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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.	SC S069165

DEFENDANT'S RESPONSE TO *AMICUS CURIAE* BRIEF OF BILL BRADBURY AND JEANNE ATKINS

Continued...

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DEFENDANT'S RESPONSE TO *AMICUS CURIAE* BRIEF OF BILL BRADBURY AND JEANNE ATKINS

A. *Amici* fail to grapple with history and case law demonstrating that "resident within" means domiciled.

The dispute in this case is whether plaintiff was domiciled in Oregon during the 13-month period beginning November 2019 (three years before the 2022 gubernatorial election) and ending December 2020 (when plaintiff registered to vote in Oregon). There is, of course, a difference between a "residence" and a "domicile" in some contexts. (*Amici* Br 6–8). But that observation does not resolve the issue of constitutional interpretation in this case. Article V, section 2, states that a candidate for governor must be a "resident within" this state, not just have a part-time residence here. And as the Secretary has explained, the history of Article V, section 2, and the overwhelming weight of case law interpretating similar residency requirements for public office, shows that to be "resident within this State" a person must be domiciled in Oregon. (Resp Br 15–33). Neither the drafters of that provision nor the voters who adopted it intended for someone who is domiciled elsewhere—someone who lives, works, votes, and pays taxes in another state—to be permitted to serve as Oregon's governor. Yet that is what *amici* suggest.

B. The choice to vote in another state matters when determining domicile.

Amici understate the importance of voting as objective evidence of where a person has chosen to center their civic life. Contrary to their assertion (*Amici* Br 11), the Secretary cited well-established case law showing how important the issue of voting is to domicile. (Resp Br 41–42). Indeed, just before the framers drafted the Oregon Constitution, the United States Supreme Court described voting as "conclusive on the subject" of domicile. *Shelton v. Tiffin*, 47 US 163, 185, 12 L Ed 387 (1848).

Following the well-established precedents that give substantial weight to where one has chosen to vote will not make it more difficult for students, retirees, and newcomers to vote in Oregon. (*Amici* Br 15 n 7). Students do not lose their Oregon residence simply because they are out of state for school. Or Const, Art II, § 4. And more generally, any part-year resident who registers to vote in Oregon is demonstrating—objectively—a choice to make Oregon their domicile. That makes them eligible to vote here even if they spend time elsewhere.

As the Secretary explained (Resp Br 43), absent some indication that registration is self-serving subterfuge,[1] a person's choice of where to vote

[1] For example, in *Miller v. Miller*, 67 Or 359, 136 P 15 (1913), this court recognized the husband's Idaho voter registration was a brazen effort to prevent a spouse from filing for divorce in Oregon.

carries significant weight in any domicile analysis. When a person spends time in two different states, and they choose one of those states as the place where they vote, no elections official or court is likely to second-guess their choice of the state of registration as their domicile. *Cf. Maas v. Gaebel*, 9 NYS3d 701, 703 (App Div 3d Dept 2015) (noting that New York law "does not preclude a person from having two residences and choosing one for election purposes provided he or she has legitimate, significant and continuing attachments to that residence") (internal quotation marks omitted).

It is not difficult to vote in Oregon, and there is no durational residency requirement that would delay a person in registering. In other words, any person who chooses to make Oregon their permanent home may register to vote in Oregon immediately. New Oregon voters must register only 20 days in advance to participate in a particular election. Or Const, Art II, § 2(1)(c). Unhoused people may also register to vote immediately. ORS 247.038. Oregonians may receive ballots by mail even when they are physically absent from the state. ORS 247.015. In short, it is very easy to establish residency in Oregon when a person chooses to. For example, plaintiff himself voted in New York in November 2020, registered to vote in Oregon in December 2020, and was eligible to vote in the following May 2021 primary election in Oregon.

The problem for plaintiff is fundamentally different: He had connections in both Oregon and New York, but he repeatedly confirmed his New York

domicile through his own choices, in part by continuing to choose to vote in New York as recently as November 2020.

C. An "any evidence" standard would harm voters by placing candidates who fail to meet constitutional requirements on the ballot.

Amici appear to suggest that, rather than addressing plaintiff's qualifications to serve, this court should stop the Secretary—and other filing officers around the state—from making most residency determinations. They argue that filing officers should place even unqualified candidates on the ballot if there is "any evidence" of eligibility. (*Amici* Br 15).

There are several problems with that argument. First, it rests on policy grounds and does not grapple with, or even cite, the governing statutes and case law. ORS 254.165 requires filing officers to withhold a candidate's name from the ballot if they "*determine*[] * * * that the candidate will not qualify in time for the office if elected." (Emphasis added). And in *McAlmond v. Myers*, 262 Or 521, 525, 500 P2d 457 (1972), this court stated that "[it] is obvious that the Secretary of State has a duty to withhold certification of a candidate who he knows is ineligible, even though the candidate received the highest number of votes in the primary election."

Second, *amici*'s argument overlooks how important it is for voters to choose from an accurate ballot of qualified candidates. (Notably, the legislature already recognized that when it enacted ORS 254.165.) Essentially, *amici* are

urging this court to order filing officers to ignore their own considered judgment and place on the ballot any candidate who can construct any colorable argument as to why they are eligible to be on the ballot. But that would undermine the rights of voters to choose qualified candidates. *McAlmond*, 262 Or at 529. *Electing* an unqualified candidate would create an even greater crisis by invalidating a plurality or majority of votes cast. *See, e.g.*, *State ex rel Sathre v. Moodie*, 258 NW 558 (ND 1935) (disqualifying gubernatorial candidate for failure to meet the state constitution's five-year residency requirement after he won the election). Voters cannot verify a candidate's residency qualifications before an election, but filing officers can. If the constitution imposes a domicile requirement—and it does—then there must be a means to enforce it early, lest voters cast their votes unknowingly for unqualified candidates.

Finally, *amici*'s "any-evidence" standard would upend decades of practice by filing officials throughout the state, for races at every level of state government. The decision to disqualify plaintiff was made by an experienced elections official who has served under six Secretaries of State, including both *amici*, and who followed the same process as always. (Def App-1). It is not unusual for elections officials to disqualify candidates for failure to meet the qualifications of office, including residency. (Def App-2); *see also, e.g.*, *Kucera v. Bradbury*, 337 Or 384, 97 P3d 1191 (2004) (upholding the Secretary of State's determination not to place Ralph Nader on the presidential ballot after

disqualifying elector signatures supporting the nomination); *Lehman v. Bradbury*, 333 Or 231, 233, 37 P3d 989 (2002) (noting that the Secretary of State rejected the plaintiffs' declarations of candidacy based on term limits that the court later declared unenforceable). This court should not inject uncertainty into the well-established qualification process by adopting an any-evidence standard.

Having exercised its discretion to hear this case in an original mandamus proceeding, this court should resolve definitively whether plaintiff is qualified to serve as Governor rather than leaving the issue open for further litigation before or after the election. For the reasons explained in the Secretary's brief, the court should uphold the Elections Division's determination that plaintiff does not meet the three-year residency requirement for the November 2022 election for Oregon Governor.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 26, 2022, I directed the original Defendant's Response to *Amicus Curiae* Brief of Bill Bradbury and Jeanne Atkins to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Misha Isaak and Thomas Russell Johnson, attorneys for relator, and Nicholas A. Kahl, attorney for amicus, by using the court's electronic filing system.

I further certify that on January 26, 2022, I directed the Defendant's Response to *Amicus Curiae* Brief of Bill Bradbury and Jeanne Atkins to be served upon Jeremy A. Carp, attorney for realtor; Thomas M. Christ, attorney for amicus; and Drew Eyman, attorney for amicus, by mailing two copies with postage prepaid, in an envelope addressed to:

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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 1,327 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).

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