FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** VFV

DATE: **August 19, 2024**

SUBJECT: **AOR 2024-12 (McCutcheon) - Comment from Campaign Legal Center**

Attached is AOR 2024-12 (McCutcheon) – Comment from Campaign Legal Center.

Attachment

CLC
ADVANCING DEMOCRACY THROUGH LAW

August 19, 2024

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Federal Election Commission
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Re: Advisory Opinion Request 2024-12 (McCutcheon)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment regarding Advisory Opinion Request 2024-12 (McCutcheon).[1] The requestor, Shaun McCutcheon, asks the Federal Election Commission ("FEC" or "Commission") to "confirm he may contribute $9,900"—*i.e.*, the prevailing maximum individual contribution amount of $3,300 per election, for three elections—to a candidate for the U.S. Senate in Maine. Maine uses a single-winner ranked-choice voting ("RCV") system for any race involving more than two candidates, and because the race in question features four candidates, the requestor argues that it may involve three separate "elections" under the Federal Election Campaign Act ("FECA") to determine the winner, entitling an individual contributor to contribute up to $9,900 to any federal candidate in that race.

The Commission should reject this argument, which depends on two, related flawed premises: a fundamental misinterpretation of FECA's unambiguous, statutory definition of the term "election," and a misunderstanding of how Maine's RCV system—which may involve multiple rounds of vote tabulation but does not constitute multiple "elections"—works. Moreover, even if, *arguendo*, Maine's RCV process involved multiple distinct elections occurring instantly, because federal rules bar candidates from using funds designated for future elections in advance of those elections, any candidate receiving contributions designated for subsequent rounds of the RCV process would be barred from using those funds to campaign for office. As such, even if the request was legally sound, which it is not, the practical result

[1] *See* Advisory Op. Request 2024-12 (McCutcheon) (Aug. 6, 2024), https://www.fec.gov/files/legal/aos/2024-12/202412R_1.pdf ("AOR").

would be to allow contributors to give candidates money they could not use before the election.

Analysis

The request's flawed legal position stems from a basic misreading of how FECA uses the term "election" as applied to Maine's RCV system, which does not feature multiple "elections." Under FECA, an election includes "a general, special, primary, or runoff election"[2] and is defined as "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office."[3] In both contexts, the "process" by which someone "seeks" federal office is campaigning for—*i.e.*, raising and spending money in pursuit of—federal office. Indeed, under FECA, candidacy—*i.e.*, the point at which an individual "seeks nomination for election, or election, to federal office"—is triggered by money raised or spent: Someone becomes a candidate upon raising aggregate contributions or making aggregate expenditures in excess of $5,000 in an election cycle.[4]

Maine's RCV system—in contrast to a process involving multiple distinct elections—does not involve candidates campaigning or otherwise spending money once voters have cast their ballots. After votes have been counted in the first round of vote tabulation, the candidate with the fewest votes is eliminated and *the same ballots* are then retabulated to reflect voters' preferences for the remaining candidates. Because voters cannot cast any new or additional ballots between the first and any subsequent rounds of vote tabulation, there is no opportunity or "process" for candidates to raise or spend money, campaign for, or otherwise "seek" federal office.[5] Accordingly, these additional rounds in the RCV process are not distinct "elections" under FECA; they are merely additional steps in the vote-counting process used to determine the winner in a single election, based on ballots that have already been cast.[6]

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[2] 52 U.S.C. § 30101(1)(A).

[3] 11 C.F.R. § 100.2(a).

[4] 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a).

[5] Richard H. Pildes and G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Calif. L. Rev. 1773, 1804 (2021), https://www.californialawreview.org/print/the-legality-of-ranked-choice-voting ("[Under RCV, the] victor wins by popular selection, and *a single election determines the result*. Voters submit one ballot—one input—and the balloting identifies a winner.") (emphasis added); *id.* at 1806 ("[RCV] reflects a single input that is then counted in an authorized manner to produce an aggregate measure of popular support. This distinction—between multiple inputs and a single input reflecting multiple contingent choices—is critical.").

[6] *Dudum v. Arntz*, 640 F.3d 1098, 1107 (9th Cir. 2011) ("[T]he sequence of calculations mandated by restricted IRV is used to arrive at a single output—one winning candidate. The series of calculations required by the algorithm to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting").

The request errs by treating the subsequent rounds of vote tabulation in RCV as separate "runoff" elections.[7] While single-winner RCV's tabulation process is often referred to as an "instant runoff" (or instant runoff voting, "IRV") as a shorthand, single-winner RCV does not involve a "runoff election" as FECA uses that term: In a runoff election, a new and separate election date is set for a contest between two candidates, a new campaign period occurs leading up to that election, and a new set of voters turn out to the polls to cast new ballots based on a narrower set of choices—namely, the winnowed field of candidates that emerged from the primary or general election preceding the runoff.[8] Thus, candidates can "seek" federal office in a runoff election by campaigning for runoff election votes.[9] By contrast, in RCV-IRV, because the rounds of vote tabulation and winnowing use ballots that reflect voters' preferences as to all of the candidates, voters have no reason or opportunity to express new preferences based on the results of prior rounds of the tabulation process.[10] Consequently, candidates have no opportunity to persuade voters to vote differently or "seek" "nomination for election, or election, to federal office," as they would in a runoff election.

The request cites Advisory Opinion 2006-06 (Busby) for support, but that opinion is simply inapposite: Not only does it concern the "Millionaire's Amendment," a now-struck-down provision of FECA that has no relevance here, it also involved voters simultaneously casting ballots for two *different terms* of office: voters in California's 50th congressional district had the opportunity to cast two separate votes on the same day, one vote in a special general runoff election for the remainder of the 2004-2006 term, and an entirely separate vote in a primary election for the 2006-2008 term.[11] The Commission's treatment of voters casting ballots with independent votes for two different terms of office as two distinct elections in no way supports the request's conclusion that "each subsequent round of voting, tallying, and vote

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[7] AOR at 6 (urging the Commission to treat Maine's RCV process "as a general election followed by one or more runoffs").

[8] *See* 11 C.F.R. § 100.2(d) (defining a "runoff election" as an election either "held after a primary election . . . as the means for deciding which candidate(s) should be certified as a nominee" or "held after a general election . . . as the means for deciding which candidate should be certified as an officeholder elect").

[9] Pildes and Parsons, *supra* note 5 ("In traditional runoff elections, each round of voting produces an aggregate result and voters are then faced with a new, separate decisional point where they must submit a new input based on (and with the knowledge of) the first election's aggregate result. This is, notably, *not* the case with RCV.") (emphasis in original). Indeed, because runoffs present voters with a new set of choices and an opportunity to cast a new vote, the candidates participating in a runoff *need* to campaign separately because they must persuade voters who didn't vote for them (or perhaps didn't vote at all) in the initial election to vote for them in the runoff election.

[10] *See Dudum*, 640 F.3d at 1105 (noting that under an IRV system, "voters must submit their preferences before polls close, and, even though they might have chosen differently with more specific information about other voters' selections, they are not provided an opportunity to revise their choices").

[11] *See* Advisory Op. 2006-06 (Busby) at 7.

reallocation in Maine's RCV process qualifies as a 'runoff' election under the FECA."[12]

In addition, the request's proposal is inconsistent with the fundamental functioning of the federal campaign finance system because it would only serve to enable additional contributions that candidates could *not* use to campaign for office. Under FEC rules, contributions can be designated for a particular election, and any contributions that are not designated will be treated as a contribution with respect to the next election after the contribution is made.[13] Crucially, while a candidate may accept funds designated for a subsequent election (*e.g.*, a general or runoff election) before qualifying for that election, they cannot spend such funds before the preceding election occurs (*e.g.*, the primary election preceding a general election, or the general election preceding a runoff election),[14] and must refund any contributions designated for an election that they do not ultimately qualify to run in or that do not occur.[15]

Applied here, these vital FEC rules render useless—for purposes of campaigning—any candidate contributions designated for a "runoff" in Maine's RCV electoral process: A candidate accepting such contributions will never be able to spend those funds to campaign in the purported "election" for which they are designated. Either a candidate will prevail with a majority in the initial round of tabulation (and all funds designated for subsequent rounds will be refunded), or the instantaneous round-by-round tabulation process will occur on the ballots already cast to determine the winner (and there will be no opportunity to use the contributions designated for later rounds to impact the result of that process). Accordingly, the additional contributions the request seeks to provide cannot advance the basic campaign finance goal of funding a candidate's efforts to seek federal office; instead, those additional funds will end up either refunded or residual.

In sum, the request advances a deeply flawed legal argument that fundamentally misreads FECA and how Maine's RCV process works, and would not succeed in

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[12] AOR at 9.

[13] 11 C.F.R. § 110.1(b)(2).

[14] *See id.* § 102.9(e)(2) ("An authorized committee's records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made."); Advisory Op. 1980-68 (Zell Miller for U.S. Senate Comm.) at 2 ("[C]ontributions may be made and received with respect to a possible runoff election before the actual need for that election is determined under State law. . . . [T]he situation of accepting contributions for a primary runoff election is analogous to accepting general election contributions before the primary election. . . . [Accordingly,] contributions may be made and accepted with respect to a possible primary runoff election and subject to the condition . . . that they will be returned to the donors if [the candidate accepting the contribution] is not in the primary runoff.").

[15] 11 C.F.R. § 102.9(e)(3).

generating any additional money that candidates could use to actually campaign for office. The Commission should firmly reject it.

Respectfully submitted,

/s/ Saurav Ghosh

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