



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 11, 2020

Via Electronic Mail Only

**Email: BGinsberg@JonesDay.com
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Benjamin Ginsberg
E. Stewart Crosland
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001

RE: MURs 6917 & 6929
Gov. Scott Walker
Scott Walker, Inc. & Kate Teasdale
in her official capacity as treasurer

Dear Mr. Ginsberg and Mr. Crosland:

Based on a complaint filed with the Federal Election Commission (the "Commission"), and information supplied by your clients, the Commission on April 23, 2019, found reason to believe that Governor Scott Walker violated 52 U.S.C. §§ 30116(f) and 30102(e)(1) and 11 C.F.R. §§ 100.72(a), 100.131(a), and 101.1(a); and Scott Walker, Inc. and Kate Teasdale in her official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(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.

MURs 6917 and 6929 (Gov. Scott Walker and Scott Walker Inc.)
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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.

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

1
2
3 In the Matter of)
4) MURs 6917 & 6929
5 Governor Scott Walker)
6 Scott Walker, Inc. and Kate Teasdale¹ in her official)
7 capacity as treasurer)
8

GENERAL COUNSEL'S BRIEF

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11 **I. STATEMENT OF THE CASE**

12 Former Wisconsin Governor Scott Walker publicly announced that he was running for
13 President of the United States on July 13, 2015, just weeks after announcing he was testing the
14 waters for a possible candidacy. Based on the Complaints, Responses, and available record, the
15 Commission found reason to believe that Walker and Scott Walker, Inc., and Kate Teasdale in
16 her official capacity as treasurer ("Committee") violated 52 U.S.C. § 30116(f) by accepting
17 excessive and prohibited contributions from Our American Revival and C. Ryan Burchfield² in
18 his official capacity as treasurer ("OAR") in the form of "testing the waters" expenditures prior
19 to Walker's declaration of candidacy.³ The Commission further found reason to believe that the
20 Committee violated 52 U.S.C. § 30104(b) by failing to report these testing-the-waters expenses
21 and in-kind contributions from OAR.⁴ Finally the Commission found reason to believe that
22 Walker violated 52 U.S.C. § 30102(e)(1) by failing to timely file a Statement of Candidacy.⁵

23 The Commission's investigation revealed that, beginning in January 2015, Walker sought
24 to gauge support for his potential presidential candidacy, and that a team of staffers and

¹ Kate Teasdale's name at the time that the complaints were filed was Kate Lind.

² At the time of the Complaint, OAR's treasurer was Andrew Hitt.

³ MURs 6917 and 6929, Certification (Apr. 23, 2019).

⁴ *Id.*

⁵ *Id.*

1 consultants funded by OAR worked to (1) determine whether support existed for a presidential
2 campaign; and (2) establish a network of potential endorsements and State Finance Chairs for an
3 eventual candidacy. Between April and June 2015, Walker continued to travel the country to
4 engage in public speaking events, around which he scheduled private meetings with prospective
5 donors and supporters. OAR paid for Walker's travel to these events as well as for staff and
6 consultants who supported Walker's testing-the-waters activities. Accordingly, the Office of the
7 General Counsel ("OGC") is prepared to recommend that the Commission find probable cause to
8 believe that Walker and the Committee violated 52 U.S.C. § 30116(f) as well as 11 C.F.R.
9 §§ 100.72(a) and 100.131(a) by accepting excessive and prohibited contributions in connection
10 with OAR's efforts to support Walker's testing-the-waters activities. Because the Committee
11 had an obligation to report these testing-the-waters expenses, OGC is also prepared to
12 recommend that the Commission find probable cause to believe that the Committee violated
13 52 U.S.C. § 30104(b) by failing to report in-kind contributions from OAR.

14 In addition, because Walker filed his Statement of Candidacy 23 days after his July 13,
15 2015, announcement that he was running for president, making it eight days late, OGC is
16 prepared to recommend that the Commission find probable cause to believe that Walker violated
17 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a).

1 **II. FACTUAL BACKGROUND**

2 Both Walker and the Committee's current treasurer, Kate Teasdale, were involved in the
3 creation of OAR in January 2015.⁶ Despite this involvement with the formation of OAR, neither
4 Walker nor the Committee claim to possess any documents concerning OAR's formation.⁷

5 In its responses to the Commission, Walker and the Committee emphasized that OAR's
6 purpose was to provide "logistical support for Governor Walker to address groups seeking his
7 appearance and to help organize various grassroots efforts in states where conservatives wished
8 to engage in the issues debate, including states with early primaries where citizen involvement is
9 often greatest."⁸ In response to the subpoena issued to them, Walker and the Committee further
10 stated that Walker traveled to participate in "events hosted or sponsored by grassroots groups
11 who shared his policy goals, including OAR. OAR provided Governor Walker logistical support
12 to allow him to address groups seeking his appearance."⁹

13 Despite this stated position, the document production submitted jointly by Walker and the
14 Committee provided limited supporting details and contained several notable deficiencies. First,
15 Walker did not provide any documentation concerning the formation of OAR, despite his public

⁶ See Factual & Legal Analysis ("F&LA") at 5 (citing Governor Scott Walker, Remarks at the Conservative Political Action Conference (Feb. 26, 2015), <https://www.c-span.org/video/?324557-12/governor-scott-walker-remarks-cpac>); Walker and Committee Subpoena Resp. at 3 (Aug. 9, 2019) ("Governor Walker and his political aides . . . were involved in the establishment of OAR in January 2015 Kate Teasdale filed OAR's initial request for an Employment Identification Number on January 14, 2015, and prepared OAR's IRS Forms 8871 (Initial Notice) and 8453-X (Political Organization declaration for Electronic Filing of Notice of Section 527 Status) on January 16, 2015, but had no involvement after March 2015.").

⁷ See Walker and Committee Subpoena Resp. at 3.

⁸ Walker and Committee F&LA Resp. at 2-4 (June 4, 2019).

⁹ Walker and Committee Subpoena Resp. at 4 (Aug. 9, 2019).

1 statements that he was a part of its formation.¹⁰ Although they were on notice of the Complaints
2 in this matter, via notice to Walker on March 30, 2015,¹¹ and to the Committee on November 3,
3 2015,¹² the Committee and Walker claimed to be unable to locate *any* email or systems folders.
4 The response to the subpoena further stated that “no additional responsive documents were
5 collected or identified in Governor Walker’s personal possession, custody, or control.”¹³
6 Similarly, Walker represented that he was unable to locate *any* written materials related to
7 fundraising activity for OAR.¹⁴ Although he was unable to provide any email correspondence or
8 communications that related to OAR, his testing-the-waters activities, or his eventual campaign,
9 Walker did provide a summary of his calendar, which was heavily populated with entries
10 described simply as “private meetings.”¹⁵ Walker declined to make himself available for a
11 voluntary interview in connection with this investigation.¹⁶

¹⁰ *Id.* at 3.

¹¹ Notification to Scott Walker at 1 (March 2, 2015) (stating that “you have a legal obligation to preserve all documents, records and materials relating to the subject matter of this complaint until such time as you are notified that the Commission has closed its file in this matter.”).

¹² Notification to Kate Lind on behalf of Scott Walker Inc. at 1-2 (November 3, 2015) (stating that “you have a legal obligation to preserve all documents, records and materials relating to the subject matter of this complaint until such time as you are notified that the Commission has closed its file in this matter.”)

¹³ Walker and Committee Subpoena Resp. at 2.

¹⁴ *Id.* at 25.

¹⁵ *See id.* at 6-20.

¹⁶ OGC was able to develop the timeline of Walker’s pre-candidacy activities, and OAR’s involvement in those activities, through publicly available information and third-party document productions. OGC sent thirteen informal requests for discovery, and later served subpoenas for documents and information to several key third-party vendors. OGC was able to successfully obtain documents from five of OAR’s vendors who provided support for Walker’s activities on behalf of OAR, two of whom ultimately worked for the Committee.

1 In contrast, a review of documents obtained directly from OAR's vendors concerning
2 Walker's activities from January 16, 2015, when OAR registered with the Internal Revenue
3 Service ("IRS") as a section 527 organization, through Walker's declaration of candidacy on July
4 13, 2015, confirms that Walker was seeking to gauge support for a potential presidential
5 candidacy while ostensibly traveling on behalf of OAR, and that OAR arranged, researched, and
6 staffed these efforts. Indeed, the available evidence confirms that OAR-funded activities were
7 carried out so that Walker could test the waters of a potential presidential candidacy well before
8 Walker entered his self-described two-week testing-the-waters period.

9 1. Private Meetings

10 From OAR's inception in January 2015 through June 2015, Walker attended multiple
11 fundraising events throughout New York, Florida, and Chicago, ostensibly to support OAR and
12 promote a generalized message of "[g]rowth, [r]eform and [s]afety."¹⁷ Walker and the
13 Committee assert that he was communicating a generalized vision of state-based government
14 solutions, as Respondents claim, but documents show that Walker also used these meetings and
15 events to test the waters by gauging support for his eventual candidacy and building a national
16 fundraising team.

17 OAR provided Walker with the support and funding necessary for him to travel the
18 country in order to engage in these testing-the-waters activities, including by meeting with
19 potential donors and supporters in small group settings. Walker participated in dozens of these
20 meetings, which Respondents described in response to the subpoena as "private meetings."¹⁸ At

¹⁷ See DONER-000842 ("Attach. 1").

¹⁸ See Walker and Committee Subpoena Resp. at 6-20.

1 those meetings, which OAR's fundraising consultants researched and scheduled, in addition to
2 seeking donations to OAR, Walker appears to have sought to secure endorsements, assessed the
3 attendees' willingness to serve as state financial chairs in his future campaign, and sought
4 commitments for contributions to any future presidential campaign.

5 These meetings, which began in January 2015, followed similar general scripts, which an
6 OAR fundraising consultant prepared in advance of Walker's calls and meetings with potential
7 donors. Many of the briefing documents written for Walker included a section titled "ask,"
8 which suggested Walker ask "Will [he/she] support your 2016 efforts with public
9 endorsement?"¹⁹ The endorsement request was separate from the suggestion that Walker ask the
10 potential donors to contribute to OAR itself.²⁰ Separate briefing documents prepared by OAR's
11 consultant state that Walker should "[d]iscuss [with meeting participants] your [Walker's]
12 preparation for 2016."²¹

13 On January 24-25, 2015, Walker traveled on flights arranged and paid for by OAR²² to
14 Palm Springs, California, to participate in the Freedom Partners Seminar at the Ritz-Carlton
15 Rancho Mirage hotel, as well as private meetings.²³ According to the briefing notes an OAR

¹⁹ See, e.g., DONER-000864-865 ("Attach. 2") (Briefing summary for 1/18/2015, call); DONER-000918-919 ("Attach. 3") (Briefing Summary for 1/21/2015, call).

²⁰ See, e.g., Attach. 2 at DONER-000865; Attach. 3 at DONER-000919.

²¹ DONER-000880 ("Attach. 4") (Briefing summary for January 22, 2015, call).

²² 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 Sitatunga Springs LLC, to Jonathan Peterson, Attorney, FEC (June 28, 2019) ("Attach. 5") (enclosing Sitatunga document production). 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. 6").

²³ See Excel spreadsheet produced by Sitatunga Springs LLC titled "2015 Flight Summary" at line 5 ("Attach. 7a"); Excel spreadsheet produced by Sitatunga Springs titled "2015 OAR Flights" at sheet labeled "1-24 to 1-26" ("Attach. 7b") (depicting fueling stops at Oshkosh, WI, Des Moines, IA, Palm Springs, CA, San Francisco, CA, and

1 consultant prepared, OAR instructed Walker to ask supporters at those meetings to support his
2 “2016 efforts with [a] public endorsement.”²⁴ Similarly, another supporter of both OAR and the
3 Committee hosted a breakfast event featuring Walker for which the invitation provided contact
4 information for individuals seeking “more information on Scott Walker’s Campaign.”²⁵

5 In February and March 2015, Walker continued his OAR-funded trips to secure support
6 for a potential candidacy, during which he was supported by OAR employees and agents.
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.²⁶ Notes apparently prepared subsequent
10 to a February 6, 2015, call with a potential donor in Colorado indicate that Walker had not only
11 already begun to discuss his potential presidential candidacy, but had also begun to consider
12 potential running mates: “Gov said why I’m preparing/running is because he said for US to beat
13 Hillary Clinton, we have a hard time beating a name from the past with another name from the
14 past. Said there’s a hunger for the next generation of leaders, especially if Clinton is the

Denver, CO, and indicating that Walker was accompanied by individuals named Rick and Kate for portions of the trip). OAR’s Executive Director was Rick Wiley and OAR’s fundraising consulting was handled by Kate Doner through her company Doner Fundraising.

²⁴ DONER-000225-228 (“Attach. 8”) (Briefing Notes for January 25, 2015, private meeting).

²⁵ DONER-000244 (“Attach. 9”) (Invitation to January 25, 2015, breakfast event in Indian Wells, CA).

²⁶ DONER-000069-70 (“Attach. 10”) (Briefing notes for February 19, 2015, meeting at the Harvard Club). *See also* Attach. 7b, at sheet labeled “2-18 to 2-23-15” (2015 OAR Flights). OAR appears to have been billed \$21,849.45 in connection with this flight. *See* Sitatunga Invoice for Flight 1509 (“Attach. 11”). Walker and the Committee confirmed these meetings in their response to the Commission’s subpoena. *See* Walker and Committee Subpoena Resp. at 10 (documenting “private meetings, a dinner, and a meet and greet event at the Harvard Club on February 19.”).

1 nominee. With [Senator Marco] Rubio, said a team like that could make a pretty stark
 2 contrast.”²⁷

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.²⁸ OAR briefing
 5 documents instructed Walker to ask numerous people to join his team “should he decide to run
 6 for higher office.”²⁹ The briefing notes for a “breakfast/meet & greet” held on March 12, 2015,
 7 which 43 invitees were expected to attend, indicate that OAR Executive Director Rick Wiley
 8 previously attended an American Opportunity Alliance conference in Jackson Hole, WY, where

²⁷ DONER-000888-892 at 889 (“Attach. 12”).

²⁸ DONER-000475-477 (“Attach. 13”) (Briefing Notes for February 27, 2015, dinner reception in Boca Raton, FL containing an “ask” that a potential donor “consider bundling (should Walker decide to run)?”); *see also* Walker and Committee Subpoena Resp. at 11 (confirming Walker’s private meetings in the Palm Beach area).

²⁹ DONER-000751-752 (“Attach. 14”) (Briefing notes for a March 2, 2015, private meeting in Chicago, IL); DONER-000744-745 (“Attach. 15”) (Briefing notes for a March 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. 16”) (Briefing notes for a March 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); *see* Walker and Committee Subpoena Resp. at 12 (confirming Walker’s private meetings in California); DONOR-000791-792 (“Attach. 17”) (Briefing notes for March 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.”), Walker and Committee Subpoena Resp. at 13 (confirming Walker’s “private meetings at the Boca Raton Resort & Club on March 21”); DONER-000802-803 (“Attach. 18”) (Briefing notes for March 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), Walker and Committee Subpoena Resp. at 13; DONER-000757-759 (“Attach. 19”) (Briefing notes for March 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); Walker and Committee Subpoena Resp. at 13; DONER-000781-783 (“Attach. 20”) (Briefing notes for March 21, 2015, private meeting in Boca Raton, FL requesting that a donor serve as Walker’s Georgia Co-Chair); Walker and Committee Subpoena Resp. at 13.

1 he “spoke about OAR [and] your potential run for Higher Office.”³⁰ The OAR-prepared note
 2 further instructs Walker to:

3 Please let the group know that you are considering a potential run
 4 for higher office. Give them background on OAR as well as your
 5 record in WI. Should you decide to run, you would love their
 6 support both publicly and financially. There are several
 7 individuals in the room who are substantial bundlers in the tri-
 8 states region and you would like them to serve on your NFC.
 9 Please ask those who are interested in helping now, to consider a
 10 larger contribution to OAR.³¹

11 Finally, at a March 30, 2015, dinner reception, OAR prepared Walker's talking points for
 12 interactions with various attendees, including the statement: “Need your endorsement and
 13 financial support. I can't do this run without both.”³²

14 As these materials reflect, the evidence confirms that Walker did not just use OAR
 15 meetings to promote conservative causes generally, but rather to ascertain support for his own
 16 candidacy, including *vis-a-vis* other potential presidential candidates. In preparing Walker for
 17 one of these meetings, for example, OAR employees and agents noted that a potential supporter
 18 “was staying with Romney until Romney decided what to do. Now that he's out, he's looking
 19 for his horse and is VERY interested in Governor Walker.”³³ Other OAR-prepared notes

³⁰ DONER-000173-175 (“Attach. 21”) (Briefing notes for March 12, 2015, meeting in New York, NY); *see also* Attach. 7b, “2015 OAR Flights” at sheet labeled “3-11 to 3-15-15;” Sitatunga Invoice for Flight 1513 (“Attach. 22”) (showing that OAR was billed \$20,128.50 for this travel); *see* Walker and Committee Subpoena Resp. at 12 (confirming Walker's private meetings in New York).

³¹ Attach. 21 (Briefing notes for March 12, 2015, meeting in New York, NY).

³² DONER-000332-333 (“Attach. 23”); *see also* DONER-000334 (“Attach. 24”); DONER-000337 (“Attach. 25”); DONER-000338-339 (“Attach. 26”); DONER-000330-331 (“Attach. 27”).

³³ DONER-000836-837 (“Attach. 28”) (Briefing Notes for January 31, 2015, private meeting in McLean, VA). Walker was in DC for the Alfalfa Dinner and appears to have traveled to Washington, DC on a Sitatunga Flight paid for by OAR. *See* Attach. 7a, “2015 Flight Summary” at line 6 (listing Sitatunga Flight 1505); Email produced by Sitatunga Springs dated 2/19/2015 at 2:56 PM (“Attach. 29”) (attaching credit card reimbursement

1 indicate that a potential donor was “supporting Jeb, but might hedge his bets”³⁴ and that another
2 “is willing to go against Bush.”³⁵ Still other briefing documents indicate OAR provided Walker
3 with research assessing whether potential donors had already decided to support another
4 candidate, and noting that a potential donor “has not decided on a candidate but is very
5 impressed with you and ‘leaning towards you.’”³⁶ Similarly, OAR-prepared briefing notes for
6 Walker’s March 18, 2015, private meeting to evaluate a potential donor’s support for Bush,
7 noting that, “[a]t the time, he said he was leaning Bush, but wanted to meet you. He called Kate
8 last week and said he’s impressed with you and wants to visit with you more and is now leaning
9 to you. Wants to meet with you one-on-one to make his final decision.”³⁷ An OAR briefing
10 document for a March 12, 2015, private meeting with a potential Walker supporter in New York
11 City referenced and summarized a February 6, 2015, call with that same supporter, stating that
12 Walker had “expressed that in order to beat Hillary, the Republican Party will need a fresh face
13 with big bold ideas and a leader who follows through.”³⁸ The potential donor “agreed that you

depicting Walker Flight 1505 to DC); *see* Walker and Committee Subpoena Resp. at 9 (confirming that Walker attended private meetings in the Washington, DC, area on January 31, 2015).

³⁴ DONER-000425-426 (“Attach. 30”) (Briefing Notes for March 5, 2015, lunch meeting in Boca Raton, FL); *see also* Attach. 7b, “2015 OAR Flights” at sheet labeled “3-4 to 3-8-15;” Sitatunga Invoice for Flight 1511 (“Attach. 31”) (showing that OAR was billed \$30,618 for this travel).

³⁵ DONER-000431-432 (“Attach. 32”) (Briefing Notes for March 5, 2015, private meeting in Naples, FL); *see* Walker and Committee Subpoena Resp. at 12 (confirming that Walker attended private meetings in Naples on March 5, 2015).

³⁶ DONER-000180-183 (“Attach. 33”) (Briefing Notes for March 12, 2015, private meeting in New York, NY); *see also* Attach. 7b, “2015 OAR Flights” at sheet labeled “3-11 to 3-15-15;” Sitatunga Invoice for Flight 1513 (“Attach. 34”) (showing that OAR was billed \$20,128.50 for this travel).

³⁷ DONER-000386 (“Attach. 35”) (Briefing notes for a March 18, 2015, private meeting).

³⁸ DONER-000170-173 (“Attach. 36”) (Briefing Notes for March 12, 2015 private meeting in New York, NY, which also state “Let him know you are still seriously considering a run for higher office”).

1 fit into the 'new and fresh' category and said that your record in WI proves you follow through
2 on your promises."³⁹ Briefing documents and communications prepared or received by other
3 OAR consultants indicate that Walker continued to seek endorsements and build his network
4 through the spring of 2015.⁴⁰

5 In their Response to the Commission's Factual and Legal Analysis,⁴¹ Walker and the
6 Committee explain that any public statements concerning a potential candidacy were
7 "scattered[,] indefinite, off-the-cuff statements to the media," which should not have formed the
8 basis for a finding that there was reason to believe that Walker was testing the waters for a
9 potential candidacy.⁴² Walker and the Committee also note Walker's public statements where he
10 described OAR's purpose in generalized terms, which did not refer to a potential candidacy and
11 describe Walker's similar speaking engagements before and following his candidacy, to claim
12 that OAR functioned independently from Walker's candidacy.⁴³ Respondents did not provide
13 details concerning Walker's numerous private meetings but did disclose the existence of the
14 private meetings on Walker's calendar.⁴⁴

³⁹ *Id.*

⁴⁰ See Word Document titled "NH Target Activists_5.8.15" ("Attach. 37") (documenting a May conference call where OAR prepared Walker to seek support from multiple "key" New Hampshire activists and listing their preferred presidential candidates); April 23, 2015 email to Andrew Leach ("Attach. 38").

⁴¹ Walker and the Committee's arguments that the Commission's reason to believe findings were legally flawed are addressed in the Legal Analysis section of the Brief. See *infra* at Section III.A.

⁴² Walker and Committee F&LA Resp. at 3-4.

⁴³ *Id.* at 4-5; Walker and Committee Subpoena Resp. at 4.

⁴⁴ Walker and Committee Subpoena Resp. at 6-20.

1 The investigation revealed that, while ostensibly traveling on behalf of OAR, Walker
2 used OAR-paid consultants and staff to research donor profiles, schedule private meetings, and
3 develop strategic talking points to build a network of donors and seek endorsements. It is these
4 private meetings that reveal Walker's use of OAR resources to support Walker's testing-the-
5 waters activities.

6 2. Staffing of OAR

7 OAR's staff of well-known political campaign consultants was regarded by the media as
8 Walker's "campaign in waiting,"⁴⁵ and it effectively functioned in that capacity. In January and
9 February 2015, OAR built its staff of individuals and consulting companies; most of these
10 persons would work for Walker's Committee almost immediately after leaving OAR, apparently
11 performing the same work for the Committee as they had for OAR. For example, Rick Wiley,
12 OAR's former Executive Director, left OAR on June 17, 2015, after Walker announced that he
13 had begun testing the waters and began to work for the Committee as Walker's Campaign
14 Manager the next day.⁴⁶ Similarly, Kirsten Kukowski was OAR's Communications Director
15 until June 18, 2015, when she began to work for the Committee as its Communications Director.
16 Matt Mason was OAR's Political Director prior to joining the Committee as its Political Director

⁴⁵ Zeke Miller, *Scott Walker Hires Two Former RNC Aides In Political Roles*, TIME MAGAZINE (Mar. 1, 2015), <https://time.com/3727860/scott-walker-dannv-odriscoll-wel/> ("Time Magazine Article"); see, e.g., 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>.

⁴⁶ Walker and Committee Subpoena Resp. at 20. We sent letters requesting information from 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.

1 on July 2, 2015.⁴⁷ OAR's publicly-available IRS filings show that its payroll declined from
2 \$95,661 on April 13, 2015, to \$39,154 on July 1, 2015, to \$5,228 on July 29, 2015.⁴⁸ Further,
3 there do not appear to be any payroll expenditures for OAR between August and November
4 2015.⁴⁹ The sharp decrease in OAR's total payroll expenditures indicate that OAR did not
5 replace many individuals who departed OAR to work in the same or similar capacity for the
6 Committee.

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.⁵⁰ Publicly available filings reveal that Adesys
10 Consulting provided "technical services" for both OAR and the Committee.⁵¹ LG Strategies
11 provided consulting services concerning New Hampshire grassroots efforts to both OAR and the
12 Committee.⁵² Similarly, both OAR and the Committee utilized Air Charter Team, Inc., for

⁴⁷ See Time Magazine Article.

⁴⁸ Compare Sched. B to OAR 2015 IRS Mid-Year Report Form 8872 (July 31, 2015) ("OAR IRS Mid-Year Report") (noting a 4/13/2015 payroll payment of \$95,661) with Sched. B to 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 7/1/2015 to \$5,228 on 7/29/2015).

⁴⁹ See OAR IRS Year-End Report.

⁵⁰ See Discovery Response of Mark Stephenson and Red Oak Strategic (Aug. 7, 2019) ("Attach. 39"); Discovery Response of Andy Leach and LG Strategies at 1-2 (June 17, 2019) ("Attach. 40").

⁵¹ See OAR IRS Mid-Year Report, Sched. B (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").

⁵² Attach. 40 (Discovery Response of Andrew Leach and LG Strategies) at 1-2.

1 travel,⁵³ Connectivist Media for online and digital consulting,⁵⁴ Ground Game Strategies for
2 political consulting,⁵⁵ Harbinger Outreach for event consulting,⁵⁶ Just Win Strategies for
3 grassroots organizational consulting services,⁵⁷ and Madison Strategies for additional political
4 consulting.⁵⁸

5 In response to Commission requests for information, several consultants who worked for
6 both OAR and the Committee revealed that they were paid identical amounts by both
7 organizations and provided the same type of services. OAR paid Andrew Leach and his
8 consulting company, LG Strategies, a consulting fee of \$7,500 a month from February 2015 until
9 June 2015.⁵⁹ Beginning in July 2015, the Committee began paying Leach the same amount per

⁵³ OAR IRS Mid-Year Report, Sched. B (providing “airfare”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 1906 (providing “Travel: Air”).

⁵⁴ Walker and Committee Subpoena Resp. at 24 (“Connectivist Media provided SWI with online and digital advertising platforms, including on Facebook, and consulting services from early July 2015 to September 22, 2015”); OAR IRS Mid-Year Report, Sched. B (providing “online services”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2061-62, 2736 (providing “online advertising” and “digital consulting”).

⁵⁵ Walker and Committee Subpoena Resp. at 24 (“Ground Game Strategies provided SWI with field consulting services from early July 2015 to September 22, 2015”); OAR IRS Mid-Year Report, Sched. B (providing “political consulting”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2217 (providing “field consulting”).

⁵⁶ Walker and Committee Subpoena Resp. at 22 (“Harbinger Outreach provided SWI with event production services, advance and event staffing services, and advance consulting services from early July 2015 to September 22, 2015”); OAR IRS Mid-Year Report, Sched. B (providing “event consulting”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2234-36 (providing “event production consulting” and “campaign promotional items”).

⁵⁷ Walker and Committee Subpoena Resp. at 24 (“Just Win Strategies provided SWI with field consulting services from July 15, 2015 to September 22, 2015”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2282-83 (providing “field consulting”).

⁵⁸ Walker and Committee Subpoena Resp. at 23 (“Madison Strategies provided SWI with political strategy and conservative outreach consulting services from early July 2015 to September 22, 2015”); OAR IRS Mid-Year Report, Sched. B (providing “political consulting”); Scott Walker Inc., Second Amended 2015 October Quarterly Report at 2310-11 (providing “strategy consulting”).

⁵⁹ Attach. 40 (Discovery Response of Andy Leach and LG Strategies) at 1.

1 month.⁶⁰ In his response to the Commission's document requests, Leach described his work for
2 both entities collectively, stating:

3 LG Strategies was retained to provide consulting services to Our
4 American Revival and later Scott Walker, Inc. for efforts in New
5 Hampshire. Our role was to provide strategic advice and work
6 with staff assigned to NH to help them building [sic] a successful
7 network in New Hampshire. We also helped to organize events
8 throughout the state where people could meet Governor Walker
9 and hear his message.⁶¹

10 Similarly, Mark Stephenson, through his company Red Oak Strategic, served as a Chief Data
11 Officer for OAR through "the first half of 2015, billing OAR \$15,000 a month."⁶² In July 2015,
12 Stephenson was hired in his individual capacity as "data director" for the Committee, for which
13 he was paid an identical amount of \$15,000 a month.⁶³

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

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See* Attach. 39 (Discovery Response 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).

⁶³ *Id.*

1 consultants for New Hampshire.”⁶⁴ That consultant confirmed he had been hired, but did not
2 clarify that OAR had hired him, not Walker,⁶⁵ which indicates that his real job was to consult
3 Walker and not support OAR's purported generalized mission.

4 The mass departure of OAR staff and consultants to Walker's Committee, coupled with
5 the fact that OAR does not appear to have replaced much of its staff, confirms the perception that
6 OAR was Walker's “campaign in waiting” and suggests that once Walker had a formal
7 campaign, he no longer needed OAR to function in any significant capacity.⁶⁶

8 **III. LEGAL ANALYSIS**

9 **A. Walker Used OAR to Fund His Testing-the-Waters Activities**

10 The Commission found reason to believe that Walker tested the waters for a potential
11 candidacy and failed to report any expenditures in connection with his testing-the-waters
12 activity.⁶⁷ The evidence developed during the investigation confirms that finding and supports
13 finding probable cause to believe that Walker accepted contributions from OAR in the form of
14 expenditures to fund testing-the-waters activities for Walker prior to his formal announcement
15 that he was testing the waters on June 17, 2015.

⁶⁴ Emails between Jason Donner, Fox News, and Andrew Leach, LG Strategies (2/17/2015, 9:27 PM through 2/18/2015, 8:11 AM) (“Attach. 41”).

⁶⁵ *Id.*

⁶⁶ *See* Time Magazine Article. 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. OAR IRS Mid-Year Report at 1. In its next report, which covered the rest of 2015, OAR's spending dropped by 69%, to \$1,605,485. OAR IRS Year End Report at 1.

⁶⁷ F&LA at 2.

1 An individual becomes a candidate under the Federal Election Campaign Act of 1971, as
2 amended (the “Act”), if he or she receives contributions or makes expenditures in excess of
3 \$5,000, or consents to another doing so on his or her behalf.⁶⁸ The Commission’s regulations
4 create exemptions to the definitions of contribution and expenditure — and therefore to the
5 \$5,000 candidacy threshold — to allow individuals to conduct certain activities to evaluate a
6 potential candidacy, *i.e.*, to “test the waters.”⁶⁹ These exemptions exclude from the definition of
7 “contribution” and “expenditure” those funds received and payments made solely to determine
8 whether an individual should become a candidate.⁷⁰ The regulations allow this limited
9 exemption for activities directed to an evaluation of the feasibility of one’s candidacy, though
10 not for conduct signifying that a decision to become a candidate has been made.⁷¹ Testing-the-
11 waters activities include, but are not limited to, payments for polling, telephone calls, and travel,
12 and only funds permissible under the Act may be used for such activities.⁷² When an individual
13 becomes a candidate, any such funds received or payments made in connection with testing-the-

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

⁶⁹ 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”); 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).

⁷⁰ 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).

⁷¹ See Advisory Op. (“AO”) 1981-32 at 4(Askew); *see also* Testing the Waters E&J at 9,993.

⁷² 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 (“SOR”) of Vice Chairman Petersen and Comm’rs. Hunter, McGahn, and Weintraub at 1, MUR 5934 (Thompson) (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) (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).

1 waters activity must be reported as contributions or expenditures on the first disclosure report
2 filed by the candidate's authorized committee.⁷³

3 The Commission has stated that testing-the-waters activities are those “conducted to
4 determine whether an individual should be a candidate.”⁷⁴ Travel for the purpose of speaking
5 with opinion-makers and political and non-political groups for the purpose of deciding whether
6 potential political support exists for a national campaign has been found to be testing-the-waters
7 activity.⁷⁵ In MUR 5908 (Duncan Hunter), for example, the Commission found reason to
8 believe that a candidate's spending on travel to early primary states “to publicize his Presidential
9 campaign, and/or gauge support for his campaign” before declaring his candidacy, should have
10 been reported as testing the waters or campaign expenses.⁷⁶ When evaluating whether a
11 respondent had ceased testing the waters and begun a candidacy, the Commission has determined
12 that expenditures relating to political strategy consulting and fundraising consulting could fall
13 within permissible testing-the-waters activity.⁷⁷

14 In their response to the Factual and Legal Analysis, Walker and the Committee claim that
15 the Commission's findings represented a departure from prior findings in testing-the-waters

⁷³ 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).

⁷⁴ 11 C.F.R. §§ 100.72(a); 100.131(a); *accord* A.O. 1981-32 at 4.

⁷⁵ AO 1981-32.

⁷⁶ 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 of Comm'rs Petersen, Hunter, McGahn, Walther, & Weintraub at 2-3.

⁷⁷ 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”).

1 cases where the Commission had noted that a politician's association with a social welfare
2 organization was not "suggestive of a testing-the-waters violation in itself."⁷⁸ Walker and the
3 Committee further noted that a social welfare organization "may provide an individual . . . with a
4 platform to speak about issues, support other candidates, and maintain a public profile without
5 the payments for such activities necessarily being considered contributions to the future
6 candidate's campaign."⁷⁹ Walker and the Committee further claim that the Commission's
7 Factual and Legal Analysis rested on insufficiently particularized links between OAR's
8 payments and Walker's testing-the-waters activities, and notes that "thinking about running for
9 office is not the same thing as spending money to evaluate a possible run for office."⁸⁰ Walker
10 and the Committee also argue that Walker's pre-2015 activity, traveling the country, and
11 speaking publicly in connection with his status as a Republican governor, establish that Walker's
12 2015 travels and speeches "were not to explore the feasibility of a federal campaign."⁸¹

13 Respondents' argument, in essence, is that the Commission must find that Walker's and
14 OAR's "efforts were not to explore the feasibility of a federal campaign" because "Walker did
15 exactly what prominent public figures do: engaged as a thought leader in robust issues debates

⁷⁸ Walker and Committee F&LA Resp. at 3 (quoting First Gen. Counsel's Rpt. at 9, MUR 6907 (Huckabee); *see also* Walker and Committee Subpoena Resp.at 5 ("Respondents further note the that FEC has long found unobjectionable PACs, grassroots groups like OAR, and even Super PACs, paying costs associated with public figures who later became federal candidates").

⁷⁹ Walker and Committee F&LA Resp. at 3 (quoting SOR of Comm'rs Hunter & Petersen at 9, MUR 6928 (Santorum) ("Santorum SOR")); *see also* Walker and Committee Subpoena Resp.at 5.

⁸⁰ Walker and Committee F&LA Resp. at 4-6 (quoting Santorum SOR at 13); *see also* Walker and Committee Subpoena Resp.at 5.

⁸¹ Walker and Committee F&LA Resp. at 2.

1 that grow louder around key legislative battles and elections.”⁸² But the Commission properly
2 rejected this argument at the reason to believe stage. It is OAR’s payment, with Walker’s
3 consent, for activities directed to an evaluation of the feasibility of Walker’s candidacy that is the
4 basis of Walker and the Committee’s liability under the Act,⁸³ irrespective of Walker’s or OAR’s
5 engagement on issues. And the evidence of OAR’s payment, with Walker’s consent, for
6 activities directed to an evaluation of the feasibility of Walker’s candidacy is overwhelming.
7 Moreover, the evidence of OAR’s funding of efforts focused solely on Walker’s candidacy
8 distinguishes this matter from those matters cited by Respondents in which the Commission did
9 not find reason to believe.

10 The evidence establishes that OAR was staffed with individuals, vendors, and consultants
11 who performed campaign-related services to support Walker’s discussions and meetings with
12 potential donors and supporters about a possible presidential candidacy, and not just about
13 promoting OAR or conservative principles.⁸⁴ These preparatory activities are exactly what the
14 Commission has deemed to be testing the waters.⁸⁵ Notably, at the private meetings planned and
15 paid for by OAR, Walker separated his solicitations for OAR from requests for support for a

⁸² *Id.*

⁸³ Testing the Waters E&J at 9,993.

⁸⁴ *See, e.g.*, Attachs. 8, 10, 14, 15, and 16.

⁸⁵ *See supra*, nn. 75-77; *cf.* AO 1986-06 (Fund for America’s Future) at 4-5 (concluding that multicandidate committee could fund potential candidate’s appearances on behalf of other candidates, a political party, and policies, but cautioning that committee would make in-kind contributions to that individual if he made public statements referring to his possible intent to campaign for federal office or included activities such as “soliciting funds, holding meetings (which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy”).

1 potential presidential candidacy, though both were prepared by OAR staff.⁸⁶ Finally, based on
2 the well-developed record that Respondents have not provided information to rebut, it does not
3 appear Walker used the meetings that OAR secured for him to advocate for other conservative
4 candidates, and his incidental references to other candidates were in the context of drawing
5 comparisons between those individuals and a prospective Walker candidacy.⁸⁷

6 Furthermore, the Commission has previously advised that employing “political
7 consultants for the purpose of assisting with advice on the potential mechanics of constructing a
8 national campaign organization” constitutes testing-the-waters activity,⁸⁸ as is the
9 “[e]mployment of a specialist in opinion research to conduct polls for the purpose of determining
10 the feasibility of a national campaign.”⁸⁹ Those are exactly the kinds of services OAR retained
11 to assist Walker. Between February and June 2015, OAR paid Doner Fundraising \$809,393 for
12 “fundraising consulting,” which the investigation revealed to involve assessing the degree of
13 support available for a Walker candidacy.⁹⁰ OAR also paid LG Strategies \$37,500 for political
14 consulting, \$40,161 to Madison Strategies for political consulting, \$32,022 to Ground Game

⁸⁶ See, e.g., Attach. 2 at DONER-000865; Attach. 3 at DONER-000919; see also *supra* at 6.

⁸⁷ See Attach. 12 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”).

⁸⁸ AO 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential 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).

⁸⁹ AO 1981-32 at 3-4; see also F&LA at 5-6, MUR 6196.

⁹⁰ See OAR IRS Mid-Year Report; OAR 2015 IRS Year-End Report Form 8872, Sched. B (Jan. 29, 2016).

1 Strategies for political consulting, \$163,757 to the Tarrance Group for political consulting,⁹¹ and
2 \$74,510 to Just Win Strategies for political consulting.⁹² Many of OAR's staffers were known
3 for their previous work on candidate campaigns.⁹³

4 As to whether Walker's pre-2015 activity supports Walker and the Committee's
5 argument that he was not testing the waters, Respondents fail to address the qualitative
6 differences between Walker's pre-2015 earlier appearances, OAR's activities featuring Walker,
7 and Walker's subsequent candidacy. The existence of pre-2015 activity by Walker that was not
8 testing-the-waters activity does not negate the post-2015 testing-the-waters activity that
9 followed. Notably, Respondents' argument does not take into account that the establishment of
10 OAR and its role in arranging for and funding Walker's 2015 trips establish that Walker's 2015
11 engagements substantially differed from his pre-2015 activity. Nor do Respondents explain
12 Walker's sudden acquisition, in 2015, of multiple staffers and political consultants with
13 campaign experience to plan, organize, and staff Walker's activities.

14 Walker did not establish an official testing-the-waters entity until June 2015. Yet, the
15 evidence shows that from January until June 2015, Walker was testing the waters, and during
16 that time, OAR paid his future campaign staff, his consultants, the vendors who provided

⁹¹ See OAR IRS Mid-Year Report; OAR IRS Year-End Report.

⁹² See OAR IRS Mid-Year Report; OAR IRS Year-End Report.

⁹³ See Biography of Kirsten Kukowski, K2 & Co., <https://www.k2andcompany.com/about> (last visited May 7, 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 7, 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).

1 campaign-related services, and for travel in connection with Walker's testing-the-waters
2 activities.

3 **B. The Committee and Walker Accepted and Failed to Report Prohibited and**
4 **Excessive In-Kind Contributions to Walker's Campaign**

5 Commission regulations provide that all funds raised and spent for testing-the-waters
6 activities are subject to the Act's limitations and prohibitions.⁹⁴ The Act prohibits any person
7 from making contributions to any candidate and his authorized political committee with respect
8 to any election for federal office which, in the aggregate, exceed \$2,700 for the 2016 election
9 cycle.⁹⁵ The Act also prohibits any candidate or political committee from knowingly accepting
10 any excessive contributions.⁹⁶ The Act and Commission regulations prohibit corporations from
11 making contributions to candidate committees in connection with a federal election.⁹⁷ The
12 Commission has concluded that a 527 organization's "use of funds raised outside of the Act's
13 limitations and prohibitions to pay for individuals' testing-the-waters activities would violate
14 Commission regulations if those individuals decide to become candidates."⁹⁸ Thus, OAR was
15 prohibited from using corporate donations or donations that exceeded the Act's limitations
16 towards Walker's exploratory efforts and Walker and the Committee were prohibited from

⁹⁴ 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.").

⁹⁵ 52 U.S.C. § 30116(a)(1)(A).

⁹⁶ *Id.* § 30116(f).

⁹⁷ *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); AO 2010-11 (Commonsense Ten) at 2-3 (concluding that corporations may contribute to independent expenditure-only political committees).

⁹⁸ AO 2015-09 (Senate Majority PAC and House Majority PAC) at 5 (concluding that 527 organizations' payment for testing-the-waters activities with soft money would violate 11 C.F.R. §§ 100.72(a) and 100.13(a)).

1 accepting such prohibited funds from OAR in support of Walker's potential candidacy. Walker
2 and the Committee were further prohibited from accepting excessive contributions from OAR.

3 The record confirms that OAR paid for testing-the-waters expenses for Walker in excess
4 of the contribution limit, and that the funds OAR used to pay for Walker's testing-the-waters
5 expenses were from sources and in amounts prohibited under the Act. Walker accepted these
6 excessive and prohibited contributions on behalf of his eventual Committee by allowing OAR to
7 pay for his testing-the-waters expenses. Furthermore, Walker was aware that the funds used by
8 OAR were from sources and in amounts prohibited under the Act because he played a pivotal
9 role in soliciting the funds for OAR. It was Walker who ultimately made the "ask" described in
10 each of the briefing documents.⁹⁹ By providing Walker and his ultimate Committee with the
11 testing-the-waters expenditures described above, which included some portion of the
12 approximately \$787,372 OAR spent on "fundraising consulting," \$308,093 on "political
13 consulting," \$94,309 in travel reimbursements to future Committee staffers, and \$547,081 on
14 airfare, OAR made and Walker and the Committee accepted excessive in-kind contributions to
15 the Committee. Further, in making these excessive in-kind contributions, OAR utilized
16 contributions that it raised which were themselves prohibited under the Act. OAR's 2015 mid-
17 year IRS filing disclosed numerous contributions from individuals which exceeded \$2,700, as
18 well as contributions that appear to be prohibited corporate contributions.¹⁰⁰ Walker played an
19 integral role in cultivating relationships with these donors and communicating the requests for
20 excessive and prohibited contributions.

⁹⁹ *See supra* at 5-12.

¹⁰⁰ *See* OAR IRS Mid-Year Report, Sched. A.

1 When an individual becomes a candidate under the Act, any funds received or payments
2 made for testing-the-waters activities become contributions or expenditures subject to the
3 reporting requirements of the Act and are to be reported as such on the first disclosure report
4 filed by the candidate's authorized committee.¹⁰¹ Although the record indicates that OAR made
5 disbursements for testing-the-waters activities by Walker, the Committee did not report any in-
6 kind contributions from OAR in its first disclosure report.¹⁰² As a result, there is probable cause
7 to believe that Walker and the Committee accepted and failed to report excessive and prohibited
8 contributions to Walker's campaign from OAR in the form of payment for testing-the-waters
9 expenses.

10 **C. Walker Failed to Timely File His Statement of Candidacy**

11 An individual becomes a candidate under the Act when: (a) such individual receives
12 contributions or makes expenditures in excess of \$5,000; or (b) such individual gives his or her
13 consent to another person to receive contributions or make expenditures on behalf of such
14 individual and if such person has received such contributions or has made such expenditures in
15 excess of \$5,000.¹⁰³

16 Once the \$5,000 threshold has been met, the candidate has fifteen days to designate a
17 principal campaign committee by filing a Statement of Candidacy with the Commission.¹⁰⁴ The
18 principal campaign committee must file a Statement of Organization within ten days of its

¹⁰¹ 11 C.F.R. § 101.3.

¹⁰² The Committee did report that it paid \$15,436.09 to OAR for the purchase of office equipment and photography services. *See* Scott Walker, Inc. 2015 October Quarterly Report, at 2425-26.

¹⁰³ 52 U.S.C. § 30101(2).

¹⁰⁴ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

1 designation,¹⁰⁵ and it must file disclosure reports with the Commission.¹⁰⁶ The testing-the-waters
2 exceptions, described above,¹⁰⁷ are not available to an individual who has decided to become a
3 candidate.¹⁰⁸ Commission regulations set forth a non-exhaustive list of activities that indicate
4 when an individual is no longer testing the waters and has decided to become a candidate. Such
5 indicia include: (1) using general public political advertising to publicize his or her intention to
6 campaign for federal office; (2) raising funds in excess of what could reasonably be expected to
7 be used for exploratory activities or undertaking activity designed to amass campaign funds that
8 would be spent after he or she becomes a candidate; (3) making or authorizing written or oral
9 statements that refer to him or her as a candidate for a particular office; (4) conducting activities
10 in close proximity to the election or over a protracted period of time;¹⁰⁹ and (5) taking action to
11 qualify for the ballot under state law.¹¹⁰ Once an individual has decided to be a candidate, he or
12 she must designate a principal campaign committee within fifteen days, which must file a
13 Statement of Organization within ten days of being designated by the candidate.¹¹¹

¹⁰⁵ See 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

¹⁰⁶ 52 U.S.C. § 30104(a), (b). See, e.g., F&LA at 6, MUR 6735 (Joseph A. Sestak); F&LA at 5, MUR 6449 (Jon Bruning); F&LA at 2, MUR 5363 (Alfred C. Sharpton).

¹⁰⁷ See *supra* Section III.A.

¹⁰⁸ See AO 2015-09 at 5; see also Testing the Waters E&J at 9,993 (exemption “explicitly limited ‘solely’ to activities designed to evaluate a potential candidacy”).

¹⁰⁹ The Commission has advised that there is no specific time limit for such activities, and the length of time spent testing the waters is but one factor in determining whether an individual becomes a candidate. AO 2015-09 at 6.

¹¹⁰ 11 C.F.R. §§ 100.72(b), 100.131(b).

¹¹¹ See 52 U.S.C. §§ 30102(e)(1), 30103(a), 30104(a).

1 In determining whether an individual has moved from testing the waters to candidate
2 status, the Commission considers whether the individual has engaged in activities or made
3 statements that would indicate the individual has decided to run for federal office.¹¹² “[T]he
4 determination of whether an individual has crossed the line from ‘testing the waters’ to
5 campaigning must be made on a case-by-case basis.”¹¹³

6 Although the investigation confirmed that Walker engaged in extensive testing-the-
7 waters activity funded by OAR, the investigation did not yield additional information sufficient
8 to conclude that Walker decided to become a candidate before his July 13, 2015, announcement.
9 The activities that OAR primarily engaged in on Walker’s behalf, such as hiring consultants with
10 political and fundraising expertise, are the type of activities that the Commission has previously
11 found to be valid testing-the-waters expenses when done to explore a run.¹¹⁴ Absent other
12 indicia of candidacy, Walker’s testing-the-waters activities alone, while significant, are not
13 sufficient to conclude that he became a candidate earlier than his July announcement.¹¹⁵

¹¹² F&LA at 6-7, MUR 6449 (Jon Bruning); First Gen. Counsel Rpt. at 10, MUR 6533 (Perry Haney for Congress).

¹¹³ 50 Fed. Reg. at 9,993.

¹¹⁴ See, e.g., AO 1982-03 (Cranston) at 2-4 (hiring of political consultants can be for testing the waters if the candidate had not yet decided to run).

¹¹⁵ See, e.g., F&LA at 6 n.11, MUR 6533 (Haney) (dismissing 30102(e)(1) allegation where candidate’s committee had received almost \$112,000, primarily in the form of loans from the candidate); F&LA at 6, MUR 6224 (Carly Fiorina) (finding no reason to believe where exploratory committee raised \$225,000, and candidate spent \$400,000 in personal funds); MUR 5934 (Thompson) (dismissing where candidate had raised more than \$12 million and spent more than \$5 million); MUR 5703 (Rainville) (finding no reason to believe where \$100,000 raised was not dispositive); MUR 5661 (Butler) (same).

1 Nevertheless, Walker's Statement of Candidacy was not filed until August 5, 2015,
2 making it eight days late even under his own timetable for candidacy. As such, there is probable
3 cause to believe that Walker violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a).¹¹⁶

4 **IV. CONCLUSION**

5 Based on the foregoing, the Office of General Counsel is prepared to recommend that the
6 Commission find probable cause to believe that former Governor Scott Walker and Scott
7 Walker, Inc., accepted excessive and prohibited contributions from Our American Revival in
8 violation of 52 U.S.C. § 30116(f) and 11 C.F.R. §§ 100.72(a) and 100.131(a); that Scott Walker,
9 Inc. failed to report in-kind contributions and disbursements by Our American Revival for
10 testing-the-waters activities in violation of 52 U.S.C. § 30104(b); and that former Governor Scott

¹¹⁶ The evidence indicates that, to the extent Walker may have established, financed, maintained, or controlled OAR while he was a federal candidate, there may be violations of the Act's soft money provisions. *See* 52 U.S.C. § 30125(e); 11 C.F.R. § 300.2(c)(2); F&LA at 7-8, MUR 5367 (Issa). However, in light of the unique timing and circumstances of this matter, the gaps in the record as to Walker's relationship with OAR, and the uncertainty as to whether Walker became a federal candidate prior to his declarations of candidacy, notwithstanding OAR's significant role supporting Walker's testing-the-waters activities, we do not recommend that the Commission pursue these potential violations for prudential reasons so that this time-sensitive matter may proceed without further delay.

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1 Walker failed to timely file his statement of candidacy in violation of 52 U.S.C. § 30102(e)(1)
2 and 11 C.F.R. § 101.1(a).

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Date

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