

IN THE SUPREME COURT OF THE STATE OF OREGON

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State ex rel NICHOLAS KRISTOF,

SC S069165

Plaintiff-Relator,

**MANDAMUS PROCEEDING**

v.

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

Defendant.

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MEMORANDUM IN RESPONSE TO PETITION FOR  
WRIT OF MANDAMUS

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**MEMORANDUM IN RESPONSE TO PETITION FOR  
WRIT OF MANDAMUS**

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**A. This court should exercise its discretion to hear this proceeding because of the importance of a prompt and definitive ruling.**

The Secretary of State, defendant in this original mandamus proceeding, agrees with plaintiff-relator that this court should exercise its discretion to hear this proceeding and that it should do so expeditiously. Article VII (Amended), section 2, of the Oregon Constitution gives this court discretion to take original jurisdiction in mandamus proceedings. Although that discretion should be exercised sparingly, because most cases would benefit from proceeding through the normal course of litigation, the Secretary agrees that this is the rare case that warrants use of this court's original mandamus jurisdiction.

Plaintiff filed as a Democratic candidate for Governor in the November 2022 general election. At issue is whether he is unqualified to serve under Article V, section 2—in particular, whether he fails to satisfy the constitutional requirement that he be “a resident within this State” during the “three years next proceeding his election.” *See Or Const, Art V, § 2* (“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 Elections Division in the Secretary of State's Office (“Elections Division”)

determined that plaintiff did not meet that residency requirement because the information plaintiff provided, and other publicly available information, demonstrated that, for 20 years ending in late 2020, plaintiff considered New York his fixed and permanent home. The information available to the Elections Division demonstrated that, during that time, plaintiff lived with his spouse and three children in the house they owned in New York, voted in New York, held a New York driver's license, filed income taxes in New York, and was employed in New York. (App-127). The parties dispute both the legal test to determine whether a person is a "resident within this state" under Article V, section 2, and the application of that test to the facts here.

The Secretary's priority is building trust with Oregonians by maintaining elections processes that are prompt, predictable, and fair. In this case, that means having an accurate May 2022 primary ballot for Oregon voters that includes all qualified candidates. The Elections Division's process so far has been geared to meet that timetable. While the Secretary supports plaintiff's request for the court to extend jurisdiction here, plaintiff could have avoided the need for expedited proceedings by filing to run for Governor as early as September 9, 2021. *See* ORS 249.037(1). Plaintiff announced his campaign and began fundraising in October, but he did not file his candidacy at that time. Out of concern for the diminishing timeline, a representative of the Elections Division contacted plaintiff's counsel on December 1 to encourage plaintiff to file his candidacy without delay. (App 1).

Plaintiff did not file his candidacy until December 20, 2021. (App 7). The following day, the Elections Division notified plaintiff that his filing was insufficient to establish qualifications and gave plaintiff two additional weeks (to January 3) to supplement his filing with any information or documents that would support his claim of residency in Oregon. (App 7–10). Plaintiff provided supplemental information on January 3 and a further supplement on January 5, and the Division issued its determination on January 6. (App 126).

This court is the only body that can definitively resolve the constitutional residency question at issue here. Given the rapidly approaching election, an original mandamus proceeding is the process most likely to ensure that this court addresses the issue in time. If plaintiff were to appeal the Secretary's determination to the circuit court instead, it is unlikely that there would be sufficient time to resolve the litigation at the trial level and obtain a merits ruling on appeal before the Secretary must file a statement of candidates that will allow Oregon's 36 county elections offices to finalize, print, and send primary ballots to overseas voters beginning March 17, 2022. ORS 254.085. Only this court can resolve whether plaintiff fails to meet the three-year residency requirement in Article V, section 2, and it is in the interest of all Oregonians to have that decided as soon as possible.

**B. This court can grant an alternative writ of mandamus and still develop sufficient facts to rule definitively on whether plaintiff is qualified to serve under Article V, section 2.**

One drawback of addressing this issue through an original-jurisdiction mandamus proceeding (rather than a circuit court appeal of the Election Division's determination) is the absence of a clear mechanism to develop the factual record. The Secretary believes that the court should accept jurisdiction and manage those concerns as suggested below.

First, this court may decide the matter on the record before the Elections Division alone. The Elections Division followed its standard process in requesting any information that plaintiff wished to provide to verify his qualifications. While plaintiff provided a copious supplemental response, he offered few new facts other than a personal affidavit and two affidavits from friends. The Elections Division made its decision based on the information plaintiff provided and publicly available facts. The Elections Division's standard process provided ample opportunity for plaintiff to offer all information available to support his claim of residency, and sufficient information for the Elections Division to decide. If this court is satisfied that the evidence before the Elections Division is sufficient for the court to decide whether plaintiff is a resident of Oregon for the required period, then no further factual development is required.

Plaintiff's memorandum, however, suggests that the Elections Division should have "submit[ted] specific inquiries to Kristof or request[ed] additional

evidence or documentation from him” rather than making an “open-ended request for any further information about his residency. (Mem 7). For example, plaintiff told the Elections Division that he filed state income taxes in Oregon for 2019 and 2020, but he did not specify whether he filed those taxes as a resident, part-time resident, or nonresident. (App 31, 127). In a press conference following the Elections Division’s decision, plaintiff stated that the Elections Division had “not asked” for that information and stated that he had been willing to provide “any material” if the division had requested it.<sup>1</sup> To date, however, plaintiff has been unwilling to stipulate in these proceedings to his tax filing status for either state (resident, part-time resident, or nonresident) for the relevant period, whether or when he amended his tax returns, or—if he was a part-time resident—to specify the date his residence changed.

If this court concludes that it requires additional factual information before deciding this matter, the Secretary suggests that the court request that information from the parties directly. This court has sought factual development in other recent original-jurisdiction proceedings. *See, e.g.*, Order Appointing Special Master and Setting Briefing Schedule, *James v. State*, No. S066933 (Oct. 24, 2019) (appointing a special master for the purpose of, among other things, “[m]eeting

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<sup>1</sup> Available at <http://m.facebook.com/krisof/videos/354634159355188> (video at 12:05-12:18).

with the parties and assisting them in preparing a set of stipulated facts”); Order Appointing Special Master and Setting Briefing Schedule, *City of Damascus v. State*, No. S066939 (Nov. 18, 2019) (same); *see also* Order, *James, supra* (Dec. 5, 2019) (authorizing the special master to oversee document discovery and two depositions). Factual development is especially appropriate here because this mandamus proceeding would essentially be a substitute for an appeal of an agency determination in an other-than-contested case, in which the record before the agency may be supplemented in court. *See Norden v. Water Resources Dept.*, 329 Or 641, 647 996 P2d 958 (2000) (“[T]he legislature did not intend to limit the scope of the record on judicial review only to the evidence that the agency had before it when it issued its order.”); *cf. Kucera v. Bradbury*, 337 Or 384, 393, 97 P3d 1191 (2004) (discussing an appeal of the Secretary of State’s determination not to place a candidate on the ballot in which the parties stipulated that the trial court could take live testimony and affidavits).

Alternatively, if this court requires further factual development, it could vacate and remand the matter to the Elections Division for further consideration. But the Secretary respectfully requests that this court avoid that approach, because it would not respond to the exigencies of this unusual situation by deciding the issues promptly and definitively. A remand would delay final resolution of the matter until closer to the March 17 ballot printing deadline and could result in further litigation about plaintiff’s qualification either before or after the election—

for example, an elector's challenge under ORS 246.910 to a decision placing plaintiff on the ballot, an election contest under ORS 258.016(2), or a quo warranto proceeding under ORS 30.510. Any of those suits would cause further uncertainty and could undermine trust in the 2022 elections.

If this court is to address the issue under its original jurisdiction, it should do so as promptly and definitively as possible. For that reason, the Secretary requests that the court take any steps necessary to decide the case without the need for a remand.

**C. This court should set an expedited schedule for briefing on the merits.**

The parties have conferred and propose the following expedited schedule for briefing on the merits:

Plaintiff's brief due on January 14, 2022

The Secretary's brief due on January 20, 2022

Plaintiff's reply (if filed) due on January 26, 2022

That schedule would ensure that the proceeding can be submitted by or shortly after the end of January, including oral argument on January 31 or February 1 if the court chooses. Most critically, the Secretary asks this court to issue a final decision before March 17, 2022, the deadline for finalizing the list of candidates for the primary ballot, so that ballots can be printed and mailed on time.

This court may proceed by issuing an alternative writ to the Secretary, returnable under the schedule discussed above.

**CONCLUSION**

This court should grant an alternative writ of mandamus to the Secretary and set a briefing schedule.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 11, 2022, I directed the original Memorandum In Response To Petition For Writ Of Mandamus to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on January 11, 2022, I directed the Memorandum In Response To Petition For Writ Of Mandamus to be served upon Jeremy A. Carp, attorney for relator, by mailing two copies, with postage prepaid, in an envelope addressed to:

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/s/ Benjamin Gutman

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