FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **September 18, 2024**

SUBJECT: **AOR 2024-12 (McCutcheon) Comment from Chalmers, Adams, Backer, & Kaufman, LLC**

Attached is AOR 2024-12 (McCutcheon) Comment from Chalmers, Adams, Backer, & Kaufman, LLC. This matter is on the September 19, 2024 Open meeting.

Attachment

C|A
B|K
Chalmers, Adams, Backer & Kaufman, LLC

441 N. LEE ST, STE. 300
ALEXANDRIA, VA 22314
(202) 210-5431
dbacker@chalmersadams.com

September 18, 2024

Hon. Lisa Stevenson
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

RE: Shaun McCutcheon Advisory Opinion Request Regarding Ranked Choice Voting, A.O. 2024-12

Dear Ms. Stevenson:

Please accept this public comment in response to the draft Advisory Opinions the Federal Election Commission ("FEC" or "Commission") has released in connection with the above-referenced advisory opinion request, as well as other public comments the Commission has received regarding this request.

As you are aware, Mr. McCutcheon has submitted an advisory opinion request to confirm each round of balloting, ballot tabulation, and the resulting changes in vote tallies from different groups of voters among different candidates in Maine's ranked-choice voting ("RCV") system qualifies as a separate "election" for purposes of the Federal Election Campaign Act ("FECA").

1. The Campaign Legal Center ("CLC") contends Mr. McCutcheon has "misinterpret[ed] the term "election" as it appears in "FECA." Letter from Saurav Ghosh, Campaign Legal Center, to Lisa J. Stevenson, FEC, Re: *McCutcheon*, A.O. 2024-12, at 1 (Aug. 19, 2024) [hereinafter, "*CLC Letter*"]. CLC points out the FECA defines "election" as "the process by which individuals . . . seek nomination for election, or election, to Federal office." *CLC Letter*, *supra* at 2 (quoting 52 U.S.C. § 30101(1)(A)). CLC then goes on to completely manufacture its own definition of "process," defining it to mean "raising and spending money in pursuit of—federal office." *Id*. Based on ***its own fabricated definition***, CLC argues the second and subsequent rounds of voting, ballot tabulation, and vote reallocation in Maine's RCV system cannot qualify as separate "elections" under the FECA because there is ostensibly no opportunity for additional "campaigning or otherwise spending money once voters have cast their ballots." *Id*. at 2; *see also* Letter from Anna Keller, League of Women Voters of Maine, et al., to Lisa J. Stevenson, FEC, Re: *McCutcheon*, A.O. 2024-12, at 4 (Aug. 19, 2024) [hereinafter, "*LWV Letter*"]. The Commission's drafts appear to have adopted this argument, pointing out Maine's RCV system does "does not allow for any additional periods of campaigning and voting" after Election Day. FEC, *Draft A* at 8, lines 4-6; FEC, *Draft B* at 7, lines 13-15.

CLC's argument, echoed by the League and tentatively adopted by the Commission's drafts, fails for four reasons. ***First***, the entire argument is based on CLC's own definition of the term "process" which it manufactured from whole cloth, rather than a federal statute or regulation. ***Second***, contrary to CLC's suggestion, the FECA's definition of election does not impose any requirement that any candidate (or anyone else, for that matter) actually "rais[e] and spend[]"

441 N. LEE ST, STE. 300
ALEXANDRIA, VA 22314
(202) 210-5431
dbacker@chalmersadams.com

money in order for a proceeding to qualify as such. *See* 52 U.S.C. § 30101. While CLC emphasizes raising or spending more than $5,000 in connection with an election automatically triggers candidacy status under the FECA, *CLC Letter*, *supra* at 2 (citing 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a)), the term applies more broadly to any "individual who seeks nomination for election, or election, to Federal office" regardless of any fundraising or expenditures. 52 U.S.C. § 30101(2). Thus, CLC's attempt to tie an "election" to the expenditure of funds fails. ***Third***, a person's constitutional entitlement to exercise their fundamental First Amendment right to associate with a candidate by making a political contribution in connection with each election in which that candidate is running is completely distinct from, and should not depend upon, the extent of a candidate's ability to spend such funds. *See Buckley v. Valeo*, 424 U.S. 1, 19-20, 24-25 (1976) (per curiam). ***Fourth***, and perhaps most importantly, as discussed below, candidates ***may*** validly spend funds raised in connection with second and subsequent rounds of ballot tabulation and vote relocation. *See infra* p. 4.

2. CLC next goes on to argue second and subsequent rounds of voting, ballot tallying, and vote totals do not qualify as separate elections because they are "merely additional steps in the voting counting process used to determine the winner in a single election, based on ballots that have already been cast." *CLC Letter*, *supra* at 2. As even CLC is forced to acknowledge, however, *see CLC Letter*, *supra* at 2, the FECA expressly defines "election" to include both a "general election" as well as any subsequent "runoff" election. 52 U.S.C. § 30101(2). Both a general election and runoff elections are regarded as distinct elections under the FECA, subject to separate and independent contribution limits, despite the fact they may be characterized as part of a single "process" leading to the ultimate election of a single federal officeholder for a particular position. 11 C.F.R. § 110.1(j)(1); *Sala Burton*, A.O. 1983-16, at 3 (June 10, 1983). Although the League objects Maine has chosen not to use the "instant runoff voting" label for its RCV system, *see LWV Letter*, *supra* at 4, that is in fact the system Maine has adopted and each subsequent round of voting, ballot tabulation, and vote reallocation qualifies as a "runoff" as a matter of federal law.

The label a state chooses to give its process is merely that – a label, not a binding determination of how that proceeding should be categorized for purposes of federal law. For example, Louisiana chooses to designate the congressional election open to all voters which federal law requires it to hold in November, *see* Foster v. Love, 522 U.S. 67, 71-72 (1997) (citing 2 U.S.C. § 7), as its "primary," La. Rev. Stat. §§ 18:401(B)(1), 18:402(B)(1). Louisiana law goes on to specify if no candidate receives a majority of votes in that proceeding, a "general election" is held two months later. *Id*. §§ 18:402(B)(2), 18:511(A). Such labels would not be controlling if the Commission needed to determine whether those proceedings qualified as a "general election" and "runoff," respectively, under the FECA. *See, e.g.*, *Sala Burton*, A.O. 1983-16, at 2 (June 10, 1983) (concluding an election which state law called a "special primary" instead qualified as a "general election" under the FECA). Each round of ranked choice voting involves a different group of voters (due to exhausted ballots), different group of candidates (due to eliminated candidates), different votes, and different vote tallies. It is appropriate to recognize each such round as a separate "election" for FECA purposes, regardless of Maine's labeling for state-law purposes.

441 N. LEE ST, STE. 300
ALEXANDRIA, VA 22314
(202) 210-5431
dbacker@chalmersadams.com

The Commission's current drafts emphasize, under Maine law, a candidate is not elected until they have received the most votes in the final round of voting. "Rounds of vote tallying prior to the final round therefore cannot result in the selection of a candidate and cannot be considered separate elections." FEC, Draft A at 7, lines 3-4; FEC, Draft B at 6, lines 13-14. But that is true of the initial round of any voting whenever a runoff election is held—no round of voting prior to the last, by definition, can result in the election of a winning candidate.

Indeed, virtually all of the factors which CLC claims are essential to a runoff election apply to the second and subsequent rounds of voting, tallying, and vote reallocation in Maine's RCV system. For example, CLC contends a runoff election involves "a new set of voters." *CLC Letter*, *supra* at 3. Similarly, due to drop-offs (i.e., RCV ballots on which voters do not select candidates for each round of voting), each round of voting in an RCV election invariably involves a different universe of voters, as well. Likewise, CLC contends a runoff election requires "new ballots." *Id*. Likewise, in Maine's RCV system, regardless of whether individuals' rankings are made on the same physical piece of paper, separate papers, or electronically, each round of voting involves new votes. Finally, CLC points out runoff elections involve a "narrower set of choices" than the general election. *Id*. The same is true in an RCV system—as candidates are eliminated, each runoff involves a narrower field than previous elections. The only difference is Maine's RCV system does not entail "a new and separate election date." But that begs the question. As discussed throughout this comment, however, the FECA imposes no such requirement, and this Commission has declined to do so in the past. *See Busby*, A.O. 2006-06 (Mar. 10, 2006) (concluding elections for the same office occurring on the same day were subject to separate contribution limits). Particularly in light of the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Commission is not free to simply depart from the FECA's plain statutory text to add, under the guise of "interpretation," CLC's proposed requirements concerning election timing. An uncharacteristically efficient government process such as Maine's RCV system neither results in fewer substantive elections nor operates to deny candidates, voters, and Mr. McCutcheon of their constitutionally protected rights.

The League of Women Voters of Maine and its allies (collectively, "LWV"), instead emphasizes with RCV systems, once a ballot has been cast, "[t]here 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." *League Letter*, *supra* at 3. The League later reemphasizes, "Voters have a single opportunity to input their preferences on a single ballot." *Id*. at 5. The FEC's current drafts likewise emphasize, "[T]he Commission is not aware of, any date after November 5 prescribed by Maine law on which voters will be able to cast votes for U.S. Senate candidates in Maine's 2024 election." FEC, *Draft A* at 6, lines 3-5; FEC, *Draft B* at 6, lines 2-4.

This argument completely overlooks the fact circumstances exist where voters cast multiple votes at the same time, on the same ballot, despite the fact we recognize them to be for distinct elections. For example, Georgia generally requires candidates to receive a majority of votes to prevail, and provides for runoff elections if no candidate receives such a majority. Ga. Code § 21-2-501(a)(1). There is no question these proceedings qualify as separate elections under FECA subject to distinct contribution limits. Georgia, however, provides "special absentee run-off

441 N. LEE ST, STE. 300
ALEXANDRIA, VA 22314
(202) 210-5431
dbacker@chalmersadams.com

ballots" in both primary and general elections to uniformed and overseas voters. *Id*. § 21-2-384(e)(1), (e)(5)-(e)(6).[1] Such ballots permit each voter to rank their candidate choices for each office, rather than casting a separate runoff ballot at a later date (due in part to concerns about delays in mail transmission overseas). *Id*. § 21-2-384(e)(2)-(e)(4). Such ballots are counted in both the general election and any runoffs based on the voters' candidate rankings, and are ultimately counted along with votes cast in person on Election Day and in any subsequent runoff. There is no doubt uniformed and overseas voters are participating in two distinct elections—a general election and a runoff (if it occurs)—by ranking candidates for the same office at the same time on a single ballot. The number of elections in which such voters are participating should not depend on the manner in which other, domestic voters cast their ballots. Accordingly, the outcome should be no different for a state such as Maine that chooses to allow voters in general to cast their votes, like uniformed and overseas citizens registered in Georgia, through a ranked choice voting system. *Cf*. 21-A Me. Rev. Stat. § 752(1).

3. The Commission's drafts appear to be overlooking the importance of *Busby*, A.O. 2006-26 (Mar. 10, 2006). *See* FEC, *Draft A* at 8, lines 7-9; FEC, *Draft B* at 8, lines 2-3; *see also League Letter*, *supra* at 4; *CLC Letter*, *supra* at 3-4. In that advisory opinion, two elections were being held on the same day for the same House seat, but for different terms. Despite the fact the period of campaigning for both elections completely overlapped, this Commission nevertheless recognized they were separate elections subject to distinct contribution limits. Although, as the Commission pointed out, the two elections in *Busby* were for separate terms of the office at issue, it demonstrates elections for a particular office may be considered legally distinct for FECA purposes even if they involve the exact same campaign period. *Busby* appear to preclude the Commission's reasoning that a distinct election for a particular office cannot exist unless it entails a "separate opportunity to campaign." FEC, *Draft A* at 8, line 3; FEC, *Draft B* at 7, lines 12.

4. A key objection implicated by both the FEC's drafts as well as the comments is the presumption candidates would be categorically unable to spend funds raised in connection with possible second and subsequent rounds of voting, ballot tabulation, and vote reallocation. *See League Letter*, *supra* at 5 ("There is no opportunity for additional advertisements or doorknocking . . . [T]here is nothing a candidate can do to spend any additional contributions[] [o]nce the ballots are cast and tabulation begins . . . ."); *CLC Letter*, *supra* at 4 ("A candidate accepting such contributions will never be able to spend those funds to campaign in the purported 'election' for which they are designated.").

As discussed above, concerns about a candidate's inability to spend funds is not a grounds for restricting a supporter's First Amendment right to associate with that candidate by making contributions. Moreover, the Supreme Court has repeatedly affirmed the only valid basis for limiting campaign contributions is preventing actual or apparent *quid pro quo* corruption. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality op.); *accord Citizens United v. FEC*, 558 U.S. 310, 360 (2010); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497

[1] Georgia takes these definitions from the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310.

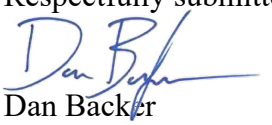
441 N. LEE ST, STE. 300
ALEXANDRIA, VA 22314
(202) 210-5431
dbacker@chalmersadams.com

(1985). Objections concerning a candidate's purported inability to spend the funds they raise is not a constitutionally valid basis for prohibiting that candidate from accepting contributions, regardless of whether the League shamefully chooses to denigrate such political participation as "absurd." *League Letter*, *supra* at 5-6. The fact funds may wind up being "refunded or residual," as CLC complains, *CLC Letter*, *supra* at 4, should not preclude a candidate from being able to raise them in the first place.

Perhaps more importantly, however, candidates ***are*** able to spend funds raised in connection with second and subsequent rounds of voting, ballot tallying, and vote totals. Certain expenses, such as those associated with hired poll watchers, are properly attributable to all elections conducted within an RCV proceeding and could be allocated among the funds raised in connection with each sequential round/election in which a candidate participates. Likewise, funds raised in connection with runoff elections (i.e., second and subsequent rounds of tallying and vote reallocation) could be used for expenses directly attributable to such elections, including observers specifically for those proceedings, as well as data analytics on the results, legal research, preparing and making objections, or litigation arising specifically from a second or subsequent round of tallying and vote reallocation.[2] The realistic possibility for such proceedings exist regardless of whether the ballots are tallied "instantly" by computer or more slowly, over time, by hand. *Cf. League Letter*, *supra* at 3. Thus, the assumption the timing of RCV proceedings makes it impossible for candidates to legally spend funds raised in connection with runoffs—which appears to lay at the foundation of the opposition to Mr. McCutcheon's advisory opinion request—is simply incorrect, and irrelevant in any case.

For these reasons, the Commission should issue Mr. McCutcheon's requested advisory opinion. Federal law allows him to contribute a total of $9,900 to Republican Senate nominee Demi Kouzounas, including $3,300 in connection with the general election, as well as an additional $3,300 in connection with each subsequent possible round of the RCV process as "runoff elections" (subject to segregation of those funds by Ms. Kouzounas and refund if, for any reason, she does not participate in a particular runoff).

Respectfully submitted,



Dan Backer
202—210-5431
dbacker@ChalmersAdams.com

Counsel for Shaun McCutcheon

[2] Of course, other funds may also be available to subsidize such proceedings, although any such funds would necessarily have to be spread across all elections conducted as part of an RCV proceeding for a particular office. The potential availability of such additional funds does not change the underlying fact that litigation, recounts, contests, and other proceedings focused specifically on runoffs (i.e., second and subsequent rounds of voting, ballot tallying, and vote reallocation in an RCV proceeding) are legally valid ways in which a candidate may use funds raised specifically in connection with such elections.