

**BEFORE THE FEDERAL ELECTION COMMISSION**

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 )      **MURs 6917/6929**
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**REPLY TO THE OFFICE OF GENERAL COUNSEL'S PROBABLE CAUSE BRIEF BY  
RESPONDENTS GOVERNOR SCOTT WALKER AND SCOTT WALKER, INC.  
AND KATE TEASDALE, AS TREASURER**

Respondents Governor Scott Walker and Scott Walker, Inc. (the “Campaign”) and Kate Teasdale, as Treasurer, hereby reply, by and through undersigned counsel, to the “probable cause” brief issued by the Office of General Counsel (“OGC”) in the above-referenced MURs. For the reasons set forth below, the Commission should dismiss these matters and close both files, which stem from activities that occurred in the first half of 2015.

Respondents further hereby respectfully request a probable cause hearing in accordance with the Commission’s policy set forth at 72 Fed. Reg. 64,919 (Nov. 19 2007), which Respondents believe is the most direct and efficient manner to address the issues in these more than five-year-old MURs, particularly in light of the fact that Commissioner Trainor is just joining the Commission. At the hearing, Respondents’ counsel will address the specific matters raised in this submission or in any necessary supplement hereto.<sup>1</sup>

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<sup>1</sup> On May 18, 2020, Respondents, through counsel, requested a copy of the information gathered by OGC in the course of its investigation in these MURs pursuant to *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34,986 (June 15, 2011). See Exhibit A. In their request, Respondents noted that “[a]ccess to this information is necessary so that they can ‘present fully informed submissions and frame legal issues for the Commission’s consideration’ in light of the Office of General Counsel’s notice of its intent to recommend that the Commission proceed to a vote on probable cause in these MURs.” *Id.* (quoting 76 Fed. Reg. at 34,989). The requested records, however, had not been provided to Respondents as of the date this Response was due. Respondents did not have the opportunity to review the records prior to making this submission, and thus they reserve the right to supplement this Response based on that review, which is likely to include materials demonstrating that OGC’s brief cherry-picks evidence to reach its chosen conclusion and will provide a much more fulsome discussion of these matters.

## **INTRODUCTION**

Scott Walker announced he would no longer be a candidate for President of the United States on September 21, 2015, a little over two months after he announced his candidacy and three months after he commenced testing-the-waters activity. In the more than five years and two months that OGC has had these MURs before it, it has inappropriately attempted to extend its regulatory scope to activities that fall well outside the FEC’s jurisdiction to include the activities of someone who is not a federal candidate at the time of the activities but who then later becomes a candidate. And even with all that time, OGC cannot now adequately substantiate its overly broad claim that Governor Walker engaged in so-called “testing the waters” activities prior to June 17, 2015, when he began disclosing testing-the-waters expenses, and that Our American Revival (“OAR”), a 527 organization, funded those activities. Despite its overbroad rhetorical assertions, OGC has failed to meet its burden of factually demonstrating its case.

## **ARGUMENT**

At the probable cause stage, the question before the Commission is whether the law and factual record developed by OGC in these MURs justify further enforcement and efforts at conciliation. They clearly do not, for two independent reasons. *First*, all of the OAR spending actually discussed in OGC’s brief occurred more than five years ago and is now time-barred under the five-year statute of limitations, 28 U.S.C § 2462, or will be soon. *Second*, even if these actions were not time-barred, OGC’s brief does not establish probable cause to believe that *any* of Governor Walker’s activities on behalf of OAR constituted “testing the waters,” and OGC certainly has not met its burden to show with particularity which specific OAR payments OGC believes furthered testing-the-waters activities or how those costs should be allocated to the

Campaign. Indeed, even with OGC’s brief in hand, Respondents still have no idea what the scope of OGC’s allegations against them may be.

Finally, as an apparent punitive side point, OGC’s note that Governor Walker filed his Form 2 (Statement of Candidacy) *eight* days late is barely worth mentioning given the FEC’s prior decisions, the immateriality five years later, and because there can be no question that by late-July 2015 the public was fully on notice that Governor Walker was running for president. The Commission should dismiss these matters.

#### **I. THE PRE-CANDIDACY SPENDING AT ISSUE IN OGC’S BRIEF OCCURRED OVER FIVE YEARS AGO**

As a threshold issue, all the activity described in OGC’s probable cause brief is now time-barred or will be soon and these matters should be dismissed. All of OAR’s spending activity described in OGC’s brief occurred more than five years ago. Most notably, all of the OAR-related travel highlighted in OGC’s brief had occurred by the end of March 2015. *See* OGC Br. 5–12 (discussing donor meetings and events from January to March 2015). Even if OGC tries to argue that these are not the determinative events, OGC itself recognizes, consistent with its prior matters, that the latest possible date of any actionable spending by OAR is the date of Governor Walker’s “formal announcement that he was testing the waters on June 17, 2015.” *See* OGC’s Br. 16. In applying the default five-year statute of limitations to allegedly improper testing-the-waters payments, OGC consistently has recognized that the statutory period is tied to the date of the spending. *See, e.g.*, MUR 6462 (Donald J. Trump), First General Counsel’s Report at 1; *see also* MUR 6509 (Friends of Herman Cain), First General Counsel’s Report at 1. Therefore, even if there were any merit to OGC’s probable cause analysis (there’s not), there simply is not sufficient time

remaining under the statute of limitations to resolve all the outstanding issues, as addressed below,<sup>2</sup> and to conciliate these matters under the statute. The Commission should dismiss these MURs for this reason alone. *See* MURs 6391 & 6471 (The Commission on Hope, Growth, and Opportunity), Statement of Reasons of Comm’rs Petersen, Hunter & Goodman 4 (dismissing matter where, among other considerations, “statute of limitations effectively foreclosed further enforcement effort”).

## **II. THERE IS NO PROBABLE CAUSE TO BELIEVE OAR PAID FOR ANY “TESTING THE WATERS” EXPENSES**

OGC’s brief makes the broad conclusion that there is probable cause to believe that “some portion” of OAR’s spending during the first half of calendar year 2015 was for the purpose of Governor Walker “testing the waters” of a 2016 presidential campaign. *See* OGC Br. 24. Those testing-the-waters expenditures, OGC’s brief claims, came in the form of OAR’s payments for Governor Walker’s travel “to engage in public speaking events, around which [were] scheduled private meetings with prospective donors and supporters” (notably, none of which are the actual events that served as the basis for the FEC’s “reason to believe” finding, *see generally Exhibit B* (Resp’ts Response to F&LA)), and for the OAR staffers who provided support related to those activities and who later worked on his Campaign. *Id.* at 2. *But see* MUR 6928 (Rick Santorum), Statement of Reasons of Comm’rs Hunter & Petersen [hereinafter “Santorum SOR”] 14 (explaining that it is not “significant” to a testing-the-waters analysis that staff who worked for a

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<sup>2</sup> For example, even if the Commission were to determine that the statute of limitations does not expire until later in the summer of 2020, as discussed in Part II.B, *infra*, OGC must, at minimum, amend its probable cause brief and recommendations to show with particularity which OAR payments it believes are allocable to the Campaign, and the amount of such allocation. Given the five years that it has had to investigate, OGC’s inability to make this showing thus far shows there is no basis to believe that it could do so at all, let alone in a manner that would enable these proceedings to conclude before the limitations period expires. *See* 52 U.S.C. § 30109(a)(4)(A)(i) (mandating 30 day minimum conciliation period).

grassroots organization associated with a public figure, “and thus [who] in all likelihood share in his values and worldview,” “would want to continue working for [that individual] on a campaign”).

OGC’s testing-the-waters analysis runs roughshod over the critical limitation on FEC jurisdiction at stake in these MURs: not everything an individual does pre-candidacy constitutes “testing the waters” merely because that person later becomes a federal candidate. Simply put, the Commission’s testing-the-waters regulations do not impose a pre-candidacy campaign finance regime; they merely offer a legally compliant way for those who wish to undertake certain, specific testing-the-waters activities that could otherwise be deemed a contribution or expenditure “to determine whether a person wishes to pursue a candidacy.” 11 C.F.R. §§ 100.72(a), 100.131. The testing-the-waters exception, in other words, is not a mandatory stage of becoming a candidate, nor does it provide for a regulatory twilight “look-back” period for those who do later become candidates. Instead, only those pre-candidacy activities shown to have been done specifically to determine whether the individual should run for federal office fall under FEC regulation. To hold otherwise would subject anyone who eventually became a federal candidate to FEC regulatory scrutiny for any activity, speech, or meeting that person happened to have done that included discussions of federal policies, the political future, or the building of relationships.

For these reasons, the Commission has recognized repeatedly that before becoming a federal candidate, a public figure such as Scott Walker may associate himself with grassroots organizations like OAR. Even if the individual’s activities on behalf of the organization help further his public image and improve his political brand, they are not properly considered “testing the waters” activities unless done specifically for the purpose of determining whether to run for federal office. *See, e.g.*, MUR 6907 (Huckabee), First General Counsel’s Report 9 (recognizing that an individual’s mere association with an organization prior to becoming a candidate does not

give rise to a violation, even where the individual “use[s] [the organization] as a platform to maintain [a] public image”). Accordingly, in this area of fundamental First Amendment rights, the Commission has made clear that payments by such organizations in connection with a public figure’s pre-candidacy activities are regulated by the FEC post-candidacy only if there is clear evidence of “*particularized* payments for *specific* activities” done to assess whether to run for federal office that are fairly allocable to the individual’s federal campaign. Santorum SOR 9 (emphasis added). Payments that further the mission of the organization itself are beyond the FEC’s reach. *See, e.g.*, MUR 5908 (Duncan Hunter), Statement of Reasons of Comm’rs Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn II, Steven T. Walther, and Ellen L. Weintraub [hereinafter “Duncan Hunter SOR”] 3.

OGC’s brief fails to meet its burden of identifying any specific payments by OAR properly considered testing-the-waters expenses, as opposed to disbursements advancing OAR’s own organizational mission. And even if some of those activities could be deemed for testing the waters, OGC’s brief does not, as it must, identify with particularity the payments and amounts OGC deems allocable to the Campaign. *See* Santorum SOR 9; Duncan Hunter SOL 3; MUR 6509 (Herman Cain), Statement of Reasons of Comm’rs Petersen, Hunter & Goodman [hereinafter “Cain SOR”] 8. For each of these reasons, OGC’s brief does not establish probable cause to believe that OAR funded testing-the-waters activities.

**A. OGC’s Brief Does Not Identify Any Actual “Testing The Waters” Expenses Funded By OAR.**

“[W]hen conducting a testing-the-waters analysis, the Commission’s proper focus is on whether a particular payment is made solely for the purpose of determining whether an individual should become a candidate.” Santorum SOR 9. In other words, the activity must be proven to have “occurred *for the purpose of* determining the viability of a candidacy.” *Id.* (emphasis added). The

Commission has made clear that this analysis must turn on the facts and circumstances of each case. *See id.* (“[W]hether particular expenses are rightly considered testing-the-waters expenses will usually be a *highly fact-intensive inquiry.*” (emphasis added)). Yet OGC’s brief ignores the circumstances as they existed in 2015 when Governor Walker was traveling the country promoting OAR and its agenda and meeting with donors to fundraise on behalf of the organization. By doing so, OGC’s brief contorts appropriate, commonplace activities in support of a grassroots organization into FEC regulated testing-the-waters activities. The Commission must not permit such an unwarranted effort to expand its jurisdiction.

OGC’s brief glosses over the inconvenient truth that in early 2015, Governor Walker was of one of the principal leaders and most recognizable faces in the Republican Party. He was the sitting second-term Republican Governor of Wisconsin, having won three elections in four years, including a contentious 2011 recall election that received considerable national focus. He had been Governor for over more than five years, during which he had pursued an aggressive conservative legislative reform agenda. *See, e.g.*, M.D. Kittle, *The Scott Walker Years: Taxpayer-Centered Reforms in Wisconsin*, The Daily Signal (Dec. 11, 2018) (describing Governor Walker’s term as governor as an “era of sweeping conservative reforms”);<sup>3</sup> Patrick Gleason, *Five Years Later, Scott Walker’s Reforms Have Saved Taxpayers Billions*, Forbes (Feb. 28, 2016).<sup>4</sup> His leadership and bold agenda in Wisconsin had grown his public profile, and Governor Walker was one of the most sought after speakers to address Republican and conservative groups and individual donors. This, of course, was largely driven by an overall narrative at the time that placed Governor Walker among the favorites to secure the Republican nomination for president if he chose to run. *See, e.g.*,

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<sup>3</sup> Available at <https://www.dailysignal.com/2018/12/11/the-scott-walker-years-taxpayer-centered-reforms-in-wisconsin>.

<sup>4</sup> Available at <https://www.forbes.com/sites/patrickgleason/2016/02/28/act10/#622db2254e50>.

Seth McLaughlin, *Scott Walker in 2016? Wisconsin governor leads GOP presidential ranking*, Wash. Times (Feb. 6, 2014).<sup>5</sup>

The public's and media's interest in Governor Walker and his broader political ambitions made him the ideal face—and a perfect fundraiser—for OAR. OAR's mission was, and still is, moving the issues debate forward by disseminating the accomplishments and solutions coming out of state governments. In 2015, Governor Walker was the living embodiment of state-based accomplishment. And thus while Governor Walker used OAR as “a platform to speak about issues . . . and maintain [his] public profile,” Santorum SOR 9, OAR too used Governor Walker and his public notoriety to promote its federalism mission and to raise money in support of that agenda.

This is why the OGC brief's reliance on Governor Walker's attendance at various private OAR donor meetings scheduled around his travel to larger-scale speaking engagements is misplaced. *See* OGC Br. 2. It is well understood that “individuals who may consider running for office at a future point may make public appearances and assist in fundraising efforts on behalf of others without being considered to test the waters.” Santorum SOR 15. OGC's brief acknowledges, and the record evidence supports, that Governor Walker's donor meetings benefitted OAR. *See* OGC Br. 6 (acknowledging that meetings sought “donations to OAR”). Most of these individuals named in attachments to OGC's brief in fact donated to OAR shortly after these meetings,<sup>6</sup> while

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<sup>5</sup> Available at <https://www.washingtontimes.com/news/2014/feb/6/scott-walker-2016-wisconsin-governor-leads-gop-pre>.

<sup>6</sup> As examples, as was publicly disclosed on OAR's Form 8872, Randy Kendrick (OGC Br. Attach. 2) donated to OAR on February 16, 2015; John Ingram (OGC Br. Attach 3) donated to OAR on February 6, 2015; David Humphreys (OGC Br. Attach. 8) donated to OAR on February 9, 2015; Jimmy Westcott (OGC Br. Attach. 9) donated to OAR on January 25, 2015 and February 18, 2015; Carl Westcott (OGC Br. Attach. 9) donated to OAR on February 18, 2015; John Loeb (OGC Br. Attach. 10) donated to OAR on February 19, 2015; Dan Cook (OGC Br. Attach. 12) donated to OAR on April 6, 2015; Mike and Mary Shannon (OGC Br. Attach. 12) donated to OAR on February 19, 2015; Fritz Corrigan (OGC Br. Attach. 12) donated to OAR on April 1, 2015; Marc Goldman (OGC Br. Attach. 13) donated to OAR on February 27, 2015 and March 3, 2015; Ken

several never contributed to Scott Walker, Inc.<sup>7</sup> Yet OGC’s brief claims that these meetings—several of which were mere phone calls with no apparent incremental cost, *see* OGC Br. Attachs. 2–4—were truly for “testing the waters.” OGC presents no evidence of what was actually discussed during these meetings. Instead, it bases its conclusions only on some notations in pre-meeting briefing documents created by OAR fundraisers, which OGC claims advised Governor Walker to discuss with the prospective OAR donors potential endorsements or other 2016 considerations in the event he decided to run for president. This ignores that OAR sought authorizations from prospective donors to promote their support of OAR and its mission publicly, and the references to “2016 efforts” or a “campaign” in several of these briefing documents (*e.g.*, OGC Br. Attachs. 2–4, 8, 9) have no clear relationship to a Walker candidacy. Furthermore, that some OAR fundraisers paid on commission may have sought to feed off media speculation at the time and use donor interest in Governor Walker’s potential presidential interests to help drive attention and funding to OAR is hardly surprising, and certainly does not prove that Governor Walker’s efforts in support of OAR were intended for him to test the waters. *See, e.g.*, Duncan Hunter SOR 3 (“Nothing revealed in the Commission’s investigation contradicts the conclusion that the travel disbursements advanced PTS PAC’s core mission.”); *see also* Santorum SOR 14 (“Clearly, the ability to raise and spend funds were of vital importance to the missions of [organizations].”).

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Griffin (OGC Br. Attach. 15) donated to OAR on April 24, 2015; Andrew Puzder (OGC Br. Attach. 16) donated to OAR on April 8, 2015; Bernie Marcus (OGC Br. Attach. 30) donated to OAR on March 5, 2015; and Michael Epstein (OGC Br. Attach. 33) donated to OAR on March 23, 2015.

<sup>7</sup> *E.g.*, from a review of FEC disclosure reports, Cook, Griffin, Ingram, Kendrick, and the Shannons all did not contribute to the Campaign.

Indeed, OGC’s brief offers no evidence that any of Governor Walker’s travel or meetings done on behalf of OAR “occurred *for the purpose of* determining the viability of [his] candidacy.” Santorum SOR 9. Nothing in OGC’s brief indicates that the travel was designed to have, or in fact had, any bearing on Governor Walker’s decision to run for president. This is very different from Advisory Opinion 1981-32 (Askew), on which OGC relies. *See* OGC Br. 18 n.75 (citing Advisory Opinion 1981-32). There, Askew was not proposing to travel in support of a separate organization, and he also explicitly acknowledged that his travel would be for the purpose “determin[ing] whether his candidacy for the Democratic nomination for President is feasible and desirable.” Advisory Op. 1981-32, at 2.<sup>8</sup> Governor Walker was doing no such thing in 2015 when he traveled across the country to promote and fundraise for OAR.

**B. Even If Some Of OAR’s Payments Furthered Testing-The-Waters Activities, OGC Fails To Meet Its Burden To Identify With Particularity The Costs Allocable To The Campaign.**

“Unlike ‘candidacy,’ which is a generalized status under the [Federal Election Campaign] Act, the Commission’s testing-the-waters regulations speak in terms of particularized payments for specific activities.” Santorum SOR 9. Therefore, even if some of the activities discussed in OGC’s brief could be considered “testing the waters,” it would not mean that all of OAR’s disbursements are FEC regulated. As noted, even OGC’s brief acknowledges that the travel and meetings benefitted OAR. *See* OGC Br. 2, 5–12.

The Commission has made clear that “payments must be appropriately allocated between the sponsoring entity and the individual’s campaign before being disclosed to the Commission.” Santorum SOR 9; *see also* Duncan Hunter SOR 3; *cf.* 11 C.F.R. § 106.3 (concerning “[a]llocation

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<sup>8</sup> OGC’s reliance on the reason to believe finding in MUR 5908 (Duncan Hunter) is equally faulty, given that the allegations were dismissed at the probable cause stage. *See generally* Duncan Hunter SOR.

of expenses between campaign and non-campaign related travel”). Yet OGC’s brief provides no information on which to base such an allocation. Rather, it asserts only that “some portion” of OAR’s spending may have been for testing-the-waters activities. OGC Br. 24. That failure to specify is not sufficient at the probable cause stage. *See Cain SOR 8–9* (dismissing matter where, among other things “[t]he record . . . provided no information on which to base such an allocation”). For OGC to meet its burden at probable cause as well as a matter of fundamental fairness, Respondents are entitled to know the scope of the allegations against them so that they may respond meaningfully.

**III. THERE IS NO JUSTIFICATION FOR ANY FURTHER ENFORCEMENT EFFORTS RELATED TO THE TIMING OF GOVERNOR WALKER’S FEC FORM 2 (STATEMENT OF CANDIDACY)**

OGC’s brief also recommends that the Commission find probable cause to believe that Governor Walker filed his Form 2 (Statement of Candidacy) eight days late. OGC Br. 25–28. Inexplicably, OGC’s brief completely ignores the fact that on July 2, 2015, Governor Walker submitted to the FEC a letter noting that he “had received contributions of more than \$5,000” which made him a candidate under the FECA and regulations upon his announcement. The letter, which contained all the information required on a Form 2, was provided to the FEC in lieu of a Form 2 in order to place the public on notice that Governor Walker shortly would become a candidate. The FEC, for reasons that are not clear, did not make the letter public. Yet the general public knew that Governor Walker was a candidate by no later than July 13, 2015, and there simply was no harm from any delay in filing the technical Form 2—let alone from an alleged lapse of eight days that occurred seven months before any votes were cast in any state. Indeed, the Commission consistently has found such technicalities unworthy of additional enforcement efforts, even in the face of significantly longer delays. *See, e.g.*, MUR 7261 (Levi for Colorado),

Factual & Legal Analysis 6–7 (dismissing complaint where candidate failed to file Form 2 “by about a month”); MUR 6999 (David Larsen), Factual & Legal Analysis 10–11 (dismissing complaint where candidate filed Form 2 147 days late); *see also* MUR 7360 (Liuba for Congress), Enforcement Priority System Dismissal Report 1 n.2 (dismissing complaint where Form 2 appeared to have been filed “two months late”). The FEC’s substantial disparate treatment of Respondents is unwarranted.

### **CONCLUSION**

The Commission should dismiss these matters and take no further action.

Dated: May 26, 2020

Respectfully submitted,

*/s/ Benjamin L. Ginsberg*  
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# **EXHIBIT A**

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CONFIDENTIAL

May 18, 2020

VIA E-MAIL

Adrienne C. Baranowicz  
 Federal Election Commission  
 Enforcement Division  
 1050 First Street, NE  
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 abaranowicz@fec.gov

Re: MURs 6917 and 6929—Request for information ascertained during investigation

Dear Ms. Baranowicz:

On behalf of Scott Walker, Inc. and Treasurer Kate Teasdale and Governor Scott Walker (collectively, “Respondents”), we hereby request a copy of the information gathered by the Office of General Counsel in the course of its investigation in these Matters Under Review. *See* Notice of Agency Procedure, *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34,986 (June 15, 2011). Access to this information is necessary so that Respondents can “present fully informed submissions and frame legal issues for the Commission’s consideration” in light of the Office of General Counsel’s notice of its intent to recommend that the Commission proceed to a vote on probable cause in these MURs. *Id.* at 34,989.

Sincerely,



E. Stewart Crosland

cc: Lynn Tran, Federal Election Commission  
 Benjamin L. Ginsberg, Jones Day

## **EXHIBIT B**

# JONES DAY

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June 4, 2019

## **VIA EMAIL TO JPETERSON@FEC.GOV**

Mr. Jonathan Peterson  
Office of General Counsel  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

Re: MURs 6917 & 6929: Governor Scott Walker and Scott Walker, Inc. and Kate Lind, as Treasurer

Dear Mr. Peterson:

Governor Scott Walker and Scott Walker, Inc. and Kate Lind, as Treasurer (collectively, “the Committee”), respondents in the above-referenced MURs, hereby respond, by and through undersigned counsel, to the Factual & Legal Analysis (“the F&LA”) in these matters. The F&LA finds “reason to believe” Governor Walker engaged in so-called “testing the waters” activities prior to June 2015, when he began disclosing testing-the-waters expenses, and that Our American Revival (“OAR”), a 527 organization, funded those activities. It also calls for an investigation into whether Governor Walker filed his FEC Form 2 Statement of Candidacy untimely, by eight days. In each regard, the F&LA gets it wrong, as a matter of fact and law.

### **I. THE “TESTING THE WATERS” ANALYSIS OVERLOOKS CRITICAL FACTS AND CONTRADICTS PRECEDENT**

The F&LA finds that OAR “may” have funded travel and events for purposes of allowing Governor Walker to “test the waters” of a potential presidential candidacy. This finding, as discussed below, directly contradicts established FEC precedent by:

- overlooking Governor Walker’s status as a sitting Governor and leading Republican policy voice with a history of receiving invitations to speak at events around the country because of his policy innovations and electoral successes having nothing to do with a federal candidacy;
- overemphasizing indefinite, off-the-cuff remarks in response to media inquiries; and
- failing to identify even one particularized testing-the-waters activity paid by OAR.

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**A. The F&LA ignores Governor Walker's central role in the Republican party and conservative issues debate.**

The F&LA inexplicably overlooks the most critical fact here: Governor Walker's status as an elected official and in the Republican party. Long before 2015 (and still today) Governor Walker's role as a party leader naturally led him to travel all over the country to speak to groups about politics and policy matters. Governor Walker was the sitting two-term Republican governor of Wisconsin. He had won three elections in four years, including a contentious 2011 recall election that received considerable national attention. See, e.g., Monica Davey, Governor Who Took On Unions May Face a Closely Watched Recall Election, N.Y. Times (Jan. 15, 2012), <https://www.nytimes.com/2012/01/16/us/scott-walker-recall-drive-is-closely-watched.html>. He had driven major conservative reforms in a historically left-leaning state. See, e.g., M.D. Kittle, The Scott Walker Years: Taxpayer-Centered Reforms in Wisconsin, The Daily Signal (Dec. 11, 2018), <https://www.dailysignal.com/2018/12/11/the-scott-walker-years-taxpayer-centered-reforms-in-wisconsin> (describing Governor Walker's term as governor as an "era of sweeping conservative reforms"); Patrick Gleason, Five Years Later, Scott Walker's Reforms Have Saved Taxpayers Billions, Forbes (Feb. 28, 2016), <https://www.forbes.com/sites/Patrickgleason/2016/02/28/act10/#2ff136bd4e50>. These electoral and policy successes placed him among the most important and well-known faces in the Republican party, and made him one of the most sought after speakers on conservative issues and political campaigns. Indeed, as early as 2011 "Scott Walker [was] the nation's most-talked-about governor and a hero on the right." Kasie Hunt, GOP bets future on Wisconsin, Politico (Feb. 27, 2011), <https://www.politico.com/story/2011/02/gop-bets-future-on-wisconsin-050261>.

Consequently, long before 2015, Governor Walker routinely spoke to conservative grassroots and Republican groups across the nation – including in early primary states such as Iowa and South Carolina – and still does. See, e.g., brandootr, Scott Walker 2012 Republican National Committee Speech, YouTube (Aug. 29, 2012), <https://www.youtube.com/watch?v=PY3E8Zp9AAg>; Right Scoop, Full Speech: Governor Scott Walker at CPAC 2012, YouTube (Feb. 10, 2012), <https://www.youtube.com/watch?v=cOcjxT8ZAuU>; PBS, Scott Walker Speaks to Iowa Republicans (May 24, 2013), <https://www.pbs.org/video/here-and-now-scott-walker-speaks-iowa-republicans> (noting Walker was wrapping "up a week of out-of-state trips with a speech to the Polk County Republican Party in Iowa"); Am. Conservative Union, CPAC 2013 – Gov. Scott Walker, YouTube (Mar. 16, 2013), <https://www.youtube.com/watch?v=XXq5EhG4kqY>. These efforts were not to explore the feasibility of a federal campaign. To the contrary, Governor Walker did exactly what prominent public figures do: engaged as a thought leader in robust issues debates that grow louder around key legislative battles and elections – activity falling well beyond the FEC's jurisdiction. In other words, Governor Walker epitomized that "[b]efore becoming a candidate, an individual may already be a public figure with a history of public activism and discourse who engages in activities, such as travel and public speaking, for reasons other than a potential campaign." MUR 6928 (Santorum), Statement of Reasons of Comm'r's

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Hunter & Petersen [hereinafter “Santorum SOR”] 7–8; see also, e.g., AO 1986-06 (Fund for America’s Future).

Some of Governor Walker’s travel and event attendance was done on behalf of OAR, a group formed to engage in, and which is still actively engaged in, the issues debate that has its own institutional mission and goals separate from any specific candidate: to promote the important role states and their elected leaders can play in resolving issues at the national level. See About Our American Revival, Our American Revival, <http://www.ouramericanrevival.com/about/> (last visited June 4, 2019). As part of its mission, OAR seeks to encourage state-based conservative reforms similar to those that Governor Walker delivered in Wisconsin. To help promote its reform message OAR provides logistical support for Governor Walker to address groups seeking his appearance and to help organize various grassroots efforts in states where conservatives wished to engage in the issues debate, including states with early primaries where citizen involvement is often greatest.

Such activities are commonplace among grassroots organizations, and the FEC has refused to attribute subjective political aspirations to a public figure associated with these organizations. See MUR 6907 (Huckabee), First General Counsel’s Report 9 (“As a public figure and politician, Huckabee’s association with a social welfare organization is not suggestive of a testing-the-waters violation in itself”). An organization like OAR, according to the Commission, “may provide an individual . . . with a platform to speak about issues, support other candidates, and maintain a public profile without the payments for such activities necessarily being considered contributions to the future candidate’s campaign.” See Santorum SOR 8–9. The F&LA, however, ignores this well-established principle and important check on FEC jurisdiction.

**b. The F&LA creates a false causal connection between OAR and testing-the-waters activity based on incidental responses to media inquiries.**

Disappointingly, the F&LA also falls for the Complaints’ game of press-statement “gotcha,” placing great weight on a few random comments in response to media questions. It is true that a potential Governor Walker presidential candidacy was the subject of much chatter in early 2015. No one in his shoes could have or would have completely ignored that chatter, but the F&LA errs in suggesting scattered indefinite, off-the-cuff statements to the media about a possible run “link” his activities on behalf of OAR to an assessment of candidacy. The F&LA also ignores the Commission’s long-established rule that incidental remarks in response to questions cannot form the basis for a testing-the-waters finding. Advisory Opinion 1986-06.

This reliance on statements cherry-picked by the Complaints further overlooks the fact that Governor Walker made clear the policy purpose behind his work on behalf of OAR in various other public statements. See, e.g., Press Release, Our American Revival (Jan. 27, 2015) [<http://www.4president.us/websites/2016/ouramericanrevival012715home.htm>] (quoting Govern

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or Walker: “Our American Revival encompasses the shared values that make our country great; limiting the powers of the federal government to those defined in the Constitution while creating a leaner, more efficient, more effective and more accountable government to the American people.”’); Jessie Opolen, Scott Walker says fundraising committee is about ‘ideas,’ not promoting a candidate, The Capital Times (Jan. 28, 2015), [https://madison.com/ct/news/local/writers/jessie-opolen/scott-walker-says-fundraising-committee-is-about-ideas-not-promoting/article\\_ef9829dd-572f-5dab-b8fb-4ede66b8f52c.html](https://madison.com/ct/news/local/writers/jessie-opolen/scott-walker-says-fundraising-committee-is-about-ideas-not-promoting/article_ef9829dd-572f-5dab-b8fb-4ede66b8f52c.html) (quoting Governor Walker as explaining that OAR is “focused on ideas”); see also Scott Bland, Scott Walker’s second act, Politico (April 4, 2016), <https://www.politico.com/story/2016/04/scott-walker-republican-wisconsin-221549> (“We need your help in the states. . . . We are depending on you at the state and the local level. That’s what Our American Revival is all about. We are trying to take America back one state, one community, one person at a time, and that’s why I need your help now more than ever.”’).

The actual facts about OAR, moreover, clearly sever any causal connection between the group and testing-the-waters activity. As noted, OAR continues to operate, and Governor Walker continues to travel on its behalf to promote their mutual message in support of federalism principles. These temporal facts matter to the testing-the-waters analysis, as the Commission made clear recently in MUR 6928. See Santorum SOR 14 (“[G]iven that Patriot Voices and the PAC continue operations to this day further undermines any claim that they were mere shells to pay for Santorum’s testing-the-waters expenses.”).

**c. The F&LA does not identify one particularized testing-the-waters expense, as its reliance on Governor Walker’s appearance at the 2015 CPAC Conference is misplaced.**

Finally, the F&LA ignores the FEC’s repeated admonition that “[u]nlike ‘candidacy,’ which is a generalized status under the [Federal Election Campaign] Act, the Commission’s testing-the-waters regulations speak in terms of particularized payments for specific activities.” Santorum SOR at 9. The Commission has explained that this means its “proper focus is on whether a particular payment is made solely for the purpose of determining whether an individual should become a candidate.” Id. (emphases added). The F&LA does not identify any such payment by OAR, or even any event in which Governor Walker referred to himself as a potential candidate or discussed himself entering the 2016 presidential race during his prepared remarks. These matters, therefore, must be dismissed as a matter of law.

The F&LA identifies only one event it believes was for testing the waters: Governor Walker’s attendance at the February 2015 CPAC Conference (see F&LA at 10.) The facts prove otherwise. Governor Walker has been a prominent speaker at almost every CPAC Conference since 2012 – i.e., before and after his presidential candidacy. See Right Scoop, Full Speech: Governor Scott Walker at CPAC 2012, YouTube (Feb. 10, 2012), <https://www.youtube.com/watch?v=cOcjxT8ZAuU>; Am. Conservative Union, CPAC 2013 – Gov. Scott Walker (R-WI),

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YouTube (Mar. 16, 2013), <https://www.youtube.com/watch?v=XXq5EhG4kqY>; Am. Conservative Union, CPAC 2016 – Gov. Scott Walker, YouTube (Mar. 3, 2016), <https://www.youtube.com/watch?v=dw4MN1CIJ-Q>; Am. Conservative Union, CPAC 2017 – Gov. Scott Walker, YouTube (Feb. 23, 2017), <https://www.youtube.com/watch?v=E3VcHx6-62o&t=3s>; Am. Conservative Union, CPAC 2019 – Scott Walker’s Closing Remarks to What Makes America Great, YouTube (Feb. 28, 2019), <https://www.youtube.com/watch?v=lvSgTtvnSAQ>. This plainly “undermine[s] any particular significance of [Governor Walker’s] CPAC attendance in 2015.” Santorum SOR at 11. Governor Walker’s CPAC attendance in 2015 was not for the purpose of testing the waters of candidacy, it was – as it always has been – because he cares about conservative issues. See, e.g., id. at 12 (finding Santorum’s regular attendance at CPAC indicates “he attended CPAC because he cares about the issues addressed at CPAC, something the Commission has no jurisdiction to regulate”).

The F&LA wrongly suggests that “during his speech” to CPAC in 2015, Governor Walker said ““we are exploring a campaign,”” which it claims “appear[s] to link his activities on OAR’s behalf to his assessment of a potential candidacy.” (F&LA at 10.) Governor Walker’s stray, indefinite statement was not part of his prepared remarks. See Am. Conservative Union, CPAC 2015 – Governor Scott Walker, WI, YouTube, at 18:47–19:30 (Feb. 26, 2015), [https://www.youtube.com/watch?v=f\\_v7KT\\_OVFE](https://www.youtube.com/watch?v=f_v7KT_OVFE). It was an aside in a response to a hypothetical question about how he might address efforts to regulate the Internet *if* he were President. The FEC consistently has said that responses to such speculative questions do not convert the costs of the underlying event into a testing-the-waters expense. Advisory Opinion 1986-06; see also Santorum SOR at 9, 11 (“Even if the individual refers to a possible candidacy in ‘incidental remarks’ or ‘response[s] to questions’ . . . those references, by themselves, will not convert the activities to testing-the- waters activities.” (second alteration in original)). At most, this indefinite statement about “exploring” indicated nothing other than that, in the midst of all the speculation about his running for president, the thought had crossed Governor Walker’s his mind. Yet, as commissioners recently recognized, “thinking about running for office is not the same thing as spending money to evaluate a possible run for office.” Santorum SOR at 13 (emphasis added).

In addition to the CPAC conference, the F&LA also mentions Governor Walker’s attendance at a May 2015 Lincoln Day Dinner hosted by the Republican Party of Iowa. The F&LA quotes a press release issued by the Republican Party of Iowa puffing up the event’s importance to the 2016 election. (F&LA at 5.) It is unclear what, if any, reliance the F&LA places on this puffery by event sponsors. The F&LA’s analysis section does not mention it. Nonetheless, the marketing pitch of a separate committee cannot be attributed to Governor Walker or convert his attendance at the event into a testing-the-waters activity. In his remarks at the dinner, moreover, Governor Walker did not refer to himself as a potential candidate or discuss entering the 2016 contest. See C-SPAN, Scott Walker Iowa Lincoln Dinner (May 18, 2015), <https://www.c-span.org/video/?c4538040/scott-walker-iowa-lincoln-dinner>.

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The F&LA's failure to identify even one specific testing-the-waters activity paid for by OAR discredits any further effort to prosecute these matters. See, e.g., MUR 5260 (Talent), First General Counsel's Report (dismissing matter where there were no specific instances of testing-the-waters activity). Absent some particularity focused around specific events reasonably believed to have been for testing the waters, any further investigation would be entirely unwarranted, a roving fishing expedition into a group engaged in activities beyond the FEC's regulatory reach. The courts have made clear that such "mere 'official curiosity' will not suffice as the basis for FEC investigations." Machinists Non-partisan Political Action Comm. v. FEC, 655 F.2d 380,388 (D.C. Cir. 1981).

\* \* \*

The FEC's vague testing-the-waters regulations are nearly forty years old. Although the Commission has had the opportunity to interpret the regulations through a series of advisory opinions and enforcement matters, it has yet to revise them. Governor Walker's First Amendment-protected activities on behalf of OAR were consistent with the FEC's existing precedent, and further enforcement efforts would be not only aimless and wasteful, but wholly unjustified. The Commission cannot engage in a rulemaking-by-MUR investigation, and in this area of fundamental First Amendment rights, Governor Walker and the Committee cannot be subject to government reprisal without having clear notice of which activities are regulable. See Buckley v. Valeo, 424 U.S. 1,41 n. 48 (1976) (citations omitted) ("In such circumstances, vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.").

## **II. THERE IS NO JUSTIFICATION FOR FURTHER ENFORCEMENT EFFORTS RELATED TO THE TIMING OF GOVERNOR WALKER'S FEC STATEMENT OF CANDIDACY**

The F&LA additionally finds that Governor Walker filed his Form 2 Statement of Candidacy untimely after announcing his presidential candidacy.

This section of the F&LA pays lip service – in a mere footnote – to the fact that Governor Walker before becoming a candidate under FECA and FEC regulations submitted to the FEC a letter noting he "had received contributions of more than \$5,000" which made him a candidate under the FECA and regulations upon his announcement. (F&LA at 12 n.49.) The letter was provided to the FEC in lieu of a Form 2 in order to place the public on notice that Governor Walker shortly would become a candidate. The FEC, for reasons unclear, did not make the letter public.

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Nevertheless, the public knew that Governor Walker had announced his candidacy on July 13, 2015. There was no harm from any delay in filing the technical Form 2 – let alone from an alleged lapse of eight days that occurred seven months before any votes were cast in any state. Indeed, the Commission consistently has found such technicalities unworthy of additional enforcement efforts, even in the face of significantly longer delays. See, e.g., MUR 7261 (Levi for Colorado), Factual & Legal Analysis 6–7 (dismissing complaint where candidate failed to file Form 2 “by about a month”); MUR 6999 (David Larsen), Factual & Legal Analysis 10–11 (dismissing complaint where candidate filed Form 2 147 days late). The Commission’s inconsistent application here is puzzling and unwarranted.

In light of the foregoing discussion, the Commission should dismiss these matters and take no further action.

Very truly yours,

Benjamin L. Ginsberg  
E. Stewart Crosland

cc: Chairman Ellen L. Weintraub  
Vice Chairman Matthew S. Petersen  
Commissioner Caroline C. Hunter  
Commissioner Steven T. Walther