IN THE SUPREME COURT FOR THE STATE OF OREGON

State ex rel Nicholas Kristof, Plaintiff-Relator, v. Oregon Secretary of State, Shemia Fagan, Defendant-Adverse Party.	Supreme Court No. S_____ MANDAMUS PROCEEDING

RELATOR NICHOLAS KRISTOF'S MEMORANDUM IN SUPPORT OF PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

STATE OF OREGON

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INTRODUCTION

Nicholas Kristof petitions this Court for a peremptory or alternative writ of mandamus requiring the Oregon Secretary of State to accept his declaration of candidacy and include him as a Democratic candidate for Governor on the May 2022 primary ballot. Although Kristof is considered by many to be a frontrunner in the race to become Oregon's next Governor, the Secretary of State has taken the extraordinary step of preventing Kristof's name from appearing on the primary ballot. Her action is based on a previously untested and uninterpreted provision of the Oregon Constitution providing that the Governor must have been "a resident within this State" for the "three years next preceding his election." Or Const, Art V, § 2. According to the Secretary of State, Kristof will not have been a "resident" of Oregon for the three years preceding his election.

That determination is wrong. Kristof lives in Oregon and considers his family's Yamhill farm to be his home. In published writings and interviews dating back to at least 1982, Kristof has consistently described the farm as home. More than that, he has treated his family's farm as home by spending virtually every summer there since the 1970s; purchasing, improving, and paying Oregon taxes on nearby land starting in 1993; building an addition to the farmhouse for him and his family in 1994; managing the farm's operations since 2010; directly leasing the farm from his mother since 2018; and paying Oregon income taxes since 2019. He also attests under oath that for decades he has lived in Yamhill at

least part-time; considers it to be his home; intends to return there when he is away; has always planned to live there full-time in retirement; and has been present there with more continuity since 2018. Two other witnesses provide corroborating sworn statements. These facts readily satisfy Oregon's durational residency requirement—a provision originally intended by its framers to exclude "strangers" to the state who were unfamiliar with its interests.

Kristof's eligibility to hold the office of Governor is also the type of issue that warrants the exercise of this Court's original jurisdiction. At stake is nothing less than the right of Oregon voters to freely choose their next Governor. If Kristof's eligibility is not promptly resolved, not only could voters lose the opportunity to cast their ballots for Kristof, but they will also face an election clouded by the uncertainty of ongoing litigation. Both results would undermine confidence in the democratic process. Indeed, a candidate's success should be determined by his or her policies and character—not the unilateral decision of a government official or the specter of unresolved litigation. The extraordinary remedy of mandamus is the only way to timely provide the clarity and certainty that Oregon voters, Kristof, and elections officials require.

BACKGROUND

A. Kristof was raised in Yamhill, Oregon, and he has maintained a home in Yamhill for his entire adult life.

Kristof was raised in Yamhill, Oregon. He moved to Yamhill with his parents, Ladis and Jane, when he was 12 years old after Ladis accepted a teaching

position at Portland State University. (App 28.) The family purchased a 73-acre farm in unincorporated Yamhill, which has been the Kristof family homestead ever since. (*Id.*) Kristof attended and graduated from the nearby Yamhill Carlton High School, where he was student body president and editor of the school newspaper. (*Id.*) After finishing high school in 1977, Kristof spent a year working full-time as an Oregon state officer for Future Farmers of America. (*Id.*)

Since leaving home for college in 1978, Kristof has returned to his family's farm virtually every summer. (*Id.*) In 1994, Kristof and his wife, Sheryl WuDunn, built an addition to the Kristof family home so that it would be large enough to accommodate Kristof, WuDunn, and their children living in the home. (*Id.* at 29.) They have designated bedrooms in the home and have always kept personal items like clothing there. (*Id.*) Kristof and WuDunn have also purchased three nearby properties. (*Id.* at 29-31.) The first, purchased in 1993, is a 150-acre property in Yamhill; the second, purchased in 1996, is a 290-acre property in McMinnville; the third, purchased in 2020, is a 115-acre parcel adjacent to their Yamhill farm. (*Id.*) Since purchasing these properties, Kristof and WuDunn have managed, improved, and cultivated them. (*Id.*) They have also paid Oregon property taxes on each since their acquisition. (*Id.*)

Kristof and WuDunn have treated the Yamhill family farm as their home in other ways. When their professional obligations allowed, Kristof and WuDunn spent additional time on the farm. In 1994 and 1999, the couple and their children

lived on the farm for most of the year, and their children attended Oregon schools in 1999. (*Id.* at 29.) Kristof was also registered to vote in Oregon and maintained an Oregon driver's license through the 1990s. (*Id.*) He has long maintained that he plans to live fulltime in Yamhill in retirement and wishes for his ashes to be scattered at home in Oregon. (*Id.* at 32.) When Kristof's father passed away in 2010, Kristof took over management of the family farm—maintaining farm equipment, ordering trees, and overseeing federal and state timber programs. (*Id.* at 30.) He has also regularly received mail at his Yamhill home for decades, and he has used return mailing labels listing his Yamhill home address. (*Id.* at 29.)

Kristof's residential contacts with Oregon increased starting in 2018. With their children grown, Kristof and WuDunn spent much of 2018 on the Kristof farm researching and writing a book on the social and economic changes to Yamhill and the ways Kristof's childhood classmates have experienced those changes. (*Id.* at 30-31.) As a result of their more regular presence, as well as market pressures, Kristof and WuDunn decided to transition the farm's principal crop from cherries to cider apples and wine grapes—a process that required a significant investment of time and money. (*Id.* at 31.) They formalized their investment by leasing the farm from Kristof's mother in October 2018. (*Id.*) The next summer, in August 2019, an Oregon limited liability company was formed to hold their interest in the farm, and they hired three people to work the farm.

(*Id.*) In recognition of the increased time and money spent in Oregon, they filed Oregon tax returns for 2019 and 2020. (*Id.*)

B. Kristof has consistently described Oregon as his home in both his personal and professional capacities.

Kristof has always viewed Oregon as home. That sentiment was captured early in his career, when he declared in an essay written for the Washington Post: "I know Yamhill, for this is my home." Nicholas Kristof, *Cut to Quick by Recession, Oregon Town Holds Fast to Voluntarism*, Washington Post (Aug 2, 1982). (App 38.) He has repeated this view regularly. In a 2004 opinion piece, for instance, Kristof wrote about being "home—too briefly—in Yamhill, Ore." over the summer. Nicolas Kristof, *Living Poor, Voting Rich*, New York Times (Nov 3, 2004). (App 42.) Similarly, in a 2017 appearance on CNN, Kristof described having been "home in Oregon over the weekend." CNN: Tonight (Feb 22, 2017). (App 48.) And in a 2018 article, Kristof described how he and his daughter "complete[d] the Pacific Crest Trail in my home state, Oregon." Nicholas Kristof, *Six Years, Four Sore Feet, 2,650 Miles*, New York Times (Aug 31, 2018). (App 61.)

Similarly, in July 2019, Kristof wrote the foreword to a coffee table picture book, "Oregon, My Oregon," in which he extolled the "profound and sometimes ostentatious pride" that "[w]e Oregonians" feel for "our state," proudly proclaiming that "I firmly count myself as an Oregonian." Photo Cascadia, *Oregon, My Oregon: Land of Natural Wonders* (2020). (App 98.) The same year,

in a 2019 interview with Portland Monthly Magazine, Kristof described himself as a "local yokel" and "someone who is part of the community" in Yamhill. (*Id.* at 69.)

Kristof's sworn statement that he lives in Yamhill and considers his farm to be home is corroborated in the record not just by decades of professional writings and interviews, but also by third-party witnesses. Robert Bansen, a Yamhill dairy farmer who has known Kristof since 1973, stated under oath that "my observation has been that [Kristof] always thought of and treated Yamhill and his family farm here as his permanent home." (*Id.* at 111.) Based on his regular conversations with and observations of Kristof, Bansen attested that Kristof "has maintained a close connection with the state and our local community for his entire adult life." (*Id.*) Bansen has also lent advice on the recent transition of Kristof's farm, and thus has observed Kristof's presence in Yamhill "quite a bit more regularly" since 2018. (*Id.*)

Kristof's friend since 1984, Michael Gisser, says the same: "There is no question in my mind that Nicholas Kristof considers Yamhill to be his home, and has for the entire duration of our acquaintance." (*Id.* at 119.) "Nick spent time living in other places, including Beijing and Tokyo, for professional purposes, but, from my observations, it was always his intention to make his home and his family's at the farm in Yamhill." (*Id.*) Gisser's affidavit also details his observations from spending time with Kristof at his Yamhill home, including

Kristof's relationships with neighbors, maintenance of his property holdings, and manner of acting while at home. (*Id.* at 119-20.)

C. Kristof was a frontrunner in the gubernatorial race until he was excluded from the ballot by the Secretary of State.

On October 27, 2021, Kristof announced that he was running to be the next Governor of Oregon. Since announcing his candidacy, 5,700 Oregonians from 35 different counties have donated to his campaign, and he has raised more than $2.5 million. (*Id.* at 79.) No other candidate seeking the Democratic nomination for Governor has received as many donations or raised as much money. Kristof also leads in the polls and has secured endorsements from key community leaders and organizations, including the state's largest private-sector union.

On December 20, 2021, Kristof submitted his formal declaration of candidacy to the Oregon Secretary of State. (*Id.* at 7.) *See* ORS 249.020. Just one day later, the Secretary of State took the unusual step of moving to "verify" that, if elected, Kristof would qualify for the office of Governor. (App 9-10.) Specifically, she sought to determine whether Kristof satisfies the requirements of Article V, section 2, of the state constitution, which requires any candidate for Governor to have been "a resident within this State" for the "three years next preceding his election." (*Id.*) But instead of submitting specific inquiries to Kristof or requesting additional evidence or documentation from him, the Secretary of State made an open-ended request for any further information about his residency. (*Id.*) On January 3, 2022, Kristof responded by offering more than

100 pages of documentation of his residency, consisting of both legal argument and supporting evidence. (*Id.* at 11-112.)

After taking just two days to review Kristof's evidence and legal argument, the Secretary of State concluded that Kristof does not qualify to be Governor of Oregon because, in her view, he has not been a "resident" of Oregon since on or before November 8, 2019. (*Id.* at 126-28.) In a brief and bullet-pointed explanation for her decision, the Secretary of State offered no supporting legal citations and drew inferences from evidence and facts not in the record. For example, she discounted the weight of Kristof having hired and supervised workers on his Yamhill farm because he did not describe the extent of his supervision or whether he did so in person or from New York. But the Secretary of State never requested that information, and the record contained no evidence that his supervision was anything less than direct. Similarly, she discounted the weight of Kristof having paid Oregon income taxes in 2019 and 2020 because he did not specify whether he did so as a resident or nonresident. But, again, the Secretary of State never requested that information, and the record contained direct evidence that Kristof was living and working much of 2019 and 2020 in Oregon.

In addition to her reliance on evidence and facts not in the record, the Secretary of State gave virtually no weight to Kristof's sworn statement that he has lived in Yamhill part-time and considered his farm to be his home since 1971.

That decision departed from decades of past practice by the Secretary of State's office. As then-Secretary of State Phil Keisling explained in resolving a challenge to the residency of Wes Cooley when he was running for State Senate in 1992, "absent sufficient clear and convincing evidence, [the Elections Division] must place substantial weight on [a candidate's] sworn affidavit that he intend[s] [a place] to be his residence." (App 3.) More recently, Keisling and two other former secretaries of state—Jeanne Atkins and Bill Bradbury—confirmed in a published essay that the Secretary of State's office has long assigned considerable weight to a candidate's sworn statement that he or she considers Oregon to be their home: "Absent compelling evidence to the contrary, a person should be presumed to be a resident of the place or places they consider to be home." (*Id.* at 76.)

The explanation offered by the Secretary of State also misstated material facts. First, the Secretary of State described Kristof as having spent more time present in Oregon starting only in 2019. It was uncontradicted in the record, however, that Kristof spent more time on his farm starting a year earlier, in 2018, while researching and writing a book focused on social and economic changes to Yamhill. Second, the Secretary of State described Kristof as having paid income taxes in New York from 1999 to 2021. But Kristof has yet to file income taxes anywhere for 2021 because they are not yet due. And the first year Kristof filed income taxes in New York was 2000, not 1999. Finally, the Secretary of State accurately described New York law as allowing a voter to choose between one

of several residences, but she then implied that Kristof tried to vote at his New York residence while also claiming the right to vote in Oregon. Nowhere in the record does Kristof claim that he simultaneously had qualified to vote in both New York and Oregon, and Kristof could not have qualified to vote in Oregon before 2020 for the simple reason that he was not registered to vote in the state.

Based on her conclusion that Kristof does not qualify to serve as Governor, the Secretary of State has taken the extraordinary step of excluding Kristof's name from the primary ballot. ORS 254.165(1). The result is that, despite the enthusiastic and widespread support for Kristof's candidacy, Oregon voters will be denied the opportunity to elect Kristof as their next Governor unless there is a timely judicial intervention.

D. Kristof's eligibility to serve as Governor must be resolved before ballots are printed on March 17—and hopefully much sooner.

The deadline for the Secretary of State to submit the candidate names that will be printed on the primary ballot is March 17—candidates may not be added after that date. *See* ORS 254.085; ORS 254.056. If a candidate seeking a major party's nomination for the office of Governor "fails to receive the nomination," they are prohibited from participating in the general election, including as an unaffiliated candidate. ORS 249.048. Similarly, if a major party's nominee for the office of Governor is found to be ineligible at any point between the primary and general election, the party must repeat the nominating process. ORS 249.190. This means that, as a practical matter, Kristof's eligibility to run for Governor

must be finally resolved on or before March 17, at the very latest.

Every day that passes between now and a judicial reversal of the Secretary of State's decision prejudices Kristof, his supporters, and the fairness of the Democratic primary. His ability to do the work of a candidate for Governor—raise money, win endorsements, attend campaign events—is severely burdened now that the Secretary of State has announced to the public that he is ineligible. So even if this Court restores Kristof to the ballot before March 17, the damage caused by the Secretary of State to his campaign and the fairness of the election may be irreversible. The situation is therefore one of extreme urgency requiring swift action by the Court.

ARGUMENT

This Court should grant Kristof the requested mandamus relief. First, this case is the type that warrants mandamus relief. Kristof's eligibility to run for Governor presents a novel and important constitutional question, and with just over sixty days before primary ballots must be printed, Kristof and Oregon voters share a significant interest in resolving his eligibility as soon as possible. Second, the Secretary of State erred in finding that Kristof does not satisfy the residency requirement of Article V, section 2, of the Oregon Constitution. Kristof has consistently viewed and treated his family's Yamhill farm as home, and he has never wavered in his intent that the farm, Yamhill, and Oregon remain his home. Finally, the Secretary of State's application of Article V, section 2, to Kristof

violates the Equal Protection Clause of the United States Constitution. This Court should thus grant Kristof the requested mandamus relief.

A. This Court should exercise its original mandamus jurisdiction and order the Secretary of State to include Kristof on the primary ballot.

This case is the type that warrants mandamus relief. Under Article VII, section 2, of the Oregon Constitution and ORS 34.120, this Court has original jurisdiction to decide time-sensitive issues of major public importance. *See*, *e.g.*, *McAlmond v. Myers*, 262 Or 521, 526-27, 500 P2d 457 (1972); *State ex rel Kelly v. Plummer*, 97 Or 518, 525, 189 P 405 (1920). This case satisfies both criteria. First, as a practical matter, Kristof's eligibility for Governor must be resolved before primary ballots are printed on March 17—and hopefully much sooner. Second, whether the Secretary of State erred in unliterally blocking Kristof from the ballot presents an issue of exceptional public importance. At stake is nothing less than the right of Oregon voters to freely choose their next Governor. The outcome of this case, as well as the timing of its final resolution, will have serious implications not only for the democratic integrity of this election, but also that of future elections. This Court should thus grant Kristof the requested relief.

1. Kristof's eligibility to run for Governor must be conclusively resolved before primary ballots are printed on March 17.

Kristof's eligibility to appear on the ballot must be resolved before ballots are printed on March 17. Mandamus relief is appropriate only when there is no "plain, speedy, and adequate remedy in the ordinary course of the law." ORS

34.110. Mandamus may issue, however, "even where other remedies exist, if they are not sufficiently speedy to prevent material injury." *State ex rel Ricco v. Biggs*, 198 Or 413, 425, 255 P2d 1055 (1953). To that end, other remedies must "be equally convenient, beneficial, and effective." *State ex rel Pierce v. Slusher*, 117 Or 498, 501, 244 P 540 (1926). "An adequate remedy, therefore, is a remedy that is sufficient and as equally convenient and effective as mandamus." *State ex rel Dewberry v. Kulongoski*, 346 Or 260, 274, 210 P3d 884 (2009).

A political candidate seeking access to the ballot is without a plain, speedy, and adequate remedy when their election is four months away. *See, e.g., McAlmond*, 262 Or at 523-27 (accepting jurisdiction three-and-a-half months before the election); *Roberts*, 260 Or at 229 (same more than six months before the election); *Bradley v. Myers*, 255 Or 296, 466 P2d 931 (1970) (same two-and-a-half months before the election); *Pense v. McCall*, 243 Or 383, 385, 413 P2d 722 (1966) (same more than a month before the election). As explained in *McAlmond*, "it is extremely doubtful" that filing an action in circuit court would, under these circumstances, "constitute an adequate remedy" because of the prolonged disruption and uncertainty such an action and its resulting appeal would cause to the political process. 262 Or at 527-28.

Here, the primary election is just over four months away, and ballots must be printed in little more than two months. As contemplated by ORS 254.085, the Secretary of State must provide each county clerk with a list of candidates for

inclusion on the primary ballot no later than March 17—candidates may not be added after that date. If a candidate seeking a major party's nomination for the office of Governor "fails to receive the nomination," they are prohibited from participating in the general election, including as an unaffiliated candidate. ORS 249.048. Similarly, if a major party's nominee for the office of Governor is found to be ineligible at any point between the primary and general election, the party must repeat the nominating process. ORS 249.190.

An action filed by Kristof in Marion County Circuit Court, as well as the appeal which would "[u]ndoubtedly" follow, *McAlmond*, 262 Or at 528, will not be resolved before March 17. This means that, if the circuit court is unable to issue a decision or does not rule in favor of Kristof before March 17, Oregonians will lose the opportunity to elect Kristof as their next Governor. Alternatively, if Kristof wins the primary after securing a TRO that allows him to appear on the primary ballot, Democratic voters will need to repeat the nominating process should Kristof later be deemed ineligible at the merits stage or on appeal. And even if Kristof wins his party's nomination and prevails at every juncture in the litigation—TRO, merits, and appeal—the prolonged confusion and uncertainty caused by the litigation will irreversibly alter the course of the election.

Indeed, the urgency is even greater than the March 17 deadline suggests. The Secretary of State's decision has stalled Kristof's ability to run a campaign. As a practical matter, he cannot galvanize public support, raise money, solicit

endorsements, and do the work of a candidate under the cloud of the Secretary of State's widely publicized decision. Consider just one effect: voter pamphlet statements—wherein candidates educate voters about their endorsements—are due on March 10. But Kristof cannot win endorsements before March 10 if endorsing organizations are told by the Secretary of State that he is not an eligible candidate. The Secretary of State's decision must be reversed quickly to minimize harm to a fair and competitive primary election.

Accordingly, because requiring Kristof to file an action in Marion County Circuit Court "would practically amount to a denial of justice"—both for Kristof and the many Oregonians who intend to vote for him—this Court should exercise its discretion to grant Kristof the requested mandamus relief. *State ex rel Kelly*, 97 Or at 525.

2. Kristof's eligibility to run for Governor presents a novel constitutional question of exceptional public importance.

Kristof's eligibility to run for Governor is also a novel issue of exceptional public importance. In addition to the urgency of an issue, this Court has often exercised its mandamus jurisdiction "based on the importance and novelty" of an issue. *State ex rel Sajo v. Paulus*, 297 Or 646, 648, 688 P2d 367 (1984); *see also State ex rel Boe v. Straub*, 282 Or 387, 389, 578 P2d 1247 (1978) (accepting jurisdiction because the issue was "one of public importance"); *Kelly*, 97 Or at 525 (accepting jurisdiction because "the interests of a great many people" were implicated by the dispute). When, as here, a candidate for statewide elected office

petitions for access to the ballot, this Court has held that "the right to be vindicated is a public as well as a private one." *McAlmond*, 262 Or at 526-27. In such cases, "the entire voting public has an interest in knowing as soon as possible whether [the candidate] is qualified." *Id.* at 527.

As described above, the issue presented in this case is unprecedented: the Secretary of State is denying voters the opportunity to elect a leading candidate for Governor based solely on a previously untested and uninterpreted residency requirement. Without this Court's intervention, the election stands to be decided not at the ballot box but rather by a single government official. Such a result would be antithetical to democratic principles. Indeed, Kristof is a frontrunner in the gubernatorial race. He has raised more money, and received donations from more Oregonians, than any other Democrat. The outcome of his legal challenge, as well as the timing of its resolution, will undoubtedly affect the trajectory of his and other candidates' campaigns, the donations made to each, and the decision-making process for hundreds of thousands of voters. Oregonians share an interest in choosing their next Governor based on his or her policies and character—not the decision of a lone government official or the specter of unresolved litigation.

Accordingly, because Kristof's eligibility to run for Governor presents a novel question of exceptional public importance, this Court should exercise its discretion to grant Kristof the requested mandamus relief.

B. Kristof satisfies the residency requirement of Article V, section 2, of the Oregon Constitution.

Kristof satisfies Oregon's residency requirement because he lives in Oregon and has viewed and treated Oregon as his home for decades. Article V, section 2, of the Oregon Constitution provides that any candidate for Governor must have been "a resident within this State" for the "three years next preceding his election." When construing a provision of the state constitution, Oregon courts consider three factors: (1) its text "in context," (2) the "historical circumstances" of its adoption, and (3) any "case law that has construed it." *State v. Mills*, 354 Or 350, 353, 312 P3d 515 (2013). Here, in the absence of any case directly construing the residency provision, its text and history—including contemporaneous Oregon and Indiana cases interpreting the term "resident" in other contexts—evidence that a "resident" is someone who intends for Oregon to be their home and acts pursuant to that intent. Because Kristof has long viewed and treated Oregon as his home, he satisfies Oregon's residency requirement.

1. The text of Article V, section 2, shows that residency is distinct from domicile and nonexclusive of ties to other states.

When read in context, the text of Article V, section 2, of the Oregon Constitution suggests that its drafters intended the term "resident" to be distinct from the doctrine of "domicile" and broad enough to encompass individuals with more than one home. It also shows that residency requires less than a continuous physical presence in the state and that a person's ability or choice to vote in

Oregon is not dispositive of his or her residency.

First, the original constitution's requirement that the Secretary of State "reside" at the seat of government supports the premise that—unlike domicile—a person can have more than one residence. Before it was amended in 1986, Article VI, section 5, required the Secretary of State to "reside" at the "seat of government" while in office (i.e., Marion County). But this clause did not restrict the position of Secretary of State to people with their one true home or "domicile" in Marion County; indeed, early secretaries had principal residences elsewhere. A secretary could live—and vote—elsewhere and still "reside" in Marion County for the purpose of serving in that office. Although Article V, section 2, uses the word "resident," not "reside," the original Oregon Constitution used the terms interchangeably. *Compare* Or Const, Art V, § 2 (requiring the Governor to be "a resident within this State"), *with* Or Const, Art VII, § 5 (requiring that Justices of the Oregon Supreme Court "shall have resided in the state"). Thus, the drafters likely intended "resident" to mean something less restrictive than "domicile."

Second, unlike other state constitutions, the Oregon Constitution does not require the Governor to be both a "resident" *and* "citizen" of the state. As the Indiana Supreme Court observed when interpreting a similar residency provision in the Indiana Constitution, it is only in those states where both residency *and* citizenship are required that other state supreme courts have found durational residency provisions to require "continual physical presence." *State Election Bd.*

Bayh, 521 NE2d 1313, 1316 (Ind 1988). "In each case, the court read residency to require continuing physical presence because any other interpretation would have made the requirement mere surplusage to the requirement of state citizenship." *Id.* (citing *Ravenel v. Dekle*, 218 SE2d 521, 527 (SC 1975); *Sec'y of State v. McGucken*, 222 A2d 693, 695-96 (MD 1966)). The drafters' omission of state citizenship requirement from Article V, section 2, suggests that—unlike in other states—they did not intend to require a sustained physical presence.

Third, where the drafters of the state constitution intended to tie a person's eligibility for office to their continuing physical presence in a place, they used the term "inhabitant" rather than "resident." Under Article IV, section 8, no person may be a state senator or representative unless they have been, "for one year next preceding the election," an "inhabitant" of the district that they represent. As this Court explained in *Roberts v. Meyers*, this requirement reflects the drafters' belief that a state legislator "best represents his constituency when he lives among them, has knowledge of their problems, and is more readily available to [them]." 260 Or 228, 230, 489 P2d 1148 (1971); *cf. also Holmes v. Or. & Cal. Ry. Co.*, 5 F 523, 527 (D Or 1881) ("[A]n inhabitant of a place is one who ordinarily is personally present there * * *."). The drafters' use of the term "resident" rather than "inhabitant" to describe a person's eligibility for the office of Governor suggests that they did not have the same concerns about the office-holder having continuously "live[d] among" his or her far-flung constituents.

Fourth, at least two other provisions of the original state constitution use the terms "resident" and "residence" in ways that suggest they were understood to be nonexclusive of activities in other states. First, the original Article I, section 31, contained a provision contemplating that "foreigners" could be "residents" of Oregon for the purpose of owning property. Although the provision does not describe how "foreigners" could become "residents," it evidences that the term "resident" was understood to include people with connections outside of the state—even those with robust connections. Second, the original Article I, section 5, contained a provision specifying that "[n]o soldier, seaman, or marine * * * shall be deemed to have acquired a residence" as a result of being "stationed within the [state]." The need for this provision suggests that, despite the members of each of these groups having significant connections outside the state, likely owning property outside the state, and even potentially voting outside the state, they could have qualified as residents were it not for an express prohibition.

Finally, there is evidence that the drafters of the state constitution did not view a person's registration to vote in Oregon as dispositive of residency. One of the many racist provisions of the original state constitution provided that, unless a "Chinaman" was "a resident of the state" when the constitution was ratified, they would be denied certain property rights. Or Const, Art XV, § 8. This provision clearly contemplated that Chinese immigrants could be residents of Oregon when the state constitution was ratified. But, despite their ability to

become residents, Chinese immigrants could not vote in Oregon until 1927. *See* Statutes of the Oregon Territory, ch 1, § 1, p 51 (1853); Or Const, Art II, § 2 (1857). Thus, when the Oregon Constitution was drafted, a person's ability or decision to vote in Oregon did not determine whether they were a "resident" of the state within the meaning of Article V, section 2.

2. The historical circumstances of Article V, section 2, evidence that a "resident" is someone who intends for Oregon to be their home and acts pursuant to that intent.

The historical circumstances attendant to the adoption of Article V, section 2, reinforce the above analysis and evidence that a "resident" is someone who both intends for Oregon to be their home and acts pursuant to that intent. When considering the historical circumstances of a constitutional provision, this Court often looks to the debates of the Constitutional Convention and decisions of the Oregon and Indiana courts concerning the same or similar issues up until Oregon achieved statehood in 1859. *See State v. Hirsch*, 338 Or 622, 643-56, 114 P3d 1104 (2005). The purpose of this analysis "is to ascertain the meaning most likely understood by those who adopted the provision" and, based on that meaning, to identify "relevant underlying principles that may inform * * * application of the constitutional text to modern circumstances." *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). This inquiry is not meant to "freeze the meaning of the state constitution in the mid-nineteenth century." *Id*.

(a) The debates of the Constitutional Convention show that Article V, section 2, was intended to exclude candidates who were unfamiliar with Oregon.

There are few mentions of the residency requirement in the debate records of the Oregon Constitutional Convention, but the comments that were recorded suggest that the requirement had two overlapping objectives: (1) to ensure that holders of Oregon's highest statewide office were familiar with the state, and (2) to exclude opportunistic "strangers" with no ties to the state.

First, as reflected in the remarks of James Kelley, the framers wished to ensure that any Governor would be familiar with the state. Kelly asked: "Why should a man be elected our chief executive who had only just arrived amongst us? A man should know something of the state before he assumed to take into his hands the reins of the government." Charles H. Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 222 (1926). This comment suggests that the framers were concerned less with the details of whether a person who had lifelong ties to the state was also spending time outside of the state and more with the foundational question of whether a person "kn[e]w something of the state" or had "only just arrived." *Id.*

Second, as reflected in the remarks of Frederick Waymire, the framers wished to exclude interlopers and those who did not identify as Oregonians. The Oregon Argus summarized Mr. Waymire's remarks as follows: "If this three years' residence is dispensed with, we will have half the office-seekers of

California up here. Strangers came here sometimes and married our girls, when at the same time they had wives in the States, and he was opposed to giving our substance into the hands of strangers." *Constitutional Convention*, Oregon Argus (Sept 12, 1957). Waymire's remarks suggest that the framers—none of whom were born in the state and half of whom had arrived less than seven years before the Constitutional Convention—were concerned that "strangers" with no ties to the state would opportunistically seek statewide office. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part III (Mostly Miscellaneous: Articles VIII-XVIII)*, 40 Willamette L. Rev. 225, 228-29 (2004).

Taken together, records of the Constitutional Convention show that the main policy objectives of Article V, section 2, were to: (1) ensure that holders of Oregon's highest statewide office were familiar with the state, and (2) exclude opportunistic "strangers" with no ties to the state. Given that half of the delegates to the Constitutional Convention had first set foot in Oregon less than seven years before the gathering, as well as the fact that none of the delegates had been born in Oregon, the residency requirement reflects their basic desire for the Governor to both identify as an Oregonian and have specific ties to the state.

(b) Early Oregon and Indiana cases show that a person is a "resident" if they intend for a place to be their home and their activities corroborate that intent.

The policy objectives of the residency requirement—to keep "strangers" who were unfamiliar with the state's interests from becoming Governor—align

neatly with early Oregon and Indiana precedents interpreting the term "resident." Specifically, early cases reflect the understanding that someone is a "resident" of a place not only if they are physically present there, but if they view that place as their home and maintain ties to the place that are consistent with that intent.

One of the earliest cases is *Lee v. Simonds*, 1 Or 158 (1854). In *Lee*, the Supreme Court of the Oregon Territory—which included several justices who would soon serve as delegates to the Constitutional Convention—expounded on the concept of residence while resolving a claim under the Donation Land Act of 1850. The plaintiff in *Lee*, Daniel Simonds, claimed a tract of land where had had lived for just a short period of months—from the fall of 1849 to the spring of 1850. 1 Or at 158. When Simonds left Oregon to retrieve his family from Illinois in the spring of 1850, he entrusted the land to an agent, who then sold it to Philester Lee in the fall of that same year. *Id*. When Simonds returned to the property in 1851, he challenged the sale to Lee by arguing that he was still "residing upon and cultivating" the land when it was sold. *Id.* at 159.

Before resolving the claim, the Court outlined the standard for determining a person's residence. *Id.* at 160. It started by cautioning that the idea of residency is not subject to an "exact definition" and, in any given case, depends not upon "one fact" but rather "the whole taken together." *Id.* The Court then outlined two considerations for determining a person's residence: (1) their statements and subjective intent as to the place they consider "home," and (2) their "acts and

circumstances" taken pursuant to that intent. *Id.* Although the Court reasoned that physical "presence in a place" is one factor to be considered, "it is far from being conclusive." *Id.* Thus, a person's "[t]emporary absence * * * does not necessarily change or affect that residence, if it is in point of fact the home of the settler while away, and he looks to it, and treats it as his actual permanent home." *Id.*

The Court applied these principles to find that Simonds did not "reside" on the land when it was sold. First, the Court emphasized that there was no record of Simonds stating that "his residence was upon the land in dispute," nor any evidence that Simonds had "declared or intended to put his family on it when they came to Oregon." *Id.* at 160. It acknowledged that Simonds had shared his intent to return to Oregon before leaving for Illinois, but it reasoned that, "if this goes far enough to prove a residence in Oregon, it falls far short of proving a residence upon the particular land in question." *Id.* at 159-60. Second, the Court found that Simonds failed to treat the land as his home. *Id.* It observed that Simonds was present on the land only once for a period of months; never made improvements or built a dwelling on it; and never took steps to "make it a comfortable or permanent home for himself and [his] family." *Id.* Because Simonds had neither viewed nor treated the property as his home, the Court concluded that he did not reside there when it was sold. *Id.*

Another early case from Indiana confirms that a person's continuous physical presence is not dispositive of their residence. In *Pendleton v. Vanausdal*,

2 Ind 54 (1850), the Indiana Supreme Court considered the meaning of "residence" while resolving a challenge to the sufficiency of a creditor's service on a debtor. The debtor had "left for the south in the capacity of a peddler, taking a wagonload of goods with him," but was served six months later at the Indiana home where he was last known to have lived. 2 Ind at 54. In holding that the Indiana home was still the debtor's "residence" despite his absence, the court noted that the debtor had lived there for "six or seven years" before leaving, that his family still lived there, and that "it was not known that he had or intended to change his residence." *Id.* Thus, as in *Lee*, the debtor's residence turned on his subjective intent to maintain the same residence (i.e., he had not told anyone he intended to change his residence), together with acts corroborating that intent (i.e., he had lived at the home previously and his family remained there).

This flexible conception of residence is consistent with early precedents distinguishing between a person's "residence" and "domicile." In *French v. Lighty*, 9 Ind 475 (1857), for instance, the Indiana Supreme Court observed that, "a residence, within the meaning of our constitution, is a home." 9 Ind at 477 n 1. By contrast, the court explained, the "best definition of domicile" is "'[a] residence at a particular place, accompanied with positive or presumptive proof of an intention to remain *for an unlimited time*.'" *Id.* (emphasis added). The court implied that a person might have multiple residences at any given time, but that because of the requirement that they intend to remain present for "an unlimited

time," a person could have only one domicile at any given time. *See id.* (reasoning that no one can be "without a fixed domicile"); *cf. also McFarlane v. Cornelius*, 43 Or 513, 522, 73 P 325 (1903) ("[A] person may simultaneously have a permanent and a temporary residence * * *.") Thus, although some courts have used the two terms interchangeably—indeed, the terms are undoubtedly close cousins—*French* suggests that the term "residence" sets a lower bar.

Another early Oregon case supports the inference that "residence" is a more lenient standard than the traditional doctrine of "domicile." In *Pickering v. Winch*, 48 Or 500, 87 P 763 (1906), this Court considered whether Amanda Reed, the founder of Reed College, was domiciled in Oregon at the time of her death. Reed and her husband Simeon lived in Oregon from 1854 to 1892, but when Simeon fell ill in 1892, they purchased a home in Pasadena, California, and "removed their household effects and personal belongings from Portland to Pasadena." 48 Or at 501. After Simeon's death in 1895, Reed constructed another home in Pasadena and spent the majority of her time there until she died in 1904. *Id.* at 502. When several heirs contested the probate of her will, the heirs argued that Reed had been domiciled in California when she died and that, as such, the contest should be venued in California. *Id.* at 503.

In holding that Reed was domiciled in Oregon, the Court made several observations about her residence and its relation to her domicile. "To constitute domicile," the Court explained, "there must be both the fact of a fixed habitation

or abode in a particular place, and an intent to remain there permanently or indefinitely." *Id.* at 504. It cautioned, however, that domicile "is not in a legal sense synonymous with 'residence.'" *Id.* Unlike domicile, "[a] person may have more than one residence." *Id.* Thus, the Court observed, Reed was a resident of both Oregon *and* California at the time of her death. Specifically, it reasoned that, despite having lived in California for 12 years, Reed maintained robust ties to Oregon: she managed a business in Oregon, had an office in Oregon, retained church connections, contributed to Oregon-based charities, kept an Oregon bank account, retained Oregon property interests, and regularly described herself as an Oregon resident. *Id.* at 511-12. It was based on these same facts, in combination with the fact that Reed had never expressed an intent to abandon her original domicile, that the Court likewise found her domicile to be in Oregon. *Id.*

As relevant here, *Pickering*'s distinction between the concepts of "residence" and "domicile" buttresses the inference from *French*—an Indiana case contemporaneous with the adoption of the Oregon Constitution—that the "residence" standard is less onerous than that of "domicile." Further, the Court's conclusion that Reed, despite having lived in California for 12 years, resided and was domiciled in Oregon is consistent with the understanding of residency reflected in *Lee* and *Pendleton*. Specifically, it is consistent with the view that someone resides within a place if: (1) they view that place as their home, and (2) they maintain ties to the place that are consistent with that intent. The concept of

"residence" is not, as each of these cases makes clear, a rigid physical presence requirement, nor is it exclusive of activities or even residences in other states.

3. Kristof has long viewed and treated his family's farm as home by returning regularly and spending extended periods of time there, managing its operations, and purchasing nearby land.

The textual, historical, and precedential authorities outlined above are best synthesized by requiring a proponent of Oregon residence to establish, in view of the totality of circumstances, their subjective intent that a place in Oregon is or remains their home, together with objective facts evincing their actions taken in conformity with that intent. This is the standard of *Lee* distilled to its essence—that is, these are the factors that the Supreme Court of the Oregon Territory found dispositive of residence just three years before the Constitutional Convention. The early Indiana cases *Pendleton* and *French* are in accord. And these factors give effect to the text and contextual drafting choices of the framers, as well as their main policy objectives as described at the Constitutional Convention.

Kristof readily satisfies this standard. First, Kristof has always described his Yamhill family farm as home. This includes references Kristof has made to Oregon, generally, and Yamhill, specifically, as his home in published writings and interviews since at least 1982. Second, Kristof has consistently treated his Yamhill family farm as home. This includes spending nearly every summer on the farm since the 1970s; purchasing and improving nearby lands starting in 1993; building an addition to the property's farmhouse for him and his family in

1994; managing the farm's operations since 2010; and directly leasing the farm from his mother since 2018. Finally, although Kristof has previously voted in New York, both Oregon and New York law are clear that a person may have multiple residences, and New York law allows a person to vote in the state even if their primary residence is elsewhere. Because Kristof has long viewed and treated Oregon as his home, he satisfies its residency requirement.

(a) Kristof has always held and shared the subjective view that his family farm in Yamhill is his home.

Kristof's intent for Yamhill to be his home is manifest in his interviews, published writings, and private legal documents. As early as 1982, Kristof described Yamhill as "my home" in the Washington Post. In other professional writings and interviews, Kristof has likewise used the word "home" to describe time spent in Oregon between 2000 and 2020. In a 2004 opinion piece, for example, Kristof wrote that he was "home" in Yamhill over the summer. Similarly, in a 2017 interview with CNN: Tonight, Kristof described having been "home in Oregon over the weekend." And the 1999 purchase deed for his house in Scarsdale, New York, states that Kristof lives in Yamhill. Kristof has also regularly used return mailing labels with his Yamhill home address.

In July 2019, Kristof even wrote the foreword to a coffee table picture book, "Oregon, My Oregon," published the following year, in which he extolled the "profound and sometimes ostentatious pride" that "[w]e Oregonians" feel for "our state." A few months later, Kristof gave an interview to Portland Monthly

Magazine in which he described himself as a "local yokel" and "someone who is part of the community" in Yamhill. Taken together, these statements show that Kristof has consistently viewed his family farm in Yamhill as home.

(b) Kristof has treated his family farm as home by regularly spending extended periods of time there, leasing and managing it, and purchasing and improving nearby land.

Kristof has also treated his Yamhill farm as home. Since leaving for college in 1978, Kristof has returned home to the farm nearly every summer. (App 28.) In 1994, Kristof and WuDunn built an addition to the Kristof family home so that it would be large enough to accommodate the entire family. (*Id.* at 29.) Kristof, WuDunn, and their children have designated bedrooms in the house, and they have long kept personal items like clothing in their rooms. (*Id.*) Similarly, Kristof and WuDunn have purchased three nearby parcels of land. (*Id.* at 29-30.) The first, purchased in 1993, is a 150-acre property in Yamhill; the second, purchased in 1996, is a 372-acre property in McMinnville (a portion has since been sold); and the third, purchased in 2020, is a 115-acre parcel adjacent to their Yamhill farm. (*Id.*) Over the years, Kristof has managed, improved, and cultivated these properties. (*Id.*) Kristof and WuDunn have also paid Oregon property taxes on all three tracts since they were purchased. (*Id.*)

In addition to living on the Yamhill farm each summer and purchasing nearby land, Kristof and WuDunn have treated Oregon as their home in other ways. For example, when their professional obligations allowed, Kristof and

WuDunn spent additional time on the farm. Thus, in 1994, Kristof, WuDunn, and their children spent most of the year in Oregon. (*Id.* at 29.) They were able to do so again for most of the year in 1999, with Kristof and WuDunn's children attending Oregon schools. (*Id.*) Kristof was also registered to vote in Oregon and maintained an Oregon driver's license through the 1990s. (*Id.*) Although Kristof and WuDunn purchased a New York home in 1999, the original deed stated that they live in Yamhill. (*Id.* at 15.) Kristof also continued to use return mailing labels with his Yamhill home address even after the purchase. (*Id.* at 29.) And when Kristof's father passed away in 2010, he took over management of the Yamhill family farm—maintaining farm equipment, ordering trees, and overseeing federal and state timber programs. (*Id.* at 29-31.)

Kristof's residential contacts with Oregon have only increased since 2018. Starting that year, Kristof and WuDunn spent substantial time on the Kristof farm researching and writing a book about ongoing social and economic changes to Oregon. (*Id.* at 30-31.) As a result of their more regular presence, as well as market pressures, they made a significant investment to transition the principal crop of the Kristof family farm from cherries to cider apples and wine grapes. (*Id.* at 31.) Kristof and WuDunn formalized their investment by forming a lease of the farm in October 2018. (*Id.*) Similarly, in August 2019, an Oregon limited liability company was formed to hold their interest in the farm, and they hired three people—overseen by Kristof—to work the farm. (*Id.*) Based on this

increased expenditure of time and money in Oregon, Kristof filed Oregon tax returns for 2019 and 2020. (*Id.*) These acts, taken together, demonstrate that Kristof has consistently treated Oregon as home.

(c) Kristof's registration to vote in New York is minimally relevant because a person can have multiple residences and New York law allows voting from a secondary home.

Although the Secretary of State places considerable weight on Kristof's registration to vote in New York between 2000 and 2020, his registration is of little relevance to his Oregon residency. First, while New York limits voting to residents of the state, it is hornbook law that a person can be a resident of multiple places. 28 CJS *Domicile* § 5 ("One * * * may have more than one residence at the same time * * *."). This principle is consistent with how the term "residence" was used in *French*—an Indiana case contemporaneous with the adoption of the Oregon Constitution—as well as this Court's thorough discussion of the term in *Pickering*. The view that a person may be a resident of more than one state is also consistent with cases from other states that are contemporaneous with the adoption of Oregon's constitution. *See, e.g.*, *Succession of Franklin*, 7 La Ann 395, 411 (La 1852) (examining domicile doctrine "where the party has two residences"); *Hairston v. Hairston*, 27 Miss 704, 720 (1854) (same); *Smith v. Croom*, 7 Fla 81, 153 (1857) (same). The fact that Kristof was a resident of New York for voting purposes cannot be dispositive of his Oregon residency.

Second, Kristof's registration to vote in New York is legally and factually

consistent with Yamhill being his *primary* residence. New York law does not require a voter to register in the jurisdiction of their principal residence; rather, a voter with two residences may register in either one. *Willkie v. Del. Cty. Bd. of Elections*, 865 NYS2d 739, 741-42 (NY App Div 2008). A voter, to that end, is not limited to registering at their "year-round permanent home" or the home where they have "more significant contacts to that place than any other." *Maas v. Gaebel*, 9 NYS3d 701, 705 (NY App Div 2015). The residents of a seasonal cooperative (*i.e.*, owners of vacation homes), for example, may register to vote in the jurisdiction of their seasonal homes. *Id.* at 703-05. "[T]he inquiry is not which of [a voter's] dual residences is 'the more appropriate one' for voting purposes, but whether the residence held by [the voter] is a legitimate one." *Willkie*, 865 NYS2d at 742. Thus, not only was it legal for Kristof to vote in New York, it is consistent with him having treated the Kristof farm as home.

Third, nothing in the Oregon Constitution or the historical sources used to interpret its meaning suggest that registering to vote in another jurisdiction is dispositive of residential eligibility for Governor.[1] To the contrary, although there

[1] The Secretary of State relies on ORS 247.035(1)(e) to find that "voting is integral to residency." ORS 247.035(1)(e), states that a person who votes in another state surrenders Oregon residency for purposes of voting. But this statute, by its terms, "determine[es] the residence and qualifications of a person offering to register or vote," ORS 247.035(1), not eligibility for Governor. More fundamentally, the statute was adopted by legislative enactment long after the Oregon Constitution was ratified in 1859, and original provisions of the Oregon Constitution are not interpreted based on later-enacted statutes. *See State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Or 277, 284, 613 P2d 23 (1980) ("[L]egislative

are no pre-1859 cases on point from Oregon or Indiana, contemporaneous authorities from other states confirm that registration to vote was not viewed as dispositive of residence. *See, e.g.*, *Clarke v. Wash. Territory*, 1 Wash Terr 68, 70 (1859) (holding that "voting for President" in another state "cannot be considered as establishing a residence"); *Smith v. Croom*, 7 Fla 81, 158 (1857) (holding that "undue importance" should not be given to "the exercise of the political right of voting" in determining "residence, habitation, and domicil"); *Town of New Milford v. Town of Sherman*, 21 Conn 101, 112 (1851) (holding that voting "would not be the proper evidence * * * of residence").

Similarly, this Court has discounted the relevance of voter registration to the question of Oregon residence in other contexts. In *Miller v. Miller*, 67 Or 359, 136 P 15 (1913), for instance, this Court considered the relevance of out-of-state voting to a person's Oregon residency in a domestic relations case. At issue in *Miller* was whether the defendant's decision to vote in Idaho was dispositive of his Oregon residency. 67 Or at 366. According to the Court, it was not: voting in Idaho did not have "any effect one way or the other in establishing his domicile there." *Id.* "Considered in connection with [the defendant's] previous registration in Oregon," the Court explained, "his voting in Idaho * * * is of no consequence." *Id.* at 366-67; *see also Volmer v. Volmer*, 231 Or 57, 60, 371 P2d 70 (1962)

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actions should not necessarily be given much weight when construing constitutional principles.").

(holding that "the act of registering to vote is often self-serving and, standing alone, is entitled to little weight"); *see also Inhabitants of E. Livermore v. Inhabitants of Farmington*, 74 Me 154, 156 (1882) ("It is obvious that the fact of voting in a place is not and cannot be conclusive of the fact of residence.").

This is not to suggest that voting has no relevance to the issue of residential eligibility for Governor. But its relevance, like that of any other fact, is as "one fact" weighed against "the whole taken together." *Lee*, 1 Or at 160. That is, Kristof's history of voting in New York weighs in the residency analysis no more prominently than the many other facts bearing upon his intent that Oregon be his home. It would undermine Kristof's claim to Oregon residency only if it cast doubt on the truthfulness of his sworn and unsworn statements that he considers Oregon his home. But it does not. Kristof registered and voted in New York—despite also residing in Oregon—as a simple matter of convenience since he expected to be present there during more elections. That explanation is consistent with his view of Oregon and his Yamhill farm as home. Simply put, Kristof's voting history cannot outweigh the decades of other statements and acts reflecting his view and treatment of his Yamhill farm as home.

4. Kristof also satisfies the heightened "domicile" standard applied in error by the Secretary of State.

Kristof has also been domiciled in Oregon since moving to the state in 1971. Although the Secretary of State avoids describing it as such, her decision applies the standard for determining a person's domicile. (App 127.) ("[W]e

consider a 'residence' to be a place in which a person's habitation is fixed and to which, when they are absent, they intend to return."). For the reasons discussed above, the framers of the Oregon Constitution did not harbor a secret intent to require "domicile" where they used the term "resident," nor would such an intent change the original purpose of Oregon's residency provision. But even if domicile were the governing standard, Kristof meets that standard because he has never expressed or carried into effect an intent to abandon his Oregon domicile—first established when he moved to the state in 1971—in favor of New York.

As understood when Oregon ratified its constitution, domicile requires "residence in [a] place" coupled "with the intention" that the place be the person's "principal and permanent residence." *Ennis v. Smith*, 55 US 400, 422-23 (1852). This means that a person's domicile is comprised of two elements: "residence and intention." *Pickering*, 48 Or at 504. Critically, a person's place of domicile, once established, is presumed to continue "until it is shown that a new one was established, in intent and in fact, by indicating and carrying into effect *an intention to abandon the [original] domicile*." *Id.* at 505 (emphasis added); *see also Ennis*, 55 US at 401 ("The presumption of law is that [domicile is] retained, unless the change is proved * * *."). Indeed, to change a person's domicile, "[r]esidence is not enough, except as it is co-joined with intent." *Pickering*, 48 Or at 404; *accord* Restatement (First) Conflict of Laws § 24 (Am Law Inst 1934) ("When a person * * * has more than one home, his domicil is in the earlier home,

unless he regards the second home as his principal home.").

The bar for establishing a change in domicile was exceedingly high when Oregon ratified its constitution in 1859. In *Succession of Franklin*, 7 La Ann 395 (1852), for instance, the Supreme Court of Louisiana considered whether Isaac Franklin was domiciled at his residence in Louisiana or Tennessee for the purpose of probate. Franklin was raised in Tennessee but left home "after he came of age" to "engage[] in business" outside of Tennessee for the next 30 years. 7 La Ann at 409-10. During this time, although Franklin spent just "a few days" in Tennessee each year, his father gifted him a Tennessee farm, and he purchased a nearby estate where he built a home. *Id.* at 410. Franklin would retire from business and go on to marry and purchase an estate in Louisiana, where he spent the vast majority of his time living and cultivating the land for the last eight years of his life. *Id.* Franklin also voted in Louisiana and listed it as his residence in several official documents, but with just "one or two exceptions" he still returned to his Tennessee estate every summer after acquiring his residence in Louisiana. *Id.*

In holding that Franklin was domiciled in Tennessee, the Supreme Court of Louisiana emphasized that Tennessee was Franklin's original domicile, and thus presumed to continue absent express evidence of a contrary intent. *Id.* at 411. Such evidence was lacking, the court reasoned, because Franklin had consistently returned home to Tennessee, even if just for "a few days" a year, throughout his life. *Id.* at 410. The court also found compelling that Franklin had described

Tennessee as his home in his will—if not in other "notarial acts" like voter registration—and that he chose to be buried in Tennessee. *Id.* at 411. Taken together, the court concluded that Franklin's stated "intention" to maintain his domicile in Tennessee, "coupled with [his] occasional residence, was sufficient to continue his domicile [there]." *Id.* That is, despite having lived most of his adult life away from Tennessee, the court held that he remained domiciled there because he often described it as home and returned throughout his life.

The same result was reached on similar facts in *Smith v. Croom*, 7 Fla 81 (1857). In that case, the Supreme Court of Florida considered whether Hardy B. Croom was domiciled at his Florida or North Carolina residence for the purpose of probate. Croom was born, raised, and educated in North Carolina. 7 Fla 81 at 150. Although he inherited a family home in North Carolina, Croom lived most of the final 20 years of his life on plantations he purchased in Florida. *Id.* at 155-56. He "settled and improved" the plantations, lived on them for most of the year, kept most of his property and other wealth in Florida, and even voted in Florida. *Id.* at 155-58. At the same time, Croom spent "a portion of each year" on the family estate in North Carolina, where his wife and child lived. *Id.* at 156. Croom also described "returning home" to North Carolina in private letters, though he often also listed Florida as his home in official documents. *Id.* at 161, 163-64.

Notwithstanding his consistent absence from North Carolina, the Florida Supreme Court held that Croom retained his original domicile in the state. *Id.* at

166-67. In doing so, it emphasized an "overwhelming presumption" that a person retains their original domicile absent evidence of an intent to "abandon" the original domicile. *Id.* at 154, 166. The court cited extensively from private correspondence in which Croom described his family's North Carolina estate as "home," and it emphasized that Croom never stopped returning to North Carolina annually. *Id.* at 156, 165-67. Croom never "abandoned his residence in North Carolina," the court reasoned, because he "continued to spend a portion of each year * * * with his family at their original place of abode." *Id.* at 156. The fact that Croom had voted in Florida was "at best of a very dubious character" in determining whether he had intended to change his domicile. *Id.* at 160.

Here, it is incontrovertible that Kristof—who lived exclusively in Oregon before attending college—established his domicile in the state in 1971. The only question is whether Kristof has since indicated and carried into effect an intent to "abandon" his Oregon domicile and establish a new one in New York. It is clear from both *Succession of Franklin* and *Smith* that Kristof never abandoned his Oregon domicile in favor of New York. Like the decedent in those cases, Kristof has consistently described Oregon as his home and returned to the state annually since the 1970s. Further, unlike those cases, Kristof has spent far more than just "a few days" in Oregon each year—he has lived on his farm virtually every summer and returned home at other points for both brief and extended periods of time. It is also uncontroverted that Kristof has long intended to retire on his farm

and have his ashes scattered in Oregon. These facts show that Kristof has been domiciled in Oregon since moving to the state in 1971.

In reaching a contrary conclusion, the Secretary of State questioned the truth of Kristof's sworn declaration and indicated that his past acts, such as voting and holding a driver's license in New York, were inconsistent with domicile in Oregon. But voting and "notarial acts" were insufficient for the decedents in *Succession of Franklin* and *Smith* to "abandon" their original domiciles—the best evidence of how "domicile" was understood when Oregon ratified its constitution in 1859. *Accord Miller*, 67 Or at 367 (voting is "of no consequence" to domicile). And the Secretary of State simply failed to address the decades of published statements in which Kristof candidly described Oregon as his home. These types of corroborating statements were more than enough for this Court to conclude, in *Pickering*, that Amanda Reed was domiciled in Oregon despite having resided in California for 12 years. 48 Or at 511-12. Kristof thus satisfies even the heightened "domicile" standard applied in error by the Secretary of State.

C. The Secretary of State's unreasonably broad interpretation of Article V, section 2, violates the Equal Protection Clause of the United States Constitution.

The Secretary of State's interpretation of Article V, section 2, implicates one final issue: adherence to the Equal Protection Clause of the United States Constitution. The Equal Protection Clause requires that no state "deny to any person within its jurisdiction the equal protection of the laws." US Const, Amend

XIV, § 1. This prohibits states from enforcing laws in ways that jeopardize fundamental rights unless the enforcement withstands strict scrutiny. *Dunn v. Blumstein*, 405 US 330, 335 (1972).

Nearly 50 years ago, the United States Supreme Court applied the Equal Protection Clause and struck down durational residency rules for voting. *Id.* at 344-60. In a careful opinion by Justice Thurgood Marshall, the Court held that voting residency rules unreasonably burden the fundamental rights to vote and to move from state to state and, accordingly, must withstand strict scrutiny—that is, be narrowly tailored to the governmental interests they purport to advance. *Id.* The Court ultimately concluded that voting residency rules are not narrowly tailored and therefore are unconstitutional. *Id.* at 360.

Since *Dunn*, courts have applied the same framework to residency rules for public office. Although typical applications of durational residency rules have been upheld, courts have struck down durational residency rules where applied more broadly than their policy justifications require. For instance, in *Callaway v. Samson*, a federal court invalidated a durational residency rule used to disqualify a candidate who lived mere blocks outside his district and who had worked within the district for two decades. 193 F Supp 2d 783, 789 (DNJ 2002). The court held that a rule of law that disqualifies a candidate who is intimately familiar with his district, just because he lives several blocks away, is not narrowly tailored. *Id.* Similarly, in *Robertson v. Bartels*, a federal court invalidated a durational

residency rule used to disqualify someone whose home had been drawn out of his district in redistricting. 890 F Supp 2d 519, 531-33 (DNJ 2012). There, also, the federal court held that a rule of law that disqualifies a candidate who is familiar with his district, just because his home was drawn out of the district, is not narrowly tailored.[2]

Here, too, the court should reject the Secretary of State's unnecessarily broad interpretation of Article V, section 2, that excludes one from being a resident of more than one state at a time. The Secretary of State's interpretation unnecessarily burdens several important and fundamental rights. Like in *Dunn*, the Secretary of State's interpretation penalizes those who have recently exercised the freedom to move from state to state, burdening the fundamental right to interstate travel. *See Dunn*, 405 US at 338, 341 (holding that the right to travel interstate and "abide in any State in the Union" is a "fundamental," "basic," and "unconditional personal" right). Courts have found this alone enough to trigger strict scrutiny. *See, e.g.*, *Callaway*, 193 F Supp 2d at 787 (holding that a one-year residency requirement for city council wards "plainly burden[s] [the plaintiff's] right to travel within the State of New Jersey" because the requirement "conditions his eligibility for public office, one of the highest honors and

[2] The California Secretary of State has also opined that California's gubernatorial residency requirement under Article V, section 2, of the California Constitution "violates the U.S. Constitution and is unenforceable." Summary of Qualifications and Requirements for the Office of Governor at 1, n 1 (Sept 14, 2021), https://elections.cdn.sos.ca.gov/statewide-elections/2021-recall/qualifications-requirements.pdf.

privileges of our democratic system, on his willingness to remain within the relevant geographical unit for one year"). Moreover, the Secretary of State's standard for applying Article V, section 2—which is driven directly by a candidate's choice of where to vote—unreasonably burdens candidates' fundamental right to vote by tying the exercise of one right (to run for public office) to another fundamental right (to vote). *See Dunn*, 405 U.S. at 336 (holding that the right to vote is fundamental). The Secretary of State's interpretation forces candidates to forfeit one right by exercising the other. But "[b]efore the right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans v. Cornman*, 398 US 419, 422 (1970).

The Secretary of State's interpretation also burdens the collective rights of both candidates and voters. The important right to run for office, while not "fundamental," is closely intertwined with voters' rights to political expression and to vote for candidates of their choice. *See Bullock v. Carter*, 405 US 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."); *see also Williams v. Rhodes*, 393 US 23, 30 (1968) ("[T]he state laws [limiting candidate access to the ballot] place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of

qualified voters * * * to cast their votes effectively. Both these rights * * * rank among our most precious freedoms."). Strict scrutiny is appropriate where a restriction has a "real and appreciable impact" on both voters and candidates. *Id.* at 143-44 (requiring courts to examine the impact of candidate restrictions "in a realistic light" regarding "the extent and nature of their impact on voters"). Here, a broad application of Article V, section 2, will undeniably have a very "real and appreciable impact" on voters. Indeed, a substantial number of voters have already shown support for Kristof in polls; political commentators considered Kristof a frontrunner in Oregon's Democratic Primary; 5,700 Oregonians have donated to his campaign, notwithstanding the very early stage of the race. His exclusion denies his many supporters the candidate of their choice.[3]

Because the Secretary of State's interpretation burdens fundamental and important constitutional rights, she must show that it is "necessary to promote compelling governmental interests." *Dunn*, 405 US at 339. Although the Secretary has, so far, cited none, states usually cite three particular justifications:

[3] The Secretary of State's interpretation of this provision will likely deprive voters of their choice of candidate in future elections by disfavoring candidates who, like Kristof, frequently travel abroad, maintain multiple residences, and/or have strong ties both in Oregon and elsewhere. There are many peripatetic Oregonians who, for various reasons, live in more than one place and may prefer candidates who have some understanding of the experience of living in multiple places or changing residences often. Such Oregonians come from all walks of life: houseless persons who move frequently due to housing insecurity; university students; seasonal migrant workers; military servicepeople; the list goes on. These groups of Oregonians will be disserved by the Secretary of State's interpretation, contravening the spirit of free, fair, and equal Oregon elections. *See generally* Or Const, Art II, § 1 ("All elections shall be free and equal.").

(1) enabling the candidate to become familiar with constituents and their needs; (2) enabling constituents to become familiar with the candidate; and (3) preventing "carpetbagging." *E.g.*, *Robertson*, 150 F Supp 2d at 696; *Callaway*, 193 F Supp 2d at 787. Clearly, none of these interests are served by excluding candidates who have close ties to Oregon but who *also* have ties to other states. Nothing about voting or sojourning outside of Oregon—while simultaneously maintaining close ties and a home in Oregon—shows that a candidate is (1) unknowledgeable about Oregon, (2) a stranger to Oregon, or (3) uninterested in Oregon affairs. Kristof is a prime example of this: even though he voted and traveled outside of Oregon, he has always been (and continues to be) intimately involved and dedicated to serving Oregonians and addressing Oregon issues.

In short, when deciding what it means for a person to be a "resident within" Oregon under Article V, section 2, the United States Constitution requires an interpretation that is tailored to the purposes of Article V, section 2. Excluding an Oregon resident from elected office just because he registered to vote or periodically lived elsewhere is not necessary to achieve the purposes of Article V, section 2. The court should reject the Secretary of State's interpretation and construe Article V, section 2, inclusively.

CONCLUSION

Kristof requests that this Court (1) exercise its original jurisdiction under Article VII, section 2, of the Oregon Constitution and ORS 34.120, and (2) issue

a peremptory writ of mandamus requiring the Oregon Secretary of State to accept Kristof's declaration of candidacy and submit his name to each county clerk for printing on the primary ballot. Alternatively, if this Court does not immediately issue a peremptory writ, Kristof requests that the Court issue an alternative writ of mandamus directing the Oregon Secretary of State to show cause why she should not be required to accept Kristof's declaration of candidacy and submit his name to each county clerk for printing on the primary ballot.

Dated this 7th day of January, 2022

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing Memorandum in Support of Petition for Peremptory or Alternative Writ of Mandamus with the Appellate Court Administrator on January 7, 2022, through the Appellate Court eFiling system.

I further certify that, on the same date, I served a copy of the forgoing Memorandum in Support of Petition for Peremptory or Alternative Writ of Mandamus on the attorneys identified below via email and U.S. First Class mail:

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