

IN THE SUPREME COURT FOR 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
MANDAMUS PROCEEDING

AMICUS BRIEF OF WLNSVEY CAMPOS, IMANI DORSEY,
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I. INTRODUCTION

The parties to this brief are Oregonians who identify as people of color who have collectively spent decades working to make Oregon fairer, more inclusive, and a place where diverse communities can thrive. Because of their lived experiences, they are uniquely situated to highlight the harmful consequences attendant to Nicholas Kristof's legal claims to be a resident within Oregon.

II. LEGAL ARGUMENT

Article V, section 2, of the Oregon Constitution requires candidates for governor to be "a resident within this State" for the three years preceding a gubernatorial election. Nicholas Kristof does not meet the minimum residency qualification to be governor of Oregon because, as a resident of New York, he made a choice to register to vote and voted in New York elections in November 2020, and for 20 years.¹

There are other facts that weigh against Kristof's claim to Oregon residency. He was employed in New York. He owns a home and lived in New York. And he was licensed to drive in New York. But Kristof's voting history should be the focus of the Court's analysis and be the dispositive factor in rejecting his claim to be an Oregon resident. The Court should also reject Kristof's arguments that Oregon property ownership or subjective sentiments about Oregon somehow

¹ Opening Brief at 37.

outweigh the objective facts that show he was a New Yorker, and centered his civic life New York, until at least December 2020.

A. *Where you vote matters.*

As Oregon’s chief elections officer, the Secretary of State must “obtain and maintain uniformity in the application, operation and interpretation of [Oregon’s] election laws.” ORS 246.110. In determining whether candidates meet Article V, section 2’s residency requirement, the Secretary of State rightfully places substantial weight on voting. That approach is entirely consistent with her legislative mandate. To register to vote in Oregon, you do not need to own property,² be free from felony convictions,³ or be housed.⁴ By examining voter registration status and voter history, the Secretary of State focuses the residency analysis on an objective factor that is race, gender, and class neutral. As such, the Secretary of State’s residency analysis fulfills her duty to obtain and maintain uniformity in the application, operation and interpretation of Article V, section 2.

Faced with the incontrovertible fact that he voted in New York for twenty years, up until December 2020, Kristof makes an astonishing argument for a gubernatorial candidate: where he voted in 2020—or at any other time—does not matter. But of course it matters. Voting is the foundation of a functioning

² See ORS Ch 247 (“Qualification and Registration of Electors”).

³ See ORS 137.281.

⁴ See ORS 247.038.

democracy. Arguments that discount the importance of voting in our Oregon elections ignore the impact of voting on our lives and the lives of all Oregonians. Such arguments also demean the legacies of the people who struggled—and continue to struggle—to secure the right to vote for everyone.

For twenty years, from 2000 until 2020, millions of Oregonians voted on issues of critical importance to the people of this state. During that time, Nicholas Kristof chose to vote, instead, in New York, on issues of critical importance to New Yorkers. His choice matters.

While Kristof was voting in New York, Oregonians voted to remove racist language from our constitution.⁵ While Kristof was voting in New York, Oregonians voted to preserve our sanctuary state law.⁶ While Kristof was voting in New York, Oregonians twice voted to guarantee access to safe and legal abortions regardless of age or economic circumstances.⁷ While Kristof was voting in New York, Oregonians twice voted to fund healthcare for low-income children and families.⁸ While Kristof was voting in New York, Oregonians voted to increase the minimum wage.⁹ While Kristof was voting in New York, Oregonians voted to deny Oregon driver's licenses to people who could not prove their legal presence

⁵ Ballot Measure 14 (2002).

⁶ Ballot Measure 105 (2018).

⁷ Ballot Measure 106 (2018) and Ballot Measure 43 (2006).

⁸ Ballot Measure 108 (2020) and Ballot Measure 101 (2018).

⁹ Ballot Measure 25 (2002).

in the United States.¹⁰ While Kristof was voting in New York, Oregonians voted to deny marriage to same-sex couples.¹¹

Decisions about whether Oregonians would earn a living wage, have access to healthcare, or even be allowed to legally drive to work were felt more acutely by communities of color in Oregon, who for generations have been systematically denied an equal opportunity to accumulate wealth because of institutional racism.¹² Because that is the case, it is troubling that Kristof has the temerity to insinuate that his fundraising prowess and access to wealthy donors should have any bearing on his residency qualification.

For twenty years—nearly an entire generation—whenever Kristof voted, he voted as a New Yorker. He voted as a New Yorker when school board elections were held in Scarsdale, where his children attended public school as New York residents. He voted as a New Yorker when his state sent George Pataki, Eliot Spitzer, and Andrew Cuomo to Albany, New York. For two decades, Kristof cast his vote on the momentous decisions that impacted the lives of New Yorkers. Not Oregonians.

¹⁰ Ballot Measure 88 (2014).

¹¹ Ballot Measure 36 (2004).

¹² Kucklick, A. and Manzer, L., *Overlooked & Undercounted 2021: Struggling to Make Ends Meet in Oregon* (Sep 2021) (available at: <https://www.oregon.gov/workforceboard/data-and-reports/Documents/Overlooked-Undercounted-2021.pdf>) (last visited January 21, 2022).

To be clear, Kristof nowhere expresses the importance of his vote. Instead, he voted in New York “as a simple matter of convenience.”¹³ In so doing, he posits a view of elections that divorces the act of voting in an election from the consequences of an election’s results. Elections affect the rights and economic security of the residents of a state and those impacts are felt most acutely by marginalized communities. It may be that Kristof is largely immune from the consequences of his votes, but most people are not in his situation. To most people, voting and the impacts of elections matter a great deal.

The Court should reject Kristof’s privileged view of elections and his arguments for their diminished importance in determining his residency. Instead, the Court should recognize that the place where a person votes must play a significant, if not dispositive, role in the determination of residency for eligibility to hold Oregon’s highest office.¹⁴

Through the 2020 general election, Kristof centered his civic life in New York. He cannot rightfully claim to have been an Oregon resident and have the right to lead our state when he did not participate in civic life here for the required minimum of three years preceding his potential election.

¹³ Opening Brief at 40.

¹⁴ To be clear, we do not argue that a person must be eligible or registered to vote or ever have voted to be determined a resident. Instead, if a person is registered to vote and has a record of voting during the relevant time period, where that person voted is appropriately dispositive of the residency issue.

B. *There is no property qualification to be governor.*

Because Kristof acknowledges that he voted in New York in November 2020—a clear violation of the three-year residency requirement to run for governor of Oregon—he asks this Court to abandon the Secretary of State’s review procedure and adopt one that focuses on his privileged circumstances: the fact that he has a second home and owns property in Oregon.

But there is no property qualification to be governor of Oregon and you cannot purchase residency by buying property. Consequently, the fact that Kristof owns property in Oregon does not qualify him to be governor.

The fact that a person owns property in Oregon may be a legitimate factor in determining residency under a different set of facts. For example, if a person only owned property in Oregon *and had never voted anywhere*, then the fact that a person owned property here might be given some weight. But where, as in Kristof’s case, a person is registered to vote and actually votes in another state, is licensed to drive in that other state, is employed in that other state, and owns a home in that other state, then to rely on the fact of property ownership in Oregon would elevate that factor above all others. In so doing, the Court would create a privileged place in Oregon’s election laws for people with the financial means to own property at all, let alone own property in more than one state.

Furthermore, adopting a test that focuses on property ownership could never

be applied equally to Oregon's communities of color. Racial disparities in homeownership because of historic and systemic barriers in Oregon are well documented.¹⁵ Communities of color in Oregon are significantly less likely than white Oregonians to own even a first home in our state.¹⁶ 65% of white Oregonians own a home.¹⁷ Half that number of Black (32%) and Native Hawaiian/Pacific Islander (33%) Oregonians own a home.¹⁸ Less than 45% of Hispanic or Latinx Oregonians and American Indian/Alaska Natives own a home.¹⁹ When so many people of color in Oregon have been denied the ability to even own one home here, the fact that Kristof owns vacation and investment property in Oregon should be given no weight in the Court's residency analysis.

C. *Residency should be measured by objective standards.*

Because he fails any objective test for residency, Kristof invites the Court to adopt a subjective one. Kristof states in a myriad of different ways that Oregon is his home. By repeatedly framing the arguments in favor of his residency in terms

¹⁵ Joint Task Force Addressing Racial Disparities in Home Ownership, *Report on Addressing Barriers to Home Ownership for People of Color in Oregon* (Dec 2019) (available at https://www.oregonlegislature.gov/citizen_engagement/Reports/2019-JARDHO-Addressing%20Barriers%20to%20Home%20Ownership%20for%20People%20of%20Color%20in%20Oregon.pdf) (last visited January 21, 2022).

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

of his subjective beliefs, Kristof invites application of a subjective test for elected office that in turn invites decisions based upon implicit bias, patronage, or cronyism that have no place in Oregon law.

Subjective tests have been rejected in the context of voting for the same reason they should be rejected here, because subjective tests in voting have historically benefited white males and disenfranchised women and people of color.²⁰ In the context of voting, subjective tests have been rejected because they “leave the voting fate of a citizen to the passing whim or impulse” of a government official.²¹

The same standard should apply to the right of a person to stand for public office. That determination should not turn on the “passing whim or impulse” of a Secretary of State or members of the judiciary. The test of whether or not Kristof is a resident within Oregon should not rise and fall on a subjective assessment of the credibility of his “sentiment” that he “has always viewed Oregon as home.”²²

Put another way, Kristof is applying for a job: governor of Oregon. Applying a subjective standard to the minimum residency job qualification—where a purely objective test would suffice—invites the specter of implicit bias into the

²⁰ See e.g. 52 USC § 10501 (the provision of the Voting Rights Act that prohibits any requirement that a person as a prerequisite for voting or registration for voting “possess good moral character”).

²¹ *Louisiana v. United States*, 380 US 145, 153 (1965).

²² Opening Brief at 8.

qualification process just like any other job. Kristof’s “sentiment” that he “has always viewed Oregon as home,”²³ recalls other subjective standards that have historically denied women and people of color access to equal opportunity.

Claiming a subjective connection to Oregon is no different.

To represent Oregonians in the highest office in the land, people don’t get to skip the eligibility rules just because they say Oregon is home. Relying on purely subjective standards to determine if someone is eligible to run for Oregon Governor not only renders the plain language of the Oregon Constitution meaningless, it also asks Oregon to move backwards in its progress towards equity.

III. CONCLUSION

For the foregoing reasons, the Court should conclude, as the Secretary of State did, that Nicholas Kristof was not “a resident within this State” for the three years preceding the forthcoming gubernatorial election, it should deny plaintiff’s petition for writ of mandamus, and it should dismiss the alternative writ.

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 24, 2022, I directed the original Amicus Brief of WLnsvey Campos, Imani Dorsey, Nancy Haque, Reyna Lopez, Becca Uherbelau, and Andrea Valderrama (“Amicus Brief”) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Misha Isaak, Thomas Russell Johnson, Jeremy A. Carp, attorneys for relator, and Benjamin Gutman, Kirsten M. Naito, Christopher A. Perdue, and Patricia G. Rincon, attorney for Plaintiff, by using the court’s electronic filing system. Additionally, I further certify that on January 21, 2022, I directed the Amicus Brief to be served upon Misha Isaak, Thomas Russell Johnson, Jeremy A. Carp, attorneys for relator, and Benjamin Gutman, Kirsten M. Naito, Christopher A. Perdue, and Patricia G. Rincon, attorney for Plaintiff, by electronic mail to the following email addresses:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 2,043 words. 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(3)(b).