

No. 22A1027

In the Supreme Court of the United States

AMANDA GUNASEKARA,
Applicant,

v.

MATTHEW BARTON AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,
Respondents.

On Application for Stay, Recall of Mandate, and Injunctive Relief, and Alternative
Petition for a Writ of Certiorari to the Supreme Court of Mississippi

**RESPONSE OF THE STATE OF MISSISSIPPI
TO THE EMERGENCY APPLICATION**

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RESPONSE OF THE STATE OF MISSISSIPPI

In accordance with 28 U.S.C. § 2403(b), the State of Mississippi respectfully submits this response to the emergency application.

1. Mississippi has a three-member Public Service Commission. Miss. Code Ann. § 77-1-1. Commissioners are elected every four years from three districts. *Ibid.* To qualify as a commissioner, a candidate must be a citizen of Mississippi for the five years before the general election. *Ibid.* (commissioner must have “the qualifications prescribed for the Secretary of State”); Miss. Const. art. V, § 133 (Secretary of State must be a citizen of the State for the five years before the election).

In November 2022, applicant Amanda Gunasekara announced her intention to run for public service commissioner for the State’s Northern District. Application Appendix (App.) 7. In January 2023, she filed paperwork to qualify for the position. *Ibid.* She planned to run in the August 2023 Republican Party primary. *Ibid.* Respondent Matthew Barton contested applicant’s qualifications by filing a petition with respondent Mississippi Republican Executive Committee. App.8; *see* Miss. Code Ann. § 23-15-961(1) (procedure for contesting candidate’s qualifications in a primary election). (The State refers to Mr. Barton as *respondent* and the Mississippi Republican Executive Committee as *the Committee*.) Respondent contended that applicant is not qualified to be a commissioner because she had been a resident of Washington, D.C., within the five-year period preceding Mississippi’s November 7, 2023 general election. App.8. The Committee denied the contest and certified applicant as a candidate. *Ibid.* Respondent sought judicial review in state court. *Ibid.*; *see* Miss. Code Ann. § 23-15-961(4) (authorizing judicial review).

On March 27, after a hearing, the state trial court entered an order disqualifying applicant as a candidate. App.27-30. The evidence, the court found, showed that applicant maintained her residency in Washington, D.C., on November 7, 2018, the date by which she needed to be a Mississippi resident to meet the five-year residency requirement. App.29-30. The court thus ruled that applicant did not qualify “under the Mississippi Constitution and Mississippi Code” to be a candidate for commissioner in the November 2023 election. App.30.

Before the trial court, applicant did not make a federal constitutional challenge to Mississippi’s five-year residency requirement. She also did not notify the Mississippi Attorney General of any challenge to the constitutionality of Miss. Code Ann. § 77-1-1 (which imposes the residency requirement) or any other state law. *See* Miss. R. Civ. P. 24(d) (a “party asserting the unconstitutionality of ... [a state] statute shall notify the Attorney General ... within such time as to afford” her “an opportunity to intervene and argue the question of constitutionality”). The trial court did not rule on the constitutionality of any state law or decide any federal issue. App.27-30.

Applicant appealed to the Mississippi Supreme Court. She argued that the trial court erred under state law in disqualifying her. App.46-52 (opening brief, filed April 13). She also argued, for the first time, that applying the state-law residency requirement to disqualify her violates the Fourteenth Amendment to the U.S. Constitution. *E.g.*, App.52-56. In his response brief, filed April 18, respondent observed that applicant “did not raise any constitutional claims at the trial court and did not notify the Mississippi Attorney General of the constitutional claims.”

Response Br. 7-8. The next day, April 19, applicant's counsel emailed the Mississippi Attorney General's Office a letter, attaching applicant's opening appellate brief. App.31-57. The letter said that "one issue raised in the appeal is whether the manner in which the trial court applied a Mississippi statute in the contest violated the U.S. Constitution." App.31. The letter maintained that Miss. R. Civ. P. 24(d)'s notification requirement did not apply because applicant was making an as-applied constitutional challenge, but said that "notice is nevertheless hereby given as a matter of courtesy." *Ibid.* Applicant filed her reply brief the next day, April 20.

On May 11, the Mississippi Supreme Court affirmed the order disqualifying applicant. App.1-26. It ruled that the trial court applied the correct legal standard and soundly considered the evidence in finding that applicant did not satisfy the state-law residency requirement. App.11-24. The state supreme court declined to decide applicant's claim that the residency requirement violates the federal Constitution. App.24-25. The court recognized that applicant had failed to notify the Attorney General of the challenge as Miss. R. Civ. P. 24(d) requires. *Ibid.* The court also observed that applicant's challenge is a facial attack on "the five-year residency requirement as a whole," that the resolution of that issue "is of broad public importance," and, thus, that "as a matter of public policy, the attorney general should be given an opportunity to argue the question of constitutionality." App.25. The Mississippi Supreme Court thus "decline[d] to address the issue at this time." *Ibid.*

On May 17, applicant moved to recall the Mississippi Supreme Court's mandate. On May 24, that request was denied. App.58.

The emergency application followed. The application argues (among other things) that Mississippi law's five-year residency requirement violates the federal Constitution as applied to applicant. Application 27-36. This Court's Rules provide: "In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State." S. Ct. R. 29.4(c). The application does not cite 28 U.S.C. § 2403(b), which provides that when "the constitutionality of any statute of [a] State affecting the public interest is drawn in question," a court "shall certify such fact to the attorney general of the State, and shall permit the State to intervene ... for argument on the question of constitutionality." Applicant's counsel emailed the application to the Mississippi Attorney General's Office, but applicant did not—and did not claim to—serve the application on the Attorney General. *See* No. 22A1027 Application Proof of Service (attesting to service on only respondent and the Committee).

2. In seeking emergency relief, applicant contends that this Court is likely to grant certiorari and summarily reject the decision below because the Mississippi Supreme Court improperly avoided a federal constitutional claim (Application 11-22) and that this Court is likely to grant certiorari to address the federal constitutional standard applicable to candidate residency requirements (Application 22-36).

The State of Mississippi has not taken—and does not now take—a position on the factbound question, decided by the lower courts, whether applicant satisfied the

state-law candidate residency requirement. But the State has a strong interest in the constitutionality of its laws, including its law imposing the residency requirement that the application attacks. At this abbreviated emergency-application stage, where the application was filed on May 26, the State has never been a party to this case and was not served with the application, and a response has been called for by June 5 at noon, the State submits this response to defend its interest by briefly addressing applicant's federal constitutional arguments against Mississippi state law.

3. This case is not a vehicle for deciding any federal constitutional challenge to Mississippi's candidate residency requirement. This Court should not reach any such issue in this case. That is so for multiple reasons.

First, applicant failed to make a federal constitutional challenge before the state trial court—and, as a result, such a challenge has never properly been part of this case. Applicant raised a federal argument for the first time on appeal. She did not preserve that argument, so the Mississippi Supreme Court was right not to rule on it. Declining to reach an unpreserved argument is a well-recognized practice of long standing. *See, e.g., Pickens v. Donaldson*, 748 So. 2d 684, 691-92 (Miss. 1999) (declining to consider constitutional issue that had not been presented to trial court). This is reason enough to let stand the Mississippi Supreme Court's decision not to decide a federal constitutional issue here.

Second, applicant did not follow state rules requiring her to notify the Mississippi Attorney General that she was "asserting the unconstitutionality" of a state statute. Miss. R. Civ. P. 24(d). That civil-rule requirement applies in trial court.

Yet applicant did not purport to notify the Attorney General until after she had filed her opening appellate brief in the Mississippi Supreme Court. That notification came only after respondent pointed out in his brief that applicant had not provided the notice that Rule 24(d) requires. The Mississippi Supreme Court reasonably declined to reach this argument. *See, e.g., Pickens*, 748 So. 2d at 691-92 (declining to consider constitutional issue where Attorney General had not been notified under Rule 24(d)). Applicant has maintained that Rule 24(d) does not apply because she brings an as-applied rather than a facial challenge. *E.g.*, App.31. But the State’s highest court rejected applicant’s claim that that state rule does not apply and recognized that, although applicant claims to attack the statutory residency requirement as applied to her, her broad arguments (*e.g.*, Application 33-35) “attack the five-year residency requirement as a whole.” App.25.

Third, the lower courts did not decide any federal constitutional issue. Applicant thus asks this Court to reach such an issue without the benefit of lower-court consideration. This feature alone makes this a poor vehicle for addressing any federal constitutional challenge to Mississippi’s candidate residency requirement. Although applicant faults the lower courts for not deciding the federal constitutional issue, given the two failures noted above—the failure to make and preserve such an argument and the failure to provide the notice that state law requires—the lower courts cannot be faulted for not deciding a federal question. To the contrary, those courts were right to avoid unnecessary constitutional adjudication and to rule on the only grounds properly before them: fact-bound questions of state law.

Fourth, reaching applicant’s federal constitutional argument would unfairly prejudice the State. Applicant’s failures to assert and notice that argument in the trial court deprived the State of an opportunity to intervene at the trial-court level. That deprivation matters. Applicant argues that her federal claim turns on what “level of scrutiny” applies to the residency requirement and the “validity” of the State’s “claimed” “justifications” for it. Application 22. The State never had a chance to develop a trial-court record of factual “justifications” for its residency requirement and reasons why it meets whatever “scrutiny” applies. Reaching the federal constitutional issue now—amidst the procedural missteps that denied the State an opportunity to argue and develop its defense of its law—would be improper.

Last, this is an especially poor vehicle to reach any federal constitutional issue because that issue is presented on the highly abbreviated timeline of an emergency application. If the issues here are as important as the application claims, Application 25-27, then the Court should wait for a case that presents them cleanly—and on a timeline that lets the Court be confident that its decision will be the right one.

The application (and alternative petition for certiorari) is not a vehicle for addressing any federal constitutional challenge to Mississippi’s candidate residency requirement. This Court should not decide any such issue in this case.

Respectfully submitted.

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