

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 _____

RELATOR NICHOLAS KRISTOF'S PETITION FOR A
PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

STATE OF OREGON

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INTRODUCTION

Nicholas Kristof is a frontrunner in the race to become the next Governor of Oregon. Since announcing his candidacy in October, 5,700 Oregonians from 35 Oregon counties have donated to Kristof's campaign, and he has raised more than \$2.5 million. By both measures, Kristof has garnered more support than any other candidate seeking the Democratic nomination for Governor. Kristof also leads in the polls and has secured endorsements from key community leaders and organizations, including the state's largest private-sector union. But with just over two months before primary ballots must be printed, and without a single ballot having been cast, the Secretary of State has made the unprecedented decision to deny voters the opportunity to choose Kristof as their next Governor.

Her decision is based on the novel and untested legal theory that Kristof cannot satisfy the residency requirement of Article V, section 2, of the Oregon Constitution. Under Article V, section 2, any candidate for Governor must have been "a resident within this State" for the "three years next preceding his election." What it means to be a "resident" for the purpose of ballot access has never been addressed by an Oregon court—let alone this Court. Yet, in her role as the filing officer for statewide elections, the Secretary of State has found that Kristof—who has for decades claimed his family's Yamhill farm as his home—is unable to satisfy this requirement. The effect of her decision is that Kristof will be excluded from the ballot unless there is a timely judicial intervention.

Kristof thus petitions this Court for a peremptory or alternative writ of mandamus requiring the Secretary of State to accept his declaration of candidacy and submit his name for printing on the primary ballot. With voting rights under unprecedented attack around the country, fidelity to democratic principles—especially to the right of the public to choose its government—has never been more important. Unfortunately, in the absence of this Court’s intervention, voters will be marginalized, and the gubernatorial race will be irreversibly altered by a lone government official applying novel and untested legal reasoning. The decision now before this Court is whether to afford—or deny—Oregon voters the opportunity to make their own choice about the state’s highest office. Because nothing less than the right of Oregon voters to freely elect their next Governor is at stake, Kristof urges this Court to grant the requested mandamus relief.

PETITION

A. Statement of Facts

Nicholas Kristof grew up in Oregon and, for many years, has lived in the state part-time. His work as a journalist required him to have a house in New York, to be present there some of the time, and to travel abroad from New York as his base. But, despite spending time in a variety of places, Kristof has long viewed and treated Oregon as his home.

Kristof’s roots in the state reach back to 1971, when his parents moved with him to a 73-acre farm in Yamhill, Oregon. Since leaving home for college

in 1978, Kristof has returned to spend virtually every summer on the Kristof farm, in addition to spending time there on other occasions. In 1994, after marrying and starting his own family, Kristof built an addition to the farmhouse so that it would be large enough to accommodate his wife and children. Since then, Kristof and his family have had designated bedrooms in the home and kept personal items like clothing there. In 2010, after his father passed away, Kristof took over management of the farm—maintaining farm equipment, procuring and planting trees, and overseeing timber stock. Kristof and his wife, Sheryl WuDunn, have also owned, improved, and paid taxes on multiple pieces of Oregon property since the 1990s—two in Yamhill and one in McMinnville.

Kristof and WuDunn have treated the Kristof 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. Kristof was also registered to vote in Oregon and maintained an Oregon driver's license through the 1990s. Although Kristof and WuDunn own a home outside of Oregon that was used to accommodate past employment in New York, the original deed to their New York home stated that they live in Yamhill, and Kristof has consistently referred to Oregon, generally, and Yamhill, specifically, as his home in published writings and interviews dating back to 1982.

Kristof and WuDunn's contacts with Oregon have only increased since

2018. With their children grown, they spent much of 2018 on the Kristof farm researching and writing a book about the social and economic changes to Yamhill. As a result of their more regular presence, as well as market demands, they made a significant investment of time and money to transition the principal crop of the Kristof farm from cherries to cider apples and wine grapes. Kristof and WuDunn formalized this investment by leasing the farm from Kristof's mother in October 2018. And 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. Based on this increased expenditure of time and money in Oregon, Kristof and WuDunn filed Oregon tax returns for 2019 and 2020.

Kristof is now running to be the state's next Governor. On December 20, 2021, he submitted his formal declaration of candidacy to the Oregon Secretary of State. *See* ORS 249.020. Pursuant to ORS 249.004, and in her role as the filing officer for statewide elections, the Secretary of State moved to "verify" that, if elected, Kristof would qualify for the office of Governor. One day after Kristof submitted his declaration of candidacy, the Secretary of State sent an open-ended inquiry to Kristof requesting more information about his residency. Kristof provided more than 100 pages of documentation of his residency, consisting of both legal argument and evidence, on January 3, 2022. After the passage of just two days, the Secretary of State announced her decision that Kristof does not qualify to be Governor because, in her view, Kristof has not been a resident of

Oregon since on or before November 8, 2019.

As a result, the Secretary of State will prevent Kristof from appearing on the primary ballot absent judicial intervention. Under Article V, section 2, of the Oregon Constitution, any candidate for Governor must have been “a resident within this State” for the “three years next preceding his election.” Because the Secretary of State concluded that Kristof does not “qualify” for the office of Governor under Article V, section 2, state law authorizes her to omit his name from the ballot. ORS 254.165(1). Oregon voters, in turn, will not have the opportunity to elect Kristof without timely intervention by this Court.

The deadline for the Secretary of State to submit the candidate names that will be printed on the primary ballot is March 17, 2022—a candidate 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; *see also* Democratic Party of Oregon, *Standing Rules & Special Rules of Order* 1-3 (2019). Thus, as a practical matter, Kristof’s eligibility to run for Governor must be finally resolved on or before March 17.

Every day that passes between now and a judicial reversal of the Secretary

of State’s decision prejudices Kristof. 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. That is, the Secretary of State may have predetermined the outcome of the primary election—or at least put a thumb firmly on the scale—even if this Court reverses her decision. 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 to a fair election contest may be irreversible. The situation is therefore one of extreme urgency requiring swift action by this Court.

B. Timeliness of Petition

Kristof’s mandamus petition is timely. A party seeking mandamus must file their petition “within a reasonable time.” *State ex rel Fidanque v. Paulus*, 297 Or 711, 718, 688 P2d 1303 (1984) (citations omitted). “As a rule of thumb, the relator usually should file the petition within 30 days after the date of the action that the relator seeks to challenge in mandamus.” ORAP 11.05(2)(c)(ii) n 4. Here, the Secretary of State issued her eligibility determination on January 6, 2022. Kristof acted promptly by filing this mandamus petition one day after that determination. His petition is therefore timely.

C. Inadequacy of Other Remedies

Kristof is without a “plain, speedy, and adequate remedy in the ordinary course of law.” ORS 34.110. As this Court explained in *McAlmond v. Myers*, “it

is extremely doubtful” that filing an action in circuit court will “constitute an adequate remedy” when, as here, a political candidate seeks access to the ballot in an upcoming election. 262 Or 521, 523-27, 500 P2d 457 (1972). That is because the time it would take to litigate such a case through final judgment and appeal will often lead to significant disruptions and uncertainty in the political process. *See id.* at 527-28. In this case, an action filed by Kristof in circuit court, as well as the appeal which would “[u]ndoubtedly” follow, *id.* at 528, will not be finally resolved before primary ballots must be printed on March 17. This not only leaves Kristof’s campaign in a state of limbo, but it also generates significant uncertainty for voters, other candidates, and election officials.

Although the March 17 ballot-printing deadline sets a backstop by which time Kristof’s eligibility must be resolved, it is imperative that Kristof’s eligibility be decided well before then. The gubernatorial campaign is well underway, for Kristof and others. Kristof cannot effectively do the work of a candidate for office under the cloud created by the Secretary of State’s decision. If his candidacy is not revived by a judicial decision until March 17, he will have missed the critical season for obtaining endorsements (which must be submitted to the Secretary of State by March 10 to appear in the voters’ pamphlet), fundraising, and winning public support.

Thus, to avoid extreme prejudice to Kristof, to his campaign, to his supporters, and to the fairness of the Democratic primary election for Governor,

the decision of the Secretary of State must be reviewed and reversed before the end of the month. There is no “plain, speedy, and adequate remedy in the ordinary course of law,” ORS 34.110, which would allow a judicial decision and appellate review within that timeframe, or even before March 17. The only available option is prompt consideration by this Court.

D. Bypassing of Circuit Court

In addition to the time pressures described above, Kristof seeks relief in this Court, rather than the circuit court, because of the novelty and importance of the issue presented. *See State ex rel Sajo v. Paulus*, 297 Or 646, 648, 688 P2d 367 (1984) (accepting jurisdiction “because of the importance and the novelty of the * * * issues raised by the petition”). No court of this state has ever interpreted the residency provision of Article V, section 2. Moreover, when a candidate for public 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 [a candidate] is qualified.” *Id.* at 527.

Here, Oregon voters’ right to elect Kristof as their next Governor hangs in the balance. In the absence of 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 currently leads the Governor’s race in the polls, and he is considered a frontrunner by many

in the press. The outcome of Kristof’s 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 government official or the specter of unresolved litigation.

E. Position of the Secretary of State

The Secretary of State acknowledged in both her office’s written decision and in her public statements of January 6, 2022, that Kristof’s eligibility should be decided expeditiously by the Oregon Supreme Court. She said in a press conference: “We are very, very committed to working with [Kristof] to make sure that we can do everything we can to get this before the Oregon Supreme Court as quickly as possible.”

CONCLUSION

For the reasons explained here and in the accompanying memorandum of law, this Court should (1) exercise its original mandamus 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, this Court should 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 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 this 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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