

In the Supreme Court of the United States

***McCain v. Obama***

Before: Chief Justice David Levi, Associate Justices Thomas Phillips and Patricia Wald

To be argued:  
10:00am on Monday, October 20  
[as if it were Monday, December 1]

Presenting the argument on behalf of petitioners John McCain, et al.:

Glen Nager, Jones Day

Presenting the arguments on behalf of respondents Barack Obama, et al.:

Walter Dellinger, O'Melveny & Myers

**Statement of the Case**

*This hypothetical case derives from teaching and scholarship conducted at the Moritz College of Law of the Ohio State University, one of this project's co-sponsors, and has been refined through collaboration with the other co-sponsors, the AEI-Brookings Election Reform Project and the Supreme Court Institute of Georgetown Law School. None of the real-world individuals named in the hypothetical, including the two presidential candidates (or their actual attorneys or other representatives), were consulted on the content of this hypothetical or are in any way responsible for it. The two attorneys arguing each side of this hypothetical case are doing so as part of the exercise and do not actually represent their hypothetical clients, although true to their commitment to professional norms—and to the spirit of the exercise—these attorneys will argue zealously as if the named parties were in fact their clients.*

Colorado turned out to be the decisive state in the November 2008 presidential election between Senators John McCain and Barack Obama. Apart from Colorado, McCain had 265 undisputed Electoral College votes, and Obama had 264 undisputed Electoral College votes. A majority of Electoral College votes, 270, is necessary to prevail. Colorado has 9 Electoral College votes, and therefore whichever candidate received them would be the winner.

On Election Day in Colorado, an especially severe and unusual winter storm hit Denver, causing treacherous driving conditions even for motorists used to difficult snow and ice. The storm arrived in full force mid-afternoon, making after-work rush hour traffic exceptionally gridlocked. Denver's suburbs, as well as the rest of the state, largely escaped the full brunt of the freakish storm. Although some suburban roads suffered storm-related delays, they were not significantly worse than often occurs during heavy traffic and minor in comparison to what drivers were experiencing on Denver's roads (a difference attributed by some local media commentators to greater per capita spending by the suburban municipalities for weather-related services). Consequently, there were reports of suburban commuters having difficulties getting to their polling places, but many more complaints of this type from Denver dwellers.

At 4:53 pm, Denver Elections Director Michael Scarpello publicly announced that he had just notified all polling locations by email that he was directing them to stay open an extra two hours, closing at 9:00 pm instead of the previously scheduled 7:00 pm. He ordered them to make sure that any voter arriving after 7:00 pm was required to use a provisional ballot to vote.

Under Colorado law, responsibility for administering elections in Denver belongs to the city's Clerk and Recorder, an elected official.<sup>1</sup> The current Clerk and Recorder is Stephanie Y. O'Malley, a Democrat. The city's Election Director, Scarpello, reports to O'Malley. He received her approval before issuing his directive concerning the extension of polling hours. O'Malley, before giving her approval, consulted with Denver's elected mayor, John Hickenlooper, also a Democrat, about traffic conditions throughout the city and the need to extend polling hours.

Upon hearing of Scarpello's directive, Mike Coffman, Colorado's Secretary of State (an elected Republican<sup>2</sup>), filed a lawsuit in state district court against O'Malley and Scarpello, asking the court to enjoin the extension of polling hours.<sup>3</sup> The suit was filed at 5:37pm. Coffman argued that Colorado law has no provision to permit any extension beyond the regularly scheduled closing time. Colorado Revised Statutes § 1-7-101, entitled "Hours of Voting," states:

- (1) All polls shall be opened continuously from 7 a.m. until 7 p.m. of each election day. If a full set of election judges is not present at the hour of 7 a.m. and it is necessary for judges to be appointed to conduct the election as provided [elsewhere in the code], the election may commence when two judges who are not of the same political affiliation for partisan elections are present at any hour before the time for closing the polls. The polls shall remain open after 7 p.m. until every eligible elector who was at the polling

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<sup>1</sup> The placement of this responsibility for the city's elections is recent, as a result of problems that occurred in 2006. The office's own account of this change can be found here: <http://www.denvergov.org/elections/AbouttheElectionsDivision/tabid/429484/Default.aspx>.

<sup>2</sup> In the same election held on November 4, Coffman ran for Congress as the Republican candidate for Colorado's 6<sup>th</sup> congressional district, the seat vacated by Tom Tancredo: <http://www.coffmanforcongress.com/>. (Coffman won easily in this solid Republican district.)

<sup>3</sup> The Secretary of State was represented in this lawsuit by Colorado's Attorney General, John Suthers (also an elected Republican), who continues to represent the Secretary in all legal matters relevant to this case. The Denver defendants were, and continue to be, represented by the city's attorney, an office appointed by the Mayor.

place at or before 7 p.m. has been allowed to vote. Any person arriving after 7 p.m. shall not be entitled to vote.

- (2) Upon the opening of the polls, a proclamation shall be made by one of the judges that the polls are open, and, thirty minutes before the closing of the polls, a proclamation shall be made that the polls will close in thirty minutes.

No other statute addresses whether polling hours may be extended in an emergency, and no administrative rule promulgated by the Secretary of State provides for such a possibility.<sup>4</sup> (Under Colorado law, the Secretary of State has responsibility for issuing statewide rules to implement the state's statutes concerning the conduct of the election.<sup>5</sup>)

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<sup>4</sup> Rule 43.10 of the Election Rules of the Colorado Secretary of State, available at [http://www.elections.colorado.gov/WWW/default/Rule%20Making/2008/8\\_ccr\\_1505\\_1\\_sos\\_election\\_rules\\_as\\_amended\\_07\\_11\\_08.pdf](http://www.elections.colorado.gov/WWW/default/Rule%20Making/2008/8_ccr_1505_1_sos_election_rules_as_amended_07_11_08.pdf), requires each local election authority within the state to develop a "contingency plan" as part of the "security procedures" that it must file with the Secretary of State in advance of an election. "The contingency plan shall include [among other things]. . . (b) Back up plans for emergency situations including fire, severe weather, bomb threat, civil unrest, electrical blackout, equipment failure, and any other emergency situations identified by the designated election official."

In addition, the Colorado Secretary of State has issued an "Emergency and Disaster Planning: Best Practices Guide," <http://www.elections.colorado.gov/DDefault.aspx?tid=1029>. This guide contains no directives, only suggestions, and does not refer to § 1-7-101 or otherwise address the time for closing polls and whether there is any possibility for extending polling hours and, if so, in what circumstances. Regarding the possibility that "severely inclement weather" may require extraordinary steps on Election Day, the guide only advises that there may be "a need to deploy four-wheel drive vehicles to polling places" (p. 3).

<sup>5</sup> Colorado Revised Statute § 1-1-107, provides:

- (1) In addition to any other duties prescribed by law, the secretary of state has the following duties:
  - (a) To supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state;
  - (b) To enforce the provisions of this [elections] code;
  - (c) With the assistance and advice of the attorney general, to make uniform interpretations of this code;
  - (d) To coordinate the responsibilities of the state of Colorado under the federal "National Voter Registration Act of 1993", [42 U.S.C. sec. 1973gg](#);
  - (e) To serve as the chief state election official within the meaning of the federal "Help America Vote Act of 2002", [P.L. No. 107-252](#), and, in that capacity, to coordinate the responsibilities of the state of Colorado under the federal act in accordance with the requirements of this code.
- (2) In addition to any other powers prescribed by law, the secretary of state shall have the

Consequently, Secretary Coffman argued that Colorado law intends the time for closing the polls to be absolute, subject to the qualification that anyone who arrives by 7:00pm will be permitted to cast a ballot.

The state district judge, however, rejected Secretary Coffman's request for an injunction to nullify Director Scarpello's order. In a brief opinion, issued at 6:49pm (after telephone hearing with attorneys from both sides), the judge reasoned that, because Scarpello had ordered all ballots cast by individuals arriving after 7:00pm to be provisional, they could be disqualified during the official canvassing of election returns without injury to any candidate, voter, or other interested party—assuming that Scarpello had acted unlawfully, as the Secretary alleged. Conversely, if Scarpello had been entitled

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following powers:

- (a) To promulgate, publish, and distribute, either in conjunction with copies of the election laws pursuant to [section 1-1-108](#) or separately, such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws, including but not limited to rules establishing the amount of fees as provided in this code;
- (b) To inspect, with or without the filing of a complaint by any person, and review the practices and procedures of county clerk and recorders, election commissions, their employees, and other election officials in the conduct of primary, general, and congressional vacancy elections and the registration of electors in this state;
- (c) To employ, subject to [section 13 of article XII of the state constitution](#), the personnel deemed necessary to efficiently carry out the powers and duties prescribed in this code;
- (d) To enforce the provisions of this code by injunctive action brought by the attorney general in the district court for the judicial district in which any violation occurs.
- (3) Repealed by [Laws 1996, H.B.96-1061, § 84, eff. July 1, 1996](#).
- (4) Any other provision of law to the contrary notwithstanding, the office of the secretary of state, or the section or division administering the election laws of this state pursuant to this section, shall be open and available to the election officials and employees of the various political subdivisions conducting elections on each election day during the same hours that the polls are open for voting if the political subdivision has notified the office of the secretary of state that an election has been called and that the services of the office are desired.
- (5) The provisions of this section are enacted, pursuant to [section 11 of article VII of the state constitution](#), to secure the purity of elections and to guard against the abuses of the elective franchise.
- (6) Repealed by [Laws 2003, Ch. 326, § 3, eff. May 22, 2003](#).
- (7) No person while serving in the office of secretary of state shall serve as the highest ranking official, whether actual or honorary, in the campaign of any candidate for federal or statewide office. This subsection (7) shall not apply to a campaign in which the secretary of state is the candidate.

to issue his order, then an injunction stopping its implementation would cause irreparable injury to both him, as a public official, and the voters whose interests he sought to protect by issuing the order. Consequently, the judge concluded that, according to the well-established test for whether or not to issue an injunction, the “balancing of the equities” clearly favored permitting Scarpello’s directive to stay in effect, given the provisional status of all ballots cast pursuant to that directive.

Coffman took an immediate appeal to the Colorado Supreme Court, bypassing the state’s court of appeals, as is permitted in certain situations. The appeal was filed at 7:15pm. The Colorado Supreme Court, which has seven justices, issued a 5-2 ruling, upholding the district judge’s decision. The divided ruling, which was announced at 7:52pm, was along party lines: the court presently has five members appointed by Democratic governors and two appointed by Republican governors. The majority said that the district court did not abuse its discretion in “balancing the equities” as it did. The dissent asserted that it was “absolutely clear” that Scarpello had no authority to order an extension of polling hours, and his order should be voided immediately, lest the provisional ballots cast pursuant to that order cause unwarranted confusion over the proper winner of the state’s presidential election.

Coffman then immediately sought an emergency injunction from the U.S. Supreme Court, which the Court received by email at 8:12pm. At 8:46pm, the Court issued this one-sentence ruling: “The application for an emergency injunction is denied on the ground that any such relief at this point would be moot.” As is common for orders of this kind, this one gave no indication whether or not the Justices were unanimous in reaching this ruling.

When all the returns were in on Election Night from Colorado, McCain had 1,134,657 votes, and Obama had 1,121,294—for a difference of 13,363 votes (out of 2,255,951). But 104,655 provisional ballots had been cast, 70,434 of which were from Denver, including 62,729 that were cast pursuant to Director Scarpello’s order by voters arriving at the polls after 7pm. Of the regular ballots cast in Denver, Obama had won over 70 percent of them: 149,993 for Obama, to 58,331 for McCain. If the same percentage applied to all the provisional ballots from Denver, and if all of them were counted, Obama would net over 50,000 additional votes, far more than enough to overcome McCain’s statewide lead in regular ballots. McCain could not rely on the 34,221 provisional ballots outside Denver to offset Obama’s presumed advantage if the post-7pm provisional ballots from Denver were counted (and Obama would not be able to win without them, since it was highly unlikely that non-Denver provisional ballots would break sufficiently in his favor). Nor was it likely that enough of the pre-7pm Denver provisional ballots, cast for reasons other than Director Scarpello’s order, would end up being disqualified to make a difference. In 2006, for example, Colorado disqualified only 15% of provisional ballots. Thus, whether the post-7pm provisional ballots are counted would, in all probability, determine the winner in Colorado—and thus the nation.

On Thursday, November 6 (two days after Election Day), Secretary Coffman issued an administrative order, invoking his statutory authority under Colorado Revised Code, that certified results from Denver must not include any of the provisional ballots cast by individuals arriving at the polls after 7pm. (In addition to his general supervisory authority over the conduct of elections under § 1-1-107, set forth above in footnote 5, the

Secretary of State has specific statutory authority over the certification of results of all statewide, including presidential, elections.<sup>6)</sup> The Secretary’s administrative order further instructed Denver’s election officials to set aside all the contested provisional ballots, to take no further action with respect to them, and to submit to the Secretary by November 21 (according to the deadline set by state law<sup>7)</sup> certified results that exclude these ballots. In announcing his administrative order, Coffman pointed out that in no other county neighboring Denver, or elsewhere in the state, had polling hours been extended after 7pm, and surely there were non-Denver voters who would have taken advantage of an extra two hours of voting had they been given that same opportunity.

Later the same day (Nov. 6), Scarpello held a press conference where he insisted that the post-7pm provisional ballots from Denver should be counted as long as the individual voters were otherwise qualified. Scarpello argued that driving conditions in Denver during rush hour on Election Day had been much worse than in neighboring localities. “Suburban voters faced no extraordinary obstacles in getting to their polling places by 7pm,” he asserted, “but Denver voters did, and they should not be disenfranchised because they were stuck on the roads through no fault of their own.”

Voter turnout statistics proved his point, he declared. In the state’s non-Denver counties,

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<sup>6</sup> See Colorado Revised Statutes §§ 1-10-104 (imperfect returns—corrections), 1-10-105 (official abstract of votes cast—certification by secretary of state), 1-11-107 (list of presidential electors).

<sup>7</sup> Colorado’s Election Code specifies the following dates to complete various relevant actions:

Verification and counting of provisional ballots	14 days after election (Nov. 18)	§ 1-8.5-105(5)
Official results from localities to Secretary of State	17 days after election (Nov. 21)	§ 1-10-102(1)
Secretary of State’s compilation (pre-recounts)	24 days after election (Nov. 28)	§ 1-10-103(2)
Completion of any recount	30 days after election (Dec. 4)	§ 1-10.5-102
Certification of presidential electors	35 days after election (Dec. 9)	§ 1-11-107

over 92% of “active” voters (as defined by the Secretary of State) cast ballots, a historically high rate reflecting the intense public interest in this year’s presidential election. By contrast, without the 62,729 provisional ballots cast by voters arriving after 7pm, turnout in Denver would have been only 67% of active voters. But if those post-7pm provisional ballots are included in Denver’s turnout statistics, the figure rises to 87%. This comparison, according to Scarpello, shows that without his extension of polling hours, Denver voters would have suffered from serious disenfranchisement not faced elsewhere.<sup>8</sup> Thus, Scarpello contended, his order was necessary to redress the uniquely acute effect of the storm on Denver, and his order merely put Denver back on level terms with the rest of the state.

The next day (Nov. 7), Director Scarpello went back to the state district judge who had ruled in his favor, seeking a decree that would void Secretary Coffman’s order and entitle Denver’s election officials to proceed with the processing of these provisional ballots, counting them if cast by otherwise eligible voters, and including the count of these ballots as part of the official results that Denver submits to the Secretary. The district judge, however, immediately passed the dispute along to the Colorado Supreme Court, asking for its instructions on this question (as the district judge was entitled to do under the state’s rules of judicial procedure): “Under the laws of this state, and of the United States, in determining the state’s presidential electors, should the certified vote totals for each presidential candidate include provisional ballots cast by individuals

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<sup>8</sup> The suburban county most affected by the storm (other than Denver itself, of course) was Jefferson County, which lies immediately west of Denver. Turnout in Jefferson County was 89%, lower than the statewide average, but higher than in Denver even if the provisional ballots are included in the turnout calculation. To compare these 2008 turnout rates with those in the 2004 general election, see “Official Publication of the Abstract of Results” (p.152): <http://www.elections.colorado.gov/WWW/default/Prior%20Years%20Election%20Information/2004/Abstract%202003%202004%20082305%20Late%20PM-5.pdf>

arriving at polls after 7pm pursuant to the directive of the Denver Elections Director, if there is no other basis for disqualifying those provisional ballots?” The district judge further ordered that, while the matter is pending before the Colorado Supreme Court, Denver officials may proceed with reviewing these provisional ballots to determine whether or not each would be eligible for counting apart from the issue in dispute. As to those ballots which would be so eligible, the district judge instructed that the Denver officials may not count them (or even open their envelopes to prepare them for counting), but instead shall proceed to report to the Secretary by November 21, according to the deadline specified under state law, official results divided into two categories: (1) a partial certification, based on the official canvass of all ballots other than the contested provisional ballots; and (2) the total number of contested provisional ballots that have no other basis for disqualification. The district court added that the Secretary may proceed to review Denver’s report of official results as authorized under state law, except that a final certification based on the ultimate status of “category (2) ballots” (the contested provisional ballots that have no other basis for disqualification) must await a final order from the Colorado Supreme Court.

The Colorado Supreme Court scheduled oral argument for Friday, November 14 on the question referred to it by the district court. Meanwhile, both the McCain and Obama campaigns intervened in the litigation to protect their interests.<sup>9</sup> In a public

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<sup>9</sup> Each side’s motion to intervene, which were granted by the court, included a variety of parties: each candidate, the official campaign organization (both nationally and in Colorado), Democratic and Republican party organizations (national, state, and local), and registered voters fitting various descriptions (those who cast regular ballots and those who cast provisional ballots, some of whom lived in Denver and others who lived in its suburbs and elsewhere, as well as registered voters from these locations who submitted affidavits saying that they were unable to get to the polls by 7pm because of bad traffic or other reasons). As a result of this panoply of intervenors, there is no foreseeable Article III standing issue presented in this case.

statement at the time of filing its brief, the McCain campaign accused the Obama campaign of using the two extra hours provided by Scarpello's order to turn out extra Democrats who had never attempted to go to the polls earlier in the day. The Obama campaign responded by saying that they had simply advised Democratic voters who may not have heard of the order extending polling hours that they now would be able to vote until 9pm if they wished to do so.

On Tuesday, November 18, the Colorado Supreme Court issued a 4-3 decision in Obama's favor. (One of the Democratic justices who had joined the earlier 5-2 majority now joined the two Republicans in dissent.) The majority opinion stated:

It would deny Denver voters Equal Protection not to count these provisional ballots. As cogently explained by Denver's Election Director, if polling hours had not been extended in the city, Denver voters would have been denied an equal opportunity to cast a ballot when compared to voters elsewhere in the state. Permitting those voters to cast a provisional ballot after 7pm protected these voters from wrongful disenfranchisement, serving the purpose of provisional ballots as required by Congress in the Help America Vote Act of 2002. It would cause the same wrongful disenfranchisement of these voters—who are indisputably eligible, registered, and at their correct polling location—to now toss their ballots in the trash without bothering to count them. Like their fellow citizens elsewhere in the state, they sought to exercise their high civic duty of participating in a presidential election, and they did so under extreme weather conditions. As the U.S. Supreme Court recognized in *Bush v. Gore*, the Equal Protection Clause protects the right of all citizens to have their votes count equally. To refuse to count the provisional ballots cast by these dutiful voters would violate this constitutional right as well as subvert the very essence of democracy.

Moreover, the Colorado constitution, no less than the U.S. Constitution, protects a citizen's equal right to vote. On numerous occasions, this court has stated that it is a "fundamental right of the first order." [citing many precedents] Thus, even without regard to *Bush v. Gore* and the Equal Protection Clause of the U.S. Constitution, we would be compelled to rule that these provisional ballots must be counted. Yet there is no conflict between state and federal law on this point, as both yield the same conclusion.

Finally, section 1-1-103(1) of our state's Election Code explicitly states: "This code shall be liberally construed so that all eligible electors may be

permitted to vote . . . .” This instruction from our state’s legislature, combined with the constitutional principles we have already mentioned, means that section 1-7-101 should not be construed to prohibit the extension of polling hours when exigencies require it. Instead, that section of the code simply sets forth the general rule that polls close at 7pm; it does *not* state that there are never any exceptions to this general rule. True emergencies rarely, but sometimes, will necessitate keeping the polls open beyond 7pm in some places: for example, localized power outages, or flooding caused by a water main break. The officials responsible under law for conducting elections in Denver determined that a rare emergency of this kind occurred on November 4, and section 1-1-103(1) obligates us to uphold that determination and to permit the counting of provisional ballots cast by qualified voters protected by that decision.

The dissent responded:

This case should be simple. There is no authority under Colorado law to permit anyone arriving after 7pm to vote. Therefore, any ballot cast by a person in this situation is unlawful, void, and must be disqualified. To disqualify these unlawful ballots does not deny Equal Protection. On the contrary, to close the polls uniformly at 7:00pm, permitting only those standing in line at that time to cast a ballot, would uphold equality, not deny it.

Section 1-1-103(1) does not permit, much less require, a contrary conclusion. That provision is noticeable in its balance between facilitating “eligible” voters and protecting against the “corruption” of an election from votes cast by “those who are not eligible.” In full, the relevant provision reads: “This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections.” When applying this balanced interpretative instruction to section 1-7-101 (the operative provision in this case), two truths should be obvious—as they were to the Secretary of State, who, and not the Denver Elections Director, is given the statutory authority to interpret the state’s Election Code so that it is enforced uniformly statewide.

First, there is no language in section 1-7-101 to “construe liberally” in favor of counting ballots cast by any person who was not already standing in line at 7pm. (Of course, no matter how many eligible voters are standing in line by 7pm, they all will get to vote, no matter how long it takes, and that is why the extension of polling hours was unnecessary—and prohibited.) Section 1-7-107 is unequivocal and unambiguous in stating: “Any person arriving after 7pm shall not be entitled to vote.” The point is not open to construction, liberal or otherwise.

Second, and more fundamental, the command to engage in liberal construction applies only to protect the counting of “eligible” ballots, but by the very terms of section 1-7-107 any ballot cast by a “person arriving after 7pm” is

*not* “entitled,” i.e., “eligible.” On the contrary, because these ballots most clearly are “not eligible,” the interpretative canon of section 1-1-103 reinforces the straightforward requirement that the Secretary of State (to whom this canon is actually addressed) must preclude the counting of them.

In answering “Yes” to the question submitted by the district judge, the Colorado Supreme Court remanded the case with instructions to enter an order requiring the Secretary of State to accept vote totals from Denver containing the contested provisional ballots and to include these vote totals as part of the Secretary’s final certification of the election. On its own motion, the court stayed the effect of its mandate until November 28, unless the U.S. Supreme Court granted any petition for certiorari to review the court’s decision, in which case the stay would last until the U.S. Supreme Court concluded its own proceedings or otherwise superseded the stay. During the period of this stay, the Colorado Supreme Court further specified, the Secretary of State was not permitted to enter any certification of the election contrary to the court’s ruling.

Both the McCain campaign and Secretary Coffman filed petitions for certiorari in the U.S. Supreme Court to review the Colorado Supreme Court’s decision. These petitions presented the following questions:

1. Whether the Colorado Supreme Court decision misconstrued the Equal Protection Clause or itself violates the Equal Protection Clause insofar as it requires the counting of the contested provisional ballots; and
2. Whether the Colorado Supreme Court decision violates Article II’s grant of authority to the Colorado legislature to “direct” the “Manner” of appointing the state’s presidential electors.

On Friday, November 21, the Supreme Court granted these petitions (consolidating them), and ordered expedited briefing on the merits, scheduling oral argument for

Monday, December 1.<sup>10</sup> In 2008, “the safe harbor deadline” for resolving disputes concerning presidential electors pursuant to 3 U.S.C. § 5 is Tuesday, December 9. The Electoral College is scheduled to meet on Monday, December 15.

Meanwhile, on Wednesday, November 26 (the day before Thanksgiving), the Governor of Colorado, the President of the Colorado Senate, and the Speaker of the Colorado House of Representatives (all three Democrats), held a joint press conference where they released this statement:

We believe that the Colorado Supreme Court’s decision of November 18 is the correct interpretation of our state’s Election Code as it currently exists. If the United State Supreme Court overturns that correct decision in a mistaken belief that it violates our state legislature’s authority under Article II of the U.S. Constitution to determine the “Manner” of appointing presidential electors, then we shall have to consider calling a special session of the legislature, as the Governor is empowered to do, in order to rectify that mistake.

Currently, Colorado has 20 Democratic and 15 Republican Senators; the state’s House of Representatives has 40 Democratic and 25 Republican members.

Also, since the U.S. Supreme Court granted certiorari, both the Denver Elections Director and the Secretary of State have proceeded with the preparation of official returns insofar as permitted under the still-operative order of the state district court, given the terms of the Colorado Supreme Court’s stay of its own decision. In other words, on November 21 the Denver Election Director submitted the two distinct categories of official returns specified in the court order, and on November 28 the Secretary of State announced official statewide totals that were complete except for resolution of the status of the contested provisional ballots. That announcement confirmed what was apparent on Election Night: McCain would win if the contested provisional ballots were disqualified,

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<sup>10</sup> By agreement, Glen Nager will present the oral argument on behalf of all petitioners, and Walter Dellinger will present the oral argument on behalf of all respondents.

whereas Obama would win if *both* they were permitted to be counted *and*, upon counting them, the percentage voted in his favor was at all comparable to his share of regular Denver ballots.

[This Statement of the Case was prepared for counsel and for the Court by Edward B. Foley, serving as Clerk of the Court for this case. It will serve as a Stipulated Record upon which to base the argument and analysis of the issues for the Court's decision.]