



FEDERAL ELECTION COMMISSION  
Washington, DC

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary <sup>VFW</sup>

**DATE:** August 19, 2024

**SUBJECT:** AOR 2024-12 (McCutcheon) - Comment  
from The League of Women Voters of Maine  
(LWVME), RepresentUs, and Fair Vote

Attached is AOR 2024-12 (McCutcheon) – Comment from The League of Women Voters of Maine (LWVME), RepresentUS, and Fair Vote.

**Attachment**

**RECEIVED**

*By Office of the Commission Secretary at 9:22 am, Aug 19, 2024*

August 19, 2024

**RECEIVED**

*By Office of General Counsel at 8:46 am, Aug 19, 2024*

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Acting General Counsel  
Federal Election Commission  
1050 First St. NE  
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ao@fec.gov

**Re: Advisory Opinion Request 2024-12 (McCutcheon)**

Dear Ms. Stevenson:

The League of Women Voters of Maine (LWVME), RepresentUs, and FairVote respectfully submit this comment concerning Advisory Opinion Request 2024-12 (McCutcheon) (“request”).<sup>1</sup> Shaun McCutcheon, the requestor, wishes to contribute three times the maximum lawful individual limit to a U.S. Senate candidate in Maine. Maine uses ranked choice voting (“RCV”), a voting method that can involve multiple rounds of tabulation of ballots, to nominate or elect candidates for federal office. The request claims that each round of tabulation under RCV constitutes a new “election” under the Federal Election Campaign Act (“FECA”), which would allow individual contributions equal to the product of the current maximum limit and the maximum number of rounds possible in any federal primary or general election conducted with RCV.

The organizations submitting this comment have significant experience with RCV, both across the United States and in Maine specifically. LWVME has been engaged with RCV in Maine for over 15 years and was among the leading organizations responsible for its enactment in 2016. Since then LWVME has been continuously involved in the implementation of RCV, its expansion to other races, and its legal defense. RepresentUs is a nonpartisan organization that advocates for electoral reforms like RCV and reasonable campaign finance laws. RepresentUs has been involved in passing and implementing RCV laws across the country. FairVote is the national driving force behind advancing ranked choice voting to give voters more choices, fairer representation, and better government. It is the oldest and largest RCV advocacy group in the

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<sup>1</sup> See Advisory Op. Request 2024-12 (McCutcheon) (Aug. 6, 2024), [https://www.fec.gov/files/legal/aos/2024-12/202412R\\_1.pdf](https://www.fec.gov/files/legal/aos/2024-12/202412R_1.pdf) (“AO Request”).

nation, and has decades of experience analyzing RCV systems. We respectfully offer our expertise in RCV to assist the Commission as it considers this request.

The Commission should reject the request's interpretation of FECA, which relies upon a fundamental misunderstanding of RCV. While RCV elections can involve multiple rounds of tabulation, these rounds are integral parts of a single, cohesive electoral process, and cannot be considered distinct "elections" under FECA. Defining each round of RCV tabulation as a new election would disregard basic distinctions between RCV and the traditional runoff elections currently recognized as separate elections in FECA and the Commission's governing regulations, and would lead to absurd results such as candidates receiving substantial campaign contributions that they are by definition unable to spend.

### **How RCV Works**

Maine's voters adopted RCV by ballot initiative in 2016, and have used it in certain state and federal elections involving three or more candidates since the law went into effect beginning with Maine's 2018 primary elections.<sup>2</sup> Maine's use of RCV is straightforward. Voters assign numerical rankings to the candidates for each office. Voters complete and cast a single ballot containing all of their rankings for the election. Voters are unable to change their rankings or submit new ballots containing different rankings once they cast their ballots. The ballot a voter casts represents the voter's singular point of input for the entire tabulation process. Once ballots are cast, voting is complete and there is nothing more a voter or candidate can do to alter the outcome.

Just as in a traditional "choose one" election, after the ballots are cast they are tabulated. During this tabulation, each ballot counts toward its highest-ranked candidate.<sup>3</sup> If a candidate has the highest ranking on a majority of ballots, that candidate is elected or nominated.<sup>4</sup> If no candidate has majority support, the candidate with the least support is eliminated from contention.<sup>5</sup> Tabulation then moves to another round in which ballots that had counted for the eliminated candidate now count for their next-highest-ranked candidate, continuing until two candidates remain.<sup>6</sup> Not all RCV elections will involve multiple rounds of tabulation. As noted above, any election where a candidate receives majority support in the initial tabulation will end after a single round.<sup>7</sup>

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<sup>2</sup> *Ranked Choice Voting in Maine*, Me. St. Legislature, <https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509> (last visited Aug. 16, 2024). Maine currently uses RCV for state and federal primary elections and federal general elections. Me. Stat. tit. 21-A, §1(27-C).

<sup>3</sup> Me. Stat. tit. 21-A, §723-A(2).

<sup>4</sup> 29-250-535 Me. Code. R. § 4(2).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> For example, in 2020 Senator Susan Collins won reelection with a single round of tabulation after receiving a majority of first-choice rankings. *Senate Latest: GOP Sen. Susan Collins wins reelection in Maine*, AP News (Nov.

No matter how many rounds an RCV election ultimately has, once the polls close and tabulation begins the process of determining a winner is dictated entirely by the mathematical logic of the voters' rankings. There is no further opportunity for voters to change their mind or direct the process to reach a different outcome than what they had already indicated on their ballots. Ranked choice voting tabulation is a singular, cohesive process that begins with the casting of ballots and ends with the determination of a winner.

### **Analysis**

- a. A round of RCV tabulation is not a separate “election” in which additional contributions can be used to campaign for federal office.*

An RCV election, like any other election covered by the Commission's regulations, requires a single input from voters (in the form of a ranked ballot) and concludes when the polls close and the last valid ballot marked by a voter has been received. This input may contain more information than a ballot under another voting method, and it may require a different form of tabulation involving multiple rounds to process that information, but it is still a single input that is used to determine a single aggregate result. Thus, the fact that each RCV ballot contains more *information* does not mean it counts as multiple *votes*, and the fact that a tabulation under RCV could require a *series of rounds* to determine the winner is not the same as saying it is a *series of elections*. Whatever process a state has in place to canvass those ballot inputs and certify the winner does not and cannot constitute a new or separate “election.”

The differences between a round of RCV tabulation and what the Commission has traditionally understood as a “runoff election” can be illustrated by two crucial distinctions. First, the entire RCV tabulation process is resolved almost instantly. Maine uses tabulation software for RCV elections, which takes “only seconds or minutes” once all ballot data has been uploaded.<sup>8</sup> An election administrator pushes a button and moments later the tabulation software provides the full results of the election. Unlike a traditional runoff election, which is typically held weeks or months after the initial election, there is simply no time or opportunity for a campaign to spend additional contributions between the first and any subsequent rounds of an RCV election.

Second, even in situations where the RCV tabulation may take longer (if ballots are counted by hand, for example), there is nothing that any candidate can do between rounds to persuade voters or otherwise affect who is ultimately elected or nominated. While candidates for U.S. Senate in

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4, 2020),

<https://apnews.com/article/election-2020-donald-trump-senate-elections-susan-collins-elections-b30f7aaab9ed0b59ab7ab75be46df92c>.

<sup>8</sup> Ranked Choice Voting Res. Ctr., *MAINE: Ranked Choice Voting State Readiness Assessment 2023 Edition 16* (2023), available at [https://drive.google.com/file/d/1\\_GysQCrcYpmPk4nvseMyn5lhFlxD3LkB/view](https://drive.google.com/file/d/1_GysQCrcYpmPk4nvseMyn5lhFlxD3LkB/view).

Maine campaign for votes up to and through Election Day, that effort ends once ballots are cast like any other primary or general election. The entirety of the voter preferences that could determine the outcome of the contest are contained on those ballots.

In a runoff election, however, voters can make a new decision about which candidate to support and must once again decide whether to participate by casting a new ballot. Candidates in runoff elections can use the time between the initial general or primary election and the subsequent runoff election to persuade the voters to participate in the runoff and vote for them. In fact, some detractors of RCV criticize it on the basis of voters' inability to reevaluate the remaining options and change their votes between rounds, seeing that as a weakness as compared to the traditional runoff elections they prefer.<sup>9</sup>

The request insists that "Maine's ranked-choice voting system is, in effect, an instant-runoff system[.]"<sup>10</sup> but the Commission should not give undue importance to what is, in effect, an analogy.<sup>11</sup> As the Ninth Circuit observed when considering a challenge to San Francisco's use of RCV, "the analogy is just that — an analogy."<sup>12</sup> The Ninth Circuit recognized a clear distinction between RCV and the two-round runoff system used in other California elections, noting that under RCV, "once the polls close and calculations begin, no new votes are cast," whereas under a two-round runoff system, "even if a voter's chosen candidate in the first round successfully proceeds to the runoff election, that voter is still afforded an opportunity in the runoff election to select a different candidate, or not to vote at all."<sup>13</sup>

In a runoff election, candidates spend a new period of time, distinct from the one prior to the initial election, taking action and spending money to seek nomination or election, clearly delineating two distinct elections. In a situation like the one described in *Busby* (AO 2006-06), where a special general election runoff and a primary election appear on the same ballot, candidates may campaign during a single period of time but are seeking two distinct things—to be elected to fill a vacancy in the special election and to be nominated in the primary election. They are asking voters to make two different choices and seeking two different outcomes, again clearly delineating between two distinct elections.

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<sup>9</sup> See, e.g., *Baber v. Dunlap*, 376 F. Supp. 3d 125, 131–32 (D. Me. 2018) ("[According to Dr. Gimpel, the] primary flaw . . . in RCV is that, unlike ordinary elections and ordinary run-offs, voters are required to make predictions about who will be left standing following an initial tabulation of the votes."). While it is true that voters cannot know prior to tabulation who their vote will ultimately count for, they do not need to make "predictions about who will be left standing." When a voter ranks candidates in an RCV election they know that their ballot will count for their highest-ranked choice. They also know that if that choice cannot win, their ballot will count for their next-highest-ranked choice, and so on.

<sup>10</sup> AO Request at 5.

<sup>11</sup> Some jurisdictions that use RCV, like San Francisco, call it "instant runoff voting," but Maine does not. See *Dudum v. Arntz*, 640 F. 3d 1098, 1100 n.4 (9th Cir. 2011).

<sup>12</sup> *Id.* at 1107.

<sup>13</sup> *Id.*

Under RCV, there is no such distinction. Candidates have a single period of time for campaigning. Voters have a single opportunity to input their preferences onto a single ballot. The final result is the election or nomination of a candidate to a single term of office.

Under any reasonable interpretation of 11 C.F.R. § 100.2(a), an RCV election is a single election subject to the same contribution limits as any other election. To consider an RCV election anything else would require a definition of “election” that does not require any input or action from voters and candidates specific to that particular election.

*b. Treating each round of tabulation as a separate election would produce absurd results.*

Even setting all other considerations aside, the absurd consequences of treating different rounds of RCV tabulation as different elections under FECA counsel against the request’s interpretation.

Once a ballot is cast in an RCV election, all that remains is a mechanistic counting process predetermined by the voters’ rankings. Nothing a candidate or voter can do between rounds would alter that outcome. There is no opportunity for additional advertisements or door knocking. Unlike a runoff election, there is nothing a candidate can do to spend any additional contributions. Once the ballots are cast and tabulation begins, candidates cannot “seek” anything. Like any election results watch party, all they can do is observe as the results come in.<sup>14</sup>

Simply put, no funds contributed under the theory put forth in the request could ever be used to impact the purported “election” they are intended to influence. Either the winning candidate will be identified in the first round of tabulation and the contributions will be returned, or the winning candidate will be identified in a later round of tabulation. Either way, candidates would have no way to use or access the funds to influence the outcome of the election.

### **Conclusion**

Contrary to the request’s understanding, RCV tabulation is a single, cohesive process constituting a single election. While each round of counting reveals which candidate has been eliminated, that counting process does not stop until the winner is identified. Every round is an inextricably linked part of that unified whole. Each round of RCV tabulation is no more a different election than each inning in baseball is a different game or each chapter of a Stephen King novel is a different book.

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<sup>14</sup> For an example of what candidates experience during the tabulation process, see this thread of posts by a candidate in Arlington, VA’s 2023 primary election, which was conducted using the proportional multi-winner form of RCV, see Maureen Coffey (@maureencoffeyva), X (June 23, 2023, 5:16PM), <https://x.com/maureencoffeyva/status/1672352914004754432>.

The reasoning underlying the request rests on misunderstanding superficial similarities between RCV and runoff elections and overlooks essential features of RCV tabulation. Accepting the request's interpretation can only lead to absurd results. The Commission should reject the request's interpretation.

Respectfully submitted,

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