

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN McCAIN ET AL.,                   :

                  Petitioners,                   :

                  v.                                   :           Mock Case No. 1

BARACK OBAMA ET AL.,                   :

                  Respondents.                   :

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Washington, D.C.

Monday, October 20, 2008

The above-entitled matter came of  
for oral argument before the Mock Supreme Court at  
10:30 a.m.

APPEARANCES:

GLEN D. NAGER, ESQ., Washington, D.C., on behalf  
of Petitioners.

WALTER DELLINGER, ESQ., Washington, D.C., on  
behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:30 a.m.)

3 MR. FOLEY: All rise. The Honorable the Chief  
4 Justice and the Associate Justices of the United States  
5 Supreme Court. Oyez, oyez, oyez. All persons having  
6 business before the Honorable Supreme Court of the United  
7 States are admonished to draw near and give their attention,  
8 for the Court is now sitting. God save the United States  
9 and the Honorable Court.

10 CHIEF JUSTICE LEVI: Good morning. We will now  
11 hear argument in the case of McCain versus Obama.

12 Mr. Nager, you may proceed.

13 ORAL ARGUMENT OF GLEN D. NAGER

14 ON BE HALF OF THE PETITIONERS

15 MR. NAGER: Thank you, Mr. Chief Justice, and  
16 may it please the Court:

17 Secretary of State Coffman's decision to count -  
18 - not to count ballots cast after the 7:00 p.m. deadline  
19 specified by Colorado Code section 1-7-101 was perfectly  
20 constitutional because it held all voters equally to the  
21 same standard. And the Colorado Supreme Court's contrary  
22 decision commits three fundamental errors of law.

23 First, nothing in the Equal Protection Clause  
24 requires a State to extend polling hours when the only  
25 obstacle alleged to timely voting is increased traffic

1 resulting from a storm.

2 Second, even if the State wanted to extend  
3 polling hours, it could not do so constitutionally under the  
4 Equal Protection Clause in the way that the Colorado Supreme  
5 Court has ordered here because the Colorado Supreme Court's  
6 order here compels arbitrary and differential treatment of  
7 similarly situated voters in the State.

8 And, third, Article II of the Constitution vests  
9 the federally delegated power to specify the manner in which  
10 presidential electors will be selected to the legislature of  
11 States, not to the courts of States, and that prohibits the  
12 Colorado Supreme Court from revising or departing from the  
13 terms of the Colorado Election Code and, specifically here,  
14 its requirement that no person arriving at the polls after  
15 7:00 p.m. shall be entitled to vote.

16 JUSTICE WALD: Counsel, do you want us to bring  
17 a ruling down a ruling -- Article II, the argument you just  
18 set out? That would be a first for us, right? So you're  
19 relying on some of the dissenters in Bush v. Gore?

20 MR. NAGER: No, Justice Wald. In fact, it would  
21 not be a first for the Court. The Court has looked at  
22 Article II issues before, including McPherson versus  
23 Blacker, and ruled on Article II challenges.

24 That said, we have presented to the Court two  
25 different grounds -- equal protection as well as Article II

1 -- that the Colorado Supreme Court's decision violates, and  
2 either one of those is obviously a sufficient basis for  
3 complete reversal of the Colorado Supreme Court's decision  
4 and for a remand order directing dismissal of this lawsuit.

5 JUSTICE PHILLIPS: -- to win on both of your  
6 first -- on both of your equal protection propositions, in  
7 order to prevail on your equal protection argument?

8 MR. NAGER: Justice Phillips, I would say, in  
9 response to that, the short answer to that is no. We only  
10 have to win on our argument that the Equal Protection Clause  
11 prohibits the order that the Colorado Supreme Court entered.  
12 However, it would be necessary, in the course of explaining  
13 that decision, that the Court also make it clear that what  
14 the Equal Protection Clause prohibits, it can't also  
15 require. So, in that respect, the Court does also have to  
16 address the Equal Protection Clause requirements.

17 CHIEF JUSTICE LEVI: Why would extending the  
18 hours for polling pose an equal protection problem any more  
19 serious than had the -- had Mr. Scarpello simply dispatched  
20 a fleet of four-wheel-drive vehicles to get voters to the  
21 polls in Denver County, but not in other counties, since he  
22 had no authority over other counties?

23 MR. NAGER: The difference there, Mr. Chief  
24 Justice, would be that the effect of the Colorado Supreme  
25 Court's order is to deprive people outside of Denver of the

1 right to vote after 7:00 p.m.; whereas, Director Scarpello's  
2 extension of the polling after 7:00 p.m. allowed Denver  
3 voters to vote. If Director Scarpello had just done what  
4 you suggested, had taken efforts to facilitate the arrival  
5 of voters to the polls before 7:00 p.m. to vote, there would  
6 not have been a differential treatment by the State -- the  
7 right to vote and allowing others.

8 What this Court has repeatedly said is that the  
9 State has wide and broad and necessary power in regulating  
10 the conduct of elections. It needs to do so in an even-  
11 handed, non-discriminatory way. And where it's --

12 CHIEF JUSTICE LEVI: The weather -- the weather  
13 doesn't apparently respond to that injunction, and it  
14 treated the voters of the State differentially. And so the  
15 Director of Elections and each county director has to make  
16 his or her own decision, decides what is the nature of the  
17 weather, is there a problem, is there some problem at the  
18 polls that the director needs to respond to, and then makes  
19 a decision. Any other county director could have extended  
20 the time to the polls if that director thought the weather,  
21 you know, was an issue.

22 MR. NAGER: With all due respect, Mr. Chief  
23 Justice, no, the -- does not confer discretion on Mr.  
24 Scarpello in Denver or any other election official around  
25 the State to extend the polls -- any one who arrives at the

1 polls after 7:00 p.m. is not entitled to vote.

2 JUSTICE WALD: Well, counsel, you're asking us  
3 to give a very absolutist interpretation, one that the  
4 Colorado Supreme Court itself did not accept, to this one  
5 provision which says that anybody who arrives after 7  
6 o'clock at night shall not have their vote counted.  
7 However, that's part of a provision in the revised statute,  
8 called ``Hours of Voting,`` which says all polls shall be  
9 open continuously, operated continuously, from 7:00 a.m.  
10 until 7:00 p.m., et cetera.

11 My question to you -- partly hypothetical, but  
12 it will help me to understand your argument -- is that if  
13 something, if an emergency happens, if a tornado hits, if  
14 the electrical power goes out for a couple of hours during  
15 the Election Day between 7:00 a.m. and 7:00 p.m. so that the  
16 polls cannot be continuously operated, you would still say  
17 that there's no authority for the electoral district to  
18 lengthen the hours for voting beyond 7:00 -- beyond anybody  
19 that arrives by 7:00 p.m. I mean, you, unlike the Colorado  
20 Supreme Court, think this is -- this cannot be violated  
21 under any circumstances. Is that right?

22 MR. NAGER: What I would say in response to your  
23 questions, Justice Wald, one is that the election scheme  
24 itself does not allow for any extension of the polling  
25 hours. However, if the -- an event happened such that the

1 jurisdiction was not fulfilling its requirement to keep the  
2 polls open continuously --

3 JUSTICE WALD: Right.

4 MR. NAGER: -- during that 12-hour period of  
5 time --

6 JUSTICE WALD: Right.

7 MR. NAGER: -- we do believe that the Equal  
8 Protection Clause would require that jurisdiction to have  
9 its polls open for the same period of time that other  
10 jurisdictions around the State were required to have theirs  
11 open.

12 JUSTICE WALD: If I can -- question on that.  
13 So, if I understand you, you are saying that this particular  
14 provision -- since you've got two possibly inconsistent  
15 provisions, that the polls have to operate continuously and  
16 that nobody who arrives after 7:00 p.m. can have their vote  
17 counted -- if there were something, is the line you're  
18 drawing -- if it was something that the election -- that the  
19 State had control over --

20 MR. NAGER: That's correct. If --

21 JUSTICE WALD: If the voting machines stopped,  
22 if the electricity went out in the polling place, but  
23 anything outside -- in other words, if the roads directly  
24 leading to the polling place had snow up to the sky and were  
25 impassable, too bad. That's an act of God, and therefore

1 this provision -- way to permit it. Is that right?

2 MR. NAGER: The short answer to that is yes.  
3 The reason for that, of course, is because the Equal  
4 Protection Clause doesn't apply to God. It doesn't apply to  
5 Mother Nature.

6 JUSTICE WALD: Well, all right.

7 MR. NAGER: It --

8 JUSTICE WALD: Just finally, then, what about  
9 the fact that -- and I think it's referred to in the record  
10 at one point -- the fact that the traffic congestion was so  
11 great that it provoked the electoral district people into  
12 extending the hours? Isn't that a responsibility of the  
13 State? In other words, States -- the State didn't keep the  
14 roads clear enough so that people could get to the polls.

15 MR. NAGER: With all due respect, I believe what  
16 the stipulated facts show is that there was speculation  
17 about whether or not there had been similar investments in  
18 road care by other jurisdictions versus the State --

19 JUSTICE WALD: But there's no doubt that the  
20 roads were worse than they were in parallel jurisdictions.

21 MR. NAGER: I don't think that in that  
22 particular instance that the --

23 JUSTICE WALD: Well, I'm reading from the  
24 record. ``Although some suburban roads suffered storm-  
25 related ? significantly ? during heavy traffic and minor ?

1 what drivers were experiencing on Denver's roads.''

2 MR. NAGER: And my answer to that is, is that  
3 government has to create the obstacle to timely voting. If  
4 government doesn't create the timely obstacle that prevents  
5 the time for voting, government may, consistent with Article  
6 II and consistent with the Equal Protection Clause, try to  
7 accommodate where it thinks it appropriate as a legislative  
8 decision, but the Equal Protection Clause wouldn't require  
9 it, or the Equal Protection Clause would require it is where  
10 the government had directly created an obstacle.

11 JUSTICE WALD: So, if a tornado hit the polling  
12 booth -- and I'll stop here. What if a tornado hit the  
13 polling station in the middle of the day, the government  
14 might but wouldn't have to extend the hours?

15 MR. NAGER: Well, actually, Colorado's electoral  
16 scheme has a provision to address that. It says if there is  
17 an emergency event which requires a change in polling  
18 places, then it should be done. That isn't -- that, of  
19 course, shows that the Colorado legislature thought about  
20 what exceptions it wanted. It didn't provide one for  
21 extending time.

22 The important point for the Equal Protection  
23 Clause issue here, Justice Wald, is that, in this particular  
24 instance, Director Scarpello did not do what he needed to do  
25 in order to get a proper extension. He didn't listen to the

1 State official who he is directed by statute to take orders  
2 from, the Secretary of State. He didn't go to court --

3 CHIEF JUSTICE LEVI: That's ? State law. So, is  
4 it your argument that if Scarpello had actually closed the  
5 polls in Denver from 3:00 to 5:00, let's say, in the  
6 afternoon, then the extension would have been okay because  
7 everybody had 12 hours?

8 MR. NAGER: That would be correct. He would  
9 have to have made an adjustment if he had closed.

10 CHIEF JUSTICE LEVI: So, that doesn't present an  
11 equal protection problem as far as you're concerned?

12 MR. NAGER: That is correct. There may be a  
13 State law problem with that.

14 CHIEF JUSTICE LEVI: This provision of State law  
15 then, that provides that the polls don't open until an  
16 election judge that is authorized from each political party  
17 shows up at the polls, that is in your view unconstitutional  
18 then because a poll where the judges late then wouldn't be  
19 open for the full 12 hours?

20 MR. NAGER: I'm not sure I follow the reasoning  
21 as to why it would be --

22 CHIEF JUSTICE LEVI: Well, you seem to be  
23 stating a principle that, unless all of the polls in all of  
24 the counties of the State of Colorado are open for precisely  
25 the same amount of time, there's an equal protection

1 problem.

2 MR. NAGER: No --

3 CHIEF JUSTICE LEVI: There's some sort of  
4 differential treatment that --

5 MR. NAGER: No. With regard to the additional  
6 provision --

7 CHIEF JUSTICE LEVI: -- we should care about.

8 MR. NAGER: All voters in Colorado were subject  
9 to that electoral code that provided that you got 12 hours,  
10 unless the election judges didn't show up on time. So, in  
11 that particular instance, there's no Equal Protection Clause  
12 problem with that, because everyone in Colorado is subject  
13 ex ante to same rules by government. But the  
14 problem here -- Denver voters were subject to a different  
15 set of rules than non-Denver voters. The snow storm  
16 impacted cities beyond Denver, and none of those voters,  
17 whether they were affected by the storm or not, were given  
18 an extension of the deadline; whereas, all Denver voters  
19 were. There were non-Denver voters who were on the roads in  
20 Denver impacted by the exact same storm and the exact same  
21 traffic. They were denied the right to vote in their  
22 counties outside of Denver; whereas, Director Scarpello  
23 extended the hours for Denver, and --

24 JUSTICE PHILLIPS: So why would the remedy  
25 be then not to count those votes? I mean, you're going to

1 tell 62,000 people or so, who understood from a duly  
2 appointed election official that they had an extra two hours  
3 -- maybe they could have gotten there on time, but they  
4 thought that they had more time and that it would be more  
5 convenient, perhaps safer, to show up later. They acted in  
6 reliance upon that. Why -- why would that be a just order  
7 on equal protection grounds?

8 MR. NAGER: Well, it would be an unjust order  
9 because it would violate the Equal Protection Clause by  
10 treating voters throughout the State differently. What this  
11 Court's decisions in Dunn versus Blumstein and Bush versus  
12 Gore and O'Brien versus Skinner say is that the State, when  
13 it comes to the actual right to vote, may not deny the vote  
14 to one where it grants it to a similarly situated other  
15 voter, and --

16 JUSTICE PHILLIPS: They're not similarly  
17 situated though.

18 JUSTICE WALD: Right.

19 JUSTICE PHILLIPS: I'll yield here in a moment.  
20 You're not similarly situated if you've been told by your  
21 election official you have an extra two hours and you take  
22 advantage of that. Sixty-two thousand people, you are  
23 suggesting, should have their votes rejected now, not  
24 counted, in order that others who weren't subject to the  
25 same extension and didn't have anything to rely on and

1 didn't have the same weather, because those others didn't  
2 have the additional two hours.

3 MR. NAGER: Well, Director Scarpello has not --  
4 claim in this case that he misled the citizens of Denver.  
5 It's not surprising he's not going to make that statement,  
6 so -- and the answer is he was told by the Secretary of  
7 State that he did not have authority to extend those polling  
8 hours, and the other election directors around the State  
9 didn't extend polling hours. And what this Court is  
10 reviewing is the Colorado Supreme Court's decision that says  
11 that the lawful basis for extending the polling hours was  
12 the exigency in Denver. And yet, the exigency extended  
13 beyond the Denver lines to voters in other jurisdictions,  
14 and those other jurisdictions were denied the right to vote.  
15 So --

16 JUSTICE PHILLIPS: But if the county voting  
17 directors in those adjacent counties had also disregarded  
18 the Secretary of State's advice and opened the polls  
19 themselves, your equal protection claim would disappear.  
20 Isn't that correct?

21 MR. NAGER: It -- that is correct. If all  
22 jurisdictions, either in the State of Colorado or impacted  
23 by the snow storms, had extended the voting hours so that  
24 all voters in Denver similarly situated were granted the  
25 same amount of time, we wouldn't be presenting our argument

1 that the Colorado Supreme Court's decision violates the  
2 Equal Protection Clause. We would, of course, be presenting  
3 our argument that the decision violates Article II.

4 JUSTICE WALD: So --

5 JUSTICE PHILLIPS: Well, why isn't the claim --  
6 why doesn't your claim then rest with people in a suburban  
7 county who were not allowed to vote, and the remedy is some  
8 type of very quick election for them, rather than denying  
9 people who presumably relied in good faith on a government  
10 directive --

11 MR. NAGER: Well --

12 JUSTICE PHILLIPS: -- and taking their vote  
13 away?

14 MR. NAGER: We're here, of course, as Petitioner  
15 because we lost below, but we were the -- in the trial, and  
16 the question in this case is what remedy has the plaintiff  
17 sought, and is that a constitutional remedy? And the remedy  
18 that the plaintiff sought in the trial court was one thing  
19 and one thing only: to count these provisional ballots --

20 JUSTICE PHILLIPS: -- remedy on your own --

21 MR. NAGER: No.

22 JUSTICE PHILLIPS: -- other than to resist their  
23 claim?

24 MR. NAGER: I'm sorry. Excuse me for  
25 interrupting. But, no, we didn't because, of course, the

1 Secretary of State of Colorado believes, pursuant to his  
2 authority to interpret the Colorado Election Code and to  
3 count the votes and certify the votes, that voting after  
4 7:00 p.m. is not permitted in the State of Colorado.

5 JUSTICE PHILLIPS: And does that make difference  
6 for your equal protection claim who in the State -- what --  
7 this State decision?

8 MR. NAGER: Yes, it does. The -- in Bush versus  
9 Gore, this Court made clear that an equal protection -- an  
10 electoral system requires consistent treatment of voters  
11 across the State and a statewide actor who is able to ensure  
12 consistency across the State, and found a flaw, of course,  
13 in the Florida Supreme Court's order, that it was a  
14 statewide actor and it had not ensured the equal treatment  
15 of voters across the State.

16 JUSTICE WALD: How --

17 MR. NAGER: Here --

18 JUSTICE WALD: Go ahead. Finish.

19 MR. NAGER: Here, we have two statewide actors.  
20 We have the Secretary of State, who has been trying to  
21 ensure equal treatment of voters across the State and  
22 compliance with his understanding of the Election Code, and  
23 we have the Colorado Supreme Court, who has ordered  
24 differential treatment of similarly situated voters across  
25 that State. And that, of course, is what we contend

1 violates the Equal Protection Clause.

2 JUSTICE WALD: Does the record show, counsel,  
3 that when the Secretary of State found out about what the  
4 Election Director in Denver had done, that he had any  
5 communication suggesting he had the authority at that point  
6 to say, ``No, you did wrong. Rescind that regulation''?  
7 According to the record, as I read it, he immediately or  
8 very quickly went to court to get a restraining order. The  
9 reason I raise the question is, in reading the parts of the  
10 Colorado statutes that are available to us, it's not  
11 entirely clear that the Election Director doesn't have some  
12 kind of residual authority to make -- an emergency plan.  
13 The emergency plan is reviewed -- from experience.  
14 Emergencies arise which some which you can't anticipate, and  
15 it's not clear that the Election Director doesn't have that  
16 kind of residual, on-the-ground, on-the-spot authority to  
17 provide for an emergency that isn't in the emergency plan.

18 MR. NAGER: With all respect, Justice Wald, I  
19 think the statutory law and the -- ambiguity of the  
20 Secretary of State's interpretation of that statutory law is  
21 clear. The statutory --

22 JUSTICE WALD: Well, in that case, why didn't  
23 she just tell him ``Rescind that'' -- you know, ``Go ahead.  
24 I say no. It's over with.''

25 MR. NAGER: Well --

1 JUSTICE : ``I'm the authority. Forget about  
2 it. Rescind it''

3 MR. NAGER: That's an excellent question. I  
4 think the answer to that is that -- if the conventional way  
5 of dealing with disputes of this type in advance of a --

6 JUSTICE WALD: To go to court, rather than if  
7 you have authority to tell your subordinate, ``Don't do  
8 it''?

9 MR. NAGER: That, perhaps regrettably, is true.

10 JUSTICE WALD: -- practice.

11 MR. NAGER: It's akin to fiduciaries of trusts,  
12 that when they think that something is in violation of the  
13 trust or if the trust is unlawful, that they go to court to  
14 get a court order. And in this particular instance, of  
15 course, Director Scarpello had been told not to do it and  
16 was continuing to do it.

17 JUSTICE WALD: But he hadn't -- at least, we  
18 don't have anything in the record.

19 MR. NAGER: But this goes to show, on another  
20 subject, that although he was required by law to take --  
21 comply with the orders of the Secretary of State, he  
22 actually didn't work for and couldn't be fired by the  
23 Secretary.

24 JUSTICE WALD: But she hadn't made any orders  
25 that we know about?

1 MR. NAGER: Well --

2 JUSTICE WALD: Ahead of the emergency. In other  
3 words, she didn't -- she had not issued any orders saying  
4 ``Never under any circumstances extend the poll hours''?

5 MR. NAGER: I suppose it depends upon your  
6 definition of the word ``order.'' ``Order,`` at least under  
7 Federal administrative law, includes both formal orders and  
8 informal orders.

9 JUSTICE WALD: But we don't know?

10 MR. NAGER: We don't know, not in this record.

11 CHIEF JUSTICE LEVI: -- and it expressly gave to  
12 the county Election Director the authority to extend the  
13 polling time by two hours, but no more than two hours, in  
14 the event of inclement weather in that county. And people  
15 thought this was a very good idea because the weather in  
16 Colorado is not statewide, it varies from place to place,  
17 and that these judgments should be made -- the local  
18 Election Director is in a position to know whether it's  
19 practicable on short notice to extend the polling hours in  
20 particular counties, and that may depend on resources, the  
21 distance to the polls, and how many polls there are, and  
22 that sort of thing. That, in your view, would be  
23 unconstitutional?

24 MR. NAGER: I don't think the mere conferral of  
25 that authority on the local Election Director would be

1 unconstitutional if there was not a mechanism under State  
2 law for ensuring that there was consistent treatment across  
3 the State. I think Bush versus Gore says that that doesn't  
4 satisfy the minimum procedure --

5 CHIEF JUSTICE LEVI: Because ``inclement'' is  
6 too indefinite?

7 MR. NAGER: It's too abstract. Right. It's --

8 CHIEF JUSTICE LEVI: So you'd be satisfied if  
9 it's ever five inches of snow at the airport or at some  
10 particular facility, then the officer has the discretion to  
11 extend the time by two hours, or is it that you just think  
12 discretion in -- must violate equal protection?

13 MR. NAGER: No. What I think there has --  
14 which if I understand your hypothetical, there is, and there  
15 has to be consistent application of that rule across the  
16 State so that, if a plaintiff came in and showed that that  
17 discretion was being exercised differently by different  
18 local officials, that would be constitutionally problematic.  
19 That's what Bush versus Gore and the other cases -- a state  
20 actor to coordinate. That, of course, is not this case.

21 JUSTICE PHILLIPS: You must think the New York  
22 Court of Appeals was wrong in Corning in upholding a law  
23 that gave different people in different parts of the State  
24 different amounts of time to vote.

25 MR. NAGER: No, because that law in fact didn't

1 deny anyone the right to vote. What it did -- the opening.  
2 It's like early voting laws and absentee ballots. It's --  
3 it's extending the amount of opportunity available to cast a  
4 vote. What's different about that case and this case is  
5 there was a cutoff here, and that cutoff was changed for the  
6 voters of Denver, but not for the other voters in the State.  
7 And that's what creates the Equal Protection claim.

8 JUSTICE WALD: But, counsel, myself and several  
9 other colleagues in prior cases, election cases, have --  
10 think the amount of scrutiny with which we would look upon  
11 State resolutions of election disputes would vary with the  
12 intensity of the deprivation that any one group of voters,  
13 et cetera, along with the motive. But I don't think anybody  
14 is here challenging the motive. They're not suggesting that  
15 the Election Director said, ``Aha! If I extend it, we're  
16 going to get more Democratic votes.''

17 MR. NAGER: Well, we haven't actually gotten to  
18 that point in this case, of course. I wouldn't want the  
19 Court to think that the fact that two democratically elected  
20 officers directing this Election Director --

21 JUSTICE WALD: But isn't that -- isn't that an  
22 absolutely inevitable part of all election disputes, you  
23 know, that some people in charge of the government are going  
24 to be Democratic or Republican, and certain districts are  
25 going to be predictable one way --

1 MR. NAGER: It may be but --

2 JUSTICE WALD: -- et cetera?

3 MR. NAGER: It may be but (a) we can't --

4 JUSTICE WALD: But just to get back to my point,  
5 and that is here who actually got disadvantaged? What was  
6 the extent of the deprivation? And I know you're going to  
7 tell me that there are some voters in Jefferson County, some  
8 -- even though as a whole they didn't. When you looked at  
9 the election returns that night, you saw that 92 percent in  
10 the neighboring county of active voters voted by the regular  
11 7 o'clock closing time; whereas, here it would have been 67  
12 percent going up to 87 percent, if you counted the  
13 provisional voters later. So, you know, who, except perhaps  
14 somebody -- the example who lived -- a few individuals, et  
15 cetera, was prejudiced in Jefferson County where apparently  
16 they didn't have --

17 MR. NAGER: Well, that --

18 JUSTICE WALD: -- terrible road conditions?

19 MR. NAGER: That's just not right. That's just  
20 not right. If the Election Director -- first of all, we  
21 don't know the number of people who did show up after 7:00  
22 p.m. in other jurisdictions and weren't given a provisional  
23 ballot. And, two, we don't know how many people would have  
24 come out in all of those other jurisdictions to vote because  
25 of the convenience of having an additional two hours to

1 vote. So --

2 JUSTICE WALD: So you're saying equal protection  
3 requires that even if you did have a terrible snow storm,  
4 just in one particular district, and you took some immediate  
5 steps to try to equalize the situation to what it was in  
6 other counties for a moment suggests that there were no snow  
7 storms in the other counties, that you still -- if you add a  
8 couple of hours on to Denver, you have to add it on  
9 gratuitously, even though nobody's having any troubles in  
10 all the rest of the State in order to comply with equal  
11 protection?

12 MR. NAGER: No, actually, we're not saying that.

13 JUSTICE WALD: Well, what are you saying?

14 MR. NAGER: What I am saying is that similarly  
15 situated -- that is --

16 JUSTICE WALD: But this -- but the record  
17 suggests that these weren't similarly situated people except  
18 for perhaps some individuals in those States --

19 MR. NAGER: Well --

20 JUSTICE WALD: -- but not -- I mean, don't we  
21 have to go with -- the election system is set up by  
22 electoral district, and people have to make decisions about  
23 what to do in this electoral district. As Judge Posner said  
24 in the Seventh Circuit case, we can't pick out individuals -  
25 - working mothers or people who happen to have a longer

1 commute than somebody else, and they are disenfranchised,  
2 but --

3 MR. NAGER: That's right. He said judges can't  
4 do that, and that's precisely what the Colorado Supreme  
5 Court has done here. It's chosen to favor some of the  
6 people who were impacted by traffic and not others. It's  
7 chosen to favor some people who weren't impacted by the snow  
8 or traffic at all and not others.

9 JUSTICE WALD: But Colorado set up its electoral  
10 system to give authority and discretion to -- to elected  
11 officials district by district --

12 MR. NAGER: With all respect --

13 JUSTICE WALD: -- not person by person.

14 MR. NAGER: With all respect, it gave it to the  
15 Secretary of State, which is why he did what he did.

16 CHIEF JUSTICE LEVI: You must be interested in  
17 getting to your Article II argument in the very little time  
18 that you have left.

19 MR. NAGER: Well, I think that, in its essence,  
20 is the Article II argument, Mr. Chief Justice. The two  
21 provisions of the law, Colorado law, that the Colorado  
22 Supreme Court directly ignored -- time which can't be  
23 extended beyond 7:00 p.m. and the delegation of authority  
24 both in interpreting the statute and counting the votes and  
25 then certifying the votes to the Secretary of State, and yet

1 the Colorado Supreme Court said it was obligated to defer,  
2 not to the Secretary of State, but to local officials who  
3 were supposed to be taking orders from the Secretary of  
4 State. And that departs from the electoral scheme.

5 JUSTICE PHILLIPS: How do you -- what support  
6 can you give us for the proposition that the constitutional  
7 terms -- presidential electors shall be appointed in such  
8 manner as the legislature of each State shall direct -- that  
9 that extends down to issues like whether polls shall be open  
10 from 7:00 to 7:00 means they close absolutely at 7:00 or  
11 they will be open for 12 hours, from a practical matter as  
12 opposed to a purely legalistic matter? How -- what makes  
13 you think that the Constitution gets down to this level of  
14 detail in Article II?

15 MR. NAGER: Oh, the level of detail is it uses  
16 the word ``legislature.'' And this Court --

17 JUSTICE PHILLIPS: I'm interested in the word  
18 ``manner.''

19 MR. NAGER: Well --

20 JUSTICE PHILLIPS: Why is this part of -- why is  
21 this the legislature directing the manner of the appointment  
22 of electors?

23 MR. NAGER: Well, what I -- all I can say to  
24 Your Honors is that the House, in Baldwin versus Trowbridge,  
25 the Senate in the Senate report cited in McPherson versus

1 Blacker, the State supreme courts who have looked at this  
2 question said that the electoral scheme enacted by the State  
3 is the manner of directing the election and that that cannot  
4 be trumped by either the substantive provisions of a State  
5 constitution or a distorted reading of the elector scheme.

6 If I may, I'd reserve the rest of my time.

7 CHIEF JUSTICE LEVI: Yes. Thank you.

8 Mr. Dellinger.

9 ORAL ARGUMENT OF WALTER DELLINGER

10 ON BEHALF OF THE RESPONDENTS

11 MR. DELLINGER: Mr. Chief Justice, and may it  
12 please the Court:

13 What is missing from the important dialogue the  
14 Court has had with learned counsel for the Petitioners is  
15 any sense that this discussion will lead to a determination  
16 of who is to be the next President of the United States,  
17 head of the Executive Branch, and Commander in Chief for the  
18 next four years. And what I believe the discussion this  
19 morning with able counsel demonstrated is how inappropriate  
20 it is for this Court to be making that decision.

21 The Framers of the Constitution and the Congress  
22 realized that the time may come when it was disputed what  
23 electoral votes were cast for what candidates.

24 CHIEF JUSTICE LEVI: This is your non-  
25 justiciability argument. Suppose that the director of the

1 county elections had said that, because elderly people need  
2 more time to get to the polls, that he would extend the  
3 polls two hours for anyone over the age of 55.

4 MR. DELLINGER: I would not --

5 CHIEF JUSTICE LEVI: Do you think we wouldn't  
6 have jurisdiction to review that?

7 MR. DELLINGER: I think it is too late in the  
8 day, given Baker versus Carr, Reynolds against Simms, and  
9 other cases, to maintain a strong position that this Court  
10 is constitutionally precluded from hearing such cases. And  
11 I think those that go to individual rights may well have  
12 some appeal in certain circumstances, but this case shows  
13 how improvident it was for this Court to decide that it  
14 needed to step in and resolve the -- particularly the  
15 Article II question, when Congress has full authority to  
16 determine the validity of the electors from Colorado and to  
17 make the decision, in the exercise of the counting function,  
18 whether to count votes, electoral votes from Colorado that  
19 include or do not include --

20 JUSTICE WALD: Counsel, what about your  
21 opponent's argument which he didn't have time to allude to  
22 in oral argument, but we can take notice from the brief,  
23 that in this particular instance the Colorado legislature  
24 has actually, in a word, delegated to the Colorado Supreme  
25 Court, in 1-11-204, original jurisdiction for the

1 adjudication of contests concerning presidential electors,  
2 et cetera.

3 MR. DELLINGER: And, Judge Wald, what -- there  
4 are a number of questions that arise out of that provision.  
5 Which -- which question would you like me --

6 JUSTICE WALD: I'd like you to address the  
7 question why isn't that -- the legislature itself said, ''We  
8 want you, the Colorado Supreme Court, to adjudicate these  
9 disputed issues concerning presidential --

10 MR. DELLINGER: I agree that it is the full and  
11 complete answer to Petitioner's Article II claim that this  
12 election was decided in the manner directed by the  
13 legislature, because the legislature determined that the  
14 court should have the authority to resolve disputes. And  
15 Petitioner, in deference to the Article II provision that  
16 does give the legislature --

17 JUSTICE WALD: It's okay down there, but not up  
18 here?

19 MR. DELLINGER: Yes, because there is a  
20 mechanism for the national government to supervise the  
21 counting of votes, and that is the mechanism of counting in  
22 Congress. If you look at Article II and the Twelfth  
23 Amendment, what is revealing is how elaborate the process is  
24 by which Congress is to receive and count the votes.

25 CHIEF JUSTICE LEVI: Well, just a moment. If

1 the Colorado Supreme Court, relying in part on its  
2 understanding of Federal constitutional law, makes certain  
3 rulings as to State law, then -- and does it in a timely  
4 fashion, then those rulings will be presumptively valid  
5 under the safe harbor provision, so that this -- this is not  
6 going to get any kind of de novo review in the United States  
7 Congress, and so there is something that hinges on -- on the  
8 State of Colorado, the supreme court's determination of  
9 Federal law.

10 MR. DELLINGER: Your Honor, the answer to that  
11 is that the safe harbor is, I think, an utterly illusive  
12 safeguard. The notion that the Congress that was acting in  
13 the 19th century could control how the next Congress  
14 resolves this issue is counter to principle that no Congress  
15 may bind a future Congress. This was a point that the Court  
16 utterly failed to understand, I believe, in Bush versus Gore  
17 when it gave weight to the existence of the safe harbor,  
18 that that presumption, I think, is not the least bit binding  
19 on the Congress that receives and counts -- and counts the  
20 votes.

21 But passing that aside, the reason why -- and  
22 I'll just be very brief about this. The reason why I think  
23 it was improvident for this Court to grant review is that  
24 the ultimate question is so political that it ought to be  
25 resolved by politically accountable people; that is, rather

1 than try to find a court without a tincture of partisanship,  
2 we should agree that it is to be resolved by partisans,  
3 partisans who are accountable to the people of the United  
4 States, who must -- who have been elected and must stand --

5           If you look at the kinds of questions that are  
6 presented, both in Bush versus Gore and here, they are  
7 essentially legislative judgments. Would in that case, for  
8 example, the Florida legislature, have preferred the safe  
9 harbor to a full count? What would create greater  
10 confidence in the outcome of the election? These are  
11 essentially legislative judgments. And the reason that the  
12 Framers had the counting not done by the Archives or by a  
13 court, but by the Congress with provisions for what to do  
14 where there is a dispute is that they contemplated that,  
15 more elections than not, the House of Representatives would  
16 be choosing the president.

17           Now, we often speak colloquially of a -- of an  
18 election being, quote, ``thrown'' into the House, as if it  
19 were some kind of constitutional anomaly, but actually it is  
20 the way that every other -- free government in parliamentary  
21 systems chooses their chief executive, is by selection by  
22 the elected members of the legislature or parliament of that  
23 country. And appropriate it would be that this issue were  
24 resolved by those who are politically accountable.

25           JUSTICE WALD: So Congress would have to decide

1 whether or not it was a denial of equal protection for the  
2 election district director in Denver, after a snow storm  
3 came, to extend the polling hours for two hours or not?

4 MR. DELLINGER: That would be an issue for --

5 JUSTICE WALD: That's the natural place --

6 MR. DELLINGER: That would be an issue presented  
7 to Congress, but the advantage of having a matter like this  
8 resolved by Congress is that there's -- there's no magic  
9 answer. People are going to debate these issues for years.  
10 This is not the fodder of a first-year classroom discussion.  
11 Congress can make a judgment about what result it thinks  
12 will secure the greatest confidence of the people of the  
13 United States and the world in the selection of the  
14 President and does not need to attempt to answer that on  
15 some narrow legal technocratic grounds. I think the  
16 judgments to be made are more appropriately made by  
17 Congress.

18 CHIEF JUSTICE LEVI: Well, can't it still do  
19 that? I mean, this Court isn't going to tell Congress --  
20 isn't telling Congress what to do in the way of counting  
21 electors.

22 MR. DELLINGER: Excellent question, Mr. Chief  
23 Justice. It is -- it is the case that Congress could  
24 countermand the decision of this Court and reach a different  
25 decision in the counting function.

1           CHIEF JUSTICE LEVI:  And what about the Colorado  
2 State legislature?  Could it --

3           MR. DELLINGER:  Well, first let me do Congress.  
4 I think that the problem with Congress -- if that is the  
5 case that Congress could do that, it is yet another reason  
6 why this Court's judgment in this instance would be  
7 essentially advisory, and yet another reason why the writ of  
8 certiorari was improvidently granted.

9           CHIEF JUSTICE LEVI:  Well, it wouldn't be  
10 advisory on the question of what certification the State of  
11 Colorado should make, and that's a decision of some  
12 significance, so --

13          MR. DELLINGER:  That is --

14          CHIEF JUSTICE LEVI:  -- it's to that issue, and  
15 it's a narrow issue.  It is not advisory.

16          MR. DELLINGER:  That is technically true, but I  
17 do think that the better exercise of discretion is to let  
18 this be determined, without the undue influence of this  
19 Court, by the national body assigned that role by the  
20 Constitution.

21                 Now, this Court has granted certiorari, so  
22 presumably you may well have considered and rejected these  
23 arguments.  And let me, therefore, tell you why I believe  
24 this judgment below should be affirmed.

25                 There is really only one difficult issue in this

1 case, and that is entirely and exclusively a matter of State  
2 law, and that is whether there is -- the plain language of  
3 the 7:00 p.m. provision controls. But let me begin --

4 JUSTICE WALD: Counsel, just to get rid of some  
5 of the underbrush, do you agree or disagree with the part of  
6 the Colorado Supreme Court's decision that said equal  
7 protection, Federal -- the constitutional equal protection  
8 required that they do this?

9 MR. DELLINGER: Judge Wald, we do not press the  
10 argument that equal protection would require an extension of  
11 voting hours. I believe the -- if the Court wants to adopt  
12 that view and affirm on that basis, we would welcome it, of  
13 course, but I believe that that argument is in tension with  
14 our more fundamental argument, that courts should not be  
15 applying litmus test sensitive equal protection to the  
16 decision of election officials whether to extend or not to  
17 extend. Those on-the-ground decisions, in our view, are  
18 best made by the elected and appointed --

19 JUSTICE WALD: Do you have no limits to that?  
20 Suppose the election district director in Denver said,  
21 ''Leave them open as long as anybody shows, as long as we  
22 can somebody to the polls before midnight on the day of  
23 Election Day''? I mean, is there no limit to that  
24 particular argument?

25 MR. DELLINGER: At some point -- at some point,

1       there is an equal protection, you know, violation.  What I  
2       am --

3                   JUSTICE WALD:  A rationality test?  A  
4       reasonableness test?

5                   MR. DELLINGER:  The argument -- the argument I'm  
6       not advancing here is the argument that the Equal Protection  
7       Clause would be violated by maintenance of uniform hours --

8                   JUSTICE WALD:  Right.

9                   MR. DELLINGER:  -- notwithstanding the snow  
10      storm.

11                   JUSTICE WALD:  Right.

12                   MR. DELLINGER:  That, I think, is a heroic  
13      argument and that I am not making.

14                   Here the equal protection -- well, before we go  
15      to the equal protection, I'll clear out some underbrush with  
16      Article II.  We have no disagreement with the Petitioners  
17      that Article II is strong medicine.  And when the Framers of  
18      the Constitution said that each State shall appoint in the  
19      manner its legislature shall direct a number of electors, it  
20      gave authority to the State legislature, and State courts  
21      may not contradict that authority.  The State constitution  
22      may be -- by the legislature, which has plenary authority.

23                   But that's not what happened here.  Here, what  
24      happened is the State legislature, in determining the manner  
25      of selecting electors, expressly identified the courts as

1 the organ for resolving disputes.

2 CHIEF JUSTICE LEVI: And couldn't the  
3 legislature take back that authority even now, if it wished  
4 to, under Article II?

5 MR. DELLINGER: Subject -- yes, subject to this  
6 constraint: Whatever the State legislature does, the  
7 appointment of electors must happen on a uniform day, in  
8 this instance on November the 4th. You can have different  
9 procedures for trying to ascertain what happened on November  
10 the 4th, but in our view, the legislature cannot adopt a --  
11 make a new decision. A very important principle that the  
12 electors in each State are chosen on a -- on a uniform day.  
13 So that subject -- the legislature could adopt a different  
14 method for resolving the question of what happened on  
15 November the 4th.

16 Now, the -- the critical part about -- what the  
17 Petitioners here and what concurring opinions in Bush versus  
18 Gore did was to simply eliminate one-half of the  
19 legislature's judgment about the manner of choosing  
20 electors. When the legislature decided that the courts  
21 shall follow the normal process, they made a decision that  
22 they did not have to make. The legislature of Colorado  
23 could have said all disputes concerning the appointment of  
24 presidential electors shall be resolved by a joint committee  
25 of the State House and the State Senate. They did not.

1 They chose to confer that authority on the -- in this  
2 particular instance, the supreme court is the appropriate  
3 body in the State to resolve that.

4 JUSTICE PHILLIPS: So they give that decision to  
5 the court, and the court chooses to interpret the Colorado  
6 legislature's dictates on the basis of Federal equal  
7 protection, doesn't some regard for the uniformity of the  
8 Constitution of our country require that this Court step in  
9 if that decision was blatantly wrong?

10 MR. DELLINGER: It would, Justice Phillips, if  
11 that were a load-bearing element of the decision, but it is  
12 not. I believe you do not need to resolve -- well, the  
13 argument that it violates the Federal Equal Protection  
14 Clause is an issue that this Court is to determine, but it's  
15 separate and apart from the Article II question, if I am  
16 making that point clear.

17 Article II -- with respect to the State  
18 constitution, to the extent that -- while I'm not making a  
19 Federal equal protection argument -- to the extent that  
20 Colorado's supreme court decided that the State equal  
21 protection clause cut in favor of permitting the extension  
22 of hours, I do not think that is contrary to Article II  
23 because when the Colorado legislature confers the dispute-  
24 resolution capacity on the courts, it's likely to assume  
25 that the courts will take into account constitutional

1 provisions. That is, indeed, part of the normal functioning  
2 of courts. They don't have to do that. They could say  
3 notwithstanding anything in the State constitution, you are  
4 to resolve these disputes --considering statutory law. In  
5 the absence of such a provision, we would assume that the  
6 legislature intended the normal judicial process to be the  
7 mechanism by which it resolved those electoral disputes. So  
8 I think that the Article II question in this case is --  
9 borders on frivolous, since these judges --

10 CHIEF JUSTICE LEVI: I'd like to take you back  
11 to what it is that Colorado legislature could do now by way  
12 of clarifying the state of the law in -- November the 4th.  
13 So, let us suppose we were to affirm, as you would like, and  
14 that -- perhaps this seems unlikely given the press  
15 conference that is in the record, but let us suppose that  
16 the State legislature were unhappy with that affirmance and  
17 thought that the State Election Code had been substantially  
18 deviated from -- just suppose that as a hypothetical -- and  
19 that the legislature said that, in the exercise of Article  
20 II powers, we will now determine which electors were  
21 selected on November 4th and it is our understanding of the  
22 Election Code that there could be no extension past --  
23 respect the authority of the State supreme court that we had  
24 earlier -- to participate in this election process. Would  
25 that be okay, or would you say that that was a change in

1 procedure that meant that we were no longer operating under  
2 November 4th principles even though the legislature is  
3 saying this is what the substance of the law was as of  
4 November 4th?

5 Are you with me?

6 MR. DELLINGER: I am. That's a very good  
7 question, and I am inclined to believe that the Colorado  
8 legislature could provide that the dispute over the  
9 inclusion of the provisional voters from Denver is now to be  
10 resolved by a joint committee appointed by the legislature,  
11 by a joint commission whose new assignment is to make its  
12 own determination as to whether that was proper as a matter  
13 of Colorado law; that is, given the plenary authority to the  
14 legislature to determine the manner of -- of selecting of  
15 electors, I see nothing that would preclude the legislature  
16 from making a new procedural arrangement about how to  
17 determine what happened on November the 4th, though I think,  
18 not wanting to answer a case that is not before us, we would  
19 have to reserve judgment as to whether that was -- actually  
20 they were making a decision after November the 4th about who  
21 the electors would be.

22 CHIEF JUSTICE LEVI: Well, I sense a bit of  
23 inconsistency in that answer and the previous statement by -  
24 - delegating to the -- or in giving -- supreme court, the  
25 legislature was acting under its authority to determine the

1 manner of selection. And so it had determined the manner of  
2 selection as of November 4th -- include interpretation by  
3 the Colorado Supreme Court. Now we're saying, well, it  
4 could withdraw that, even though that we're now in a post-  
5 November --

6 MR. DELLINGER: I think that is exactly the  
7 question. Is a change in the manner of resolving disputes  
8 that occurs after the Election Day actually a change in the  
9 uniform day? And I do find that to be a difficult question,  
10 one not presented here, one that could be resolved by -- by  
11 -- let me turn to the --

12 JUSTICE WALD: Before you do that, could I --  
13 give me your quick answer to the sort of guts of the -- your  
14 opponent's equal protection argument. I mean to the merits  
15 of it, that, i.e., that if you have an elongation of the  
16 hours in one district caused by the snow storm or whatever,  
17 that you have to do a comparable extension in any other  
18 district as well. I think he -- I'm not totally clear  
19 whether he meant you always have to do that statewide or, if  
20 you're in a district in which any of the voters in the other  
21 district are hurt by the snow storm, you have to give to the  
22 whole district or you have to give it to whole State. I  
23 mean, where does the line drawing on equal protection here  
24 stop?

25 MR. DELLINGER: Justice Wald, I think that

1 interchange with counsel for the Petitioners highlights how  
2 wrong-headed it is to -- equal protection -- a rigid equal  
3 protection test that -- efforts to facilitate more people  
4 voting. The -- this is not a case in which the State has  
5 drawn a line.

6 JUSTICE WALD: Or taken away something.

7 MR. DELLINGER: They haven't taken away anything  
8 from anyone. No State actor took away the right of people  
9 in counties other than Denver to have extended voting hours.  
10 That issue was never presented by those county officials.  
11 And equal protection jurisprudence which would invalidate  
12 any variations in voting that struck down those which made  
13 it easy -- ought to be to make it as easy and to facilitate  
14 voting by as many people as possibly can vote. And that's  
15 why different counties throughout Colorado -- and I think  
16 this is virtually dispositive -- counties throughout  
17 Colorado have different hours for early voting, consistent  
18 with their capacity. The more early voting hours, the more  
19 early voting days the better. What the approach Petitioners  
20 urge on this Court -- the effect of what they urge on this  
21 Court would be to reduce every county in every State to the  
22 least common denominator; that is, the most restrictive  
23 ballot access provisions would have to govern, and no one  
24 could expand access unless they did so uniformly on a  
25 statewide basis. And I think that is an unwarranted --

1 JUSTICE PHILLIPS: We're not talking about  
2 what's fundamental fairness here; we're back to the language  
3 of the Colorado Election Code. And you're premise -- the  
4 people of Colorado themselves, through this statute, gave  
5 the supreme court the right to interpret it, is that based  
6 on statute 1-11-204, that gives the Colorado Supreme Court  
7 original jurisdiction for the adjudication of contests  
8 concerning presidential electors and a mandate to prescribe  
9 rules for practice and proceedings?

10 MR. DELLINGER: It is based either or both on  
11 that on general -- of the trial court. I think whether  
12 there is a, I think, insignificant technical question here,  
13 whether when a new motion was filed after the election to  
14 require certification based on inclusion of the -- of the  
15 Denver provisional votes, whether that question, which was  
16 referred by the district court to the State supreme court,  
17 should have instead been transferred to the original  
18 jurisdiction of that court, and whether the decision of the  
19 supreme court directing the district court to issue such an  
20 order should in fact have been an order issued from the  
21 supreme court, I think that's a very technical difference.

22 JUSTICE PHILLIPS: That may be --

23 MR. DELLINGER: But one way or the other, even  
24 through the general jurisdiction of the trial courts to hear  
25 election disputes or the particular provision about

1 presidential electors, it is manifestly clear that the  
2 legislature of Colorado has decided that the manner of  
3 choosing electors shall include the resolution of disputes  
4 by the courts of the State. Now --

5 JUSTICE PHILLIPS: If we presume that -- that  
6 the law would be the three-judge -- Chief Justice  
7 Rehnquist's concurrence in Bush versus Gore, we have to give  
8 that court interpretation some deference, but not the  
9 deference that we would ordinarily give to a State high  
10 court's interpretation of its own law. Is that correct? In  
11 other words, we -- that interpretation is clearly wrong or  
12 is not --

13 MR. DELLINGER: Right.

14 JUSTICE : -- entitled to deference, and that  
15 the plain meaning of 7 o'clock is 7 o'clock.

16 MR. DELLINGER: Well, there are three different  
17 approaches you could take to this question. Under any of  
18 the three, we should prevail.

19 Number one is that, right or wrong, the decision  
20 has been entrusted to the courts by -- no Article II  
21 violation, period.

22 Number two would be that, as long as the State  
23 constitution -- that the State's interpretation of its own  
24 law by the courts is plausible, is not a distortion of the  
25 law, whether you agree with it or not, it's --

1 JUSTICE PHILLIPS: Given that they --

2 MR. DELLINGER: That's the second one. That's  
3 the one that you think is -- that's essentially where the  
4 Chief Justice Rehnquist was.

5 JUSTICE PHILLIPS: If we undertake our own  
6 independent review to decide that, we would not take at face  
7 value what the Colorado Supreme Court said.

8 MR. DELLINGER: Well, you -- you would review it  
9 very deferentially to decide whether it was so outlandish a  
10 reading of State law that it -- that it basically usurped  
11 the authority of the legislature -- not just got it wrong,  
12 but essentially usurped the authority of the legislature.

13 And the last would be, if contrary even to the  
14 Rehnquist opinion, you required me to defend that decision  
15 on the merits, I think it's actually defensible and correct,  
16 though of course we need not show that. And here's why: I  
17 mean, the -- the essential point of the Petitioners is that  
18 when the legislature says no one shall be allowed to vote  
19 after 7:00 p.m. and the court says that means people may be  
20 allowed to vote after 7:00 p.m., that that is such a  
21 distortion that it constitutes a selection of electors in a  
22 manner chosen by the court rather than by the legislature.  
23 I believe that to be a fair statement of it.

24 But here, I think, the defense of the decision  
25 by the Colorado Supreme Court is this: The hours of voting

1 provision does two things. It sets out what the statewide  
2 standard default amount of time is -- 7:00 a.m. to 7:00 p.m.  
3 And, secondly, it deals with the issue of what you do about  
4 the queue at closing time, and it says, in essence, all  
5 those who are at the polling place in the queue at the  
6 closing hour shall be permitted to vote, no matter how long  
7 that line is.

8 JUSTICE PHILLIPS: This is what bothers me about  
9 the case, and I'd like your legal take on it. The Colorado  
10 legislature may or may not have had role for the supreme  
11 court -- but they clearly had a role for the Secretary of  
12 State, delegated some of the -- Secretary of State to make  
13 these kinds of decisions. Wouldn't your case be much  
14 stronger if the Secretary of State had been monitoring the  
15 Weather Channel and had said keep these polls --

16 MR. DELLINGER: That, it seems to me, Justice  
17 Phillips, goes to completely second-guessing the Colorado  
18 Supreme Court about a matter of Colorado law. I mean, how  
19 much deference is owed to the Secretary? How much  
20 discretion is in the counties?

21 JUSTICE PHILLIPS: This is an Article II problem  
22 --

23 MR. DELLINGER: I -- I understand that, but --

24 JUSTICE PHILLIPS: -- deference as we --

25 MR. DELLINGER: It seems to me that the

1 interpretation by the Secretary that the 7:00 p.m. provision  
2 controls here and is absolute is subject to the following, I  
3 think, fundamental objection, and that is that the very  
4 different question of whether voting hours may be extended  
5 is not specifically addressed, whether voting hours may be  
6 extended in an exercise of equitable discretion in the face  
7 of the kind of weather emergency that occurred in Denver.  
8 If you assume that in the absence of anything to the  
9 contrary, the time may be extended as a matter of equitable  
10 discretion, then you would read the ``those who were at the  
11 polling place at 7:00 p.m. may vote; those who are not there  
12 till after 7:00 p.m. may not'' to mean closing time, the new  
13 closing time. And that's a perfectly sensible reading of  
14 State law.

15 In short, the only hard question is that  
16 question of State law. The Colorado legislature decided  
17 that it should be resolved by the courts of Colorado. They  
18 have made that resolution. The equal protection Federal  
19 claim which is, I believe, properly before this Court  
20 jurisdictionally is one that is essentially a dog in the  
21 manger claim, that people should not be -- jurisdiction  
22 should not be allowed to try to facilitate voting unless  
23 it's the least common denominator, and in any event, if  
24 there's any question federally about the appropriateness of  
25 what Colorado has done, in our view this Court should let it

1 pass and be resolved by Congress.

2 Are there further questions?

3 CHIEF JUSTICE LEVI: What about the substantial  
4 compliance provision? Do you rely on that at all or do you  
5 rely only on the liberal construction provision?

6 MR. DELLINGER: Well, I think substantial  
7 compliance/liberal construction are both background factors  
8 that the Colorado legislature would ordinarily have assumed  
9 the Colorado courts would take into account as part of the  
10 manner and therefore do not -- do not raise a problem.

11 JUSTICE PHILLIPS: Doesn't the -- weren't you  
12 bothered by only citing liberal construction and using some  
13 ellipses that leave out the language about maintaining the  
14 purity of the ballot box and make sure that people who  
15 weren't supposed to vote didn't vote?

16 MR. DELLINGER: Ellipses should always be filled  
17 in, Justice Phillips, in that case.

18 I would like to take the privilege of expressing  
19 appreciation for the assistance by three of my colleagues,  
20 Lily Bashkania (phonetic spelling), Sean (inaudible), and  
21 Stephanie Rogers.

22 Thank you very much.

23 CHIEF JUSTICE LEVI: Thank you.

24 Mr. Nager.

25 REBUTTAL ARGUMENT BY GLEN D. NAGER

1                   ON BEHALF OF THE PETITIONERS

2                   MR. NAGER: Mr. Chief Justice, I'm not sure  
3 whether it's a snow storm, but the lighting system isn't  
4 working the way it normally does. I'm not sure how much  
5 time I have left for rebuttal, but I have --

6                   JUSTICE : Five minutes.

7                   MR. NAGER: I -- unless the Court has lots of  
8 questions. One, page 10 footnote 9 of the stipulated facts  
9 states that there are affidavits in the record from  
10 registered voters outside -- who lived outside of Denver,  
11 who were not able to vote because there was not extended  
12 polling hours.

13                   So, Justice Wald, I do want to reiterate our  
14 equal protection claim is based upon the fact that there  
15 were voters in Colorado who would have wanted to vote and  
16 weren't allowed to vote because their hours weren't extended  
17 while Denver's voters' were.

18                   Second, with regard to your question about the  
19 scope of the extension, I want to reiterate and make clear,  
20 if I was unclear in my opening remarks, if the -- a  
21 jurisdiction's hours are extended for only people who are  
22 impacted by the snow storm, then the equal protection  
23 obligation only extends to extending hours in other  
24 jurisdictions who were affected by the snow storm. On the  
25 other hand, if, as Director Scarpello did, he extended the

1 voting hours for all voters in Denver, whatever his reason,  
2 then equal protection requires extending the hours --

3 JUSTICE WALD: But don't we, counsel, have to be  
4 a little bit practical? I think it was Justice Blackmun in  
5 one of the election cases, you know, suggests that line  
6 drawing is inevitable when you're trying to organize or  
7 supervise as complicated a process as voting across the  
8 State. And so if you were to show that only one voter in  
9 neighboring Jefferson County was really -- could have used  
10 that extra time and has an affidavit and said -- been  
11 allowed to get there at 8 o'clock at night instead of 7  
12 o'clock it would have been great, that that is enough of a  
13 basis for an equal protection argument? I mean, don't we  
14 have to give a kind of a practical cutoff in terms of the  
15 fact that election districts do have their own  
16 representatives? The legislature has set it up that way to  
17 have their officials making -- making decisions that affect  
18 the whole district, not just, you know, one voter or two  
19 voters who might be in a neighboring district --

20 MR. NAGER: Well, the answer is that was Justice  
21 Blackmun's dissent in Skinner versus O'Brien, and the  
22 majority in that case held that arbitrarily denying one  
23 voter the right to vote, the person who was in one jail  
24 cell, while the person next to them is granted the right to  
25 vote, violates the Equal Protection Clause. Two --

1 JUSTICE WALD: But are you really going to take  
2 that position here, that if a single person in Jefferson  
3 County you could show had been -- would have been able to  
4 vote when they said they couldn't vote, get there by 7  
5 o'clock, that that is enough of an equal protection --

6 MR. NAGER: Well, it's an individual right, but  
7 that's also not the facts of this case.

8 JUSTICE WALD: Well, you've said -- it's very  
9 vague. It says some affidavits, the statement said a few  
10 people, the statement of facts.

11 MR. NAGER: Well, Justice Wald, there's been no  
12 trial in this case.

13 JUSTICE WALD: But did you ask -- did you people  
14 ask for any remand for factfinding in the Colorado Supreme  
15 Court?

16 MR. NAGER: The case went up on an expedited --  
17 went up on a certified order --

18 JUSTICE : Yes, but I mean, did you -- was that  
19 argument made? We don't have enough facts; we've got to go  
20 back and get some more facts?

21 MR. NAGER: I wasn't counsel below, so I can't  
22 honestly --

23 (Laughter.)

24 MR. NAGER: -- represent to the Court, but I  
25 what I can say is that Colorado law -- to the extent is

1 allows any discretion and we would suggest that it doesn't  
2 allow discretion in extending polling hours -- vests that  
3 discretion in the Secretary of State of Colorado, and the  
4 Secretary of State of Colorado took the position that the  
5 polling hours shouldn't be extended, and he also by order,  
6 Judge Wald, issued an order telling Director Scarpello not  
7 to count those votes. And so the Secretary has in fact  
8 exercised whatever discretion --

9 JUSTICE WALD: After the fact.

10 MR. NAGER: Well, Director Scarpello is changing  
11 the hours of the poll after the facts, after the snow storm,  
12 and --

13 JUSTICE WALD: Not after the --

14 MR. NAGER: Secretary Coffman has to issue  
15 orders about what ballots --

16 JUSTICE WALD: Yes, but still -- it's still  
17 unclear to me why, when she found out about that, as she  
18 obviously did, in order to go to court, if she really does  
19 have the kind of authority that you suggest, she didn't  
20 simply, say, issue her own orders saying, "Stop it, stop  
21 it, stop it." You know, "the polls close at 7 o'clock."  
22 It was still only 5 o'clock. I mean, so -- they could have  
23 closed at the original hour at 7 o'clock --

24 MR. NAGER: I don't --

25 JUSTICE WALD: All would be well from your point

1 of view?

2 MR. NAGER: I don't know the answer to that  
3 question, but what I do know is that the Secretary said they  
4 shouldn't be counted, and then the Secretary issued an order  
5 saying they shouldn't be counted.

6 CHIEF JUSTICE LEVI: Thank you. The case is  
7 submitted.

8 Thank you, counsel.

9 (Whereupon, at 11:25 a.m., the case in  
10 the above-entitled matter was submitted.)

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