



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 28, 2022

VIA EMAIL & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

chair@pimadems.org

Bonnie Heidler, Chair
Pima County Democratic Party
4639 E. First Street
Tucson, AZ 85711

RE: MUR 7303
(McSally for Congress, *et al.*)

Dear Ms. Heidler:

This is in reference to the complaint filed on behalf of Pima County Democratic Party with the Federal Election Commission on December 17, 2017, concerning McSally for Congress and Paul Kilgore in his official capacity as treasurer (the "House Committee") and Martha McSally. On May 20, 2021, the Commission dismissed the following allegations: that Martha McSally untimely filed her Statement of Candidacy in violation of 52 U.S.C. § 30102(e); that Martha McSally violated 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for her House candidacy and potential Senate candidacy; and that the House Committee and Senate Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to properly report receipts and disbursements in connection with her testing-the-waters activities. Accordingly, on May 20, 2021, the Commission closed the file in MUR 7303. The Factual and Legal Analysis, which the Commission approved on June 24, 2021, formed the basis for the Commission's findings and is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8). If you have any questions, please contact me at (202) 694-1650 or cgalagher@fec.gov.

Sincerely,

A handwritten signature in cursive script that reads "Christine C. Gallagher".

Christine C. Gallagher
Attorney

Enclosure
Factual and Legal Analysis

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: McSally for Congress and Paul Kilgore MURs 7303 and 7380
in his official capacity as treasurer
McSally for Senate, Inc. and Paul Kilgore
in his official capacity as treasurer
Martha McSally

I. INTRODUCTION

During the 2018 election cycle, Martha McSally was serving as U.S. Representative from Arizona’s 2nd Congressional District and was a candidate for the U.S. Senate.¹ The MUR 7303 Complaint alleges that McSally failed to file a timely Statement of Candidacy for the Senate and that McSally for Congress and Paul Kilgore in his official capacity as treasurer (“House Committee”) continued to raise and spend funds to support McSally’s Senate campaign, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).² The Complaint in MUR 7380 alleges that McSally, her House Committee, and McSally for Senate, Inc. and Paul Kilgore in his official capacity as treasurer (“Senate Committee”) violated the Act by raising and spending funds through both her House and Senate Committees to support her Senate candidacy, and illegally transferring nearly \$1 million from her House Committee to her Senate Committee in January and February 2018.³ Finally, the Complaint in MUR 7566 and the Referral by the Commission’s Reports Analysis Division in RR 19L-28 (MUR 7910) allege that the Senate Committee received excessive contributions during the 2018 election cycle.⁴

¹ McSally won the August 28, 2018, Republican primary for the U.S. Senate and lost the general election in November 2018. On January 3, 2019, McSally was appointed by the Arizona governor to fill a vacant U.S. Senate seat.

² MUR 7303 Compl. at 1-2 (Dec. 15, 2017).

³ MUR 7380 Compl. at 1, 4 (May 7, 2018).

⁴ MUR 7566 Compl. at 2 (Feb. 12, 2019); RR 19L-28 at 1 (Aug. 28, 2019).

As set forth below, the Commission finds reason to believe that the House Committee and Senate Committee violated 52 U.S.C. § 30116(a)(5)(C) and that the Senate Committee violated 52 U.S.C. § 30116(f) in connection with the receipt of excessive contributions. In addition, the Commission exercises its prosecutorial discretion and dismisses the allegation that McSally failed to timely file her Statement of Candidacy for the Senate, in violation of 52 U.S.C. § 30102(e). Further, the Commission dismisses the allegation that the House Committee and the Senate Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to properly report receipts and disbursements in connection with McSally's testing-the-waters activities. Last, the Commission dismisses the allegation that McSally violated 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for her House candidacy and potential Senate candidacy. The Commission merges MURs 7566 and 7910 into MUR 7380, and closes MUR 7303.

II. FACTS

A. MUR 7303

McSally filed her Statement of Candidacy for re-election to the House in 2018 on November 23, 2016.⁵ McSally for Congress is her principal campaign committee for her House campaign.⁶ On January 11, 2018, she filed a Statement of Candidacy for the Senate.⁷ McSally

⁵ Martha McSally, Statement of Candidacy (House) (Nov. 23, 2016).

⁶ McSally for Congress, Statement of Organization (amended May 30, 2017).

⁷ Martha McSally, Statement of Candidacy (Senate) (Jan. 11, 2018).

MURs 7303 and 7380 (McSally for Congress, *et al.*)

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for Senate, Inc. is her principal committee for the Senate campaign.⁸ Paul Kilgore is both committees' treasurer.

The Complaint in MUR 7303, filed about a month before McSally declared her candidacy for the Senate, alleges that she triggered candidacy as early as November 7, 2017, when a news article reported that Representative David Schweikert said McSally told him that she was running for the Senate seat to be vacated by then-Senator Jeff Flake.⁹ The article reported that "[t]he news didn't come from McSally" but from Schweikert, who "confirmed to reporters for several news outlets that the retired Air Force colonel said she was planning to enter the Senate race," and that McSally could not be reached for comment.¹⁰ The Complaint further alleges that McSally hired a polling company, WPA Intelligence, in November 2017 "to run a poll geared towards setting the strategy of her new campaign for U.S. Senate."¹¹ The Complaint alleges that after the date of the news article, the House Committee continued to accept contributions and make expenditures, and that McSally's House campaign website was still live and soliciting contributions.¹² The Complaint further alleges that Respondents used the House Committee to fundraise for McSally's Senate candidacy, implying that she was using her House Committee as the authorized committee for her Senate campaign without filing an Amended

⁸ McSally for Senate, Inc., Statement of Organization (Jan. 11, 2018).

⁹ MUR 7303 Compl. at 3 & n.6 (citing Mike Christy, *U.S. Rep. Martha McSally Tells House Colleagues She's Running for Senate*, ARIZONA DAILY STAR, Nov. 7, 2017, https://tucson.com/news/local/us-rep-martha-mcsally-tells-house-colleagues-she-s-running/article_6075f236-83fe-5d8a-87fe-924ac7fd90f3.html ("Arizona Daily Star Article"))

¹⁰ Arizona Daily Star Article.

¹¹ MUR 7303 Complaint at 3-4.

¹² *Id.*

1 Statement of Organization.¹³ The Complaint argues that given these facts, McSally must have
2 raised or spent \$5,000 in support of her Senate campaign by November 15, 2017, thus triggering
3 the requirement to file her Statement of Candidacy within 15 days.¹⁴

4 In a joint Response to MUR 7303, McSally and the House Committee assert that
5 Schweikert was not McSally’s agent or authorized representative, nor did he have actual or
6 implied authority to act or speak on her behalf.¹⁵ The Response further asserts that McSally was
7 merely testing the waters for a possible Senate candidacy in November 2017, but she did not
8 become a Senate candidate until her announcement in January 2018.¹⁶ During this time, she
9 “met with various constituents and groups throughout Arizona, and performed traditional testing-
10 the-waters activities, such as polling, to determine the viability of her potential candidacy for
11 Senate.”¹⁷

12 **B. MUR 7380**

13 The Complaint in MUR 7380 alleges that after McSally became a declared Senate
14 candidate, Respondents impermissibly raised and spent funds through both her House and Senate
15 Committees to support her dual candidacy, and that the House Committee impermissibly
16 transferred approximately \$1 million to the Senate Committee while McSally was actively
17 seeking election to more than one Federal office.¹⁸ According to the Complaint, on January 22,

¹³ *Id.* at 4.

¹⁴ *Id.* at 3.

¹⁵ MUR 7303 Resp. at 4 (Feb. 7, 2018).

¹⁶ *Id.* at 2, 4.

¹⁷ *Id.* at 2.

¹⁸ MUR 7380 Compl. at 1-2.

1 2018, the House Committee transferred \$140,000 to the Senate Committee, and on February 13,
2 2018, it made an additional transfer of \$832,498.97.¹⁹ The Complaint alleges that McSally made
3 no formal announcement that she had abandoned her House candidacy nor did she file a
4 termination report with the Commission.²⁰ According to the Complaint, these transfers indicate
5 that McSally maintained the House Committee merely to raise additional funds under a separate
6 limit to support her Senate candidacy.²¹

7 In a joint Response to MUR 7380, Respondents assert that the House Committee did not
8 solicit or disburse funds to further her Senate campaign.²² Specifically, Respondents assert that
9 any contributions the House Committee received after McSally announced her Senate candidacy
10 were in response to “direct mail and email solicitations that were sent out before she became a
11 candidate for Senate, most of which were in small dollar amounts.”²³ Respondents further assert
12 that disbursements from her House Committee after McSally announced her Senate candidacy
13 were made in connection with House Committee expenses incurred before McSally became a
14 Senate candidate, not to further her Senate campaign.²⁴ Additionally, Respondents state that the
15 House Committee remains open because of ongoing enforcement matters, including an audit.²⁵
16 Last, Respondents assert that the transfers from the House Committee to the Senate Committee

¹⁹ *Id.* at 4.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² MUR 7380 Resp. at 4 (May 3, 2018).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 5; see A15-04, Final Audit Report of the Commission on McSally for Congress 2014 (May 15, 2018); ADR 872 (McSally for Congress) (closed on July 3, 2019, with a negotiated settlement).

were permissible because they occurred after McSally publicly announced that she was not running for re-election to the House, and the House Committee’s counsel informed the Commission’s Reports Analysis Division (“RAD”) that McSally was not running for re-election.²⁶

C. MUR 7566 and RR 19L-28

The Complaint in MUR 7566 alleges that during the 2018 election cycle, the Senate Committee received more than \$270,000 in excessive contributions from over 60 individuals.²⁷ The allegations are based on two Requests for Additional Information (“RFAI”) that RAD sent to the Committee regarding its Amended 2018 12-Day Pre-General and Amended 2018 30-Day Post-General Reports, as well as to a news article referencing those RFAs.²⁸

The Referral in RR 19L-28 states that the Senate Committee received a total of \$52,300 in excessive contributions from 20 individuals from October 1 through November 26, 2018, which were not timely refunded, reattributed or redesignated within the permissible time frames. On January 28, 2019, RAD sent an RFAI to the Senate Committee identifying \$116,667.50 in excessive contributions from 59 individuals appearing on its first amended 2018 30-Day Post-

²⁶ MUR 7380 Resp. at 6-7 & nn.19-22.

²⁷ MUR 7566 Compl. at 2.

²⁸ *Id.* at 2-3, nn.7, 8 (citing RFAI (Jan. 28, 2019); RFAI (Feb. 5, 2019); Brian Slodysko, *FEC Flags Arizona Senator for Excessive Campaign Donations*, AP NEWS (Jan. 31, 2019), <https://apnews.com/41d63f30a1da4fedb9b5d8a4118e0a10>). The Complaint further alleges recidivism with regard to the Senator’s federal political committees, and as support refers to the Commission’s 2014 audit of the House Committee. MUR 7566 Compl. at 3-4 & n.9-11 (citing Dylan Smith, *Errors in McSally Campaign Reports Add Up to Millions*, TUCSON SENTINEL (July 17, 2015), http://www.tucsonsentinel.com/local/report/071715_mcsally/errors-mcsally-campaign-reports-add-up-millions/; Dylan Smith, *FEC Audit: McSally Campaign Misstated Finances, Didn’t Disclose Donors’ Jobs*, TUCSON SENTINEL (Apr. 26, 2018), https://www.tucsonsentinel.com/local/report/042618_mcsally_fec/fec-audit-mcsally-campaign-misstated-finances-didnt-disclose-donors-jobs/).

1 General Report.²⁹ On February 5, 2019, RAD sent another RFAI to the Senate Committee
2 referencing the Amended 2018 12-Day Pre-General Report filed on October 25, 2018, which
3 contained excessive and prohibited contributions totaling \$25,800 from ten individuals and two
4 limited liability companies.³⁰

5 In Response to the MUR 7566 Complaint, the Senate Committee asserts that it timely
6 refunded or reattributed each of the excessive contributions identified in the January 2019 RFAI,
7 and addressed them in either its 2018 Year End Report, 2019 April Quarterly Report, or its Form
8 99 Miscellaneous Report filed March 4, 2019.³¹

9 As set forth in detail in the Referral, the Committee timely remedied all but \$30,700 in
10 excessive contributions from twelve individuals disclosed on its first amended 2018
11 30-Day Post-General Report filed January 23, 2019,³² and timely remedied all but \$21,600 in
12 excessive contributions appearing on its original 2018 12-Day Pre-General Report filed October
13 25, 2018.³³

14 From June 7 through July 26, 2019, a RAD analyst spoke with the Senate Committee's
15 treasurer or representative a few times regarding the excessive contributions, and notified the
16 Committee that it could be referred for potential enforcement action.³⁴ The Senate Committee
17 explained that some of the refunds were made outside of the permissible time frames because it

²⁹ RFAI (Jan. 28, 2019).

³⁰ RR 19L-29 at 1-2.

³¹ MUR 7566 Resp. at 2.

³² RR 19L-28 at 3-6.

³³ *Id.* at 1-3.

³⁴ *Id.* at 5-6.

received the RFAIs in late January and early February 2019.³⁵ On August 28, 2019, RAD referred the Senate Committee to the Office of the General Counsel (“OGC”) and on the same day OGC forwarded a copy of the Referral to the Senate Committee. The Senate Committee did not respond to the RAD Referral.

III. LEGAL ANALYSIS

A. There Is Reason to Believe McSally Impermissibly Transferred Funds from the House Committee to the Senate Committee During the Time She Was “Actively Seeking” Both Nominations.

The Act and Commission regulations restrict transfers of funds between the principal campaign committees of a candidate who is seeking nomination or election to more than one Federal office.³⁶ A candidate is deemed to be seeking more than one Federal office if the individual is concurrently a candidate for more than one Federal office during the same or overlapping election cycles, and is thus subject to the “dual candidacy” transfer rules.³⁷

No funds may be transferred between the separate campaigns, except the transfer of funds between the principal campaign committees of a House or Senate candidate is permissible provided that two conditions are met: (i) the limitations in the Act on contributions by persons are not exceeded by such transfer, and (ii) the transfer is not made when the candidate is “actively seeking” nomination or election to both such offices.³⁸

³⁵ *Id.* at 6.

³⁶ 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5)(i).

³⁷ *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contributions Limitations and Earmarked Contributions* (“E&J, *Transfers*”), 54 Fed. Reg. 34,098, 34,102-03 (Aug. 17, 1989). This rule, 11 C.F.R. § 110.3(c), along with others, implements the contribution limitations and prohibitions of the Act. *Id.*

³⁸ 52 U.S.C. § 30116(a)(5)(C); *see also* 11 C.F.R. §§ 110.3(c)(5), 110.8(d).

1 1. Actively Seeking

2 Addressing the “actively seeking” condition precedent to a legal transfer first, an
3 individual will not be considered to be “actively seeking” nomination or election to a Federal
4 office if one of the following four criteria is met: (1) the individual has publicly announced that
5 she will no longer seek nomination or election to that Federal office and “ceases to conduct
6 campaign activities with respect to that election except in connection with the retirement of debts
7 outstanding at the time of the announcement;”(2) “the individual becomes ineligible for
8 nomination or election to that office by operation of law;” (3) the individual has filed a
9 termination report with the Commission; or (4) the individual has notified the Commission in
10 writing that she will no longer conduct further campaign activities with respect to that election.³⁹

11 None of the four criteria in the regulation appears to be met here. Taking the criteria in
12 turn, the available information does not support McSally’s argument that she had personally
13 disavowed her House re-election campaign in January 2018 when she declared her Senate
14 candidacy, nor is it clear that she ceased campaign activities with respect to her House race.
15 Respondents assert that McSally “has made numerous public statements to this effect, in both
16 smaller settings and larger campaign events and fundraisers,” yet they provide no details or
17 declarations in support of this assertion. Instead, they cite only to three news articles reacting to
18 McSally’s announcement that she was running for the Senate, two of which observe that there
19 would be no incumbent on the House ballot in her district, and one of which quotes the
20 Democratic Congressional Campaign Committee as stating that McSally’s Senate race

³⁹ 11 C.F.R. § 110.3(c)(5)(i). This regulation implements 52 U.S.C. § 30116(a)(5)(C). E&J, *Transfers*, 54 Fed. Reg. at 34,103.

1 announcement creates a “vacancy” in the House.⁴⁰ While a public statement by a third party that
 2 a person is running for the Senate may imply that the person is no longer running for the House,
 3 the Commission’s regulation specifies that the individual candidate must announce that he or she
 4 will no longer seek election or nomination to the Federal office.⁴¹ The Commission’s review of
 5 publicly available information from the relevant time period did not reveal that McSally herself
 6 publicly stated that she would not be running for re-election to the House.

7 Further, the available information does not sufficiently demonstrate that the Committee
 8 ceased campaign activity after McSally’s Senate candidacy announcement. The House
 9 Committee’s reports disclose that it accepted over \$380,000 in contributions, which included
 10 \$17,500 in PAC contributions, between January 1 and March 31, the large majority of which
 11 were received after McSally filed her Statement of Candidacy for the Senate race on
 12 January 11.⁴² While Respondents assert that these funds were received by the House Committee
 13 in response to solicitations sent before McSally’s Senate run announcement,⁴³ their assertion in
 14 the response is general and unsworn. On the other hand, publicly available information shows
 15 that the House Committee’s campaign website, which contained a “donate” link to accept

⁴⁰ MUR 7380 Resp. at 6-7 nn.20-22 (citing Matthew Yglesias, *Arizona’s Already Very Complicated Senate Race, explained*, VOXMEDIA (Jan. 12, 2018), <https://www.vox.com/policy-and-politics/2018/1/12/16877796/mcsally-announcement-arizona-senate>; Steven Shepard and Kevin Robillard, *McSally Will Run for Senate in Arizona*, POLITICO (Jan. 12, 2018), <https://www.politico.com/story/2018/01/12/martha-mcsally-arizona-senate-race-283408>; Democratic Congressional Campaign Committee, *DCCC Statement of Martha McSally’s Run for U.S. Senate* (Jan. 12, 2018), <https://dccc.org/dccc-statement-martha-mcsallys-run-u-s-senate/>).

⁴¹ See 11 C.F.R. § 110.3(c)(5)(i)(A).

⁴² McSally for Congress 2017 Year-End Report at 2 (Jan. 31, 2018); McSally for Congress 2018 April Quarterly Report at 2 (Apr. 13, 2018). Although the regulations do not define “campaign activities” for the purpose of determining whether a candidate ceases to conduct campaign activities with respect to a particular election, the Commission has defined “campaign activities” in another context to include accepting contributions. See 11 C.F.R. § 9004.7(b)(2) (defining “campaign activity” for purposes of determining qualified campaign expenses for presidential general election public financing). The House Committee had no debt to retire.

⁴³ See MUR 7380 Resp. at 4.

1 contributions, remained active until January 2, 2018, a fact which would suggest that the House
2 Committee ceased activities just before her Senate candidacy announcement.⁴⁴

3 As to the second “actively seeking” criterion, whether and when McSally became
4 ineligible to run for one of the offices by operation of law, Arizona law provides:

5 A person is not eligible to be a candidate for nomination or election
6 to more than one public office if the elections for those offices are
7 held on the same day and if the person would be prohibited from
8 serving the offices simultaneously. A person is not eligible to be a
9 candidate for nomination or election to more than one federal office
10 simultaneously (except for offices of president and vice
11 president).⁴⁵

12 To have appeared on the ballot in the August 28, 2018, Arizona Senatorial primary, a candidate
13 had to have filed a Statement of Candidacy with the Commission and submitted that statement
14 along with a “Federal Candidate Nomination Paper Declaration of Qualification” with the
15 Arizona Secretary of State sometime between April 30 and May 30, 2018.⁴⁶

16 McSally filed her Statements of Candidacy with the Commission for the House on
17 November 23, 2016, and for the Senate on January 11, 2018. On May 16, 2018, she filed the
18 required documents with the Arizona Secretary of State to run for the Senate.⁴⁷ Thus, by
19 qualifying on May 16 for the Republican Senatorial primary, she became legally ineligible to run
20 for re-election to the House. Thus, under operation of state law, she was “actively seeking” both
21 positions until May 16.

⁴⁴ See MCSALLYFORCONGRESS.COM (Jan.2, 2018) *archived at*
<https://web.archive.org/web/20180102180444/https://mcsallyforcongress.com/>.

⁴⁵ A.R.S. § 38-296.01; *see also* A.R.S. § 38-296; Ariz. Const. Art. 22.

⁴⁶ *See* A.R.S. § 16-311.

⁴⁷ *See* State of Arizona, Martha McSally Federal Candidate Nomination Paper Declaration of Qualification (May 16, 2018), <https://apps.arizona.vote/electioninfo/assets/4/0/NominationPapers/mcsally-martha-8780-6029.pdf>.

1 With regard to the third and fourth criteria of the “actively seeking” regulation, the record
2 indicates that McSally has not filed a termination report with the Commission nor did she notify
3 the Commission in writing until August 30, 2018—the date of her Response to the Complaint in
4 MUR 7380—that she and the House Committee would conduct no further campaign activities
5 other than retiring debts. Respondents also state that counsel to the House Committee informed
6 RAD by phone that McSally was not running for re-election to the House.⁴⁸ RAD’s records
7 show that on February 22, 2018, counsel to the House Committee spoke with RAD in connection
8 with an audit of the House Committee’s 2014 cycle activity, and they discussed termination
9 guidelines and how to disclose a transfer of residual funds to the Senate Committee. RAD told
10 counsel that while it encourages committees to file a Miscellaneous Report (“Form 99”) to
11 indicate that a dual candidate is no longer conducting activities with respect to one of the
12 campaigns, RAD does not require a Form 99 if it is clear from the candidate’s public statements
13 and media sources that the candidate is no longer seeking one of the offices. Thus, while counsel
14 did speak with RAD on this subject, the regulation requires that the notice be written. As
15 discussed above, McSally’s public statements were not sufficiently clear, and, in any event, the
16 bulk of the transfers, \$972,498.97, occurred *before* this conversation.⁴⁹

17 In sum, the available information does not demonstrate that McSally had satisfied any of
18 the “actively seeking” criteria until May 16, 2018, so the second condition precedent for a legal
19 transfer between the House and Senate Committees did not occur.

⁴⁸ MUR 7380 Resp. at 6 n.19.

⁴⁹ 11 C.F.R. § 110.3(c)(5)(i)(D).

1 2. Contribution Limits

2 As for the other condition precedent to a legal transfer between the House and Senate
3 Committee – compliance with the applicable contributions limits—the Committees did not meet
4 it. The Act prohibits any person from making contributions to any candidate and the candidate’s
5 authorized political committee in excess of the limits at 52 U.S.C. § 30116(a), and candidate
6 committees are prohibited from knowingly accepting excessive contributions.⁵⁰ For the 2017-
7 2018 election cycle, individuals were permitted to contribute a maximum of \$2,700 to a
8 candidate or candidate committee per election.⁵¹ All refunds, reattributions, or redesignations of
9 contributions which exceed the Act’s limitations must be made within sixty (60) days of
10 receipt.⁵²

11 The Committees’ disclosure reports reveal that the transfers from the House Committee
12 to the Senate Committee resulted in at least \$10,875 in excessive contributions that were either
13 not remedied or had not been refunded as of the date of McSally’s October 2019 Quarterly
14 Report. Further, it is not clear whether the Senate Committee obtained proper redesignations of
15 money contributed to the House Committee. Thus, Respondents have not satisfied the first of
16 the two conditions precedent for a permissible transfer from the House to the Senate Committee.

17 Commission regulations provide that when an individual is a candidate for more than one
18 Federal office, a separate contribution limitation applies for each election to each office.⁵³ If a
19 candidate is no longer seeking two federal offices, and the transfer from one campaign

⁵⁰ 52 U.S.C. § 30116(f); 11 C.F.R. § 110.9.

⁵¹ 52 U.S.C. § 30116(a)(1)(A).

⁵² 11 C.F.R. § 103.3(b)(3).

⁵³ 11 C.F.R. §§ 110.1(f), 110.8(d).

1 committee to the other is otherwise permitted, the contributions which make up the transfer shall
2 be reviewed on a “last in, first transferred” basis, beginning with the last contribution received
3 and working back until the amount transferred is reached. The total amount transferred must be
4 reduced if the described review of contributions indicates that any contributor has reached the
5 applicable limitation of the Act.⁵⁴ In addition, the transferee committee must disclose the
6 transferred funds received as contributions received from the original contributors.⁵⁵

7 McSally’s reports show four transfers from the House to the Senate Committees totaling
8 \$1,292,982.77: \$140,000.00 on January 22, 2018; \$832,498.97 on February 13, 2018; \$6,222.63
9 on May 10, 2018; and \$314,261.17 on June 6, 2018. The January, February and May transfers
10 were impermissible because McSally was still “actively seeking” the nomination or election to
11 both the House and Senate at those times. The June transfer is permissible because it occurred
12 after McSally filed her nomination papers for the Senate primary. Moreover, the House
13 campaign was required to obtain written statements from the House contributors redesignating
14 those contributions to the Senate candidacy, and aggregate those contributions with any others
15 from those contributors to the Senate campaign.⁵⁶ The Senate Committee appears to have
16 reported each transfer, disclosing memo entries to support each transfer on Schedule A for Line
17 12 of its reports. The memo entries appear to disclose the transferred funds received as
18 contributions received from the original contributors.

⁵⁴ See 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5)(ii); *see also* Advisory Op. 1984-38 (Friends of Jim Oberstar); Advisory Op. 1979-51 (Edgar for Congress Committee); Advisory Op. 1982-01 (James J. Florio).

⁵⁵ See 11 C.F.R. § 104.12.

⁵⁶ See 11 C.F.R. §§ 110.3(c)(5)(ii); 110.1(b)(5).

Nonetheless, an examination of the Committees' reports reveals that the Act's individual contribution limits were exceeded as a result of the transfers in the total amount of \$10,875: \$4,475 in excessive individual contributions that were not remedied as of September 30, 2019, the date of closing for the 2019 October Quarterly Report, and \$6,400 that was refunded outside the applicable sixty-day limit set forth in 11 C.F.R. § 103.3(b)(3). Further, the current record does not indicate whether the Senate Committee obtained the necessary contribution redesignations.⁵⁷

Therefore, there is reason to believe that the House Committee and Senate Committee violated 52 U.S.C. § 30116(a)(5)(C) by impermissibly transferring funds from the House Committee to the Senate Committee. There is also reason to believe that the Senate Committee violated 52 U.S.C. § 30116(f) by knowingly accepting excessive individual contributions created by the transfer.

B. The Commission Exercises its Prosecutorial Discretion and Dismisses the Allegation that McSally Untimely Filed her Statement of Candidacy

According to the Act, an individual becomes a candidate if: (a) such individual receives contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions or has made such expenditures in excess of \$5,000.⁵⁸ Once the \$5,000 threshold has been met, the candidate has fifteen days to

⁵⁷ See Factual and Legal Analysis at 4-5, MUR 3063 (Bonker for Senate Committee) (Commission found reason to believe Bonker Senate Committee violated Title 2 predecessor to 52 U.S.C. § 30116(a)(5)(C)(i) for transferring funds from authorized Bonker House Committee to Senate Committee while candidate was actively seeking election to both federal offices). The Commission conciliated with the Senate Committee after discovery. See Certifications, MUR 3063 (Dec. 24, 1990 and July 12, 1991).

⁵⁸ 52 U.S.C. § 30101(2).

1 designate a principal campaign committee by filing a Statement of Candidacy with the
2 Commission.⁵⁹ The principal campaign committee must file a Statement of Organization within
3 ten days of its designation,⁶⁰ and must file disclosure reports with the Commission in accordance
4 with 52 U.S.C. § 30104(a) and (b).⁶¹

5 Notwithstanding the reporting requirements triggered by an individual's candidacy, the
6 Commission has established limited "testing-the-waters" exemptions that permit an individual to
7 test the feasibility of a campaign for Federal office without becoming a candidate under the
8 Act.⁶² These exemptions exclude from the definition of "contribution" and "expenditure" those
9 funds received and payments made solely to determine whether an individual should become a
10 candidate.⁶³ These regulations seek to "draw a distinction between activities directed to an
11 evaluation of the feasibility of one's candidacy, as distinguished from conduct signifying that a
12 private decision to become a candidate has been made."⁶⁴ Testing-the-waters activities include,
13 but are not limited to, payments for polling, telephone calls, and travel, and only funds
14 permissible under the Act may be used for such activities.⁶⁵ The testing-the-waters exemption is
15 not available to individuals who have made a decision to become a candidate or conduct

⁵⁹ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

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

⁶¹ *See, e.g.*, Factual and Legal Analysis at 6-9, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

⁶² 11 C.F.R. §§ 100.72, 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

⁶³ 11 C.F.R. §§ 100.72(a), 100.131(a).

⁶⁴ Advisory Op. 1981-32 at 4 (Reubin Askew).

⁶⁵ 11 C.F.R. § 100.72(a).

activities that indicate he or she has decided to become a candidate.⁶⁶ Commission regulations set forth a non-exhaustive list of activities that indicate that an individual is no longer testing the waters and has decided to become a candidate. Such indicia include: (1) using general public political advertising to publicize his or her intention to campaign for Federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time;⁶⁷ and (5) taking action to qualify for the ballot under state law.⁶⁸

McSally contends that she was merely considering a run for the Senate and alleges that Schweikert's reported statement to the press on November 7, 2017, that "[s]he said she's in for Senate,"⁶⁹ is hearsay, and is not attributable to her given that Schweikert is not McSally's agent or authorized representative, nor does he have actual or implied authority to speak on her behalf.⁷⁰ Regardless, the time between Schweikert's statement and McSally's candidacy

⁶⁶ See Advisory Op. 2015-09 at 5 (Senate Majority PAC, *et al.*) ("AO 2015-09"); see also Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

⁶⁷ 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.

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

⁶⁹ See n.9, *supra*.

⁷⁰ See MUR 7303 Resp. at 4.

1 announcement was relatively short—about two months—and occurred long before the primary
 2 election.⁷¹

3 Therefore, the Commission exercise its prosecutorial discretion and dismisses the
 4 allegations that McSally untimely filed her statement of candidacy in violation of 52 U.S.C.
 5 § 30102(e).⁷²

6 **C. The Commission Exercises its Prosecutorial Discretion and Dismisses the**
 7 **Allegations that Respondents Did Not Properly Report Receipts and**
 8 **Disbursements for McSally’s House and Senate Campaigns and Failed to**
 9 **Maintain Separate Campaign Organizations.**

10 Under the Act, reports filed with the Commission must accurately disclose, *inter alia*, the
 11 total amount of all receipts and disbursements as well as total amounts in contributions and
 12 expenditures made to meet the candidate’s or committee’s operating expenses.⁷³ Commission
 13 regulations provide that treasurers are personally responsible for ensuring the timely and
 14 complete filing of committee reports and the accuracy of the information contained therein.⁷⁴

15 An individual who is testing the waters need not register or file disclosure reports with
 16 the Commission unless and until the individual subsequently decides to run for Federal office,⁷⁵
 17 or conducts activities that indicate he or she has decided to become a candidate.⁷⁶ All funds
 18 raised and spent for testing-the-waters activities are, however, subject to the Act’s limitations

⁷¹ See Factual and Legal Analysis at 6-7, MUR 7261 (Levi for Colorado) (Dismissing allegation that candidate filed Statements of Candidacy and Organization about one month late but well in advance of primary election).

⁷² See *Heckler v. Chaney*, 470 U.S. 521 (1985).

⁷³ 52 U.S.C. § 30104(b)(2), (4).

⁷⁴ 11 C.F.R. § 104.14(d).

⁷⁵ 11 C.F.R. §§ 100.72(b), 100.131(b). See also AO 2015-09.

⁷⁶ *Id.*; see also Advisory Op. 1979-26 (Grassley) (funds raised or spent solely for exploratory purposes are not immediately subject to the Act’s reporting requirements).

1 and prohibitions.⁷⁷ Commission regulations require that once the individual begins to campaign
 2 or decides to become a candidate, funds received and disbursed for testing-the-waters activities
 3 are subject to the reporting requirements of the Act, and must be reported with the first report
 4 filed by the candidate's principal campaign committee.⁷⁸

5 Finally, Commission regulations provide that an individual seeking more than one
 6 Federal office, or a Federal office and a state office, must designate separate principal campaign
 7 committees and maintain completely separate campaign organizations.⁷⁹ No funds, goods, or
 8 services may be transferred between or used by the separate campaigns, except as provided by
 9 the Commission regulations.⁸⁰ If an individual wishes to contribute to both campaigns, the
 10 contributions for each election for each office must be made to separate committees.⁸¹

11 The Act does not address, however, whether individuals who have declared their
 12 candidacies for one federal office and are testing the waters for a second federal office need to
 13 establish separate campaign committees. *See* Statement of Reasons in MURs 7263 (Lucas

⁷⁷ 11 C.F.R. §§ 100.72(a); 100.131(a).

⁷⁸ *Id.* Commission regulations further require that an individual testing the waters keep records of the name of each contributor, the date of receipt and amount of all funds received, and all payments made in connection with activities conducted under 11 C.F.R. §§ 100.72 and 100.131. *Id.* § 101.3.

⁷⁹ 11 C.F.R. § 110.8(d); Advisory Op. 1995-3 (Gramm) (“Commission regulations provide that a candidate seeking more than one Federal office must designate separate principal campaign committees and establish completely separate campaign organizations.”) (superseded in part on other grounds); *Campaign Guide for Congressional Candidates and Committees* at 59-60 (June 2014) (presenting example of “Candidate B,” who “begins the 2014 election cycle as a House candidate, but later begins a campaign for a Senate seat in 2014”); *see also* 52 U.S.C. § 30102(e)(3) (prohibiting an authorized committee from supporting more than one candidate); 11 C.F.R. § 101.1(a) (requiring a candidate to include, *inter alia*, his or her name and address, party affiliation, and office sought when designating a principal campaign committee).

⁸⁰ 11 C.F.R. § 110.8(d)(2); *see* 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5), (7).

⁸¹ 11 C.F.R. § 110.1(f). Each contribution must be designated in writing by the contributor for a particular office, and a committee generally may not transfer funds to, loan funds to, make contributions to, or make expenditures on behalf of the candidate's other committee. *Id.*

1 “Luke” Messer, *et al.*) and 7264 (Theodore “Todd” Rokita, *et al.*) (“SOR”).⁸² In MURs 7263
 2 and 7264, Luke Messer and Todd Rokita were each testing the waters for a Senate candidacy
 3 while simultaneously running for re-election to the House and did not establish separate Senate
 4 committees until they declared their Senate candidacies. The Commission concluded that each
 5 committee should have made clear on the public record the proper designations for its House re-
 6 election campaign and Senate exploratory activity.⁸³

7 McSally is similarly situated to Messer and Rokita as a candidate testing the waters for a
 8 Senate candidacy while simultaneously running for re-election to her House seat. While
 9 McSally established a separate Senate Committee after she declared her candidacy, she did not
 10 do so during her Senate exploratory phase, and her House and Senate Committees’ disclosure
 11 reports do not clearly identify some of the receipts and disbursements by disclosing them as in
 12 connection with her House re-election campaign or for testing-the-waters activities.

13 The MUR 7303 Response states that McSally’s testing-the-waters activities included
 14 conducting a poll and “meeting with groups and individuals throughout Arizona.”⁸⁴ But the
 15 Committees’ disclosure reports do not clearly indicate whether they reported these activities
 16 correctly. For example, from November 2017 through January 2018, the House Committee
 17 disclosed a total of \$148,926 in disbursements to WPA Intelligence, the company McSally hired
 18 to conduct polling for her potential Senate run,⁸⁵ and it described the purpose of the

⁸² SOR at 1, Comm’rs Weintraub, Petersen, Hunter and Walther.

⁸³ *Id.* at 2.

⁸⁴ MUR 7303 Resp. at 4.

⁸⁵ MUR 7303 Compl. at n.7.

1 disbursement as “surveying” without disclosing the office sought.⁸⁶ Similarly, the Senate
2 Committee disclosed a disbursement to WPA Intelligence on March 8, 2018, for \$24,750 for
3 “surveying,” also without disclosing the office sought.⁸⁷ Thus, the disclosure reports are not
4 clear as to which disbursement is for the November 2017 poll conducted while McSally was
5 testing the waters for a Senate run. Similarly, the disclosure reports do not show expenses
6 incurred for travelling “throughout Arizona” to meet with various groups and individuals while
7 testing the waters for her potential Senate candidacy.⁸⁸ The payments for travel during the
8 testing-the-waters period became expenditures under the Act once McSally became a Senate
9 candidate, and her Senate Committee was required to report them on its 2018 April Quarterly
10 Report, but it did not.⁸⁹

11 Finally, it is not clear from the disclosure reports whether McSally raised funds for a
12 potential Senate run during the testing-the-waters period, and whether those funds were reported
13 correctly. From January 1 through March 3, 2018, the House Committee reported receipts of
14 \$362,634.54 in contributions from individuals and \$17,500 in PAC contributions.⁹⁰ The
15 MUR 7380 Response states that the House Committee received the contributions from
16 individuals in response to solicitations made before McSally became a Senate candidate.⁹¹

⁸⁶ The House Committee reported the disbursements to WPA as follows: \$21,150 on November 14, 2017; \$39,600 on November 27, 2017; \$6,486.18 on December 12, 2017; \$81,690 on January 12, 2018. *See* McSally for Congress 2017 Year-End Report at 921, 924, 933 (Jan. 31, 2018); McSally for Congress April 2018 Quarterly Report at 357 (Apr. 13, 2018).

⁸⁷ McSally for Senate 2018 April Quarterly Report at 1092 (Apr. 13, 2018).

⁸⁸ MUR 7303 Resp. at 4.

⁸⁹ 11 C.F.R. § 100.131.

⁹⁰ McSally for Congress 2018 April Quarterly Report (Apr. 13, 2018).

⁹¹ *See* MUR 7380 Resp. at 4.

1 Further, publicly available information shows that the House campaign website, which contained
2 a “donate” link to accept contributions, remained active until January 2, 2018.⁹² The Senate
3 Committee’s reports disclose contributions from individuals in the aggregate amount of
4 \$2,087,881 during the first quarter of 2018, but it is unclear if any of these funds were raised
5 during the testing-the-waters period.⁹³ Consequently, the House Committee reports inaccurately
6 reflect that all of the activity from November 2017 through January 2018 was in connection with
7 McSally’s House campaign, when available information indicates that McSally was spending,
8 and possibly raising, funds to test the waters for her Senate campaign. Thus, the House and
9 Senate Committee reports do not clearly distinguish receipts and disbursements designating
10 campaign and exploratory activity for the different federal offices sought.

11 In MURs 7263 and 7264 the Commission dismissed the allegations that the Rokita and
12 Messer Committees failed to maintain separate campaign organizations and failed to properly
13 report receipts and disbursements in connection with the candidates’ House re-election
14 campaigns and testing-the-waters campaigns for Senate, given that the underlying activity was
15 reported “and the lack of explicit guidance on this issue.”⁹⁴ In dismissing those matters, the
16 Commission advised that similarly situated committees in the future should clearly distinguish
17 campaign and exploratory activity for different offices sought on their disclosure reports.⁹⁵

18 As in MURs 7263 and 7264, the underlying activity related to McSally’s House re-
19 election campaign and Senate exploratory activities was reported. Further, the conduct here

⁹² See <https://web.archive.org/web/20180102180444/https://mcsallyforcongress.com/>.

⁹³ McSally for Senate 2018 April Quarterly Report (Apr. 13, 2018).

⁹⁴ SOR at 3

⁹⁵ *Id.* at 2.

1 occurred before MURs 7263 and 7264 concluded, and thus Respondents did not have the benefit
2 of the Commission's guidance. Under these circumstances, the Commission, like in MURs 7263
3 and 7264, exercises its prosecutorial discretion and dismisses the allegation that McSally failed
4 to establish and maintain separate campaign committees for each of her candidacies during the
5 period in which McSally was testing the waters for her Senate candidacy in violation of
6 11 C.F.R. § 110.8(d) and dismisses the allegation that receipts and disbursements were not
7 accurately reported for McSally's House and Senate campaigns in violation of 52 U.S.C.
8 § 30104(b) and 11 C.F.R. §§ 100.72(a) and 100.131(a).

9 **D. There is Reason to Believe that the Senate Committee Received Excessive**
10 **Contributions**
11

12 As set forth in RAD Referral 19L-28, the Committee did not timely refund or reattribute
13 an aggregate of \$53,200 in excessive contributions from 20 individuals as identified on its 2018
14 12-Day Pre-General and 30-Day Post-General Reports. While the MUR 7566 Complaint alleges
15 that the Committee received \$270,000 in excessive contributions, the Complaint did not take into
16 account the timely corrective action by the Committee. Nonetheless, the \$53,200 in excessive
17 contributions is distinct from the excessive contributions created from the transfer of funds from
18 the House to Senate Committee from April to October 2018 as discussed in Sections II.B and
19 III.A, *supra*.

20 Therefore, there is reason to believe that the Senate Committee violated 52 U.S.C.
21 § 30116(f) by receiving excessive contributions from individuals disclosed in its 2018 12-Day
22 Pre-General and 2018 30-Day Post General Reports.