

# SUPREME COURT

## Media Release



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Case decided February 17, 2022.

*State ex rel Nicholas Kristof v. Shemia Fagan*, (SC S069165)

On a petition for writ of mandamus. The alternative writ of mandamus is dismissed, and the petition for writ of mandamus is denied. Notwithstanding ORAP 9.25(1), the State Court Administrator shall issue the appellate judgment on February 23, 2022, unless a petition for reconsideration is electronically filed by 5:00 pm on February 22, 2022. Notwithstanding ORAP 9.25(2), if a petition for reconsideration is filed, a response to the petition may be electronically filed by 5:00 pm on February 24, 2022. A timely petition for reconsideration shall stay issuance of the appellate judgment until the court acts on the petition. Opinion of the Court Per Curiam. Justices Christopher L. Garrett and Roger J. DeHoog did not participate in the consideration or decision of this case.

Article V, section 2, of the Oregon Constitution requires a candidate for governor to be a "resident within this State" in the "three years next preceding" the election. Today, in a mandamus proceeding initiated by relator Nicholas Kristof, the Oregon Supreme Court held "resident" in Article V, section 2, took its meaning from the legal concept of domicile, that is, the place where a person lives with the intent to remain indefinitely. The Court further held, applying that interpretation of "resident" and under the legal standards that apply in mandamus proceedings, that the Secretary of State had not been compelled to accept relator's candidacy for governor in the upcoming 2022 election, and, therefore, that relator was not entitled to a writ to that effect.

Relator filed a declaration of candidacy for governor with the Secretary of State. The Elections Division reached out to relator's campaign, seeking additional information concerning whether he could satisfy the requirement, contained in Article V, section 2, of the Oregon Constitution, that a governor "have been three years next preceding his election, a resident within this State." Relator responded with a packet of information, including an affidavit from relator detailing his connections to Oregon.

The secretary determined that relator did not satisfy the constitutional residency requirement, concluding that he had been a resident of New York State from the early 2000s until December 2020. In a letter to relator explaining that decision, the Elections Division relied on the facts that relator had been registered to vote in New York from 2000 to December 2020, that he had maintained a New York driver's license over the same period of time, and that he had lived primarily in New York, among other evidence.

Relator then filed a mandamus petition in the Supreme Court, seeking a writ of mandamus directing the secretary to accept his declaration of candidacy. Relator argued that the secretary had construed the constitutional term "resident" too narrowly and that, properly construed, it was possible for a person to be a resident in two places at the same time. In the alternative, he argued that, even under a narrower definition of resident, Oregon was his place of residence. Relator also argued that, should the durational residency requirement in the Oregon Constitution be construed narrowly, it would violate the Equal Protection Clause of the United States Constitution.

In her response, the secretary stated that the Oregon Supreme Court "is the only body that can definitively resolve the constitutional residency question at issue here," and she recommended that the Court issue an alternative writ of mandamus and set an expedited briefing schedule. The Court then issued an alternative writ and received briefing from both parties, as well as several *amici curiae*.

In a unanimous per curiam opinion, the Supreme Court held that relator was not entitled to a peremptory writ of mandamus. The Court first explained that its role was not to evaluate the depth of relator's emotional connection to Oregon or whether he was sufficiently "Oregonian"; rather, the case required the Court to decide two legal questions: "(1) the meaning of 'resident within this State,' as those words are used in Article V, section 2, of the Oregon Constitution; and (2) whether the secretary was required to conclude that relator met that legal standard."

Beginning with the first question, the Court noted that the secretary took the position that "resident," as used in Article V, section 2, referred to the legal concept of domicile. Domicile refers to the place where a person lives with the intent to remain indefinitely, and a person can have only one domicile. Relator argued for a looser standard, contending that a resident is "someone who intends to be at home in Oregon and acts pursuant to that intent" and that a person could be a resident in two places at once.

To determine what the term "resident" meant in Article V, section 2, the Court reviewed legal dictionaries; other uses of related terms in the Oregon Constitution; the history behind the adoption of Article V, section 2; and the legal backdrop against which Article V, section 2, was ratified. The Court explained that uses of the term

"residence" to set a residency requirement for voting in Article II of the Oregon Constitution linked the meaning of that term to domicile. In addition, after examining both case law and treatises, the Court concluded that, "[d]uring the mid-nineteenth century, laws or constitutions that included residency requirements for voting or officeholding were commonplace, and they were overwhelmingly interpreted to require domicile." The Court therefore agreed with the secretary that "resident," as used in Article V, section 2, took its meaning from the legal concept of domicile.

The Court then turned to the application of that standard to this case. The Court observed that, based on statutes and the Court's case law, the Secretary of State has "the responsibility of determining, in the first instance, whether a prospective candidate is qualified to appear on the ballot." The Court further observed that, because domicile requires an intent to remain permanently or indefinitely, "the ultimate legal question of relator's domicile necessarily turns on subsidiary factual findings about relator's intent." Reviewing its own case law about the legal standards that apply when deciding whether issuing a writ of mandamus is appropriate, the Court explained that a writ of mandamus directing a public official to perform an act is appropriate only when a public official is legally obligated to do so. The Court stated that, as a result, its task in this dispute was not to conduct its own assessment of the facts, but to decide whether the record before the secretary compelled a decision in relator's favor.

The Court noted that the secretary had applied the correct legal standard under Article V, section 2, and had relied on evidence that, in prior cases, the Court had treated as probative of a person's intent to indefinitely remain. That evidence included where relator voted, where he maintained a driver's license, the amount of time that he spent in Oregon and New York, and where he paid income taxes. Although the Court recognized that there was evidence that pointed in the other direction, the Court could not conclude that the secretary was compelled to find that relator remained domiciled in Oregon through the early 2000s or that he had regained an Oregon domicile by November 2019, three years before the November 2022 general election.

Finally, the Court turned to relator's argument that the durational residency requirement contained in Article V, section 2, violated the Equal Protection Clause of the United States Constitution. Relator argued that the requirement infringed on the right to vote and the right to interstate travel, and that it could be sustained only if it satisfied strict scrutiny, which in turn required that the requirement be narrowly tailored to a compelling state interest. The Court did not reach the merits of that argument. Without deciding whether strict scrutiny was appropriate, the Court explained that relator's argument turned on whether the durational residency requirement was narrowly tailored to its purposes, a question with a factual component that made it unsuited to the "extraordinary legal remedy of mandamus."

Because the Court concluded that the secretary was not compelled to

conclude that relator satisfied the durational residency requirement, the Court dismissed the alternative writ of mandamus and denied the petition for writ of mandamus.