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November 18, 2021

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Christine C. Gallagher, Esq.
Federal Election Commission
Office of General Counsel
1050 First St, NE
Washington, D.C. 20463
**VIA EMAIL: cgallagher@fec.gov**

**Re: MURs 7303 and 7380; Response to RTB Finding**

Dear Ms. Gallagher:

We are writing this letter on behalf of former Senator Martha McSally, McSally for Congress (the "House Committee"), Senator McSally's former principal campaign committee for U.S. House, McSally for Senate, Inc. (the "Senate Committee"), her former principal campaign committee for U.S. Senate, and Paul Kilgore, in his official capacity as Treasurer to both committees (collectively, the "Respondents") in response to your letter dated July 7, 2021, in which you inform Respondents of the Commission's Reason to Believe ("RTB") finding that the House and Senate Committees violated 52 U.S.C. § 30116(a)(5)(C) and the Senate Committee violated 52 U.S.C. § 30116(f), provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"). Included in your letter is the Commission's Factual and Legal Analysis ("F&LA") and a proposed pre-probable cause conciliation agreement.

Respondents remain interested in bringing this matter to a conclusion through the pre-probable cause conciliation process

Accordingly, below is a response to the Commission's finding with respect to the House and Senate Committee's alleged violation of 52 U.S.C. § 30116(a)(5)(C).

**1) Senator McSally Was Never "Actively Seeking" Nomination to Both the House and Senate**

The Commission found reason to believe McSally "impermissibly transferred funds from the House Committee to the Senate Committee during the time she was 'actively seeking' both nominations."[1] However, McSally never actively sought nomination to both the House and Senate. As we stated in our response to the complaint in MUR 7380, then-Congresswoman McSally made clear when she announced her Senate candidacy on January 12, 2018 that she had no intention to run for reelection to the House. After her January 12th announcement, she made numerous public statements that she would not run for reelection to the House in both smaller settings and larger campaign and fundraising events. Senator McSally also ceased conducting all campaign activities related to reelection to the House upon her Senate candidacy announcement.

The Complaint in MUR 7380 contains a general, conclusory statement that McSally "has made no formal announcement that she has abandoned her House campaign"[2] as apparent support for the complainant's contention that "McSally is raising and spending funds through two committees to support her Senate candidacy."[3] However, the Complaint fails to provide any specific evidence to support this contention. Instead, the Complaint generally points to "the record" or the "public record" as apparent support for its speculative assertions. The Commission has made clear that simple speculation by a complainant is insufficient and does not establish that there is reason to believe a violation occurred.[4] This is especially the case when such speculative allegations are accompanied by a direct refutation. Furthermore, due process and fundamental fairness dictate that the burden must not shift to a respondent merely because a complaint filled with naked allegations is filed with the Commission.[5]

[1] F&LA at 8.
[2] MUR 7380, Compl. at 5.
[3] *Id*. at 4.
[4] MUR 5467 (Michael Moore), First General Counsel's Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form the adequate basis to fund reason to believe that a violation of [the Act] has occurred" (quoting MUR 4960 (Hillary Rodham Clinton for US Senate Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 3).
[5] *See* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, and holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to respondents.").

Despite the Commission's clear precedent that "[u]nwarranted legal conclusions from asserted facts, … or mere speculation, … will not be accepted as true,"[6] the F&LA treats the Complainant's conclusory statement that McSally "has made no formal announcement that she has abandoned her House campaign"[7] as if it were incontrovertible fact. Furthermore, "[c]omplaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented."[8] The Commission does not find "reason to believe" violations of the Act have occurred absent reliable evidence thereof and has repeatedly found "no reason to believe" to dispose of complaints that do not allege specific facts sufficient to establish a violation.[9] In this case, the Complaint is not based on the personal knowledge of the complainant. The complainant, therefore, was required to "identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented." Yet, the Complaint does not provide a single piece of evidence, such as a declaration, affidavit, or even a news article, that demonstrates then-Congresswoman McSally was simultaneously seeking nomination to both the House and Senate.

Remarkably, in finding reason to believe, the Commission has not only failed to acknowledge the factual and evidentiary deficiencies of the Complaint, but it has taken the complainant's hollow allegation that McSally "has made no formal announcement that she has abandoned her House campaign" and used it to shift the burden to respondents to prove a negative. Indeed, in addressing Respondents' refutation of the allegations in the Complaint—specifically, Respondents' statements that "McSally has made abundantly clear since her

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[6] MUR 4960, Statement of Reasons at 2.
[7] MUR 7380, Compl. at 5.
[8] MUR 4960, Statement of Reasons at 1 (first citing 11 C.F.R. § 111.4(d)(2); then quoting MUR 4545 (Clinton/Gore '96 Primary Comm./Amtrak), First General Counsel's Rpt., at 15; and then quoting MUR 3534 (Bibleway Church of Atlas Road, Inc., et al.), Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Trevor Potter, and Commissioners Joan D. Aikens, Lee Ann Elliot, Danny Lee McDonald, and John Warren McGarry, at 2).
[9] *See* MUR 3534, Statement of Reasons, at 2 (unanimously rejecting OGC recommendation and finding no reason to believe because the complaint was "vague" as to the content of communications at issue, and because "there was a lack of evidence" of facts suggesting a FECA violation); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, at 2 (unanimously finding no reason to believe because the complaint failed to allege conduct that would constitute a violation of the Act); MUR 7169 (Democratic Congressional Campaign Committee, et al.), Factual and Legal Analysis, at 11 (rejecting complaints alleging an excessive in-kind contribution where "the Complaints do not allege specific facts that are sufficient to provide reason to believe that the conduct prong has been satisfied."); MUR 6821 (Shaheen for Senate, et al.), Factual and Legal Analysis, at 7-8 (finding no reason to believe there had been a "coordinated communication" where the complaint "fails to identify any communication" between the relevant parties); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis, at 3 (finding "the complaint does not contain sufficient information on which to base an investigation" into whether the conduct standard was met where it does not "even specifically identify which 'conduct' standard would apply to the activity complained of" and "does not connect any such discussions" to any alleged coordinated communications).

announcement in January that she is not running for reelection to the House" and that "she has made numerous public statements to this effect, in both smaller settings and larger campaign events and fundraisers"—the Commission ignores this direct refutation and merely states that "they provide no details or declarations in support of this assertion.[10] Apparently, in the Commission's view, any bare allegation in a complaint that is unsupported by actual evidence is not only sufficient to find reason to believe, but also good enough to shift the burden on a respondent to prove with sworn testimony or declaration that such unsupported allegations are false.

The Commission in the F&LA engages in the same extra-statutory burden shifting in response to another direct refutation made by Respondents—i.e. that "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."[11] This direct refutation came in response to the Complaint's allegation that after McSally announced her candidacy for Senate, she "simultaneously continued to raise and spend funds from McSally for Congress."[12]

However, once again, instead of acknowledging the Complaint's lack of evidence in making such allegations, and the Respondents' direct refutation and detailed explanation of the circumstances surrounding the House Committee's permissible receipt of contributions after McSally's Senate announcement, the F&LA discounts the refutation because Respondents' "assertion in the response is general and unsworn."[13] But there is nothing in the Act or the Commission's regulations that require a refutation of an allegation—especially an allegation that is not based on personal knowledge and unsupported by evidence—to be in the form of a declaration or sworn affidavit. Ironically, pointing to the fact that the House Committee's "donate" link was deactivated over a week before McSally's Senate announcement, the Commission actually concedes that this was "a fact which would suggest that the House Committee ceased activities just before her Senate candidacy announcement."[14]

The F&LA also takes issue with the fact that Respondents' response to the Complaint contained several articles "reacting to McSally's announcement that she was running for Senate" as evidence that then-Congresswoman McSally made clear to supporters she would not run for reelection to the House in 2018. Specifically, the F&LA states that "while public statements by a third party that a person is running for the Senate may imply that the person is no longer running

[10] F&LA at 9.
[11] MUR 7380, Response to Complaint at 4.
[12] MUR 7380, Compl. at 2.
[13] F&LA at 10.
[14] F&LA at 11.

for the House, the Commission's regulation specifies that the individual candidate must announce that he or she will no longer seek election or nomination to the Federal office."[15] Interestingly, the Commission takes the direct opposite position with respect to the validity of third party media accounts when it states that it "does not require a Form 99 if it is clear from the candidate's public statements and media sources that the candidate is no longer seeking one of the offices."[16] It therefore strains credibility for the Commission to assert that "the available information does not support McSally's argument that she has personally disavowed her House re-election campaign in January 2018 when she declared her Senate candidacy," when the "media sources" cited by Respondents indicate the opposite.

In reality, as stated in our response to the Complaint, after McSally announced her Senate bid on January 12, 2018, she publicly announced to supporters, donors, and other Arizona voters along the campaign trail that she would not run for reelection to the House and would instead focus solely on her Senate campaign. While it is our position that the direct refutations and explanations in our response were sufficient to negate the unsupported allegations in the Complaint, we are attaching a declaration from Senator McSally verifying that she publicly announced to supporters on numerous occasions her intention not to seek reelection to the House after her Senate announcement on January 12, 2018.[17]

In light of the foregoing, we respectfully request that the Commission dismiss the finding that the House and Senate Committees violated 52 U.S.C. § 30116(a)(5)(C) because McSally was never simultaneously "actively seeking" nomination or election to the House and Senate

[15] F&LA at 10
[16] F&LA at 12.
[17] *See* Declaration of Martha E. McSally (attached as Exhibit A).

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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,

James E. Tyrrell III
*Counsel to Respondents*

# Exhibit A

**BEFORE THE FEDERAL ELECTION COMMISSION**

| | | |
|---|---|---|
| Declaration of | ) | |
| | ) | MUR 7380 |
| Martha E. McSally | ) | |
| | ) | |

**DECLARATION OF MARTHA E. MCSALLY**

I, Martha E. McSally, declare:

1. I served as a Member of Congress representing Arizona's Second Congressional District from 2015 to 2019. My principal campaign committee for the U.S. House was McSally for Congress.

2. On January 11, 2018, I filed a Statement of Candidacy for U.S. Senate to fill the seat of retiring U.S. Senator Jeff Flake. I filed a Statement of Organization for my U.S. Senate campaign committee, McSally for Senate, Inc., the same day.

3. On January 12, 2018, I publicly announced my candidacy for U.S. Senate in a video posted on YouTube and at a campaign kickoff event in Tucson, AZ.

4. Following my announcement of my Senate candidacy on January 12, 2018 and prior to my U.S. House campaign committee first transferring funds to my U.S. Senate campaign committee on January 22, 2018, I publicly announced my intention to not run for reelection to my U.S. House seat to supporters, donors and other Arizona voters on numerous occasions along the campaign trail. This included public announcements and conversations with supporters in both smaller settings and at larger campaign events and fundraisers.

5. After my Senate candidacy announcement on January 12, 2018, I ceased to conduct campaign activities with respect to my reelection to the U.S. House, but my House campaign committee was unable to terminate due to outstanding FEC enforcement matters.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of November, 2021

Martha E. McSally