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Jeff S. Jordan
 Assistant General Counsel
 Complaints Examination & Legal Administration
 Federal Election Commission
 1050 First Street NE
 Washington, DC 20463
VIA EMAIL: CELA@fec.gov

Re: MUR 7380; Response to Complaint from McSally for Congress, et al.

Dear Mr. Jordan:

We are writing this letter on behalf of Congresswoman Martha McSally, McSally for Congress, and Paul Kilgore in his official capacity as Treasurer (the “House Committee”), and McSally for Senate, Inc., and Paul Kilgore in his official capacity as Treasurer (the “Senate Committee”) in response to the Complaint filed in the above-referenced matter by End Citizens United (“ECU” or “Complainant”), a liberal anti-First Amendment group that has endorsed Congresswoman McSally’s opponent¹ and is led by the former Deputy Political Director of the Democratic Senatorial Campaign Committee. The Complaint was clearly filed for publicity and political gain and is based solely on speculation and a gross misapplication of federal law.

The Federal Election Commission (the “Commission”) may find “reason to believe” only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act (the “Act”). *See* 11 CFR §§ 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. *See* Statement of Reasons of Commissioners David A. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas in the Matter of MUR 4960 (Hillary Clinton for U.S. Senate Explanatory Committee), at 2 (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. *See id.*

As explained in more detail below, the allegations made in the Complaint are both factually and legally flawed and do not support a reason to believe finding in this matter. The Complaint should be immediately dismissed.

¹ See End Citizens United website, *Endorsed Candidates*, <http://endcitizensunited.org/endorsed-candidates/>.



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Factual Background

Martha McSally is a current Member of Congress representing Arizona's Second Congressional District. She declared her candidacy for the U.S. Senate on January 12, 2018 to fill the seat of retiring Senator Jeff Flake.² She filed her FEC Form 2 Statement of Candidacy and FEC Form 1 Statement of Organization for her principal campaign committee for Senate, McSally for Senate, Inc., with the Secretary of the Senate on January 11, 2018.³

Congresswoman McSally has made clear since her Senate candidacy announcement on January 12th that she has no intention to run for reelection to the House. Since that time, she has made numerous public statements to that effect, has informed the Reports Analysis Division of this fact, and has ceased conducting campaign activities related to reelection to her current office. She has also made almost \$1.3 million in permissible transfers from her House Committee to the Senate Committee since January 22, 2018.

As the Commission is aware, Congresswoman McSally's House Committee was subjected to an audit of its financial activities from the 2013-14 election cycle.⁴ The audit only recently concluded with the Audit Division's issuance of a Final Audit Report on May 15, 2018. Since then, the Audit Division has referred one of its Findings to the Administrative Fine ("AF") Program⁵ and two of its Findings to the Alternative Dispute Resolution ("ADR") Program.⁶ These matters are currently ongoing.

In addition to the AF and ADR matters stemming from the Commission's recently completed audit, Congresswoman McSally and the House Committee have also been named as respondents in several frivolous and politically-motivated complaints, including this one.⁷ These enforcement matters are also currently ongoing, and are only at the beginning of the Office of General Counsel's ("OGC") enforcement process.

² Dan Nowicki & Ronald J. Hansen, *Martha McSally makes it official: She's running for the Senate*, THE REPUBLIC (Jan. 12, 2018), available at <https://www.azcentral.com/story/news/politics/arizona/2018/01/12/martha-mcsally-arizona-candidate-us-senate/872458001/>.

³ See McSally for Senate, Inc. Form 1; Martha McSally Form 2.

⁴ See Audit of McSally for Congress, 2013-14 Election Cycle, available at https://transition.fec.gov/audits/2014/AuditReport_2014_McSallyForCongress.shtml.

⁵ See AF 3373.

⁶ See ADR 872.

⁷ See MUR 7303 (complaint filed by Pima County Democrat Party Chair, Jo M. Holt); see also MUR 7380 (complaint filed by End Citizens United).



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In light of these ongoing enforcement matters, the House Committee remains open and continues to file reports. Congresswoman McSally would prefer to terminate her House Committee, but is prohibited from doing so until all of these enforcement matters have been resolved. This is also precisely why the House Committee has kept a modest amount of reserve funds in its account—to pay for legal and administrative costs associated with such matters. Importantly, the House Committee has not spent any of these reserve funds for campaign activities in furtherance of Congresswoman McSally’s Senate run, as the Complaint falsely alleges.

The Complaint

The Complaint speciously claims that Congresswoman McSally “is running for Senate, while raising funds for a non-existent House candidacy under a separate limit.”⁸ It asserts that Congresswoman McSally is “maintaining a sham campaign for the House, so that she can raise money under an additional limit to her Senate campaign.”⁹ The Complaint then frivolously contends that the transfers the House Committee made to the Senate Committee were “flatly illegal”¹⁰ because “FEC regulations prohibit transfers between principal campaign committees when a candidate is seeking multiple offices.”¹¹ Of course, this allegation is based on the false premise that Congresswoman McSally is concurrently running for Senate and reelection to the House, which is patently false.

As purported evidence to support these allegations, ECU provides only its own self-serving conclusions concerning the House Committee’s disclosure reports and false and speculative statements about whether Congresswoman McSally stopped actively seeking nomination or election to the House. For example, the Complaint blindly asserts that Congresswoman McSally “has made no formal announcement that she has abandoned her House campaign...nor has [she] publicly notified the Commission that [the House Committee] will cease operations.”¹² As discussed below, such allegations and so-called evidence are devoid of reality and should be summarily dismissed.

⁸ Complaint at 1.

⁹ Complaint at 3.

¹⁰ Complaint at 5.

¹¹ Complaint at 4.

¹² Complaint at 5.



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Legal Analysis

The House Committee Has Not Solicited or Disbursed Funds in Furtherance of Congresswoman McSally's Senate Campaign.

Despite the Complaint's hysterical rhetoric and false and conclusory statements, the House Committee has not solicited or spent funds in furtherance of Congresswoman McSally's Senate campaign. Any contributions received by the House Committee after Congresswoman McSally declared her candidacy were received in response to direct mail and email solicitations that were sent out before she became a candidate for Senate, most of which were in small dollar amounts.

Any political professional familiar with direct mail and email fundraising is aware that contributions can trickle in weeks or months after any given solicitation mail piece or email is sent. This is precisely the case here, where the House Committee's direct mail and email fundraising vendors sent numerous solicitations out prior to Congresswoman McSally becoming a Senate candidate. The fact that the House Committee received such contributions after she became a Senate candidate is entirely permissible under the Act and the Commission's regulations. Moreover, it would have been impermissible to deposit such contributions into the Senate Committee's account because the checks and online donations were made out to the House Committee.

As for the House Committee's disbursements after Congresswoman McSally became a Senate candidate, these payments were not made in furtherance of her Senate campaign. To the contrary, these disbursements were made to cover expenses related solely to the House Committee, such as vendors' bills for services rendered solely to the House Committee prior to her becoming a Senate candidate, or costs related to her official duties as a sitting Member of Congress, such as travel, which is permissible under 11 CFR § 113.2.¹³ The House Committee's disbursements after Congresswoman McSally became a Senate candidate also include legal and accounting costs stemming from the Commission's audit and the ongoing enforcement matters referenced above.

¹³ See also Advisory Opinion 1997-02 (Skaggs/LaHood), where the Commission permitted sitting Members of Congress to use campaign funds for Congressional retreat fees and travel.



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In reality, once Congresswoman McSally became a Senate candidate, the Senate Committee established separate and distinct bank accounts, escrow accounts, P.O. boxes, databases, etc., to ensure that there was complete separation between the Senate Committee and the House Committee in accordance with 11 CFR § 110.8(d)(1). Any suggestion by ECU to the contrary is a complete fabrication and manufactured out of whole cloth to score cheap political points.

The House Committee Must Remain Open and File Reports Due to Ongoing Enforcement Matters

The Complaint appears to take issue with the fact that the House Committee remains open, and patronizingly states that “[i]n order to make sure candidates understand these requirements, the FEC publishes easily accessible, plain language guidance on its website that covers topics such as how to register as a new candidate and the rules on taking in receipts and making disbursements.”¹⁴ ECU must have overlooked the portion of this “easily accessible, plain language guidance” that makes clear that “[a] committee involved in an FEC enforcement action, an FEC audit or litigation with the FEC, however, must continue to file regularly scheduled reports until the matter is resolved.”¹⁵

As stated above, the House Committee has several ongoing enforcement matters pending in various offices of the Commission, some of which stem from the Commission’s audit and others that have resulted from bogus complaints like the current one. It is ironic that ECU complains about the House Committee remaining open and spending money when the mere filing of this trivial complaint will result in the House Committee having to stay open even longer and spend its reserve funds on legal fees to address it. Of course, it’s likely difficult for the liberal hacks at ECU to recognize irony when they are spending tens of millions of dollars to get money out of politics.

¹⁴ Complaint at 3.

¹⁵ Campaign Guide for Congressional Candidates and Committees (2014), at 123.



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Congresswoman McSally has publicly stated numerous times and has informed the Reports Analysis Division that she is not running for reelection to the House, and is therefore entitled to transfer funds from the House Committee to the Senate Committee.

The Complaint erroneously asserts that Congresswoman McSally “appears to have illegally transferred nearly a million dollars from McSally for Congress to McSally for Senate, Inc.”¹⁶ ECU bases this allegation on its unfounded theory that McSally “is seeking multiple offices”¹⁷ and was therefore prohibited from making transfers from her House Committee to her Senate Committee. Specifically, the Complaint maintains, without evidence, that Congresswoman McSally “has made no formal announcement that she has abandoned her House campaign,” and that she has not “publicly notified the Commission that [the House Committee] will cease operations.”¹⁸ Such statements are devoid of reality.

In reality, Congresswoman McSally has made abundantly clear since her announcement in January that she is not running for reelection to the House. She has made numerous public statements to this effect, in both smaller settings and larger campaign events and fundraisers, and has also informed the Reports Analysis Division of this fact.¹⁹ Perhaps this is why Vox Media wrote the following on the day of Congresswoman McSally’s Senate announcement:

Recruiting McSally into the Senate race carries some cost for Republicans. She holds a swing House district; without an incumbent on the ballot, the district is probably considered Democratic-leaning in a year shaping up to be a Democratic wave.²⁰

Politico added on the same day:

McSally’s announcement is a boon to Senate Republicans, but it means House Republicans have one more competitive open seat without an incumbent on the ballot this fall: her Southern Arizona

¹⁶ Complaint at 4.

¹⁷ Complaint at 4.

¹⁸ Complaint at 5.

¹⁹ Around the time of Congresswoman McSally’s Senate announcement, the House Committee, through counsel, sought guidance from its RAD Analyst with respect to the process for transfers to the Senate Committee. The House Committee made clear to its RAD Analyst that Congresswoman McSally is not running for reelection to the House.

²⁰ Matthew Yglesias, *Arizona’s already very complicated Senate race, explained*, VOX MEDIA (Jan. 12, 2018), available at <https://www.vox.com/policy-and-politics/2018/1/12/16877796/mcsally-announcement-arizona-senate>.



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district. At the presidential level, Hillary Clinton carried McSally's seat by a 5-point margin in 2016, 50 percent to 45 percent.²¹

Even the Democrat Congressional Campaign Committee ("DCCC") admits that Congresswoman McSally is not running for reelection to the House. In fact, on the day of her announcement, the DCCC issued a press release making it clear that national Democrats were fully aware of Congresswoman McSally's decision to forego her current House seat to run for Senate. The release stated that:

In response to the announcement that Rep. Martha McSally is running for U.S. Senate and opening up one of the most competitive, Republican-held House seats in the country, DCCC spokeswoman Rachel Irwin released the following statement ... "McSally's vacancy only enhances our chances of taking back this seat..."²²

ECU describes itself as "Democrats Fighting for Reform"²³ at the top of its website, and the group toes the Democrat Party line without reservation. It is therefore extraordinary that ECU could possibly conclude in the Complaint that McSally "is seeking multiple offices"²⁴ when the DCCC and multiple news outlets resoundingly came to the opposite conclusion as early as the day of her Senate announcement.

ECU also whines that Congresswoman McSally "has made no formal announcement that she has abandoned her House campaign."²⁵ Perhaps ECU is disappointed it did not receive a handwritten note from Congresswoman McSally regarding her intentions or a "formal" memo describing her campaign plans. Of course, no such "formal" notification is necessary under the Act or the Commission's regulations, and as detailed above, Congresswoman McSally has publicly announced her intentions to vacate her House seat on multiple occasions. In short, this is just another example of ECU manufacturing an alternate reality for political purposes. The fact remains that when Congresswoman McSally became a Senate candidate, established her Senate Committee, and publicly announced her intention to not run for reelection to the House, she was free to transfer funds from her House Committee to the Senate Committee, which she has done in full accordance with 11 CFR §§ 110.3(c)(5) and 110.8(d)(2).

²¹ Steven Shepard and Kevin Robillard, *McSally will run for Senate in Arizona*, POLITICO (Jan. 12, 2018), available at <https://www.politico.com/story/2018/01/12/martha-mcsally-arizona-senate-race-283408>.

²² Democrat Congressional Campaign Committee, *DCCC Statement of Martha McSally's Run for U.S. Senate* (Jan. 12, 2018), available at <https://dccc.org/dccc-statement-martha-mcsallys-run-u-s-senate/>.

²³ See End Citizens United website, <http://endcitizensunited.org/>.

²⁴ Complaint at 4.

²⁵ Complaint at 5.



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Conclusion

In presenting politically-motivated and factually and legally unsubstantiated arguments, ECU has failed to demonstrate that Congresswoman McSally, the House Committee, or the Senate Committee have violated any provision of the Act or the Commission's regulations. Instead, ECU has invoked an administrative process as a means to assault its political opponents. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 344-4522 with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "James E. Tyrrell III". The signature is fluid and cursive, with "James E." on top and "Tyrrell III" on the line below.

James E. Tyrrell III
*Counsel to McSally for Congress
and Paul Kilgore as Treasurer &
McSally for Senate, Inc.
and Paul Kilgore as Treasurer*