IN THE SUPREME COURT FOR THE STATE OF OREGON

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:** **RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY LANDMARK LEGAL FOUNDATION**

Landmark Legal Foundation ("Landmark") on December 20, 2023, filed a motion for leave to file a brief *amicus curiae* in opposition to our Petition for Peremptory of Alternative Writ of Mandamus.[1]

I. THE LANDMARK LEGAL FOUNDATION MOTION DOES NOT COMPLY WITH THE OREGON RULES OF APPELLATE PROCEDURE.

The Landmark motion incorrectly states:

> 11. This motion is timely as Landmark intends to file its amicus brief on or before December 29, 2023, and Plaintiff-Realtors' Petition was filed on December 6, 2023.

1. Counsel for LLC did not solicit our position on its motion prior to filing it.

First, ORAP 8.15(3) requires "The motion shall be accompanied by the amicus brief sought to be filed." Landmark did not file the *amicus* brief with its motion.

Second, ORAP 8.15(5)(i) specifies:

> The motion [to appear as *amicus curiae*] shall be filed within 14 days after the filing of the petition, unless the court grants leave otherwise for good cause shown.

Landmark did not ask for an extension of time to file the *amicus* brief, which must be filed with the motion. Instead, Landmark incorrectly asserted that its filing was timely, if the brief were filed by December 29. That is not correct; its *amicus* brief was due December 20. Even if its motion could be construed as an implicit request to an extension of time to file the *amicus* brief, Landmark offered no good cause for the extension.

II. THE ISSUES LANDMARK LEGAL FOUNDATION SEEKS TO BRIEF ARE PRECLUDED.

Landmark proposes to "confine its submission to policy-based considerations of broad applicability and whether Section 3 of the 14th Amendment to the United States Constitution is self-executing and matters associated with this particular issue." It is unnecessary for the Court to receive additional briefing regarding Section 3 of the 14th Amendment to the U.S. Constitution, because such issues are precluded by the doctrine of issue preclusion.

Donald J. Trump is a party in this case and is a party in ***Anderson v. Griswold***, 2023 Colo 63, 2023 WL 8770111 (2023), decided by the Colorado Supreme Court on December 19, 2023 (attachment to Memorandum of Additional Authorities filed December 20, 2023). That decision comprehensively addressed and decided all issues in this case pertaining to the U.S. Constitution, as shown by the table in our Memorandum of Additional Authorities.

Because those issues were addressed and decided in ***Anderson v. Griswold***, Donald J. Trump is precluded from relitigating those issues in this Court.

> Oregon recognizes a common-law doctrine of issue preclusion, which "'arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding.'" ***Barackman v. Anderson***, 338 Or 365, 368, 109 P3d 370 (2005) (quoting ***Nelson v. Emerald People's Utility Dist.***, 318 Or 99, 103, 862 P2d 1293 (1993)). "Issue preclusion is a jurisprudential rule that promotes judicial efficiency." *Id.*
>
> The Supreme Court has identified five requirements that are essential to the application of common-law issue preclusion:
>
> (1) The issue in the two proceedings must be identical;
>
> (2) The issue must have been actually litigated and "'essential to a final decision on the merits in the prior proceeding'";
>
> (3) The party against whom issue preclusion is asserted must have "'had a full and fair opportunity to be heard on that issue'" in the prior proceeding;
>
> (4) The party against whom issue preclusion is asserted must have been "'a party or [be] in privity with a party to the prior proceeding'"; and

> (5) The prior proceeding must be "'the type of proceeding to which this court will give preclusive effect.' " *Id.* (quoting ***Nelson***, 318 Or at 104, 862 P2d 1293).

Hancock v. Pioneer Asphalt, Inc., 276 Or App 875, 880, 369 P3d 1188 (2016). *Accord*, ***Marshall v. PricewaterhouseCoopers, LLP***, 316 Or App 610, 504 P3d 1236 (2021).

> We now clarify that the party asserting issue preclusion bears the burden of proof on the first, second, and fourth factors, after which the party against whom preclusion is asserted has the burden on the third and fifth factors.

Barackman v. Anderson, 214 Or App 660, 667, 167 P3d 994, *review denied*, 344 Or 401 (2008). *Accord*, ***Bishop v. KC Development Grp., LLC***, 300 Or App 584, 591-92, 453 P3d 613 (2019).

Here, the five requirements are met:

(1) Issues regarding the meaning and application of Section 3 of the 14th Amendment are the same in ***Anderson v. Griswold*** and in this case;

(2) Those issues were actually litigated and essential to a final decision on the merits in ***Anderson v. Griswold***;

(3) The party against whom issue preclusion is asserted had a full and fair opportunity to be heard on those issues in ***Anderson v. Griswold*** (party opposing preclusion has burden of proof);

(4) The party against whom issue preclusion is asserted, Donald J. Trump, was a party in ***Anderson v. Griswold***; and

(5) ***Anderson v. Griswold*** was the type of proceeding to which this court will give preclusive effect--the final decision of a state supreme court (party opposing preclusion has burden of proof).

Oregon courts recognize the issue preclusive effect of court decisions, whether or not rendered by Oregon state courts. ***E. Side Plating, Inc. v. City of Portland***, 316 Or App 111, 502 P3d 1192 (2021), *review denied*, 369 Or 675 (2022); ***First Resolution Inv. Corp. v. Avery***, 238 Or App 565, 246 P3d 1136 (2010); ***Serenity Servs., Inc. v. Castrey***, 109 Or App 360, 819 P2d 750 (1991).

One might argue that issue preclusion does not apply, because ***Anderson v. Griswold*** is subject to the filing of a petition for certiorari to the United States Supreme Court. No such petition has been filed. Even if one is filed, the pendency of an appeal from the decision in the prior proceeding does not affect the application of issue preclusion in the second proceeding.

> However, contrary to defendant's assertions, in Oregon "[t]he pendency of an appeal does [not] * * * prevent a judgment from operating as *res judicata* or *collateral estoppel*"--i.e., issue preclusion. ***Ron Tonkin Gran Turismo v. Wakehouse Motors***, 46 Or App. 199, 207, 611 P2d 658, *review denied*, 289 Or 373 (1980) * * *.

Berg on behalf of Estate of Higbee v. Benton, 297 Or App 323, 328, 443 P3d 714 (2019). *Accord*, ***State v. Stephens***, 184 Or App 556, 563, 56 P3d 950 (2002), *review denied*, 335 Or 195 (2003).

Donald J. Trump might argue that he did not have a full and fair opportunity to be heard on the federal constitutional issues in the Colorado case. He has the burden of proof on that assertion, which would have no basis. The trial court in Colorado conducted a 5-day evidentiary hearing over a period of two weeks, followed by briefing of the issues. ***Anderson v. Griswold***, 2023 CO

63, 2023 WL 8770111, at *5. There is no indication that his opportunity to be heard was not full and fair.

III. CONCLUSION.

The Court should deny the Landmark motion, as it does not comply with the Oregon Rules of Appellate Procedure, and the issues Landmark seeks to brief have already been litigated to finality by Donald J. Trump in ***Anderson v. Griswold***, making those issues precluded from consideration by the Court.

December 26, 2023

Respectfully Submitted,

/s/ *Daniel Meek*

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CERTIFICATE OF FILING AND SERVICE

I certify that on this day I filed by Efile to the Appellate Court Administrator the foregoing:

MANDAMUS PROCEEDING: RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY LANDMARK LEGAL FOUNDATION

I certify that on this day I served that document on the party representatives listed below by Efile and by conventional email.

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