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 **MANDAMUS PROCEEDING**

DEFENDANT'S ANSWERING BRIEF

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INTRODUCTION

Oregon's Secretary of State is responsible for protecting Oregonians' fundamental right to vote in elections that are fair, accessible, and trustworthy. If Oregonians are to trust their elections, rules that govern minimum qualifications for office must apply equally to all potential candidates, regardless of their status, fundraising, or popularity. That matters because, although this case centers on a single potential candidate, there is nothing extraordinary about reviewing minimum qualifications for office. Elections officials, including those in the Secretary of State's Elections Division ("Elections Division"), routinely evaluate the qualifications of all candidates for office according to long-held standards based in common law and recognized in Oregon's constitution, statutes, and court decisions. Indeed, this is a routine task, and many candidates are disqualified every election, including seven potential candidates seeking to run for Governor in 2022. Although this case focuses on one of those candidates, its result will affect many others. This case is about ensuring that all candidates are qualified to serve if they are elected.

Under Article V, section 2, of the Oregon Constitution, the Governor of Oregon must be at least 30 years old, a United States citizen, and a "resident

within" Oregon for the three years preceding the election. At issue in this case is the third qualification.

The text, context, and history of Article V, section 2, indicate that, to be a "resident within" Oregon for three years preceding the election, a person must have been domiciled in Oregon during that period. A person can only have one domicile at any given time. Domicile, which will be discussed in depth below, is established primarily by a person's intent as demonstrated by objective facts and not subjective or emotional feelings about a place as home.

Here, the Elections Division correctly determined that plaintiff does not meet the three-year residency requirement. Although plaintiff lived in Oregon beginning at age 12 and until he left for college, and he continues to have ties here, his conduct shows that he was domiciled in New York—not Oregon—until at least December 2020. For two decades, plaintiff voted in New York, held a New York driver's license, owned a primary residence in New York, lived and worked in New York, paid income taxes in New York, and sent his children to public schools in New York. Most telling is plaintiff's voting record: Even for the November 2020 election, when he was apparently physically present in Oregon and Oregon voters faced important choices in Yamhill County and statewide, plaintiff voted by absentee ballot in New York. That vote confirms what other objective factors suggest: that regardless of plaintiff's sentimental feelings about Oregon as "home," until December 2020

the center of plaintiff's civic engagement, like his personal and professional life, was in New York.

The Elections Division's job is not to determine whether a candidate is sufficiently "Oregonian" or whether a candidate subjectively feels that Oregon is "home"; it is to determine whether the person was a "resident within" Oregon for the three years before the November 2022 general election. Because the record shows that plaintiff was not, the Elections Division correctly used its regular procedures and disqualified him.

STATEMENT OF CASE

The Secretary supplements plaintiff's summary of facts in the argument below but otherwise accepts his statement of the case. This brief constitutes the Secretary's answer to the alternative writ as provided by ORS 34.170.

BACKGROUND

A. The Secretary has a statutory duty to ensure that candidates for office meet eligibility requirements before placing their names on the ballot.

ORS 249.031(1)(f) and 249.720(1)(f) require candidates to state in their nominating petition or declaration of candidacy that they will qualify for the office if elected, and ORS 249.004 authorizes filing officers to "verify the validity of the contents" of those documents. Accordingly, when the filing officer learns of facts relating to a candidate filing that reasonably call into question whether the candidate will qualify for the office sought, the officer has

a duty to verify whether the candidate will qualify. If the filing officer determines that the candidate will not qualify in time for the office sought, the filing officer has a duty to refrain from placing the candidate's name on the ballot. *See McAlmond v. Myers*, 262 Or 521, 525, 500 P2d 457 (1972) (the filing officer's authority to verify the validity of the contents of the candidate's filings "would be meaningless if it was not contemplated that he would take action if facts became known to him which show that the candidate is unqualified"). After completing an investigation, the filing officer must withhold a candidate's name from the ballot if they "determine[] * * * that the candidate will not qualify in time for the office if elected." ORS 254.165.

Pre-election determinations protect the rights of voters to vote for the qualified candidate of their choice, a right that may be lost if the winning candidate is disqualified after the election is held. ORS 258.016 authorizes electors and unsuccessful candidates to contest the results of the nomination or election on the grounds that a candidate is ineligible to hold the office at the time of the election. This court has explained that under those circumstances, "the electorate would be deprived of a choice for [the election] if, in fact, [the person] is disqualified." *McAlmond*, 262 Or at 529; *see also, e.g., State ex rel Sathre v. Moodie*, 258 NW 558 (ND 1935) (disqualifying candidate for failure to meet the state constitution's five-year residency requirement after he received the most votes in an election for Governor of

North Dakota). Accordingly, the filing officer's duty to ensure that only qualified candidates are placed on the ballot is necessary to prevent a situation where the electorate casts its vote for a person who cannot take office.[1]

B. From the early 2000s to 2020, plaintiff lived, worked, paid income taxes, maintained a driver's license, and voted in New York.

At age 12, plaintiff Nicholas Kristof and his family moved to Oregon, where he attended school through twelfth grade in Yamhill. (App-28). After graduating from high school, plaintiff left Oregon and headed east to attend Harvard College and then graduate school at Magdalene College, Oxford. (App-7). In 1984, he became a journalist for the New York Times. (App-7, 28). In 1999, he bought a home in Scarsdale, New York, lived there with his spouse and three children, and continued working for the New York Times from there. (*See* App-28, 97 (describing how plaintiff spent summers in Oregon but otherwise lived in Scarsdale, New York)).

From 2000 to 2019, plaintiff spent most of his time outside of Oregon. (App-127 (Elections Division so finding)). He obtained a New York driver's

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[1] Like the Secretary, local election officials have a duty to ensure that local candidates are qualified to serve for the positions they seek. *See generally* ORS 249.004. Because many state and local offices also have residency requirements of various lengths, *see, e.g.*, ORS 204.016(2) (one-year residency requirement for county offices); ORS 332.018(2) (one-year residency requirement for school board directors); ORS 334.090(5) (one-year residency requirement for education service district directors), state elections officials collectively evaluate hundreds of candidate applications for office each year. Accordingly, the court's decision in this case will affect future decisions by those officials.

license and maintained it until some point in or after 2020. (App-98, 107, 127). He enrolled his children in New York schools. (App-30). He registered and voted in New York from the early 2000s until 2020. (App-31, 127). Even in 2020, when he states that he was working from his family's property in Yamhill, plaintiff voted by absentee ballot in New York elections. (App-31).

In December 2020, plaintiff registered to vote in Oregon. (App-31, 127). As of 2021, he leased his New York home and states that he began living exclusively in Oregon. (App-106 (so representing in legal memorandum about residence status)). He retired from the New York Times in October 2021. Marc Tracy, *Nicholas Kristof Leaves New York Times as He Considers a Political Run*, NY Times (Oct 14, 2021), *available at* https://www.nytimes.com/2021/10/14/business/media/nicholas-kristof-oregon-governor.html.

C. The Elections Division, consistent with previous practice, reviewed plaintiff's declaration, attempted to verify his qualifications, and requested additional documentation.

Plaintiff filed his declaration of candidacy on December 20, 2021. (App-7). Lydia Plukchi, a compliance specialist in the Elections Division, followed the Division's normal process to verify plaintiff's qualifications. (Def App-3).[2]

[2] Plaintiff takes issue with Elections Division staff issuing the decision because they "are not lawyers." (Op Br 13). This statement suggests—inaccurately—that nonlawyers cannot understand legal requirements through their own experience, and that nonlawyers are incapable of seeking legal counsel when

Footnote continued…

First, she checked the Oregon voter registration database; there was no record that plaintiff had registered to vote in Oregon before December 2020. (Def App-3).

On December 21, 2021, Plukchi asked plaintiff to supplement his declaration with more information. (App-9–10). She understood that plaintiff had "voted in New York State as recently as 2020," and she had reviewed a published legal memorandum from his lawyers concerning his residency. (App-10; *see also* App-95–109 (copy of memo)). She asked him to respond by January 3 and to "provide any documentation or explanation in addition to [his] published legal memo that demonstrates he [has] been a resident of Oregon for three (3) years preceding the November 8, 2022, general election." (App-10).

On January 3, plaintiff supplemented his declaration of candidacy with a letter explaining his residence in Oregon and with several exhibits. (App-11–112). Those exhibits include his prior legal memorandum, legal opinions, as well as several news reports regarding plaintiff's candidacy, much of which Plukchi was already aware of. (Def App-3). Two days later, plaintiff further supplemented his declaration by adding a copy of an Oregon circuit court

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further guidance is needed. This is especially inaccurate in Plukchi's case. She is an experienced elections official, who has been with the Elections Division since 2002 and served under the last six Secretaries of State. (Def App-1). She has verified the qualifications of hundreds of candidates. (Def App-2).

judgment in *Wyatt v. Myers*, a 1974 case, and another declaration from a friend opining on plaintiff's connections to Oregon. (App-113–22).

D. The Elections Division determined that plaintiff was not qualified to serve as Governor under Article V, section 2, of the Oregon Constitution.

Plukchi reviewed plaintiff's documentation. (Def App-3). Because plaintiff's counsel had already told an Elections Division representative that he did not have "much more information" to present than what was already publicly available, she did not ask plaintiff to supplement any additional information. (Def App-3).

Plukchi notified plaintiff of the Elections Division's determination that plaintiff was not qualified to serve as Governor under Article V, section 2, on January 6, 2022. (App-126–28).[3] The Elections Division made that determination based on the totality of the circumstances—notably, that plaintiff had been registered to vote in New York from 2000 to 2020, voted in New York in November 2020, and registered to vote in Oregon on December 28, 2020. (App-127). It further found that, between 2000 and 2020, plaintiff maintained a New York driver's license, which "indicate[d] that [he] viewed

[3] Plaintiff notes that "[i]t remains unclear whether DOJ advised the Secretary that Kristof is not eligible." (Op Br 13 n 2). That has no bearing on the correctness of the decision, but any advice given would be privileged. *See* OEC 503 (defining confidential communication as that "in furtherance of the rendition of professional legal services.").

New York as the place where [he] intended to permanently return when [he was] away." (App-127). It also found that, although he maintained houses in both Oregon and New York, plaintiff spent more time outside of Oregon than inside of it before 2019. (App-127). It noted that plaintiff worked in New York as a journalist and in Oregon on his farm, but it was unclear to what degree he supervised employees in Oregon. (App-127). Finally, the Elections Division found that plaintiff had paid income taxes in New York since 1999 and income taxes in Oregon in 2019 and 2020. (App-127). But it observed that he did not specify whether he had paid income taxes in Oregon as a resident, nonresident, or part-time resident. (App-127).[4]

In explaining why plaintiff did not qualify to serve as Governor under Article V, section 2, the Elections Division noted that a person's "residence" is "a place in which a person's habitation is fixed and to which, when they are absent, they intend to return." (App-127). Under that standard, the Elections Division stated that "the place where a person votes is particularly powerful, because voting is the center of engaged citizenship." (App-127). The Elections

[4] Although plaintiff contests the Elections Division's conclusions, his brief does not dispute any of those facts, except to say that he could not have filed taxes in New York in 2021, as indicated in the determination letter. (Op Br 12–13). The Elections Division agrees that including 2021 in the range of years in which he filed New York income taxes was a scrivener's error and was not material to its determination.

Division thus reasoned that plaintiff's 20-year period of voting in New York "strongly indicate[d]" that he viewed New York as the place where he intended to "permanently return" when he was away. (App-127). It cited ORS 247.035, which enumerates various factors for determining residency in election law, as further evidence that the act voting is "integral to residency." (App-127). Based on the information that plaintiff submitted, it concluded that he was not a resident between November 2019 and December 2020, when he was still registered to vote in New York. (App-127–28).

Plaintiff's disqualification was not an unusual or extraordinary step taken by the Elections Division. On the contrary, it is a common, and normally uncontroversial, occurrence for elections officials to determine that a candidate does not meet residency and other requirements before the ballot is printed and election held. (*See, e.g.*, Supp App 9 (press conference noting that the Secretary's Elections Division disqualified ten other candidates in the past year, including six other candidates for Governor in the 2022 election)).

On January 7, plaintiff petitioned this court for a writ of mandamus ordering the Secretary to accept his declaration of candidacy and submit his name to each county clerk for printing on the primary ballot. The Secretary responded that the court should issue an alternative writ so as to allow it to resolve this dispute as quickly as possible. On January 12, this court accepted the Secretary's suggestion and allowed the alternative writ of mandamus.

SUMMARY OF ARGUMENT

A person is qualified to serve as Governor only if the person has been domiciled in Oregon for the three years preceding the election. The requirement in Article V, section 2, that the candidate be "resident within" Oregon refers to the candidate's domicile. At the time the wording was adopted in 1857, courts and scholars tended to treat "resident" and "domiciliary" as synonymous. History shows that the delegates adopted the residency requirement to ensure that the Governor was someone who had actually lived "amongst us," not merely visited from out of state. And the strong weight of case law from other jurisdictions is that constitutional residency requirements for holding office turn on the person's domicile.

A person can have one, and only one, domicile at any time. When a person has more than one home, courts examine the totality of the circumstances to determine which one is the domicile, but objective conduct that demonstrates intent carries more weight than subjective statements, such as expressions of feeling about a place. Conduct includes objective facts like where the person voted, obtained licenses, paid taxes, spent time, and worked.

Here, those objective facts overwhelmingly support the conclusion that plaintiff was domiciled in New York from at least the early 2000s until late 2020:

Personal and professional life: Although plaintiff owned property and was sometimes present in Oregon, the center of his personal and professional life was New York. Plaintiff bought a home in New York in 1999, not far from the headquarters of his employer, the New York Times. He enrolled his children in public schools in New York.

Voting: Plaintiff registered to vote in New York in the early 2000s, and he voted there in the November 2020 election. New York law required plaintiff to be domiciled in New York to vote there. Plaintiff's explanation that he voted in New York only out of "convenience" makes little sense in light of Oregon's convenient and established vote-by-mail system, which easily allows Oregon voters to receive their ballots anywhere in the world.

Driver's license: Plaintiff maintained a New York driver's license from around 2000 to 2020.

Income taxes: Plaintiff paid income taxes in New York from around 1999 through 2020. He informed the Elections Division that he also filed Oregon income taxes returns in 2019 and 2020. But that, by itself, means little, because nondomiciliaries are required to file returns in some circumstances.

Weighed against those substantial objective facts, plaintiff's subjective statements that he always regarded Oregon as home carry little weight. A person who has roots in a place may regard that place as "home" in a colloquial sense without having that place be their legal domicile.

Finally, the Oregon Constitution's residency requirement does not violate the federal Equal Protection Clause. The weight of authority is that residency requirements like the one at issue here are constitutional because they are rationally related to legitimate government interests: ensuring that officeholders have a stake in Oregon's civic life, encouraging them to become familiar with the concerns of their constituents, and allowing voters a greater opportunity to observe and interact with them directly in their local community.

ANSWER TO ASSIGNMENT OF ERROR

The Elections Division correctly determined that plaintiff is ineligible to serve as Governor because he will not have been "a resident within this State" for the "three years next preceding his election." Or Const, Art V, § 2.

A. Preservation

The Secretary agrees that plaintiff preserved his arguments.

B. Standard of Review

A writ of mandamus is an extraordinary remedy to compel an official to perform an act that "the law specially enjoins." ORS 34.110. Although a court may decide complicated legal matters on mandamus, the relator's right must be "clearly founded in, or granted by, law." *State ex rel Maizels v. Juba*, 254 Or 323, 329, 460 P2d 850 (1969).

ARGUMENT

The Secretary has a statutory duty to ensure that candidates placed on the ballot are qualified to serve in office. Under Article V, section 2, to serve as Governor, a person must be a "resident within" Oregon for three years preceding the election. The specific wording, history, and case law interpreting that term establish that a person is a "resident within" Oregon only if the person is domiciled in Oregon. Even if plaintiff owned property in Oregon, held sentimental feelings about the state, and intermittently spent time here, he was not domiciled in Oregon for purposes of Article V, section 2, as of November 2019. For that reason, the Elections Division correctly concluded that plaintiff was not a "resident within" Oregon for three years before the 2022 election and does not qualify to serve as Governor of Oregon.

A. Article V, section 2, requires that gubernatorial candidates be domiciled in Oregon for at least three years before the election.

The parties' primary disagreement involves what it means to be a "resident within" Oregon. Plaintiff contends that the phrase refers merely to having a residence in Oregon and feeling that Oregon is home. But as explained below, substantial authority—and common sense—show that the phrase requires a candidate to have a domicile, not just a residence, in Oregon. Under common law, a domicile is a single permanent abode to which a person intends to return after temporary absences. People may have multiple homes, but they have only one domicile at a time.

The meaning of a provision of the Oregon Constitution depends on its specific wording, the historical circumstances underlying its adoption, and the case law that has construed it. *Busch v. McInnis Waste Sys., Inc*., 366 Or 628, 634 n 3, 468 P3d 419 (2020) (citing *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992)). Those sources demonstrate that a person is a "resident within" Oregon only if he or she is domiciled here. They explain that the person must maintain a permanent abode here, intend to return to the state when absent, and—because a person can have only one domicile at a time—not be domiciled elsewhere.

1. The specific wording of Article V, section 2, in context supports that "resident within this State" means domiciled in Oregon.

Ordinarily, "the 'best evidence' of what the framers of a constitutional provision intended to mean is the wording of the provision itself." *State v. Mills*, 354 Or 350, 356, 312 P3d 515 (2013). Generally, if the constitution does not define a term, this court presumes that the drafters intended terms "to be given their ordinary meanings." *Wittemyer v. City of Portland*, 361 Or 854, 861, 402 P3d 702 (2017).

Article V, section 2, provides that a person is eligible to be Governor only if the person is a U.S. citizen, is at least 30 years old, and "shall have been three years next preceding his election, a resident within this state." Or Const, Art V, § 2. That wording suggests that a person must have been domiciled

within Oregon for three years. The ordinary meaning of "resident," when Oregon adopted its constitution, was "[o]ne who resides or dwells in a place for some time." *See* Noah Webster, *An American Dictionary of the English Language* 695 (1830) (defining "resident"). In turn, the primary definition of "dwell" was to abide as a "permanent resident." *Id.* at 281. The ordinary meaning of "within" was "in the limits or compass of." *Id.* at 931. Thus, the ordinary meaning of "resident within" Oregon in 1857 was a person who lived as a "permanent resident" in the territorial "limits or compass" of Oregon. In legal terms, that refers to a person domiciled in Oregon.

Contemporaneous legal definitions of "resident" confirm that it was a synonym for "domiciliary." A leading mid-nineteenth-century legal dictionary defined "resident" as "[a] person coming into a place, with an intention to establish his domicil or permanent residence, and who in consequence actually remains there." John Bouvier, 2 *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 468 (6th ed. 1856); *Hinds v. Hinds*, 1 Iowa 36, 42 (1855) (attributing that definition of "resident" to Bouvier's dictionary). Other dictionaries also equated "residence" and "domicile." *See id.* (defining "residence" as "the place of one's domicile"); Alexander M. Burrill, 2 *A Law Dictionary and Glossary* 413 (1851) (defining "residence" as "[t]he place where one resides, (locus quo quis resident;) habitation; domicil").

The context of Article V, section 2, further supports the conclusion that the term "resident" denoted living permanently in Oregon—in other words, being domiciled here. For instance, Article II, section 5, makes irrelevant to a determination of "residence" a soldier's having been stationed in Oregon. *See* Or Const, Art II, § 5 ("No soldier, seaman, or marine in the Army, or Navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; nor shall any such soldier, seaman, or marine have the right to vote."). That usage of "residence" suggests that, at a minimum, the drafters of the Oregon Constitution recognized the difference between permanent habitation and temporary physical presence.

Voter eligibility in the original constitution depended on the same kind of residency requirement. People were qualified to vote in Oregon only if they "resided in this state during the six months immediately preceding such election." Or Const, Art II, § 2. For purposes of voting, Article II, section 4, clarified that a person's "presence" or "absence" because of government service or schooling would not cause the person to gain or lose residence in Oregon. Or Const, Art II, § 4 ("For the purpose of voting, no person shall be deemed to have gained, or lost a residence, by reason of his presence, or absence" under certain conditions, including government service, schooling, and imprisonment). Again, that use of "residence" confirms that, to be a resident,

people had to establish more than mere physical presence. They had to show that they voluntarily chose Oregon as their permanent home, a requirement best captured by a domicile test.

Plaintiff argues that "resident within" cannot mean domicile because of the way the word "reside" is used in Article VI, section 5, which requires that the Secretary reside at the seat of government. He asserts that "reside" must mean something other than maintain a "principal residence" because "early secretaries had principal residences" other than Salem. (Op Br 17). As an initial matter, that section does not use the term "principal residence." Regardless, the inference plaintiff draws from the section does not help him, because it shows only that, in some contexts, "reside" may require physical presence in a location. Plaintiff did not establish either residence (physical presence) or domicile (permanent home) for the full three-year period at issue here. Moreover, Article II, section 4, makes a person's absence from a location for state service irrelevant to determining that person's "residence" in a place. Or Const, Art II, § 4. In other words, even if the Secretary must "reside" at the seat of government, she is not thereby a "resident within" two places. She is a "resident within" the place that she chooses as her domicile, and her absence from that place because of state service cannot change that fact.

Similarly, plaintiff's contention that "resident within" cannot mean "continuing physical presence," (Op Br 18–19), does not imply that "resident

within" means something less rigorous than domicile. A person can remain domiciled in Oregon during periods when the person is absent from the state, because domicile requires a permanent home, not a continuing physical presence. Plaintiff also reads too much into provisions permitting people to become residents even if they maintain connections to other states or have been absent from Oregon.[5] (Op Br 19–20 (arguing that original Article I, sections 5 and 31, show that people with connections outside of Oregon could become residents)). No one disputes that people outside of Oregon can become residents despite previous connections to other locales. The question is *how* a person becomes a "resident within" Oregon in the first place. The answer is that a person becomes a "resident within" Oregon when they choose to become domiciled here. Whether the person made that choice is measured by their actions as well as their stated intent.

2. The historical circumstances of Article V, section 2, confirm that a "resident" is a person domiciled in Oregon.

The history underlying a term includes evidence about why delegates adopted the term at the Oregon Constitutional Convention and relevant

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[5] He likewise suggests that eligibility to vote is not dispositive of whether a person could become a resident because Article XV, section 8, would permit Chinese "residents" to own property yet Chinese immigrants were not permitted to vote. Again, the question is whether Article V, section 2, contemplates a domicile test, not whether the constitution makes one factor for determining domicile—a person's voting activities—dispositive.

common law understandings. *Mills*, 354 Or at 357–65. Those sources confirm that the drafters likely intended "resident within" to mean "domiciled" in Oregon.

As it reviews the history of the Oregon Constitution, this court will encounter racist and xenophobic statements by the delegates to the convention. Those attitudes are despicable facts of Oregon's past and present; the Secretary strongly condemns them and is committed to reversing their ongoing effect. But those statements have little bearing on this case. Moreover, the Secretary's personal opinions about the history or policy of residency requirements are irrelevant; she must follow the constitution. And under well-settled principles of constitutional interpretation, this court consults history to determine the meaning of the words the delegates chose.[6]

Oregon Constitutional Convention. The original version of Article V, section 2, was based on a similar provision in the Indiana Constitution. Indiana Const, Art V, § 7 (1852); *see also* Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 - Part II (Frame of Government: Articles III-VII)*, 39 Willamette L Rev 245, 339 (2003) (noting that Oregon delegates based the

[6] Plaintiff has not shown that the residency requirement in Article V, section 2, has a racist or xenophobic effect either on its face or as applied to him. It arguably would be more inequitable to adopt lax residency requirements that favor those who, like plaintiff, have the means to own property in multiple states.

articles about the executive and administrative departments on the Indiana and Wisconsin constitutions). Like the Indiana provision, the original draft of Article V, section 2, contained a requirement that a person be a "resident" in Oregon for three years before the election, although it used the phrase "resident within" rather than (as in the Indiana Constitution) "resident of." *See* Burton, 39 Willamette L Rev at 346.

The delegates at the Oregon Constitution closely debated the eligibility requirements for becoming Governor. In fact, one of two proposed amendments to the original version of Article V, section 2, would have removed the durational residency requirement. *See id.* at 347. William Starkweather and Perry Marple argued that "no shackles should be put on the people" in choosing a potential Governor. *Id.* Frederick Waymire responded that "[h]e was in for a good acquaintance before he bestowed favor on any man" and suggested that, without a residency requirement, "we will have half the office-seekers of California up here." *Id.* James Kelly agreed, asking, "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." Oregon Statesman, Sept 8, 1857, at 1, *reprinted in* Charles H. Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, at 222 (1926). In retort, Starkweather warned that one consequence of rejecting the amendment was that

it would "keep all the offices in the hands of a few." Burton, 39 Willamette L Rev at 347. Despite the risk that it would exclude otherwise appealing candidates, the delegates rejected the amendment and retained the residency requirement. *See id.*

The debate over removing a residency requirement in Article V, section 2, reveals two things about its meaning. First, delegates on both sides of the debate assumed that the "resident within" test would require that a person actually live "amongst us," not visit from time to time, as a Californian might. Second, the delegates assumed that the requirement amounted to a significant constraint on eligibility—"shackles," as Starkweather put it, a requirement demanding enough that it might "keep all the offices in the hands of a few." *Id.* The only disagreement was whether that kind of significant constraint on eligibility was good policy. By rejecting the amendment that would have removed the residency requirement, the delegates ultimately concluded that it was.

For similar reasons, the constitutional delegates also endorsed a residency requirement for Oregon Supreme Court justices, requiring both that they "resided in the State at least three years next preceding their election" and that they "reside in their respective districts" after the election, unless the district boundaries change. Or Const, Art VII (original), § 2. Although the initially proposed version of Article VII, section 2, had no residency requirement,

Reuben Boise insisted on adding one. Burton, 39 Willamette L Rev at 406. Proponents reasoned that residency requirements are crucial where "an office of value is involved." *Id.* Much of the concern was the "holy horror of your California graceless, godless school of politicians" coming to Oregon in search of office. *Id.* As a result of that fear, as Boise explained, "we have inserted in our articles in the Executive and Judicial departments, and in all other departments where an office of value is involved, a clause making a three years residence in Oregon a necessary qualification of any of those offices." *Id.* In other words, as the delegates reasoned, a residency requirement would ensure that important officeholders knew Oregon based on meaningful experience here by actually living here for a significant period of time. As they saw it, an "office of value" should be filled by a person who had resided in Oregon with some stake in the political and civic life here. The debate over the residency requirements shows that the delegates intended to establish a test that would not allow the election of a person who remained a resident of another state.

Plaintiff misapprehends the significance of the debates among the drafters of the Oregon Constitution. In his view, the delegates were more concerned about whether someone "kn[e]w something of the state" or had "only just arrived" and were thus "strangers." (Op Br 22). But if all that the delegates wanted to ensure was "know[ing] something of the state" they would not have imposed a durational residency requirement at all, much less tie it

specifically to the three years before the election. In fact, as explained, some delegates wanted to discard the requirement precisely because it would exclude candidates who might prove to be suitable Governors. *See* Burton, 39 Willamette L Rev at 347–48. By retaining the residency requirement, the delegates showed that they wanted to ensure something deeper than mere familiarity with Oregon and that they knew that some otherwise viable candidates would not be able to satisfy the residency requirement. *See id.* (noting that one argument against it was that it would be so difficult to satisfy that it might keep power in "the hands of the few").

Common Law Around 1857. Oregon cases around 1857 confirm that residence was understood to mean domicile. For example, in *Lee v. Simonds*, the territorial court interpreted the term "residing upon" by considering whether a place was a person's "domicile." 1 Or 158, 159, 161 (1854) (in a territorial donation act case reasoning that "considerable evidence" is necessary to overcome the presumption that a person's residence is where the person's family is living and relying on cases addressing how to determine a person's "domicil"). As the court reasoned, the key inquiry for determining whether a person was "residing upon" a piece of land was whether the person was "actually living" or making an "actual permanent home" there. In other words, "residing" did not mean an occasional visit. It meant a more permanent condition, which the court described as "domicil." *Id.* at 159. Similarly, in

Wood v. Fitzgerald, this court considered whether officers "reside[d]" in a place—or instead had made a "transfer of domicile" elsewhere— when it determined whether they were residents within a county for purposes of voting there. 3 Or 568, 572–73 (1870).

Lee and *Wood* thus demonstrate that, even in early cases, Oregon courts viewed the test for determining whether people were "resident[s] within" jurisdictions as a question of domicile. Plaintiff is mistaken to contend that *Lee* and other cases show that "resident within" means something less stringent. *Lee* interpreted "residing upon" to require a person to have a "home" in Oregon and treat that home as his "permanent home"—a classic description of the domicile test. 1 Or at 160. In fact, *Lee* quoted a case in which the court was trying to determine a person's residence *by identifying that person's domicile*. *See id.* (quoting opinion noting that "personal presence" is "one circumstance to determine the *domicil*" of a person and that "[n]o exact definition of *domicil* can be given" (emphases added)). *Lee* thus directly supports the conclusion that the term "resident within" means "domiciled" in Oregon.[7]

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[7] Cases outside of Oregon took the same approach. *See, e.g.*, *Hinds*, 1 Iowa at 43–47 (canvassing various authorities in deciding whether there was a difference between "resident," "inhabitant," and domiciliary and noting that "generally, residence and domicil, mean the same thing"); *Chase v. Miller*, 41 Pa 403, 420 (1862) (observing that "the primary signification of the word 'residence,' as used in the constitution, is the same as domicil—a word which means the place where a man establishes his abode, makes the seat of his

Footnote continued…

Finally, *Pickering v. Winch*, 48 Or 500, 87 P 763 (1906), does not support plaintiff's argument. In *Pickering*, the key question was whether Amanda Reed was *domiciled* in California or in Oregon under probate law. 48 Or at 501–03. In applying a domicile test, the court explained some of the differences between a having a "residence" (a house in a place) and a "domicile" (a permanent home) and repeated the well-known principle that, even if a person has more than one house, the person may have only one domicile. *Id.* at 504. But the court did not suggest that the term "residence" is always different from domicile. Thus, although *Pickering* is helpful in clarifying the difference between "residence" and "domicile," it did so in the probate context and has limited value in understanding the meaning of "resident within" for purposes of Article V, section 2.

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property, and exercises his civil and political rights"); *Yonkey v. State*, 27 Ind 236, 245 (1866) (reasoning that, to determine whether a person was a "resident of" a county, a court should consider whether he had "an intention in order to change [his] domicil" by leaving the county temporarily for work in another city). Nor do the early Indiana cases on which plaintiff relies show a different approach. (Op Br 27–28 (citing *Pendleton v. Vanausdal*, 2 Ind 54 (1850), and *French v. Lighty*, 9 Ind 475 (1857))). In *French*, a contested election case, the lower court used the terms "residence" interchangeably with domicile and described a domicile test for determining legal residence. *Id.* at 477 n 1 (describing various factors for determining how "[t]o gain a domicile in this state"). And, in *Pendleton*, the court did not decide where a person resided, but whether it was sufficient to serve that person at his last known home. 2 Ind at 54. *Pendleton* thus says nothing about whether a domicile test applies to residency in an election.

3. Relevant case law interpreting "resident" confirms that a "resident" means a person domiciled in a jurisdiction.

Although this court has never interpreted the phrase "resident within this State," states with similar constitutional provisions have concluded that the term "resident in" or "resident of" imposes a domicile requirement. For instance, the Indiana Supreme Court held that the term "resident of the State of Indiana" in the Indiana Constitution, which inspired Article V, section 2, means a person domiciled in Indiana. *State Election Bd. v. Bayh*, 521 NE2d 1313, 1316 (Ind 1988). The court reasoned that, even if the term "resident of" suggests a continuing physical presence, other contextual clues show that the constitutional drafters likely intended it to mean a person who is domiciled. *Id.* It also noted that there were compelling "democratic purposes" for a domicile requirement: ensuring "both an informed electorate and a knowledgeable candidate." *Id.*

Similarly, in *Sathre*, the North Dakota Supreme Court determined that its state constitution required that gubernatorial candidates be domiciled in North Dakota. 258 NW at 562–63 (describing "legal residence" as a place where one remains when not called elsewhere temporarily and intends to return). Under that test, a "newspaper man" who moved to Minnesota for 20 months, filed taxes there, and voted there, despite his intention to return to North Dakota "some time," was not a "resident" of North Dakota qualified to serve as

governor. *Id*. at 565–66 (noting that by voting he intended to exercise his rights of citizenship in Minnesota in part because he knew that he could vote in North Dakota as an absent voter if he had wanted to). Indeed, his disqualification from office by the North Dakota Supreme Court occurred *after* his election, and the fact that voters chose him had no bearing on his failure to meet North Dakota's residency requirement.

Other courts have also concluded that "resident" means domiciliary in election law contexts. *People ex rel. v. Connell*, 28 Ill App 285, 286 (1888) (concluding that under Illinois law the "Constitution, with reference to eligibility for office, contemplates a residence which is equivalent to home—domicile—permanent abode"); *People v. Platt*, 117 NY 159, 167 (1889) (observing that "in all cases where a statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims its benefit").

If anything, the wording of the Oregon provision—"resident within"—suggests a stronger connection than the "resident in" or "resident of" wording used in other states. The addition of "within" after "resident" emphasizes the importance of actually living in the state, not just having some connection to it.

4. Plaintiffs' policy concerns do not support a test other than domicile.

As discussed above, a *Priest v. Pearce* analysis of Article V, section 2, shows that a person is a "resident within" Oregon only if the person is domiciled in Oregon. Plaintiff argues against that rule, but his arguments are rooted in a disagreement with the policy and its effect on his candidacy, not in a textually or historically grounded understanding of what the delegates to the constitutional convention intended. (Op Br 30–32).

Plaintiff's policy critique is most evident in his proposal that this court turn to a new substantive canon of interpretation—the "democracy canon"—that would require it to construe election laws to qualify as many candidates for the ballot as possible. (Op Br 30–31). Notably, plaintiff cites no case in which a court has applied the democracy canon when construing a domicile requirement for officeholders. That is not an accident; in fact, there are good reasons for courts to avoid invoking such a canon here. The democracy canon is primarily about excusing "minor" technical errors in registration, voting, and ballot access. Richard L. Hasen, *The Democracy Canon*, 62 Stan L Rev 69, 85 (2009). But this case is not about those kinds of technical errors. In enacting a domicile requirement, the framers of Oregon's constitution were not choosing between stringent bureaucratic rules and open democratic values. Instead, they enacted the rule that they believed would best support Oregon's democratic

form of government. They decided that it was more important to have elected officials who were involved in their communities and understood their constituents than it was to have a wider variety of candidates on the ballot. And they decided that a three-year residency requirement provided an appropriate yardstick for measuring the qualifications they valued.

Plaintiff disagrees with that choice. But as this court has recognized, policy arguments cannot override what the text, history, and case law establish about the constitution's meaning. *See Outdoor Media Dimensions, Inc. v. Dept. of Transp.*, 340 Or 275, 298, 132 P3d 5, 17 (2006) (observing that "[w]hatever the merits" of certain arguments about the most "appropriate policy" they "offer little guidance in interpreting the Oregon Constitution"); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 66 n 19, 11 P3d 228 (2000) (observing that "we are not free to interpret the constitution in any way that might seem to us to be sound public policy" and that "[a]ny analysis must begin with the constitution's own words"). That is even more true when the policy arguments plainly favor one candidate's interests, at the expense of others'. This court should decline plaintiff's invitation to decide this case on policy grounds.

5. Plaintiff fails to articulate any workable test other than domicile.

The court's decision in this case will establish a precedent for the numerous candidate filings each year in which the Elections Division and local

elections officials must determine residency for the full spectrum of candidate filings, from Governor and the Supreme Court to county commissions and school boards. Thus, it is critical for this court to articulate a workable test for applying Article V, section 2, and similar residency requirements in the future. But beyond contending that residency requirements should be abandoned entirely as exclusionary, plaintiff does not articulate any rule more lenient than domicile that this court could reasonably adopt.

a. Plaintiff's Dual Residency Rule

Plaintiff contends that a person who owns homes in multiple states is a "dual residen[t]" and could be "resident within" Oregon without being domiciled there. (Op Br 1–2). But that rule produces irrational results. It would allow a person to be elected Governor of Oregon while continuing to vote and live elsewhere. Even more counterintuitively, that person could run for Governor of two different states at the same time. A rule that allowed those scenarios, however unlikely, would undermine the reasons for adopting any residency requirement at all.

b. Plaintiff's Popularity or Fundraising Rule

Plaintiff implies another standard by repeatedly claiming his status as a "frontrunner" in the gubernatorial race, as a person who has raised millions of dollars, and as a person who has numerous supporters. (Op Br 1, 10, 51). Embedded in this "frontrunner" standard is plaintiff's argument that the Court

should let the voters decide—in other words, that popularity should dictate residency. But this court should strongly reject the implication that a person's popularity, fundraising clout, or political connections are relevant to whether they are a "resident within" Oregon. The Elections Division and local elections officials apply the same rule to all candidates no matter how known or unknown they are, and regardless of how many residences they own, if they own a residence at all, or if they are houseless. Adopting the rule plaintiff appears to propose would enable a grave injustice, in which "the voters decide" for well-resourced and well-connected candidates, and other candidates are held to a more exacting standard. Any residency rule must apply equally to all candidates; even popular or well-resourced candidates should be excluded if they do not meet the minimum constitutional requirements to serve.

c. Plaintiff's Emotional Connection or Familiarity Rule

Finally, plaintiff suggests that he should be considered a "resident within" Oregon because he is familiar with Oregon and feels a deep connection to the state. (*E.g.*, Op Br 34 (discussing the forward he wrote to a coffee table picture book about Oregon)). But no filing officer should be allowed to conduct an Oregon literacy test to determine how familiar a candidate is with the state, nor could filing officers ever make consistent, fair determinations about a candidate's qualifications for office based on such subjective, transitory facts. Filing officers—including Oregon's local elections officials who make

hundreds of residency decisions every year—would be forced to either accept every potential candidate's representation about their subjective connection to the state and affirm residency in every case (thus turning the standard into no standard at all); or attempt to evaluate the closeness or sincerity of each candidate's affections for the state, risking wildly inconsistent and inequitable results. Neither result effectuates the intent of the delegates at the constitutional convention.

d. The Oregon Constitution's Domicile Rule

None of the various standards that plaintiff advances provide this court with a meaningful rule for determining residency, either in plaintiff's case or for future candidates. The domicile test does. It is grounded in constitutional history and case law, with decades of commentary and case examples to guide present-day determinations. As explained further below, it relies heavily on objective facts that are easy to ascertain and reasonably susceptible to consistent determinations. The Elections Division and local elections officials have successfully applied the domicile standard for years. Plaintiff provides no persuasive reason for the court to abandon that consistently applied rule.

B. Plaintiff will not have been domiciled in Oregon for three years before the November 2022 election.

The Elections Division correctly found that plaintiff will not have been domiciled in Oregon for three years before the November 2022 election. New York was plaintiff's domicile beginning (at least) in the early 2000s. If plaintiff

abandoned New York for an Oregon domicile, he did not do so until *after* November 8, 2019—the start of the required residency period. Accordingly, the Elections Division correctly determined that plaintiff was not qualified under Article V, section 2, to run for Governor in 2022.

1. A person has only one domicile at any time, and courts weigh the totality of the circumstances—primarily a person's conduct—to determine a person's intent to establish a domicile.

Every person has one, and only one, domicile at any time. When determining where that place is, courts weigh a person's conduct more heavily than their statements.

Under common law, domicile consists of two components: (1) "'a fixed habitation or abode in a particular place'" and (2) "'an intention to remain there permanently or indefinitely.'" *Elwert v. Elwert*, 196 Or 256, 265, 248 P2d 847 (1952) (citing *Pickering*, 48 Or at 504); *see also Ennis v. Smith*, 55 US 400, 422–23, 14 L Ed 472 (1852) ("But there must be, to constitute it, actual residence in the place with the intention that it is to be a principal and permanent residence."). That is, domicile consists of residence plus intention. *Id.*

Although a person may have multiple homes, a person "can have only one domicile." *Eli Bridge Co. v. Lachman*, 124 Or 592, 597, 265 P 435 (1928); *see also Zimmerman v. Zimmerman*, 175 Or 585, 591, 155 P2d 293 (1945)

(quoting with approval Restatement of the Conflict of Laws § 11 (1934): "Every person has at all times one domicil, and no person has more than one domicil at a time."). That domicile continues until a new one is established. *Pickering*, 48 Or at 505.

To change domicile, "three things are essential: (1) residence in another place, (2) an intention to abandon the old domicil, and (3) an intention to acquire a new domicil." *Elwert*, 196 Or at 265; *Kelley v. Kelley*, 183 Or 169, 184, 191 P2d 656 (1948) (same); *In re Noyes*, 182 Or 1, 14–15, 185 P2d 555 (1947) (same). The "dominant factor" in that analysis is the person's intention. *Elwert*, 196 Or at 265. In other words, a person's mere change of "abode" is insufficient to establish a change of domicile unless the requisite intent is present. *Pickering*, 48 Or at 510. "[T]he burden of proof is upon the party who asserts the change." *Id.* at 505.[8]

Courts determine a person's intent based on the totality of the circumstances. *Elwert*, 196 Or at 266–67 ("Domicil, in legal contemplation,

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[8] Plaintiff suggests that the burden of proof to establish a change in domicile was "exceedingly high" when Oregon ratified the Constitution, citing *Succession of Franklin*, 7 La Ann 395 (1852), and *Smith v. Croom*, 7 Fla 81 (1857). (Op Br 42–44). But those cases did not impose a greater burden of proof than this court announced in *Pickering* or subsequent cases applying the domicile standard. In the cases cited by plaintiff, the courts recognized that a person's domicile is presumed to continue until another domicile is established, which sets a high standard but not an "exceedingly high" one. *See Succession of Franklin*, 7 La Ann at 411; *Smith*, 7 Fla at 154; *Pickering*, 48 Or at 505.

depends not alone on residence but also upon a consideration of all the circumstances of the case."); *see also Lee*, 1 Or at 160 ("No exact definition of domicil can be given; it depends upon no one fact, or combination of circumstances, but from the whole taken together it must be determined in each particular case."). This court has, in other contexts involving a person's domicile, recognized several factors that are particularly indicative of a person's intent, including whether the person has exercised basic duties and privileges of citizenship there, such as by paying taxes, voting, or obtaining licenses. *See generally Elwert*, 196 Or 266–71; *Kelley*, 183 Or at 184; *Pickering*, 48 Or at 511–15; *Zimmerman*, 175 Or at 592.[9]

Thus, both words and conduct are relevant to determining a person's domicile. But where a person's declarations of intent are inconsistent with the person's conduct, the conduct is more probative. *See Elwert*, 196 Or at 267 ("Where, therefore, the declarations of a party as to his intent are inconsistent

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[9] Those domicile factors are comparable to the rules and factors set out in ORS 247.035, which elections officials consider to determine a person's residence for voter registration purposes. That statute, which is referenced in the Elections Divisions' determination letter, provides that elections officials may consider where a person voted, receives personal mail, is licensed to drive, has registered motor vehicles for personal use, their immediate family members reside, pay for utilities, and file federal or state income tax returns. *See* ORS 247.035(1), (3).

with his acts, his conduct is of greater evidential value than his declarations[.]" (internal quotation marks omitted)).

2. Plaintiff's conduct shows that he was domiciled in New York and did not abandon that domicile before November 2019.

On these facts, the Elections Division correctly determined that plaintiff's domicile was New York for at least a good part of the required period (November 8, 2019, to the present). Although plaintiff may have been domiciled in Oregon earlier in his life, he demonstrated his intent to abandon that domicile for New York when he lived with his family and worked in New York, registered to vote in New York, had a driver's license in New York, and paid income taxes in New York from about 1999 until at least 2020.

a. Plaintiff lived and worked in New York with his wife and children.

The Secretary does not dispute that plaintiff lived in Oregon as a teenager. (*See* App-28–29, 111, 119–20). But by 1999 at the latest, plaintiff consciously centered his personal and professional life in New York. In 1999, he purchased a home in Scarsdale, New York. (App-15, 97). Although "[r]esidence alone has no effect *per se*," it "may be most important, as a ground from which to infer intention." *Pickering*, 48 Or at 510. Also important is the amount of time that he spent in that home. *See Zimmerman*, 175 Or at 592 (noting that the amount of time spent in a place is a factor for determining a "home" for domicile purposes). Plaintiff did not spend mere occasional time in

his New York home after its purchase. Rather, for each year after 1999 until at least 2020, plaintiff maintained a substantial presence in that home. (App-107). He spent most of his time there on account of both his and his wife's New York-based employment, with plaintiff describing the New York home as a "base" for his job as a columnist at the New York Times. (App-16, 30, 98, 76, 107). And he returned to that New York home, not Oregon, when his work required that he travel. (App-16, 98). Those choices reflect his intention to treat the Scarsdale home as his permanent home.

Plaintiff's children also attended and graduated from public school in New York. (App-30, 98). That further reflects plaintiff's intention to make New York his domicile. *See, e.g.*, *Hawes v. Club Ecuestre El Comandante*, 598 F2d 698, 702–03 (1st Cir 1979) (reasoning that a person established domicile in New York in part because, in addition to residing, working, and obtaining a license there, she enrolled her children in school there). Notably, in New York, all residents are entitled to a free education, and children are residents for that purpose only if they are domiciled in a district. *See* NY Educ Law § 3202(1); *Longwood Cent. Sch. Dist. v. Springs Union Free Sch. Dist.*, 806 NE2d 970, 972 (NY 2004) (interpreting residence in Section 3202 to be akin to domicile).

That plaintiff voluntarily chose to live in New York most of the time in recent decades is significant evidence of his intent to establish a New York domicile. *See Lee*, 1 Or at 159 ("[C]onsiderable evidence is necessary to

overcome the presumption that a man's residence, at any given time, is where he and his family are actually living at that time."). To be sure, plaintiff returned to his farm in Yamhill for part of most summers, and his children attended summer camp at OMSI and worked on the family farm. (App-15, 17, 24, 28–29). And in 2010, he became the primary manager of the farm after his father passed away. (App-15, 30). But that does not mean that his personal and professional life was centered in Oregon throughout that period. There is no indication, for instance, that assuming primary responsibilities for the farm meant that his time was primarily spent on the farm. Indeed, plaintiff asserted that he did not begin spending more time there until 2018 or 2019, and even then he dedicated much of his time to researching and writing his book *Tightrope*. (App-30, 107). The available facts, at most, show that the Yamhill farm was a part-time abode or residence, as that term is ordinarily used. And where a person has two homes, "his domicil will be presumed to be the one which appears to be the *center* of his affairs." *Elwert*, 196 Or at 268–69 (emphasis added); *see also Hinds*, 1 Iowa at 42 ("The principal domicil of every one is that which he makes the seat and cent[er] of his affairs[.]"). Plaintiff chose to center his personal life in New York—and that choice was not due to transitory factors such as illness, education, houselessness, or military service. That demonstrated his intent to adopt New York as his domicile.

b. Plaintiff registered to vote and voted in New York.

Plaintiff further demonstrated his intent to establish a New York domicile by choosing to exercise the basic privileges and duties of citizenship in New York. Most significantly, plaintiff registered to vote in New York in the early 2000s, and he remained registered to vote there until after he registered to vote in Oregon in December 2020. (App-29–31, 108). He also exercised his right to vote in New York as recently as the November 2020 election. (App-31).

Plaintiff's voting in New York is powerful evidence that he regarded New York as his domicile. New York law requires a person voting in any election to be "a resident of this state and of the county, city, or village for a minimum of thirty days next preceding such election." NY Elec Law § 5–102(1). The election board's decision that a person is qualified to vote is "presumptive evidence of a person's residence." NY Elec Law § 5–104(2). And New York law defines "residence" for these purposes as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." NY Elec Law § 1–104(22).

Thus, by voting in New York in November 2020, plaintiff effectively affirmed that New York was his "residence"—the place he maintained a fixed home to which he intended to return even when he was in Oregon. In other words, he effectively affirmed that his domicile was in New York. *See Hosley*

v. Curry, 649 NE2d 1176, 1178 (NY 1995) (noting that "residence" in the New York Election Law is "treated as synonymous with domicile").

The New York cases that plaintiff cites (Op Br 37–38) are not to the contrary. New York law requires a person to vote at their domicile. It is true that when a person owns two homes, New York law generally allows the person to choose which one will be their domicile and to vote there. *Glickman v. Laffin*, 59 NE3d 527, 530 (NY 2005). But New York law does not allow a person to vote at a "vacation home[]," (Opp Br 38), while at the same time claiming to be domiciled elsewhere. "A person is permitted to have more than one residence, but is not permitted to have more than one electoral residence." *Glickman*, 59 NE3d at 530–31 (holding that a candidate did not meet a residency requirement because he had registered to vote in Washington, D.C., thereby "br[eaking] the chain of New York electoral residency").

Voting and registering to vote are crucial factors in determining a person's intent to establish a domicile. *See Shelton v. Tiffin*, 47 US 163, 185, 12 L Ed 387 (1848) (noting that "an exercise of the right of suffrage is conclusive on the subject" of where a person is domiciled and that "acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient"). Indeed, although a person's voter registration and voting history are not, by themselves, dispositive, Oregon courts have often considered them when determining a person's domicile. For instance, in

Kelley, this court concluded that the appellant had no intention of abandoning his Oregon domicile and acquiring one in Nevada, in part, because "he maintained his registration in [Oregon] as a voter and in the next election cast a ballot." 183 Or at 184. That is not true of plaintiff.

On the contrary, plaintiff's voter registration and voting history is most consistent with cases in which Oregon courts have concluded that a person established a domicile outside of Oregon. For instance, in *Rodda v. Rodda*, 185 Or 140, 146–47, 200 P2d 616 (1948), this court determined that plaintiff had established a "bona fide domicil" in Nevada, in part, because he had "registered as an elector in the State of Nevada and voted there" during the relevant period. *See also Doyle v. Doyle*, 17 Or App 529, 532–33, 522 P2d 906 (1974) (defendant was not domiciled in Oregon during the relevant period, in part, because he had registered to vote where he lived in California). Thus, plaintiff's voter registration and voting history are reliable facts evincing his intent to establish a New York domicile over Oregon.

Oregon statutory law reinforces that conclusion. A person is entitled to vote at the person's "residence," which is defined synonymously with domicile. ORS 247.035(1)(a) ("The person's residence shall be the place in which habitation is fixed and to which, when the person is absent, the person intends to return."). But "[i]f a person goes from this state into any other state or territory and votes there, the person shall be considered to have lost residence in

this state." ORS 247.035(1)(e). In other words, voting in another state makes a person ineligible to vote in Oregon. That reflects that voting in another state evinces an intent to change domicile to that state. Although the statute by its terms is limited to voting rather than eligibility to run for office, it confirms that where a person votes is enormously important in the domicile analysis.

This court has given little weight to a person's voter registration or voting history only when a person's acts appear to be self-serving subterfuge rather than a genuine effort to participate in civic life. *See Volmer v. Volmer*, 231 Or 57, 60, 371 P2d 70 (1962) (giving little weight to wife's act of registering to vote in Oregon where she registered just a day after filing her complaint for divorce); *Miller v. Miller*, 67 Or 359, 366–67, 136 P 15 (1913) (concluding that defendant's voting history in Idaho was "of no consequence" in a divorce case, because he had registered to vote in Oregon and his act appeared to be a self-serving declaration to avoid being domiciled in Oregon). Here, there is no reason to believe that plaintiff's acts between 2000 and 2020 were self-serving or anything other than a genuine expression of civic participation.

Plaintiff's claim that he registered to vote in New York only for convenience does not cut against finding that he was domiciled in New York. (App-29–30). On the contrary, it further proves that he considered New York to be his primary residence: In a sworn affidavit, plaintiff stated that New York

was more convenient because he expected that he would be there during elections. (App-29–30).

Furthermore, plaintiff's statement about voting convenience makes little sense. Oregon has had mail-in voting for over 20 years. *See generally* Secretary of State, *Voting in Oregon*, *available at* https://sos.oregon.gov/voting/pages/voteinor.aspx (accessed Jan 14, 2021). And Oregon voters can easily receive their ballot anywhere in the world by making a request at www.oregonvotes.gov. Plaintiff's affidavit noted that he completed and mailed his 2020 New York absentee ballot while physically in Yamhill. (App-31). It would have been just as convenient, if not more convenient, to vote by mail in Oregon from his Yamhill home where Yamhill County voters were considering important issues. But he did not, because he was domiciled in New York.

c. Plaintiff obtained and maintained a driver's license in New York.

Plaintiff also acquired a New York driver's license and did not maintain his Oregon one. (App-29, 71, 107, 127). Although maintaining a driver's license is not dispositive proof of an intent to treat the issuing state as a domicile, courts often consider it a relevant factor in discerning a person's intent. Indeed, this court has recognized that failing to obtain licenses in a new community reflects poorly on a person's claim to be domiciled there:

> Another evidence of failure to perform the duties of a citizen in the community where a new domicil is asserted is the neglect of the claimant, wilful or otherwise, to secure such licenses as are ordinarily required of residents by the state of his new 'home'. Among these are automobile licenses, licenses to operate motor vehicles and licenses or permits to carry on the kind of business in which he claims to have been engaged.

Elwert, 196 Or at 269–70, 278; *see also Doyle*, 17 Or App at 532–33 (concluding that defendant was not domiciled in Oregon, in part, because he acquired a California license during the relevant time period).

Notably, plaintiff need not have obtained a New York license in the first place if he viewed his domicile as Oregon. In New York, a nonresident may operate or drive a motor vehicle *without* being licensed in that state if licensed elsewhere. *See* NY Veh & Traf Law § 250(2). The only reason for a person to obtain a New York driver's license is if they consider themselves a New York resident—that is, a person who intends to be domiciled in New York. *See* NY Veh & Traf Law § 250(2) (requiring that nonresidents obtain license within 30 days of establishing residency); *see also id.* § 250(5) (providing "the term 'resident' shall mean domiciliary, that is, one who lives in this state with the intention of making it a fixed and permanent abode"). In that circumstance, a person would need to obtain a driver's license and maintain it regularly. Hence, although plaintiff might not have intended to treat New York as his domicile when he first arrived there, his decision to obtain a New York driver's license in

the early 2000s objectively demonstrates an intent to make New York his domicile.

d. Plaintiff's tax history is consistent with a New York domicile.

Under Oregon law, a person is a "resident" in a tax year for income tax purposes if (1) the person is "domiciled" in Oregon and either has a permanent abode or spends at least 30 days here or (2) if the person is not domiciled in Oregon but has a permanent abode and spends more than 200 days here. ORS 316.027. A person is a "part-year resident" if the person "changes status during a year from resident to nonresident or from nonresident to resident." ORS 316.022(5).

Here, the facts that plaintiff provided to the Elections Division did *not* show that he filed Oregon income tax returns between 1999 and 2018. He paid income taxes in New York between 1999 and 2020, and he filed Oregon income tax returns in 2019 and 2020, although he did not specify his filing status. (App-31, 71, 107). Those facts further suggests that plaintiff was domiciled in New York, not Oregon. *See Elwert*, 196 Or at 269 (failure to pay taxes in the place where a person claims domicile suggests that the person is not domiciled there). Plaintiff has a farm and stated that he spent most summers here between 1999 and 2018. If he had claimed Oregon domicile during those years, he would have been deemed a resident for tax purposes and would have

paid Oregon income taxes. *See* ORS 316.027. But plaintiff's affidavit stated that he filed Oregon income tax returns beginning in 2019. (App-31). That suggests (contrary to plaintiff's argument here) that he did not consider himself a domiciliary of Oregon at least between 1999 and 2018.

Although plaintiff made assertions about his 2019 and 2020 income taxes in his submission to the Elections Division, he offered no information other than the fact that he filed returns in both Oregon *and* New York to reflect an "increased expenditure of time and money in Oregon." (App-31). That information did not reveal anything about his Oregon or New York residency for income tax purposes, *i.e.*, whether he filed as resident, nonresident, or part-year resident. Thus, the information that plaintiff provided demonstrated that, for almost twenty years, plaintiff paid income taxes only in New York and it was not until 2019 that he also filed in Oregon. On balance, that information points to a New York domicile.

Plaintiff now discloses in his opening brief that he "did in fact file Oregon income taxes as a part-year resident in 2019 and a full-year resident in 2020." (Op Br 14). That information is not in the record and not supported by any other documentary evidence. Regardless, the new information does not change the analysis, for several reasons:

- Plaintiff still has not disclosed the dates that he claimed to be an Oregon resident in 2019. Part-year-resident status

alone does not show that he became an Oregon resident before November 2019, when the required residency period began.

- Even if he did become an Oregon resident before the required period, plaintiff still might not have been *domiciled* here during 2019 and 2020. A person can be an Oregon resident for tax purposes without establishing domicile. ORS 316.027(1)(a)(B).

- Plaintiff disclosed no information about his New York filing status for the relevant years.

- Plaintiff did not disclose whether he amended his 2019 or 2020 tax filings.

Plaintiff complains that the Elections Division should have asked specifically to see his tax returns (Op Br 14), but he misunderstands how the Elections Division carries out its duty to ensure that candidates are qualified for the offices they seek. The Elections Division "typically determine[s] whether candidates meet residency requirements by checking their voter registration records." (App-9). Because plaintiff's voter records did not show that he was an Oregon resident as of November 2019, the Elections Division invited him to provide "any documentation or explanation" showing that he met the residency

requirement. (App-10). The purpose of that broad request was to allow plaintiff to present the most helpful information. The Elections Division reasonably assumed that plaintiff, who was represented by experienced and sophisticated counsel, would submit anything that was helpful to his case.

Plaintiff's conduct before and after the Elections Division's determination reinforces the reasonableness of that assumption. Plaintiff did not ask the Elections Division what documents or information might be helpful. Plaintiff raised the issue of taxes but, as explained above, did not choose to provide relevant documentation. Even after the Elections Division made its determination and explained its reasoning, plaintiff did not provide key supporting documents to the Elections Division or to the court. Under those circumstances, it is reasonable to assume that plaintiff has provided everything in support of his claim to residency.[10]

[10] It would be particularly harmful to local elections officials in Oregon's 36 counties if this court were to require filing officers to seek out information as plaintiff appears to suggest. It is important that every candidate receive an opportunity to address questions concerning residency. But local elections officials regularly make residency determinations for hundreds of candidates throughout the state each year; it would be impossible for them to anticipate and request every piece of information that assists every candidate to make their case.

e. Plaintiff's references to Oregon as "home" do not overcome the compelling evidence indicating a New York domicile.

Plaintiff's statements that he subjectively identified Oregon as "home" do not outweigh the objective indicia discussed above. Contrary to his assertion, the Elections Division does not—and should not—automatically presume that a person is a resident of the place or places that the person considers to be home, particularly where there is powerful evidence pointing to a different domicile. (Op Br 2, 12). Instead, the Elections Division appropriately assesses the evidence as a whole.

When a person's declarations about what place he or she identifies as "home" do not match the person's objective actions, the declarations merit little weight. *See Elwert*, 196 Or at 269 ("[O]ne who has resided and carried on business for years in one jurisdiction cannot for his own purposes insist that his domicil is in another"). Moreover, a person can maintain a "floating intention" to return to a former domicile while still acquiring a new domicile elsewhere. *Gilbert v. David*, 235 US 561, 569, 35 S Ct 164, 59 L Ed 360 (1915). Plaintiff thus places far too much weight on his own declarations and writings and too little on the objective facts: where he chose to live, work, enroll his children in school, vote, obtain a driver's license, and pay his taxes.

In any event, plaintiff's declarations and writings add little to the analysis. It is commonplace for a person to call the place where they spent time

as a youth growing up their "home," or to plan to return there some day and reestablish a domicile. That does not make it the person's present domicile. The selected statements that plaintiff submitted to the Elections Division (App-32–33) may show that he regarded Oregon as his "home" in the loose sense of that term. They do not show that it was his legal domicile.[11] *See Pickering*, 48 Or at 515 (stating that it is "not necessary to cite authorities or enter into an argument" to know that "the word 'home' is very frequently used with reference to a place other than the legal and permanent domicile").

The Elections Division did not overlook plaintiff's subjective beliefs about where he feels at "home." But plaintiff's objective conduct contradicts plaintiff's declarations, and that conduct was compelling evidence of his intent to establish New York, not Oregon, as his domicile during the relevant time

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[11] Although it is unnecessary for this court to go outside the material submitted to the Elections Division to recognize the limited value of plaintiff's carefully selected quotations, the public record establishes that plaintiff made other, contradictory statements as well. *See, e.g.*, Michael Alberty, *Oregon Wine, Cider Scene Gains a Power Couple: Pulitzer Winners Nicholas Kristof, Sheryl WuDunn*, The Oregonian (Oct 10, 2019), *available at* https://www.oregonlive.com/life-and-culture/g66l-2019/10/a4191f37f34775/oregon-wine-cider-scene-gains-a-power-couple-pulitzer-winners-nicholas-kristof-sheryl-wudunn.html (quoting plaintiff as saying, about the conversion of his cherry orchard to a vineyard, "it has been a challenge to manage all of this while living 3,000 miles away"); Nicholas D. Kristof & Sheryl WuDunn, *Tightrope* 11 (2020) (noting that WuDunn "has been visiting Yamhill ever since our engagement").

period. Plaintiff's actions demonstrate that, for close to twenty years, he centered his personal, professional, and civic life in New York.

3. Plaintiff did not abandon his domicile in New York until December 2020 at the earliest.

Because plaintiff was most recently domiciled in New York, he can claim domicile in Oregon only if he can demonstrate that he abandoned his domicile in New York before November 8, 2019—three years before the 2022 gubernatorial election. *Pickering*, 48 Or at 505 ("[T]he burden of proof is upon the party who asserts the change."). Plaintiff does not claim to have reestablished his Oregon domicile before November 8, 2019; instead, he claims that he has always been domiciled in Oregon.

In any event, the facts would not support a finding that he abandoned his New York domicile before November 8, 2019. He did not register as an Oregon voter until December 2020, and, in fact, he voted in New York as recently as November 2020. (App-29–31, 98). He also maintained his New York driver's license until 2020. (App-71, 98, 107). Although plaintiff began spending more time in Oregon starting in 2018 or 2019 to research and write his book *Tightrope* and expand the farm operations, the record does not disclose how much more time he spent in Oregon during that time compared to New York. (App-30). And as previously noted, his tax information did not establish residency. Thus, the earliest time that the facts might establish plaintiff's intent

to abandon his domicile in New York and to reestablish it in Oregon was in late 2020. That is not even close to enough to satisfy the three-year residency requirement under Article V, section 2.

C. Article V, section 2, does not violate the Equal Protection Clause.

Finally, plaintiff argues that Article V, section 2, violates his right to equal protection under the Fourteenth Amendment. But the right to run for office is not fundamental and thus does not trigger strict scrutiny. Accordingly, because Article V, section 2's residency requirement rationally serves important governmental interests, it comports with equal protection.

The right to run for public office is not a fundamental right. *Clements v. Fashing*, 457 US 957, 963, 965–66, 102 S Ct 2836, 73 L Ed 2d 508 (1982) (plurality opinion) (observing that there is no fundamental right to candidacy or officeholding); *see id.* at 975 (Stevens, J., concurring in part and concurring in judgment) (agreeing that a Texas law making ineligible from the state legislature a set of officeholders already in office does not violate equal protection or trigger heightened scrutiny); *Bullock v. Carter*, 405 US 134, 143, 92 S Ct 849, 31 L Ed 2d 92 (1972) (explaining that a restriction that limits the field of candidates from which voters can choose "does not of itself compel close scrutiny"); *Clayton v. Kiffmeyer*, 688 NW2d 117, 127 (Minn 2004) (observing that the United States Supreme Court had not recognized the right to candidacy as a fundamental right).

Because the right to candidacy is not a fundamental right, heightened scrutiny does not automatically apply. Rather, courts apply greater scrutiny only if the restriction has a "real and appreciable impact" on the right to vote. *Bullock*, 405 US at 144. If the restriction has no such impact and is not "severe"—that is, if it is reasonable and politically neutral—rational-basis review applies. *Burdick v. Takushi*, 504 US 428, 434, 112 S Ct 2059, 119 L Ed 2d 245 (1992). Article V, section 2, is a longstanding, political neutral rule for gubernatorial qualifications similar to that in many other constitutions. *See, e.g.*, US Const, Art II, § 1 (The President must have "been fourteen Years a Resident within the United States."). It neither imposes a severe burden nor makes an invidious classification. And it does not significantly limit the number of people who can run for governor in Oregon. Rational-basis review applies.

A three-year residency requirement for Governor is rationally related to the interest in ensuring that officeholders know Oregon and have a stake in Oregon's civic life. It also permits voters to observe the character, experience, and views of the people who seek to represent them. Those are longstanding, legitimate government interests, and Article V, section 2's residency requirement is rationally related to them. *See Clayton*, 688 NW2d at 132 (concluding that a residency requirement for judges does not violate equal protection); *Mobley v. Armstrong*, 978 SW2d 307, 309 (Ky 1998) (same).

In arguing to the contrary, plaintiff relies on two isolated district court opinions from New Jersey—*Callaway v. Samson*, 193 F Supp 2d 783 (DNJ 2002) and *Robertson v. Bartels*, 890 F Supp 2d 519 (DNJ 2012). (Op Br 48–50). But neither case is germane, let alone persuasive. *Callaway* invalidated a New Jersey law barring a candidate from running for office in a ward of Atlantic City because, although he had lived in the city his whole life, he resided several blocks outside the particular ward that he sought to represent. 193 F Supp at 784–85, 789. *Robertson* invalidated a New Jersey law requiring state assembly members to have lived in their districts for a year, noting that its decision turned on the "much smaller geographical dimensions" of local districts, not statewide officeholder eligibility. 890 F Supp 2d at 523; *id.* at 530 (quoting earlier decision on the same issue in *Robertson v. Bartels*, 150 F Supp 2d 691 (DNJ 2001))

Those decisions are not necessarily correct; the New Jersey Supreme Court expressly repudiated the analysis in *Robertson*. *See In re Contest of November 8, 2011 Gen. Election of Office of New Jersey Gen. Assembly*, 40 A3d 684, 704 (NJ 2012) (disagreeing with *Robertson* and concluding that a one-year durational residency requirement for membership in the General Assembly did not violate equal protection). But right or wrong, they have no application here. Plaintiff does not assert a claim protecting his right to

intrastate travel, as in *Callaway*. And *Robertson*'s reasoning was expressly confined to eligibility for local, not statewide, office. 890 F Supp 2d at 523.

The greater weight of authority is that residency requirements for statewide offices like that in Article V, section 2, do not violate equal protection. *See, e.g.*, *Chimento v. Stark*, 353 F Supp 1211, 1217 (DNH 1973), *aff'd*, 414 US 802, 94 S Ct 125, 38 L Ed 2d 39 (1973) (upholding seven-year residency requirement for Governor); *Sununu v. Stark*, 383 F Supp 1287, 1292 (DNH 1974), *aff'd*, 420 US 958, 95 S Ct 1346, 43 L Ed 2d 435 (1975) (same for state senator);[12] *Cox v. Barber*, 275 Ga 415, 418, 568 SE2d 478 (2002) (per curiam) (same for 12-month residency requirement for public service commission); *Mobley*, 978 SW2d at 309 (same for two-year residency requirement for judgeship). Plaintiff offers no reason to depart from that settled consensus here.

Finally, the Elections Division's determination will not "disfavor[] candidates who, like plaintiff, frequently travel abroad, maintain multiple residences, and/or have strong ties both in Oregon and elsewhere." (Op Br 51 n

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[12] Both *Chimento* and *Sununu* were affirmed summarily without opinion on direct appeal from the three-judge district court panels that issued those opinions. *Chimento*, 414 US at 802; *Sununu*, 420 US at 958. Summary affirmances are precedent for "the precise issues presented and necessarily decided" by the judgment below. *Mandel v. Bradley*, 432 US 173, 176, 97 S Ct 2238, 53 L Ed 2d 199 (1977) (per curiam).

11). Article V, section 2's residency requirement does not prevent anyone, including gubernatorial candidates, from traveling abroad, spending time in other states, or developing strong ties to other places. It requires only that a person seeking the governorship choose to domicile in Oregon and act consistently with that choice for at least three years before an election. A person domiciled in Oregon may travel to, spend time in, and even develop or maintain connections to many other places. What matters for Article V, section 2, purposes is a person's choice of domicile, not a person's choice to travel or maintain connections elsewhere.

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CONCLUSION

This court should deny plaintiff's petition for writ of mandamus, and it should dismiss the alternative writ.

Respectfully submitted,

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DEFENDANT'S APPENDIX

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 20, 2022, I directed the original Defendant's Answering Brief 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, by using the court's electronic filing system.

I further certify that on January 20, 2022, I directed the Defendant's Answering Brief to be served upon Jeremy A. Carp, attorney for realtor, by mailing two copies with postage prepaid, in an envelope addressed to:

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Continued…

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 13,971 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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