

**JONES DAY**

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June 5, 2019

**VIA U.S. MAIL**

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

*MURs 6917 & 6929  
June 5, 2019*

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

Dear Mr. Peterson:

On behalf of Governor Scott Walker and Scott Walker, Inc. and Kate Lind, as Treasurer,  
please see the enclosed correspondence in regard to MURs 6917 and 6929.

Very truly yours,



Benjamin L. Ginsberg  
E. Stewart Crosland

Enclosure

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

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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'rs

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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 Opoien, 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-opoien/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-opoien/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\\_0VFE](https://www.youtube.com/watch?v=f_v7KT_0VFE). 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.

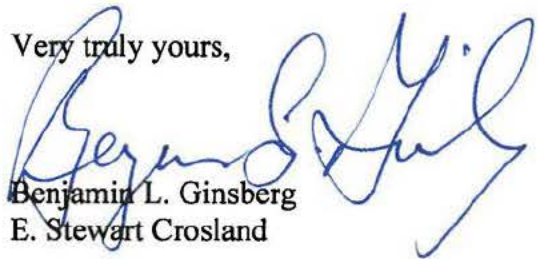
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Nevertheless, the public knew that Governor Walker had announced his candidacy on July 13, 2015. There was no harm from any delay in filing the technical Form 2 – let alone from an alleged lapse of eight days that occurred seven months before any votes 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