

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 S _____

**MANDAMUS
PROCEEDING:**

**PETITION FOR
PEREMPTORY OR
ALTERNATIVE WRIT OF
MANDAMUS**

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TABLE OF CONTENTS

I. INTRODUCTION. 2

II. TIMELINESS OF PETITION. 5

III. MANDAMUS IS THE APPROPRIATE PROCEDURE FOR THIS MATTER. 5

IV. INADEQUACY OF OTHER REMEDIES; WHY APPLICATION NOT MADE TO CIRCUIT COURT. 6

V. DEFENDANT SECRETARY OF STATE HAS AUTHORITY TO DISQUALIFY DONALD J. TRUMP FROM THE PRIMARY AND GENERAL ELECTION BALLOTS. 8

 A. STATE ELECTION LAW OFFICIALS MAY ENFORCE SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION. 8

 B. THE OREGON SECRETARY OF STATE HAS AUTHORITY TO ENFORCE SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION. 8

 1. A CANDIDATE FILING A NOMINATING PETITION MUST VERIFIABLY ATTEST TO BE QUALIFIED TO TAKE THE OFFICE SOUGHT. 10

 2. A PRESIDENTIAL PRIMARY CANDIDATE SELECTED BY THE SECRETARY OF STATE MUST NEVERTHELESS FILE A NOMINATING PETITION AND VERIFIABLY ATTEST TO BE QUALIFIED TO TAKE THE OFFICE SOUGHT. 11

 3. NOTHING IN THE SOLICITOR GENERAL’S LETTER EXCUSES THE SECRETARY OF STATE FROM DETERMINING THE ELIGIBILITY OF A PRESIDENTIAL CANDIDATE. 15

C. THE SECRETARY OF STATE MAY IMPLEMENT THE DISQUALIFICATION BY RULEMAKING OR DECLARATION.	21
VI. FEES, COSTS AND DISBURSEMENTS.	22
VII. CONCLUSION.	23

TABLE OF CONTENTS OF EXHIBITS

Exhibit 1	Letter from Free Speech For People (FSFP) to Oregon Secretary of State LaVonne Griffin-Valade	July 12, 2023
Exhibit 2	Letter from Free Speech For People (FSFP) to Oregon Secretary of State LaVonne Griffin-Valade	November 21, 2023
Exhibit 3	FORM SEL 101: CANDIDATE FILING by Oregon Secretary of State	rev 02/2023
Exhibit 4	Letter from Oregon Solicitor General Benjamin Gutman to Oregon Secretary of State LaVonne Griffin-Valade regarding the Presidential Primary Ballot	November 14, 2023
Exhibit 5	Oregon Secretary of State ORESTAR System, Candidate Information about Presidential Primary Candidates	2016 and 2020
Exhibit 6	<i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023)	November 17, 2023
Exhibit 7	Transcript of Trial on October 30, 2023, in <i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023), with word index removed for brevity but otherwise fully true and correct	October 30, 2023
Exhibit 8	Transcript of Trial on October 31, 2023, in <i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023), with word index removed for brevity but otherwise fully true and correct	October 31, 2023

Exhibit 9	Transcript of Trial on November 1, 2023, in <i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023), with word index removed for brevity but otherwise fully true and correct	November 1, 2023
Exhibit 10	Transcript of Trial on November 2, 2023, in <i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023), with word index removed for brevity but otherwise fully true and correct	November 2, 2023
Exhibit 11	Transcript of Trial on November 3, 2023, in <i>Anderson v Griswold</i> , Docket No. 2023-CV-32577, 2023 WL 8006216 (Colo. Dist. Ct. 2023), with word index removed for brevity but otherwise fully true and correct	November 3, 2023

TABLE OF AUTHORITIES

CASES

<i>Bradley v. Myers</i> , 255 Or 296, 466 P2d 931 (1970)	6
<i>Bullock v. Carter</i> , 405 US 134, 92 SCt 849, 31 LEd2d 92 (1972)	20
<i>Couey v. Atkins</i> , 357 Or 460, 355 P3d 866 (2015) (Couey)	7
<i>Crandon Capital Partners v. Shelk</i> , 342 Or 555, 157 P3d 176 (2007)	23
<i>De Young v. Brown</i> , 300 OrApp 530, 451 P3d 651 (2019)	23
<i>Deras v. Myers</i> , 272 Or 47, 535 P2d 541 (1975)	22
<i>Ekwall v. Stadelman</i> , 146 Or 439, 30 P2d 1037 (1934)	13
<i>Geddry v. Richardson</i> , 296 OrApp 134, 437 P3d 1163, 1168 (2019)	8

<i>Harisay v. Atkins</i> , 295 OrApp 493, 434 P3d 442, 445 (2018)	8
<i>Harisay v. Clarno</i> , 367 Or 116, 474 P3d 378 (2020)	8
<i>Kerr v. Bradbury</i> , 194 Or App 133, 93 P3d 841 (2004)	22
<i>Knopp, et al. v. Lavonne Griffin-Valade</i> (No. SC S070456)	3, 4
<i>Kucera v. Bradbury</i> , 337 Or 384, 97 P3d 1191 (2004)	6
<i>Leppanen v. Lane Transit District</i> , 181 OrApp 136, 45 P3d 501 (2002)	22
<i>Lindsay v. Bowen</i> , 750 F3d 1061, 1064 (9th Cir 2014)	20
<i>McAlmond v. Myers</i> , 262 Or 521, 500 P2d 457 (1972)	6, 13
<i>McCamant v. Olcott</i> , 80 Or 246, 156 P 1034 (1916)	16
<i>Nixon v. Condon</i> , 286 US 73, 52 SCt 48476, LEd 984 (1932)	21
<i>Nixon v. Herndon</i> , 273 US 536, 47 SCt 446, 71 LEd 759 (1927)	20
<i>Pense v. McCall</i> , 243 Or 383, 413 P2d 722 (1966)	6, 10
<i>Roberts v. Myers</i> , 260 Or 228, 489 P2d 1148 (1971)	6
<i>Smith v. Allwright</i> , 321 US 649, 64 SCt 75788, LEd 987 (1944)	21
<i>State ex rel. Boe v. Straub</i> , 282 Or 387, 578 P2d 1247 (1978)	5
<i>State ex rel. Dewberry v. Kulongoski</i> , 346 Or 260, 210 P3d 884 (2009)	7
<i>State ex rel Kelly v. Plummer</i> , 97 Or 518, 189 P 405 (1920)	5, 6
<i>State ex rel Kotek v. Fagan</i> , 367 Or 803, 484 P3d 1058 (2021)	5

State ex rel Kristof v. Fagan, 369 Or 261, 504 P3d 1163
(2022) 5, 10, 12, 13

State ex rel. Pierce v. Slusher, 117 Or 498, 244 P 540
(1926) 7

*State ex rel. Portland Habilitation Ctr, Inc. v.
Portland State Univ.*, 353 Or 42, 292 P3d 537, 541
(2012) 2

State ex rel. Ricco v. Biggs, 198 Or 413, 255 P2d 1055
(1953) 7

State ex rel. Sajo v. Paulus, 297 Or 646, 688 P2d 367
(1984) 5

State ex rel. Smith v. Hitt (Hitt), 291 OrApp 750, 424
P3d 749 (2018) (election law) 8

Swett v. Bradbury, 335 Or 378, 67 P3d 391 (2003) 22

Ex parte Virginia, 100 US 339, 25 LEd 676 (1879) 9

*Washington v. Wash. State Comml Passenger Fishing
Vessel Assn*, 443 US 658, 99 SCt 3055, 61 LEd2d 823
(1979) 14

Williams v. Rhodes, 393 US 23, 89 SCt 521, LEd2d 24
(1968) 9

Worthy v. Barrett, 63 N.C. 199 (1869) 3

UNITED STATES CONSTITUTIONS

Article VI, cl. 2-3 14

Amendment XIV, § 3 1-5, 7-8, 13-14, 20

OREGON CONSTITUTION

Article VII, § 2 5, 23

OREGON STATUTES

ORS 34.110 1, 7

ORS 34.120 5, 23

ORS 34.240 22

ORS 34.250 1

ORS 183.335(5) 21

ORS 183.400 22

ORS 183.410 22

ORS 183.482(8)(b)(B) 18

ORS 183.484 7

ORS 183.490 7

ORS 246.046 13

ORS 246.910 6, 7

ORS 249.004(1) 10

ORS 249.031(1)(f) 10, 17

ORS 249.078(1) 9, 11, 15, 17, 19

ORS 254.115(1)(c) and (e) 19

ORS 254.165(1) 10, 11, 12, 16, 18, 19

ORS 260.345 6

PETITION

Plaintiffs-Relators MARY LEE NELSON, MICHAEL NELSON, JUDY HUFF, SAMUEL JOHNSON, and CHAD SULLIVAN are registered voters and electors of Oregon. Their interest is the correct application of the U.S. Constitution to the content of Oregon election ballots.

They petition the Court to issue a peremptory or alternative writ of mandamus directing the Defendant to disqualify Donald John Trump ("Trump") from both the Oregon 2024 primary election ballot and the Oregon 2024 general election ballot. Undersigned counsel from Free Speech For People ("FSFP") on July 12 and on November 21, 2023, requested that Defendant take that action (Exhibits 1 and 2).¹ On November 30, 2023, Defendant issued a statement saying she would not bar Trump, under Section 3 of the Fourteenth Amendment to the U.S. Constitution, from the 2024 presidential primary ballot in Oregon, erroneously stating that she lacked authority to enforce constitutional qualifications in presidential primaries.² Her refusal to do so is in violation of Defendant's constitutional duty to correctly and fairly administer the election laws of Oregon and the United States. ORS 34.110; ORS 34.250.

[T]hree requirements underlie the issuance of a writ of mandamus. First, the relator must identify an inferior court, entity, or person as described who is obligated to perform a particular act. Second, the

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1. All exhibits are presented in the accompanying Declaration of Daniel Meek.
 2. <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=16738>

relator must request performance of an act specifically required by law, by virtue of a duty as described, which does not involve the exercise of judicial discretion. Third, a writ may not be issued if the relator has a plain, speedy, and adequate remedy in the ordinary course of law.

State ex rel. Portland Habilitation Ctr., Inc. v. Portland State Univ., 353 Or 42, 48, 292 P3d 537, 541 (2012).

I. INTRODUCTION.

"No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

-United States Constitution, Amendment XIV, § 3

This is an action to prevent Donald J. Trump ("Trump") from appearing on the 2024 presidential primary or general election ballots because, having sworn an oath to support the Constitution of the United States, he has "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof" and is therefore disqualified from public office under Section 3 of the Fourteenth Amendment to the United States Constitution.

On November 15, 2022, Trump filed paperwork with the Federal Election Commission as a candidate for president of the United States. That same day, he publicly announced his candidacy in a speech at his Mar-a-Lago property in Florida.

Trump is constitutionally ineligible for the office of President of the United States, or for any other public office. Under Section 3 of the Fourteenth Amendment to the U.S. Constitution, known as the Insurrectionist Disqualification Clause:

"No person shall . . . hold any office, civil or military under the United States, . . . who, having previously taken an oath, . . . as an officer of the United States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

Persons who trigger this provision are disqualified from public office. "The oath to support the Constitution is the test. The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress." *Worthy v. Barrett*, 63 N.C. 199, 204 (1869).

As set forth in detail in the accompanying Statement of Facts (SOF) and Memorandum, in late 2020 and early 2021, Trump engaged in a course of conduct, culminating on January 6, 2021, that constituted "insurrection or rebellion" against the U.S. Constitution. Before the election, he simultaneously sought re-election but also prepared to retain power if he lost. SOF ¶¶ 40-52. When he did not win re-election, he engaged in various illegal and fraudulent attempts to overturn the election results. SOF ¶¶ 53-89. When all other plans failed, he summoned a large crowd to Washington, D.C. to "be wild" on January 6, 2021—the day Congress would count electoral votes. SOF ¶¶ 90-97. Knowing that many of his most fervent supporters were prone to violence, he ensured that his armed and angry supporters were able to bring their

weapons. SOF ¶¶ 98-130. On January 6 itself, he incited them against Vice President Pence, Congress, the certification of electoral votes, and the peaceful transfer of power, and instructed them to march on the Capitol for the purpose of preventing, obstructing, disrupting, or delaying the electoral vote count and peaceful transfer of power. SOF ¶¶ 131-173. They heeded his call, conquered the Capitol, and for the first time in our nation's history blocked the peaceful transfer of power. SOF ¶¶ 174-201. Trump encouraged them during their attack, used the attack as an opportunity to further pressure and intimidate the Vice President and Members of Congress, provided material support to the insurrection by refraining from mobilizing federal law enforcement or National Guard assistance; and otherwise fomented, facilitated, encouraged, and aided the insurrection. SOF ¶¶ 202-242. Multiple judges and government officials have determined that January 6 was an insurrection and that Trump is responsible. SOF ¶¶ 243-257. Meanwhile, Trump has subsequently acknowledged that he was in command of the insurrectionists, remains unrepentant, and would do it again. SOF ¶¶ 258-276.

Trump, through his words and actions, after swearing an oath as an officer of the United States to support the Constitution, engaged in insurrection or rebellion, or gave aid and comfort to its enemies, as defined by Section 3 of the Fourteenth Amendment. He is disqualified from holding the presidency or any other office under the United States unless and until Congress provides him relief.

II. TIMELINESS OF PETITION.

This petition is timely. Defendant Secretary of State has not taken the action requested by undersigned counsel from FSFP on July 12 and November 21, 2023. Rather, Defendant has issued a statement dated November 30, 2023, saying she will not, under Section 3 of the Fourteenth Amendment, bar Trump from appearing on the 2024 presidential primary ballot in Oregon, absent a court order. In light of Defendant's refusal to follow the mandate of Section 3 of the Fourteenth Amendment as it applies to Trump, this matter is now ripe for this Court's review.

III. MANDAMUS IS THE APPROPRIATE PROCEDURE FOR THIS MATTER.

Under Article VII, § 2, of the Oregon Constitution and ORS 34.120, this Court has original jurisdiction to decide time-sensitive issues of major public importance. See, e.g., *State ex rel Kristof v. Fagan*, 369 Or 261, 285, 504 P3d 1163 (2022) (exercising jurisdiction in candidate qualification case to resolve "novel legal question"); *State ex rel Kotek v. Fagan*, 367 Or 803, 484 P3d 1058 (2021) (exercising jurisdiction to establish a revised decennial reapportionment schedule where impossibility prevented compliance with constitutional deadlines); *State ex rel Kelly v. Plummer*, 97 Or 518, 525, 189 P 405 (1920). This Court has often exercised its mandamus jurisdiction "based on the importance and novelty" of an issue. *State ex rel. Sajo v. Paulus*, 297 Or 646, 648, 688 P2d 367 (1984); *State ex rel. Boe v. Straub*, 282 Or 387, 389, 578 P2d 1247 (1978) (the issue was "one of public

importance"); *Kelly*, 97 Or at 525 ("the interests of a great many people" were implicated by the dispute).

This Court has repeatedly granted mandamus petitions brought in order to obtain or deny a place on the ballot for a candidate.

At this late date, it is extremely doubtful whether the procedure under either of the above statutes [ORS 246.910 and ORS 260.345] would constitute an adequate remedy. Both procedures would have to be instituted in circuit court. Undoubtedly, an appeal from the decision of the circuit court would be taken. In the event Mrs. Corbett was found to be disqualified, there would be inadequate time for any substitute nominee to campaign effectively for office. In *Bradley v. Myers*, 255 Or 296, 466 P2d 931 (1970), where the Secretary of State refused to accept a party's filing for office, we permitted the use of a writ of mandamus to determine whether that party was qualified to be a candidate. It seems clear that ORS 246.910 would have been available to the candidate. However, without discussing ORS 246.910, we allowed the use of mandamus to decide the question. The application for the writ was made about two and one-half months prior to the election.¹²

12. In *Pense v. McCall*, 243 Or 383, 413 P2d 722 (1966), we permitted the use of mandamus to prohibit the Multnomah County Registrar of Elections from putting on the ballot the name of a candidate who was disqualified from filing. See *Roberts v. Myers*, 260 Or 228, 489 P2d 1148 (1971).

McAlmond v. Myers, 262 Or 521, 528, 500 P2d 457 (1972); *see also Kucera v. Bradbury*, 337 Or 384, 97 P3d 1191 (2004) (affirming Secretary of State's power to investigate the soundness of nomination petitions).

The public importance and novelty of this matter are shown in Part I of this petition and in the accompanying Memorandum.

IV. INADEQUACY OF OTHER REMEDIES; WHY APPLICATION NOT MADE TO CIRCUIT COURT.

Mandamus relief is appropriate when there is no "plain, speedy, and

adequate remedy in the ordinary course of the law." ORS 34.110.

Mandamus may issue, however, "even where other remedies exist, if they are not sufficiently speedy to prevent material injury." *State ex rel. Ricco v. Biggs*, 198 Or 413, 425, 255 P2d 1055 (1953). To that end, other remedies must "be equally convenient, beneficial, and effective." *State ex rel. Pierce v. Slusher*, 117 Or 498, 501, 244 P 540 (1926). "An adequate remedy, therefore, is a remedy that is sufficient and as equally convenient and effective as mandamus." *State ex rel. Dewberry v. Kulongoski*, 346 Or 260, 274, 210 P3d 884 (2009).

Plaintiffs-Relators have no other remedy that qualifies as "plain, speedy, and adequate." ORS 34.110. Any other remedies are certainly "not sufficiently speedy to prevent material injury" or "equally convenient, beneficial, and effective," or "sufficient and as equally convenient and effective as mandamus." The only other remedies are actions in Circuit Courts under ORS 246.910 and/or ORS 183.484 and/or ORS 183.490. Any decision by the Circuit Court would then be appealable to the Oregon Court of Appeals, with possible review by this Court.

Challenging via Circuit Court the Secretary's refusal to follow the mandate of Section 3 of the Fourteenth Amendment as it applies to Trump would inevitably consume sufficient time to preclude the exclusion of Trump from the 2024 primary election ballot. This Court has many times recognized that cases involving election law typically take much time to resolve through the usual course involving 3 layers of judicial review. *Couey v. Atkins*, 357

Or 460, 477, 355 P3d 866 (2015) (*Couey*); *Harisay v. Clarno*, 367 Or 116, 474 P3d 378 (2020); *Geddry v. Richardson*, 296 OrApp 134, 142, 437 P3d 1163, 1168 (2019); *Harisay v. Atkins*, 295 OrApp 493, 496, 434 P3d 442, 445 (2018); *State ex rel. Smith v. Hitt (Hitt)*, 291 OrApp 750, 424 P3d 749 (2018) (election law). The court proceedings in most of those cases took several years.

Only a writ of mandamus issued to Defendant from this Court can provide the relief sought by Plaintiffs-Relators before the late March 2024 finalization of the 2024 Oregon primary election ballots.

V. DEFENDANT SECRETARY OF STATE HAS AUTHORITY TO DISQUALIFY DONALD J. TRUMP FROM THE PRIMARY AND GENERAL ELECTION BALLOTS.

A. STATE ELECTION LAW OFFICIALS MAY ENFORCE SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

States may enforce Section 3 without any special permission from Congress. As explained in detail in the accompanying Memorandum, states can enforce Section 3 without any new federal legislation—just as they regularly enforce other constitutional provisions, including other sections of the Fourteenth Amendment itself.

B. THE OREGON SECRETARY OF STATE HAS AUTHORITY TO ENFORCE SECTION 3 OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The Oregon Secretary of State is responsible for enforcing Section 3 in Oregon. She has the authority and responsibility to determine, as part of the

state ballot qualification process, whether a candidate for office is ineligible to appear on the Oregon presidential primary ballot because, "having previously taken an oath . . . to support the Constitution of the United States," he then proceeded to "engage[] in insurrection or rebellion against the same."

In general, her authority to exclude an ineligible candidate from the presidential ballot inheres in the interaction between the roles of Congress and the states in the presidential selection process. The states, including officers such as Secretaries, play a critical role in that process but cannot act inconsistently with the U.S. Constitution.³

In Oregon, a presidential primary candidate may qualify to appear on the Oregon primary election ballot in two ways. ORS 249.078(1) provides:

249.078 Printing name of candidate for presidential nomination of major party on ballot; discretion of Secretary of State; nominating petition; petition requirements. (1) The name of a candidate for a major political party nomination for President of the United States shall be printed on the ballot only:

- (a) By 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; or
- (b) By nominating petition described in this section and filed with the Secretary of State.

3. *See Williams v. Rhodes*, 393 US 23, 29, 89 SCt 521 LEd2d 24 (1968); *see also Ex parte Virginia*, 100 US 339, 347, 25 LEd 676 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.").

1. A CANDIDATE FILING A NOMINATING PETITION MUST VERIFIABLY ATTEST TO BE QUALIFIED TO TAKE THE OFFICE SOUGHT.

If the candidate seeks to appear on the ballot by means of a nominating petition, the candidate is required to file with the Secretary of State a declaration including "[a] statement that the candidate will qualify if elected."⁴ The Secretary of State then "may verify the validity," or "reject declarations when the candidate will not be qualified to take office." ORS 249.004(1); *State ex rel Kristof v. Fagan, supra*, 369 Or at 277; *Pense v. McCall, supra*, 243 Or at 393. Specifically, if the Secretary "determines that a candidate has . . . 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." ORS 254.165(1).⁵ Since an insurrectionist who previously

4. ORS § 249.031(1)(f) (major party candidate declaration). The required Form SEL 101, *Candidate Filing (for) Major Political Party or Nonpartisan* (Exhibit 3) requires every candidate to attest that "I will qualify for said office if elected").

5. 254.165 Adjusting ballot when vacancy occurs; notice to Secretary of State; exception.

- (1) If the filing officer 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 or, if ballots have already been printed, the ballots must be reprinted without the name of the candidate before the ballots are delivered to the electors. The name of a candidate nominated to fill a vacancy in nomination or office must be printed on the ballots or, if the ballots have already been printed, the county clerk shall cause the name to appear on the ballots before the ballots are delivered to the electors. A filing officer, other than the

(continued...)

took an oath of office is constitutionally disqualified from becoming president, any declaration such candidate puts forth is inherently defective and cannot be verified, thereby precluding placement of the candidate's name on the ballot.

2. A PRESIDENTIAL PRIMARY CANDIDATE SELECTED BY THE SECRETARY OF STATE MUST NEVERTHELESS FILE A NOMINATING PETITION AND VERIFIABLY ATTEST TO BE QUALIFIED TO TAKE THE OFFICE SOUGHT.

The other way for a candidate to appear specifically on a presidential primary ballot in Oregon is when the Secretary of State determines "that the candidate's candidacy is generally advocated or is recognized in national news media," pursuant to ORS 249.078(1)(a). On information and belief: When the Secretary makes such a determination, she notifies the prospective candidate and requires that the candidate file a completed Form SEL 101, which (as noted above) requires the candidate to attest that "I will qualify for said office if elected." The Secretary then verifies the Form SEL 101 in the same manner as for a candidate who initially filed a nominating petition and is obligated to disqualify the candidate under ORS 254.165(1), if the qualifications are not met.

5.(...continued)

Secretary of State, shall notify the Secretary of State of any action taken under this section.

- (2) Subsection (1) of this section does not apply if the filing officer makes the determination under subsection (1) of this section on or after the 61st day before the date of the election.

ORS 254.165 makes clear that the Secretary is not to place on the primary ballot the name of a person who is disqualified to serve in the office sought. Last year, the Supreme Court of Oregon reaffirmed the Secretary's role in removing ineligible candidates from the primary ballot. *Kristof, supra*, 369 Or at 278. In denying a non-resident candidate's petition challenging the Secretary's exclusion of his name from the gubernatorial primary ballot, the Court determined that the "legislature has accorded the secretary the responsibility of determining, in the first instance, whether a prospective candidate is qualified to appear on the ballot" and would otherwise "be meaningless if it was not contemplated that [the Secretary] would take action if facts became known to him which show that the candidate is unqualified." *Id.*

Another example: On August 8, 2023, the Secretary adopted a temporary rule to implement Measure 113 (2022), which amended the Oregon Constitution to disqualify certain members of the Oregon Legislature from serving in that body for a subsequent term. The Secretary concluded that she was required to exclude those members from appearing on the ballot, even though Measure 113 contained no provision about ballot access, because they would not be qualified to serve in the office sought, should they win the election. As Respondent in *Knopp, et al. v. Lavonne Griffin-Valade* (No. SC S070456), the Secretary of State stated on October 27, 2023:

More importantly, petitioners are not arguing that they should be able to run for a term they cannot serve. And for good reason. The text, context, and history--considered as a whole--indicate that Measure 113 does not alter the Secretary's well-established

authority to assess qualifications when she receives a candidate filing for legislative office. Although the measure's text does not speak to that issue, its context does. Specifically, at the time of Measure 113's adoption, the law was clear that the Secretary has authority to reject a declaration of candidacy filed by a candidate for state office who will not be qualified to serve if elected. *See, e.g., State ex rel Kristof v. Fagan*, 369 Or 261, 277-78, 504 P3d 1163 (2022) (interpreting various statutes as authorizing the Secretary to reject a declaration of candidacy when a candidate for state office will not be qualified to serve); see also *Sagdal*, 356 Or at 642 (context for a constitutional amendment includes "preexisting constitutional provisions, case law, and statutory framework").

Respondent's Answering Brief in SC S070456 (October 27, 2023), p. 25.⁶

Moreover, Oregon law leaves the Secretary no neutral position. No other Oregon official is required to "diligently seek out any evidence of violation of any election law" [ORS 246.046] and remove an ineligible candidate's name from the ballot. Oregon courts have affirmed that the "test of eligibility [for a candidate for federal office] must be * * * laid down in the federal Constitution."⁷ Here, that test is provided by Section 3 of the Fourteenth Amendment. Allowing a known insurrectionist who has previously taken an oath of office to appear on the ballot is inconsistent with

6. Available at <https://appellate-public.courts.oregon.gov/public/caseView.do?csIID=190445>

7. *Ekwall v. Stadelman*, 146 Or 439, 445, 30 P2d 1037 (1934) (quoting *State v. Howell*, 175 P 569, 570, (Wash. 1918)); see also *McAlmond v. Myers*, 262 Or 521, 500 P2d 457 (1972) (court sustained candidate petition challenging opposing candidate based on violation of Corrupt Practices Act and denied ballot access).

the Secretary of State's obligation and oath of office to support the U.S. Constitution as "the supreme Law of the Land."⁸

The January 6, 2021, attack and its facts are well documented (and set forth in the accompanying Statement of Facts and Memorandum) for the Secretary to know and thereby "take action" to prevent Trump from appearing on Oregon ballots for President in the 2024 presidential primary election and in the 2024 general election. To the extent that additional fact finding by the Secretary was needed to make this determination, the Secretary has the authority and responsibility to request and review additional evidence to determine Trump's qualifications, just as the Secretary did (with this Court's approval) in the *Kristof* case. As the Secretary has failed to do so, it is now incumbent on this Court under state and federal law to assess the evidence and determine whether Trump is disqualified under Section 3.

8. U.S. Constitution, Article VI, cl. 2-3. In fact, even if state law *did* purport to require the Secretary of State to list Mr. Trump's name, the U.S. Constitution supersedes any state law that would ostensibly require such approval of an insurrectionist who has previously taken an oath of office as a valid candidate for federal office. No state authority, including the state legislature or even the state constitution, could compel a state official to violate the U.S. Constitution. "[A]ny conflicting obligations" of state law "must give way" to federal law when there is a conflict. *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 US 658, 691-92, 99 SCt 3055, 61 LEd2d 823 (1979). Any state law that purports to require the Secretary of State to use her official powers to aid a constitutionally ineligible insurrectionist in obtaining office must give way to the 14th Amendment.

3. NOTHING IN THE SOLICITOR GENERAL'S LETTER EXCUSES THE SECRETARY OF STATE FROM DETERMINING THE ELIGIBILITY OF A PRESIDENTIAL CANDIDATE.

In her rejection of the petition to exclude Trump from the Oregon 2024 presidential primary ballot, the Secretary of State on November 30, 2023, published a letter by the Solicitor General of Oregon dated November 14, 2023 (Exhibit 4). The Solicitor General's Letter offers invalid reasons for the Secretary of State to avoid determining the qualifications of Trump before placing his name on the primary ballot.

The Solicitor General's Letter (p. 2) states:

But presidential primaries are different. Unique among Oregon elections, they do not determine who is elected to office or even who will appear on the general-election ballot.

Whether this is true is immaterial, because the applicable Oregon statutes refer to the "ballot" and do not make exception for primary elections. ORS 249.078(1) refers to the primary election "ballot" and is obviously applicable to the primary election, whether or not that election determines who is elected to office.

As noted above, the other way for a candidate to appear on a presidential primary ballot in Oregon is when the Secretary of State determines "that the candidate's candidacy is generally advocated or is recognized in national news media," pursuant to ORS 249.078(1)(a). But the established practice of the Secretary is to require such persons to then file completed Form SEL 101, which requires the candidate to attest that "I will qualify for said office if elected." See reference to the ORESTAR filing system at pages 18-18, *post*.

And, in any event, ORS 254.165 makes clear that the Secretary is to continuously scrutinize every candidate for qualifications and remove from the ballot the name of any candidate who "has * * * become disqualified, or that the candidate will not qualify in time for the office if elected." This continuous scrutiny ends "on or after the 61st day before the date of the election." ORS 254.165(2). ORS 254.165 applies to all elections and does not exempt primary elections. It expressly applies to primary elections, because it refers to "the name of a candidate nominated to fill **a vacancy in nomination** or office must be printed on the ballots," if the unqualified candidate is disqualified. An election ballot that would have a "vacancy in nomination" would be a primary election ballot.

The Solicitor General's Letter (p. 2) cites *McCamant v. Olcott*, 80 Or 246, 156 P 1034 (1916), for the proposition that "the presidential preference primary election has a unique status under Oregon law and is not necessarily subject to the rules that apply to nominations or traditional elections."

McCamant addressed statutes different from the current ones. It involved a statute that authorized major party supporters to place the names of candidates on their primary election ballots without the concurrence of the candidates. But that does not negate the application of the **current** statutes cited above. The statutes in 1916 did not require that the Secretary of State determine the qualifications of those candidates, as the current statutes do does now.

The decision in *McCamant* was based on the plain text of the then-current statutes. It was not based on the *dicta* that a person appearing on the

presidential primary ballot "is not a candidate in the sense of seeking or running for the office." It is clear under current law that anyone placed on a presidential primary ballot is a "candidate." ORS 249.078(1)(a) refers to "a candidate for a major political party nomination for President" and "the candidate," and the Solicitor General's Letter depends upon that subsection to justify placing a candidate on the primary ballot without regard to his qualification to serve in office, if elected.

The Solicitor General's Letter (p. 3) states that "Neither statutory avenue expressly requires a determination about qualifications," regarding ORS 249.078(1)(a) and (2). But reading that statute in context does so require. First, the Solicitor General's statement omits 249.078(1)(b), which requires the filing of a "nominating petition described in this section and filed with the Secretary of State." ORS 249.031(1) describes the contents of such nominating petition, which must include:

- (f) A statement that the candidate will qualify if elected.
- (g) If the candidate is seeking the nomination of a major political party, a statement that the candidate, if not nominated, will not accept the nomination or endorsement of any political party other than the one of which the candidate is a member on the date the petition or declaration is filed.
- (h) The signature of the candidate.

As to the 249.078(1)(a) path to the ballot, the longstanding practice of the Secretary of State has been to require persons she deems to be presidential primary candidates to file the Form SEL 101, which is not a "declaration of candidacy" but is entitled "candidate filing." The Form SEL 101 requires the

candidate to attest that "I will qualify for said office if elected" and to personally sign the form. The form is adopted as a rule by the Secretary of State and thus has the force of law. Requiring such attestation is consistent with the Secretary of State's duty to scrutinize the qualifications of all person who appear on Oregon ballots, under ORS 254.165.

An examination of the electronic candidate filing system, ORESTAR, as far back as 2008 shows that every candidate who has appeared on the Oregon presidential primary ballot has done so by means of the "filing source" consisting of a "paper filing," including Donald J. Trump in 2016 and 2020. See Exhibit 5. Counsel for Plaintiffs-Relators were informed by the Elections Division of the Secretary of State that the "paper filing" is Form SEL 101.

Changing a longstanding agency or officer practice is grounds for reversal and remand by the Oregon courts under ORS 183.482(8)(b)(B), if the action is: "Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency." Here the agency (Secretary of State) has not explained why (1) she and her predecessors have consistently for decades required the filing of Form SEL 101 by every candidate who appears on the presidential primary ballot yet (2) she now disavows that any such candidate is required to make the attestations required by that form.

And, as explained at page 16, *ante*, ORS 254.165 makes clear that the Secretary is to continuously scrutinize every candidate for qualifications and remove from the ballot the name of any candidate who "has * * * become

disqualified, or that the candidate will not qualify in time for the office if elected," a duty that ends on the 61st day before the date of the election.

The Solicitor General's Letter (pp. 3-4) cites ORS 254.115(1)(c) and (e) for a proposition they do not support. ORS 254.115 states:

254.115 Official primary election ballot.

- (1) The official primary election ballot shall be styled "Official Primary Nominating Ballot for the _____ Party." and shall state:
 - (a) The name of the county for which it is intended.
 - (b) The date of the primary election.
 - (c) The 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.
 - (d) The names of candidates for election as precinct committeeperson.
 - (e) The names of candidates for the party nomination for President of the United States who qualified for the ballot under ORS 249.078.

The Solicitor General suggests that this statute somehow exempts presidential primary candidates from scrutiny under ORS 254.165. But, as noted above, ORS 254.165 requires continuous scrutiny of qualifications of all persons appearing on Oregon ballots. ORS 254.115 provides no exception to that. Nor does the Solicitor General's Letter address the fact that Oregon Secretaries of State for decades have considered completion of the Form SEL 101 and its attestation as to qualifications as part of the process of qualifying for the ballot under each part of ORS 249.078.

The Solicitor General's Letter (p.4) then asserts that including a barred candidate's name "on the ballot for the presidential preference primary election would not itself violate the federal constitution." The Solicitor General offers no legal authority for that assertion. As set forth at page 8 and note 8, *ante*, it is the duty of state election officers to enforce the requirements of Section 3 of the Fourteenth Amendment, which disqualifies from serving in public office an insurrectionist who previously took an oath of office. The federal government alone cannot enforce that requirement, because state officials are in charge of designing ballots for nominations and elections to state and federal offices. As the Ninth Circuit wrote regarding another presidential candidate qualification:

[T]here's no doubt that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." See *Bullock v. Carter*, 405 US 134, 145, 92 SCt 849, 31 LEd2d 92 (1972). Holding that [the California Secretary of State] couldn't exclude [an underage candidate] from the ballot, despite her admission that she was underage, would mean that anyone, regardless of age, citizenship *or any other constitutional ineligibility* would be entitled to clutter and confuse our electoral ballot.

Lindsay v. Bowen, 750 F3d 1061, 1064 (9th Cir 2014) (emphasis added).

Further, a political party may not use the election machinery of the state in a way that conflicts with the requirements of the U.S. Constitution. The Solicitor General's claim that the presidential primary process is strictly an internal party process runs counter to the US Supreme Court's rulings in the white primary cases, *Nixon v. Herndon*, 273 US 536, 47 SCt 446, 71 LEd 759 (1927) (finding that state statute barring African-Americans from participation

in the Democratic primary violates the Equal Protection Clause of the Fourteenth Amendment); *Nixon v. Condon*, 286 US 73, 52 SCt 48476 LEd 984 (1932) (concluding that State Democratic Party's action amounted to delegation of state power and was invalid under the Fourteenth Amendment); and *Smith v. Allwright*, 321 US 649, 64 SCt 75788 LEd 987 (1944) (noting exclusion of African-Americans from party primary by vote of party membership constituted state action violating the Fifteenth Amendment). Just as the state cannot statutorily delegate to a political party or its membership the effective right to discriminate based on race, nor can the state delegate to a political party the effective right to have ineligible candidates listed on the presidential primary ballot.

C. THE SECRETARY OF STATE MAY IMPLEMENT THE DISQUALIFICATION BY RULEMAKING OR DECLARATION.

Defendant Secretary of State has authority to implement the disqualification of Donald J. Trump from the Oregon 2024 primary and general election ballots by rulemaking or declaration.

The most rapid method would be adoption of a temporary rule disqualifying him from the ballot. As noted above, on August 8, 2023, the Secretary adopted a temporary rule to implement Measure 113 (2022), which amended the Oregon Constitution to disqualify certain members of the Oregon Legislature from serving in that body for a future term. The Secretary may adopt temporary rules that are immediately effective and remain in effect for up to 180 days, without prior notice or hearing. ORS 183.335(5). If adopted

on December 15, 2023, for example, the temporary rule could remain effective until June 12, 2024, which would be 22 days after the May 21, 2024 primary election. During that 180 days, the Secretary could engage in permanent rulemaking regarding disqualification of Trump from the Oregon 2024 general election ballot.

Trump could obtain judicial review of the temporary rule in the Court of Appeals under ORS 183.400. After the Secretary adopted the temporary rule on August 8, 2023, the affected legislators sought judicial review under ORS 183.400. The Oregon Court of Appeals certified the case to the Oregon Supreme Court, which accepted the certification. Briefing was completed on November 13, 2023.

Another method would be for the Secretary to issue a declaratory ruling that she will not qualify Trump for the Oregon ballots. ORS 183.410. Trump could obtain judicial review of the declaratory ruling in the Court of Appeals under ORS 183.410.

VI. FEES, COSTS AND DISBURSEMENTS.

Should Plaintiffs-Relators prevail on the merits of their request, they intend to seek an award of costs, disbursements and fees pursuant to ORS 34.240 or:

1. The public benefit doctrine, exemplified by *Deras v. Myers*, 272 Or 47, 66-67, 535 P2d 541 (1975), *Leppanen v. Lane Transit District*, 181 OrApp 136, 149, 45 P3d 501 (2002), *Swett v. Bradbury*, 335 Or 378, 67 P3d 391 (2003), and *Kerr v. Bradbury*, 194 Or App 133, 93 P3d 841 (2004); and/or

2. The substantial benefit doctrine, exemplified by *Crandon Capital Partners v. Shelk*, 342 Or 555, 564, 157 P3d 176 (2007) and *De Young v. Brown*, 300 OrApp 530, 451 P3d 651 (2019); and

VII. CONCLUSION.

For the reasons explained above and in the accompanying Statement of Facts and Memorandum, this Court should (1) exercise its original mandamus jurisdiction under Article VII, section 2, of the Oregon Constitution and ORS 34.120, and (2) issue a peremptory writ of mandamus requiring the Secretary of State to exclude Donald J. Trump from both the Oregon 2024 presidential primary election ballot and the Oregon 2024 general election ballot.

Alternatively, if this Court does not immediately issue a peremptory writ, this Court should issue an alternative writ of mandamus directing the Secretary of State to show cause why she should not be required to exclude

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