IN THE SUPREME COURT OF THE STATE OF OREGON

STATE EX REL MARY LEE NELSON, MICHAEL NELSON, JUDY HUFF, SAMUEL JOHNSON, and CHAD SULLIVAN, electors of Oregon, Plaintiffs-Relators, v. LAVONNE GRIFFIN-VALADE, Secretary of State of Oregon, Defendant.	SC S070658 **MANDAMUS PROCEEDING**

MEMORANDUM OF THE SECRETARY OF STATE IN RESPONSE TO PETITION FOR WRIT OF MANDAMUS

DANIEL W. MEEK #791242
Attorney at Law
10266 SW Lancaster Rd.
Portland, Oregon 97219
Telephone: (503) 293-9021
Email: dan@meek.net

JASON LLEWELLYN KAFOURY #091200
Kafoury & McDougal
411 SW Second Ave., Ste. 200
Portland, Oregon 97204
Telephone: (503) 224-2647
Email: jkafoury@kafourymcdougal.com

Attorneys for Plaintiffs-Relators

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: benjamin.gutman@doj.state.or.us

Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

MEMORANDUM OF THE SECRETARY OF STATE IN RESPONSE TO PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

The Secretary of State is responsible for determining which major-party presidential candidates are "generally advocated or [] recognized in national news media" and placing those candidates on the ballot for the presidential preference primary election. ORS 249.078(1)(a). The Secretary has determined that former President Donald Trump's candidacy for the Republican Party nomination is generally recognized in national news media. Consistent with decades of agency practice and advice from the Department of Justice, the Secretary did not determine whether Trump would be qualified to serve as president before placing him on the ballot under ORS 249.078(1)(a).

The Secretary welcomes this court's guidance on whether she correctly understood her responsibility under state law. The Secretary's priority is building trust with Oregonians by maintaining elections processes that are prompt, predictable, and fair. In this case, that means having an accurate May 2024 primary ballot for Oregon voters that includes all the candidates who should be on it. As explained further below, because the primary ballot must be finalized no later than March 21, 2024, this court should expedite its consideration of the case and, to the extent it addresses the legal issues

presented here, proceed directly to decide whether to issue a peremptory writ of mandamus.

BACKGROUND

A. The Secretary's role in the presidential preference primary election

The Secretary of State is ordinarily responsible for determining the qualifications of candidates who will appear on the ballot, including for primary elections. The Secretary is the chief elections officer of the state, ORS 246.110, and may verify the validity of the contents of documents filed with her office, ORS 249.004(1).

In general, a person seeking nomination for office by a major political party must file either a nominating petition or declaration of candidacy stating (among other things) that the person "will qualify if elected." ORS 249.031(1)(f); *see also* ORS 249.020(1) (requiring either a petition or declaration). The Secretary has authority to verify that statement and, if the Secretary determines that "the candidate will not qualify in time for the office if elected," must omit the candidate's name from the printed ballot. ORS 254.165; *see also State ex rel Kristof v. Fagan*, 369 Or 261, 277, 504 P3d 1163 (2022) (explaining Secretary's authority to remove unqualified candidates from the ballot).

But presidential primaries are governed by a separate statutory scheme that sets out a unique process for determining who appears on the ballot.

ORS 249.078(1) provides that the name of a major-party candidate shall be printed on the ballot "only" in one of two ways. The principal way is "[b]y direction of the Secretary of State who in the secretary's sole discretion has determined that the candidate's candidacy is generally advocated or is recognized in national news media." ORS 249.078(1)(a). The alternative way, for candidates not selected by the Secretary, is to submit a nomination petition signed by 1,000 party members in each congressional district. ORS 249.078(1)(b), (2).

The results of that "presidential preference primary," ORS 248.315(1), inform how the major parties select delegates to their national conventions. ORS 248.315(3) requires each party to select convention delegates "so that the number of delegates who favor a certain candidate shall represent the proportion of votes received by the candidate in relation to the other candidates of that party at the presidential preference primary election." Each delegate then must "sign a pledge" that the person will support the candidate the delegate was selected to favor until the candidate is nominated, the candidate receives less than 35 percent of the vote at the convention, the candidate releases the delegate from the pledge, or the convention proceeds to a third ballot. ORS 248.315(3).

B. Proceedings before the Secretary

As the 2024 presidential election approaches, some scholars and advocates have argued that former President Donald Trump is barred from serving as President under Section 3 of the Fourteenth Amendment to the United States Constitution. Section 3 provides in relevant part that no person shall hold any "office, civil or military, under the United States" if the person previously took an oath to support the Constitution as an "officer of the United States" and then "engaged in insurrection or rebellion against the same, or g[a]ve[] aid or comfort to the enemies thereof." Those scholars and advocates have argued that the former President is disqualified from the presidency under Section 3 because of efforts to present a slate of false electors and his role in the events on January 6, 2021, when rioters disrupted Congress while it was meeting to certify the results of the election. Among other things, advocates urged the Secretary not to include the former President on the ballot for the May 2024 presidential preference primary election in Oregon. Meek Decl, exs 1–2.

Based on advice from the Department of Justice, the Secretary declined the advocates' invitation and announced that she would include former President Trump on the upcoming ballot. *See* Press Release, *Secretary of State LaVonne Griffin-Valade Will Not Remove Donald Trump from Presidential Primary Ballot* (Nov 30, 2023), *available at*

https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=180167 (last viewed Dec 12, 2023). The opinion letter from the Department of Justice, which the Secretary released, explained that for decades it had consistently advised the Secretary not to determine the qualifications of presidential primary candidates. Meek Decl, ex 4, at 1, 4. The letter considered whether that advice had been superseded by more recent developments in the law and concluded that it remained sound. *Id.* at 4–5.

The letter addressed only the presidential preference primary ballot and only the principal way of accessing the ballot under ORS 249.078(1)(a). *Id.* at 3 n 1, 5. It declined to address whether the Secretary would have a duty to consider qualifications for a candidate who submitted a nominating petition or what the Secretary should do with respect to the general election ballot. *Id.*

ARGUMENT

A. This court has the discretion to hear this proceeding to resolve a time-sensitive question on a matter of great importance.

Article VII (Amended), section 2, of the Oregon Constitution gives this court discretion to take original jurisdiction in mandamus proceedings. Ordinarily, appeals from the Secretary's election rulings—including the result of the Secretary's review of an initiative for constitutional procedural compliance—are heard in circuit court under ORS 183.484 or ORS 246.910. OAR 165-014-0028(6); *see also State ex rel. Ofsink v. Fagan*, 369 Or 340, 342, 505 P3d 973 (2022) (noting other potential statutory remedies). Thus,

"[g]enerally, a petition for mandamus relief is not the accepted and proper way to secure judicial review of decisions of the Secretary of State under the election laws." *Ofsink*, 369 Or at 342 (quotation marks omitted).

But on rare occasions, when a case presents a novel legal issue of great public importance, and where this court determines that there is no other plain, speedy, and adequate remedy, this court has exercised its discretion to consider the matter in an original-jurisdiction mandamus proceeding. *See, e.g.*, *Kristof*, 369 Or 261 (residency requirement for Governor); *State ex rel. Kotek v. Fagan*, 367 Or 803, 484 P3d 1058 (2021) (redistricting deadlines when census data is delayed); *State ex rel. Sajo v. Paulus*, 297 Or 646, 649, 688 P2d 367 (1984) (qualifications of voters). It does so only where "exceptional circumstances" persuade the court that the issue is "so novel and significant, and that immediate resolution is so imperative," that expedited review by this court is warranted. *Ofsink*, 369 Or at 343.

This case involves novel and significant issues that, because of the election calendar, must be resolved immediately. In particular, whether the Secretary must consider a presidential primary candidate's qualification to serve is a question of Oregon statutory law that has not previously been addressed by any court and could determine whether a frontrunner for the Republican nomination appears on the ballot in Oregon. As in *Kristof*, which involved a frontrunner for the Democratic gubernatorial nomination, this case presents

exceptional circumstances: a serious question about the qualification of a leading candidate to hold one of the country's most important offices.

To be sure, there may be less need for immediate judicial resolution of the question here than there was in *Kristof*. In that case, the Secretary had concluded that the candidate was not qualified and would be omitted from the ballot. Had this court not reviewed that conclusion immediately, there was a risk of erroneously depriving voters of the opportunity to vote for a leading candidate, with no possibility of correcting the error after the primary. Here, the Secretary's conclusion means that former President Trump will appear on the primary ballot. If it turns out that he is not qualified, delegates to the Republican National Convention will still have the opportunity to determine whom to nominate, and the Secretary will have the opportunity to determine whether to place that candidate on the general-election ballot.

If this court exercises its discretion to consider this case, it should limit its review to the state-law question of the Secretary's authority or other threshold legal issues that can be resolved without factual development. The court should not opine on the merits of the Section 3 question, because the merits ultimately turn on factual findings that it would not be appropriate for this court to make in the first instance in a mandamus proceeding. *See Kristof*, 369 Or at 279 (explaining that the court does not conduct its own review of the facts in mandamus proceedings against a state official). If the court concludes

that the Secretary must consider a presidential candidate's qualifications at this stage, the appropriate remedy would be an order directing the Secretary to do so. The Secretary would make any necessary factual findings in the first instance, and if necessary, this court could review those findings in a future mandamus proceeding under the proper standard of review: whether the evidence compelled a contrary decision. *Id.* at 279–80; *see also id.* 282–83 (applying that standard). The court could choose to address purely legal threshold questions such as whether Section 3 is self-executing and whether it applies to the presidency at all—questions that the Secretary has not addressed and does not intend to brief in this case—but it should not decide the ultimate question of whether former President Trump engaged in an insurrection that disqualifies him from election.

If this court exercises its discretion, it also should do so on an expedited basis that accounts for the election schedule. The Secretary must finalize a statement of candidates by March 21, 2024. ORS 254.085. That timeline allows Oregon's 36 county elections offices to design, proofread, and print primary ballots before the April 6 federal deadline to distribute them to military and overseas voters. 52 USC § 20302(a)(8)(A). In determining how quickly to resolve this case, the court also must allow for the possibility of further proceedings before the Secretary and further judicial review of her conclusions in those proceedings.

To expedite matters, the court should consider proceeding directly to decide whether to issue a peremptory writ based on the petition, this response, and any response from the former President's campaign should it move to intervene, rather than issuing an alternative writ and inviting further briefing. *See, e.g.*, *Kotek*, 367 Or at 815 (so doing because "time is of the essence").

B. The Secretary correctly declined to consider former President Trump's qualification to serve as president at this stage.

To help this court resolve the case without further briefing, the Secretary offers the following argument on the threshold question of Oregon law. The Secretary takes no position at this time on any of the substantive Section 3 issues addressed by the petition. Whether Section 3 bars former President Trump from returning to office is a question of paramount importance to American democracy. But as explained below, it is not a question that the legislature has charged the Secretary with determining when assembling a list of candidates at the primary election stage. If the court concludes otherwise, the Secretary should be given the opportunity to make that determination after suitable—and suitably prompt—process.

1. The unique laws governing presidential preference primary elections do not require the Secretary to verify qualifications.

ORS 249.078(1)(a) requires the Secretary to decide only one question before directing that a major-party candidate's name be printed on the ballot for the presidential preference primary election: whether the "candidate's

candidacy is generally advocated or is recognized in national news media." The statute's text does not require the Secretary also to determine the candidate's qualification to hold office.

Context explains why the presidential preference primary is different from every other election in that respect. Unique among Oregon elections, the presidential preference primary does not determine who is elected to office or even who will appear on the general election ballot. Rather, it effectively serves as a straw poll of party members to determine their preferred candidates and to guide the delegates to the party's national convention, who pledge to support a particular candidate until certain events occur. ORS 248.315(3).

This court's ruling in *McCamant v. Olcott*, 80 Or 246, 156 P 1034 (1916), confirms that the presidential preference primary has a unique status under Oregon law and is not necessarily subject to the rules that apply to nominations or traditional elections. Although the wording of the statute has changed, the basic function of the primary remains the same as it was at the time *McCamant* was decided. That case held that the Secretary was required to include Justice Charles Evans Hughes on the Republican primary ballot even though Justice Hughes had asked not to be included and Oregon law normally permitted candidates to refuse a nomination. *Id.* at 247, 254. The court explained that the presidential preference primary election did "not amount to a nomination, but merely to the expression of a preference by a majority of the

voters." *Id.* at 249. Thus, "[t]he preferential vote cast in his favor does not nominate him for President, but is merely advisory to and morally obligatory upon the delegates chosen to represent the party in the national convention." *Id.* at 253. It noted that the voters could achieve the same result through write-in votes for Justice Hughes, so "[p]rinting his name upon the ballot merely enables his supporters to do conveniently and expeditiously what would otherwise cause inconvenience and delay at the polls, and is in line with the primary intent of the act, which is to enable every citizen to express his preference." *Id.* at 254.

Those considerations remain salient under current law. Omitting Trump's name from the ballot would not stop primary voters from casting write-in votes on his behalf. It would, however, exponentially complicate the work of elections officials who had to tally those write-in votes. *See* ORS 254.500 (specifying procedures). Placing his name on the ballot based on his candidacy's national recognition allows primary voters to express their preference more "conveniently and expeditiously." *McCamant*, 80 Or at 254.

2. The statutes authorizing the Secretary to verify candidate filings do not apply because no candidate filing is required.

In arguing to the contrary, petitioners rely on ORS 249.004(1) and 249.031(1)(f), which require declarations of candidacy to include a statement that the candidate will qualify if elected and give the Secretary authority to

verify that filing. Pet 10, 17. Those statutes led this court to hold that, generally, the Secretary has "the responsibility of determining, in the first instance, whether a prospective candidate is qualified to appear on the ballot." *Kristof*, 369 Or at 277–78; *see also McAlmond v. Myers*, *Corbett*, 262 Or 521, 525, 500 P2d 457 (1972) (the authority to verify the validity of 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"). Those statutes also supplied the authority for the Secretary to reject filings by state senators who were disqualified from running for reelection under Measure 113, which is at issue in *Knopp v. Griffin-Valade* (S070456) (pending).

But those statutes do not apply to major-party presidential primary candidates. Rather, ORS 249.078 provides the "only" means for those candidates' names to be printed on the ballot, and for candidates selected under subsection (1)(a) it does not require any candidate filing whatsoever—much less a filing that includes a declaration that the candidate will qualify if elected. There is thus no filing for the Secretary to verify or reject.

That is not an accident. The provision authorizing the Secretary to place candidates on the ballot if their candidacies are "generally advocated or recognized in national news media" dates back to a 1959 law that was codified as *former* ORS 249.368(2)(a). Or Laws 1959, ch 390. Legislative history confirms that the purpose of placing that responsibility on the Secretary was to

ensure that *all* nationally recognized candidates were on the ballot in Oregon even if some might have preferred to skip Oregon and compete elsewhere. Minutes, Senate Committee on Elections and Privileges (SB 280), March 12, 1959, at 1 (statement of Senator Dimick explaining that "the candidates from the other states should be on the Oregon primary ballot").

The Secretary's rules confirm that there is no official candidate filing to verify or reject. The State Candidate Manual, which has the status of an administrative rule, states that "[m]ajor party presidential candidates do not submit a declaration of candidacy." Secretary of State, Elections Division, *State Candidate Manual* 10 (rev 9/2023), *available at* https://sos.oregon.gov/elections/Documents/statecandidates.pdf (visited Dec 12, 2023); OAR 165-010-0005. Petitioners ignore that statement but instead refer to the Secretary's informal practice—not required by the Candidate Manual or any other law—of asking presidential candidates selected under ORS 249.078(1)(a) to file a completed Form SEL 101, which is the usual declaration of candidacy. Pet 11, 15, 17–18. That practice is an administratively convenient way to obtain information useful to the Secretary, including up-to-date contact information for the campaigns and how they would like the candidates' names to appear on the ballot. Meek Decl, Ex 3. But the Secretary's office does not use that form to qualify presidential primary candidates. And while the Secretary might well regard a candidate who

declined to submit such a form (for example, because the candidate had dropped out of the race) as one who no longer had a nationally recognized candidacy for purposes of ORS 249.078(1)(a), submission of the form is not required by the Secretary's rules, much less by the underlying statutes. Because no declaration of candidacy is required, there is no statement of qualification for the Secretary to verify under ORS 249.004(1).

3. ORS 254.165(1) does not apply to the presidential preference primary election.

Petitioners also rely on ORS 254.165(1), which provides in relevant part that if the Secretary "determines that a candidate has died, withdrawn or become disqualified, or that the candidate will not qualify in time for the office if elected, the name of the candidate may not be printed on the ballots." Pet 10–12, 16, 18–19. To the extent that provision is inconsistent with ORS 249.078, however, the latter—as the more specific statute—controls. ORS 174.020(2). ORS 249.078 states explicitly that it sets forth the "only" paths for major-party presidential candidates to appear on the primary ballot. It supersedes other statutes, including ORS 254.165(1), that control access to the primary ballot more generally for other offices.

Context supports that understanding of the statutes. ORS 254.115(1)(c) and (e) respectively require primary ballots to include "[t]he names of all candidates for nomination at the primary election whose nominating petitions or

declarations of candidacy have been made and filed, and who have not died, withdrawn or become disqualified" and, separately, "[t]he names of candidates for the party nomination for President of the United States who qualified for the ballot under ORS 249.078." That statute's separate mention of presidential candidates—and its omission of the "died, withdrawn or become disqualified" wording for the provision on presidential candidates—suggests that that limitation does not apply in the specific context of a presidential preference primary election.

4. The federal constitution does not preempt state law on this question.

Petitioners are mistaken in arguing that if Oregon law permitted the Secretary to place a disqualified candidate on the presidential preference primary ballot, that law would be preempted by the federal constitution. Pet 14 n 8, 20. They are right, of course, that "[n]o state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution." *Id.* at 14 n 8. But placing a candidate's name on the ballot for a *preference* primary does not "violate the U.S. Constitution." The presidential preference primary election does not, in fact, elect anyone to office. It also does not nominate the person for the presidency or determine whether they appear on the general election ballot. It guides the appointment of delegates to the party's national convention and the pledges that those delegates

must take about who to support in the initial rounds of voting at the convention. The federal constitution does not forbid the state from including the candidate's name in a preference primary.

That analysis does not implicate the "white primary" cases that petitioners invoke. Pet 20–21. There is no dispute that the presidential primary is state action subject to constitutional constraints. But it effectively amounts to a state-sponsored public opinion poll of party members. The state may run such a poll, even if it includes candidates who would never qualify or choose to run if elected, without running afoul of any federal constitutional limits.

CONCLUSION

The court should proceed directly to decide whether to issue a peremptory writ and deny the writ.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

Attorneys for Defendant
LaVonne Griffin-Valade
Secretary of State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 13, 2023, I directed the original Memorandum of the Secretary of State in Response to Petition for Writ of Mandamus to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Daniel W. Meek, attorney for relators, by using the court's electronic filing system.

I further certify that on December 13, 2023, I directed the Memorandum of the Secretary of State in Response to Petition for Writ of Mandamus to be served upon Jason Llewellyn Kafoury, attorney for realtor, by email at jkafoury@kafourymcdougal.com pursuant to ORAP 1.35(2)(b)(iii) and ORCP 9 G, as his account through the Court’s electronic filing system is not able to receive service.

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 3,606 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).

/s/ Benjamin Gutman

BENJAMIN GUTMAN #160599
Solicitor General
benjamin.gutman@doj.state.or.us

Attorney for Defendant
LaVonne Griffin-Valade
Secretary of State of Oregon

BG2:kw5/935050092