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

AMICUS CURIAE BRIEF OF LEAVEN COMMUNITY LAND AND HOUSING COALITION, DR. ANGELA E. ADDAE, and DAVID FIDANQUE

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INTERESTS OF AMICI CURIAE

Leaven Community Land and Housing Coalition is a coalition of faith leaders across Clackamas, Multnomah and Washington Counties engaging in the practice of sacred organizing to activate the power of our relationships for creating more housing equity and immigration and racial justice in our communities, counties and state. They are Sikh, Jewish, Unitarian Universalist and Christian, including United Methodist, Presbyterian Church (USA), Evangelical Lutheran Church in America (ELCA), United Church of Christ, the Episcopal Church, and independent evangelical congregations.

Dr. Angela E. Addae is an Assistant Professor at the University of Oregon School of Law who teaches and writes in the field of civil rights law. In her work, she has frequently described the legacies of exclusion historically perpetuated by the Oregon Constitution, and she has an interest in promoting this court's civil rights jurisprudence as well as its continuity with constitutional law governing fundamental rights. She shares an interest in ensuring that the Oregon Constitution is interpreted in a manner that promotes civic involvement and is consistent with the core goals and values of democratic participation.

David Fidanque retired in 2015 from the staff of the American Civil Liberties Union of Oregon, where he had served for 33 years. Prior to that, he had worked for U.S. Rep. Jim Weaver, Oregon Rep. Grattan Kerans and as a broadcast journalist. Since 1974, he has followed and/or been directly involved

in Oregon politics and the Oregon Legislature. He has been, and remains, a consistent advocate for civil liberties, including the support of voting rights. He has been a vocal opponent of discrimination based on race, color, religion, national origin, gender, and mental or physical disability.

INTRODUCTION

The question presented to this court—whether Nicholas Kristof is eligible to run for Governor of Oregon—requires the court to rule on what "resident" means in our Constitution. As the Secretary of State noted in her letter to Mr. Kristof, there is no distinction between "resident" in the context of Article V, section 2—the provision at issue in this action—and "resident" as used in fifteen other places in the Oregon Constitution, and variations of the term appear another fifteen times—"reside(d)" and "residence." As important as the governor's race may be, the court's construal reaches areas far broader than who may run for governor. In the absence of a constitutional definition of "resident" or "residency," Amici Curiae urge the court to construe those terms—which appear throughout the Oregon Constitution and affect fundamental rights such as voting—in the broadest possible sense consistent with modern principles of democratic participation and inclusivity, rather than with the xenophobia and racism that motivated the durational residency requirement 162 years ago.

Amici Curiae do not endorse or oppose any particular candidate and take

no position on whether Mr. Kristof is eligible to run for Governor of Oregon. Rather, based on their interests described above, Amici Curiae feel the need to advocate for a definition of "resident" that includes those whose residences may change for a variety of reasons—voluntary and otherwise. For the reasons that follow, the text of the Oregon Constitution supports such a definition.

ARGUMENT

I. History of Durational Residency Requirements

Durational residency requirements pre-date the American colonies. "The durational residency requirements for public office in early fifteenth century England are traceable to the anti-democratic sentiment existing at the close of the Wars of the Roses when large numbers of electors were disfranchised." Frederic S. Le Clercq, *Durational Residency Requirements for Public Office*, 27 S. C. L. REV. 847, 850 (1976). Several hundred years later, the American colonies created voting rules "largely shaped by the knowledge that the colonists had of how representation worked in England," which had a system of democracy "initially designed to represent land." Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 615 (2016). It's unsurprising then that colonies allocated seats in their legislatures to territorial units, and many of the colonies instituted durational residency requirements to seek public office in that colony. *Id.* at 515-16. Similar durational residency requirements would

eventually appear in state constitutions.

At the federal Constitutional Convention, however, the framers considered and rejected state residency requirements as a prerequisite to hold federal office. Le Clercq, 27 S. C. L. REV. 847 at 851-54. Those opposing the state residency requirements generally found such requirements to be inconsistent with the formation of a national government of unified citizens. *Id.* at 852-854. At least several framers also opposed durational residency requirements as unnecessary, on the grounds that "[p]eople rarely choose a nonresident," and "new residents if elected will be most zealous to conform to the will of their constituents, as their conduct will be watched with a more jealous eye." *Id.* at 853 (quoting Mr. Morris and Mr. Williamson, respectively).

Nearly 200 years later, in section 202 of the Voting Rights Act of 1965, Congress prohibited state durational residency requirements for presidential and vice-presidential elections. In doing so, Congress made a series of express findings regarding such durational residency requirements, including that such requirements deny or abridge the constitutional right to enjoy free movement across State lines; and that such requirements do not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections. The Supreme Court upheld that section of the Voting Rights Act in *Oregon v. Mitchell*, 400 US 112 (1970).

Two years later, in an opinion authored by Justice Marshall, the Supreme

Court struck down a state durational residency requirement for voting eligibility. There, the court held that a Tennessee law requiring one year of state residency, and three months in the county, violated the equal protection clause of the Fourteenth Amendment. *Dunn v. Blumstein*, 405 US 330, 335 (1972). The Supreme Court explained,

> "Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote."

Id. at 334-35. As the Supreme Court held, "we cannot say that durational residence requirements are necessary to further a compelling state interest." *Id.* at 360.

While *Dunn* concerns durational residency requirements for voter eligibility, much of the discussion is equally applicable to such requirements to serve in public office. In part, because the two are so closely linked:

> "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."

Powell v. McCormack, 395 US 486, 547 (1969) (internal citation omitted). For that reason, and others, legal scholars have long criticized durational residency requirements to serve in public office. *See, e.g.,* Justin Louis Rand,

Carpetbagger Battle Cry: Scrutinizing Durational Residency Requirements for State and Local Offices, 13 RUTGERS J. L. & PUB. POL'Y 242, 250 (2016) ("Whether through limiting voters' choice of candidates or barring one's potential candidacy, these requirements operate as a source of unjustifiable discrimination under the Fourteenth Amendment."); Michael J. Pitts, *Against Residency Requirements*, 2015 U. CHI. LEGAL F. 341 (2015) ("[N]ot only do potential candidates suffer from residency requirements, but so does the electorate. And, again, this harm does not seem to be for any significant benefit."); Le Clercq, 27 S. C. L. REV. at 914 ("Durational residency requirements for public office significantly dilute fundamental rights which deserve, and have received, judicial protection: the right to vote, the right of political association and the right to travel."); Edward Tynes Hand, *Durational Residence Requirements for Candidates*, 40 U. CHI. L. REV. 357, 381 (1973) ("Durational residence requirements for candidates for public office are not only poorly designed to further legitimate state interests in assuring competent public officials, but they also infringe on the right to vote, the right to travel, and the right to be a candidate.").

It is against that backdrop that this court should consider Oregon's durational residency requirement to serve as Governor.

II. The Term "Resident" is Broad

This court's construal of "resident" implicates numerous constitutional

provisions, not just who gets to run for governor. The term "resident" appears sixteen times in the 2021 edition of the Oregon Constitution, and variations of the term appear another fifteen times—"reside(d)" and "residence."[1] A narrow interpretation of those terms would affect complicated but not unusual residency questions in many other contexts. In a recent op-ed, three former secretaries of state highlighted several examples: unhoused persons, who might be present in multiple jurisdictions over a relatively short period, or cross state lines in order to avail themselves of resources in Oregon; persons who move to seek care for a long-term illness; Oregon-raised soldiers serving overseas or in another state; migrant farmworkers (who are disproportionately persons of color); and college students. APP-75-77. A narrow definition would affect those who are out of state to care for loved ones; children (whether minor or adult) whose parents are separated or divorced and might live in other states; survivors of domestic violence, seeking refuge or a new start; or those who work project-based jobs, such as construction, in neighboring states for months at a time.

Fortunately, the text of the durational residency requirement supports a

[1] "Resident(s)" appears in: Article II, Sec. 16 (x1); Article II, Sec. 22 (x3); Article V, Sec. 2 (x1); Article VIII, Sec. 4 (x1); Article XI, Sec. 12 (x1); Article XI-A, Sec. 1 (x1); Article XI-F(2), Sec. 1 (x1); Article XI-F(2), Sec. 2 (x1); Article XI-I(1), Sec. 1 (x2); Article XV, Sec. 4a (x3); Article XV, Sec. 4f (x1). "Reside(d)" appears in: Article II, Sec. 2 (x2); Article II, Sec. 17 (x2); Article VII, Sec. 2 (x2); Article XI-A, Sec. 3 (x5). "Residence" appears in: Article II, Sec. 4 (x1); Article II, Sec. 5 (x1); Article VII, Sec. 2 (x1); Article XI-F(2), Sec. 9 (x1).

broad reading of "resident." Dictionaries in circulation at the time of the Oregon Constitutional Convention define "resident" as an informal connection to a place that does not depend on physical presence or permanence: "Dwelling or having an abode in a place for a continuance of time, but not definite" or "One who resides or dwells in a place for some time." Noah Webster, *An American Dictionary of the English Language* 943 (1857).[2] That definition makes clear that residency is neither tied to continuous physical presence, nor undermined by activities undertaken elsewhere such as voting in another state.

Although Article 5, section 2 of the Oregon Constitution does not define the term "resident," sections 4 and 5 of Article II define the scope of "residence" for purposes of voting. Those sections provide that "no person shall be deemed to have gained, or lost a residence, by reason of his presence, or absence" while: employed by the government; on Oregon or national waters; a seminary student; living in an alms house or other asylum at public expense; confined in a public prison; or while stationed in Oregon as a member of the U.S. military. What those exclusions have in common is a lack of agency, a lack of a personal decision to call a particular place in Oregon home. The implication is that, a person's decision to call Oregon home should play a significant role in determining whether they are a resident of Oregon.

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[2] Available at https://archive.org/details/dictionaamerican00websrich/page/942/mode/2up (last accessed Jan. 4, 2022).

There's no reason to think the drafters of Oregon's Constitution intended residency for purposes of voting to be different from residency for purposes of running for governor. The Secretary of State appears to agree. *See* APP-127 ("We determine residency as consistently as possible for all election laws and all candidates. Although Oregon courts have not interpreted the constitutional residency requirement for gubernatorial candidates, it is only one of many Oregon residency requirements that apply statewide for voter registration and candidacy qualification."). Those principles of personal choice and connection are reinforced by the purpose articulated by the drafters at the Oregon Constitutional convention. A certain drafter clearly stated the legitimate purpose of the 3-year residency requirement: "Why should a man be elected our chief executive who had only just arrived amongst us? A man should know something of the state before he assumed to take into his hands the reins of the government." Charles H. Carey, Editor, *Oregon Constitution Proceedings and Debates of the Constitutional Convention of 1857*, 222 (1926).

Broad construal is entirely consistent with the desire that a candidate "know something of the state": so long as someone considers Oregon to be home and has some presence there, that person is no stranger to Oregon and therefore is eligible to run. This is consistent with even the more xenophobic drafters' views of the 3-year residency requirement. For example, when confronted with a proposal to remove the 3-year residency requirement Mr.

Waymire explained:

> "[i]f this three years' residence is dispensed with, we will have half the office-seekers of California up here. Strangers came here sometimes and married our girls, when at the same time they had wives in the States, and [Mr. Waymire] was opposed to giving our substance into the hands of strangers."

Oregon Argus, Sept. 12, 1857, at 1.[3]

The drafters were equally concerned that the residency requirement not be a tool to discourage public participation. In responding to Mr. Waymire, Mr. Starkweather admonished:

> "that it had been charged that there was a disposition to keep all the offices in the hands of a few—and he thought the opposition to this amendment [to remove the 3-year residency requirement] rather squinted that way. He hoped and was disposed to believe, however, that no such unworthy motive prompted opposition to the amendment."

Id.

Such antidemocratic "unworthy motive" was made clear, however, in the debate over voter qualifications, which also contain a residency requirement. A certain drafter "thought the proper and correct doctrine was that foreigners should become acquainted with the laws and customs of the people before they should become voters." Charles H. Carey, Editor, *Oregon Constitution Proceedings and Debates of the Constitutional Convention of 1857*, 319 (1926). But another drafter made clear that the Oregon constitutional guarantee of free

[3] Available at https://oregonnews.uoregon.edu/lccn/sn83025129/1857-09-12/ed-1/seq-1/ (last accessed Jan. 4, 2022).

and equal elections "did not mean Chinese or n[redacted]s." *Id.* (racial epithet omitted).

At the convention, a lengthy debate ensued about which "foreigners" would be allowed to vote and how long such foreigners must reside in Oregon to become voters. The drafters' concern was how best to limit the vote to white males. A certain drafter was concerned that limiting the vote to "those of the white race" did not go far enough because it "would admit quarter-blood n[redacted]s—they had a predominance of white blood, and would be entitled to vote under Mr. Deady's amendment." *Id.* at 324 (racial epithet omitted). Mr. Deady responded that "the word white was well understood. But he would move to make it 'pure white.'" *Id.*

Ultimately, and seemingly due to practical concerns with how to determine who was "pure white," the drafters decided that voting would simply be limited to "white male[s]" who have resided in Oregon during the six months before an election, plus one-year residence in the United States for a "white male of foreign birth." Oregon Constitution, Article II, Sec. 2 (original text, 1859).

That is, unfortunately, the racially-charged environment in which the three-year residency requirement arose—to say nothing of the drafters' flat-out exclusion of Black people from this state. That context shows how the court should <u>not</u> construe the constitutional definition of 'resident,' in a manner that

perpetuates structural inequality in service of a landed gentry—persons who are less likely to be migrant laborers or gig-seekers out of state, or to find themselves caretakers of elderly or ill family members who cannot afford to pay others to assist them.

CONCLUSION

For those reasons, this court should adopt a broad reading of the term "resident" when determining whether a gubernatorial candidate meets the qualifications in Article V, section 2 of the Oregon Constitution. Such a reading is consistent with the drafters' understanding of who a resident is—someone who is familiar with the state and calls it home—while rejecting antidemocratic exclusion and xenophobia of a bygone era.

Dated: January 25, 2022

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