

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 7648**

DATES COMPLAINT FILED: 10/01/19; 10/29/19

DATES OF NOTIFICATION: 10/07/19; 10/30/19

LAST RESPONSE RECEIVED: 11/19/19

DATE ACTIVATED: 12/06/19

**COMPLAINANT:**

Diana Miller

**RESPONDENT:**

Troy Nehls

**MUR: 7651**

DATE COMPLAINT FILED: 10/16/19

DATE OF NOTIFICATION: 10/17/19

LAST RESPONSE RECEIVED: 11/19/19

DATE ACTIVATED: 12/06/19

EXPIRATION OF SOL: 12/01/22 – 11/23/24

ELECTION CYCLE: 2020

**COMPLAINANT:**

Grace Po

**RESPONDENT:**

Troy Nehls

**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30101(2)

52 U.S.C. § 30102(e)(1)

11 C.F.R. § 100.3(a)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.1(a)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

The Complaints in MURs 7648 and 7651 allege that Fort Bend (Texas) County Sheriff and now candidate for Texas's 22nd Congressional District, Troy Nehls, failed to timely disclose

1 that he was a candidate, in violation of the Federal Election Campaign Act of 1971, as amended  
2 (the “Act”). His alleged motivation for not timely disclosing was to avoid the Texas  
3 Constitution’s “resign-to-run” provision, which mandates that certain state officials resign their  
4 current position if they are a candidate for another office, unless they become a candidate within  
5 one year and 30 days prior to the end of their current term. For Nehls’s candidacy, the operative  
6 date of the provision was December 1, 2019. Nehls filed his Statement of Candidacy on  
7 December 9, 2019, and remains County Sheriff. One of the Complaints further alleges that Nehls  
8 used his state office and state campaign committee to make payments for federal testing-the-  
9 waters activities, in connection with a golf tournament fundraiser and appearance at a county  
10 parade.

11 As discussed more fully below, the available information does not provide a reasonable  
12 basis to infer that Nehls became a candidate more than fifteen days prior to registering with the  
13 Commission. There is no indication that Nehls was testing the waters for an extensive time  
14 period or that he raised an excessive amount, and there are no statements from Nehls on the  
15 record that he was running for office or referring to himself as a candidate. Nehls reportedly  
16 made public statements, in defiance of the “resign-to-run” provision, that he was “not willing” to  
17 register as a candidate if it would mean having to resign as sheriff. The available statements,  
18 however, are not conclusive as to whether Nehls had decided to become a candidate.

19 Therefore, we recommend that the Commission dismiss the allegations that Nehls violated  
20 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of  
21 Candidacy. In addition, because there is no information showing that the golf tournament  
22 fundraiser or appearance at the parade were related to a federal election, we recommend that the

Commission dismiss the allegation that Nehls violated 11 C.F.R. §§ 100.72(a), 100.131(a) by using impermissible funds to test the waters of a federal election.

## II. FACTUAL BACKGROUND

Nehls was elected Fort Bend County Sheriff in 2012, won re-election in 2016, and his current term ends on December 31, 2020.<sup>1</sup> On September 26, 2019, Nehls publicly announced that he had formed an exploratory committee for a potential campaign for Texas's 22nd Congressional District and had raised over \$100,000 in funds.<sup>2</sup> Nehls registered as a candidate on December 9, 2019, and his authorized committee subsequently filed a report disclosing that he received his first contribution on July 30, 2019.<sup>3</sup> Between July 30, 2019, and December 8, 2019, Nehls raised a total of \$132,270 in itemized contributions.<sup>4</sup>

The Complaints allege that Nehls had decided to run by at least October 2019, when the Complaints were filed, and that he intentionally postponed filing in order to circumvent the Texas Constitution's "resign-to-run" provision.<sup>5</sup> The MUR 7648 Complaint alleges that Nehls began

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<sup>1</sup> Aaron Barker, *Fort Bend County Sheriff Troy Nehls Says He's Exploring Running for Congress Again*, CLICK2HOUSTON.COM, Sept. 26, 2019 (quoted by MUR 7648 Compl. at 2 (Oct. 1, 2019)). On July 10, 2019, Nehls announced he would not seek another term as Sheriff. Brooke A. Lewis, *Fort Bend County Sheriff Troy Nehls Won't Seek Another Term*, CHRON.COM, July 11, 2019 (attached to MUR 7648 Supp. Compl. (Oct. 28, 2019)).

<sup>2</sup> Sheriff Troy E. Nehls, Facebook (Sept. 26, 2019), <https://www.facebook.com/SheriffTNehls/posts/2361939030725514> ("I'm proud to announce the formation of a 22nd District Exploratory Committee. The support we've received with over \$100,000 in total donations has been quite overwhelming. I thank them and will continue to strongly consider running.") (cited by MUR 7651 Compl. at 1); @SheriffTNehls, Twitter (Sept. 26, 2019, 10:03am), <https://twitter.com/SheriffTNehls/status/1177222197544464385> (same) (cited by MUR 7651 Compl. at 1).

<sup>3</sup> Troy Nehls, Statement of Candidacy (Dec. 9, 2019); Nehls for Congress, Year-End Rpt. at 7 (Jan. 31, 2020).

<sup>4</sup> Nehls for Congress, Year-End Rpt. at 5-46 (Jan. 31, 2020) (itemized receipts). Because dates of unitemized contributions are not listed, we cannot identify the amount of unitemized contributions received during the testing-the-waters period. Notably, by September 26, 2019, the date of his testing-the-waters announcement, Nehls had raised \$100,750 in itemized contributions.

<sup>5</sup> See MUR 7648 Compl. at 1-2; MUR 7648 Supp. Compl. at 1; see MUR 7651 Compl. at 1 (Oct. 16, 2019)); see also TEX. CONST. ART. XVI, § 65(b) ("If any of the [state or local] officers named herein [including Sheriffs] shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held.").

1 testing the waters in December 2017, citing to a news article in which Nehls confirmed that he  
2 commissioned polling asking whether residents would consider voting for him if he ran for  
3 Congress.<sup>6</sup> The Complaint argues that Nehls had therefore engaged in exploratory activities for  
4 an “extensive time period,” thus indicating that he had become a candidate before he officially  
5 registered.<sup>7</sup> In addition, the Complaint alleges that Nehls made public statements referring to his  
6 candidacy as part of his September 26, 2019 public announcement. In support, the Complaint  
7 points to a news article stating that “Nehls said the exploration phase will allow voters to get to  
8 know him and why he wants to represent them.”<sup>8</sup> The MUR 7651 Complaint also argues that  
9 Nehls triggered candidate status because he raised contribution amounts in excess of those  
10 necessary for exploratory efforts when he had accumulated over \$100,000 in contributions by the  
11 time of the September 26, 2019, exploratory announcement.<sup>9</sup>

12 Separate from whether Nehls failed to timely register as a candidate, the MUR 7648  
13 Complaint further alleges that Nehls used his state office and state campaign committee to raise  
14 funds for his federal congressional campaign.<sup>10</sup> As support, the Complaint alleges that the timing  
15 of his announcement on September 26, 2019, that he was forming an exploratory committee, was  
16 one day prior to the 2019 Fort Bend County Fair Parade at which Nehls appeared as Sheriff, and  
17 that the Fort Bend County Sheriff’s Office Facebook page posted photographs of Nehls “using his  
18 elected position to present himself before the community in a manner that was not available to

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<sup>6</sup> MUR 7648 Supp. Compl. at 1 (citing Scott Reese Willey, *Nehls Eyes Congress, Polls Residents*, FORT BEND HERALD, Dec. 1, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> MUR 7651 Compl. at 1.

<sup>9</sup> *Id.*

<sup>10</sup> MUR 7648 Supp. Compl. at 1.

other candidates.”<sup>11</sup> In addition, the Complaint alleges that a golf tournament fundraiser held on November 11, 2019, reportedly paid for by his state political campaign committee, was actually a federal campaign-related event.<sup>12</sup>

In response, Nehls argues that “there is no credible information reflecting any potential violation of the testing the waters regulation.”<sup>13</sup> First, Nehls admits to paying for polling in 2017, but contends that he was conducting polling in connection with his exploring a potential race for Congress in 2018, a separate election cycle (he ultimately decided not to run).<sup>14</sup> Second, Nehls asserts that \$100,000 does not reflect an amount that is in excess of what could reasonably be expected to be used for exploratory activities.<sup>15</sup> Third, regarding the golf tournament, Nehls asserts that it was “not related to [his] federal exploratory activities, for which [he] maintains a separate account.”<sup>16</sup> Nehls states that all expenses for the fundraiser were paid for by his state sheriff officeholder and campaign account, and that Texas state law permits state officeholders “to collect and spend contributions not only for state campaign purposes, but also for expenses related to officeholder duties.”<sup>17</sup>

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<sup>11</sup> MUR 7648 Compl. at 4 (citing Fort Bend County Sheriff's Office, FBC Fair Parade 2019, Facebook (Sept. 27, 2019), [https://www.facebook.com/pg/FortBendCountySheriffsOffice/photos/?tab=album&album\\_id=10157923573496122](https://www.facebook.com/pg/FortBendCountySheriffsOffice/photos/?tab=album&album_id=10157923573496122)).

<sup>12</sup> MUR 7648 Supp. Compl. at 1; *see also id.*, Attach. 4 (solicitation flyer for golf tournament, asking for donations to “support Sheriff Troy Nehls,” paid for by Friends of Sheriff Nehls, Chad Norvell, Treasurer).

<sup>13</sup> MURs 7648 & 7651 Resp. at 1 (Nov. 19, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1 (citing Tex. Elec. Code § 251.001(9)).

### III. LEGAL ANALYSIS

An individual becomes a federal candidate if he or she receives contributions or makes expenditures in excess of \$5,000, or consents to another doing so on his or her behalf.<sup>18</sup> Within fifteen days of becoming a candidate, the individual must register with the Commission by filing a Statement of Candidacy and designate a principal campaign committee.<sup>19</sup>

The Commission's regulations create a limited exception to the definitions of contribution and expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to conduct certain activities to evaluate a potential candidacy (*i.e.*, to “test the waters”).<sup>20</sup> An individual who is testing the waters need not register with the Commission unless and until the individual decides to run for federal office.<sup>21</sup> The regulations define testing the waters activities as those “conducted to determine whether an individual should become a candidate,” and include, but are not limited to, conducting a poll, telephone calls, and travel.<sup>22</sup> Only funds received and payments made “solely for this purpose” are permissible under this exception; they are not contributions and expenditures under the Act but are nonetheless still subject to the limitations and prohibitions of the Act.<sup>23</sup>

The Commission has opined that an individual who has crossed the \$5,000 threshold becomes a candidate “when he or she makes a private determination that he or she will run for

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<sup>18</sup> 52 U.S.C. § 30101(2) (definition of candidate); 11 C.F.R. § 100.3(a) (same).

<sup>19</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

<sup>20</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>21</sup> Advisory Op. 1981-32 at 3 (Askew) (“AO”) (“If and when the individual becomes a candidate the regulation has a retroactive effect in that the financing of all activity coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations.”).

<sup>22</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>23</sup> *Id.* §§ 100.72(a), 100.131(a). When an individual becomes a candidate, funds received or payments made during the course of testing the waters are to be reported as such on the first disclosure report filed by the candidate's authorized committee. *Id.* § 101.3.

federal office.”<sup>24</sup> The Commission’s regulation enumerates circumstances that indicate when an individual has decided to become a candidate. They include: (1) advertising to publicize an intent to campaign for federal office; (2) fundraising in excess of what could reasonably expected to be used for testing the waters activity; (3) making statements that refer to the individual as a candidate; (4) conducting activities in close proximity to the election or over a protracted period of time; or (5) taking action to qualify for the ballot.<sup>25</sup> Where those examples do not apply, the Commission has distinguished between activities “directed to an evaluation of the feasibility of one’s candidacy,” and those “signifying that a private decision to become a candidate has been made” or conducted “as a means of seeking some affirmation or reinforcement of a private decision . . . to be a candidate.”<sup>26</sup>

**A. The Commission Should Dismiss the Allegation that Nehls Violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by Failing to Timely File His Statement of Candidacy**

After consideration of the circumstances outlined in the Commission’s testing-the-waters regulation that would indicate when an individual has decided to become a candidate, the available information does not support the allegation that Nehls failed to timely file his Statement of Candidacy.

**1. Duration of Nehls’s Testing-the-Waters Activities**

Testing-the-waters activities conducted “over a protracted period of time” may indicate that an individual has decided to become a candidate.<sup>27</sup> The Commission regulations do not

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<sup>24</sup> AO 2015-09 at 5 (Senate Majority PAC and House Majority PAC); *accord* AO 1981-32 at 4 (Askew); AO 1982-03 at 3 (Cranston).

<sup>25</sup> 11 C.F.R. §§ 100.72(b); 100.131(b).

<sup>26</sup> AO 1981-32 at 4.

<sup>27</sup> 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4).

specify a time limit for testing-the-waters activities, but consider it one factor in determining whether the individual becomes a candidate.<sup>28</sup> The Commission has opined that testing-the-waters activities often begin “well in advance of an election.”<sup>29</sup> In a prior enforcement matter, the Commission determined that activity such as polling occurring two years before the election did not itself violate the testing-the-waters provision.<sup>30</sup>

Here, the MUR 7648 Complaint alleges that Nehls began testing the waters in December 2017, almost three years before the election at issue, by commissioning polling of residents on the question of his electability.<sup>31</sup> The Response, however, contends that the polling was for the previous (2018) election cycle, and the news article attached to the Complaint tends to support this claim.<sup>32</sup> The first reported contribution or expenditure by Nehls in connection with testing the waters for the current (2020) election cycle occurred on July 31, 2019, and Nehls filed his Statement of Candidacy on December 9, 2019 — a period of approximately four months. In sum, there is no indication from the available information that Nehls conducted testing-the-waters activities over a protracted period of time.

## 2. Raising and Spending Funds

Another indication that an individual has become a candidate is if he or she “raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a

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<sup>28</sup> AO 2015-09 at 6 (Senate Majority PAC and House Majority PAC).

<sup>29</sup> Factual & Legal Analysis at 6, MUR 5722 (Friends of Lauzen).

<sup>30</sup> *Id.*

<sup>31</sup> MUR 7648 Supp. Compl. at 1.

<sup>32</sup> MURs 7648 & 7651 Resp. at 1.



candidate.”<sup>33</sup> On September 26, 2019, Nehls stated that he had raised over \$100,000 in donations for his exploratory committee, and his campaign committee’s initial disclosure report shows that Nehls raised a total of \$132,270 in individual, itemized contributions between July 30, 2019, and December 8, 2019 (the period when he reportedly began testing the waters until filing his Statement of Candidacy).<sup>34</sup> In previous matters involving similar amounts of money raised for exploratory activities, the Commission has declined to find that the individual had necessarily become a candidate.<sup>35</sup> Thus, based on the reported amount that Nehls raised, there is no basis to conclude that he became a candidate.

### 3. Public Statements

Authorized statements that “refer to [an individual] as a candidate for a particular office” indicate that he or she has decided to become a candidate.<sup>36</sup> The MUR 7648 Complaint cites to a news article that paraphrases a statement from Nehls — “Nehls said that the exploration phase *will allow voters to get to know him and why he wants to represent them.*”<sup>37</sup> The Complaint asserts that this is “Campaigning Activity. Not testing the waters.”<sup>38</sup> However, the language here is not a statement from Nehls but rather a paraphrase by a news article — and its significance is further discounted by quotes from Nehls on the record in which he explains that he was still deciding whether to run. For instance, when Nehls announced his exploratory committee on

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<sup>33</sup> 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2).

<sup>34</sup> Nehls for Congress, Year-End Rpt. at 5-46 (Jan. 31, 2020) (itemized receipts).

<sup>35</sup> Certification, MUR 5703 (Rainville) (June 22, 2006) (\$100,000); Certification, MUR 5661 (Butler), (Oct. 27, 2006) (\$100,000); Certification, MUR 2710 (Judge Harvey Sloane) (Feb. 7, 1989) (\$200,000); Statement of Reasons, Comm’rs McDonald, Elliott, Aikens, Josefiak, McGarry & Thomas, at 2-3, MUR 2710 (Mar. 2, 1989).

<sup>36</sup> 11 C.F.R. §§ 100.72(b)(3); 100.131(b)(3).

<sup>37</sup> Barker, CLICK2HOUSTON.COM (Sept. 26, 2019) (quoted by MUR 7648 Compl. at 2) (emphasis added).

<sup>38</sup> MUR 7648 Compl. at 2.

September 26, 2019, on social media, he stated that he “will continue to strongly consider running.”<sup>39</sup> Moreover, in statements to the press, responding to accusations that he was circumventing the “resign-to-run” provision, Nehls asserted that: “I formed an exploratory committee and I’m testing the waters. I’m seeing over the next 60 days, would I be a viable candidate for Congress.”<sup>40</sup> There are no statements from Nehls in the record referring to himself as a candidate or otherwise indicating that he had decided to run.

Nehls also reportedly stated that because of the “resign-to-run” provision, “[i]f I were to announce that I was running for Congress next week or even next month, I would have to resign my current position as sheriff, and I’m not willing to do that. So if I choose to run, I will make that known the first week of December.”<sup>41</sup> While this might raise questions as to whether Nehls would have properly registered before December 1, 2019, the operative date for the “resign-to-run” provision, if he had decided by that time to run, in and of themselves these comments are not conclusive evidence that Nehls had made such a decision.<sup>42</sup>

#### 4. Other Activities

Finally, regarding the remaining examples of activities that indicate an individual has decided to become a candidate, as listed in 11 C.F.R. §§ 100.72 and 100.131, there is no information that Nehls engaged in any such activities. For instance, there is no allegation that

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<sup>39</sup> *Supra* note 2.

<sup>40</sup> Marla Carter, *Ft. Bend Co. Sheriff Staying Put After Claiming ‘Witch-Hunt’ For His Ouster*, ABC13.COM, Oct. 8, 2019 (attached to MUR 7648 Supp. Compl.).

<sup>41</sup> MUR 7648 Comp. at 4 (attaching screenshot of untitled and undated article from the *Katy Times* that does not appear to be currently available on the publication’s website).

<sup>42</sup> *Cf.* First Gen. Counsel’s Rpt. at 3, 8, MUR 6907 (Mike Huckabee, *et al.*) (recommending a finding of no reason to believe that an individual impermissibly used a 501(c)(4) organization to engage in exploratory activities despite allegations that the individual had a motive to secretly use the 501(c)(4) for such purposes in order to retain his contract with Fox News, which prohibited employees from demonstrating intent to run for public office, because there was “no information tending to show a nexus” between the 501(c)(4) and any testing-the-waters activity).

Nehls took action to qualify for the ballot under State law. Moreover, there are no examples on record of any public advertising by Nehls to publicize his intention to run.<sup>43</sup>

## 5. Conclusion

In sum, the alleged facts regarding Nehls's duration of testing-the-waters activities, the amount of funds raised during his reported testing-the-waters period, public statements made by Nehls, as well as additional alleged conduct by Nehls, fail to give rise to a reasonable inference that Nehls became candidate more than fifteen days before he registered. Therefore, we recommend that the Commission dismiss the allegation that Nehls violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy.

### **B. The Commission Should Dismiss the Allegation that Nehls Violated 11 C.F.R. §§ 100.72(a), 100.131(a) by Using Impermissible Funds to Test the Waters of a Federal Election**

As discussed above, funds received or spent to test the waters of an election are not treated as contributions or expenditures under the Act until the individual testing the waters becomes a candidate.<sup>44</sup> Nonetheless, “[o]nly funds permissible under the Act may be used for [testing-the-waters] activities.”<sup>45</sup> The Commission has stated that when an individual becomes a candidate, his or her authorized committee is “required to make refunds or repayments of any excessive or prohibited contributions that were received during the ‘testing the waters’ period.”<sup>46</sup> In addition, the Commission has explained that, because a state committee is prohibited from transferring

<sup>43</sup> The MUR 7648 Complaint attaches a solicitation flyer for a golf tournament fundraiser hosted by Nehls's state campaign committee, which states that attendees will “support Sheriff Troy Nehls” but makes no reference to any federal campaign activity or intention by Nehls to run for federal office. MUR 7648 Supp. Compl., Attach. 4.

<sup>44</sup> AO 2015-09 at 5 (Senate Majority PAC) (“If an individual becomes a candidate, payments that were made for any testing-the-waters activities must have been made with ‘funds permissible under the Act.’ 11 C.F.R. §§ 100.72(a), 100.131(a)”).

<sup>45</sup> 11 C.F.R. §§ 100.72(a), 100.131(a); see AO 1982-03 at 3 (Cranston); AO 1982-19 at 3 (Cranston Presidential Advisory Committee).

<sup>46</sup> AO 1982-19 at 3 (Cranston Presidential Advisory Committee).

1 funds to a federal committee under 11 C.F.R. § 110.3(d), it follows that a state committee is  
 2 prohibited from making expenditures on behalf of a potential federal campaign.<sup>47</sup> Thus, once an  
 3 individual becomes a candidate, the state committee's earlier testing-the waters expenditures  
 4 become in-kind contributions to the federal committee and constitute a prohibited transfer.

5 The MUR 7648 Complaint alleges that Nehls used his state committee and state office in  
 6 connection with his testing-the-waters activities, in violation of the Act.<sup>48</sup> The Complaint  
 7 specifically points to a golf tournament fundraiser and Nehls's appearance at a county parade, but  
 8 there are insufficient facts to reasonably conclude that either was related to his testing-the-waters  
 9 activities.

10 First, as to the November 11, 2019, golf tournament fundraiser paid for by Nehls's state  
 11 campaign committee,<sup>49</sup> the MUR 7648 Complaint alleges that the event must have been for

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<sup>47</sup> Factual & Legal Analysis at 15, MUR 4323 (Huckabee Election Committee) (concluding that a state committee "could not . . . use funds it could not otherwise legally have transferred to make direct expenditures on behalf of a potential [] federal campaign"); *see* Transfers of Funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36,345 (Aug. 12, 1992) (explaining the transfer prohibition as intended to prevent "indirect" use of impermissible funds); Factual & Legal Analysis at 4-5, MUR 6267 (Paton for Senate) (finding Paton's federal committee received prohibited transfers of funds when Paton's state senate committee paid for polling and a survey benefiting his federal campaign); Factual & Legal Analysis at 8, MUR 5722 (Friends for Lauzen) (concluding that even if a state committee has sufficient permissible funds to cover a federal testing-the-waters expense, Section 110.3(d) nonetheless "prohibits all transfers from the nonfederal to a federal campaign of the same individual regardless of whether the funds used are permissible under the Act," and therefore prohibits testing-the-waters expenses made by state committees).

<sup>48</sup> MUR 7648 Compl. at 3 (parade appearance); MUR 7648 Supp. Compl. at 1 (golf event). The Act's soft money prohibition states that a federal candidate, a candidate's agent, and entities established, financed, maintained or controlled by them may not solicit, receive, direct, transfer, or spend funds in connection with a federal election unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(e)(1)(A). The record does not reasonably indicate that Nehls was a candidate during the time of the parade or the golf event, prior to his official campaign announcement in December 2019. *Supra*, Part III.A. Accordingly, we apply the testing-the-waters regulations here. *See, e.g.*, First Gen. Counsel's Rpt. at 20,

<sup>49</sup> MURs 7648 & 7651 Resp. at 1. There is a disclaimer which indicates that the event was paid for by Friends of Sheriff Nehls, and a review of the committee's disclosure reports filed with the Texas Ethics Commission show that it disclosed costs associated with the event. MUR 7648 Supp. Resp., Attach. (solicitation flyer); Troy Nehls, Semi-Annual, Candidate/Officeholder Campaign Finance Report at 20, 23-26, Schedule. F1 at 1, 4-7 (Jan. 10, 2020).

1 Nehls' federal election because it took place after both his July 11, 2019, announcement that he  
2 would not be seeking re-election for state office, and the September 26, 2019, announcement that  
3 he would be testing the waters of a federal campaign.<sup>50</sup> The solicitation flyer, distributed in  
4 connection with the event, identifies the event title as "Sheriff Troy Nehls Veterans Day Golf  
5 Tournament," and generally states that contributions would be used "to support Sheriff Troy  
6 Nehls."<sup>51</sup> The Response does not clarify the purpose of the event, but appears to suggest that it  
7 was "related to officeholder duties," which the Response asserts is a permissible use of campaign  
8 funds under state law.<sup>52</sup>

9 Here, the available information raises questions as to whether the golf tournament was  
10 related to Nehls's testing-the-waters activities, *e.g.*, Nehls was not running for state office, the  
11 purported connection to his "officeholder duties" is unclear, and the solicitation flyer does not  
12 contain a description about the purpose. However, our review of Texas law appears to confirm  
13 Respondents' assertion that state officeholders are permitted to solicit contributions and make  
14 expenditures in connection with officeholder-related duties.<sup>53</sup> Even if the golf tournament was  
15 not itself an "officeholder-related" event, Nehls was permitted to raise funds to spend on a future  
16 officeholder-related event or spend on a political campaign if he were to change his mind and run

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<sup>50</sup> MUR 7648 Supp. Compl. at 1.

<sup>51</sup> *Id.*, Attach. 4.

<sup>52</sup> MURs 7648 & 7651 Resp. at 1 (citing Tex. Elec. Code § 251.001(9)) (defining "officeholder expenditure" as an expenditure made by any person to defray expenses that are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office, and are not reimbursable with public money).

<sup>53</sup> Tex. Elec. Code § 253.035 (prohibiting the conversion of committee funds to "personal use," which is defined as "a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office").

for state office.<sup>54</sup> Accordingly, absent more information about the event, there is not a reasonable basis to conclude that it was for testing the waters of a federal election.

Second, as to the 2019 Fort Bend County Fair Parade, the information supplied by the MUR 7648 Complaint shows that Nehls appeared in the parade as Sheriff, that pictures of the parade were posted on the Fort Bend County Sheriff's Office Facebook page, and that Nehls announced his intention of exploring a federal campaign one day before the parade.<sup>55</sup> The Complaint argues that Nehls used his position as Sheriff to "present himself before the community in a manner that was not available to other candidates."<sup>56</sup> This Office has opined that an individual's use of an outside position "as a platform to maintain his public image and advance certain issues" does not itself implicate the testing-the-waters provision.<sup>57</sup> There is no indication from the record before the Commission that Nehls appeared as a candidate, engaged in any testing-the-waters activities, made any solicitations, or received any contributions at the parade. Although the state of Texas falls within the meaning of "person" under the Act and thus the individual contribution limit would seemingly apply to the Fort Bend County Sheriff's Office,<sup>58</sup> there is no factual basis to conclude that any such in-kind contribution was made to Nehls.

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<sup>54</sup> *Id.* § 253.036.

<sup>55</sup> MUR 7648 Compl. at 3.

<sup>56</sup> *Id.*

<sup>57</sup> First Gen. Counsel's Rpt. at 9, MUR 6907 (Mike Huckabee, *et al.*) (citing First Gen. Counsel's Rpt. at 26-27, MUR 5260 (Talent for Senate) (the fact that a state leadership PAC served as a candidate's "platform" to "keep up his political profile and support Republican candidates and causes," does not indicate that the PAC assisted with the candidate's testing-the-waters or federal election activities).

<sup>58</sup> The Commission has long held that states are "persons" under the Act and are subject to the individual contribution limit which, during the 2020 election cycle, was \$2,800 per election. Factual & Legal Analysis at 4, MUR 6858 (Malone PAC, *et al.*); Factual & Legal Analysis at 4-6, MUR 5127 (Democratic Party of Illinois, *et al.*); 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 84 Fed. Reg. 2,504, 2,506 (Feb. 7, 2019). Under the Texas State Constitution, counties are "recognized as legal subdivisions of the State." TEX. CONST. ART. XI, § 1.

In conclusion, based on the available information, we recommend that the Commission dismiss the allegation that Nehls violated 11 C.F.R. §§ 100.72(a), 100.131(a) by using impermissible funds to test the waters of a federal election.<sup>59</sup>

#### IV. RECOMMENDATIONS

1. Dismiss the allegation that Troy Nehls violated 52 U.S.C. § 30102(e) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy;
2. Dismiss the allegation that Troy Nehls violated 11 C.F.R. §§ 100.72(a), 100.131(a) by using impermissible funds to test the waters of a federal election;
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letter; and

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<sup>59</sup> Factual & Legal Analysis at 9, MUR 6788 (Jim Tracy, *et al.*) (concluding that a state committee's payments made before the individual declared his federal candidacy — for activities related to his duties as a state senator and re-election to that office — were not contributions or expenditures for the purposes of the Act).

5. Close the file.

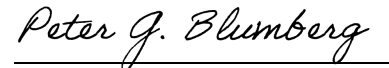
Lisa J. Stevenson  
Acting General Counsel

Charles Kitcher  
Acting Associate General Counsel  
for Enforcement

4/3/2020

Date

BY:



Peter G. Blumberg  
Acting Deputy Associate General Counsel  
for Enforcement



Claudio J. Pavia  
Acting Assistant General Counsel



Christine C. Gallagher  
Attorney

Attachment:  
Factual and Legal Analysis



ELW and SMB edits 10/27/21

**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Troy Nehls

MURs 7648, 7651

**I. INTRODUCTION**

This matter was generated by Complaints filed with the Federal Election Commission by Diana Miller and Grace Po, alleging that Fort Bend (Texas) County Sheriff and now candidate for Texas's 22nd Congressional District, Troy Nehls, failed to timely disclose that he was a candidate, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). His alleged motivation for not timely disclosing was to avoid the Texas Constitution's "resign-to-run" provision, which mandates that certain state officials resign their current position if they are a candidate for another office, unless they become a candidate within one year and 30 days prior to the end of their current term. For Nehls's candidacy, the operative date of the provision was December 1, 2019. Nehls filed his Statement of Candidacy on December 9, 2019, and remains County Sheriff. One of the Complaints further alleges that Nehls used his state office and state campaign committee to make payments for federal testing-the-waters activities, in connection with a golf tournament fundraiser and appearance at a county parade.

As discussed more fully below, the available information does not provide a reasonable basis to infer that Nehls became a candidate more than fifteen days prior to registering with the Commission. There is no indication that Nehls was testing the waters for an extensive time period or that he raised an excessive amount, and there are no statements from Nehls on the record that he was running for office or referring to himself as a candidate. Nehls reportedly made public statements, in defiance of the "resign-to-run" provision, that he was "not willing" to register as a candidate if it would mean having to resign as sheriff. The available statements, however, are not conclusive as to whether Nehls had decided to become a candidate.

**ATTACHMENT**

Therefore, the Commission dismisses the allegations that Nehls violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy. In addition, because there is no information showing that the golf tournament fundraiser or appearance at the parade were related to a federal election, the Commission dismisses the allegation that Nehls violated 11 C.F.R. §§ 100.72(a), 100.131(a) by using impermissible funds to test the waters of a federal election.

## II. FACTUAL BACKGROUND

Nehls was elected Fort Bend County Sheriff in 2012, won re-election in 2016, and his current term ends on December 31, 2020.<sup>1</sup> On September 26, 2019, Nehls publicly announced that he had formed an exploratory committee for a potential campaign for Texas's 22nd Congressional District and had raised over \$100,000 in funds.<sup>2</sup> Nehls registered as a candidate on December 9, 2019, and his authorized committee subsequently filed a report disclosing that he received his first contribution on July 30, 2019.<sup>3</sup> Between July 30, 2019, and December 8, 2019, Nehls raised a total of \$132,270 in itemized contributions.<sup>4</sup>

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<sup>1</sup> Aaron Barker, *Fort Bend County Sheriff Troy Nehls Says He's Exploring Running for Congress Again*, CLICK2HOUSTON.COM, Sept. 26, 2019 (quoted by MUR 7648 Compl. at 2 (Oct. 1, 2019)). On July 10, 2019, Nehls announced he would not seek another term as Sheriff. Brooke A. Lewis, *Fort Bend County Sheriff Troy Nehls Won't Seek Another Term*, CHRON.COM, July 11, 2019 (attached to MUR 7648 Supp. Compl. (Oct. 28, 2019)).

<sup>2</sup> Sheriff Troy E. Nehls, Facebook (Sept. 26, 2019), <https://www.facebook.com/SheriffTNEhls/posts/2361939030725514> ("I'm proud to announce the formation of a 22nd District Exploratory Committee. The support we've received with over \$100,000 in total donations has been quite overwhelming. I thank them and will continue to strongly consider running.") (cited by MUR 7651 Compl. at 1); @SheriffTNEhls, Twitter (Sept. 26, 2019, 10:03am), <https://twitter.com/SheriffTNEhls/status/1177222197544464385> (same) (cited by MUR 7651 Compl. at 1).

<sup>3</sup> Troy Nehls, Statement of Candidacy (Dec. 9, 2019); Nehls for Congress, Year-End Rpt. at 7 (Jan. 31, 2020).

<sup>4</sup> Nehls for Congress, Year-End Rpt. at 5-46 (Jan. 31, 2020) (itemized receipts). Because dates of unitemized contributions are not listed, the Commission cannot identify the amount of unitemized contributions received during the testing-the-waters period. Notably, by September 26, 2019, the date of his testing-the-waters announcement, Nehls had raised \$100,750 in itemized contributions.

1           The Complaints allege that Nehls had decided to run by at least October 2019, when the  
2   Complaints were filed, and that he intentionally postponed filing in order to circumvent the Texas  
3   Constitution’s “resign-to-run” provision.<sup>5</sup> The MUR 7648 Complaint alleges that Nehls began  
4   testing the waters in December 2017, citing to a news article in which Nehls confirmed that he  
5   commissioned polling asking whether residents would consider voting for him if he ran for  
6   Congress.<sup>6</sup> The Complaint argues that Nehls had therefore engaged in exploratory activities for  
7   an “extensive time period,” thus indicating that he had become a candidate before he officially  
8   registered.<sup>7</sup> In addition, the Complaint alleges that Nehls made public statements referring to his  
9   candidacy as part of his September 26, 2019 public announcement. In support, the Complaint  
10   points to a news article stating that “Nehls said the exploration phase will allow voters to get to  
11   know him and why he wants to represent them.”<sup>8</sup> The MUR 7651 Complaint also argues that  
12   Nehls triggered candidate status because he raised contribution amounts in excess of those  
13   necessary for exploratory efforts when he had accumulated over \$100,000 in contributions by the  
14   time of the September 26, 2019, exploratory announcement.<sup>9</sup>

15           Separate from whether Nehls failed to timely register as a candidate, the MUR 7648  
16   Complaint further alleges that Nehls used his state office and state campaign committee to raise

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<sup>5</sup>       See MUR 7648 Compl. at 1-2; MUR 7648 Supp. Compl. at 1; see MUR 7651 Compl. at 1 (Oct. 16, 2019));  
see also TEX. CONST. ART. XVI, § 65(b) (“If any of the [state or local] officers named herein [including Sheriffs]  
shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for  
any office of profit or trust under the laws of this State or the United States other than the office then held, at any time  
when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such  
candidacy shall constitute an automatic resignation of the office then held.”).

<sup>6</sup>       MUR 7648 Supp. Compl. at 1 (citing Scott Reese Willey, *Nehls Eyes Congress, Polls Residents*, FORT BEND  
HERALD, Dec. 1, 2017).

<sup>7</sup>       *Id.*

<sup>8</sup>       MUR 7651 Compl. at 1.

<sup>9</sup>       *Id.*

funds for his federal congressional campaign.<sup>10</sup> As support, the Complaint alleges that the timing of his announcement on September 26, 2019, that he was forming an exploratory committee, was one day prior to the 2019 Fort Bend County Fair Parade at which Nehls appeared as Sheriff, and that the Fort Bend County Sheriff’s Office Facebook page posted photographs of Nehls “using his elected position to present himself before the community in a manner that was not available to other candidates.”<sup>11</sup> In addition, the Complaint alleges that a golf tournament fundraiser held on November 11, 2019, reportedly paid for by his state political campaign committee, was actually a federal campaign-related event.<sup>12</sup>

In response, Nehls argues that “there is no credible information reflecting any potential violation of the testing the waters regulation.”<sup>13</sup> First, Nehls admits to paying for polling in 2017, but contends that he was conducting polling in connection with his exploring a potential race for Congress in 2018, a separate election cycle (he ultimately decided not to run).<sup>14</sup> Second, Nehls asserts that \$100,000 does not reflect an amount that is in excess of what could reasonably be expected to be used for exploratory activities.<sup>15</sup> Third, regarding the golf tournament, Nehls asserts that it was “not related to [his] federal exploratory activities, for which [he] maintains a separate account.”<sup>16</sup> Nehls states that all expenses for the fundraiser were paid for by his state

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<sup>10</sup> MUR 7648 Supp. Compl. at 1.

<sup>11</sup> MUR 7648 Compl. at 4 (citing Fort Bend County Sheriff’s Office, FBC Fair Parade 2019, Facebook (Sept. 27, 2019), [https://www.facebook.com/pg/FortBendCountySheriffsOffice/photos/?tab=album&album\\_id=10157923573496122](https://www.facebook.com/pg/FortBendCountySheriffsOffice/photos/?tab=album&album_id=10157923573496122)).

<sup>12</sup> MUR 7648 Supp. Compl. at 1; *see also id.*, Attach. 4 (solicitation flyer for golf tournament, asking for donations to “support Sheriff Troy Nehls,” paid for by Friends of Sheriff Nehls, Chad Norvell, Treasurer).

<sup>13</sup> MURs 7648 & 7651 Resp. at 1 (Nov. 19, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

sheriff officeholder and campaign account, and that Texas state law permits state officeholders “to collect and spend contributions not only for state campaign purposes, but also for expenses related to officeholder duties.”<sup>17</sup>

### III. LEGAL ANALYSIS

An individual becomes a federal candidate if he or she receives contributions or makes expenditures in excess of \$5,000, or consents to another doing so on his or her behalf.<sup>18</sup> Within fifteen days of becoming a candidate, the individual must register with the Commission by filing a Statement of Candidacy and designate a principal campaign committee.<sup>19</sup>

The Commission’s regulations create a limited exception to the definitions of contribution and expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to conduct certain activities to evaluate a potential candidacy (*i.e.*, to “test the waters”).<sup>20</sup> An individual who is testing the waters need not register with the Commission unless and until the individual decides to run for federal office.<sup>21</sup> The regulations define testing the waters activities as those “conducted to determine whether an individual should become a candidate,” and include, but are not limited to, conducting a poll, telephone calls, and travel.<sup>22</sup> “Only funds permissible under the Act may be used for” testing the waters activities.<sup>23</sup> When an individual becomes a

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<sup>17</sup> *Id.* at 1 (citing Tex. Elec. Code § 251.001(9)).

<sup>18</sup> 52 U.S.C. § 30101(2) (definition of candidate); 11 C.F.R. § 100.3(a) (same).

<sup>19</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

<sup>20</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>21</sup> Advisory Op. 1981-32 at 3 (Askew) (“AO”) (“If and when the individual becomes a candidate the regulation has a retroactive effect in that the financing of all activity coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations.”).

<sup>22</sup> 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>23</sup> *Id.* §§ 100.72(a), 100.131(a).

1 candidate, funds received or payments made during the course of testing the waters are to be  
 2 reported as such on the first disclosure report filed by the candidate's authorized committee.<sup>24</sup> .

3 The Commission has opined that an individual who has crossed the \$5,000 threshold  
 4 becomes a candidate "when he or she makes a private determination that he or she will run for  
 5 federal office."<sup>25</sup> The Commission's regulation enumerates circumstances that indicate when an  
 6 individual has decided to become a candidate. They include: (1) advertising to publicize an intent  
 7 to campaign for federal office; (2) fundraising in excess of what could reasonably expected to be  
 8 used for testing the waters activity; (3) making statements that refer to the individual as a  
 9 candidate; (4) conducting activities in close proximity to the election or over a protracted period  
 10 of time; or (5) taking action to qualify for the ballot.<sup>26</sup> Where those examples do not apply, the  
 11 Commission has distinguished between activities "directed to an evaluation of the feasibility of  
 12 one's candidacy," and those "signifying that a private decision to become a candidate has been  
 13 made" or conducted "as a means of seeking some affirmation or reinforcement of a private  
 14 decision . . . to be a candidate."<sup>27</sup>

15 **A. The Commission Dismisses the Allegation that Nehls Violated 52 U.S.C.**  
 16 **§ 30102(e)(1) and 11 C.F.R. § 101.1(a) by Failing to Timely File His Statement**  
 17 **of Candidacy**

18 After consideration of the circumstances outlined in the Commission's testing-the-waters  
 19 regulation that would indicate when an individual has decided to become a candidate, the

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<sup>24</sup> *Id.* § 101.3.

<sup>25</sup> AO 2015-09 at 5 (Senate Majority PAC and House Majority PAC); *accord* AO 1981-32 at 4 (Askew); AO 1982-03 at 3 (Cranston).

<sup>26</sup> 11 C.F.R. §§ 100.72(b); 100.131(b).

<sup>27</sup> AO 1981-32 at 4.

available information does not support the allegation that Nehls failed to timely file his Statement of Candidacy.

1. Duration of Nehls’s Testing-the-Waters Activities

Testing-the-waters activities conducted “over a protracted period of time” may indicate that an individual has decided to become a candidate.<sup>28</sup> The Commission regulations do not specify a time limit for testing-the-waters activities, but consider it one factor in determining whether the individual becomes a candidate.<sup>29</sup> The Commission has opined that testing-the-waters activities often begin “well in advance of an election.”<sup>30</sup> In a prior enforcement matter, the Commission determined that activity such as polling occurring two years before the election did not itself violate the testing-the-waters provision.<sup>31</sup>

Here, the MUR 7648 Complaint alleges that Nehls began testing the waters in December 2017, almost three years before the election at issue, by commissioning polling of residents on the question of his electability.<sup>32</sup> The Response, however, contends that the polling was for the previous (2018) election cycle, and the news article attached to the Complaint tends to support this claim.<sup>33</sup> The first reported contribution or expenditure by Nehls in connection with testing the waters for the current (2020) election cycle occurred on July 31, 2019, and Nehls filed his Statement of Candidacy on December 9, 2019 — a period of approximately four months. In sum,

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<sup>28</sup> 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4).

<sup>29</sup> AO 2015-09 at 6 (Senate Majority PAC and House Majority PAC).

<sup>30</sup> Factual & Legal Analysis at 6, MUR 5722 (Friends of Lauzen).

<sup>31</sup> *Id.*

<sup>32</sup> MUR 7648 Supp. Compl. at 1.

<sup>33</sup> MURs 7648 & 7651 Resp. at 1.

there is no indication from the available information that Nehls conducted testing-the-waters activities over a protracted period of time.

## 2. Raising and Spending Funds

Another indication that an individual has become a candidate is if he or she “raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.”<sup>34</sup> On September 26, 2019, Nehls stated that he had raised over \$100,000 in donations for his exploratory committee, and his campaign committee’s initial disclosure report shows that Nehls raised a total of \$132,270 in individual, itemized contributions between July 30, 2019, and December 8, 2019 (the period when he reportedly began testing the waters until filing his Statement of Candidacy).<sup>35</sup> In previous matters involving similar amounts of money raised for exploratory activities, the Commission has declined to find that the individual had necessarily become a candidate.<sup>36</sup> Thus, based on the reported amount that Nehls raised, there is no basis to conclude that he became a candidate.

## 3. Public Statements

Authorized statements that “refer to [an individual] as a candidate for a particular office” indicate that he or she has decided to become a candidate.<sup>37</sup> The MUR 7648 Complaint cites to a news article that paraphrases a statement from Nehls — “Nehls said that the exploration phase

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<sup>34</sup> 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2).

<sup>35</sup> Nehls for Congress, Year-End Rpt. at 5-46 (Jan. 31, 2020) (itemized receipts).

<sup>36</sup> Certification, MUR 5703 (Rainville) (June 22, 2006) (\$100,000); Certification, MUR 5661 (Butler), (Oct. 27, 2006) (\$100,000); Certification, MUR 2710 (Judge Harvey Sloane) (Feb. 7, 1989) (\$200,000); Statement of Reasons, Comm’rs McDonald, Elliott, Aikens, Josefiak, McGarry & Thomas, at 2-3, MUR 2710 (Mar. 2, 1989).

<sup>37</sup> 11 C.F.R. §§ 100.72(b)(3); 100.131(b)(3).



1 *will allow voters to get to know him and why he wants to represent them.*”<sup>38</sup> The Complaint  
 2 asserts that this is “Campaigning Activity. Not testing the waters.”<sup>39</sup> However, the language here  
 3 is not a statement from Nehls but rather a paraphrase by a news article — and its significance is  
 4 further discounted by quotes from Nehls on the record in which he explains that he was still  
 5 deciding whether to run. For instance, when Nehls announced his exploratory committee on  
 6 September 26, 2019, on social media, he stated that he “will continue to strongly consider  
 7 running.”<sup>40</sup> Moreover, in statements to the press, responding to accusations that he was  
 8 circumventing the “resign-to-run” provision, Nehls asserted that: “I formed an exploratory  
 9 committee and I’m testing the waters. I’m seeing over the next 60 days, would I be a viable  
 10 candidate for Congress.”<sup>41</sup> There are no statements from Nehls in the record referring to himself  
 11 as a candidate or otherwise indicating that he had decided to run.

12 Nehls also reportedly stated that because of the “resign-to-run” provision, “[i]f I were to  
 13 announce that I was running for Congress next week or even next month, I would have to resign  
 14 my current position as sheriff, and I’m not willing to do that. So if I choose to run, I will make  
 15 that known the first week of December.”<sup>42</sup> While this might raise questions as to whether Nehls  
 16 would have properly registered before December 1, 2019, the operative date for the “resign-to-

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<sup>38</sup> Barker, CLICK2HOUSTON.COM (Sept. 26, 2019) (quoted by MUR 7648 Compl. at 2) (emphasis added).

<sup>39</sup> MUR 7648 Compl. at 2.

<sup>40</sup> *Supra* note 2.

<sup>41</sup> Marla Carter, *Ft. Bend Co. Sheriff Staying Put After Claiming ‘Witch-Hunt’ For His Ouster*, ABC13.COM, Oct. 8, 2019 (attached to MUR 7648 Supp. Compl.).

<sup>42</sup> MUR 7648 Comp. at 4 (attaching screenshot of untitled and undated article from the *Katy Times* that does not appear to be currently available on the publication’s website).

run” provision, if he had decided by that time to run, in and of themselves these comments are not conclusive evidence that Nehls had made such a decision.

#### 4. Other Activities

Finally, regarding the remaining examples of activities that indicate an individual has decided to become a candidate, as listed in 11 C.F.R. §§ 100.72 and 100.131, there is no information that Nehls engaged in any such activities. For instance, there is no allegation that Nehls took action to qualify for the ballot under State law. Moreover, there are no examples on record of any public advertising by Nehls to publicize his intention to run.<sup>43</sup>

#### 5. Conclusion

In sum, the alleged facts regarding Nehls’s duration of testing-the-waters activities, the amount of funds raised during his reported testing-the-waters period, public statements made by Nehls, as well as additional alleged conduct by Nehls, fail to give rise to a reasonable inference that Nehls became candidate more than fifteen days before he registered.

The Commission dismisses the allegation that Nehls violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy.

#### **B. The Commission Dismisses the Allegation that Nehls Violated 11 C.F.R. §§ 100.72(a), 100.131(a) by Using Impermissible Funds to Test the Waters of a Federal Election**

As discussed above, funds received or spent to test the waters of an election are not treated as contributions or expenditures under the Act until the individual testing the waters becomes a

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<sup>43</sup> The MUR 7648 Complaint attaches a solicitation flyer for a golf tournament fundraiser hosted by Nehls’s state campaign committee, which states that attendees will “support Sheriff Troy Nehls” but makes no reference to any federal campaign activity or intention by Nehls to run for federal office. MUR 7648 Supp. Compl., Attach. 4.

1 candidate.<sup>44</sup> Nonetheless, “[o]nly funds permissible under the Act may be used for [testing-the-  
 2 waters] activities.”<sup>45</sup> The Commission has stated that when an individual becomes a candidate,  
 3 his or her authorized committee is “required to make refunds or repayments of any excessive or  
 4 prohibited contributions that were received during the ‘testing the waters’ period.”<sup>46</sup> In addition,  
 5 the Commission has explained that, because a state committee is prohibited from transferring  
 6 funds to a federal committee under 11 C.F.R. § 110.3(d), it follows that a state committee is  
 7 prohibited from making expenditures on behalf of a potential federal campaign.<sup>47</sup> Thus, once an  
 8 individual becomes a candidate, the state committee’s earlier testing-the waters expenditures  
 9 become in-kind contributions to the federal committee and constitute a prohibited transfer.

10 The MUR 7648 Complaint alleges that Nehls used his state committee and state office in  
 11 connection with his testing-the-waters activities, in violation of the Act.<sup>48</sup> The Complaint

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<sup>44</sup> AO 2015-09 at 5 (Senate Majority PAC) (“If an individual becomes a candidate, payments that were made for any testing-the-waters activities must have been made with ‘funds permissible under the Act.’ 11 C.F.R. §§ 100.72(a), 100.131(a)”).

<sup>45</sup> 11 C.F.R. §§ 100.72(a), 100.131(a); *see* AO 1982-03 at 3 (Cranston); AO 1982-19 at 3 (Cranston Presidential Advisory Committee).

<sup>46</sup> AO 1982-19 at 3 (Cranston Presidential Advisory Committee).

<sup>47</sup> Factual & Legal Analysis at 15, MUR 4323 (Huckabee Election Committee) (concluding that a state committee “could not . . . use funds it could not otherwise legally have transferred to make direct expenditures on behalf of a potential [ ] federal campaign”); *sSee* Transfers of Funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36,345 (Aug. 12, 1992) (explaining the transfer prohibition as intended to prevent “indirect” use of impermissible funds); Factual & Legal Analysis at 4-5, MUR 6267 (Paton for Senate) (finding Paton’s federal committee received prohibited transfers of funds when Paton’s state senate committee paid for polling and a survey benefiting his federal campaign); Factual & Legal Analysis at 8, MUR 5722 (Friends for Lauzen) (concluding that even if a state committee has sufficient permissible funds to cover a federal testing-the-waters expense, Section 110.3(d) nonetheless “prohibits all transfers from the nonfederal to a federal campaign of the same individual regardless of whether the funds used are permissible under the Act,” and therefore prohibits testing-the-waters expenses made by state committees).

<sup>48</sup> MUR 7648 Compl. at 3 (parade appearance); MUR 7648 Supp. Compl. at 1 (golf event). Under what is known as the Act’s “soft money” prohibition states that a federal candidate, a candidate’s agent, and entities established, financed, maintained or controlled by them may not solicit, receive, direct, transfer, or spend funds in connection with a federal election unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(e)(1)(A). The record does not reasonably indicate that Nehls was a candidate during the time of the parade or the golf event, prior to his official campaign announcement in December 2019. *Supra*, Part III.A. Accordingly, the Commission applies the testing-the-waters regulations here.

1 specifically points to a golf tournament fundraiser and Nehls's appearance at a county parade, but  
2 there are insufficient facts to reasonably conclude that either was related to his testing-the-waters  
3 activities.

4 First, as to the November 11, 2019, golf tournament fundraiser paid for by Nehls's state  
5 campaign committee,<sup>49</sup> the MUR 7648 Complaint alleges that the event must have been for  
6 Nehls' federal election because it took place after both his July 11, 2019, announcement that he  
7 would not be seeking re-election for state office, and the September 26, 2019, announcement that  
8 he would be testing the waters of a federal campaign.<sup>50</sup> The solicitation flyer, distributed in  
9 connection with the event, identifies the event title as "Sheriff Troy Nehls Veterans Day Golf  
10 Tournament," and generally states that contributions would be used "to support Sheriff Troy  
11 Nehls."<sup>51</sup> The Response does not clarify the purpose of the event, but appears to suggest that it  
12 was "related to officeholder duties," which the Response asserts is a permissible use of campaign  
13 funds under state law.<sup>52</sup>

14 Here, the available information raises questions as to whether the golf tournament was  
15 related to Nehls's testing-the-waters activities, *e.g.*, Nehls was not running for state office, the  
16 purported connection to his "officeholder duties" is unclear, and the solicitation flyer does not  
17 contain a description about the purpose. However, Texas law appears to confirm Respondents'

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<sup>49</sup> MURs 7648 & 7651 Resp. at 1. There is a disclaimer which indicates that the event was paid for by Friends of Sheriff Nehls, and a review of the committee's disclosure reports filed with the Texas Ethics Commission show that it disclosed costs associated with the event. MUR 7648 Supp. Resp., Attach. (solicitation flyer); Troy Nehls, Semi-Annual, Candidate/Officeholder Campaign Finance Report at 20, 23-26, Schedule. F1 at 1, 4-7 (Jan. 10, 2020).

<sup>50</sup> MUR 7648 Supp. Compl. at 1.

<sup>51</sup> *Id.*, Attach. 4.

<sup>52</sup> MURs 7648 & 7651 Resp. at 1 (citing Tex. Elec. Code § 251.001(9)) (defining "officeholder expenditure" as an expenditure made by any person to defray expenses that are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office, and are not reimbursable with public money).

1 assertion that state officeholders are permitted to solicit contributions and make expenditures in  
 2 connection with officeholder-related duties.<sup>53</sup> Even if the golf tournament was not itself an  
 3 “officeholder-related” event, Nehls was permitted to raise funds to spend on a future officeholder-  
 4 related event or spend on a political campaign if he were to change his mind and run for state  
 5 office.<sup>54</sup> Accordingly, absent more information about the event, there is not a reasonable basis to  
 6 conclude that it was for testing the waters of a federal election.

7 Second, as to the 2019 Fort Bend County Fair Parade, the information supplied by the  
 8 MUR 7648 Complaint shows that Nehls appeared in the parade as Sheriff, that pictures of the  
 9 parade were posted on the Fort Bend County Sheriff’s Office Facebook page, and that Nehls  
 10 announced his intention of exploring a federal campaign one day before the parade.<sup>55</sup> The  
 11 Complaint argues that Nehls used his position as Sheriff to “present himself before the  
 12 community in a manner that was not available to other candidates.”<sup>56</sup> However, an individual’s  
 13 use of an outside position as a platform to maintain his public image and advance certain issues  
 14 does not necessarily implicate the testing-the-waters provision.<sup>57</sup> There is no indication from the  
 15 record before the Commission that Nehls appeared as a candidate, engaged in any testing-the-  
 16 waters activities, made any solicitations, or received any contributions at the parade. Although  
 17 the state of Texas falls within the meaning of “person” under the Act and thus the individual

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<sup>53</sup> Tex. Elec. Code § 253.035 (prohibiting the conversion of committee funds to “personal use,” which is defined as “a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office”).

<sup>54</sup> *Id.* § 253.036.

<sup>55</sup> MUR 7648 Compl. at 3.

<sup>56</sup> *Id.*

<sup>57</sup> MUR 5260 (Talent for Senate) (the fact that a state leadership PAC served as a candidate’s “platform” to “keep up his political profile and support Republican candidates and causes,” does not in and of itself establish that the PAC assisted with the candidate’s testing-the-waters or federal election activities).

1 contribution limit would seemingly apply to the Fort Bend County Sheriff's Office,<sup>58</sup> there is no  
 2 factual basis to conclude that any such in-kind contribution was made to Nehls.

3 Therefore, the Commission dismisses the allegation that Nehls violated 11 C.F.R.

4 §§ 100.72(a), 100.131(a) by using impermissible funds to test the waters of a federal election.<sup>59</sup>

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<sup>58</sup> The Commission has long held that states are "persons" under the Act and are subject to the individual contribution limit which, during the 2020 election cycle, was \$2,800 per election. Factual & Legal Analysis at 4, MUR 6858 (Malone PAC, *et al.*); Factual & Legal Analysis at 4-6, MUR 5127 (Democratic Party of Illinois, *et al.*); 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 84 Fed. Reg. 2,504, 2,506 (Feb. 7, 2019). Under the Texas State Constitution, counties are "recognized as legal subdivisions of the State." TEX. CONST. ART. XI, § 1.

<sup>59</sup> Factual & Legal Analysis at 9, MUR 6788 (Jim Tracy, *et al.*) (concluding that a state committee's payments made before the individual declared his federal candidacy — for activities related to his duties as a state senator and re-election to that office — were not contributions or expenditures for the purposes of the Act).