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 TO THE SUPREME COURT OF MISSISSIPPI

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY, RECALL OF MANDATE, AND INJUNCTIVE RELIEF

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Neither response meaningfully contests that wielding Mississippi Rule of Civil Procedure 24(d) to bar an as-applied constitutional defense in an election contest is not a firmly established, regularly followed Mississippi procedural rule. Nor does either response dispute that there is an entrenched split on the underlying constitutional issue of durational candidate citizenship or residency requirements. The application should be granted.

1. Starting with Rule 24(d), neither response tries to explain how the text of that rule would apply to Mrs. Gunasekara's challenge. *See* Application 14.[1] Neither response discusses Rule 81, which limits the applicability of Rule 24(d) in election contests. *Id.* at 16–17. Neither response defends the Mississippi Supreme Court's reliance on *James v. Westbrooks*, 275 So. 3d 62 (Miss. 2019)—the only case that the court below considered on-point. *See* Barton Response 9–10 (quoting *Westbrooks*'s discussion of Rule 44, not Rule 24(d)); *see also* Application 17–18.[2] Neither response argues that the court below's invocation of a "public policy" procedural bar was firmly established or regularly followed. *See id.* at 18–19.

Instead, both responses merely repeat the court below's unreasoned statement that Mrs. Gunasekara's challenge is facial, not as-applied. State Response 6; Barton Response 11. Neither response disputes that as-applied constitutional challenges fall

[1] Mr. Barton relies instead on a federal rule with no Mississippi analogue and whose terms are substantially broader. *See* Barton Response 7 (discussing Federal Rule of Civil Procedure 5.1).

[2] Both responses agree that Mrs. Gunasekara provided a copy of her opening brief below to the attorney general within a week—and several weeks before the court issued a decision in this expedited case. Barton Response 11; State Response 3.

outside of Rule 24(d). *See* Application 14–16. And neither response *defends* the court below's redefinition of Mrs. Gunasekara's own claim, which even the court below identified as focused on "application" of the statute to her. App. 9; *accord* App. 53–55. Mrs. Gunasekara has not argued that someone who first stepped foot in Mississippi the day before the election is constitutionally entitled to run for office. Instead, she contends that *she* is. *See* Application 31–36. That is an as-applied challenge. *See Ward v. Colom*, 253 So. 3d 265, 267 (Miss. 2018) (explaining that a facial challenge asserts that the regulation "could never be constitutionally applied and valid" (cleaned up)); *see also Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (adequacy is "a question of federal law" (cleaned up)). In all events, that Mrs. Gunasekara's constitutional claim is as-applied is only one of many reasons that Rule 24(d)'s application here was not firmly established or regularly followed, and the responses do not grapple with all the other reasons supporting that conclusion.[3]

2. The State's response primarily relies on a different purported procedural bar, arguing that "[d]eclining to reach an unpreserved argument is a well-recognized practice of long standing" and "[t]his is reason enough to let stand the Mississippi Supreme Court's decision not to decide a federal constitutional issue here." State Response 5; *see also* Barton Response 5–6, 12–13. The simplest answer to that argument is that the Mississippi Supreme Court did not rely on that bar here.

[3] Mr. Barton relies on *Barnes v. Singing River Hospital Systems*, 733 So. 2d 199 (Miss. 1999) (Barton Response 8–9), but that case was not an election contest and involved a plaintiff bringing an action that challenged the constitutionality of a statute. And contrary to Mr. Barton's claim that the court there "refused to consider the constitutional challenge," Barton Response 8, the court noted several procedural bars then addressed "the merits" anyway. 733 So. 2d at 203.

This Court has no authority to invoke a new purported state procedural bar to justify a decision relying on an inadequate one. As the Court has explained many times, the state court must be "explicit in its reliance on a procedural default." *Harris v. Reed*, 489 U.S. 255, 264 (1989); *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("the state court decision" must "indicate[] clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds"). When "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground," this Court "assume[s] that there are no such grounds." *Id.* at 1042.

In any event, this new proffered procedural bar would not clearly apply. Mr. Barton affirmatively argued below that the judicial review component of Miss. Code Ann. § 23-15-961 provides a procedure that "is not designed to resolve constitutional challenges." Response 17; *see* Application 20. Further, Mrs. Gunasekara's constitutional argument centered on "the trial court's application of the five-year durational-citizenship requirement," App. 9, an issue that did not arise until after the trial court applied the requirement. And the statutory scheme provides no mechanism to ask the trial court for reconsideration. *Cf. Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) ("It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.").

3. The State argues that the underlying constitutional question should not be reached because it would "prejudice the State." State Response 7. But Mrs. Gunasekara's lead request is for the Court to grant the application then summarily vacate and remand so that the courts below—and the State, if it deems appropriate—

may address that constitutional question. This course would minimize the State's vehicle and participation concerns. *See id.* at 6–7.[4] And neither Mr. Barton nor the State disputes that constitutional law about durational candidacy requirements is in disarray—or that this issue is important. *See* Application 22–27.

4. Quoting a concurring opinion, Mr. Barton suggests that this Court's consideration should be shaded by the principle that federal courts hesitate to intervene last-minute in state elections. Response 15 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring), discussing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). The State itself does not seem to share Mr. Barton's concerns, which suggests that the (simple) "changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). This case involves the name of a single candidate, not the redrawing of district maps. *See id.* at 881 n.1 ("Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement."). And as a principle pertaining to stays, *Purcell* does not apply to this Court's consideration of the merits of Mrs. Gunasekara's suggestion for vacatur and remand.

The Court should grant the application.

[4] The State invokes this Court's Rule 29.4(c), State Response 4, but Mrs. Gunasekara's lead suggestion for vacatur and remand is not premised on "the constitutionality of any statute of a State." S. Ct. R. 29.4(c). Otherwise, the State concedes that it had timely notice of the Application. State Response 4. Applicant agrees with the State that 28 U.S.C. § 2403(b) may apply to this Court's consideration of the underlying constitutional question about durational candidacy requirements, and Applicant's counsel regrets the omission from the Application and Certificate of Service.

Respectfully submitted,

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