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June 21, 2018

VIA ELECTRONIC MAIL

Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn.: Kristina Portner
1050 First Street, NE
Washington, DC 20463
cela@fec.gov

Re: MUR 7368

Dear Mr. Jordan:

On behalf of Postcards to Voters, LLC and Anthony McMullin (collectively, "PTV"), we write in response to the Complaint filed by Tyler Montague of the Public Integrity Alliance on April 12, 2018. The Complaint alleges that PTV sponsored coordinated communications supporting congressional candidate Dr. Hiral Tiperneni, that PTV is a political committee, and that PTV disseminated communications lacking a disclaimer. As described herein, the Complaint is based on erroneous assumptions about the underlying facts, as well as a misunderstanding of the applicable law. In short, PTV is a project that is operated by a small group of uncompensated individuals and engages exclusively in activities on the internet to facilitate the volunteer political activity of other uncompensated volunteers. It does not sponsor public communications, has not accepted more than \$1,000 in contributions or made more than \$1,000 in expenditures, and does not have the major purpose of influencing federal elections. Accordingly, the Complaint should be promptly dismissed

FACTUAL BACKGROUND

PTV is a single-member LLC organized under Georgia law. Its sole member is Anthony McMullin. PTV was established by Mr. McMullin in 2017 to serve as a hub for volunteers who wish to make a difference by encouraging fellow Democratic voters to vote in contested elections. It is currently operated by Mr. McMullin and several other individuals on an uncompensated basis. PTV does not itself communicate with voters; instead, it facilitates the political participation of individual volunteers by



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providing them with the names and addresses of registered Democratic voters in those jurisdictions, so that the volunteers can mail their own individualized postcards to those voters.

To participate, an individual must register with PTV and submit a sample postcard so that PTV can verify that the individual is a bona fide volunteer. Once a volunteer has been verified, the volunteer can choose to participate in volunteer activities through PTV at the volunteer's sole discretion. If a volunteer wishes to participate, he or she can request the addresses of individual Democratic voters through PTV's website, email, Facebook messenger, or text message, by specifying the campaign in which the volunteer wishes to participate and the number of addresses the volunteer wishes to send mail to, which may range from 4 to 30; on average PTV volunteers request 13 names at a time. PTV software then provides the volunteer with the requested number of addresses, as well as sample "talking points" that the volunteer can use to provide the content for the volunteer's postcards. This information is provided to the volunteer by email, Facebook messenger, or SMTP text message¹ that contains a link to a web page containing the relevant information. While PTV requests that volunteers base their postcards on the provided talking points, it encourages volunteers to change the wording to suit their individual style and, ultimately, each volunteer retains sole discretion over the content of their postcards. PTV does not monitor the content or number of the postcards sent by its volunteers, nor does it have any way of knowing that its volunteers have sent postcards to the addresses requested.

PTV does not provide postage or printed postcards to its volunteers. Instead, the volunteers provide for these individually using their own personal funds. PTV does provide on its website blank sample postcards, which volunteers may print using their own personal printer. These samples do not identify any clearly identified candidates, nor do they expressly advocate for any candidate.²

PTV is an all-volunteer effort. As stated above, its activities are supported by several uncompensated volunteers, including Mr. McMullin, and it does not have any paid staff. The only costs that PTV has incurred are administrative expenses such as a monthly fee for its email platform, fees

¹ "SMTP" is an abbreviation for "Simple Mail Transfer Protocol," and refers to the protocol used to send and receive electronic mail. *See* https://en.wikipedia.org/wiki/Simple_Mail_Transfer_Protocol. Thus, SMTP messages are emails that are sent to cellular phones.

² *See* <https://postcardstovoters.org/templates/>.

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associated with the software that permits it to send and receive text messages, and other software license fees.

To date, PTV has provided volunteer information to participants in 92 different elections. Of those 92, only 8 have involved federal candidates.³

LEGAL BACKGROUND AND ANALYSIS

The Complaint makes three principal allegations against PTV: (1) that PTV made in-kind contributions in the form of coordinated communications, and otherwise, to Hiral for Congress; (2) that PTV is a political committee; and (3) that postcards sent by PTV volunteers should have contained a disclaimer. All three allegations are based on misguided speculation and an incorrect reading of the law.

I. PTV Did Not Make Contributions To Hiral For Congress

The Complaint alleges that PTV made in-kind contributions to Hiral for Congress both in the form of coordinated communications under 11 C.F.R. § 109.21 and in the form of in-kind contributions under 11 C.F.R. § 109.20(b). Neither allegation has merit.

A. PTV Did Not Make Coordinated Communications

Under FEC rules, a communication will be considered a “coordinated communication” and an in-kind contribution to the candidate with whom it is coordinated only if the communication: (1) is paid for by someone other than the candidate or candidate’s authorized committee, (2) contains certain types of content, and (3) follows certain conduct.⁴ At least two prongs are missing here.

First, PTV did not make coordinated communications because it did not pay for any communications. While PTV provides volunteers with the names and addresses of Democratic voters, it does not pay for any of the expenses associated with the distribution of postcards by the volunteers. The

³ The campaigns involving federal elections were the April 2017 special election in Georgia’s Sixth Congressional District; the June 2017 special election in South Carolina’s Fifth Congressional District; the November 2017 special election in Utah’s Third Congressional District; the December 2017 special election for U.S. Senate in Alabama; the March 2018 special election in Pennsylvania’s Eighteenth Congressional District; the March 2018 primary in Illinois’ Third Congressional District; the April 2018 special election in Arizona’s Eighth Congressional District; and the June 2018 special election in Texas’s Twenty Seventh Congressional District. See <https://postcardstovoters.org/results/>.

⁴ 11 C.F.R. § 109.21(a).

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individual volunteers are solely responsible for paying for the costs associated with printing and mailing postcards that they send.

Second, the postcards do not meet any of the Commission's content standards for coordinated communications. To meet the content prong, a communication must be (1) a television or radio communication aired near the time of an election,⁵ or (2) a "public communication."⁶ A mailed advertisement only qualifies as a "public communication" if it is a "mass mailing," which is a mailing "of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period."⁷ Mail pieces are "substantially similar" if they include "substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location."⁸ In adopting this rule, the Commission cited concerns, previously voiced when adopting the Commission's disclaimer rules, that "technological advances now permit what is basically the same communication to be personalized to include the recipient's name, occupation, geographic location, and similar variables."⁹

The postcards sent by PTV volunteers do not qualify as mass mailings. The rulemaking history makes it clear that the term "mass mailing" only includes communications that are mass produced through technological means.¹⁰ It does not include individualized, handwritten postcards.

Moreover, though PTV, for its part, does not monitor the content of the volunteers' postcards, there is no reason to believe that any more than a handful of postcards sent by PTV volunteers were "substantially similar" in content. The postcards are individualized, handwritten postcards, written

⁵ *Id.* §§ 109.21(c)(1), 100.29(b).

⁶ *Id.* § 109.21(c)(2)-(5).

⁷ *Id.* §§ 100.26, 100.27.

⁸ *Id.* § 100.27.

⁹ *Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule*, 67 Fed. Reg., 49, 49,072 (July 29, 2002) (citing *Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures*, 60 Fed. Reg. 52,069, 52,070 (Oct. 5, 1995)).

¹⁰ *Id.*

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by dozens of different volunteers. Though the volunteers are provided with general talking points to use, they are not required to stick to any particular script, are able to pick and choose from among the talking points that they use, and are encouraged to change the wording to reflect their own personal style. Moreover, while PTV provides a number of postcard templates that volunteers can print, volunteers may obtain postcards from any number of sources, so the non-postage side of the postcards are invariably very different from one another. Even if an individual volunteer chose to send the exact same postcard to all recipients, the number of identical postcards would necessarily be limited by the fact that volunteers may only request up to 30 addresses at a time, and the average volunteer requests only 13. And, while the Complaint baldly alleges that the postcards are “substantially similar,” it fails to support this allegation, providing only a single postcard from a single volunteer.¹¹ Because the postcards are not “public communications,” they cannot be “coordinated communications” under Commission rules.¹²

B. PTV Did Not Make In-Kind Contributions To Hiral For Congress

The Complaint alleges that, even if PTV did not make coordinated communications, it made in-kind contributions to Hiral for Congress under 11 C.F.R. § 109.20(b). These contributions, the Complaint alleges take two forms (1) PTV’s “preparation and distribution of mailers” and (2) “its provision of sophisticated logistics services in connection with these electioneering efforts.”¹³ The Complaint is incorrect on both counts.

The Commission has rejected the Complaint’s first theory: that a communication that is not a coordinated communication under section 109.21 can still result in an in-kind contribution under

¹¹ See Complaint, Ex. B.

¹² See, e.g., Adv. Op. 2017-10 (finding that websites and emails prepared by an independent expenditure-only committee are not “coordinated communications” because the underlying media are not “public communications”).

¹³ Complaint at 7.

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section 109.20.¹⁴ Because these communications are not “coordinated communications” under section 109.21, they are not contributions under section 109.20.¹⁵

The second theory fails because PTV does not provide services to campaigns, nor does it incur “substantial costs” to provide them.¹⁶ The “commercial Help Desk system” is a free software program that PTV uses to respond to volunteer requests, not to campaigns. The “commercial business intelligence package” and “heatmap” describe database software that PTV uses primarily for its own internal organizational purposes, though PTV will occasionally use it to post statistics about volunteer activity on social media. It is not used to provide services to campaigns, and PTV does not pay for this service; the software access is provided free of charge by a volunteer. And the texting service permits individual volunteers, rather than campaigns, the ability to request volunteer opportunities from PTV. To the extent that PTV incurs costs for the texting service,¹⁷ it is not an in-kind contribution because it was used to provide services to individuals who are seeking volunteer opportunities, not to any federal candidates or committees.¹⁸

C. PTV’s Activities Are Exempt Internet Activities

There is a separate reason why PTV did not make any contributions to Hiral for Congress: PTV’s activities fall squarely within the Commission’s Internet exemption. Commission rules provide that “[w]hen an individual or a group of individuals, acting independently or in coordination with any

¹⁴ *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (“paragraph (b) of section 109.20 addresses expenditures that are not made for communications but that are coordinated with a candidate) (emphasis added); see also Adv. Op. 2011-23, Statement of Commissioners Hunter, McGahn and Peterson.

¹⁵ *Id.*

¹⁶ Complaint at 6.

¹⁷ As described below, the costs associated with the texting service are *de minimis*. See Section II.A, *infra*.

¹⁸ See, e.g., Adv. Op. 2012-22 (distinguishing between online donation services that process contributions as a service to candidates from those that process contributions as a service to individual contributors, and finding that processing fees associated with the latter are not contributions to candidates). It is worth nothing that the SMTP messages sent using the text system are not coordinated communications, either. Among other things, these communications are a form of electronic mail, and are only sent in response to a request from a volunteer, so they are not “general public political advertising” or “public communications” under Commission rules. 11 C.F.R. § 100.26; Adv. Op. 2017-10.

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candidate, authorized committee or political party committee, engages in Internet activities for the purpose of influencing a Federal election,” the uncompensated personal services and equipment and services used for the activities are not a contribution or expenditure, “regardless of who owns the equipment or services.”¹⁹ Internet activities include, but are not limited to, sending and forwarding email, blogging, creating, maintaining and hosting websites, paying a nominal fee for the use of another person’s website, and “any other form of communication distributed over the Internet.”²⁰ “Equipment and services” covered by the rule include, but are not limited to, computers, software, internet domain names, “and any other technology that is used to provide access to or use of the Internet.”²¹

The activities of PTV are operated by a small group of uncompensated individuals.²² PTV engages exclusively in activities over the Internet: it receives electronic requests from volunteers; uses a software program to send those volunteers an email (in the form of traditional email or SMTP message) or Facebook message containing a link to a website that contains the addresses of Democratic voters; and posts on its website and social media pages about its activities. That is it. It does not sponsor paid Internet advertising or any other “public communications,” nor does it purchase or rent email lists.²³ Therefore, its activities are not contributions (or expenditures) under the Commission’s internet exemption.

¹⁹ 11 C.F.R. §§ 100.94(a), 100.155(a).

²⁰ *Id.* §§ 100.94(b), 100.155(b).

²¹ *Id.* §§ 100.94(c), 100.155(c); *see also* Internet Communications, 70 Fed. Reg. 18,589, 18,604 (Apr. 12, 2006) (equipment and services “include, but are not limited to, computers, handheld communication devices that provide access to the Internet, software, routers, servers, Internet access purchased from an ISP, subscription fees, blog hosting services, bandwidth, licensed graphics, domain name services, and e-mail services.”)

²² PTV itself is a single-member LLC owned by Mr. McMullin that, under Commission rules, would be regarded as an individual. *See* 11 C.F.R. § 110.1(g)(4); *see also* Adv. Op. 2009-02. Moreover, though PTV invites individuals to donate funds to help offset the costs it incurs for its technology expenses, such reimbursement of costs is not considered compensation under the rules. 70 Fed. Reg. at 18,605.

²³ 11 C.F.R. §§ 100.94(e), 100.155(e).

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II. PTV Is Not A Political Committee

Under the Act, a political committee is, in relevant part, a committee, club, association or group of persons that receives contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year.²⁴ Moreover, to avoid constitutional vagueness concerns, the Commission will not impose political committee status on an entity unless its “major purpose” is “the nomination or election of a Federal candidate.”²⁵ Though the Complaint alleges that PTV is a political committee, PTV does not meet any of the criteria for political committee status.

A. PTV Did Not Make More Than \$1,000 In Expenditures

Under the Act, an “expenditure” is “any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”²⁶ Again to avoid constitutional vagueness concerns, this definition has been construed to include only (1) contributions to candidates, or (2) communications that contain express advocacy.²⁷

As described above in Section I, PTV has not made any contributions to candidates. Nor has it made any expenditures. It has not sponsored any communications containing express advocacy, except on its website and in emails with volunteers, both of which fall within the Internet exemption. Therefore it is not a political committee.²⁸

Even if the Commission finds that the internet exception does not completely exempt PTV’s activity under the Act, it must still find that PTV is not a political committee because PTV made less than \$1,000 in disbursements related to federal elections. As noted above, PTV’s only costs have been for

²⁴ 52 U.S.C. § 30101(4).

²⁵ *Political Committee Status*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

²⁶ 52 U.S.C. § 30101(9)(A)(i).

²⁷ *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

²⁸ *See* 70 Fed. Reg. at 18,604 (“The Commission also notes that a group of individuals will not trigger political committee status through Internet activities covered by the new exceptions because those Internet activities would not constitute contributions or expenditures under the Act.”).

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administrative and overhead costs like software licenses and technology costs. Most of these involved set one-time payments or monthly fees that are not attributable to any particular campaign.²⁹ The only cost that PTV incurs that can be attributed to particular campaigns is the cost of the text message system, which is billed on a per-message basis. PTV estimates that, between 2017 and 2018, it has only spent \$793.53 on text messages with volunteers working on federal elections. Even if the Commission deems this expense to be an “expenditure,” PTV would still not reach the \$1,000 threshold to trigger political committee status.

B. PTV Did Not Receive More Than \$1,000 In Contributions

The Complaint also assumes, without basis, that PTV has “received more than \$1,000 in direct contributions.”³⁰ It did not. Under the Act, a contribution is “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”³¹ Though PTV does accept donations to offset its technology costs,³² it does not tell donors that funds raised will be used in connection with federal elections.³³ Moreover, even if some portion of the funds donated to PTV are treated as “contributions” based on how they are spent, PTV would still fall well beneath the \$1,000 political committee threshold. PTV received approximately \$6,578 in donations in 2017 and \$9,776 in donations in 2018. Given that only 8 of the 92 (8.7%) elections in which PTV has been involved were federal, using a funds expended method, it received only \$572 in

²⁹ If PTV were to become a political committee, this kind of overhead expense could be paid for by a nonfederal account and would not need to be reported to the Commission. See FEC Statement on the D.C. Circuit Court of Appeals Decision in *EMILY's List v. Federal Election Commission* (Jan. 12, 2010) (“nonconnected committees and separate segregated funds need not allocate administrative expenses . . . [n]or do they need to report these allocations on FEC Form 3-X.”). *A fortiori*, these expenses are not “expenditures” that trigger political committee registration in the first instance.

³⁰ Complaint at 2.

³¹ 52 U.S.C. § 30101(8)(A)(i).

³² All donations received by PTV to date have been from individuals and in increments of less than \$5,000.

³³ See <https://postcardstovoters.org/donate/>. Commission rules previously treated funds raised in response to a solicitation that a portion of funds raised would be used in connection with a federal election. See 11 C.F.R. § 100.57 (2009). Though this provision was invalidated by the D.C. Circuit in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), even under this old, more restrictive standard, the donations received by PTV would not be contributions.

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contributions in 2017 and \$850 in contributions in 2018. This falls far short of the Act's registration threshold.

C. PTV's Major Purpose Is Not Influencing Federal Elections

Lastly, even if PTV did exceed the statutory \$1,000 registration threshold – and, as described above, it did not – it would still not be a political committee because its “major purpose” is not influencing federal elections. As described above, only 8 of the 92 campaigns it has conducted to date – approximately 8.7% – have involved candidates for federal office. And most of its activities have involved elections where there have involved special elections or other elections where there has not even been federal candidates on the ballot.

III. PTV Did Not Violate The Act's Disclaimer Requirements

The Act and Commission regulations only require a disclaimer on printed materials if, in relevant part, they qualify as “public communications” and either (1) are distributed by a political committee, or (2) contain express advocacy.³⁴ However, as discussed at length above, PTV does not itself publicly disseminate any postcards, and the postcards disseminated by its volunteers are not “public communications” as defined by Commission regulations. Thus, the materials distributed by PTV's volunteers were not required to bear a “paid for by” disclaimer, as the Complaint contends. In fact, if Complainant had his way, and the postcards were required to contain a notice that they were “paid for by Postcards to Voters,” it would mislead the public, by informing recipients that Postcards to Voters paid for a communication that it did not.

CONCLUSION

For the reasons described above, the Commission should find that there is no reason to believe PTV violated the Act, and it should promptly close the file.

Sincerely,



Andrew Harris Werbrock

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³⁴ 11 C.F.R. § 110.11(a).