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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

RELATOR NICHOLAS KRISTOF'S SUPPLEMENTAL BRIEF RESPONDING TO AMICUS SUBMISSION OF DERRIN "DAG" ROBINSON

STATE OF OREGON

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Benjamin Gutman, OSB No. 160599
Solicitor General
benjamin.gutman@doj.state.or.us
1162 Court St. NE
Salem, OR 97301-4096
Telephone: 503.378.4402

Attorneys for Defendant Shemia Fagan

PERKINS COIE LLP

Misha Isaak, OSB No. 086430
MIsaak@perkinscoie.com
Thomas R. Johnson, OSB No. 010645
TRJohnson@perkinscoie.com
Jeremy A. Carp, OSB No. 173164
JCarp@perkinscoie.com
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff-Relator Nicholas Kristof

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Amicus briefs can be clarifying by bringing into relief big-picture issues and themes. The submission by Harney County's Clerk/Recorder, Derrin "Dag" Robinson, is useful for that very reason. Nicholas Kristof responds as follows.

A. This case is as much about the right to vote as an individual candidate's eligibility for office.

Everyone involved in this case—Kristof, the Secretary, and various amicus parties—acknowledges that the Court's ruling will affect not just whether one person is eligible to serve as Governor under Article V, section 2, of the Oregon Constitution, but more generally what it means to be a "resident" as that standard is used by elections officials. Even the Secretary's written decision of January 6, 2022, says that the Elections Division uses a single residency standard for all purposes. (App 127.) Robinson's amicus submission says essentially the same. (Robinson Br 5 n2.) Thus, what the Court decides in this case will determine not just whether one person may run for Governor, but who in Oregon may vote. Put differently, this Court's decision will license elections officials in Salem and in Oregon's 36 counties to make determinations about voters' and candidates' residency based on the standards it announces.

Realizing the consequences of her position for voting, the Secretary's latest filing minimizes the issue. Her lawyers ignore her own public statement that one conclusively loses Oregon residency when one votes elsewhere (Supp App 25-

26); they try to reassure the Court that "any person who chooses to make Oregon their permanent home may register to vote in Oregon immediately." (Amicus Response 4.) But this assurance is quite the opposite of the legal standard they have asked the Court to adopt: that "residents" must prove they are local domiciliaries with easy-to-verify documentation like tax returns, driver's licenses, and voting history. (Response Br 34-37.) Incredibly, after submitting an entire brief constructed around the thesis that elections officials should *not* defer to individuals' good-faith, well-founded representations about their own residency, the Secretary's lawyers suddenly say the opposite: "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." (Amicus Response 3.)[1]

What is the basis for this? The Secretary does not speak for Oregon's 36 county clerks. And if Robinson's submission is any indication, many of them have bullish ideas about their own role in disqualifying candidates and voters. Even more telling, the Secretary's sensationalist claims about the perils and difficulties of administering a deferential residency standard all but disappear in her discussion of voter registration. (Resp Br 30-33.) How is it possible that the

[1] Look how the same sentence reads if one changes just a few key words: "When a person spends time in two different states, and they choose one of those states as the place where they ~~vote~~ **run for office**, no elections official or court is likely to second-guess their choice of the state of ~~registration~~ **candidacy** as their domicile."

same standard *is* workable for a person registering to vote, but *not* for a person seeking office? The Secretary does not say. One would expect the same concerns, if genuine, to be even greater in the voting context, where the number of new registrants far exceeds the number of office seekers.

B. Despite elections officials' desire for a simple formula to disqualify voters and candidates, giving dispositive weight to a person's voting history is antithetical to narrow tailoring.

Robinson also validates the warning raised in Kristof's reply brief: that elections officials see for themselves a muscular role in smoking out and disqualifying supposed nonresidents, even voters and candidates acting based on good-faith, well-founded beliefs about their own residency.

Echoing the Secretary's public statements that a person's voting history has dispositive weight when determining residency, (*see* Supp App 25-26 ("[I]f a person casts a ballot in another state, they are no longer a resident of Oregon. It's very, very simple.")), Robinson explains that in making residency findings, his office considers only voter registration:

> If a person has been registered to vote in Harney County for at least a year, Mr. Robinson determines that they are eligible to serve in Harney County office. If they have been registered to vote in a different county within the last year, Mr. Robinson determines that they are not eligible to serve in Harney County office.

(Robinson Br 4.) Robinson makes no effort to justify this practice by interpreting "resident" in the state constitution; he defends it simply as expedient policy.

No doubt, the legal rule Robinson would have the Court adopt *is* expedient policy. Any one-dimensional residency test is easy to administer, whether based on voter registration or something else like property ownership. But simplicity sacrifices accuracy—meaning that it wrongfully excludes individuals from democratic participation and unnecessarily limits democratic choice.[2]

For precisely this reason, the U.S. Constitution requires that burdens on fundamental rights be tested with strict scrutiny. *See Dunn v. Blumstein*, 405 US 330, 336 (1972). If government must limit the exercise of constitutional rights, its policy must be crafted to minimize the restriction. Robinson and the Secretary have little to say about the important rights their policies impede. Rights of equal protection and voting, of interstate movement, and to run for office are so insignificant—according to them—that any rational policy, no matter how broad, is constitutionally permissible on the grounds that it is easy to administer. The breadth of the rule Robinson proposes well illustrates the problem.

C. The risks Robinson warns of are unserious.

Robinson repeats the Secretary's caution that strict durational residency rules are needed to stop people from voting in one place and serving in elected

[2] Imagine if another county official—sheriffs—argued that this Court's search and seizure jurisprudence were too complex to administer. True enough, it would be easier to determine probable cause in all cases based on a bright-line rule that follows from a fixed and simple set of "yes" or 'no" inquiries. But this Court does not determine constitutional meaning—no matter the context—based on the amount of work it might generate for local officials.

office elsewhere, or to stop people from running for the same position in different jurisdictions. (Robinson Br 6.) The Secretary even warns that a person could run for Governor of two different states at the same time. (Response Br 31.)

Come on. Many states have no durational residency rules for officeholders. California, the most populous state, has not enforced durational residency rules since its supreme court struck them down a half-century ago. *See Thompson v. Mellon*, 507 P2d 628, 633 (Cal 1973). Oregon has no durational residency requirement for state executive offices (other than Governor) or for federal offices. Although American democracy is still young, we have not yet seen an epidemic of the same people running for office in different jurisdictions. If there were reason for concern (and there isn't), legislatures could impose the additional requirement that officeholders be electors of the states, districts, or municipalities they represent while in office. *E.g.*, ORS 171.051(2) (requiring an appointee to a vacant legislative position be an elector in the district). The suggestion that draconian durational residency rules are a bulwark against Idahoans taking over the Oregon Legislature is unserious.

CONCLUSION

Rather than license elections officials in Salem and in county clerk's offices to second-guess, interrogate, and demand proof of the residency of candidates and voters, the Court should adopt a standard that defers to individuals' good-faith and well-founded attestations about their own

residency—the standard applied by previous Oregon secretaries. Robinson's amicus brief helpfully illustrates why.

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PERKINS COIE LLP

By: *s/ Misha Isaak*

Misha Isaak, OSB No. 086430
MIsaak@perkinscoie.com
Thomas R. Johnson, OSB No. 010645
TRJohnson@perkinscoie.com
Jeremy A. Carp, OSB No. 173164
JCarp@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff-Relator Nicholas Kristof

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Ellen F. Rosenblum, OSB No. 753239 Attorney General Benjamin Gutman, OSB No. 160599 Solicitor General 1162 Court St. NE Salem, OR 97301-4096 Telephone: 503.378.4402 benjamin.gutman@doj.state.or.us *Attorneys for Defendant*	Harry B. Wilson, OSB No. 077214 Hannah K. Hoffman, OSB No. 9183641 Markowitz Herbold PC 1455 SW Broadway, Suite 1900 Portland, OR 97201 harrywilson@markowitzherbold.com hannahhoffman@markowitzherbold.com *Attorneys for Amicus Derrin "Dag" Robinson*

Dated: January 28, 2022

PERKINS COIE LLP

By: *s/ Misha Isaak*

Misha Isaak, OSB No. 086430
misaak@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff-Relator Nicholas Kristof