IN THE SUPREME COURT OF

THE STATE OF OREGON

State *ex rel* NICHOLAS KRISTOF,

Plaintiff – Relator,

v.

SHEMIA FAGAN, Secretary of State of the State of Oregon,

Defendant.

Supreme Court No. S069165

Amicus Curiae Brief of Bill Bradbury and Jeanne Atkins

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I. INTRODUCTION

Bill Bradbury and Jeanne Atkins, former Oregon Secretaries of State, from 1999 to 2009 and from 2015 to 2017, respectively, offer this friend-of-the-court brief on the issue raised by relator Kristof's petition: whether the current Secretary erred in concluding that Kristof doesn't meet the residency requirement for gubernatorial candidates in Article V, section 2, of the Oregon Constitution. As former secretaries, these friends, or *amici*, know first-hand how important the electoral process is to our democracy, and how important it is to the electoral process that decisions about voter and candidate eligibility be free, fair, nonpartisan, and, not least, inclusionary, especially in a state that has, at times, restricted access to the polls and to elected office, especially for people of color, sometimes through durational residency requirements. They are mindful of that shameful history and concerned about how other states seem to be forgetting their own shameful histories and working to re-restrict access for voters and candidates alike. As Bradbury and Atkins explained in a recent op/ed, co-authored with Phil Keisling, himself a former secretary of state: "On matters of residency and similar questions, Oregon and its voters would be best served if we continue to make inclusion – and not exclusion – the guiding principle of our participatory democracy." *Opinion: Residency standard designed to support voter access, inclusion*, Oregon/Live (Dec 19, 2021),

available online at https://www.oregonlive.com/opinion/2021/12/opinion-residency-standard-designed-to-support-voter-access-inclusion.html (last viewed Jan 18, 2022). That principle guided these *amici* when they were deciding election cases, and they believe it should guide this court in deciding this one, as explained later in this brief.

II. DISCUSSION

Whether the Secretary erred in determining Kristof's eligibility for election depends on: (a) the meaning of "resident" in Article V, section 2, of the constitution; (b) the evidence Kristof presented of his connections to this state; and (c) the scope of the Secretary's review of that evidence. Those topics are addressed in turn below.

A. The Meaning of "Resident"

In deciding what Article V, section 2, requires of candidates for Governor, this court should follow its usual methodology; it should consider the text of the provision, taken in context; the circumstances of its adoption; and the cases that have construed it. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). The relevant text in section 2 says that no person is eligible to be Governor "who shall not have been three years next preceding his election, a

resident within this State."[1] That section was amended in 1974, but the changes then didn't affect the language just quoted; it's been there since the original constitution was adopted in 1857.[2]

The constitution does not define "resident," as that term is used in Article V, section 2, or any other provision of the document. So, the court should assume that it was meant to have its ordinary meaning – or, more precisely, its ordinary meaning at the time it was adopted, because the goal is to determine the intent of the people who adopted it and thus turned it into law. *Wittemyer v.*

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[1] The section reads in full:

> "No person except a citizen of the United States, shall be eligible to the Office of Governor, nor shall any person be eligible to that office who shall not have attained the age of thirty years, and who shall not have been three years next preceding his election, a resident within this State. The minimum age requirement of this section does not apply to a person who succeeds to the office of Governor under section 8a of this Article."

[2] The original section read:

> "No person except a citizen of the United States, shall be eligible to the office of Governor, nor shall any person be eligible to that office who shall not have attained the age of thirty years, and who shall not have been three years next preceding his election, a resident within this State."

City of Portland, 361 Or 854, 861, 402 P3d 702 (2017) (citing *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992)).[3]

Dictionaries are authorities on the meanings of words. Thus, to determine what a word meant at any given time, this court consults contemporaneous dictionaries. In 1857, the leading American dictionary was Noah Webster's *American Dictionary of the English Language*, originally published in 1828. So, that dictionary, cited hereafter as "*Webster's*," has been this court's go-to authority for interpreting words and phrases in the original constitution. *See, e.g.*, *State v. Bartol*, 368 Or 598, 618, 496 P3d 1013 (2021); *State v. Babson*, 355 Or 383, 417, 326 P3d 559 (2014); *Haugen v. Kitzhaber*, 353 Or 715, 724-25, 306 P3d 592 (2013); *West Linn Corp. Park, L.L.C. v. City of West Linn*, 349 Or 58, 89, 240 P3d 29 (2010).

According to *Webster's*, *resident* meant "[d]welling or having an abode in a place for a continuance of time," and *residence* meant "[t]he act of abiding

[3] The court has sometime referred to the intent of the "drafters" of the constitution, but that can't be right. It's the voters that gave effect to the document – that make it law. Without them, the constitution would just be a piece of paper with ink on it. So, it's the voters' intent that should matter ultimately. Other cases have referred to "the intent of the drafters of [a provision] *and* the people who adopted it," *e.g.*, *State v. Hirsch*, 338 Or. 622, 631, 114 P3d 1104 (2005), *overruled by State v. Christian*, 354 Or 22, 307 P3d 429 (2013) (emphasis added), which is better, but still a little off.

or dwelling in a place for some continuance of time." *Webster's* 695.[4] Which is pretty much what Oregon's territorial supreme court said three years before the constitutional convention. In an opinion joined by several justices who later served as delegates to the convention, the court held "that a man's residence, at any given time, is where he and his family are actually living at that time." *Lee v. Simonds*, 1 Or 158, 159 (1854).

Of course, over *a period of time*, say, three years, a person can actually live – or dwell or abide – in more than one place. They can have two homes at once –including homes in two different places, even two different states. That happens often nowadays and, more importantly, also happened back in the day, as this court remarked in *Pikering v. Winch*, 48 Or 500, 504, 87 P 763 (1906): "It is not very uncommon for wealthy merchants to have two dwelling houses, one in the city and another in the country, or in two different cities, residing in each a part of the year." (Quoting *Gilman v. Gilman*, 52 Me 165 (1863)). It's possible, then, for a person to live in two places over time and, hence, to be a

[4] The Secretary, relying on the same dictionary, says that *dwell* meant "to abide as a 'permanent resident.'" Def's Answering Br 16 (quoting *Webster's* at 281). She then tries to import the concept of permanency into *resident*, *see id.*, forgetting that the definition of *that* term is not dwelling in a place *permanently*, but dwelling there "for a continuance of time." She also overlooks the full definition of *dwell* in *Webster's*, which is "[t]o abide as a permanent resident, *or* to inhabit *for a time*; to live in a place." *Webster's* at 281 (emphasis added).

"resident" of more than one place, as that term was commonly understood in 1857.

It's significant, then, that Article V, section 2, requires candidates for Governor to *reside* in Oregon, but not to be *domiciled* here. In 1857, *domicile* commonly meant "an abode or mansion, a place of *permanent* residence, either of an individual or family." *Webster's* 271 (emphasis added). Thus, a person could only have one domicile, even if the person had two or more residences.

This court said exactly that in *Pikering*, not long after the constitution was adopted. *Domicile* and *residence*, the court explained, are "not in a legal sense synonymous." 48 Or at 504. "A person can have more than one residence and more than one home, in the ordinary acceptance of those terms, but he can have only one domicile." *Id.* The court went on to hold that "[d]omicile * * * is made up of residence and intention. Neither, standing alone, is enough. Residence is not enough, except as it is co-joined with intent, which determines whether its character is permanent or temporary[.]" *Id.* Thus, "[t]he domicile of any person is, in general, the place or country which is in fact his permanent home," *id.* at 505, as opposed to his temporary home, when he has more than one home.

The drafters of Article V, section 2, surely knew the difference between *resident* and *domicile* because both words appeared in Section 5 of the Act of

August 14, 1848 (9 Stat 323), which created Oregon's territorial government, and which became the basis, nine years later, for the voting requirements in Article II, sections 2 and 5, of the original constitution. Section 5 of the Act granted the right to vote to "every white male inhabitant above the age of twenty-one years, who shall have been a *resident* of said Territory at the time of the passage of this act," provided, however, that "no officer, soldier, seaman, or marine, or other person in the army or navy of the United States, * * * shall be allowed to vote in said Territory, by reason of being on service therein, unless said territory is and has been for the period of six months his permanent *domicil*." (Emphasis added.) Then, as now, people presumed that the same word in the same sentence meant the same thing, and, conversely, that different words meant different things. *See Burke v. DLCD*, 352 Or 428, 440, 290 P3d 790 (2012) (unlikely that legislature uses the same term in the same sentence to mean different things).

In addition to the act creating the territorial government, the drafters of our constitution, many of them lawyers, would have been aware of the out-of-state case law that distinguished *resident* and *domicile*, parts of which were cited later in *Pickering*:

- "A person may have two places of residence, for purposes of business or pleasure. But, in regard to the succession of his property, as he must have a domicile somewhere, so he can have only one." *Gilman v. Gilman*, 52 Me 165 (1863), quoted in *Pickering*, 48 Or at 506-07.

- "There is a broad distinction between a legal and actual residence. A legal residence (domicile) cannot, in the nature of things, coexist in the same person in two states or countries. * * * As contra-distinguished from his legal residence, he may have an actual residence in another state or country." *Tipton v. Tipton*, 87 Ky 245 (1888), quoted in *Pickering*, 48 Or at 507.

- "There is, however, a wide distinction between domicile and residence recognized by the most approved authorities everywhere. * * * A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences." *Long v. Ryan*, 30 Va 718 (1878), quoted in *Pickering*, 48 Or at 507-08.

These cases were not outliers. As this court noted in *Pickering*, "[o]ther decisions might be referred to to the same effect, but these are sufficient to show the distinction between residence and domicile[.]" 48 Or at 508. That was the weight of the law, as this court saw it.

In the end, of course, the best evidence that "resident" in Article V, section 2, doesn't mean *domicile* is the fact that Article V, section 2, doesn't say *domicile* – it says "resident." There is no getting around that (for the Secretary) inconvenient fact.

This court should thus conclude that the use of *resident* and not *domicile* in Article V, section 2, was meaningful, given the well-established difference between the two terms, both in common parlance and the law. That choice, the court should hold, shows that the drafters did not intend to disqualify candidates for Governor who resided in Oregon *and elsewhere* during the three years

preceding the election, and that the people who voted for the draft intended the same thing, an intent that continues to this day in the unamended language of Article V, section 2. It follows that candidates for Governor today are required to live here, but not *only* here, for three years before the election. They are permitted to live elsewhere too – to have another home, another residence – at the same time. Dual residency in another state does not cost them eligibility for office in Oregon.[5]

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[5] As discussed above, in deciding the meaning of a constitutional provision, this court should consider the circumstances surrounding its adoption, including, in the case of original provisions, the records of the constitutional convention where the provisions were debated. But there is not much to be found in those records regarding the residency requirement in Article V, section 2. What little appears there suggests that the intent of the requirement was to keep "strangers" to the state, people who had "only just arrived," from running for and obtaining office. *See* Relator's Op Br 21-23. In other words, it was meant to disqualify people who had not resided here, not to disqualify those who *had*, even if they had also resided somewhere else during the three-year vesting period, as the term resident allows. *See Pickering*.

The court should also consider the context in which "resident" is used, meaning other provisions of the original constitution. Some of those provisions use the related term *residence* in a way that suggests that an involuntary or transient presence in this state is not sufficient to create residency, at least for voting purposes. For example, original Article II, section 5, said that soldiers and sailors did not become residents for that voting purposes simply by having been stationed here. And original Article II, section 2, said that "[f]or the purpose of voting, no person shall be deemed to have gained * * * a residence, by reason of his presence" for, among other things, government service. But nothing in those provisions suggests that person cannot have a voluntary, non-transient presence in more than one state and, hence, a residence in more than one. And, of course, there is nothing transient or involuntary about Kristof's long-running, regular, and substantial presence in Oregon, as discussed later.

B. The Evidence of Kristof's Residence

As just explained, Article V, section 2, requires that Kristof reside here during the three years, or 36 months, preceding any election in which he wants to run, even if he also resided elsewhere during that time. Of course, there are eight months to go before the next election for Governor. So, the question for now is whether Kristof has resided in Oregon during the last 28 months, taking us back to November 2019.

There is ample evidence that he has. He testified without contradiction that he's had a home in Oregon since long before November 2019. It's the family farm just outside of Yamhill that his parents purchased in 1971, when he was 12. App 28 (¶ 2). He grew up there and went to grade school and high school in town. App 28 (¶ 3). He left the state for college and a distinguished career as a journalist, but he always considered Yamhill and the farm as "my home." App 28 (¶ 4); *see also* App 29 (¶ 13), App 31 (¶ 21), App 32-33 (¶¶ 23-30). He returned there "frequently" and "spent long stretches of time there," including a part of every summer since 1984, excepting 1989. App 28 (¶ 5). In 1994, he built an addition to the farmhouse to include bedrooms for him and his wife and kids. App 29 (¶ 10). They keep clothes and other personal items there. *Id.* After his father passed, Kristof took over the management of the farm, a money-making operation with several employees, in which he has made

substantial investments. App 30 (¶ 15); App 31 (¶ 18). Meanwhile, he's purchased three other parcels of land, one in Yamhill, one in McMinnville, and one adjacent to the family farm, and paid taxes on the properties. App 29 (¶¶ 8 and 11); App 31 (¶ 20). In short, Kristof lives here, owns property here, and earns a living here, even while doing the same sometimes in New York.

The Secretary was unimpressed with all that. In concluding that Kristof did not reside in Oregon for the requisite period of time, she noted that he had been registered to vote in New York, the location of his other home, until December 2020, and that meant, she said, that he could not have resided in Oregon before then. *See* App 127. Voter registration, she explained, is all but dispositive for the residency requirement in Article V, section 2. "When determining residency for elections purposes," she said, "the place where a person votes is particularly powerful[.]" *Id.*

Nothing in the ordinary meaning of "resident" circa 1857, or the case law construing that term, supports that assertion. Where you vote might be indicative of where you live and, hence, reside. It might be one factor to consider in that inquiry, depending on how easy it is to register in one state compared to the other. But there is no reason to believe that it's the only factor, or even the most important one. The Secretary cited no case law in support of her position.

If the case law suggests anything, it's that where a person resides is a multi-factored inquiry, with no one factor weightier than the others. As explained above, in the 19th century, in common parlance, *domicile* was a more exacting term than *residence*; it was a person's *main* residence when the person had more than one. And determining which was the domicile in that situation was not a single-factor inquiry. In *Lee v. Simonds*, the court quoted with approval Chief Justice Shaw's opinion in *Thorndyke v. Boston*, 1 Met. (Mass) 242: "No exact definition of domicile can be given; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case." 1 Or at 160. Later, in *Pickering*, the court quoted the Chief Justice again, albeit slightly differently: "No exact definition *can be given* of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case." 48 Or at 503-04 (emphasis added).

The court in *Pickering* went on to identify some of the relevant evidence for determining the domicile of a person with residences in two states. *See id.* at 511 *et seq.* It includes, the court said, evidence of where the person invests in property and conducts their "business affairs," 48 Or at 511-12, and evidence of the place the person considers their "home" in a "permanent," not "temporary," sense. *Id.* at 512-14. The court, it should be noted, didn't mention evidence of

where the person has registered to vote. Apparently, that was not dispositive, if even relevant.

A domicile is, again, a person's main residence when the person has more than one. So, the factors that determine domicile should also be relevant in determining residence. And they don't begin and end with voter registration.

Nor does it matter where a person votes, as the Secretary believes. In rejecting Kristof's application, she relied in part on ORS 247.035(1)(e), which provides that Oregonians who vote in another state "shall be considered to have lost residence in this state" for voter-registration purposes. App 127; *see also* Def's Answering Br 42-43. But that statute was enacted *after* the constitution and thus is not relevant to the meaning of provisions within that document, which is doubtless why the Secretary later allowed that the statute "does not apply directly in this case." App 127; *but cf.* Supp App 25-26 ("MADAME SECRETARY: * * * if a person casts a ballot in another state, they are no longer a resident of Oregon. It's very, very simple."). In any event, ORS 247.035(1)(e) concerns the right to cast a ballot, and there is no similar provision governing the right to be *on* the ballot. So, even while saying that voting elsewhere costs you the right to vote here, the legislature has *not* said

that it also costs you the right to run for office here. Thus, ORS 247.035(1)(e), if relevant at all, actually cuts against the Secretary's decision in this case.[6]

C. The Secretary's Role in Determining Residency

The meaning of "resident" is one thing, the relevant evidence another. Yet another is how a secretary should review the evidence. These *amici* believe that the review should be as lenient as possible – that in deciding who is eligible for the ballot, a secretary should always err on the side of inclusion, in keeping with the principle of self-governance that is the essence of our democracy.

The constitution, itself an act of self-governance, the seminal one, vests all power in the people, *see* Or Const Art I, § 1, including, most importantly, the power to choose their leaders. The constitution gives the people the right to elect their legislators, *see* Or Const Art IV, § 3; their Governor, *see* Or Const Art V, § 4; and their judges, *see* Or Const Art VII (amend), § 1. A too-strict view of a candidate's proof of eligibility runs the risk of impinging on those

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[6] In discussing Kristof's proof of residency, the Secretary dismisses the evidence of his deep emotional attachment to the state – the evidence that he always thought of Oregon as his permanent home. *See* Def's Answering Br 42-43. Recall, however, that *domicile*, in the legal sense, equals residence *plus* intent. As this court said in *Pickering*, discussed earlier, "[d]omicile * * * is made up of residence and intention." 44 Or at 504. Thus, if "resident" in Article V, section 2, means domicile, as the Secretary argues, Kristof's emotional attachment to this state is actually very important.

rights. After all, "the 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." *Bullock v. Carter*, 405 US 134, 143, 92 S Ct 849 (1972). For all practical purposes, disqualifying a candidate has the effect as disenfranchising the voters who would prefer that candidate.[7]

To avoid that risk, these *amici* believe a secretary should pass a candidate to the ballot if there is any evidence to support a finding of eligibility. In the case of a gubernatorial candidate, in particular, the secretary should pass any candidate for whom there is *some* evidence of residence for the three required years, leaving it to the voters to make the final call. Those voters who think that residency is important and requires connections to the state that the candidate might lack can express that view by voting for someone else. And

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[7] Which brings up another concern for these *amici*. Article V, section 2, is not the only provision in the original constitution that contains a residency requirement. Article II, dealing with suffrage and elections, granted the right to vote to "every white male citizen of the United States, of the age of twenty one years, and upwards, *who shall have resided in the State during the six months immediately preceding such election*." Or Const Art II, § 2 (1859). Later amendments have lowered the voting age to 18 and deleted the "white male" requirement – thank goodness – but the six-month residency requirement remains, although it might not be enforceable in full. *See Dunn v. Blumstein*, 405 US 330, 92 S Ct 995 (1972) (striking down one-year residence requirement for voting). Words in one part of a document are usually presumed to mean the same in other parts, so a too-strict interpretation of the residency requirement for Governor could spill over into interpretation of the residency requirement for voters. That, in turn, could lead to the disenfranchisement of Oregonians who live out-of-state for part of the year, as do many students and retirees.

those who think otherwise can vote otherwise. But, collectively, the people will get the Governor the majority of them wants. The Secretary shouldn't shortstop the voters' decision-making unless it's all but certain that a candidate hasn't lived here.

This deference to the electorate is no different, really, than the deference shown to that other great bulwark against tyranny: the jury. We want jurors, our peers, not judges or other government officials, to decide the defendant's guilt in criminal cases and fault in civil ones. That's why we send cases out for verdict when there is any evidence, no matter how slight, on both sides of the issue. We let the jurors weigh it, not the judge. In both civil and criminal cases, we take the question from the jury only when there is no evidence to support a decision either way. *See, e.g.*, *State v. Brown*, 306 Or 599, 602-05, 761 P2d 1300 (1988).

Voters are the ultimate decision-makers in elections just as jurors are in trials, and these *amici* believe they should be shown the same respect. In reviewing a candidate's proof of eligibility for office, a secretary should give the candidate the benefit of all favorable inferences, and resolve any doubt in the candidate's favor. The inquiry should be more generous, less rigorous, than was shown to Kristof. That's how these *amici* handled such matters when they were in office, and they commend that standard to the court.

There is one more reason – a practical one – for the deferential standard described above. Determining residence is, in part, a factual inquiry, and there is no formal fact-finding process available to the secretary in disputes of this sort. *See* Memo in Response to Pet for Writ of Mandamus at 4 (acknowledging "the absence of a clear mechanism to develop the factual record"). The informal, *ad hoc* inquiry the Secretary conducted here, which included review of information she said was "publicly available" but not subject to anything resembling cross-examination, *see id.* at 2, does not lend itself to deciding something so important as whether people with as many ties to the state as Kristof can offer themselves to the voters.

III. CONCLUSION

The court should grant the petition and issue the writ.

Respectfully submitted,

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Certificate of Compliance with ORAP 5.05(2)

Brief length

I certify that this petition complies with the 14,000 word-count limitation in ORAP 5.05(1)(b)(i)(B) and that the word count of this brief, as described in ORAP 5.05(2)(a), is 4,406 words.

Type size

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: January 25, 2022

s/ Thomas M. Christ
Thomas M. Christ

Certificate of Filing and Service

I certify that I filed the foregoing Brief on January 25, 2022, using the court's eFiling system.

I further certify that on the same date I served the Brief on the following lawyers, using the eService function of the eFiling system:

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