IN THE SUPREME COURT FOR THE STATE OF OREGON

State ex rel NICHOLAS KRISTOF, Plaintiff-Relator, v. SHEMIA FAGAN, Secretary of State of the State of Oregon, Defendant.	Supreme Court No. S069165 MANDAMUS PROCEEDING

RELATOR NICHOLAS KRISTOF'S REPLY BRIEF

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INTRODUCTION

People's domestic lives and relationships to "home" are complicated. Consider these examples. A teenager lives with dad during the week and mom on weekends. A fishing-boat captain lives in Alaska from March through October and otherwise in Oregon; she has houses in both places. A congressperson works in Washington, D.C., and travels regularly to her home district. A business executive is promoted to run a division in London; the family returns home each summer. A retiree spends winter months in Florida. A family experiencing housing-insecurity moves between apartments and motels; their "permanent address" is a grandparent's home. A doctoral student divides time between school, parents, and a field-research location. Where do these people receive mail? Pay taxes? Vote? Hold driver's licenses? Send kids to school? Invariably, these supposed indicia of residency will point in different directions.

The Secretary of State imagines a world simpler than it is. In this imagined world, each person has the privilege of one address to which objective evidence uniformly points as a fixed place of habitation. According to the Secretary, that is a person's "residence" for all purposes under the Oregon Constitution, whether for holding office or voting. But the Secretary's view reflects neither how people actually live, nor what the Oregon Constitution requires.

Like fishers, congresspeople, snowbirds, and others, Nicholas Kristof has lived in more than one place for decades. But the Secretary ignores these facts

and fails to grapple meaningfully with the real question presented here: whether someone who was raised and has lived part-time in the state for decades is a "resident" of Oregon under Article V, section 2, of the state constitution. Rather than account for the complexity of the lives of real people, including Kristof, the Secretary takes a facile view of the legal doctrine and factual record—asserting that Kristof "lived in New York" despite both contemporaneous and sworn statements that he lived in both places.

The Oregon Constitution has room enough to accommodate the lives of real people like Kristof. He has been a resident of the state for many years, his ties to Oregon are deep and abiding, and voters—not elections officials—should decide his suitability to be Governor.

ARGUMENT

A. The framers of Article V, section 2, did not mean "domicile" when they wrote "resident."

The text and historical circumstances underlying the adoption of Article V, section 2, evidence that "resident" does not mean "domicile." In urging this Court to find otherwise, the Secretary focuses on cherry-picked dictionary definitions and the importance assigned to durational residency rules by delegates to the Oregon Constitutional Convention. But neither the cited definitions nor the delegates' insistence on a residency requirement provide meaningful support for the Secretary's argument that the attorney-framers of Oregon's constitution meant "domicile" when they wrote "resident."

The Secretary attempts to use dictionary definitions of "resident" to prove that "resident" means "domicile." But no definition of "resident" can prove the tautology that "resident" means *resident*. Any definition will only show that "resident" was related to or capable of description by other words. This does little to illuminate the drafters' intent. Moreover, the main dictionary cited by the Secretary does not even define a "resident" as one who is "domiciled" in a place; rather, it defines a "resident" as "one who resides or dwells in a place." (Resp Br 16.) To reach her desired result, the Secretary is forced to further define select words from her primary definition, and even then, she is left with a perplexing result: "resident" means "permanent resident." (*Id.*) Other dictionaries of the era also omit any mention of domicile. *See* Noah Webster, *An America Dictionary of the English Language* 943 (1857) (defining "resident" as "[d]welling or having an abode in a place for a continuance of time, but not definite"); John Boag, 1 *Imperial Lexicon of the English Language* 351 (1850) (same).

The definitions from two legal dictionaries cited by the Secretary fare no better, offering multiple potential meanings, including "habitation" and, again, "permanent resident." (Resp Br 16.) Interestingly, the Secretary omits a portion of the definition in Bouvier's legal dictionary providing that "intent" is "essential" in determining where a person resides. John Bouvier, 2 *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 468 (6th ed. 1856). And the Secretary cites the definition of "residence," not

"resident," in Burrill's legal dictionary, likely because Burrill makes no mention of domicile when defining "resident." *See* Alexander M. Burrill, 2 *A Law Dictionary and Glossary* 413 (1851) (defining "resident" as "[o]ne who has a seat or settlement in a place; one who dwells, abides or lies in a place").

The Secretary also offers little response to pre-1859 authorities showing that residence and domicile were often distinguished in practice. *See, e.g.*, *Jones v. McMaster*, 61 US 8, 10 (1857) (holding that "a domicil implies and presupposes a residence," but residence alone "does not constitute a domicil"); *The Amistad*, 40 US 518, 562 (1841) ("[A] former domicil is not abandoned by residence [elsewhere]."); *Mitchell v. United States*, 88 US 350, 353 (1874) (identifying "residence" as one element of "domicile"). Indeed, the best evidence of whether the framers recognized this distinction is the Indiana case of *French v. Lighty*, 9 Ind 475 (1857)—a case that expressly distinguishes the two concepts. Likewise, the 1848 law establishing a government for the Oregon Territory distinguished "residence" from "domicile." It provided that "a resident" could vote or hold office, but it excluded military service-members residing in the territory who did not have a "permanent domicile" here for at least six months. An Act to Establish the Territorial Government of Oregon, 9 Stat 323, § 5 (1848). The statute, like other legal texts of which the drafters would have been aware, used "residence" as a category distinct from and broader than "domicile."

The common law distinction between residence and domicile explains why

the Secretary can cite no early Oregon case to support her position. To the contrary, she asks the Court to infer that the concepts were necessarily treated as interchangeable based on a single citation in *Lee v. Simonds*, 1 Or 158 (1854). But the case cited by *Lee*—*Thorndike v. City of Boston*, 42 Mass 242 (1840)—expressly recognized the distinction between residence and domicile. *Thorndike*, 42 Mass at 245 (observing that "residence, inhabitancy [and] domicil" are related but "not in all respects precisely the same"). And *Lee* itself does not hold that a person can be a "resident" of only one place—the hallmark of domicile—but rather that the plaintiff was not a "resident" because he quite literally had no home in Oregon. 1 Or at 160. The distinction between residence and domicile is confirmed by this Court's later cases. *See, e.g.*, *Pickering v. Winch*, 48 Or 500, 504, 87 P 763 (1906) ("[Domicile] is not in a legal sense synonymous with 'residence.'"); *Zimmerman v. Zimmerman*, 175 Or 585, 590, 155 P2d 293 (1945) ("At common law, residence and domicile are not synonymous.").

Early out-of-state authorities cited by the Secretary also do not support her position. The only pre-1859 case she cites, *Hinds v Hinds*, 1 Iowa 36 (1855), concerned whether "resident," as used in Iowa's divorce statute, required an "intention" to make the state one's home or whether a transient presence would suffice; it did not hold that residence and domicile are always interchangeable. 1 Iowa at 38-49; *accord Root v. Tooney*, 841 NW2d 83, 91-92 (Iowa 2013) (limiting the *Hinds* interpretation of "resident" to the statute at issue in *Hinds*).

Similarly, *Chase v. Miller*, 41 Pa 403 (1862), does not stand for the general proposition that residence and domicile are synonymous, only that they were intended to be synonymous "as used in the [Pennsylvania] constitution." 41 Pa at 420. And contemporaneous state constitutions expressly distinguish between residence and domicile.[1] The last case cited by the Secretary, *Yonkey v. State*, 27 Ind 236 (1866), likewise recognizes the distinction between domicile and residence, noting that one who "leaves his place of residence" with an intent to return "does not thereby lose his domicile." 27 Ind at 245.

To overcome the dearth of early Oregon and out-of-state authorities holding that "resident" means "domicile," the Secretary cites the debates of the Constitutional Convention. But her discussion proves an unremarkable and self-evident proposition: that the framers were determined to include a durational residency requirement, even if it would exclude some people from office. This again begs the question of whether the framers meant "domicile" when they wrote "resident." As to that point, the Secretary cannot cite a single instance in which "domicile" was used while delegates debated the various residency requirements in the Oregon Constitution—a strange omission if the term was, in fact, used interchangeably with "resident." And the policy objectives of a residency requirement—to exclude "strangers" who were unfamiliar with the

[1] *E.g.*, Fla Const, Art VI, § 1 (1838); La Const, Art XXII (1879); Miss Const, Art XI, § 234 (1890).

state—are not uniquely served by a domicile standard.[2]

B. The Secretary's proposed domicile standard is arbitrary and harder to administer than alternatives.

The Secretary says that her proposed legal standard is more easily administered than alternatives. It is unclear why. For individuals with indeterminate residences, the doctrine of domicile requires a multivariate weighing of evidence. In contrast, Kristof proposes that the best evidence of residence is (1) a person's attestation about where they live and consider to be home, and (2) corroborating facts. Not only is this standard easily administered but, according to three former secretaries, it is the standard that has governed residency determinations in the past. (App 75-77.) Indeed, the disposition of residency challenges for Wes Cooley and, ultimately, for Bill Wyatt deferred to the candidates' attestations and testimony. (*Id.* at 5-6, 117.) Other jurisdictions likewise defer to individuals' own choices in making residency determinations. *See Maas v. Gaebel*, 9 NYS3d 701, 703-05 (NY App Div 2015). That is the most fair-minded approach—county clerks should not interrogate snowbirds, college students, houseless individuals, and migrant workers who are registering to vote about proof of their domicile; they should accept good-faith and well-founded

[2] Although the Secretary questions whether the original policy aims of a residency requirement were truly to exclude those who were "strangers" and did not "know something of the state," (Resp Br 23), the quoted language is taken directly from the historical record. *Constitutional Convention*, Oregon Argus (Sept 12, 1857).

attestations that *this is the place I consider to be home*.[3]

An alarming suggestion underlies the Secretary's argument. Though she has said that residency is "not a high bar," (Supp App 28), she now suggests that elections officials should have a muscular role in smoking out and disqualifying supposed nonresidents. At a time when canards of voter fraud provoke searches for imagined ineligible registrants, the Secretary would license county officials to disqualify voters and candidates who are acting based on good-faith, well-founded beliefs about their residency.

C. The Secretary ignores both facts and precedents demonstrating that Kristof retained his Oregon domicile.

Kristof readily satisfies the domicile standard applied in error by the Secretary. In reaching a contrary conclusion, the Secretary focuses myopically on Kristof's ties to New York while avoiding the facts most relevant to this case: *Kristof's ties to Oregon*. She also fails to address a line of pre-1859 precedents that offer the best evidence of how the drafters of Article V, section 2, would have applied a domicile standard to Kristof. These early domicile cases demonstrate that Kristof's deep and enduring ties to Oregon are controlling.

The burden was on the Secretary to prove that Kristof "indicat[ed] and carr[ied] into effect an intention to abandon" his Oregon domicile. *Pickering*, 48

[3] Even if a domicile standard were more easily administered (it is not), it is unclear why this consideration should be dispositive. County officials apply complex legal standards and exercise judgment all the time. Administrative convenience is no reason to sacrifice constitutional rights.

Or at 505. What's more, the Secretary was required to consider the "whole taken together"—not just facts confirming her position. *Id.* (quoting *Thorndike*, 42 Mass at 242). But the Secretary's analysis fails to credit the substantial evidence that Kristof maintained deep and enduring ties to his Oregon farm. She makes no mention of the home Kristof built for his family on the farm; the nearby properties that he has long owned, improved, and paid taxes on; the decades of writings in which he has identified the farm as his home; the many periods during which he has lived and worked on the farm; his hiring and oversight of staff; the years he devoted to replanting the farm's crops; his leasing the farm; and the years he spent writing a book about Oregon while living on the farm. None of these facts evidence an intent for Kristof to abandon his Oregon domicile; to the contrary, they corroborate his unwavering view that the farm was and remains his home.

Moreover, many of the facts on which the Secretary does rely are far less probative of Kristof's intent than those she ignores or dismisses.[4] The quality of

[4] The Secretary says items like income taxes were dispositive of her decision, despite not having requested information about them. She rationalizes this game of cat-and-mouse by referring to a statement by Kristof's counsel that Kristof would not have "much more information" than what was available publicly. Setting aside the inappropriateness of relying on a nonspecific statement like that, Kristof categorically denies that his counsel said it. (*See* App 1-2 (summarizing the conversation).) In that conversation, the Elections Division representative said it planned to work with DOJ to formulate a series of specific questions, but the only specific issue identified in the December 21 inquiry was Kristof's voting history. Kristof objects to and moves to strike the Declaration of Lydia Plukchi as it contains hearsay, irrelevant information, and information previously unavailable to Kristof. *See* OEC 802, 402, 403.

a person's ties to their original domicile are highly probative of whether the person intends to abandon that domicile. The Secretary, however, pays little attention to the nature of Kristof's ongoing ties to Oregon or his farm. Instead, she places dispositive weight on infrequent ministerial acts, like applying for a driver's license, filing taxes, or changing voter registration, each of which involve little more than filling out paperwork. But it is difficult to imagine that these ministerial acts reveal more about Kristof's intent—or better serve the original policy aims of the residency requirement—than his decades of maintaining a home on his farm, religiously spending summers on the farm, managing the farm, transitioning crops on the farm, or writing an entire book about the struggles of those living near the farm. This disregard for Kristof's lived experience further undermines the Secretary's analysis.

Nothing captures this problem more vividly than the Secretary's treatment of the two years that Kristof spent writing the book *Tightrope*. Kristof lived and worked on his farm for much of 2018 and 2019 while writing the book. (App 30.) In it, Kristof examines the social and economic challenges facing Oregonians, drawing on extensive in-person interviews with friends, acquaintances, and other Oregonians whom Kristof has known for decades. (*Id.*) And yet, the Secretary uses Kristof's work on *Tightrope* as evidence that he was not *truly* living in Oregon during that time—the implication being that he was physically present, but his mind and work were elsewhere. She misses the point entirely: *Tightrope*

was a book *researched in Oregon, written in Oregon, and about Oregon*. It required Kristof to draw on his lifetime of personal connections, experiences, and knowledge of the state, to say nothing of the hundreds of hours spent talking to members of his community and becoming intimately familiar with the roots of their struggles. Surely this is not the "stranger" feared by the framers. (Opening Br 21-24.) For the Secretary to use *Tightrope* as evidence that Kristof was not *truly* living in Oregon in 2018 and 2019 is simply unsupportable.

The Secretary also fails to address the closely analogous cases of *Smith v. Croom*, 7 Fla 81 (1857), and *Succession of Franklin*, 7 La Ann 395 (1852). A cursory review of the facts and holdings of those cases—discussed at length in Kristof's opening brief—makes clear why she avoids them.

In both cases, the party in question had moved away from their original state of domicile after finishing school; lived the vast majority of their remaining life in a different state; voted in the other state; owned a home and properties in the other state; worked in the other state; listed the other state as their home in "notarial" documents; and spent as little as "a few days" each year in their original state of domicile. (Opening Br 42-46.) And in both cases, the court held that these facts could not overcome the "overwhelming presumption" that the parties retained their original domiciles because each had returned to their home state annually—even if just for "a few days"—and often described the state as "home." *Smith* and *Succession of Franklin*, as well as this Court's later decision

in *Pickering*, leave no doubt that Kristof retained his Oregon domicile. With no pre-1859 Oregon case on point, *Smith* and *Succession of Franklin* offer the best evidence of how the framers would have applied the domicile doctrine to Kristof. The Secretary's failure to address them is telling.[5]

Finally, the Secretary attempts to overcome these shortcomings by placing dispositive weight on Kristof's voting history.[6] In doing so, she conflates the question of whether New York law allowed Kristof to vote in the state with the question of whether Kristof intended to keep Oregon as his home. As New York courts have made clear, a person may vote in New York if they hold a "legitimate" residence in the state. *Maas*, 9 NYS3d at 705. A voter is *not* required to have a "year-round permanent home" in New York or "more significant contacts to [New York] than any other."[7] *Id*. Although the Secretary claims that "New York law does not allow a person to vote at a 'vacation home' while at the same time claiming to be domiciled elsewhere," (Resp Br 41), that is precisely

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[5] Although the Secretary leans heavily on modern (largely out-of-state) domicile cases, they are of little relevance to understanding the original meaning of Article V, section 2.

[6] Highlighting vote-by-mail, the Secretary questions Kristof's explanation of registering in New York for convenience. But vote-by-mail was new and unfamiliar when Kristof registered in New York; making registration changes online was not possible until years later.

[7] The Secretary cites New York's statutory definition of residency as proof that Kristof must have been domiciled in New York if he registered to vote there. But statutes are read in light of the cases interpreting them, and a reading of the statute to require registration only at a dual resident's principal home is precisely the interpretation that the New York appellate court rejected in *Maas*.

what it allows. *See id.* (rejecting the trial court's distinction between a "vacation home" and "permanent home"). More to the point, New York election law answers only the question of whether a person whose primary home is in Oregon may vote in New York: they may. But it does not help to discern a person's *intention* with respect to their Oregon home—the key question under Oregon law. The Secretary confuses the two points when she looks to New York statutes for answers to a question of Oregon law.[8]

D. The rule proposed by the Secretary is not narrowly tailored to the state's interests.

Article V, section 2, burdens the constitutional rights of equal protection and voting, to interstate travel, and to run for office. The controlling constitutional test—strict scrutiny—demands that the durational residency rule be interpreted narrowly so it is tailored to the rule's purposes and minimally intrudes on constitutional rights.

The Secretary responds that because fundamental rights are not at issue, rational basis review, not strict scrutiny, is the operative test. But the fundamental rights of voting and interstate movement *are* at issue. Even the cases relied on by the Secretary do not support her position.

It is true that two cases—*Chimento v. Stark*, 353 F Supp 1211 (DNH),

[8] For similar reasons, two states can tax an individual as their domiciliary because a determination of domicile in one state is not dispositive of the other. *E.g. Dorrance v. Martin*, 12 F Supp 746, 751 (DNJ 1935).

aff'd, 414 US 802 (1973), and *Sununu v.* Stark, 383 F Supp 1287 (DNH 1974), *aff'd*, 420 US 958 (1975)—upheld durational residency rules and were summarily affirmed by the U.S. Supreme Court. But both cases adopt strict scrutiny as the controlling test. *See Chimento*, 353 F Supp at 1214 ("[A]pplication of the 'compelling interest' test is required in this case * * *."); *Sununu*, 383 F Supp at 1290 ("[T]he proper standard of review is the 'compelling state interest' test."). The Ninth Circuit also applies strict scrutiny to durational residency rules for officeholding, stating: "[T]he vast majority of courts which have considered this issue have applied the compelling governmental interest test." *Howlett v. Salish & Kootenai Tribes*, 529 F2d 233, 242 (9th Cir 1976).

If strict scrutiny is the controlling test, what is the compelling interest that justifies a residency rule so broad in effect that it excludes individuals who have lived part-time in Oregon for decades? And how is such a rule narrowly tailored? The Secretary does not say. Those omissions are astonishing and alone may be dispositive. After all, "[u]nder strict scrutiny, *the government has the burden of proving* that [challenged restrictions] 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 US 499, 505 (2005) (emphasis added). The Secretary makes no attempt to meet this standard.

Instead, she puts all eggs in the basket of rational basis review. She does not address the bevy of cases holding that broadly-drawn residency rules for officeholding fail strict scrutiny, including decisions of four state supreme courts

and the Third Circuit. (Opening Br 49 n10 (citing cases).) And she distinguishes two federal district court decisions on immaterial grounds—i.e., that *Callaway v. Samson* is about intrastate (not interstate) travel and that *Robertson v. Bartels* addresses eligibility for local office. But interstate travel is no less a fundamental right, *Shapiro v. Thompson*, 394 US 618, 630 (1969), and the constitutional burdens imposed by durational residency rules are the same regardless of the office a candidate seeks.[9] It makes no sense to distinguish durational residency rules for officeholding on these bases, but not for voting. *Accord Dunn v. Blumstein*, 405 US 330, 335 (1972).

Several courts have upheld durational residency rules for officeholding, as in *Chimento*, *Sununu*, and *Howlett*. That is because—as discussed in Kristof's opening brief—such rules can be constitutional if drawn and applied narrowly. Here, however, the Secretary proposes an overbroad rule that disqualifies someone who by most measures is an Oregon resident. The federal constitution requires an interpretation of Article V, section 2, that conforms closely to its purposes; the Secretary's proposed interpretation—and exclusion of Kristof from the ballot—does not.

CONCLUSION

The Secretary diminishes Kristof's ties to Oregon as mere sentiment by

[9] If anything, the burdens are weightier for statewide offices than local offices because they implicate the voting rights of more people.

creating a false dichotomy: that Kristof's love for Oregon does not mean he lives here. In doing so, she ignores undisputed evidence—including objective, verifiable facts and the sworn statements of third-party witnesses—that Kristof *does* live here. What's more, Kristof does love Oregon—a fact no less significant here than in the probate of Amanda Reed, where central to this Court's analysis was her deep affection for Oregon. *See Pickering*, 48 Or at 513. Accordingly, for the reasons stated above and in his opening brief, Kristof respectfully asks this Court to grant the requested mandamus relief.

Dated: January 26, 2022

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