Executive Summary: Chief Election Officers and Conflicts of Interest Report

for **Election Reformers Network**

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&GRAY

Preface

This memorandum summarizes the *pro bono* outcome, methodology, and findings associated with a research project (the "Report") conducted by Ropes & Gray LLP ("Ropes & Gray") on behalf of the Election Research Network ("ERN"). The Report generated by Ropes & Gray attorneys reflects research and analysis of the conflict of interest laws applicable and relevant to Chief Election Officers in U.S. states where the Chief Election Officer ("CEO") is an elected position. This memorandum introduces the report and its accompanying summary chart, provides a brief overview of the methodology that produced the results identified in the Report, and offers initial, high-level commentary on the Reports' findings, in addition to proposing areas for further research.

I. Executive Summary

Ropes & Gray, on ERN's behalf, conducted a first-of-its-kind survey of all conflict of interest laws applicable to CEOs in each state with an elected CEO position. This groundbreaking research was put together in order to determine what, if any, formal legal structures exist to constrain CEOs in an era of declining political norms. The Report finds that there is currently no U.S. state (i) which elects its Chief Elections Officer and (ii) which exhibits a formal conflict of interest policy, statutory or otherwise, regulating the extent to which Chief Elections Officers can oversee their own elections or publicly advocate for, or act to advance the interests of, a political party, candidate, or ballot initiative outcome in an election under their oversight.

Instead, the Report identified a patchwork of conflict of interest rules that could, in some states, be leveraged to present a legal claim premised on conduct demonstrating a clear conflict of interest. This conduct may range from using the formal powers of office to create electoral advantages to relying on the implicit authority of the office to purposefully affect the outcome of an election. However, such a claim has little precedent and likely would not prove successful in most states.

Two states, Nevada and Rhode Island, possess some formal legal structures that may be more readily capable of imposing constraints on CEOs engaging in conflicted conduct but even in these states, there is little in the way of precedent for such claims. In practice, it appears that states with elected CEOs have historically resolved conflict of interest issues in the political arena rather than through legal redress. This vacuum of formal controls for CEOs can prove problematic, as states such as Ohio and Georgia have shown in recent decades, but also presents an important opportunity for future research, legal advocacy, and creative policy design.

II. Introduction

Ropes & Gray conducted this research on behalf of Election Reformers Network, a nonprofit, nonpartisan organization founded in January 2017 by experts in democracy promotion and election observation with extensive experience in the United States and overseas. ERN leverages this expertise to support nonpartisan election reforms that can reduce polarization and increase public confidence in U.S. democratic institutions. Election administration has been an important area of activity for many members of ERN in their work overseas, and ERN seeks to leverage this experience to help inform and support reform in this area in the U.S.

In ERN's view, the United States is unique in the world of democracies in relying on partisan elections to fill many of the most senior election administrative positions in the country. As a result, chief election officers (the secretary of state in most states) are often leading members of a competing political party and often compete in the elections they supervise. ERN is committed to further understanding the extent and impact of conflicts of interest that arise from this context, and as warranted to advancing appropriate solutions. With this goal in mind ERN solicited the help of Ropes & Gray to conduct the study discussed in this memo.

Following some discussion on the scope of this project, both parties determined that examining the conflict of interest laws for states with elected Chief Election Officers was the most urgent area of inquiry and thus should serve as the starting point for this research.

Planning for the project took place in the aftermath of the controversial 2018 gubernatorial election in Georgia. The dual role of Brian Kemp as secretary of state and candidate for governor, accusations of self-serving decisions taken by Kemp as secretary of state, and Kemp's initial refusal to recuse in the eventuality of a recount all raised considerable concern. This context created a new level of awareness nationally of the issue of secretary of state conflict of interest and increased the relevance to the research Ropes & Gray had committed to conduct.

III. Methodology and Data Collection

a. Method

The research design is centrally interested in what constraints states have created for elected Chief Elections Officers. After scrutinizing several well-known examples of questionable CEO conduct and their subsequent legal actions, including Georgia's 2018 general election and Ohio's 2004 general election, Ropes & Gray narrowed its focus to four distinct areas that could serve as a source for conflict of interest laws: State Constitutions, State Statutes, State Regulations, and State Court Case Law. Ropes & Gray Summer Associates took on the task of researching these areas for each state with an elected CEO. Following the completion of their research, the available information for each area of law in each state was synthesized into a report on each state. Ropes & Gray Associates then reviewed the reports and put together a compendium to compare the states and determine which states provided for legal challenges against Chief Election Officers who take formal action based on their personal interests or the interests of their political party. Ropes & Gray Associates also used this novel body of research to consider what a model legal structure might look like for states to build towards.

The analysis primarily focuses on the years 2000 to the present. This design is meant to capture the current law in each state as well as more contemporary issues associated with conflict of interest laws or the lack thereof. To establish a baseline of how often this problem could potentially arise, Ropes & Gray Associates created a list of all Chief Election Officers who either ran for re-election or ran for a new office while still being charged with overseeing all elections in their respective states from the year 2000 to present.

b. Data Collection

Information was collected from a wide range of government, academic, and media sources. Information on state laws was taken from each state's website or corresponding website holding official statute text. Case law and advisory opinions were collected from Westlaw and state repositories. Historical election results and office-holders come from state-published results supplemented by Ballotpedia. Finally, articles filed under "Public Perception" or "Recent Coverage" were pulled from various state and local media sources as well as the Center for Public Integrity and other academic institutions.

III. Methodology and Data Collection

Data collection was primarily performed by twenty-two Ropes & Gray Summer Associates with oversight provided by two Associates and key assistance from two paralegals. After initial collection and review, the reports were compiled together into the accompanying binder and comparison chart. In total, more than 500 hours of pro bono work were performed by Ropes & Gray personnel over a five-month period.

IV. Results and Conclusions

Ropes & Gray reviewed conflict of interest laws from sources based on constitutional, statutory, regulatory, and case law across thirty-five states with elected CEOs. No state possessed formal legal structures explicitly preventing CEOs from taking part in conflicted conduct whether to advance their own electoral interests or to purposefully aid a party, ballot initiative, or other candidate in an election they oversee. Only two states, Nevada and Rhode Island, possessed formal legal structures that could begin to limit the conduct of CEOs based on conflicts of interest.

A key difference in the formal legal frameworks used by both Nevada and Rhode Island are conflict of interest statutes that extend beyond pecuniary gain. For example, Rhode Island's Public Officers and Employee's Prohibited Activities law states, "No person subject to this code of ethics shall have any interest, financial or otherwise, direct or indirect, or engage in any business employment transaction, or professional activity, or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her duties or employment in the public interest and of his or her responsibilities as prescribed in the laws of this state." By establishing a conflicts of interest definition that extends well beyond direct financial gains, Rhode Island's statute creates space for legal redress against a CEO's procedurally sound election administration if that conduct has the purpose of aiding a specific candidate, party, or issue.

In a similar fashion, Nevada's Ethics in Government statutes also extends beyond direct financial interests. Nevada law restricts the actions of public officers when voting upon or advocating for or against the passage of a matter in which the independent judgment of a reasonable person would be materially affected by the "officer's commitment in a private capacity to the interests of another person." Though not as broad as Rhode Island's version, Nevada's direct consideration of conflicts beyond pecuniary gains marks an important step forward in the development of formal restraints on problematic CEO conduct.

Under the current era's general lack of formal legal structures, it appears most states have relied on unwritten political norms, and on accountability via the re-election process, to regulate CEO conduct. This reliance, in combination with the lack of precedential cases, could give the impression that this problem may not be a significant one, but across the thirty-five states analyzed in the report, Ropes & Gray uncovered 138 instances where a CEO oversaw an election he or she was also running in over the past twenty years alone. This number demonstrates the ample opportunity for unchecked CEO misconduct.

IV. Results and Conclusions

In addition, Ropes & Gray found numerous reported examples of CEOs using facially neutral laws to purposefully aid a specific candidate, party, or issue. One of the more famous examples of this conduct was the Ohio law requiring voter registration cards to be printed only on eighty-pound stock paper. Republican Secretary of State Ken Blackwell's enforcement of this rule over a three-week period late in the 2004 election cycle created large backlogs of voters seeking to be registered in Ohio's Democratic-leaning cities but not in the Republican-leaning rural parts of the state. Ultimately, Blackwell was taken to federal court over several of his election administration decisions in 2004.

For a majority of the examined states though, Ropes & Gray was unable to find records of any cases ever being brought over conflicted behavior despite many reported examples of questionable conduct. In the few circumstances where a CEO's actions were challenged in a legal forum, the challenge typically relied on procedural claims rather than substantive claims of bias or conflict. In other words, the claims brought by petitioners alleged that CEOs failed to properly adhere to the steps laid out for taking an action such as providing time for public notice and comment before issuing a new rule instead of claiming the rule was created to advantage the CEO's personal interests.

This pattern appears to create a negative feedback loop within the case law. At the outset of a potential action, plaintiffs must choose whether or not to bring substantive claims in addition to process claims in challenging a CEO's conduct. The lack of precedent for successful substantive conflict of interest claims creates a risk that including them could weaken any procedural claims the plaintiff also intends to make. That risk is then magnified each time a potential conflict of interest case is brought on procedural rather than substantive grounds because that decision implicitly reinforces the argument that substantive legal claims against CEOs over conflicts of interest are not viable. When the next potential case arises, the entire process repeats.

These facts make clear that the legal systems most states employ to constrain elected CEOs have proven to be extraordinarily limited. The general absence of formal legal structures for conflicts of interest has pushed petitioners to create legal arguments that lack precedent, rely on process arguments that ignore the substantive issues with alleged conduct or forego legal redress altogether and fight the issue entirely in the political realm.

IV. Results and Conclusions

As previously noted, the lack of clear precedent for preventing CEOs from undertaking conflicted conduct has hampered the viability of such claims in the limited instances where such suits have been brought. Meanwhile, relying on process arguments leaves room for bad actors to engage in conflicted conduct without reproach so long as they meticulously ensure proper procedures are followed. To ensure the practical constraints on CEO conduct is not limited to the ballot box, states must begin to examine creative policy solutions.

V. Further Areas for Review

As established by the foregoing, U.S. states do not have a well-developed system for addressing potential conflicts at the CEO level through formal sources of law. However, this lack of formal legal controls also leaves room for the laboratories of democracy to work by providing space for new and creative policy design. While the core focus of Ropes & Gray's work was spent on identifying and quantifying the current lack of CEO constraints, this section will briefly address three types of policy solutions states could research and pursue.

First, states could expand their definitions of conflicts of interest to encompass more than direct pecuniary gain. Following in the footsteps of what Rhode Island and Nevada have already done, states could expand their definitions to include matters that would materially affect the judgment of a reasonable person overseeing an election. States could also take their restrictions a step further and require recusal even if there is only an appearance of a conflict of interest that may materially affect a CEO's oversight of an election. Strong and clear statutory language on conflicts of interest would provide potential litigants with a firm basis to bring substantive claims against conflicted CEO conduct. One potential drawback of such language though, is that it could also increase the risk of litigants bringing suit against legitimate conduct from a CEO simply because the plaintiffs disagree with the policy. Policymakers following this path must find a proper balance to ensure good faith CEOs can still fulfill their roles.

Another option for states is to create a legislative preclearance requirement for certain changes to election administration rules under the authority of a CEO. By requiring such approval from a state's legislative branch, states could minimize the risk of new discriminatory rules by diffusing the rulemaking power and ensuring additional publicity for any dubious rules. Some risks here include the potential for partisan political considerations to influence such a preclearance process, the potential demotivating impact on election professionals from this constraint, and the potential for CEOs to find ways to use laws already in existence to engage in conflicted conduct.

A third option for states is to require full recusal for any CEO choosing to run for a different office. This change would eliminate the direct conflict of interest presented by elections such as the 2018 Georgia gubernatorial election. An important consideration here is how functions of the recused CEO would be delegated.

V. Further Areas for Review

Lastly, states could make the CEO position a nonpartisan office to reduce the connection, both in the public eye and in practice, between the person overseeing elections and the fortunes of a particular political party. There is no guarantee that individuals elected under a nonpartisan label would function in a nonpartisan manner, so this reform would probably need to be supported with other provisions such as the revisions to conflict of interest statutes discussed above.

Whether states examine these policy options or choose to look for different policy designs altogether, there is a clear opening for new methods of combatting conflicted conduct from CEOs. This Report shows that the status quo of resolving these issues at the ballot box has led to several high profile instances of CEO misconduct in the last two decades alone with abundant opportunity for more. By proactively examining the issue and looking at novel policy solutions now, states can significantly reduce the risk of further misconduct over the next two decades.