytics.

4 **IV. RECOMMENDATIONS**

- 5 1. Dismiss the allegation that Protect Ohio Values and Vicki Hoffman in her official
6 capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) and
7 11 C.F.R. §§ 104.9, 110.1(b)(1), and 114.2(b) by making and failing to report
8 prohibited and excessive in-kind contributions in the form of information posted on
9 *Medium*;
- 10 2. Dismiss the allegation that JD Vance for Senate, Inc., and Lisa Lisker in her official
11 capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(f), and 30118(a), and
12 11 C.F.R. §§ 104.8, 110.9, and 114.2(d) by knowingly accepting and failing to report
13 prohibited and excessive in-kind contributions in the form of information posted on
14 *Medium*;
- 15 3. Dismiss as an exercise of prosecutorial discretion the allegation that Protect Ohio
16 Values and Vicki Hoffman in her official capacity as treasurer violated 52 U.S.C. §§
17 30104(b), 30116(a), and 30118(a) and 11 C.F.R. §§ 104.9, 110.1(b)(1), and 114.2(b)
18 by making and failing to report prohibited and excessive in-kind contributions in the
19 form of services provided by Deep Root Analytics;
- 20 4. Dismiss as an exercise of prosecutorial discretion the allegation that JD Vance for
21 Senate, Inc., and Lisa Lisker in her official capacity as treasurer violated 52 U.S.C.
22 §§ 30104(b), 30116(f), and 30118(a), and 11 C.F.R. §§ 104.8, 110.9, and 114.2(d) by
23 knowingly accepting and failing to report prohibited and excessive in-kind
24 contributions in the form of services provided by Deep Root Analytics;
- 25 5. Approve the attached Factual and Legal Analysis;
- 26 6. Approve the appropriate letters; and

