



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 11, 2020

Via Electronic Mail Only
Email: chris@ashby.law

Chris Ashby, Esq.
Ashby Law
602 Cameron Street, Suite 102
Alexandria, Virginia 22314

RE: MURs 6917 & 6929
Our American Revival and C. Ryan
Burchfield in his official capacity
as treasurer

Dear Mr. Ashby:

Based on a complaint filed with the Federal Election Commission (the "Commission"), and information supplied by your client, the Commission on April 23, 2019, found reason to believe that Our American Revival and C. Ryan Burchfield in his official capacity as treasurer violated 52 U.S.C. § 30116(a), and instituted an investigation in this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations of the Act have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies, if possible) stating your clients' position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days and may require that your clients toll the running of the state of limitations before granting such an extension.

MURs 6917 and 6929 (Our American Revival)
Letter Enclosing General Counsel's Brief
Page 2

You may also request additional information gathered by the Commission in the course of its investigation in this matter. *See* Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011). For your convenience, we have already included those documents that we relied upon as part of this mailing.

In addition, you may also request an oral hearing before the Commission. *See* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues you expect to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted. If you request a probable cause hearing, the Commission may request that you toll the statute of limitations in connection with that hearing. *Id.* at 64,920.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement. If we are unable to reach an agreement after 30 days, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty. *See* 52 U.S.C. § 30109(a)(6)(A).

Should you have any questions, please contact Adrienne Baranowicz, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson

Lisa J. Stevenson
Acting General Counsel

Enclosure:
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MURs 6917 & 6929
Our American Revival and C. Ryan Burchfield in his)	
official capacity as treasurer)	
)	

GENERAL COUNSEL’S BRIEF

I. STATEMENT OF THE CASE

Former Wisconsin Governor Scott Walker (“Walker”) publicly announced that he was running for President of the United States on July 13, 2015, weeks after his announcement that he was testing the waters for a possible candidacy. Based on the Complaints, Responses, and available record, the Commission found reason to believe that Our American Revival and C. Ryan Burchfield¹ in his official capacity as treasurer (“OAR”) violated 52 U.S.C. §§ 30116(a) and 30118 by making excessive and prohibited contributions to Walker’s presidential campaign committee, Scott Walker, Inc., and Kate Teasdale² in her official capacity as treasurer (“Committee”), by paying for Walker’s testing-the-waters expenses prior to Walker’s declaration of candidacy.

The Commission’s investigation revealed that OAR arranged, staffed, and funded Walker’s testing-the-waters efforts. Beginning in January 2015, OAR funded a team of staffers and consultants who traveled the country with Walker, seeking to determine whether support existed for a Walker candidacy and laying the groundwork to establish a network of potential endorsements and State Finance Chairs for an eventual Walker candidacy. Between April and June 2015, Walker continued to travel the country and combined public speaking events with

¹ At the time of the Complaint, OAR’s treasurer was Andrew Hitt.

² Kate Teasdale’s name at the time that the complaints were filed was Kate Lind.

1 private meetings with prospective donors and supporters. OAR paid for Walker's travel to these
2 events as well as for staff and consultants who supported Walker's testing-the-waters activities.
3 Accordingly, the Office of the General Counsel ("OGC") is prepared to recommend that the
4 Commission find probable cause to believe that OAR violated 52 U.S.C. §§ 30116(a) and 30118
5 by making excessive and prohibited contributions in connection with its efforts to support
6 Walker's testing-the-waters activities.

7 **II. FACTUAL BACKGROUND**

8 OAR acknowledged in its subpoena response that "Governor Scott Walker founded Our
9 American Revival," although it did not describe Walker's role in detail or provide additional
10 information or documents to clarify the precise circumstances of OAR's establishment.³ In
11 response to the Commission's subpoena, OAR stated that it was unable to locate "any documents
12 reflecting discussions with Gov. Walker or any individual acting on behalf of Scott Walker, Inc.
13 regarding the establishment of Our American Revival."⁴ However, a review of documents
14 obtained from third parties concerning OAR's activities from January 16, 2015, when it
15 registered with the Internal Revenue Service ("IRS") as a section 527 organization, through
16 Walker's declaration of candidacy on July 13, 2015, confirms that Walker was seeking to gauge
17 support for a potential presidential candidacy when he traveled to meetings throughout the
18 country, and that OAR arranged, researched, and staffed these efforts. Indeed, the available

³ OAR Resp. to Comm'n's Subpoena to Produce Documents & Order to Submit Written Answers at 2 (Aug. 9, 2019) ("OAR Discovery Resp."). Walker confirmed that he was a part of OAR's formation in public interviews where he announced that "we created" OAR. See MUR 6917 Compl. at 5, 7 (citing Transcript, Interview by Sean Hannity, FOX News, with Governor Scott Walker, at FOX News Network (Jan. 27, 2015)). OAR does acknowledge that Walker "interviewed and decided to hire" OAR's executive director, thus acknowledging his role in determining OAR's leadership. OAR Discovery Resp. at 4.

⁴ OAR Discovery Resp. at 2.

evidence confirms that OAR-funded activities were carried out so that Walker could test the waters of a potential presidential candidacy well before Walker entered his self-described two-week testing-the-waters period.

1. Private Meetings

From OAR's inception in January 2015 through June 2015, Walker attended multiple fundraising events throughout New York, Florida, and Chicago, ostensibly to support OAR and promote a generalized message of "[g]rowth, [r]eform and [s]afety."⁵ OAR asserts that Walker was communicating a generalized vision of state-based government solutions, but documents show that Walker also used these meetings and events to test the waters by gauging support for his eventual candidacy and building a national fundraising team.

On June 5, 2019, OAR responded to the Commission's Factual and Legal Analysis, contested the legal basis for the Commission's findings, and argued that Walker's efforts to campaign on behalf of other politicians prior to 2015 indicate that Walker was not using OAR to test the waters for a presidential campaign.⁶

In response to a subpoena, OAR made two partial document productions, which it acknowledged were incomplete, and throughout the investigation continued to contest the legal basis for the Commission's reason to believe findings.⁷ Following the loss of a quorum at the Commission, OAR notified the Commission of its decision to cease responding to the subpoena,

⁵ See DONER-000842 ("Attach. 1").

⁶ See Resp. of OAR to Factual & Legal Analysis, MURs 6917 & 6929 (June 5, 2019) ("RTB Resp.").

⁷ OAR Discovery Resp. at 1.

1 stating that it did not have sufficient resources to continue to comply with the subpoena.⁸

2 Nevertheless, OGC was able to establish OAR's role in Walker's pre-candidacy activities
3 through publicly available information and third-party document productions. OGC sent thirteen
4 informal requests for discovery, and later served Commission subpoenas for documents and
5 information to several key third-party vendors. OGC was able to obtain documents from five of
6 OAR's vendors, two of whom ultimately worked for the Committee. These documents provided
7 insight into travel funded by OAR, fundraising pitches researched by OAR consultants and
8 conducted by Walker, and Walker's activities and strategies in early voting states while
9 ostensibly traveling on behalf of OAR.⁹

10 Before Walker declared his candidacy, OAR provided him with the support and funding
11 necessary for him to travel the country to engage in testing-the-waters activities, including
12 meeting with potential donors and supporters in small group settings. Walker participated in
13 dozens of these meetings, which OAR described in its response to the subpoena as "private
14 meetings."¹⁰ At those meetings, which OAR's fundraising consultants researched and

⁸ Letter from Chris Ashby, Counsel, OAR, to Jonathan A. Peterson, Attorney, FEC, at 1 (Sept. 4, 2019) ("Attach. 2"); *see also* Letter from Chris Ashby providing OAR Discovery Resp. (stating that "OAR will continue to review its records and anticipates that a supplemental production will be forthcoming"); Letter from Jonathan A. Peterson to Chris Ashby (Sept. 26, 2019) ("Attach. 3") (summarizing document production deficiencies). Counsel for OAR further stated that OAR would no longer be responding to communications from OGC as a "reflection of the fact that the Commission waited until the next national election was underway to commence an investigation of this matter from the last one — and in that interim, political realties have shifted, OAR has finished its work, people have moved on, memories have faded, and OAR's resources have dwindled." Attach. 2 at 1.

⁹ For its part, OAR produced receipts that OAR's staffers and consultants submitted in connection with their work, providing insight into the substance of its staffers' travels. *See, e.g.*, OAR-003-000448. OAR also produced some internal communications concerning OAR's work to secure speaking engagements for Walker. *See, e.g.*, OAR-000-000008.

¹⁰ OAR's Discovery Resp. at 10-29. OAR's Discovery Response included an "Attachment A," which contained a partial travel itinerary of travel where "Our American Revival believes that Gov. Walker traveled."

1 scheduled, in addition to seeking donations to OAR, Walker appears to have sought
2 endorsements to assess the attendees' willingness to serve as state financial chairs in his future
3 campaign, and seek commitments for contributions to any future presidential campaign.

4 These meetings, which began in January 2015, followed similar general scripts, which an
5 OAR fundraising consultant prepared in advance of Walker's calls and meetings with potential
6 donors.¹¹ Many of the briefing documents written for Walker included a section titled "ask,"
7 which suggested Walker ask "Will [he/she] support your 2016 efforts with public
8 endorsement?"¹² The endorsement request was separate from the suggestion that Walker ask the
9 potential donors to contribute to OAR itself.¹³ Separate briefing documents prepared by OAR's
10 consultant state that Walker should "[d]iscuss [with meeting participants] your [Walker's]
11 preparation for 2016."¹⁴

12 On January 24 and 25, 2015, Walker traveled on flights arranged and paid for by OAR¹⁵
13 to Palm Springs, California, to participate in the Freedom Partners Seminar at the Ritz-Carlton
14 Rancho Mirage hotel and private meetings.¹⁶ According to the briefing notes an OAR consultant

¹¹ OAR hired this consultant for "fundraising services," and it was paid approximately \$809,375 for its fundraising services. OAR Discovery Resp. at 5.

¹² See, e.g., DONER-000864-865 ("Attach. 4") (Briefing summary for Jan. 18, 2015 call); DONER-000918-919 ("Attach. 5"). (Briefing Summary for Jan. 21, 2015, call).

¹³ See, e.g., Attach. 4 at DONER-000864; Attach. 5 at DONER-000919.

¹⁴ DONER-000880 ("Attach. 6") (Briefing summary for Jan. 22, 2015, call).

¹⁵ From approximately January 1, 2015, through July 31, 2015, OAR entered into a leasing agreement with Sitatunga Springs LLC to use Sitatunga's aircraft. See Letter from Benjamin Abrams, Counsel, Sitatunga Springs LLC, to Jonathan Peterson, Attorney, FEC (June 28, 2019) ("Attach. 7") (enclosing Sitatunga document production). OAR has similarly acknowledged that Sitatunga Springs provided "travel and related logistical support services to Our American Revival." OAR Discovery Resp. at 5. OAR appears to have paid \$27,216 to Sitatunga Springs in connection with the flight to Palm Springs. See Sitatunga Invoice for flight 1504 ("Attach. 8").

¹⁶ See Excel spreadsheet produced by Sitatunga Springs LLC titled "2015 Flight Summary" at line 5 ("Attach. 9a"); Excel spreadsheet produced by Sitatunga Springs titled "2015 OAR Flights" at sheet labeled "1-24 to 1-26"

1 prepared, OAR instructed Walker to ask supporters at those meetings to support his “2016 efforts
 2 with [a] public endorsement.”¹⁷ Similarly, another supporter of both OAR and the Committee
 3 hosted a breakfast event featuring Walker for which the invitation provided contact information
 4 for individuals seeking “more information on Scott Walker’s Campaign.”¹⁸

5 In February and March 2015, Walker continued his OAR-funded trips to secure support
 6 for a potential candidacy, and he was supported by OAR employees and agents on these trips.
 7 Walker attended private meetings in New York on February 19, 2015. Briefing notes for that
 8 event reflect that he was prepared to ask potential supporters to endorse him, join his Finance
 9 Committee, and to encourage their friends to back him.¹⁹ Notes apparently prepared by a
 10 member of OAR’s fundraising team subsequent to a February 6, 2015, call with a potential donor
 11 in Colorado indicate that Walker had not only already begun to discuss his potential presidential
 12 candidacy, but had even begun to consider potential running mates: “Gov said why I’m
 13 preparing/running is because he said for US to beat Hillary Clinton, we have a hard time beating
 14 a name from the past with another name from the past. Said there’s a hunger for the next

(depicting fueling stops at Oshkosh, WI, Des Moines, IA, Palm Springs, CA, San Francisco, CA, and Denver, CO, and indicating that Walker was accompanied by five other individuals, including ones named Rick and Kate for portions of the trip) (“Attach. 9b”). OAR’s Executive Director was Rick Wiley and OAR’s fundraising consulting was handled by Kate Doner through her company Doner Fundraising.

¹⁷ DONER-000225-228 (“Attach. 10”) (Briefing Notes for Jan. 25, 2015, private meeting).

¹⁸ DONER-000244 (“Attach. 11”) (Invitation to Jan. 25, 2015, breakfast event in Indian Wells, CA).

¹⁹ DONER-000069-70 (“Attach. 12”) (Briefing notes for Feb. 19, 2015, meeting at the Harvard Club). *See also* Attach. 9b, (2015 OAR Flights) at sheet labeled “2-18 to 2-23-15”. OAR appears to have been billed \$21,849.45 in connection with this flight. *See* Sitatunga Invoice for Flight 1509 (“Attach. 13”). OAR confirmed these meetings in “Attachment A” of its initial discovery response, stating, “employees and agents of Our American Revival also traveled on each trip identified in Attachment A.” OAR Discovery Resp. at p. 3, 10-29.

1 generation of leaders, especially if Clinton is the nominee. With [Senator Marco] Rubio, said a
 2 team like that could make a pretty stark contrast.”²⁰

3 OAR also funded efforts by Walker to seek the support of potential fundraising
 4 “bundlers” in 2015 in the event he decided to become a presidential candidate.²¹ OAR briefing
 5 documents instructed Walker to ask numerous people to join his team “should he decide to run
 6 for higher office.”²² The briefing notes for a “breakfast/meet & greet” held on March 12, 2015,
 7 where 43 invitees were expected to attend, indicate that OAR Executive Director Rick Wiley
 8 previously attended an American Opportunity Alliance conference in Jackson Hole, Wyoming,

²⁰ DONER-000888-892 at 889 (“Attach. 14”).

²¹ DONER-000475-477 (“Attach. 15”) (Briefing Notes for Feb. 27, 2015, dinner reception in Boca Raton, FL containing an “ask” that a potential donor “consider bundling (should Walker decide to run)?”). *See also* OAR-010-000052-62 (planning Walker’s itinerary and confirming that OAR should be invoiced) (“Attach. 16”); OAR Discovery Resp. at 13-14 (confirming Walker’s private meetings in the Palm Beach area).

²² DONER-000751-752 (“Attach. 17”) (Briefing notes for a Mar. 2, 2015, private meeting in Chicago, IL); DONER-000744-745 (“Attach. 18”) (Briefing notes for a Mar. 2, 2015, private dinner in Chicago, IL stating “Should I decide to run, I’d like for you to help me raise \$1.5M out of IL”); DONER-000806-808 (“Attach. 19”) (Briefing notes for a Mar. 10, 2015, meeting at the Hotel Bel Air in Los Angeles, CA stating that Walker let donors know that “you are building a team to support you should you decide to run for higher office. Should that occur, you would like [potential donor] to play a major role in your California efforts as well as serve as an economic policy advisor. Please ask [potential donor] to serve as a CA co-chair and raise \$500k by the end of the year, if you choose to run. If he agrees, please invite him to Madison for a small private dinner on March 30 with your early supporters and state chairs.”) (emphasis in original); DONER-000791-792 (“Attach. 20”) (Briefing notes for Mar. 21, 2015, private meeting in Boca Raton, FL which states, “Please let [potential donor] know that you are building a team to support you should you decide to run for higher office.”) Attachment A to OAR Discovery Resp., page 17 of pdf; DONER-000802-803 (“Attach. 21”) (Briefing notes for Mar. 21, 2015, private meeting at Boca Raton Resort & Club stating “Please let [potential donor] know that you are building a team to support you should you decide to run for higher office. Should that occur, you would like [potential donor] to play a role in your California efforts and serve as a Los Angeles Chair and raise \$500K by the end of the year.”) (emphasis in original), Attachment A to OAR Discovery Resp., page 17 of pdf; DONER-000757-759 (“Attach. 22”) (Briefing notes for Mar. 21, 2015, private meeting in Boca Raton, FL, stating “Please let [potential donor] know that you are building a team to support you should you decide to run for higher office. Should that occur, you would like [potential donor] to play a role in your California efforts, raise \$250K and help you meet your \$2M goal in hard money from CA by the end of the year.”) (emphasis in original), Attachment A to OAR Discovery Resp., page 17 of pdf; DONER-000781-783 (“Attach. 23”) (Briefing notes for Mar. 21, 2015, private meeting in Boca Raton, FL requesting that a donor serve as Walker’s Georgia Co-Chair.), Attachment A to OAR Discovery Resp., page 17 of pdf.

where he “spoke about OAR [and] your potential run for Higher Office.”²³ The OAR-prepared note further instructs Walker to:

Please let the group know that you are considering a potential run for higher office. Give them background on OAR as well as your record in WI. Should you decide to run, you would love their support both publicly and financially. There are several individuals in the room who are substantial bundlers in the tri-states region and you would like them to serve on your NFC. Please ask those who are interested in helping now, to consider a larger contribution to OAR.²⁴

Finally, at a March 30, 2015, dinner reception, OAR prepared Walker's talking points for interactions with various attendees, including the statement: “Need your endorsement and financial support. I can't do this run without both.”²⁵

As these materials reflect, the evidence confirms that Walker did not use OAR meetings to promote conservative causes generally, but rather, he used these meetings to ascertain support for his own candidacy, including *vis-a-vis* other potential presidential candidates, and, moreover, that Walker did so with OAR's support. In preparing Walker for one of these meetings, for example, the OAR employees and agents noted that a potential supporter “was staying with Romney until Romney decided what to do. Now that he's out, he's looking for his horse and is VERY interested in Governor Walker.”²⁶ Other OAR-prepared notes indicate that a potential

²³ DONER-000173-175 (“Attach. 24”) (Briefing Notes for Mar. 12, 2015, meeting in New York, NY); *see also* Attach. 9b, “2015 OAR Flights” at sheet labeled “3-11 to 3-15-15”; Sitatunga Flight invoice for Flight 1513 (“Attach. 25”) (showing that OAR was billed \$20,128.50 for this travel); OAR Discovery Resp. at Attachment A, page 15 of pdf.

²⁴ Attach. 24 at DONER-000174 (Briefing Notes for Mar. 12, 2015, meeting in New York, NY).

²⁵ DONER-000332-333 (“Attach. 26”); *see also* DONER-000334 (“Attach. 27”); DONER-000337 (“Attach. 28”); DONER-000338-339 (“Attach. 29”); DONER-000330-331 (“Attach. 30”).

²⁶ DONER-000836-837 (“Attach. 31”) (Briefing Notes for Jan. 31, 2015, private meeting in McLean, VA). Walker was in DC for the Alfalfa Dinner and appears to have traveled to DC on a Sitatunga Flight paid for by OAR.

1 donor was “supporting Jeb, but might hedge his bets”²⁷ and that another “is willing to go against
 2 Bush.”²⁸ Still other briefing documents indicate OAR researched whether potential donors had
 3 already decided to support another candidate, noting that a potential donor “has not decided on a
 4 candidate but is very impressed with you and ‘leaning towards you.’”²⁹ Similarly, OAR-
 5 prepared briefing notes for a March 18, 2015, private meeting evaluate a potential donor’s
 6 support for Bush noting that, “[a]t the time, he said he was leaning Bush, but wanted to meet
 7 you. He called Kate last week and said he’s impressed with you and wants to visit with you
 8 more and is now leaning to you. Wants to meet with you one-on-one to make his final
 9 decision.”³⁰ An OAR briefing document for a March 12, 2015, private meeting with a potential
 10 Walker supporter in New York City referenced and summarized a February 6, 2015, call with
 11 that same supporter, stating that Walker had “expressed that in order to beat Hillary, the
 12 Republican Party will need a fresh face with big bold ideas and a leader who follows through.”³¹
 13 The potential donor “agreed that you fit into the ‘new and fresh’ category and said that your

See Attach. 9a, “2015 Flight Summary” at line 6 (listing Sitatunga Flight 1505); Email produced by Sitatunga Springs dated Feb. 19, 2015, at 2:56 pm attaching credit card reimbursement depicting Walker Flight 1505 to DC (“Attach. 32”).

²⁷ DONER-000425-426 (“Attach. 33”) (Briefing Notes for Mar. 5, 2015, lunch meeting in Boca Raton, FL; *see also* Attach. 9b, “2015 OAR Flights” at sheet labeled “3-4 to 3-8-15”; Sitatunga Flight invoice for Flight 1511 (“Attach. 34”) (showing that OAR was billed \$30,618 for this travel).

²⁸ DONER-000431-432 (“Attach. 35”) (Briefing Notes for a Mar. 5, 2015, private meeting in Naples, FL).

²⁹ DONER-000180-183 (“Attach. 36”) (Briefing Notes for Mar. 12, 2015, private meeting in New York, NY); *see also* Attach. 9b, “2015 OAR Flights” at sheet labeled “3-11 to 3-15-15”; Sitatunga Flight invoice for Flight 1513 (“Attach. 37”) (showing that OAR was billed \$20,128.50 for this travel).

³⁰ DONER-000386 (“Attach. 38”) (Briefing Notes for Mar. 18, 2015, private meeting).

³¹ DONER-000170-173 (“Attach. 39”) (Briefing Notes for Mar. 12, 2015 private meeting in New York, NY, which also state “Let him know you are still seriously considering a run for higher office.”).

record in WI proves you follow through on your promises.”³² Briefing documents and communications prepared or received by other OAR consultants indicate that Walker continued to seek endorsements and build his network through the spring of 2015.³³

OAR's Response to the Commission's Factual and Legal Analysis did not address in detail the activities it undertook for Walker, but instead emphasized Walker's public speaking experience between 2011 and 2014 in support of its position that Walker's 2015 activity was unrelated to his potential candidacy.³⁴ OAR stated that at various speaking events “throughout early 2015, Governor Walker consistently promoted OAR's mission of disseminating the accomplishments and solutions coming out of state governments, and holding up his Wisconsin record as a major example of successful state-based solutions,” suggesting that it provided logistical support to Walker so that he could promote OAR's purportedly issue-based agenda.³⁵ OAR later confirmed many of Walker's travels, listing his public speaking events along with

³² *Id.*

³³ See Word Document titled “NH Target Activists_5.8.15” (“Attach. 40”) (documenting a May conference call where OAR prepared Walker to seek support from multiple “key” New Hampshire activists and listing their preferred presidential candidates); LG Production, Apr. 23, 2015 email to Andrew Leach (“Attach. 41”).

³⁴ See RTB Resp. at 5-7. Specifically, OAR maintains that Walker had only made a handful of impromptu statements in response to press speculation about his candidacy, but a review of publicly available information reveals that Walker made comments indicating that he was considering his candidacy. OAR published a video of Walker speaking at Rick Scott's Economic Growth Summit where Walker stated, “I appreciate Rick inviting me and a number of other folks who either are or, like me, are thinking about maybe the possibility of taking the next step to help this country go forward.” Our American Revival, *Scott Walker Discusses Economic Reform & Wisconsin's Growing Economy* at 1:25-1:35, YOUTUBE (June 2, 2015) <https://www.youtube.com/watch?v=tBqS8FzyVhw>. The Economic Growth Summit took place June 1-2, 2015. Walker announced that he was testing the waters on or about June 18, 2015. Jenna Johnson, *Scott Walker Forms a 'Testing the Waters' Committee*, WASH. POST (June 18, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/18/scott-walker-forms-a-testing-the-waters-committee/>.

³⁵ See RTB Resp. at 12.

1 numerous “private meetings”³⁶ that correspond to more detailed information obtained from third
2 parties, described above, about OAR’s activities with respect to those meetings. OAR also
3 referenced several “blog” posts on its webpage as support for its arguments that OAR was
4 engaged in issue advocacy, and claims that OAR continued to have staff and fundraise in 2016
5 and 2017 and remains a going concern today.³⁷

6 The materials produced by OAR provide some insight into OAR’s functions but do not
7 completely address its activity. While OAR’s response to the Commission’s reason-to-believe
8 finding appears to focus on Walker’s public speaking engagements and compares his speaking
9 engagements before and after OAR’s formation, it does not address the numerous “private
10 meetings” that were arranged, researched, and funded by OAR.³⁸ As explained above, OAR
11 stopped producing documents in response to the Commission’s subpoena and stopped
12 communicating with OGC, so it remains unknown whether OAR would have addressed these
13 private meetings in later discussions with OGC.³⁹ OAR also protested OGC’s efforts to obtain
14 materials from third-party witnesses as “unfair.”⁴⁰

15 It is these private meetings, about which OAR provided little to no information or
16 documents, that reveal OAR’s role in paying consultants to research donor profiles, developing

³⁶ See Attachment A to OAR Discovery Resp.

³⁷ See RTB Resp. at 12-13; *but see supra* n.8 (describing communications from OAR’s counsel claiming that OAR had “finished its work”).

³⁸ See RTB Resp. at 5-7.

³⁹ See Attach. 2 (Letter from OAR to FEC).

⁴⁰ *Id.* at 2.

1 strategic talking points for Walker concerning donations and endorsements, and paying for
 2 private travel, all to support Walker's testing-the-waters activities.

3 2. Staffing of OAR

4 OAR's staff of well-known political campaign consultants was regarded by the media as
 5 Walker's "campaign-in-waiting,"⁴¹ and it effectively functioned in that capacity. In January and
 6 February 2015, OAR built its staff of individuals and consulting companies; most of these people
 7 and companies would work for Walker's Committee almost immediately after leaving OAR,
 8 apparently performing the same work for the Committee as they had for OAR. For example,
 9 Rick Wiley, began working for OAR as Executive Director in or about December 2014, and left
 10 on June 17, 2015, two days after Walker announced his potential candidacy.⁴² The next day,
 11 June 18, 2015, Wiley started working for the Committee as Walker's Campaign Manager.
 12 Similarly, Kirsten Kukowski was OAR's Communications Director from March 1, 2015, until
 13 June 18, 2015,⁴³ when she began to work for the Committee as its Communications Director.
 14 Matt Mason was OAR's Political Director from February 1, 2015, through June 17, 2015.⁴⁴
 15 Information available to the Commission indicates that on or about July 2, 2015, Mason began to

⁴¹ Zeke Miller, *Scott Walker Hires Two Former RNC Aides in Political Roles*, TIME (Mar. 1, 2015), <https://time.com/3727860/scott-walker-dannv-odriscoll-wel/> ("Time Magazine Article"); see also James Hohmann, *Walker Aides Will Run His Super PAC*, POLITICO (Apr. 16, 2015), <https://www.politico.com/story/2015/04/scott-walker-super-pac-117062>.

⁴² Wiley was paid through his company, 1060 Group, Inc. OAR Discovery Resp. at 3. We sent letters requesting information from the 1060 Group in June 2019, but did not receive a response. On September 5, 2019, the Commission issued a subpoena to 1060 Group, Inc. On September 17, 2019, we received a motion to quash the subpoena. Although we attempted on September 26, 2019, and October 8, 2019, to resolve the issues raised in the motion and negotiate more limited requests, counsel has declined to discuss the subpoena while the motion to quash is pending.

⁴³ OAR Discovery Resp. at 3.

⁴⁴ OAR Discovery Resp. at 3.

1 work for the Committee as its Political Director.⁴⁵ OAR's payroll declined from \$95,661 on
2 April 13, 2015, to \$39,154 on July 1, 2015, to \$5,228 on July 29, 2015.⁴⁶ Further, there do not
3 appear to be any payroll expenditures for OAR between August and November 2015.⁴⁷ The
4 sharp decrease in OAR's total payroll expenditures indicates that many individuals who departed
5 were not replaced, and that OAR ceased much of its activity after Walker declared his candidacy,
6 as described at the end of this subsection.

7 Other companies that provided services to OAR made similar transitions from working
8 for OAR to working for the Committee, where they, too, appear to have continued to perform the
9 same work they had performed for OAR.⁴⁸ Publicly available filings reveal that Adesys
10 Consulting provided "technical services" for both OAR and the Committee.⁴⁹ LG Strategies
11 provided consulting services concerning New Hampshire grassroots efforts to both OAR and the
12 Committee.⁵⁰ Similarly, both OAR and the Committee utilized Air Charter Team, Inc., for

⁴⁵ See Katie Glueck, *The Power Players Behind Scott Walker's Campaign*, POLITICO (July 14, 2015), <https://www.politico.com/story/2015/07/scott-walker-2016-campaign-staff-power-players-120086>.

⁴⁶ Compare Sched. B, OAR 2015 IRS Mid-Year Report Form 8872 (July 31, 2015) ("OAR IRS Mid-Year Report") (noting an Apr. 13, 2015 payroll payment of \$95,661) with Sched. B, OAR 2015 IRS Year-End Report Form 8872 (Jan. 29, 2016) ("OAR IRS Year-End Report") (depicting a decrease in payroll from \$39,154 on July 1, 2015 to \$5,228 on July 29, 2015). Additionally, there were no payroll expenditures between late July and mid-December on OAR's year-end filing.

⁴⁷ Sched. B, OAR IRS Year-End Report.

⁴⁸ See Discovery Resp. of Mark Stephenson and Red Oak Strategic at 1 (Aug. 7, 2019) ("Attach. 42"); Discovery Resp. of Andy Leach and LG Strategies at 1-2 (June 17, 2019) ("Attach. 43").

⁴⁹ Sched. B, OAR IRS Mid-Year Report (listing Adesys as providing IT equipment and Consulting); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 1904 (listing Adesys Consulting LLC as providing "Technical Services").

⁵⁰ Attach. 43 (Discovery Resp. of Andrew Leach and LG Strategies) at 1-2.

travel,⁵¹ Connectivist Media for online and digital consulting,⁵² Ground Game Strategies for political consulting,⁵³ Harbinger Outreach for event consulting,⁵⁴ Just Win Strategies for grassroots organizational consulting services,⁵⁵ and Madison Strategies for additional political consulting.⁵⁶

In response to Commission requests for information, several of OAR's consultants who worked for both OAR and the Committee revealed that they were paid identical amounts by both organizations and provided the same type of services. OAR paid Andrew Leach and his consulting company, LG Strategies, a consulting fee of \$7,500 a month from February 2015 until June 2015.⁵⁷ Beginning in July 2015, the Committee began paying Leach the same amount per month.⁵⁸ In his response to the Commission's document requests, Leach described his work for both entities collectively, stating:

⁵¹ Sched. B, OAR IRS Mid-Year Report (providing "airfare"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 1906 (providing "Travel: Air").

⁵² OAR Discovery Resp. at 6; Sched. B, OAR IRS Mid-Year Report (providing "online services"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2061-62, 2736 (providing "online advertising" and "digital consulting").

⁵³ Sched. B, OAR IRS Mid-Year Report (providing "political consulting"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2217 (providing "field consulting"); OAR Discovery Resp. at 7 ("Ground Game Strategies provided grassroots organizational consulting services").

⁵⁴ Sched. B, OAR IRS Mid-Year Report (providing "event consulting"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2234-36 (providing "event production consulting" and "campaign promotional items").

⁵⁵ OAR Discovery Resp. at 6 ("Just Win Strategies provided grassroots organizational consulting services"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2282-83 (providing "field consulting").

⁵⁶ OAR Discovery Resp. at 6 ("Madison Strategies provided strategic political consulting and conservative outreach services"); Sched. B, OAR IRS Mid-Year Report (providing "political consulting"); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2310-11 (providing "strategy consulting").

⁵⁷ Attach. 43 (Discovery Resp. of Andy Leach and LG Strategies) at 1.

⁵⁸ *Id.*

1 LG Strategies was retained to provide consulting services to Our
2 American Revival and later Scott Walker, Inc. for efforts in New
3 Hampshire. Our role was to provide strategic advice and work
4 with staff assigned to NH to help them building [sic] a successful
5 network in New Hampshire. We also helped to organize events
6 throughout the state where people could meet Governor Walker
7 and hear his message.⁵⁹

8 Similarly, Mark Stephenson, through his company Red Oak Strategic, served as a Chief Data
9 Officer for OAR through “the first half of 2015, billing OAR \$15,000 a month.”⁶⁰ In July 2015,
10 Stephenson was hired in his individual capacity as “data director” for the Committee and was
11 paid an identical amount of \$15,000 a month.⁶¹

12 OAR staff and vendors not only served in similar capacities for OAR and the Walker
13 Committee, but there is also evidence that OAR did not dispute perceptions that it was
14 effectively functioning as Walker’s potential campaign committee. Reporters seeking comment
15 on Walker’s prospective campaign reached out to OAR’s employees and vendors, who did not
16 always distinguish between the two entities or purposes, to the extent they may have diverged.
17 For example, Fox News contacted a consultant hired to handle OAR’s efforts in New Hampshire
18 and asked him to confirm whether he and another consultant had “been hired by Scott Walker as
19 consultants for New Hampshire.”⁶² That consultant confirmed he had been hired, but did not

⁵⁹ Attach. 43 (Discovery Resp. of Andy Leach and LG Strategies) at 1.

⁶⁰ Attach. 42 (Discovery Resp. of Mark Stephenson and Red Oak Strategic) at 1-2 (explaining that his employment with both OAR and the Committee were the result of informal “dialogue and negotiations” and that he was paid identical amounts by both entities).

⁶¹ *Id.*

⁶² LG Production, February 18, 2015 email chain between Jason Donner of Fox News and Andrew Leach (“Attach. 44”).

clarify that OAR had hired him, not Walker,⁶³ which indicates that his real job was to consult Walker and not support OAR's purported generalized mission.⁶⁴ Similarly, emails showed OAR staff initially agreed with a *New York Times* editor's description of "campaign staff of announced and likely 2016 presidential candidates," that included a Walker team composed of individuals who, at the time, were working for OAR.⁶⁵

Finally, after Walker announced his candidacy, OAR continued to exist, but in a significantly diminished capacity. As noted above, its Executive Director's last day was June 17, 2015; its Political Director resigned the same day; its Communications Director resigned on June 18, 2015; and its Senior Advisor stopped working for OAR on or about June 17, 2015.⁶⁶ Additionally, many of OAR's vendors stopped providing services to OAR that appeared to support a potential Walker campaign and began providing those same services to the Committee

⁶³ *Id.*; see also Attach. 41 (Apr. 23, 2015 email to Andrew Leach).

⁶⁴ OAR stated in its Response to the Commission's subpoena that it sought to exploit the public's interest in the 2016 election and the possibility that Walker was considering a campaign, stating, "Conservative activists, donors, political operatives, reporters and others constantly sought to discuss the upcoming elections. Our American Revival sought to take advantage of that interest to set a policy agenda and influence the debate in the 2016 elections." OAR Discovery Resp. at 4.

⁶⁵ See OAR-10-000523- 000524 (Apr. 22, 2015 email from Ashlee Strong to Rick Wiley, Kirsten Kukowski & Matt Mason stating "This all looks good to me" in response to a *New York Times* staffer concerning the roles of OAR staffers). It appears that OAR ultimately denied the existence of a campaign team. *Id.* (Kukowski replied, "They can't publish this."). However, *The New York Times's* assessment of the roles that OAR staffers would play on Walker's campaign did indeed prove to be accurate — Rick Wiley would become Walker's campaign manager, Matt Mason would be the National Political Director, Kirsten Kukowski would head Walker's communications team, Ashlee Strong would become press secretary, and Mark Stephenson would function as the campaign's chief data officer. See Associated Press, *Chicago Cubs Co-owner Todd Ricketts Named to Gov. Scott Walker's Senior Presidential Campaign Team*, ROCKFORD REGISTER STAR (July 24, 2015), <https://www.rstar.com/article/20150724/NEWS/150729599>, (listing positions for Wiley, Kukowski, and Mason); Attach. 42 (Discovery Resp. of Mark Stephenson and Red Oak Strategic) at 1-2.

⁶⁶ OAR Discovery Resp. at 3-4.

under substantially identical arrangements.⁶⁷ The mass departure of OAR staff and consultants to Walker's Committee, coupled with the fact that OAR does not appear to have replaced much of its staff, confirms the perception that OAR was Walker's "campaign in waiting."⁶⁸

OAR's diminution in staffing and consultants is reflected in OAR's overall spending in the months and years following Walker's announcement of his candidacy. OAR reported making \$5,135,846 of expenditures in its first IRS filing, which covered the period from OAR's formation to June 30, 2015, which included the date Walker announced that he had begun testing the waters.⁶⁹ In its next IRS report, which covered the rest of 2015, OAR's reported spending dropped by 69%, to \$1,605,485.⁷⁰ OAR's reported 2016 expenditures continued to decline. OAR's 2016 First Quarterly Report disclosed \$350,433 in expenditures,⁷¹ its Second Quarterly Report disclosed \$265,363,⁷² its Third Quarterly Report disclosed \$142,093,⁷³ and its Year-End Report disclosed \$123,815.⁷⁴ And during the first half of 2017, OAR reported spending only \$23,561, suggesting that its activity had virtually ceased after the 2016 election.⁷⁵

⁶⁷ See, e.g., Attach. 43 (Discovery Resp. of Andrew Leach and LG Strategies) at 1-2; see also Attach. 42 (Discovery Resp. of Red Oak Strategic) at 2 (describing transition details between OAR and the Committee). See also *supra* at 12-13.

⁶⁸ Time Magazine Article.

⁶⁹ OAR IRS Mid-Year Report at 1.

⁷⁰ OAR IRS Year-End Report at 1.

⁷¹ OAR 2016 IRS First quarterly report Form 8872 at 1 (Apr. 15, 2016).

⁷² OAR 2016 IRS Second quarterly report Form 8872 at 1 (July 15, 2016).

⁷³ OAR 2016 IRS Third quarterly report Form 8872 at 1 (October 13, 2016).

⁷⁴ OAR 2016 IRS Year-End Report Form 8872 at 1 (Jan. 31, 2017).

⁷⁵ OAR 2017 IRS Mid-Year Report Form 8872 at 1 (Jul. 31, 2017).

1 **III. LEGAL ANALYSIS**

2 **A. OAR Funded Walker's Testing-the-Waters Activities**

3
 4 The Commission found reason to believe that OAR may have engaged in unreported
 5 testing-the-waters activity on behalf of Walker, which would result in excessive and/or
 6 prohibited contributions to Walker's Committee.⁷⁶ The evidence developed during the
 7 investigation confirms those earlier findings and demonstrates that there is probable cause to
 8 believe that OAR expended resources to fund testing-the-waters activities for Walker prior to his
 9 formal announcement that he was testing the waters on June 17, 2015.

10 An individual becomes a candidate under the Federal Election Campaign Act of 1971, as
 11 amended (the "Act"), if he or she receives contributions or makes expenditures in excess of
 12 \$5,000, or consents to another doing so on his or her behalf.⁷⁷ The Commission's regulations
 13 create exemptions to the definitions of contribution and expenditure — and therefore to the
 14 \$5,000 candidacy threshold — to allow individuals to conduct certain activities to evaluate a
 15 potential candidacy, *i.e.*, to "test the waters."⁷⁸ These exemptions exclude from the definition of
 16 "contribution" and "expenditure" those funds received and payments made solely to determine
 17 whether an individual should become a candidate.⁷⁹ The regulations allow this limited

⁷⁶ Factual & Legal Analysis at 2 ("F&LA"); MURs 6917/6929, Certification (Apr. 23, 2019).

⁷⁷ 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a).

⁷⁸ See 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Explanation and Justification for Final Rules of Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) ("Testing the Waters E&J"); *see also* Explanation and Justification to the Disclosure Regulations, House Doc. No. 95-44, Communication from the Chairman, FEC, Transmitting the Commission's Proposed Regulations Governing Federal Elections, at 40 (Jan. 12, 1977) (defining testing-the-waters payments).

⁷⁹ 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* F&LA at 7, MUR 6775 (Hillary Clinton); F&LA at 8, MUR 6776 (Niger Innis); F&LA at 6, MUR 6735 (Joseph A. Sestak).

1 exemption for activities directed to an evaluation of the feasibility of one's candidacy, though
 2 not for conduct signifying that a decision to become a candidate has been made.⁸⁰ Testing-the-
 3 waters activities include, but are not limited to, payments for polling, telephone calls, and travel,
 4 and only funds permissible under the Act may be used for such activities.⁸¹ When an individual
 5 becomes a candidate, any such funds received or payments made in connection with testing-the-
 6 waters activity must be reported as contributions or expenditures on the first disclosure report
 7 filed by the candidate's authorized committee.⁸²

8 The Commission has stated that testing-the-waters activities are those "conducted to
 9 determine whether an individual should be a candidate."⁸³ The Commission has opined that
 10 traveling to speak with opinion makers and political and non-political groups for the purpose of
 11 deciding whether potential political support exists for a national campaign is testing-the-waters
 12 activity.⁸⁴ Similarly, in MUR 5908 (Duncan Hunter), the Commission found reason to believe
 13 that a candidate's spending on travel to early primary states "to publicize his Presidential
 14 campaign, and/or gauge support for his campaign" before declaring his candidacy, should have

⁸⁰ See Advisory Op. ("AO") 1981-32 at 4 (Askew); *see also* Testing the Waters E&J at 9,993.

⁸¹ See AO 1981-32 at 3-4; *see also* F&LA at 4 MUR 6224 (Carly Fiorina); F&LA at 2, MUR 6533 (Haney); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn and Weintraub at 1, MUR 5934 (Thompson) ("SOR") (stating that, "[d]uring the 'testing the waters' period, the individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy."); First Gen. Counsel's Rpt. at 3, MUR 5703 (Rainville) ("First GCR") (stating that, "while an individual is 'testing the waters,' he or she may raise or expend funds otherwise permissible under the Act for activities such as conducting a poll, making telephone calls and traveling.") *see also* Certification, MUR 5703 (Rainville) (June 22, 2006).

⁸² 11 C.F.R. § 101.3. A contribution includes any "gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing" any federal election. 52 U.S.C. § 30101(8)(A). "[A]nything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

⁸³ 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* AO 1981-32 at 4.

⁸⁴ AO 1981-32 at 3-4.

1 been reported as testing the waters or campaign expenses.⁸⁵ When evaluating whether a
2 respondent had ceased testing the waters and begun a candidacy, the Commission has determined
3 that expenditures relating to political strategy consulting and fundraising consulting could fall
4 within permissible testing-the-waters activity.⁸⁶

5 In response to the Factual and Legal Analysis, OAR argues that the Commission's
6 findings represent a departure from prior testing-the-waters matters, and asserts that Commission
7 precedent establishes that "an organization does not make testing the waters expenditures when it
8 hosts or pays the travel and other costs of events at which an individual who is thinking about
9 running for future federal office – or even testing the waters of a campaign – discusses issues and
10 policy and supports other candidates."⁸⁷ In support of its position, OAR cites an advisory
11 opinion in which a multicandidate committee proposed to fund a potential presidential
12 candidate's midterm election appearances on behalf of other candidates, a political party, and
13 policies, during which the potential candidate would refer to such candidacy only "in an
14 incidental manner or in response to questions by the public or press."⁸⁸ OAR focuses on the
15 "incidental" language in the advisory opinion, and appears to overlook the Commission's caution
16 that "incidental" references to a potential candidacy "should be narrowly interpreted."⁸⁹

⁸⁵ F&LA at 4-7, MUR 5908 (Hunter). The Commission took no further action in MUR 5908 after the investigation revealed that the leadership committee's excessive contributions to the candidate were likely *de minimis*. See SOR, Comm'rs Petersen, Hunter, McGahn, Walther, & Weintraub at 2-3.

⁸⁶ F&LA at 5-6, MUR 6224 (Carly Fiorina) (finding that a candidate's "pre-announcement spending and fundraising were consistent with 'testing the waters' activity").

⁸⁷ RTB Resp. at 4.

⁸⁸ AO 1986-06 (Fund for America's Future) at 3; see RTB Resp. at 2-3.

⁸⁹ AO 1986-06 at 4 (noting that "incidental statements" would not encompass "public statements" referring to an individual's possible intent to campaign for federal office or activities such as "soliciting funds, holding meetings

Moreover, the Commission cautioned that the exclusion of the outside group's payments for the potential candidate's appearances at events from allocation as testing-the-waters expenses is premised on such appearances being made "on behalf of local, state, or Federal congressional or senatorial candidates or party-building events as described by 11 C.F.R. 110.8(e) rather than appearances primarily related to the presidential nomination process."⁹⁰

Additionally, although OAR relies on several other factually distinguishable matters to argue that the Commission lacked a legal basis to reach its reason to believe findings, these matters do not preclude a conclusion that OAR was funding Walker's testing-the-waters activities. For instance, OAR relies on the Commission's findings in MUR 5260 (Talent), in which the Commission found no reason to believe a state PAC made contributions to Talent on a record that did not "link [the state PAC] to *any* federal campaign activity."⁹¹ Here, the Commission found that Walker made statements while traveling on OAR's behalf that suggested that he was considering a candidacy, thus providing the necessary "nexus" between OAR and Walker's campaign activity.⁹² OAR similarly relies on the Statement of Reasons in MUR 6928 (Santorum) to argue that no "nexus" exists between OAR and Walker's 2015 activity, that Walker's CPAC attendance has little significance with regard to any finding that Walker was engaging in testing-the-waters activity, and that "mere association with an organization prior to

(which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy . . .").

⁹⁰ *Id.*

⁹¹ First Gen. Counsel's Rpt. at 24, MUR 5260 (Talent) (emphasis in original); *see also* Certification, MUR 5260 (Talent) (Jan. 9, 2003).

⁹² F&LA at 11-12; *compare* First GCR at 28-29, MUR 5260 (Talent).

1 becoming a candidate does not give rise to a violation of the Act.”⁹³ As the evidence establishes,
2 Walker’s association with OAR did not simply provide with him with a platform for his public
3 image; it provided him with the framework and funding to test out a potential campaign. OAR’s
4 argument that MUR 6907 (Huckabee), in which the complaint failed to allege any testing-the-
5 waters activity performed or funded by the non-profit, precludes OGC from recommending that
6 OAR was funding Walker’s testing-the-waters-activities, is meritless simply because the
7 evidence in this case is far stronger.⁹⁴ Finally, OAR’s reliance on the Statement of Reasons in
8 MURs 6470, 6482, & 6484, overlooks the Commissioners’ statements that limit its conclusions
9 to the information available in that matter’s record as well as their conclusion that the amount of
10 money at issue (approximately \$30,000) counseled against opening a full investigation.⁹⁵ The
11 lack of a nexus between other politicians’ testing-the-waters activities and other organizations’
12 expenditures as discussed in these prior matters does not change the relationship between
13 Walker’s activities and OAR’s support of those activities.

14 OAR was staffed with individuals, vendors, and consultants who performed campaign-
15 related services to support Walker’s discussions and meetings with potential donors and
16 supporters about a possible presidential candidacy, exactly the type of activity that the
17 Commission has determined constitutes testing-the-waters activity. OAR’s own internal briefing

⁹³ See RTB Resp. at 7, 9 (citing SOR, Comm’rs Hunter & Petersen, MUR 6928 (Santorum)).

⁹⁴ See RTB Resp. at 3-4; First Gen. Counsel’s Rpt. at 5-6 (summarizing Huckabee’s testing-the-waters efforts, which were not extensive and did not appear to be supported by the social welfare organization at issue). And, in any event, the Commission did not adopt OGC’s recommendations in MUR 6907. Certification, MUR 6907 (Huckabee) (Apr. 28, 2016).

⁹⁵ SOR, Chairman Petersen and Comm’rs Hunter and Goodman, MURs 6470, 6482, & 6484 (Free and Strong America PAC) (evaluating three potential testing-the-waters events and concluding that, after allocation of expenses, the likely excessive contribution would have been, at most, \$5,000).

documents indicate that Walker was traveling the country to attend private meetings during which he assessed the feasibility of a possible candidacy.⁹⁶ The notes also show that the political and fundraising consultants paid for by OAR were assisting him in those endeavors.⁹⁷ At these meetings, Walker separated his solicitations for OAR from requests for support for a potential presidential candidacy.⁹⁸ Finally, based on the well-developed record that OAR has not provided information to rebut, it does not appear that OAR arranged meetings for Walker to advocate for other conservative candidates, and any incidental references to other candidates appear to have been in the context of drawing comparisons between those individuals and a prospective Walker candidacy.⁹⁹

The Commission has previously advised that the employment of “political consultants for the purpose of assisting with advice on the potential and mechanics of constructing a national campaign organization” constitutes testing-the-waters activity,¹⁰⁰ as is the “[e]mployment of a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a

⁹⁶ See, e.g., Attachs. 10, 12, 17, 18, and 19.

⁹⁷ *Id.*

⁹⁸ See, e.g., Attach. 4 at DONER-000865; Attach. 5 at DONER-000919; *see also supra* at 5.

⁹⁹ See Attach. 14 at DONER-000889 (notes of a conversation between Walker and a potential donor, which appear to critique a Jeb Bush candidacy and claim that “we have a hard time beating a name from the past with another name from the past”).

¹⁰⁰ AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential and mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing-the-waters exemption as long as the prospective candidate conducted the activities while continuing to deliberate his decision to become a candidate); *see also* F&LA at 5-6, MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition were within the testing-the-waters exemption).

1 national campaign.”¹⁰¹ Those are exactly the kinds of services OAR retained to assist Walker.
2 Between February and June 2015, OAR paid Doner Fundraising \$809,375 for “fundraising
3 consulting,” which the investigation revealed to involve assessing the degree of support available
4 for a Walker candidacy.¹⁰² OAR also paid LG Strategies \$37,500 for political consulting,
5 \$40,161 to Madison Strategies for political consulting, \$32,022 to Ground Game Strategies for
6 political consulting, \$187,542 to the Tarrance Group for political consulting, and \$74,510 to Just
7 Win Strategies for political consulting.¹⁰³ Many of OAR’s staffers were known for their
8 previous work on candidate campaigns.¹⁰⁴

9 OAR argues that Walker’s pre-2015 activity, traveling the country for and speaking
10 publicly in connection with his status as a Republican governor, “defeats any nexus between
11 OAR’s legitimate, issue-based activities” featuring Walker and Walker’s subsequent
12 candidacy.¹⁰⁵ Even assuming that activity is just as OAR contends, there is a qualitative
13 difference between Walker’s pre-2015 appearances and both the later OAR activities featuring
14 Walker and Walker’s subsequent candidacy. The existence of pre-2015 activity by Walker that
15 was not testing-the-waters activity does not insulate the 2015 testing-the-waters activity that

¹⁰¹ AO 1981-32 at 3-4; *see also* F&LA at 5-6, MUR 6196 (Kennedy).

¹⁰² OAR Discovery Resp. at 5; *see* OAR IRS Mid-Year Report; OAR IRS Year-End Report.

¹⁰³ *See* OAR Discovery Resp. at 5-7; *see* OAR IRS Mid-Year Report; OAR IRS Year-End Report.

¹⁰⁴ *See* Biography of Kirsten Kukowski, K2 & Co., <https://www.k2andcompany.com/about> (last visited May 11, 2020) (“Kirsten has led communications on some of the highest profile political campaigns in the country giving her unmatched experience in the political process and access to leaders across the political spectrum all the way to the highest offices in the US.... She served as Communications Director for a presidential campaign before leading the communications operations for a 2016 National Convention”); Biography of Rick Wiley, BLACK DIAMOND STRATEGIES, <https://www.blackdiamondstrategies.us/who-we-are/rick-wiley> (last visited May 11, 2020) (stating that Wiley is a national political consultant having managed state and national political campaigns, third-party organizations, and coalitions since the early 1990s).

¹⁰⁵ RTB Resp. at 5-8.

1 followed. Among other things, OAR's argument does not take into account that it arranged for
2 and funded Walker's 2015 trips, a role it did not play in Walker's pre-2015 activity. Nor does it
3 explain Walker's sudden acquisition, in 2015, of multiple staffers and political consultants with
4 campaign experience, in contrast to Walker's staffing for his pre-2015 public speaking schedule.
5 OAR's argument also ignores its own candidate-focused activities in connection with Walker's
6 2015 events and appearances, including its consultants' creation and distribution of internal
7 briefing documents that focused on Walker's ability to seek endorsements for his candidacy.
8 These differences confirm that the consultants were hired for something other than Walker's
9 ability to discuss issues in public speaking engagements.¹⁰⁶

10 Walker did not establish an official testing-the-waters entity until June 2015. Yet, the
11 evidence shows that from January until June 2015, Walker was testing the waters, and during
12 that time, OAR paid his future campaign staff, his consultants, and the vendors who provided
13 campaign-related services. The numerous departures of employees and consultants following the
14 announcement of Walker's candidacy,¹⁰⁷ along with the steep declines in OAR's overall
15 expenditures and payroll payments,¹⁰⁸ similarly indicate that OAR existed to support the
16 mechanics of constructing a national campaign organization for Walker. Thus, there is probable
17 cause to believe that OAR functioned as a testing-the-waters entity, and Walker's testing-the-

¹⁰⁶ See *supra* at 3-10.

¹⁰⁷ See *supra* at 12-14.

¹⁰⁸ See *supra* at 16-17.

waters activities and travel OAR paid for were not incidental activities, but a fundamental purpose of OAR.¹⁰⁹

B. OAR Made Unreported Prohibited and Excessive In-Kind Contributions to Walker's Campaign

Commission regulations provide that all funds raised and spent for testing-the-waters activities are subject to the Act's limitations and prohibitions.¹¹⁰ The Act prohibits any person from making contributions to any candidate and his authorized political committee with respect to any election for federal office that, in the aggregate, exceed \$2,700 for the 2016 election cycle.¹¹¹ The Act also prohibits any candidate or political committee from knowingly accepting any excessive contributions.¹¹² The Act and Commission regulations prohibit corporations from making contributions to candidate committees in connection with a federal election.¹¹³ The Commission has concluded that a 527 organization's "use of funds raised outside of the Act's

¹⁰⁹ The evidence appears to indicate that OAR may have been a political committee, including by having the major purpose of nominating or electing a candidate. *See* 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5; *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (concluding that the term "political committee" "need only encompass organizations that are under control of a candidate or the *major purpose of which is the nomination or election of a candidate.*") (emphasis added). It also indicates that to the extent Walker established, financed, maintained, or controlled OAR while he was a federal candidate, there may violations of the Act's soft money provisions. *See* 52 U.S.C. § 30125(e); 11 C.F.R. § 300.2(c)(2); Factual & Legal Analysis at 4-8, MUR 5367 (Issa). Given the timing and circumstances of this matter, however, we do not recommend that the Commission pursue these additional violations for prudential reasons, so that this time-sensitive matter may proceed without further delay.

¹¹⁰ *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Testing the Waters E&J at 9,993; F&LA at 3, MUR 6533 (Haney) ("All funds raised and spent for 'testing the waters' activities are, however, subject to the Act's limitations and prohibitions.").

¹¹¹ 52 U.S.C. § 30116(a)(1)(A).

¹¹² *Id.* § 30116(f).

¹¹³ *Id.* § 30118(a); 11 C.F.R. § 114.2(b); *cf.* 11 C.F.R. § 114.2, note to paragraph (b) (clarifying that corporations can make contributions to non-connected political committees that make only independent expenditures); AO 2010-11 (Commonsense Ten) at 2-3 (concluding that corporations may contribute to independent expenditure-only political committees).

1 limitations and prohibitions to pay for individuals' testing-the-waters activities would violate
2 Commission regulations if those individuals decide to become candidates.”¹¹⁴ Thus, OAR was
3 prohibited from using corporate donations towards Walker's exploratory efforts and was
4 prohibited from accepting excessive donations in support of Walker's potential candidacy. OAR
5 was further prohibited from making excessive contributions to Walker's Committee.

6 The record confirms that OAR paid for testing-the-waters expenses for Walker in excess
7 of the contribution limit, and that the funds OAR used to pay for Walker's testing-the-waters
8 expenses were from sources and in amounts prohibited under the Act. By providing Walker and
9 his ultimate Committee with the testing-the-waters expenditures described above, which
10 included some portion of the \$787,354 OAR spent on “fundraising consulting,” \$308,093 on
11 “political consulting,” and \$547,081 on airfare, OAR made excessive in-kind contributions to the
12 Committee. Further, in making these excessive in-kind contributions, OAR utilized
13 contributions that it raised which were themselves prohibited under the Act. OAR's 2015 mid-
14 year IRS filing disclosed numerous contributions from individuals which exceeded \$2,700, as
15 well as contributions that appear to be prohibited corporate contributions.¹¹⁵ As a result, there is
16 probable cause to believe that OAR made excessive and prohibited contributions to Walker's
17 campaign by paying for testing-the-waters expenses.

¹¹⁴ Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 5 (concluding that 527 organizations' payments for testing-the-waters activities with soft money would violate 11 C.F.R. §§ 100.72(a) and 100.13(a)).

¹¹⁵ See Schedule A to OAR IRS Mid-Year Report.

1 **IV. CONCLUSION**

2 Based on the foregoing, the Office of General Counsel is prepared to recommend that the
3 Commission find probable cause to believe that Our American Revival made excessive and
4 prohibited contributions to Scott Walker, Inc., in violation of 52 U.S.C. §§ 30116 and 30118.

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6 05/11/2020

7 Date

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