

FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2 **TO:** The Commission
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16 **RE:** MURs 6917 and 6929 (Our American Revival)
17 Office of General Counsel's Notice to the Commission Following the
18 Submission of Probable Cause Brief
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20
21 **I. INTRODUCTION**
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23 On May 11, 2020, the Office of General Counsel ("OGC") notified counsel for
24 Respondents that it was prepared to recommend that the Commission find probable cause to
25 believe that Our American Revival and C. Ryan Burchfield in his official capacity as treasurer
26 ("OAR") violated 52 U.S.C. §§ 30116(a) and 30118 by making excessive and prohibited
27 contributions in connection with its efforts to support Walker's testing-the-waters activities.¹
28 OGC included with this notification a General's Counsel's Brief setting forth the factual and
29 legal basis for the recommendation. On May 13, 2020, OGC circulated a copy of the General
30 Counsel's Brief to the Commission.
31

32 Respondents filed a reply brief on May 26, 2020, and requested a probable cause hearing
33 pursuant to *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64,919
34 (Nov. 19, 2007). There was insufficient Commissioner support for granting Respondents'
35 request for a probable cause hearing, in light of Respondents' unwillingness to agree to toll the
36 statute of limitations, and Respondents were notified of the Commission's decision not to grant
37 their request on June 25, 2020.

¹ See 52 U.S.C. § 30109(a)(3), 11 C.F.R. § 111.16(a); see also Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63,570 (Oct. 13, 2011).

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2 Pursuant to the *Agency Procedure Following the Submission of Probable Cause Briefs by*
3 *the Office of General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011), OGC is hereby notifying the
4 Commission that it intends to proceed with the recommendations to find probable cause to
5 believe, based on the factual and legal analysis set forth in the General Counsel’s Brief. In
6 addition, an analysis of the arguments presented in Respondents’ Reply Brief is included below.
7 A copy of this Notice is being provided to OAR at the same time that it is circulated to the
8 Commission.

9 10 **II. ANALYSIS**

11 12 **A. Respondents’ Statute of Limitations Arguments Understate the** 13 **Commission’s Authority and Do Not Extinguish the Clear Violations** 14 **Uncovered by OGC’s Investigation** 15

16 OAR argues that because OAR made many or all of its testing-the-waters expenditures
17 more than five years ago, the Commission should dismiss this matter.² This argument misstates
18 the Commission’s ability to address violations that occurred more than five years ago. The
19 Commission has acted in prior matters to address violations of the Act which were more than
20 five years old and can do so here.³ OAR cites the five-year statute of limitations contained
21 within 28 U.S.C. § 2462, which it argues limits the Commission’s time to bring “an action, suit
22 or proceeding for the *enforcement of any civil fine, penalty, or forfeiture*” (emphasis added).
23 But, assuming this limitation applies in the relevant jurisdiction,⁴ the agency’s ability to seek
24 equitable remedies is not subject to such limitations.⁵ Thus, regardless of whether the five-year
25 statute of limitations invoked by OAR impedes the Commission’s ability to seek a civil penalty,
26 it does not prevent the Commission from pursuing equitable remedies, including requiring
27 disclosure of the excessive and prohibited contributions, and it does not prevent the Commission
28 from making a probable cause to believe finding.
29

30 To the extent OAR’s statute of limitations argument incorporates the argument that the
31 Commission should decline to pursue even equitable remedies as an exercise of prosecutorial
32 discretion,⁶ that argument is unpersuasive. The violations at issue in this matter are contrary to
33 central provisions of the Act regulating the size of contributions, limits that the Supreme Court

² Reply Brief at 3-5.

³ See generally Conciliation Agreement, MUR 6538R (Americans for Job Security) (addressing equitable remedies).

⁴ Compare *Citizens for Responsibility and Ethics in Washington v. FEC*, 209 F.Supp.3d 77, n.3 (D.D.C. 2016) (rejecting an argument that the FEC cannot pursue equitable remedies after five years on the basis that no “authoritative policy or rule” barring equitable enforcement was before the court).

⁵ *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding that injunctive relief is not a penalty); *FEC v. Nat’l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995) (same).

⁶ See Reply Brief at 6.

1 has consistently upheld in recognition of the important anticorruption purposes served by such
 2 limits.⁷ These violations also took place in the context of the 2016 presidential race in
 3 connection with Walker’s significant candidacy. The Commission has already expended the
 4 resources to establish the violations and, as discussed below, OAR does not contest the facts
 5 cited in the General Counsel’s Brief, outside of arguing that the statute of limitations has run and
 6 that the full extent of the violations has not been precisely accounted.

7
 8 **B. The General Counsel’s Brief Documents Walker’s Concerted Efforts to Use**
 9 **OAR to Gauge Support for a Presidential Candidacy**

10
 11 Respondents do not engage with the overwhelming evidence in any significant way,
 12 including voluminous contemporaneous documentary evidence, presented in the General
 13 Counsel’s Brief demonstrating that OAR paid for Walker to travel the country evaluating
 14 whether support existed for a potential campaign.⁸ This conclusion is supported by Walker’s
 15 private statements that he was considering a candidacy and by the fact that he abruptly acquired a
 16 team of experienced campaign consultants to support a public speaking schedule that he had
 17 effectively managed without campaign advisors for quite some time.⁹ It is further supported by
 18 the fact that OAR ceased to function in large part following Walker’s official announcement of
 19 his candidacy.¹⁰ The presence of general statements concerning Walker’s overall political
 20 philosophy does not contravene the overwhelming statements explicitly indicating Walker’s
 21 contemplation of a campaign, and the transition of Walker’s “campaign-in-waiting” over to his
 22 eventual campaign.

23
 24 OAR does not address why Walker, after having had a successful public speaking
 25 schedule for many years, suddenly required an organization to usher hundreds of thousands of
 26 dollars of political consulting associated with early primary states, offered by individuals who
 27 were experienced in running political campaigns, to assist him in continuing to give speeches
 28 across the country. Respondents also fail to address the numerous instances where it appears that

⁷ *E.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (“As *Buckley* explained, Congress may permissibly seek to rein in ‘large contributions [that] are given to secure a political quid pro quo from current and potential office holders.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam))); *id.* (“In addition to ‘actual quid pro quo arrangements,’ Congress may permissibly limit ‘the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions’ to particular candidates.” (quoting *Buckley*, 424 U.S. at 27)).

⁸ Instead, OAR claims that the General Counsel’s Brief is overly reliant on documents provided by third-party consultants and should rely more heavily on OAR’s incomplete document production. Reply Brief at 10-14. OAR, after acknowledging that it was in possession of documents responsive to the Commission’s subpoena, unilaterally ceased responding to the subpoena, leaving it in no position to criticize OGC’s efforts to complete a full investigation or OGC’s reluctance to rely on a deficient production. See General Counsel’s Brief at 3-4, Attachs. 2, 3.

⁹ General Counsel’s Brief at 4-12.

¹⁰ *Id.* at 12-13, 16-17.

1 Walker explicitly stated that he was considering a campaign.¹¹ These activities—Walker
2 traveling the country stating that he was considering a campaign and building a team of political
3 consultants to later run that campaign—form the basis for probable cause to believe. OAR
4 contends that the fact that OAR’s fundraising consultants successfully raised money for OAR
5 indicates that their activity was not for testing-the-waters purposes.¹² But donations to OAR
6 does not undercut the conclusion that those funds were given to facilitate Walker’s testing-the-
7 waters activities.

8
9 Finally, OAR claims that OGC has not identified specific expenditures tied to testing-the-
10 waters activities.¹³ Not so. As outlined in the General Counsel’s Brief, OGC’s investigation
11 revealed that OAR existed in order to support Walker’s testing-the-waters activities: it
12 researched, arranged, and facilitated Walker’s travel to private meetings throughout the United
13 States where he repeatedly told attendees that he was looking to secure their support for an
14 eventual candidacy.¹⁴ The Brief identifies the amount of money paid to the consultants who
15 researched these private meetings and crafted the “ask” where Walker would communicate his
16 consideration of a presidential campaign.¹⁵ The General Counsel’s Brief also identifies
17 expenditures to political consultants who were experienced in running campaigns and appeared
18 to be building out the framework for an eventual campaign.¹⁶ Finally, the General Counsel’s
19 Brief also identifies travel expenses associated with Walker’s private meetings.¹⁷ These
20 expenses are not only sufficiently particularized to support a probable cause finding, but the
21 accounting issue OAR relies upon is irrelevant to whether the Commission should require OAR
22 to disclose the excessive and prohibited contributions at issue, information OAR has withheld.

23 24 **III. RECOMMENDATION**

25
26 Find probable cause to believe that Our American Revival and C. Ryan Burchfield in his
27 official capacity as treasurer violated 52 U.S.C. §§ 30116(a) and 30118 by making excessive and
28 prohibited contributions in connection with its efforts to support Walker’s testing-the-waters
29 activities.

¹¹ See *id.* at 7 & n.22 (documenting numerous occasions where OAR secured meetings where Walker asked people to join his team “should he decide to run for higher office”).

¹² See Reply Brief at 13.

¹³ *Id.* at 9.

¹⁴ General Counsel’s Brief at 22-24.

¹⁵ *Id.* at 24.

¹⁶ *Id.*

¹⁷ *Id.* at 5-9 & nn. 15, 16, 19, 23, 26, 27, 29.