BEFORE THE FEDERAL ELECTION COMMISSION

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)	**MURs 6917 & 6929**
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SUPPLEMENTAL REPLY OF RESPONDENTS GOVERNOR SCOTT WALKER AND SCOTT WALKER, INC. AND KATE TEASDALE, AS TREASURER

Governor Scott Walker and Scott Walker, Inc. (the "Campaign") and Kate Teasdale, as Treasurer (collectively, "Respondents"), by and through undersigned counsel, submit this Supplemental Reply Brief to address errors in the July 7, 2020 Notice to the Commission Following the Submission of Probable Cause Brief (the "Notice") submitted by the Office of General Counsel ("OGC"). *First*, even though the Notice concedes that the five-year statute of limitations at 28 U.S.C. § 2462 has expired, OGC erroneously claims, for the first time, that the Commission can keep Respondents locked in this stale enforcement action to seek "equitable remedies." *Second*, the Notice grossly mischaracterizes the merits arguments in Respondents' Reply to OGC's Probable Cause Brief (the "Reply"), which explains in detail why there is no probable cause to believe as a matter of law and fact. We address these concerns below.

I. OGC ADMITS THAT THE STATUTE OF LIMITATIONS HAS EXPIRED BUT ERRONEOUSLY ARGUES THAT THE COMMISSION CAN STILL SEEK "EQUITABLE REMEDIES" AGAINST RESPONDENTS FOR PAST ACTIVITY

In the Notice, OGC recognizes that *all* of the activity at issue in these MURs is now time-barred under 28 U.S.C. § 2462, the five-year statute of limitations that governs FEC enforcement actions. Notice 3, n.9; *see also FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) ("We hold that § 2462 applies to FEC actions for the assessment or imposition of civil penalties under FECA."); *CREW v. FEC*, 236 F. Supp. 3d 378, 383, 392 (D.D.C. 2017) ("The statute of limitations for FECA actions is five years." (citing 28 U.S.C. § 2462)). Section 2462 could not be any clearer: "An action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or

otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. Scott Walker has not been a federal candidate since September 21, 2015—that was 64 months ago. The statute of limitations has expired (and OGC admits it) so these MURs must be dismissed.

Yet OGC now contends that the FEC's "ability to seek equitable remedies is not subject to" the statute of limitations and that the Commission should persist in its enforcement action. Notice 3. Whether the Commission actually has the power to seek equitable relief after the statute of limitations has expired is, to put it most favorably, unsettled, and has been rejected in analogous administrative agency contexts. *See Kokesh v. SEC*, 581 U.S. ----, 137 S. Ct. 1635, 1639 (2017) (holding that § 2462 prevented the SEC from seeking equitable disgorgement for violations of federal securities law because such relief constituted a "penalty" when aimed at redressing a violation of public law or deterrence);[1] *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018–19 (8th Cir. 2010) (concluding that although § 2462 does not directly apply to equitable relief, claims for equitable relief were foreclosed under the concurrent remedy doctrine because the plaintiff's civil-penalty claims were time-barred); *Williams*, 104 F.3d at 240 (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)) (rejecting FEC's ability to seek equitable remedies when statute of limitations on legal claims had expired); *see also FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10, 15 (D.D.C. 1996) ("[P]roblems of missing documents, faded memories, and absent witnesses that inevitably occur with the passage of time are no less problematic in

[1] OGC relies on a clear deterrence rationale in its attempt to justify continued enforcement, citing the "context of the 2016 presidential race" and Governor "Walker's significant candidacy" as reasons to persist. Notice 4. But "'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Kokesh*, 137 S. Ct. at 1638 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, n.20 (1979)).

adjudicating actions for declaratory and injunctive relief than in determining liability for monetary civil penalties.").

In fact, OGC (on behalf of the Commission) has acknowledged this "uncertain availability of equitable relief"—in court. *See* FEC's Reply Mem. in Support of Mot. for Summ. J. Br. at 9–12, *CREW v. FEC*, No. 15-2038 (D.D.C. Nov. 10, 2016) [hereinafter OGC *CREW v. FEC* Br.]; *see also CREW*, 236 F. Supp. 3d at 392 ("[B]oth parties agree that there is a split of authority on whether the FEC actually retains th[e] power [to obtain equitable relief] under [§ 2462]."). In stark contrast to its definitive tone in the Notice, OGC touted this uncertainty as "significant," "an undoubted litigation risk," and a "reasonable" basis for the Commission to decline to pursue enforcement in the exercise of its discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). *See* OGC *CREW v. FEC* Br. 9–10.[2]

In any event, OGC's arguments are misplaced because under no circumstances could there be grounds for equitable relief based on these MURs. One of the central tenets of equity is that it demands "'a cognizable danger of recurrent violation.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 n.3 (1994) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). "Courts of equity are not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future." *Walling v. T. Buettner & Co.*, 133 F.2d 306, 308 (7th Cir. 1943) (citing *United States v. U.S. Steel Corp.*, 251 U.S. 417, 445 (1920)). "The remedy is never afforded on

[2] In the Notice, OGC references a conciliation agreement entered in MUR 6538R (Americans for Job Security) as support for "the Commission's ability to address violations that occurred more than five years ago." Notice 3. A conciliation agreement is a mutual settlement agreement, a form of alternative dispute resolution, and does not establish any rule or precedent—and certainly does not answer the question of whether courts have equitable jurisdiction over stale enforcement actions. Moreover, there is no indication that MUR 6538R's respondent ever raised the statute of limitations concern, unlike here, where the running of the statute has been at issue since the Probable Cause Brief was submitted by OGC at the eleventh hour.

suspicion or on the ungrounded fear that the offense may be repeated in the future." *Id.* Some courts, consequently, have held that "in cases where there is a *significant risk of future harm*, the law may allow the FEC to grant equitable relief notwithstanding the expiration of the statute of limitations." *CREW*, 236 F. Supp. 3d at 392 (emphasis added) (citing *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997)).

But that is not this case. These MURs arise from an unsuccessful presidential bid that ended before the start of the 2016 primaries and seek only to regulate past activity, thus foreclosing equitable relief. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) ("Because respondent alleges only past infractions of [the relevant statute], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury."); *Nat'l Right to Work Comm.*, 916 F. Supp. at 15 (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (rejecting FEC's grounds for declaratory and injunctive relief when there was no evidence of a likely future violation). Indeed, there could be no showing of a "significant risk of future harm" from the Campaign, which has been virtually defunct for going on six years and is merely waiting for these MURs to end so it can look to terminate, or Governor Walker, who is out of politics.[3] *See CREW*, 236 F. Supp. 3d at 393 ("[T]he controlling commissioners almost certainly could not have found a significant risk of future harm by [the respondent] as required by *Christian Coalition*, because [the respondent] was defunct at the time of the decision."). And while Governor Walker may remain a persuasive figure within the Republican Party generally, that is no basis for equitable relief. *See Nat'l Right to Work Comm.*, 916 F. Supp. at 15 (rejecting the FEC's

[3] *See, e.g.*, Chris Mills Rodrigo, *Ex-Wisconsin Gov. Scott Walker takes job as president of conservative group, won't seek office soon*, The Hill (July 15, 2019), *available at* https://thehill.com/homenews/campaign/453038-ex-wisconsin-governor-scott-walker-takes-job-as-president-of-conservative.

"somewhat wry observation" that the respondent "remain[ed] in the position, and ha[d] the motivations to engage in activities similar to those it" previously undertook).

Accordingly, these MURs are time-barred and under no basis can the Commission proceed with further enforcement. The Commission thus should dismiss these matters immediately.

II. THE NOTICE MISCHARACTERIZES THE REPLY'S MERITS ARGUMENTS THAT SHOW WHY THERE IS NO PROBABLE CAUSE TO BELIEVE

The statute of limitations has expired—and that alone should end all discussion—but Respondents must also highlight for the Commission, particularly those Commissioners who recently joined, that OGC's Notice mischaracterizes the merits arguments in the Reply. OGC asserts that "Respondents fail to respond to" or "do not contest" the legal and factual conclusions set forth in the Probable Cause Brief. Notice 4. That is not true. The Reply discusses in detail, over the course of eight pages, why OGC fails—as a matter of both law *and* fact—to establish probable cause that any of Governor Walker's activities on behalf of Our American Revival ("OAR") constituted "testing the waters" activity. *See* Reply 4–11. We refer Commissioners to that discussion, as well as to Respondents' other prior submissions in these MURs.

Of prime concern here, the Notice falsely claims that Respondents argue "that the Act does not authorize the Commission to examine actions that occurred before an individual becomes a candidate," Notice 2, and challenge only the "accounting" of purported reporting violations, Notice 4. These characterizations are not only false, but they also show that OGC misses the point entirely. The Reply never argues that the Commission cannot regulate some pre-candidacy activity post-candidacy. Respondents acknowledge this power. Instead, the Reply emphasizes the FEC's need to respect the critical jurisdictional line consequently at stake here: between regulated political activity and the unregulable speech of social welfare organizations like OAR. *See* Reply at 4–6.

As addressed in the Reply, the Commission has admonished that it must take great care not to overstep when scrutinizing such an organization's spending in the context of a public figure's pre-candidacy activities. *See id.* Accordingly, "'when 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.*'" *Id.* at 6 (alteration omitted) (emphasis added) (quoting MUR 6928 (Rick Santorum), Statement of Reasons of Comm'rs Hunter & Petersen [hereinafter "Santorum SOR"] 9). OGC's probable cause analysis fails to do this. Instead, it blows right through the key jurisdictional divide, offering only broad, conclusory assertions about OAR's spending. *See id.* at 10–11. Indeed, as the Reply explains, after nearly six years OGC has not shown any specific OAR disbursement made "solely for the purpose of determining whether [Scott Walker] should become a candidate," rather than to further OAR's fundraising and other organizational objectives. *See id.* at 6–11. Thus, there can be no basis for a probable cause finding.

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Enough is enough. For the reasons set forth above, in the Reply, and in Respondents' other prior submissions, the Commission should dismiss these stale MURs and take no further action.

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Respectfully submitted,

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