No. _____

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

EMERGENCY APPLICATION FOR STAY, RECALL OF MANDATE, AND INJUNCTIVE RELIEF

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant is Amanda Gunasekara, the Appellant in the proceedings before the Supreme Court of Mississippi.

Respondents include Matthew Barton and Mississippi Republican Executive Committee, who were Appellees in the proceedings below. The Mississippi Republican Executive Committee entered an appearance in the Mississippi Supreme Court's proceeding but did not participate in any other way. Thus, this application refers to Mr. Barton as the respondent.

The proceedings below were:

1. *Gunasekara v. Barton, et al.*, No. 2023-EC-00377-SCT (Supreme Court of Mississippi), where the final opinion and order was issued on May 11, 2023, holding "that no motion for rehearing will be allowed," "that this opinion shall be deemed final in all respects," and "that the mandate in this matter should issue immediately." App. 25. Applicant moved for a stay or a recall of the mandate pending appeal on May 17, 2023. That motion was denied on May 24, 2023. App. 58.
2. *Gunasekara v. Barton, et al.*, No. 25CI1:23-cv-00129 (Circuit Court of Hinds County, Mississippi), where the final opinion and order was issued on March 27, 2023.

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TO THE HONORABLE SAMUEL A. ALITO JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The Mississippi Supreme Court below disqualified Amanda Gunasekara from running for Public Service Commissioner. Because the court declined to address a properly presented federal constitutional claim, Mrs. Gunasekara applies to recall the mandate, stay the decision, and enjoin its enforcement, pending a decision on her petition for a writ of certiorari. Applicant suggests that the Court may treat this application as a petition for certiorari; summary vacatur and remand would allow the court below to consider the constitutional question in the first instance.

INTRODUCTION

Amanda Gunasekara is a seventh-generation Mississippian. She attended middle school, high school, college, and law school in the state. After law school, she came to D.C. to serve in the federal government before returning to Mississippi. On that basis, the state courts applied Mississippi's five-year citizenship requirement to disqualify her from running for the state's Public Service Commission, which regulates utilities. Under Mississippi law, a Public Service Commissioner must "possess the qualifications prescribed for the Secretary of State," Miss. Code Ann. § 77-1-1, including that the candidate be "a citizen of the state five years next preceding the day of [her] election," Miss. Const. art. V, § 133.

For Mississippi election purposes, citizenship and domicile are synonymous, so Mrs. Gunasekara had to be domiciled in Mississippi by November 7, 2018. App. 8, 10. Though the State Executive Committee of the Mississippi Republican Party found that Mrs. Gunasekara met this requirement, the state courts on review disqualified

her, holding that she did not "change her citizenship to the State of Mississippi [until] some point shortly after November 7, 2018." App. 18 (quoting App. 29). Mrs. Gunasekara argued that this application of Mississippi's requirement violated the Fourteenth Amendment of the U.S. Constitution by restricting the fundamental rights to vote, associate, run for office, and travel interstate. App. 9, 52–56.

The Mississippi Supreme Court "decline[d] to address" the federal constitutional question "as a matter of public policy," reasoning that "the attorney general should be given an opportunity to argue the question of constitutionality." App. 25. The court pointed out that Mississippi Rule of Civil Procedure 24(d) requires notice to the attorney general of certain constitutional challenges, though the court acknowledged that statutory election contests like this one are generally exempted from the state rules of civil procedure. Plus, Rule 24(d) by its text does not apply to the constitutional defense offered by Mrs. Gunasekara. And by settled state precedent, Rule 24(d) does not apply anyway to as-applied challenges like Mrs. Gunasekara's. The court below nonetheless asserted that one time, it had "declined to address the constitutionality of a statute in an election contest pursuant to Rule 24(d)." App. 25. But that case applied a *different* rule and a general constitutional avoidance principle. On top of all this, Mrs. Gunasekara provided timely notice to the attorney general of her constitutional argument, and the court below did not request the attorney general's views during its weeks of deliberations. Instead, the court used a novel "policy" bar to "decline to address" the constitutional defense "at this time"—while disallowing reconsideration and immediately issuing its mandate. *Id.*

The Mississippi Supreme Court's application of an unprecedented procedural bar to foreclose review of a valid federal constitutional claim contradicts this Court's precedents. Those precedents teach that state law procedural bars are only adequate to avoid constitutional claims if their application is "firmly established and regularly followed." *Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023). The bar applied below is the opposite: it was premised on a rule that is textually (and by precedent) inapplicable and has not been applied to election contests. Neither the respondent nor the court below cited *any* Mississippi case holding that Rule 24(d) bars federal constitutional defenses in election contests. For that reason alone, the Court is likely to (and could) grant certiorari, summarily vacate, and remand for the court below to conduct a constitutional analysis in the first instance.

The Court is also likely to grant certiorari on the underlying constitutional claim. The proper constitutional standard to assess durational citizenship or residency requirements for candidates is the subject of a protracted split among the lower courts, with federal courts of appeals and state high courts using everything from rational basis review to strict scrutiny. Applying a five-year citizenship requirement to bar someone who has lived in Mississippi for 21 years from running for office cannot satisfy any form of the heightened scrutiny that should apply to such a restriction on citizens' right to vote and candidates' right to travel interstate.

This Court's intervention is needed now. The Secretary of State receives the list of qualified candidates by June 9 and publishes the sample primary ballot on June 19. The Court should grant the application.

OPINION BELOW

The Mississippi Supreme Court's opinion and order was entered on May 11, 2023. It is reproduced at App. 1–26 and is reported at __ So.3d __, 2023 WL 3365567.

JURISDICTION

The Court has jurisdiction over this application for a stay and injunction pending appeal under 28 U.S.C. §§ 1257 and 1651. Section 1257 gives this Court jurisdiction to hear Mrs. Gunasekara's appeal regarding the constitutionality of applying Mississippi's five-year durational candidate citizenship requirement against her. Both a stay of the Mississippi Supreme Court's order and an injunction pending appeal would be in aid of this Court's jurisdiction over those constitutional issues. *See, e.g.*, *Smith v. E.L.*, 577 U.S. 1046 (2015) (granting application for stay of state-court judgment pending *V.L. v. E.L.*, 577 U.S. 404 (2016)).

STATEMENT

1. Amanda Gunasekara is a seventh-generation Mississippian. She attended middle school, high school, college, and law school in the State, living in both Decatur and Oxford, Mississippi. App. 2. After graduating from law school in 2010, Mrs. Gunasekara took a position working for a member of the U.S. House of Representatives in Washington, D.C. *Id.* That job led to positions in the U.S. Senate and eventually with the Environmental Protection Agency. *Id.* Though she did not "intend[] to stay in D.C. indefinitely and did not consider D.C. her home during that time frame," "she had no definite plans to leave" "[w]hile she was there." *Id.* During summer 2018, Mrs. Gunasekara and her husband "decided to transition back to

Mississippi to make it their permanent home." App. 3. "On August 21, 2018, Gunasekara's parents and she agreed to purchase a home for her family adjacent to their farm" in Decatur. *Id.* (cleaned up). "[H]er parents bought the house for her to eventually procure once [she] had the funds lined up." App. 4 n.1 (cleaned up). Mrs. Gunasekara "did not have any thoughts of staying in D.C. when the bid for the Decatur property was accepted." App. 4. In September 2018, she contacted a contractor "to make plans for renovation" of the home and was meeting with the contractor and local educators about school enrollment by November 2018. App. 4. Mrs. Gunasekara was still registered to vote in D.C., and on November 6, 2018, she "voted to help a friend" who was running for an Advisory Neighborhood Committee. App. 5.

Interior work on the house began in January 2019, and Mrs. Gunasekara reacquired a Mississippi's driver's license that month. *Id.* The next month, she resigned from the EPA and incorporated her nonprofit company in Mississippi, continuing to commute from D.C. to Mississippi. App. 5–6. In June 2019, the Gunasekaras moved to Decatur. App. 6.

In March 2020, Mrs. Gunasekara was appointed Chief of Staff at the EPA, and she commuted to D.C. for the job while "her children attended school in Mississippi" and "she continued to pay taxes in Mississippi." *Id.* Mrs. Gunasekara's "position ended when the new administration began on January 20, 2021," and the family moved to a house in Oxford, Mississippi soon after. App. 7.

2. In November 2022, Mrs. Gunasekara announced her intention to run for Public Service Commissioner, District 3, in the August 8, 2023 Republican primary election and filed the necessary paperwork. App. 7. "[N]o Democratic candidate qualified to run for the seat." App. 7 n.3. On February 9, 2023, respondent Matthew Barton—a candidate for District Attorney in Desoto County—"filed a contest of [Mrs.] Gunasekara's qualifications with the Executive Committee of the Mississippi Republican Party" contending Mrs. Gunasekara "had been a resident of D.C. within the preceding five year period" and thus "was not qualified to run for commissioner." App. 1, 8; *see* Miss. Code Ann. § 23-15-961(1). "On February 16, 2023, after a hearing on the merits, the Executive Committee denied [Mr.] Barton's contest and certified [Mrs.] Gunasekara as a candidate." App. 8.

3. On February 24, Mr. Barton petitioned for judicial review of the State Executive Committee's decision in the Circuit Court of Hinds County, Mississippi. App. 8, 27; *see* Miss. Code Ann. § 23-15-961(4). After limited discovery, briefing, and a hearing, the judge appointed by the Mississippi Supreme Court concluded that Mrs. Gunasekara did not meet the residency requirement. App. 8; *see* App. 27–30. The court found it "clear" that "in 2018, [Mrs. Gunasekara] and her family determined that they would relocate[] to Mississippi" and in August 2018 "acquired a house" to do so. App. 28. But the court found that "despite her plan to return to Mississippi," Mrs. Gunasekara "continued to maintain her residency in the District of Columbia including exercising her right to vote there on November 6, 2018." App. 29. The court said that there was "nothing in the evidence that indicates any change in that intent

in the following 24-hour period that would have been necessary in order to establish citizenship in the State of Mississippi on November 7, 2018." *Id.* Finally, the court found it "clear that [Mrs. Gunasekara] did, in fact, relocate and change her citizenship to the State of Mississippi at some point shortly after November 7, 2018." *Id.* Thus, by order entered March 27, 2023, the court disqualified Mrs. Gunasekara. App. 30.

4. On March 30, Mrs. Gunasekara filed a statutory appeal with the Mississippi Supreme Court. App. 45; *see* Miss. Code Ann. § 23-15-961(6). By statute, the appeal was expedited, and Mrs. Gunasekara filed her opening brief on April 13. App. 57. One of the three issues was "[w]hether the trial court's application of the citizenship requirement violates the Fourteenth Amendment of the United States Constitution." App. 9; *see* App. 38. Mrs. Gunasekara served a copy of this brief on the Mississippi Attorney General on April 19. App. 31; *see* Miss. R. App. P. 44(a). The briefing period concluded on April 20, and the Mississippi Supreme Court affirmed on May 11. App. 1–26.

The Supreme Court held that "the trial court did not manifestly err by holding that [Mrs.] Gunasekara failed to meet the residency requirements." App. 2. The court said that "[t]he trial court properly considered all factors" related to domicile. App. 16. And the court held that given Mrs. Gunasekara's D.C. connections on November 7, 2018—particularly her vote there the day before—the trial court did not obviously err, notwithstanding that Mrs. Gunasekara "did, in fact, relocate and change her citizenship to the State of Mississippi at some point shortly after November 7, 2018." App. 18–19 (cleaned up).

On the constitutionality of applying the five-year residency restriction to bar Mrs. Gunasekara's candidacy, the court said that "[u]nder Mississippi Rule of Civil Procedure 24(d), when the constitutionality of a statute is challenged, the Attorney General of the State of Mississippi must be notified 'within such time as to afford him an opportunity to intervene and argue the question of constitutionality.'" App. 24 (quoting Miss. R. Civ. P. 24(d)). The court immediately noted that "Mississippi Rule of Civil Procedure 81(a)(4), however, provides that the Mississippi Rules of Civil Procedure 'apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures . . . (4) proceedings pertaining to election contests.'" App. 24–25 (quoting Miss. R. Civ. P. 81(a)(4)). But the court asserted that "[e]ven so, this Court previously has declined to address the constitutionality of a statute in an election contest pursuant to Rule 24(d)." App. 25 (citing *James v. Westbrooks*, 275 So. 3d 62, 66 (Miss. 2019)). The court recognized Mrs. Gunasekara's statement "that she is attacking the constitutionality of the statute as it was applied" but said that her "arguments attack the five-year residency." App. 25. Considering "[r]esolution of this issue [to be] of broad public importance," the court said that, "as a matter of public policy, the attorney general should be given an opportunity to argue the question of constitutionality" and "[t]herefore, we decline to address the issue at this time." *Id.*

At the same time, "[g]iven the necessity for an expedited and final disposition," the court held that "no motion for rehearing will be allowed," "this opinion shall be deemed final in all respects," and "the mandate in this matter should issue

immediately." *Id.* Despite this statement of finality, a few days later, Mrs. Gunasekara moved the court to stay and recall its mandate pending an appeal to this Court. *See* Appellant's Motion for Stay or Recall of Mandate Pending Application for Certiorari (filed May 17, 2023). On May 24, the Mississippi Supreme Court denied the motion. App. 58.

The deadline for the party committees to provide their lists of qualified candidates to the Secretary of State for the primary election ballot is June 9. Mississippi Secretary of State's Office, 2023 Elections Calendar, https://www.sos.ms.gov/content/documents/Elections/2023%20Elections%20Calendar%20Final.pdf (Dec. 28, 2022). And the Secretary of State will publish the sample ballot on June 19, with absentee ballots going out on June 24. *Id.* The primary is on August 8, and the general election is on November 7. *Id.*

ARGUMENT

A stay pending appeal is appropriate when there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari;" (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below;" and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

The All Writs Act, 28 U.S.C. § 1651(a), also empowers this Court to grant injunctive relief as necessary to preserve its appellate jurisdiction. *See, e.g.*, *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 201–02 (1945). Because the Mississippi Supreme Court's decision is appealable only to this Court by writ of

certiorari, 28 U.S.C. § 1257(a), the requested injunctive relief pending appeal would be "in aid of [this Court's] jurisdiction[]," *id.* § 1651(a), and "cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.1.

This case features exceptional circumstances making immediate relief appropriate, in anticipation of summary vacatur or plenary review on the merits. Given the exigency, Applicant suggests that this Court could construe this application as a petition for certiorari and summary vacatur. The Court is likely to grant the petition for certiorari and vacate because the court below used a novel procedural bar with no basis in rule or precedent to avoid a federal constitutional defense. The Court is also likely to grant the petition for certiorari to resolve the several entrenched splits over how to analyze durational candidate residency restrictions. Because of Mrs. Gunasekara's long history in Mississippi and the lack of any compelling justification for disqualifying her, there is at least a fair prospect that the Court will reverse on this ground. The remaining equitable factors also support this Court's immediate intervention. Without that intervention, a well-qualified candidate will be wrongfully excluded from consideration by the voters of Mississippi. The respondent—who has no stake in this race—will suffer no harm, and the public interest is in vindicating important First and Fourteenth Amendment rights. The Court should grant the application.

I. This Court is likely to grant the petition for certiorari and summarily vacate or reverse.

For two reasons, this Court is likely to grant certiorari and at least vacate the decision below. First, that decision applies an unprecedented state procedural bar to

avoid a meritorious federal constitutional claim. Because state courts may not fashion novel procedural devices to preclude federal constitutional claims, this Court is likely to grant certiorari and summarily vacate and remand for the Mississippi Supreme Court to consider Mrs. Gunasekara's constitutional claim. Given that the election is imminent, Applicant suggests that the Court could go ahead and take this action.

Alternatively, the Court is likely to grant certiorari to address the constitutionality of applying Mississippi's five-year citizenship restriction to Mrs. Gunasekara. That claim was pressed below, was not subject to an adequate state procedural bar, and implicates an entrenched split of authority about how to assess the constitutionality of durational candidate residency restrictions. Because Mississippi's onerous five-year restriction, applied here, bars a candidate who has spent 21 years in Mississippi from running for public office, prevents voters from supporting her, and impedes her right to travel, there is a fair prospect that the Court would reverse on the merits.

A. The Mississippi Supreme Court's unprecedented avoidance of a valid federal constitutional claim requires summary vacatur.

This Court is likely to grant certiorari to address whether the procedural bar applied by the Mississippi Supreme Court provides an adequate state ground to avoid a federal constitutional claim in an election contest. The court below applied a rule that neither textually nor under precedent governs an as-applied constitutional defense in a statutory election contest. Wielding such a rule to block valid federal constitutional claims contradicts this Court's precedents, which limit adequate state grounds to those that are both firmly established and regularly followed. As the

Mississippi Supreme Court all but conceded, applying Mississippi Rule of Civil Procedure 24(d) to bar a constitutional defense like Mrs. Gunasekara's in an election case satisfies neither requirement. Because the decision below conflicts with this Court's precedents, this Court is likely to grant certiorari and summarily vacate—and Applicant suggests that it could do so now.

The question of adequate state grounds to avoid a federal constitutional question has both jurisdictional and merits significance here. This Court "will not take up a question of federal law in a case 'if the decision of the state court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Cruz*, 143 S. Ct. at 658 (cleaned up) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)); *see Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.").

The issue here is adequacy. "The question whether a state procedural ruling is adequate is itself a question of federal law." *Cruz*, 143 S. Ct. at 658 (quoting *Beard v. Kindler*, 558 U.S. 53, 60 (2009)). "Ordinarily, a violation of a state procedural rule that is 'firmly established and regularly followed will be adequate to foreclose review of a federal claim.'" *Id.* (cleaned up) (quoting *Lee*, 534 U.S. at 376). Thus, the relevant state procedural rule must be "firmly established and regularly followed" to be adequate. And even if those requirements are met, "in exceptional cases, a generally sound rule may be applied in a way that renders the state ground inadequate to stop consideration of a federal question." *Id.* (cleaned up).

Here, the procedural rule purportedly adopted by the Mississippi Supreme Court was not firmly established or regularly followed. And even if it were, its application in the unique context of expedited election cases renders it inadequate to preclude consideration of important federal constitutional questions. Thus, this Court has jurisdiction, and it is likely to grant certiorari and summarily vacate and remand so that the court below can undertake its obligation to adjudicate a valid federal constitutional defense.

1. The bar is not firmly established or regularly followed.

This Court will "not allow[] state courts to bar review of federal claims by invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard*, 558 U.S. at 63–64 (Kennedy, J., concurring). In *James v. Kentucky*, for instance, the rule was "not always clear or closely hewn to," so it was inadequate. 466 U.S. 341, 346 (1984). Likewise, in *NAACP v. Alabama ex rel. Patterson*, the "local procedural rule" could not preclude review of the federal claim "because petitioner could not fairly be deemed to have been apprised of its existence." 357 U.S. 449, 457 (1958). As the Court explained, "Novelty in procedural requirements cannot be permitted to thwart review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457–58. Thus, "only a firmly established and regularly followed state practice may be interposed by a State to prevent" review "of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423–24 (1991) (cleaned up).

Here, the supposed procedural bar of Mississippi Rule of Civil Procedure 24(d) on as-applied constitutional defenses in election cases is neither firmly established nor regularly followed. Every aspect of the Mississippi Supreme Court's explanation of why it applied that bar here was flawed. First, the court said that under Rule 24(d), "when the constitutionality of a statute is challenged, the Attorney General of the State of Mississippi must be notified 'within such time as to afford him an opportunity to intervene and argue the question of constitutionality.'" App. 24. But Rule 24(d)'s plain language would not cover this case even if the Mississippi Rules of Civil Procedure otherwise applied to this election contest. By its text, Rule 24(d) only pertains to actions "restraining or enjoining the action of any officer of the State" or "for declaratory relief brought pursuant to Rule 57" seeking "a declaration or adjudication of the unconstitutionality of any statute" "among the relief requested." Those do not describe the constitutional defense here. Mrs. Gunasekara did not bring this action at all and did not ask to enjoin any state official. Nor did she bring a declaratory judgment action.[1] Instead, she offered the federal constitutional argument as a defense to the disqualification action against her, and Rule 24(d)'s language does not cover that use.

Rule 24(d) did not apply for another reason. Mississippi Supreme Court precedent holds that "a claim which does not seek to invalidate a statute, but only challenges the constitutionality of its application, does not require Rule 24(d)(2) notification." *Dedeaux Util. Co. v. City of Gulfport*, 63 So. 3d 514, 534 (Miss. 2011);

[1] Nor could she have, since "the statutory provision is the exclusive remedy for deciding election contest issues." *In re Wilbourn*, 590 So. 2d 1381, 1386 (Miss. 1991).

see Aarco Oil & Gas Co. v. EOG Res., Inc., 20 So. 3d 662, 665 (Miss. 2009) (same). And the court below acknowledged that the constitutional issue as presented by Mrs. Gunasekara was "[w]hether the trial court's *application* of the citizenship requirement violates the Fourteenth Amendment." App. 9 (emphasis added). The court offered an unreasoned dismissal of this framing, stating that her "arguments attack the five-year residency requirement as a whole." App. 25. But Mrs. Gunasekara has not argued that the requirement is facially invalid. Instead, she has maintained that "the trial court's application of Art. V, § 133 to disqualify [her] candidacy . . . burdens several important and fundamental rights and serves no legitimate interests" based on her own circumstances. Brief for Appellant 16–17 (App. 53–54). For instance, she explained that no significant interest is "served by excluding [her]" because she "is a seventh-generation Mississippian who attended middle school, high school, college, and law school in the State" and even under the factual analysis below, met the requirement "but for a mere couple months at the beginning of the pertinent five-year period." *Id.* at 19 (App. 56). She repeatedly confined her challenge to an as-applied one: "durational residency requirements for holding public office are not per se unconstitutional." *Id.*; *see* Reply Brief 7 ("Contrary to Mr. Barton's assertion that '[t]he Candidate seeks to declare the entire residency requirement system,' Mrs. Gunasekara presents a much narrower," "as-applied constitutional challenge.") Because Mrs. Gunasekara "does not assert that [the statute] is per se unconstitutional, but only unconstitutional as applied to" her, "no Rule 24(d)(2) notification was required." *Dedeaux*, 63 So. 3d at 534–35; *cf. 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)).

If all that were not enough, Rule 81(a)(4) provides that the Mississippi Rules of Civil Procedure "are subject to limited applicability in," *inter alia*, "proceedings pertaining to election contests." App. 25 (court below acknowledging this limitation). Under Rule 81(a)(4), the "[s]tatutory procedures specifically provided for" election contests "shall control," and those procedures lack any analogue to Rule 24(d). *See* Miss. Code. Ann. § 23-15-961. Indeed, the Mississippi Supreme Court previously held that because of Rule 81(a)(4), "it was error" to apply the other intervention provisions in Rule 24. *Dillon v. Myers*, 227 So. 3d 923, 929 (Miss. 2017); *see also Jackson v. Bell*, 123 So. 3d 436, 440 (Miss. 2013) ("The review process is entirely distinct and established by statute, until it reaches this Court, where procedure is controlled by the Mississippi Rules of Appellate Procedure."). And as shown above, Rule 24(d) would not apply to the as-applied constitutional defense here regardless, so applying subsection (d) would be even less appropriate.

The Mississippi Supreme Court glossed over all these problems, asserting that "this Court previously has declined to address the constitutionality of a statute in an election contest pursuant to Rule 24(d)." App. 25 (citing *James v. Westbrooks*, 275 So. 3d 62, 66 (Miss. 2019)). Even if this were accurate—and putting aside the court's contrary precedent about Rules 24 and 81—one application does not a "firmly established and regularly followed" rule make. *See Walker v. Martin*, 562 U.S. 307, 320 (2011) (favorably citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir.

1990): a "state ground 'applied infrequently, unexpectedly, or freakishly' may 'discriminat[e] against the federal rights asserted' and therefore rank as 'inadequate'"); *see also Hathorn v. Lovorn*, 457 U.S. 255, 264–65 (1982) ("a procedural rule that the state court applies only irregularly" is not "adequate"); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("state procedural requirements which are not strictly or regularly followed" are inadequate).

Regardless, the decision relied on by the court below had no holding about Rule 24(d). The cited page from *Westbrooks*, in the Facts and Procedural History section of the Mississippi Supreme Court's opinion, notes the following about the trial court proceedings in an election contest: "Although [the respondent] argued that Sections 23-15-973 and 23-15-976 are unconstitutional, she did not provide notice to the attorney general as required under Mississippi Rule of Civil Procedure 24(d)." *Westbrooks*, 275 So. 3d at 66. Whatever the basis or import of this statement—which reads as a summary of proceedings below that apparently involved a *facial* challenge—it was *not* why the Mississippi Supreme Court "declined to address the constitutionality of [the] statute." App. 25. Later in the *Westbrooks* opinion, the Mississippi Supreme Court noted that the respondent cross-appealed about the trial court's "declining to consider that part of the motion for summary judgment challenging the constitutionality of" certain state provisions. 275 So. 3d at 67. The Mississippi Supreme Court did *not* hold that Rule 24(d) precluded the constitutional argument. Instead, it said that "the attorney general was not provided a copy of her [appellate] brief as required by Mississippi Rule of Appellate Procedure 44" and "[t]he

issue is therefore procedurally barred." *Id.* The court also held that it was unnecessary to decide the constitutional question "to resolve this appeal," *id.*, presumably because the court ultimately held "that the trial court correctly granted summary judgment in favor of [the respondent]" regardless, *id.* at 70.

Thus, the Mississippi Supreme Court had never held that Rule 24(d) (atextually) applied to an as-applied constitutional defense in an election contest—not even in dicta. To contrary, the Mississippi Supreme Court in *Westbrooks* applied (in dicta) Mississippi Rule of Appellate Procedure 44(a), which requires that "[i]f the validity of any statute . . . is raised in the Supreme Court," "and the state . . . is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General." Here, the Mississippi Supreme Court did not rely on Rule 44 to avoid the constitutional issue, and for good reason: it is undisputed that Mrs. Gunasekara timely served a copy of her brief on the Attorney General. *See* App. 31. The Rule 24(d) bar it *did* apply was unprecedented.

The Mississippi Supreme Court's only remaining explanation for applying a procedural bar here was that "as a matter of public policy, the attorney general should be given an opportunity to argue the question of constitutionality," and "[t]herefore, we decline to address the issue at this time." App. 25. This apparent public policy exception to adjudication of constitutional issues is neither firmly established nor regularly followed. Mrs. Gunasekara complied with all applicable Mississippi rules that would facilitate such argument by the attorney general. And the court below did

not cite a single other case in which it applied this bar untethered from a rule. More, the bar makes little sense here: The court below had sufficient time to seek argument from the attorney general. Instead, it issued an opinion refusing to address the constitutional question because the attorney general had not weighed in. Then, the court "decline[d] to address the issue at this time"—even as it immediately issued its mandate and precluded any effort at rehearing or any other follow-up litigation. App. 25. So rather than leading to a full airing of the constitutional issue, the Court's action prohibits it all together.

In sum, because the Mississippi Supreme Court "appl[ied] a rule unannounced at the time of" the proceedings below, that new rule is "inadequate to serve as an independent state ground" to preclude review of the federal constitutional claim. *Ford*, 498 U.S. at 424.

2. In any event, the bar is inadequate to preclude constitutional review.

Even if Mississippi's purported procedural rule were firmly established and regularly followed, the constitutional issue here would still warrant review. In this "exceptional case[]," "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude . . . review of a federal question." *Cruz*, 143 S. Ct. at 658 (cleaned up). "A state ground . . . may be found inadequate when 'discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law.'" *Walker*, 562 U.S. at 320 (quoting 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026 (2d ed. 1996)). "[W]hatever springes

the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (cleaned up).

As shown above, the application of Mississippi Rule of Civil Procedure 24(d) to an as-applied constitutional defense in a statutory election contest was, at minimum, unforeseeable. Moreover, applying that rule would make it nearly "impossible" "to obtain relief." *Cruz*, 143 S. Ct. at 659. According to the respondent himself below, Miss. Code Ann. § 23-15-961 provides a procedure that "is not designed to resolve constitutional challenges." Brief of Appellee 17. Yet this "statutory provision is the exclusive remedy for deciding election contest issues" before primaries. *Tunica Cnty. Democratic Exec. Comm. v. Jones*, 233 So. 3d 792, 796 (Miss. 2017) (quoting *Wilbourn*, 590 So. 2d at 1386); *see* Miss. Code. Ann. § 23-15-961(7). The statutory scheme gives the designated judge only the authority to "determine whether the candidate whose qualifications have been challenged is legally qualified to have his name placed upon the ballot in question." Miss. Code Ann. § 23-15-961(5); *see Tunica*, 233 So. 3d at 795 (emphasizing that "[t]he power of the trial judge's determination is statutorily limited"). The statutory scheme contains no provision for any party, including the attorney general, to intervene. *Cf. Dillon*, 227 So. 3d at 929 (holding that intervention in an election contest is governed by statute, "Rule 24 notwithstanding").

By statute, the election contest must proceed quickly. "The original petition with the executive committee must be filed within ten days after the qualifying

deadline, and the petition for judicial review must be filed no later than fifteen days after the petition was originally filed with the executive committee, meaning that all challenges to qualifications must be filed within twenty-five days after the qualifying deadline." *Tunica*, 233 So. 3d at 795. It is then "the official duty of the trial judge to proceed to the discharge of the designated duty at the earliest possible date." Miss. Code Ann. § 23-15-961(5). So even if the attorney general could intervene—even with no rule allowing it—it is unlikely that there would be sufficient time to do so.

Likewise, on appeal, the statute requires expedited resolution, and the Mississippi Supreme Court's action in this case seems to reflect its view that the attorney general lacked sufficient time to weigh in. Again, Mrs. Gunasekara served her brief on the attorney general nearly a month before the Supreme Court's resolution, yet the court did not believe that the attorney general had a sufficient "opportunity" to address the issue. App. 25. Under these unusual circumstances, the [Mississippi] Supreme Court's application of" Rule 24(d) "was so novel and unfounded that it does not constitute an adequate state procedural ground." *Cruz*, 143 S. Ct. at 660.

Because the court below held that Mrs. Gunasekara's as-applied constitutional defense was "procedurally barred," it did not "address[] it on the merits." *Lee*, 534 U.S. at 387. Thus, at a minimum, the Court is likely to summarily vacate the decision below and "remand the case for that purpose." *Id.*; *see, e.g.*, *Cruz*, 143 S. Ct. at 661–62 (vacating a state court decision that was "not adequate to preclude review of a federal question" and remanding); *Williams v. Georgia*, 349 U.S. 375, 391 (1955)

("[O]rderly procedure requires a remand to the State Supreme Court for reconsideration of the case.").

B. Independently, the Court is likely to grant certiorari to address the constitutional standard applicable to durational candidate citizenship requirements.

This Court has not addressed the constitutional standards that apply to durational candidate citizenship or residency requirements since a few summary dispositions fifty years ago. In the meantime, a widespread, entrenched split has arisen in the lower courts over how to analyze such laws. Courts disagree about which constitutional rights are implicated, the appropriate level of scrutiny, and the validity of claimed state justifications. The state of law is in disarray. This confusion undermines vital interests in the right to vote and run for public office. Under practically any standard, disqualifying Mrs. Gunasekara from running for office in a state where she has spent most of her life is unconstitutional. Thus, the Court is likely to grant certiorari to resolve this important, recurring question, and there is at least a fair prospect that the Court will reverse.

1. The lower courts are split on durational candidate requirements.

For over 50 years, this Court has repeatedly struck down durational residency requirements. Beginning with *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court held that voter residency rules burden the fundamental rights to vote and move between states and must withstand strict scrutiny. *Id.* at 343–44. *Dunn* is part of a long line of precedents applying heightened scrutiny to durational residency rules, including

rules related to welfare benefits,[2] medical care,[3] public employment,[4] and more.[5] Based on *Dunn*, the Mississippi Constitution's "4-months registration for qualified electors before voting in elections" was held "unconstitutional, void and of no effect, as contrary to the Equal Protection Clause of the Fourteenth Amendment." *Ferguson v. Williams*, 343 F. Supp. 654, 657 (N.D. Miss. 1972).

But the Court has not resolved the entrenched conflict over how to assess durational *candidate* requirements. About fifty years ago, it summarily affirmed a few decisions that applied heightened scrutiny and upheld such requirements.[6] Since then, a deeply entrenched split has developed in the courts about at least three interrelated issues pertaining to such requirements: (1) what constitutional rights are at stake, (2) the proper standard to adjudicate these restrictions, and (3) what state interests can justify these restrictions. *See Cox v. Barber*, 568 S.E.2d 478, 480 (Ga. 2002) ("Lower court opinions are inconsistent on the validity of requirements that a candidate must reside within a district for a specific time."); *Matthews v. City of Atl. City*, 417 A.2d 1011, 1016 (N.J. 1980) ("Courts of other jurisdictions have taken widely varying positions on both the interests involved in residency requirements for elective office and the appropriate standard of judicial scrutiny."). *See generally* J.

[2] *Saenz v. Roe*, 526 U.S. 489, 504 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).
[3] *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 269 (1974).
[4] *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986).
[5] *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2476 (2019).
[6] *See Chimento v. Stark*, 353 F. Supp. 1211, 1213-14 (D.N.H. 1973) ("[T]he proponents of the law must make 'a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest'" because the law "poses a barrier to a candidacy of a not insubstantial segment of the community," "limits the voters in their choice of candidates," and "impinges on the exercise of his basic constitutional right to travel interstate."), *aff'd*, 414 U.S. 802 (1973); *Sununu v. Stark*, 383 F. Supp. 1287, 1290 (D.N.H. 1974) ("[T]he proper standard of review is the 'compelling state interest' test."), *aff'd*, 420 U.S. 958 (1975).

Perovich, Annotation, *Validity of Requirement That Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period*, 65 A.L.R.3d 1048 (collecting cases on every side of these issues).

First, courts disagree about whether durational candidate requirements infringe several First and Fourteenth Amendment rights, including the rights to vote,[7] travel interstate freely,[8] be a candidate for public office,[9] and associate with others.[10] Most courts seem to agree that durational requirements infringe at least one of these rights to at least some extent, but a proper constitutional analysis "depend[s] upon the interest affected or the classification involved." *Dunn*, 405 U.S. at 335.

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[7] *Compare Henderson v. Fort Worth Indep. Sch. Dist.*, 526 F.2d 286, 292 (5th Cir. 1976) ("the statute's impact on voters is substantial"), *Wellford v. Battaglia*, 485 F.2d 1151, 1152 (3d Cir. 1973) (restriction "interfered with the right to vote"), *Gilbert v. State*, 526 P.2d 1131, 1133 (Alaska 1974) (emphasizing "the burden upon voters imposed by durational residency requirements for political candidates"), *and Matthews*, 417 A.2d at 1020 ("a durational residency requirement for candidates" is "a significant intrusion into the voter's freedom of choice"), *with Antonio v. Kirkpatrick*, 579 F.2d 1147, 1149 (8th Cir. 1978) ("The delay imposed upon voters is a negligible intrusion upon their exercise of the franchise."), *and City of Akron v. Bell*, 660 F.2d 166, 169 (6th Cir. 1981) (these restrictions do not implicate "a fundamental right (such as voting)").

[8] *Compare Wellford*, 485 F.2d at 1152 ("requirement interfered with the potential candidate's right to travel"), *and In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly*, 40 A.3d 684, 698 (N.J. 2012) ("[C]ourts that have applied strict scrutiny to durational residency requirements have done so only when those requirements imposed a burden on the right to interstate travel."), *with Antonio*, 579 F.2d at 1149 ("The requirement does not serve as a real or direct impediment to interstate travel"), *and Gilbert*, 526 P.2d at 1135 ("[I]t cannot seriously be asserted that limiting the privilege of candidacy to residents who have lived in the state for three years and in their legislative districts for a year would discourage citizens from exercising their rights to travel.").

[9] *Compare Cowan v. City of Aspen*, 509 P.2d 1269, 1272 (Colo. 1973) ("[T]he right to hold public office, by either appointment or election, is one of the valuable and fundamental rights of citizenship."), *Thompson v. Mellon*, 507 P.2d 628, 633 (Cal. 1973) (same), *and White v. Manchin*, 318 S.E.2d 470, 488 (W. Va. 1984) (restriction on "the [fundamental] right to become a candidate for public office"), *with Gilbert*, 526 P.2d at 1132 ("No specific right of candidacy for public office has been recognized under the Federal Constitution."), *and Matthews*, 417 A.2d at 1019 ("There is no fundamental right to run for office.").

[10] *Compare Mancuso v. Taft*, 476 F.2d 187, 195 (1st Cir. 1973) ("The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association."), *with Chimento*, 353 F. Supp. at 1217 ("This restriction does not deprive anyone of his right to association or of the freedom of expression of his political views.").

Second, courts disagree about the level of scrutiny that should apply to durational candidate requirements. With the caveat that older cases may not have grappled with the distinction between intermediate and strict scrutiny, some courts apply intermediate scrutiny[11] and others apply strict scrutiny.[12] Some courts even apply rational basis review.[13]

Third, courts disagree about the importance and validity of the state interests commonly asserted as justifications for durational candidate requirements.[14]

All these entrenched conflicts—all involving state high courts and federal courts of appeals—can be resolved only by this Court. This Court's review is needed.

2. This question is increasingly important.

The longstanding division on durational candidate restrictions implicates an important and recurring issue. As shown by the many decisions cited above, this issue

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[11] *E.g.*, *Bell*, 660 F.2d at 169; *In re Contest of Nov. 8, 2011*, 40 A.3d at 704; *Cox*, 568 S.E.2d at 481 (using both intermediate scrutiny and rational basis language).

[12] *E.g.*, *Howlett v. Salish & Kootenai Tribes of Flathead Rsrv.*, 529 F.2d 233, 243 (9th Cir. 1976); *Henderson*, 526 F.2d at 292; *Wellford*, 485 F.2d at 1152; *Mancuso*, 476 F.2d at 196; *Bruno v. Civ. Serv. Comm'n of City of Bridgeport*, 472 A.2d 328, 335 (Conn. 1984); *Thompson*, 507 P.2d at 633; *Bd. of Sup'rs of Elections of Prince George's Cnty. v. Goodsell*, 396 A.2d 1033, 1038 (Md. 1979); *Cowan*, 509 P.2d at 1272; *Gilbert*, 526 P.2d at 1134; *Manchin*, 318 S.E.2d at 488; *Hall v. Miller*, 584 S.W.2d 51, 55 (Ky. Ct. App. 1979); *Phelan v. City of Buffalo*, 54 A.D.2d 262, 269 (N.Y. App. Div. 1976).

[13] *E.g.*, *Antonio*, 579 F.2d at 1149; *State ex rel. Brown v. Summit Cnty. Bd. of Elections*, 545 N.E.2d 1256, 1260 (Ohio 1989); *Brewster v. Johnson*, 541 S.W.2d 306, 310 (Ark. 1976); *Hayes v. Gill*, 473 P.2d 872, 879 (Haw. 1970).

[14] *Compare Henderson*, 526 F.2d at 292 ("[T]he power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy rests with the voters of the Fort Worth School District."), *Cowan*, 509 P.2d at 1273 ("[T]he individual fitness of a candidate which must be left to the choice of the voter if voting is to mean anything," and "the three-year residency requirement involved in this case, after close scrutiny, cannot be found to be reasonably necessary to the accomplishment of a legitimate municipal objective."), *and Thompson*, 507 P.2d at 635 ("[T]he City has failed to demonstrate that the election process is inadequate to weed out incompetent, unknowledgeable candidates, insensitive to, and unaware of, the best needs of the community."), *with Cox*, 568 S.E.2d at 482 (relying on "the state's legitimate interests in fostering informed voters and promoting knowledgeable and responsive candidates with ties to the community"), *Manchin*, 318 S.E.2d at 489 (similar), *and Gilbert*, 526 P.2d at 1134 ("[T]he requirements are necessary to permit exposure of the candidate to his prospective constituents so they may judge his character, knowledge and reputation.").

is recurring, and it tends to avoid the Court's review due to the compressed nature of many election cases. Most states have durational candidate requirements, so the question's impact is significant. *See* E. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 Fla. St. U. L. Rev. 611, 646-47 (2016) (Table 2).

Moreover, the constitutional question presented is increasingly important as society becomes more mobile. As the facts here show, it is now possible to live and commute between states. The increasing mobility of society highlights problems with durational residency requirements, problems that the legal community was already grappling with nearly thirty years before the advent of the internet. *See* J. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 829 (1963) (recognizing "the impact of residency laws upon . . . people with the initiative and character needed to pull up stakes and seek advancement in a new community" (cleaned up)). The internet has now revolutionized modern communications, facilitating the flow of information between voters and candidates. Especially given this revolution, "it's hard to believe that . . . geography matters all that much in terms of a candidate's understanding of the issues and needs of a constituency." M. Pitts, *Against Residency Requirements*, 2015 U. Chi. Legal F. 341, 349 (2015); *see also* J. Rand, *Carpetbagger Battle Cry: Scrutinizing Durational Residency Requirements for State and Local Offices*, 13 Rutgers J.L. & Pub. Pol'y 242, 261 (2016) ("[T]he advent of modern communication

and transportation has made a long duration of residence unnecessary as a prerequisite to becoming an informed voter or candidate.").

Modern communication and transportation have allowed enterprising citizens to become even more mobile without neglecting fundamental ties to their state of residence. It is increasingly common for longtime residents of a state to work outside their home state for a short period of months or years. Many state residents do so several times over the course of a career. That is especially true for civil servants who may serve in both federal and state governments. Arbitrary applications of durational residency requirements—like excluding a 21-year resident of Mississippi for serving the public for a few years in D.C.—discourage public service and harm the people's ability to be governed by quality leaders.

The question presented is particularly important given its impact on the right to vote. "[V]oting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (cleaned up). After all, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). As discussed next, durational candidate restrictions infringe on the right to vote, which underscores the need for this Court's resolution of important constitutional questions on which the lower courts cannot agree.

3. Excluding Mrs. Gunasekara is unconstitutional.

Last, applying Mississippi's durational candidate requirement to exclude Mrs. Gunasekara is unconstitutional, and there is a fair prospect that the Court will agree. That exclusion is subject to at least heightened scrutiny for several reasons.

Excluding Mrs. Gunasekara impedes citizens' right to vote. "The right to vote" "is the right to vote for the candidate of one's choice." *Clingman v. Beaver*, 544 U.S. 581, 610 (2005) (cleaned up). "[T]he exclusion of certain candidates" via a durational candidate requirement "interfere[s] with the right to vote of citizens." *Wellford*, 485 F.2d at 1152; *see Matthews*, 417 A.2d at 1020 (same). The longer the residency requirement, the more severe the infringement on voters' rights. And "[t]he potential impact upon voter choice" from a *five-year requirement* "is clearly substantial." *Goodsell*, 396 A.2d at 1038. Under the trial court's rule, voters cannot support Mrs. Gunasekara for Public Service Commissioner for nine years after she (according to the trial court) became a Mississippi resident. "In light of such a broad exclusionary effect," excluding her "has a real and appreciable impact on the voters and their choice of candidates." *Hall*, 584 S.W.2d at 55 (cleaned up). Thus, heightened scrutiny is appropriate. *See, e.g.*, *Burdick*, 504 U.S. at 434 (requiring strict scrutiny where election restriction "severe[ly]" burdens the right to vote).

Excluding Mrs. Gunasekara also infringes her own constitutional rights, including equal protection, free association, and interstate travel. *First*, durational residency laws implicate equal protection concerns because they "divide residents into two classes, old residents and new residents, and discriminate against the latter." *Dunn*, 405 U.S. at 334. The Equal Protection Clause protects Mrs. Gunasekara's "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *see Cowan*, 509 P.2d at 1272 ("[T]he right to hold public office,

by either appointment or election, is one of the valuable and fundamental rights of citizenship."); *Manchin*, 318 S.E.2d at 488 (same). Preventing Mrs. Gunasekara from running for Public Service Commissioner for *nine years* from the date the trial court considered her to be a resident is an especially egregious infringement of that right. *Cf. Callaway v. Samson*, 193 F. Supp. 2d 783, 787 (D.N.J. 2002) (rejecting the argument that a one-year requirement is a minor imposition because it "overlooks an important feature of the real world of electoral politics: an open seat, or a seat with a vulnerable incumbent, is a once-in-a-blue-moon event").

Second, the trial court's exclusion burdens Mrs. Gunasekara's First Amendment rights of freedom of expression and association. "Candidacy for public office, like letter writing and public speaking, is merely another means of communicating one's views to the community." *Headlee v. Franklin Cnty. Bd. of Elections*, 368 F. Supp. 999, 1003 (S.D. Ohio 1973); *see also Williams v. Rhodes*, 393 U.S. 23, 38–39 (1968) ("The rights of expression and assembly may be illusory if the right to vote is undermined." (cleaned up)); *Mancuso*, 476 F.2d at 195 ("The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association."). Consequently, "any legislative classification that significantly burdens" candidacy "must be subjected to strict equal protection review." *Id.* at 196. Mrs. Gunasekara's freedoms of speech and association are implicated because "a segment of the community is arbitrarily barred from joining together to elect one of their own number to public office." *Headlee*, 368 F. Supp. at 1003.

Third, the trial court's exclusion penalizes the right to interstate travel. As this Court has said, durational residency requirements "[o]bviously" "single out the class of bona fide state . . . residents who have recently exercised this constitutionally protected right, and penalize such travelers directly." *Dunn*, 405 U.S. at 338. And this right is "an unconditional personal right" "whose exercise may not be conditioned." *Id.* at 341 (cleaned up). Yet the state courts' exclusion of Mrs. Gunasekara penalizes her for traveling to D.C. for several public service jobs. Thus, that exclusion "must be measured by a strict equal protection test: [it is] unconstitutional unless the State can demonstrate that [it is] necessary to promote a compelling governmental interest." *Id.* at 342 (cleaned up); *accord Wellford*, 485 F.2d at 1152.

For all these reasons, heightened scrutiny applies. Excluding Mrs. Gunasekara cannot satisfy such scrutiny. Restrictions subject to strict scrutiny "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). To satisfy this test, the restriction "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (cleaned up). And the respondent must show a compelling interest in enforcing the law against Mrs. Gunasekara specifically. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

Even under intermediate scrutiny, the party defending the restriction "must show at least that the challenged [restriction] serves important governmental

objectives" and that the "means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). The party must provide an "exceedingly persuasive justification," one that does not "rely on overbroad generalizations." *Id.* at 531, 533. Under either level of scrutiny, "[t]he burden of justification" "rests entirely on the" party defending the restriction. *Id.* at 533.

No matter which form of heightened scrutiny applies, the state courts' exclusion of Mrs. Gunasekara cannot stand. Below, the respondent did not even *argue* that any asserted interest is compelling or important. He invoked a supposed "legitimate state interest in being sure that candidates have a sufficient connection with the state to run for office," Brief of Appellee 23, but the voters can decide whether a candidate with Mrs. Gunasekara's long history in Mississippi is "sufficient[ly] connected" with the state. The California Supreme Court well explained the problem with the respondent's theory:

> Perhaps in the horse and buggy days the five-year requirement could have been reasonable, but in these days of modern public transportation, the automobile, newspapers, radio, television, and the rapid dissemination of news throughout all parts of the county, the requirement is unreasonable. It excludes certain citizens from public office by a classification which is unnecessary to promote a compelling governmental interest. It is a built-in device to prevent competition against the county's oldtimers for the [elected office]. Nowhere is it shown that a candidate for the [elected office] cannot acquire competent knowledge of the county's conditions in much less than five years to qualify him for the office, at least sufficiently to submit to the voters for their choice his knowledge thereof.

Zeilenga v. Nelson, 484 P.2d 578, 581 (Cal. 1971). The California Supreme Court made these points *fifty years ago*, and modern communications and transportation

has only progressed since then. For instance, Mrs. Gunasekara could commute to her job in the District of Columbia *from Mississippi*. Moreover, Mrs. Gunasekara is not even a "new" resident; she has lived in Mississippi for 21 years. The respondent identifies no "real, clear[,] and compelling" interest in "making a decision for the voters as to who shall be qualified to run for public office." *Cowan*, 509 P.2d at 1273; *accord* J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (2d ed. 1836) (quoting Alexander Hamilton: "This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."). The first several Mississippi constitutions had no five-year restriction of the type now found in § 133, and there is no contention that the absence of the restriction led to a crisis of democratic government.

Any effort to characterize the respondent's asserted interest as sufficiently important would also fail because, as applied here, the restriction "leaves appreciable damage to [the government's] supposedly vital interest[s] unprohibited" and thus "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547 (cleaned up). The courts below focused on Mrs. Gunasekara's vote in the District of Columbia on Nov. 6, 2018. *See* App. 20. A candidate who voted in the District during, say, a special election on Oct. 6, 2018 before moving back would presumably be able to run for office, even without *any* history in Mississippi—much less Mrs. Gunasekara's decades of history there. Given that discrepancy, the respondent cannot show that the restriction furthers a sufficiently important interest.

Further, the respondent cannot show that there was any Public Service Commissioner-specific (much less Mrs. Gunasekara-specific) "actual problem" in need of solving. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up). "[B]roadly formulated interests justifying the general applicability of government mandates" will not do; instead, the party must establish a specific "harm" threatened by the specific claimant. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). No sufficiently important interest exists in excluding Mrs. Gunasekara.

In passing, the respondent below suggested an interest in giving voters "firsthand knowledge about [a candidate's] habits and character." Brief of Appellee 21. But this interest is not compelling: "in the vast majority of elections—even local ones for the veritable dogcatcher—voters will have no prior personal knowledge of the candidates based on residency." Pitts, *supra*, at 352. In any event, once again, voters will naturally account for their knowledge (or lack thereof) of a candidate when casting their ballot. And Mississippi voters have had 21 years during which to become familiar with Mrs. Gunasekara. Excluding her serves no important government interest.

Even if some important interest were at stake, excluding Mrs. Gunasekara is not sufficiently tailored to such an interest. As noted above, a five-year restriction is massively long. "[I]n our modern media-saturated culture, most voters can and do learn almost everything they will ever know about a candidate only in the month or so before the election." *Callaway*, 193 F. Supp. 2d at 788. And it is by definition an

arbitrary line, with a single day making all the difference to which candidates voters may choose from. The requirement "simply sweeps away all the complex web of interests and connections we know that we share with our neighbors down the street, our coworkers, our relatives in the next town, even with strangers whose faces and stories come to us, often vividly, through newsprint and the television screen." *Id.* at 788. That is the opposite of narrowly tailored.

The state courts' exclusion is also vastly over- and under-inclusive. This "dramatic mismatch" "between the interest" asserted and Mrs. Gunasekara's exclusion shows a lack of narrow tailoring. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2386 (2021). On one hand, a California Ph.D. student who moves to Mississippi for five years has far less connection with the state than someone like Mrs. Gunasekara, a lifelong Mississippian who previously satisfied the constitutional requirement and temporarily lived in D.C. for work. On the other hand, as one court explained, "[i]t requires little imagination to conceive of an adult citizen . . . who has lived his entire life [in the state] without taking any interest whatsoever in [governmental] problems, and who would thus not fit the articulated qualifications sought to be insured by the requirement. It is also easy to conceive of a person who may have lived in the" state for several years "and gathered sufficient knowledge to be able to have a good understanding of all aspects of the [government's] difficulties." *Bolanowski v. Raich*, 330 F. Supp. 724, 731 (E.D. Mich. 1971). In other words, "[t]he imprecise nature of a durational residence requirement which includes uninformed old time resident candidates but excludes well informed new resident candidates is

clear": "[i]t is simply too crude and imprecise an instrument to effectuate [an important state] interest." *Thompson*, 507 P.2d at 635; *see also Headlee*, 368 F. Supp. at 1003 ("A residency requirement excludes both legitimate as well as frivolous candidates. It also fails to [e]nsure that only qualified candidates seek public office.").

As the Fifth Circuit explained, this type of requirement "is, at best, a crude index of the capabilities of a potential candidate." *Henderson*, 526 F.2d at 292. "The background, experience, and political views of the potential candidate are, among others, the indicia of merit and capability," but "[n]o one contends, or could, that the state is empowered to impose qualifications or requirements in these areas." *Id.* "On the contrary, the power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy rests with the voters," and "[i]t can be assumed that opposing candidates will bring deficiencies in any of these areas to the attention of the voters." *Id.*

Many other less restrictive alternatives existed to satisfy any interest asserted by the respondent. "[I]f prospective candidates must be acquainted with the [area], and this is of legitimate concern to the [area], then those candidates may be tested as to their familiarity with the [area]." *Bruno*, 472 A.2d at 335. Or, the government could require some sort of disclosure if it thought that voters would not obtain sufficient information about a candidate's history in the state (and thought for whatever reason that the candidate's opposition would not provide such information). *Cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223 (2014) ("disclosure often represents a less restrictive alternative to flat bans").

Finally, and once again, the respondent cannot show that excluding Mrs. Gunasekara in particular is necessary to further any interest, given her long history in the State—including satisfying the constitutional requirement by 2009. For all these reasons, applying Mississippi's durational candidate restriction to exclude her violates the Fourteenth Amendment.

Because the question of how to analyze durational candidate residency requirements is subject to an entrenched split, is important and recurring, and should be resolved to permit Mrs. Gunasekara's candidacy here, the Court is likely to grant certiorari, and there is a fair prospect of reversal.

II. The balance of harms and public interest warrant a stay.

A stay of the Mississippi Supreme Court's order is necessary because it will prevent irreparable harm, will not substantially injure other parties in the interim, and will serve the public interest. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). This balance of harms consistently leads this Court to grant stays related to election orders that are likely unlawful. *See*, *e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Perry v. Perez*, 565 U.S. 1090 (2011); *Karcher v. Daggett*, 455 U.S. 1303, 1306–07 (1982) (Brennan, J., in chambers); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J.); *Bullock v. Weiser*, 404 U.S. 1065 (1972); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (denying motion to vacate stay); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968).

This Court has made it clear that the denial of fundamental constitutional rights results in irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *accord Memphis A. Philip Randolph Inst. v. Hargett*,

978 F.3d 378, 391 (6th Cir. 2020) ("A restriction of the fundamental right to vote constitutes irreparable injury." (cleaned up)). Here, Mrs. Gunasekara and her supporters would see their constitutional rights to associate through voting and running for office irreparably harmed absent a stay. If Mrs. Gunasekara is wrongly excluded from the primary election this summer, her supporters will be unable to exercise their right to vote for her for another five years. In the meantime, they (and all Mississippians) will operate under the consequences of an unlawful election. Unlawfully excluding a candidate "threaten[s] irreparable harm" to the public "by casting a cloud upon . . . the legitimacy of the election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring). These harms to both Mrs. Gunasekara and the public cannot be redressed, and the election clock cannot be unwound.

In contrast, the respondent will not incur irreparable harm if this Court stays the Mississippi Supreme Court's order for the time necessary for the Court to consider Mrs. Gunasekara's petition for certiorari and request for summary vacatur. The respondent is not running for the same office and thus will not be harmed by a stay. The Mississippi Republican Executive Committee—technically the other respondent—found that Mrs. Gunasekara should appear on the ballot. *See* App. 8. And even if this case ultimately goes against Mrs. Gunasekara, the Mississippi Supreme Court has the statutory "authority to grant such relief as is appropriate under the circumstances." Miss. Code. Ann. § 23-15-961(6). In all events, there is no irreparable harm in being required to abide by the Constitution.

Last, a stay pending appeal is in the public interest both for the reasons given above and because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (cleaned up). Thus, the balance of equities and public interest support a stay.

III. An injunction pending appeal is warranted under the All Writs Act.

Finally, Mrs. Gunasekara requests that this Court enter an injunction pending appeal. 28 U.S.C. § 1651(a). An injunction pending appeal is warranted when (1) the applicant is likely to prevail on the merits, (2) denying relief would lead to irreparable injury, and (3) granting relief would not harm the public interest. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam); *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.). This Court has granted injunctions pending appeal in a range of circumstances. *See, e.g.*, *id.* at 1306 (granting injunction pending appeal "requir[ing] Arkansas state officials to establish an escrow fund in which payments of [state tax] … shall be placed"); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (granting injunction of upcoming county election pending appeal); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 65 (enjoining state executive order restricting religious services pending appeal).

For all the foregoing reasons, an injunction pending appeal to ensure that Mrs. Gunasekara appears on the primary election ballot is warranted. This Court should issue an injunction pending appeal that instructs the Mississippi Secretary of State to include her as a candidate for Public Service Commissioner, District 3—such

injunction to dissolve when this Court vacates the decision below or otherwise disposes of the petition for certiorari.

CONCLUSION

Mrs. Gunasekara respectfully asks the Court to enter an administrative stay and then a stay (and a recall of the mandate below) pending the Court's decision on her request for appellate relief. In addition, Mrs. Gunasekara respectfully asks for an injunction pending appeal. Given the exigency, Mrs. Gunasekara suggests that the Court could construe this application as a petition for certiorari, grant the petition, and summarily vacate the decision below.

Respectfully submitted,

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