

May 26, 2020

VIA EMAIL

Federal Election Commission
1050 First Street, NE
Washington, District of Columbia 20436

MURs 6917 & 6929: Response of Our American Revival to General Counsel's Brief

Dear Commissioners:

The Commission opened these matters against Our American Revival more than five years ago now, when the 2016 presidential election was still a year and a half away and the eventual winner of that election, now-President Donald Trump, had yet to declare his candidacy. These matters then languished in the agency for four years until last Spring, when the Commission's Office of General Counsel commenced a hasty factual investigation that culminated in a flurry of subpoenas which, due to the absence of a quorum, the Commission could not enforce. Now, a full year later, with mere days remaining on the statute of limitations, OGC is attempting to force a last-minute Commission vote to find probable cause on a factual record it admits is less than fully developed, and on a legal theory that shatters 35 years of Commission precedent.

As you read this, every single expenditure OGC has specifically identified in these MURs is more than five years old, and the statute of limitations has expired on them all. On May 18, 2020, the statute of limitations effectively expired on all of OAR's expenditures at issue in these MURs, whether or not specifically identified by OGC. Even if the statute of limitations were not expired, these matters are so old and stale, and there is so little time remaining—indeed, just a relative few hours—that further enforcement action by the Commission in these matters would be futile. For these reasons, the Commission should vote to close these matters.

Additionally, OGC has failed to establish probable cause that a violation of the Act occurred. It neglects in the Probable Cause Brief to appropriately allocate the portions of OAR disbursements it believes constituted payments for testing the waters expenses, volunteering on the next to last page of its brief only that "some portion" of OAR's expenditures were made to test the waters of a prospective presidential campaign. Its brief relies selectively, and almost entirely, on documents obtained from a single OAR vendor, distorts those documents, and completely ignores other documents OAR produced that inform the context within which OAR was formed and operated and, in some instances, contradict the single vendor's documents.

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OGC also has not provided documents that Commission procedures require it to provide to OAR—instead giving OAR only the documents that OGC relies upon in its Probable Cause Brief—purportedly for OAR's "convenience," but in reality depriving OAR of a full opportunity to defend itself against the one-sided narrative OGC's Probable Cause Brief attempts to spin, as what little might remain of the statute of limitations ticks away.

In the final analysis, these matters are time-barred, the factual record is incomplete, and OGC's legal theory is a deeply-flawed departure from a generation's worth of Commission precedent.¹ For these reasons, and all the reasons that follow, I urge the Commission, on behalf of Our American Revival and its Treasurer, C. Ryan Burchfield, to close the files in these five-year old matters concerning the last presidential election before our nation completes the next one.

DISCUSSION

1. The Statute Of Limitations Forecloses Further Enforcement Action In These Matters.

The Federal Election Campaign Act does not establish a statute of limitations within which the Commission must enforce matters, but in FEC v. Williams, the U.S. Court of Appeals for the Ninth Circuit held that the five-year statute of limitations established in 28 U.S.C. § 2462 applies to Commission actions for the assessment or imposition of civil penalties under the Act. 104 F.3d 237, 239-40 (9th Cir. 1996); see also FEC v. Toledano, 317 F.3d 939, 948 (9th Cir. 2002) ("Williams . . . is plainly right."); Citizens for Responsibility & Ethics v. American Action Network, 410 F. Supp. 3d 1, 23 (D.D.C. 2019) ("[C]ourts have applied the catch-all five-year limitations period set forth in 28 U.S.C. § 2462 to FECA enforcement actions brought by the Commission."); Citizens for Responsibility & Ethics v. FEC, 236 F. Supp. 3d 378, 392 (D.D.C. 2017) ("The statute of limitations for FECA actions is five years.").

"[A]n action, suit or proceeding to assess or impose a civil penalty **must be commenced within five years of the date of the violation giving rise to the penalty.**" Williams, 104 F.3d at 240 (quoting 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C. Cir. 1994) (emphasis added)). In these matters, the violation giving rise to the penalty is the alleged use, by OAR, of federally-impermissible funds to test the waters for then-Wisconsin Governor Scott Walker's eventual presidential campaign.² Indeed, in its testing the waters regulation, the Commission has decreed that "[o]nly funds permissible under the Act may be used" to pay for activities "conducted to determine whether an individual should become a candidate." 11 C.F.R. §§ 100.72(a), 100.131(a); see also MUR 6462 (Trump), First General Counsel's Report (Jan. 25, 2013) at 14 ("[O]nly funds permissible under the Act may be used for 'testing the waters' activities. * * * "[T]esting the waters' activities must comport with the limitations and prohibitions in the Act.").

¹ For a full discussion of the law of these matters, please see OAR's Response to Factual and Legal Analysis (June 5, 2019).

² As noted throughout this brief, OAR does not concede that any of its expenditures were for the purpose of testing the waters of Governor Walker's eventual campaign.

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OGC's approach in MUR 6462 (Trump) is instructive. The complaint in that MUR alleged that, in 2012, The Trump Organization, LLC made excessive and impermissible expenditures to test the waters of a presidential campaign for behalf of Donald Trump. Assessing the impact of the statute of limitations on that matter, OGC advised the Commission that the statute of limitations expired between January 1, 2016 and February 1, 2017—five years after the exploratory expenditures at issue allegedly began (January 1, 2011) and ceased (February 1, 2012). MUR 6462, First General Counsel's Report (Jan. 25, 2013) at 1. Similarly, in MUR 5722 (Lauzen), OGC pegged the expiration of the statute of limitations (December 7, 2010) to the date on which an Illinois state senator's state campaign committee paid \$12,750 for political consulting services (December 7, 2005), allegedly to test the waters of a potential congressional campaign. MUR 5722, First General Counsel's Report (Jan. 31, 2009) at 1.

Indeed, OGC never has taken the position that it must wait for an individual to declare his or her candidacy before it may enforce against an organization alleged to have paid that individual's testing the waters expenses. In MUR 6462, OGC asked the Commission to find reason to believe against the Trump Organization almost a full year **after** Mr. Trump announced he would not be a candidate for President in 2012. MUR 6462 (Trump), First General Counsel's Report (Jan. 25, 2013) at 18. In another matter involving third party payment of testing the waters expenses, MUR 2133 (Bush), OGC went in the other direction. It urged reason to believe against the Republican National Committee and Fund for America's Future in May 1986, 18 months **before** then-Vice President Bush declared his candidacy for President. MUR 2133, General Counsel's Report (May 23, 1986) at 21. See also 52 U.S.C. § 30109(a)(2) (granting Commission authority to enforce the Act if "it has reason to believe that a person has committed, or is about to commit, a violation").

Therefore, on the basis of these Commission precedents, the relevant date for purposes of determining when the five-year statute of limitations expires is the date on which OAR made each expenditure OGC contends was for the purpose of testing the waters.

A. All Of The Expenditures OGC Has Specifically Identified In These MURs Are More Than Five Years Old. The Statute Of Limitations Has Run On Them.

Governor Walker founded OAR on or about January 16, 2015. See OAR-002-00262 (OAR IRS Form 8871 (Jan. 16, 2015)). OGC contends that "evidence developed during the investigation . . . demonstrates that there is probable cause to believe that OAR expended resources to fund testing-the-waters activities for Walker prior to his formal announcement that he was testing the waters on June 17, 2015." OGC Probable Cause Brief at 18.

A closer look at OGC's Probable Cause Brief, however—and a focus on the discrete expenditures OGC specifically identifies as supposed testing the waters expenditures—reveals that OAR made them all between January 26, 2015 and March 15, 2015:³

³ As noted below in Section 2, the travel itineraries for these trips were generally much more complex than OGC presents in the Probable Cause Brief—usually involving many events and meetings across multiple cities and states over several days at a time. Thus, when OGC states, as it does on page 9, fn. 27 of the Probable Cause Brief, that OAR "was billed \$30,618" for

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<u>Date</u>	<u>Recipient</u>	<u>Amount</u>	<u>Purpose</u>	<u>PC Brief Cite</u>
January 24-25, 2015	Sitatunga Springs	\$27,216	Charter flight to/from Palm Springs, CA	p. 5, fn. 15 & accompanying text
January 31, 2015	Sitatunga Springs	\$20,511.72	Charter flight to/from Washington, DC	p. 9, fn. 26 & accompanying text
February 19, 2015	Sitatunga Springs	\$21,849.45	Charter flight to/from Washington, DC	p. 6, fn. 19 & accompanying text
February 27, 2015	Sitatunga Springs	unidentified	Charter flight to/from Boca Raton, FL	p. 7, fn. 21 & accompanying text
March 5, 2015	Sitatunga Springs	\$30,618.00	Charter flight to/from Boca Raton, FL	p. 9, fn. 27 & accompanying text
March 12, 2015	Sitatunga Springs	\$20,128.50	Charter flight to/from New York, NY	p. 8, fn. 23 & accompanying text

Each of these expenditures—made between January 26, 2015 and March 12, 2015—is well beyond the reach of the five-year statute of limitations now. And OGC does not specifically identify a single other discrete expenditure by OAR—for example, payments for classic exploratory expenses such as polling or telephone calls⁴—that it believes was made for the purpose of testing the waters of Governor Walker's eventual presidential campaign.⁵

travel associated with a "lunch meeting in Boca Raton, FL," it is very misleading, and spotlights OGC's failure to "appropriately allocate" OAR's expenses, as discussed in Section 2A, below.

⁴ For example, according to OAR's 8872s, which it produced in response to the Commission's subpoena and which are available for public inspection on the IRS's political organization disclosure website, between its inception and June 17, 2015, OAR paid \$21,027 to Advantage Inc., a well-known for "phone services," "conference calls" and a "teleforum." OGC does not allege that these payments were made for testing the waters purposes.

⁵ Beyond the scant palmful of expenditures for travel identified above, OGC generally contends that OAR's payment for some of the services provided by certain individuals or companies constituted testing the waters expenditures due to the nature of the services those individuals or companies provided. However, as discussed in Section 2, below, OGC fails to appropriately allocate the value of the services those individuals and companies provided to

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Accordingly, the statute of limitations has expired on each expenditure OGC specifically identifies as a basis for a probable cause finding in these matters, and so the Commission should close these files immediately.

B. The Statute Of Limitations On All Other OAR Expenditures In These MURs, Whether Or Not OGC Specifically Identifies Them, Has Effectively Run Out.

Moreover, taking into account the 30-day conciliation period mandated by 52 U.S.C. § 30109(a)(4)(A)(i) that must follow any probable cause vote by the Commission, the statute of limitations already has effectively expired on **any and all** of the supposed testing the waters expenditures at issue in these matters—even on those that OGC fails to identify with the requisite specificity (see fn.4, above, and Section 2, below). This is because **under OGC's theory, OAR did not pay for any exploratory expenses after Governor Walker announced, on June 17, 2015, that he would test the waters of a presidential campaign.** See OGC Probable Cause Brief at 18 ("OAR expended resources to fund testing-the-waters activities for Walker **prior to his formal announcement** that he was testing the waters on June 17, 2015." (Emphasis added)).

If OGC admits that OAR's very last payment of an alleged testing the waters expense could have been on June 17, 2015, then the statute of limitations on all such expenditures by OAR—whether or not specifically identified by OGC—effectively expired on May 18, 2020, which is June 17, 2015, plus five years, minus the mandatory 30-day statutory conciliation period. See generally Williams, 104 F.3d at 241 (acknowledging that, due to the Act's mandatory notice and conciliation requirements, the statute of limitations on FECA violations effectively expires prior to the end of the five-year limitations period); see also MURs 6391 & 6471 (CHGO), Statement of Reasons of Comm'rs Petersen, Hunter & Goodman at 1 (explaining that the statute of limitations had "effectively expired"). Therefore, the Commission should dismiss these matters and close its files.

C. Even If The Statute Of Limitations Has Not Expired, Further Enforcement Action In These Matters Would Be Pyrrhic And Futile.

When the Commission first opened these MURs over five years ago, there was but one declared candidate for President. Today, as the Commission determines what to do with these matters, the major parties' nominations for the next presidential election are fully settled. In the interim, OGC took four years to recommend a reason to believe finding, and then spent another year investigating it in pursuit of probable cause but—as noted in footnote 4, above, and detailed further in Section 2, below—has compiled a factual record that is insufficiently detailed.

OAR remains a going concern today,⁶ but solely for purposes of awaiting the conclusion of these matters. OAR's work is finished and, as several years' worth of its 8872s and 990s

OAR on the one hand, and to Governor Walker's alleged exploratory effort on the other. Such vague and imprecise allegations cannot serve as the basis for a probable cause finding.

⁶ A "going concern" is "[a] firm or corporation which, though financially embarrassed, continues to transact its ordinary business." Black's Law Dictionary 691 (6th ed. 1990).

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indicate, its resources have dwindled. Its founder and figurehead has left elected office and moved on to other professional and political pursuits, as is his right. Its most recent 990, filed on November 14, 2019 and publicly available on the IRS's political organization disclosure website, discloses a cash balance of \$16,839, all of which it will have to use to pay the expenses associated with defending itself in what remains of these matters. It would be foolish to think that an organization in OAR's position could raise money from donors to fund a settlement with this agency in two time-barred matters that pre-date the last presidential election.

For these reasons, if the Commission concludes that continued enforcement of some aspect of these matters is not foreclosed by the statute of limitations, then it certainly is clear that any further enforcement action would be pyrrhic and futile. See MURs 6391 & 6471 (CHGO), Statement of Reasons of Comm'rs Petersen, Hunter & Goodman at 1, 4. Accordingly, the Commission should dismiss these matters in the exercise of its prosecutorial discretion. See Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts . . .").

2. OGC Has Failed To Establish Probable Cause That A Violation Of The Act Occurred In These Matters.

After five years of investigation, and 27 pages of briefing, the most that OGC can offer in the end is that "some portion" of OAR's expenditures were made to test the waters of Governor Walker's eventual presidential campaign. OGC Probable Cause Brief at 27. This failure—to appropriately allocate OAR's expenditures between those that advanced OAR's issue-focused mission and those that, in OGC's view, tested the waters of a presidential campaign for Governor Walker—is fatal to OGC's case. The Commission cannot vote to find probable cause on a claim that a mere "some portion" of OAR's expenditures tested the waters.

To paint that nebulous conclusion for the Commission, OGC uses the broadest brush—relying almost entirely on documents it received from a single vendor, assuming other vendors provided testing the waters services because those vendors previously worked for presidential candidates, and even attempting to connect dots with news articles.

OGC also has not presented the Commission some of the most important of the nearly 4,000 pages of documents OAR provided in response to its subpoena—documents that contradict those provided by the single vendor its brief relies on, and prove OAR was aware of and observed the limitations of its status in the politically-charged environment in which it was operating. Additionally, OGC has failed to provide OAR with all of the documents gathered in the course of its investigation, as required by Commission procedures—providing OAR instead with only the documents cited in OGC's slanted brief. For this reason, while OAR will address below the obvious deficiencies in the Probable Cause Brief, we reserve the right to supplement this response if and when we receive documents from OGC and have had an adequate opportunity to review them.

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A. The Probable Cause Brief Fails To Establish Probable Cause Because It Does Not Inform The Commission Of How Much OAR Allegedly Spent To Test The Waters And The Activities Those Payments Funded.

To sustain an enforcement action against an organization alleged to have expended funds to test the waters on behalf of a prospective candidate, OGC must "appropriately allocate" the expenditures between the organization's bona fide activities on the one hand, and the alleged exploratory activities on the other. See MUR 5908 (Hunter), Statement of Reasons of Comm'rs Petersen, Hunter, McGahn, Walther & Weintraub at 3 ("The Commission notes further that any disbursements benefitting both the presidential campaign and PTS PAC would have been allocable between the two committees."); MURs 6470, 6482 & 6484 (Romney), Statement of Reasons of Comm'rs Petersen, Hunter & Goodman at 1 ("Parsing the precise value of the alleged in-kind contributions would require . . . allocating between FSA, for its bona fide activity, and the Romney campaign, for its testing-the-waters activity"), and 5 ("And even where payments may constitute an in-kind contribution to an individual's future campaign, such payments must be **appropriately allocated** between the organization and the campaign." (Emphasis added.)).

Off the top, OGC admits—as it must—that only "some portion" of OAR's expenditures tested the waters—and, by extension, that some portion of them did not, but rather advanced OAR's bona fide, issue-focused mission.⁷ OGC Probable Cause Brief at 27. Indeed, the full record in this matter is replete with examples of OAR's bona fide, issue-focused activities, which included speeches about issues and ideas by Governor Walker to numerous Republican and conservative groups and gatherings, see generally OAR's Response to Factual & Legal Analysis (June 5, 2019) at 9-12; issue advocacy on such topics as taxes, budgeting, federalism, educational choice, health care, energy policy, foreign policy and support for our troops and veterans, see generally OAR's Response to Factual & Legal Analysis (June 5, 2019) at 12-13, and www.ouramericanrevival.com/category/news; dissemination of state and local policy news and updates to its supporters, see, e.g., "State & Local News Brief" (OAR-010-000453-456); and grassroots organization and development, see e.g., Anderson County & Greenville County, SC organizational meeting materials (OAR-010-000731-744).

On this record, OGC cannot contend that all of OAR's expenditures—or even entire categories of expenditures—were made for testing the waters purposes. Nor does it. It alleges only that "some portion of the \$787,354 OAR spent on 'fundraising consulting,' \$308,093 on 'political consulting,' and \$547,081 on airfare" were testing the waters expenditures." OGC Probable Cause Brief at 27. In other words, it alleges that, out of the \$4,906,841 OAR spent from inception to June 17, 2015, some lesser percentage of 16 percent went to pay for exploratory expenses.

However, even for those OAR expenditures OGC specifically identifies as supposedly made to test the waters, OGC still neglects to allocate them, as required by MUR 5908 (Hunter), MURs

⁷ As noted throughout this response, OAR does not admit that **any** portion of its expenditures were made to test the waters.

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6470, 6482 & 6484 (Romney), and other Commission precedents, see, e.g., AO 1985-40 (Republican Majority Fund).

For example, OGC identifies six trips OAR paid for on which Governor Walker allegedly engaged in some testing the waters activities (see generally Section 1A, above) and attempts to tag OAR for the entire cost of each trip. But the Probable Cause Brief does not tell the full story. Each of those trips spanned multiple days, and in most cases multiple cities, with many events advancing OAR's mission:

- From January 24-26, 2015, Governor Walker was in Palm Springs, California, where he attended a multi-day event hosted by Freedom Partners. On the basis of one or more private meetings, at which Governor Walker solicited contributions and other support for OAR, and which resulted in contributions to OAR, but which may have included discussions of presidential politics, OGC seeks to treat the entire cost of the trip as a testing the waters expenditure.
- From January 28 - February 1, 2015, Governor Walker was in Washington, D.C. to speak at the annual Alfalfa Dinner and attend associated events. On the basis of one or more private meetings, at which Governor Walker solicited contributions and other support for OAR, and which resulted in contributions to OAR, but which may have included discussions of presidential politics, OGC seeks to treat the entire cost of this trip, too, as a testing the waters expenditure.
- Between February 18-23, 2015, Governor Walker traveled to New York, Washington, DC and Nashville, Tennessee. In New York, he was a guest on the CNBC show "Squawk Box." In Washington, he attended three days of Republican Governors Association and National Governors Association meetings. In Nashville, he spoke to the National Religious Broadcasters Association. During this nearly week-long trip, Governor Walker had some private meetings, at which he solicited contributions and other support for OAR, and which resulted in contributions to OAR, but which may have included discussions of presidential politics, OGC seeks to treat the entire cost of this travel as a testing the waters expenditure.
- From March 4-8, 2015, Governor Walker flew to West Palm Beach, Ft. Lauderdale and Naples, Florida, St. Simon, Georgia and Des Moines and Dubuque, Iowa. In Georgia, he participated in an event hosted by the American Enterprise Institute. In the other locations, he had private meetings, at which he solicited contributions and other support for OAR, and which resulted in contributions to OAR, but which may have included discussions of presidential politics, so OGC seeks to treat the entire cost of this travel as testing the waters.
- From March 11-15, 2015, Governor Walker was in New York, Boston, New Hampshire and Washington, DC. In New Hampshire, he participated multiple party building events, had meetings with Republican elected officials and activists, and did several media interviews. In Washington, he attended the annual Gridiron Club dinner and associated events. At various points throughout this trip, Governor Walker had private meetings, at which he solicited contributions and other support for OAR, and which resulted in contributions to

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OAR, but which may have included discussions of presidential politics. OGC seeks to treat the entire cost of this travel as a testing the waters expenditure.

Additionally, OGC seeks probable cause arising out of OAR's payment to certain individuals, based on these facts: some of the individuals were "well-known political consultants" who were "regarded by the media as Walker's 'campaign in waiting,'" OGC Probable Cause Brief at 12; "many" of the individuals "were known for their previous work on candidate campaigns," OGC Probable Cause Brief at 24 & fn. 104 (but actually identifying only two such individuals); "most" (but not all) of the individuals "would go on to work for Walker's Committee" where they "apparently perform[ed] the same work for the Committee as they had for OAR," OGC Probable Cause Brief at 12. **Glaringly, however, OGC does not identify a single testing the waters expenditure that any such individual participated in while paid by OAR. Not one.** Instead, it hairsplits some of their responses to media inquiries about their positions and activities. This passage is particularly ridiculous:

For example, Fox News contacted a consultant hired to handle OAR's efforts in New Hampshire and asked him to confirm whether he and another consultant "had been hired by Scott Walker as consultants for New Hampshire." That consultant confirmed he had been hired, but did not clarify that OAR had hired him, not Walker, which indicates that his real job was to consult Walker and not support OAR's purported generalized mission.

OGC Probable Cause Brief at 15-16. All this passage indicates is that this particular individual responded casually to an email message from a reporter, instead of sharpshooting the reporter and parsing his question with an eye to how his answer eventually might be construed by attorneys in the FEC's Office of General Counsel. Of course, in some instances, OAR's leadership and communications staffers did push back against reporters' questions and media narratives about the supposed "campaign in waiting." OGC relegates one such instance to the footnotes of its brief. See, e.g., OGC Probable Cause Brief at 16 & fn. 65 ("[I]n response to a New York Times staffer concerning the roles of OAR staffers . . . It appears that OAR ultimately denied the existence of a campaign team). It neglects to mention other such instances altogether. See, e.g., OAR-000-000001 (email message from OAR Communications Director Rick Wiley dated May 21, 2015: "OAR is a Section 527 political organization. We are working with Governor Walker to spread a message of big, bold reforms to states and supporters nationwide. We are not, however, a candidate committee of Governor Walker."); OAR-000-000011 (email message from OAR Chief Data Officer Mark Stephenson dated February 18, 2015, requesting edits to a contract: "OAR isn't a campaign, but an organization focused on issue advocacy, activism and recruitment. I think on page 1, 'a campaign' can be changed to 'an organization.'").

In the end, after five full years, OGC does not appropriately allocate the expenditures at issue in these matters to identify the amount of the in-kind contribution it alleges OAR made to Governor Walker's eventual campaign, and the basis for its calculation. Without such an allocation—which, on the record in these MURs, OGC cannot make, because all of OAR's

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expenditures furthered its bona fide, issue-focused purpose—there is no basis for a finding of probable cause here.⁸

B. The Probable Cause Brief Is A One-Sided Tale, Woven Almost Entirely From Documents Obtained From A Single Vendor.

The Probable Cause Brief leans heavily on documents OGC obtained from a single OAR vendor, Kate Doner of Doner Fundraising. Across 28 pages and 115 footnotes, it references documents obtained from just three other vendors—Sitatunga Springs, which provided charter air travel services to OAR; LG Strategies, which provided grassroots political consulting services in New Hampshire; and Red Oak Strategic, which provided data consulting services. It cites documents received from Doner Fundraising more than those received from all other OAR vendors combined. And, when it does cite to documents from LG Strategies and Red Oak Strategic, the Probable Cause Brief does so to make immaterial points, such as that a vendor provided services to OAR and then to the Walker Committee, or that the vendor was paid the same amount by both entities.

- i. *OGC twists the Doner documents, quotes them selectively and presents them out of context.*

OGC makes much of references in the Doner documents to "2016 efforts" and "endorsements" to attempt to make it look like Governor Walker was testing the waters in his fundraising meetings arranged by Doner Fundraising. Upon a full view of the documents and the surrounding context, however, a different picture emerges:

- As evidence that Governor Walker was testing the waters during fundraising meetings, OGC points to an invitation to an OAR fundraising invitation that encouraged prospective contributors to contact Kate Doner "for more information on Scott Walker's campaign." OGC Probable Cause Brief, Attachment 11 (DONER-000244). The paragraph immediately above that statement makes clear what Scott Walker's campaign was: **"Governor Walker is pushing creative solutions to difficult government problems.** He is an incubator for solving tough issues in a truly politically divided state. From tax reform, education reform, entitlement reform and working around ObamaCare – **Walker is testing policies that affect all states."** *Id.*
 - Along this same line, OGC uses another Doner document to establish that OAR was "ostensibly" promoting a "generalized message of '[g]rowth, [r]eform and [s]afety'" but was actually testing the waters of the impending presidential election. OGC Probable Cause Brief, Attachment 1 (DONER-000842). The very next sentence of that document, however, reads: "With the first official debate scheduled for early August, **Our American Revival is actively building a policy infrastructure to showcase our big and bold ideas."** *Id.*

⁸ For the reasons discussed in Section 1, above, there also is no time left for OGC to amend its Probable Cause Brief now in an attempt to identify and allocate specific expenditures between OAR and Scott Walker Inc.

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- As evidence that Governor Walker was testing the waters during fundraising meetings, OGC points to bullets in briefing materials advising him to seek an "endorsement." See, e.g., OGC Probable Cause Brief, Attachments 4 (DONER-000865), 5 (DONER-000919), 10 (DONER-000227), 12 (DONER-000070), 26 (DONER-000332), etc. **Documents produced by OAR make clear that Governor Walker was seeking endorsements of OAR.** See OAR-000-00016 (OAR Pledge Form: "I authorize OAR to publicly promote my support of their principles and mission.") and OAR-010-000754-94 (examples of signed OAR pledge forms); see also OAR-010-000424 ("Iowa State Senators Join Governor Walker's Our American Revival Leadership Team") and OAR-000426 ("Top Iowa GOP County Officials . . . Sign On to Our American Revival Leadership Team").
- As evidence that Governor Walker was testing the waters during fundraising meetings, OGC points to the fact that, in one briefing document, the suggestion that Governor Walker request an endorsement was in one bullet and the suggestion that he solicit a contribution to OAR was in another bullet and that, therefore, those must be two "separate" things. See OGC Probable Cause Brief at 5, fn. 13 & Attachments 4-5 (DONER-000864-65 & DONER-000918-19). However, in the very next document OGC relies upon, "preparation for 2016" and "helping to raise money for the 527" are actually in a single bullet. See OGC Probable Cause Brief at 6, fn. 14 & Attachments 6 (DONER-000-880). OGC is really grasping at straws when it assigns (albeit inconsistently) such significance to the way things are bulleted in a finance brief.
- As evidence that Governor Walker was testing the waters during fundraising meetings, OGC points to excerpts from five pages of unsigned notes supposedly taken by an agent of Doner Fundraising. See OGC Probable Cause Brief, Attachment 14 (DONER-000888-92). The notetaker's identity is not apparent from the face of the documents, nor is it clear the reason for which the individual supposedly took the notes or whether the notes are a full, complete and accurate account of the conversations they purport to document. Nevertheless, the following passages from the notes—which OGC did not highlight for the Commission—contradict the passages OGC relies upon and undermine the meaning it attempts to attach to them:
 - The unidentified notetaker writes that, following a discussion with a prospective contributor about presidential politics, Governor Walker refocuses the discussion on OAR: **"Walker explains OAR and where all we've been. Need help with people who 1) want to donate to that 2) need people to help us out to recruit others."** The unidentified notetaker closes that the contributor "[c]ommitted to OAR and wants to help again down the road." (DONER-000889.)
 - The unidentified notetaker writes that Governor Walker engaged one contributor in an apparently lengthy discussion about issues including state budgeting, use of a "rainy day fund," university governance, revenue estimates and state procurement processes. (DONER-000890.)
 - The unidentified notetaker recounts another conversation with a prospective contributor in which, after talking presidential politics, Governor Walker again brings the focus to

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OAR: **"Walker talks about OAR 527 and said it's issue based, it's not exploratory, it's not a campaign committee."** (DONER-000891.)

- The unidentified notetaker records that after talking with another prospective contributor about the great work being done by the Koch-aligned network of organizations, principles of limited government and individual freedom, how markets work and presidential politics, Governor Walker brought the discussion to OAR: "Walker says we need people to recruit people to be on our team, but in short term **we have 527 OAR. Focuses on state and the people, not Washington. Focusing on \$ to get that message [out]. Would love your help with that** or further on down the line." (DONER-000892.). According to the unidentified notetaker, the contributor asked for an "email . . . from your team and pledge form that goes with it," and then concluded the meeting by stating: "[A]ctions speak louder than words and you sure have done that. It's remarkable. My daughter was McFadden's campaign manager. He asked **how can we make Minnesota into WI** and I think that's attributed to what you've done over there. **Great model for us to follow.**" *Id.*

Also missing from OGC's discussion of the services Doner Fundraising provided to OAR is this fact: Kate Doner helped raise a lot of money for OAR. The meetings OGC highlights as support for its testing the waters theory in these MURs actually resulted in contributions to OAR. OAR's 8872s, which it produced to the Commission in response to its subpoena and which are available for public inspection on the IRS's political organization disclosure website, reveal that of the 36 prospective contributors highlighted in the Probable Cause brief, 14 contributed a total of \$588,792 to OAR. That fundraising is the reason OAR retained Kate Doner and was the valuable service she provided to OAR, and OAR used the funds she helped raise to pay the expenses of its bona fide, issue-focused mission.

- ii. *The Probable Cause Brief Minimizes, and Mostly Ignores, Documents OAR Produced.*

Beyond the selective and misleading use OGC makes of the Doner documents, it also mostly ignores documents OAR provided in response to its subpoena—documents that contradict and undermine the narrative OGC attempts to weave from the Doner documents.

The such one document OGC uses, it twists. Responding to a New York Times reporter's inquiry concerning an upcoming report about "the campaign staff of announced and likely 2016 presidential candidates," OAR Executive Director Rick Wiley wrote: "There is no campaign therefore there is no campaign manager nor campaign staff." (OAR-010-000523.). OAR Communications Director Kirsten Kukowski agreed: "They can't publish this." *Id.* OGC, however, presents this email chain as evidence that "OAR staff initially agreed with" the reporter's assessment based upon an earlier message in the thread that said, "This all looks good to me, but please confirm." *See* OGC Probable Cause Brief at 16 & fn. 65. (OGC leaves the "but please confirm" part out of the Probable Cause Brief. Viewed in full context, the sender of that message was not expressing agreement but rather uncertainty.)

OGC leaves out many other documents OAR produced, including but not limited to:

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- Detailed, affirmative statements from OAR regarding its mission and activities. See, e.g., OAR-000-000002, -000007 & -000726.
- Long lists of conservative policies on issues including budgeting and spending reform, taxes, labor policy, Second Amendment rights, health care, protection of unborn children, public assistance reform, criminal justice reform, tort reform, K-12 and higher education, and school choice. See, e.g., OAR-000-000003-4.
- Op-Eds on issues such as international economic engagement and the Iran nuclear deal. See, e.g., OAR-010-000727-30.
- Detailed digital media schedules for issue-focused campaigns on right to work and Israel policy. See, e.g., OAR-010-000694-96.
- Power point presentations for organizational meetings of grassroots activities, promoting OAR's "Big, Bold Conservative Ideas." See, e.g., OAR-010-000731-744.

OGC also fails to show the Commission documents evidencing that OAR knew the limitations of its status, and observed the lines established by the Act. For example:

- OAR Executive Director Rick Wiley sent numerous email messages stating:

Our American Revival is dedicated to promoting the principles that have been embodied [in] Governor Walker's public service for more than a decade. It is a Section 527 political organization, registered solely with the IRS. * * * It is not a candidate committee established to support or promote any individual candidate for office.

OAR-010-000721.

- In early April 2015, OAR Communications Director Kirsten Kukowski pushed back against a New York Times reporter—the same one who would go on to write the "campaign-in-waiting" piece that OGC says OAR "initially agreed" with—and told him it was "much, much too early" and "right now is not the time" for the reporter to "meet with . . . key members of the team, and some of the finance people." OAR-010-000450-51.
- On May 21, 2015, OAR Executive Director Rick Wiley wrote to RNC Chief of Staff Katie Walsh to decline an invitation to participate in a meeting between the RNC and representatives of various actual and prospective candidates:

Thank you for inviting Our American Revival (OAR) staff to a meeting at the Republican National Committee.

OAR is a Section 527 political organization. We are working with Governor Walker to spread a message of big, bold reforms to states and supporters nationwide. We are not, however, a candidate committee of Governor Walker.

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As such, OAR cannot engage in discussions that may be associated with or directed toward planning for a potential federal candidacy.

For this reason, OAR must decline the invitation. We look forward to continued good relations with you and everyone at the RNC, and appreciate your understanding of the limitations of our legal status.

OAR-000-000001.

iii. *OGC Has Not Yet Provided Documents To OAR As Required By Commission Procedures.*

Commission procedures require OGC to provide OAR with "all relevant documents gathered by the Office of General Counsel in its investigation, not publicly available and not already in the possession of respondent, in connection with its investigation of the allegations against the respondent," including "any documents that contain exculpatory information." 76 Fed. Reg. 34986, 34990 (June 15, 2011). OGC is to provide the documents in response to a request made within 15 days of the date of the General Counsel's notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause." 76 Fed. Reg. at 34991.

In these matters, OGC notified OAR of its probable cause recommendation on the evening of May 11, 2020. After reviewing the Probable Cause Brief and conferring with OAR, I requested documents pursuant to the procedures referenced above on May 18, 2020. As of the date of this response, May 26, 2020, OGC has yet to provide its documents to OAR. Instead, it has provided only the documents it references in the Probable Cause Brief.

Of course, under the Commission's procedures, OGC still has several days to provide documents to OAR. Still, under the circumstances of these matters, which have reached the end of the statute of limitations but which OGC nonetheless continues to push forward to a probable cause vote—which we expect OGC intends to seek with great haste—the failure to provide documents is particularly unfair and has deprived OAR of the full opportunity to defend itself against the allegations in the Probable Cause Brief.

This is just the latest way in which OGC has jammed and prejudiced OAR in these matters. The Commission "is specifically empowered to conduct investigations expeditiously." Williams, 104 F.3d at 241. And yet, this investigation was initiated four years after the filing of the underlying complaints, with just a year remaining on the statute of limitations. By that time, the national political landscape had shifted dramatically and Governor Walker was out of office. OAR's personnel all had departed and moved on to other projects, too, and OAR was out of funds and waiting to terminate. The commencement of a far-reaching, fast-moving investigation under these circumstances was entirely unfair to OAR—and to the individuals and vendors who worked for it many years ago now, who suddenly were served with subpoenas and, in some cases, apparently had to retain attorneys to determine their rights and obligations and to interface with OGC on their behalves.

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OGC took a year to conduct this investigation, and no doubt had many months to prepare for this moment. With full awareness of the requirements of the Commission's document procedures—and in particular, its goals of “promoting fairness in the enforcement process” and giving respondents “the greatest possible access to documents and information” so that they can “present fully informed submissions and frame legal issues for the Commission's consideration”—OGC should have had the documents ready and provided them by now, instead of waiting to provide them until after it knows OAR's response to its Probable Cause Brief is due.

Conclusion

The statute of limitations on these matters has expired. Even if these matters are not time-barred, OGC has failed to establish probable cause because it does not—and cannot—appropriately allocate OAR's expenditures between its bona fide, issue-focused mission and the testing the waters activities OGC attempts to allege. The Probable Cause Brief also is based, almost entirely, on snippets from a selected few documents OGC obtained from a single OAR vendor. When viewed in full context—which includes the passages that surround those snippets, as well as documents OAR produced but which OGC does not present to the Commission—it becomes clear that the Probable Cause Brief is a twisted, one-sided narrative that does not stand up to the full record in this matter.

Moreover, a probable cause finding in these matters would shatter 35 years of Commission precedent, as discussed at length in OAR's Response to Factual and Legal Analysis submitted last year in these matters.

For all these reasons, OAR urges the Commission to dismiss these stale matters and close its files.

Additionally, pursuant to the Commission's Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and its Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009), OAR requests an oral hearing before the Commission on these matters, so that it can argue against these time-barred matters and the departure from over three decades of precedent that a probable cause finding would represent—particularly for the benefit of Commissioner Trainor, who soon will join the Commission with no prior familiarity with these matters.

Sincerely,

Chris Ashby
Counsel, Our American Revival

cc: Lisa J. Stevenson, Acting General Counsel
Charles Kitcher, Acting Associate General Counsel for Enforcement
Lynn Y. Tran, Assistant General Counsel
Adrienne C. Baranowicz, Attorney