In the Supreme Court of the United States

McCain v. Obama

RESPONDENT BARACK OBAMA'S
SUMMARY OF ARGUMENTS AND POINTS OF LAW

I. BECAUSE THIS CASE PRESENTS A POLITICAL QUESTION ENTRUSTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES TO RESOLUTION BY CONGRESS, THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

A. Petitioner's Challenges to the Award of Colorado's Electoral Votes Should Be Decided by Congress, not by this Court.

This Court should decline to exercise its jurisdiction because the framework established by the Constitution for determining Presidential election results provides for the resolution of this dispute by the United States Congress. Article II, Section 1, Clause 2 of the Constitution, as amended by the Twelfth Amendment, vests Congress with the authority to determine the proper counting of electoral votes from each state. Article II expressly provides that the vote of the electors in each state shall be transmitted under seal to the President of the Senate, that the Senate and House shall determine the proper count, and that the House shall select the President in the event that Congress determines that no candidate commands a majority. *See* U.S. Const. art II, § 1, cls. 3-4, *amended by* U.S. Const. amend. XII. The text of the Constitution therefore confers upon Congress the critical and culminating role in the election of the President.

Congress's role is evident not only from the text of the Constitution, but also from the elaborate statutory scheme Congress devised in the Electoral Count Act to lay down how it will select electors should competing elector slates be submitted from the same state. *See* 3 U.S.C. § 15 (2006) (providing that only votes "regularly given" within the meaning of 3 U.S.C. § 5 shall

be counted).[1] This detailed statutory framework simply would not have been necessary if Congress expected this Court to be the final arbiter in such a dispute. Accordingly, this remedy is far preferable to the prospect of this Court wading into the political thicket and resolving the election on its own.[2]

Indeed, if the Constitution gives to Congress the power to determine whether electors have been chosen in the manner directed by the state legislature, this Court should not abrogate that power by intervening before Congress has an opportunity to decide the issue. It inheres in the structure of the Constitution that questions calling for a political will and choice rather than a legal judgment belong to the political department. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Electoral disputes about the manner in which state electors are appointed are not only "textually committed" to the state and national legislatures, *Baker v. Carr*, 369 U.S. 186, 217 (1962), but they are quintessentially political in nature and are an inextricable part of the political process that is also designed to be the proper dispute resolution forum for them.

Both prudence and due respect for a coordinate branch demand that federal courts not enter "the political thicket" of a political dispute, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), and instead allow for a nationally representative and politically accountable branch to take responsibility for a political decision. *See Bush v. Gore*, 531 U.S. 98, 141-142, n.2 (Ginsburg, J., dissenting) ("Even in the rare case in which a State's 'manner' of making and construing laws

[1] 3 U.S.C. § 5 provides that a state determination of any controversies as to the appointment of electors, "by judicial or other methods or procedures," will be "conclusive" if such a determination was made at least six days before the meeting of the electors pursuant to a law existing on such day. *See* 3 U.S.C. § 5. Section 1-11-204 of the Colorado Revised Statutes provides that the state supreme court "has original jurisdiction for the adjudication of contests concerning presidential electors and shall prescribe rules for practice and proceedings for such contests." *See* Colo. Rev. Stat. § 1-11-204 (2008).

[2] The Constitutional Convention debates similarly illustrate that the Framers intended that "[t]he power . . . to regulate the elections of our federal representatives must be lodged" in "the legislatures of several states and the Congress" and that, according to Madison, selection of the electors by the judiciary "was out of the question." *See* 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 24, 363 (J.B. Lippincott Co., 2d. ed., 1881).

might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint.") (citing the Twelfth Amendment; 3 U.S.C. §§ 1-15; *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Luther v. Borden*, 48 U.S. 1 (1849)).

Nor is this a case where the federal interest is left to the devices of a state court judgment. The only federal interest involved in this case—the interest to see that Article II is complied with—is committed to Congress, the branch most apt to accomplish that goal in such a politically contentious circumstance, to protect. This case is not about federal judicial supremacy to say what the law is; rather, it is about the appropriate remedy when the proper counting of a states' electoral votes is at issue. The Constitution places the locus of that remedy squarely within the political process. The judgment of the Colorado Supreme Court, which the Colorado legislature directed to adjudicate electoral contests, any legislative and other measures available to the parties under the Colorado law, and ultimately the intervention of the United States Congress, are the only avenues that the Constitution provides for pursuing in this dispute.

McPherson v. Blacker, which decided a challenge to a state electoral scheme under Article II, is not to the contrary. 146 U.S. 1 (1892). In *McPherson*, the Court merely concluded that the Constitution does not bar the state legislature from providing for the selection of electors by districts. It does not stand for the proposition that a federal court has the power to interpret state law for purposes of determining whether state courts have complied with the directives of the state legislature.

II. THE COLORADO SUPREME COURT'S DECISION WAS CONSISTENT WITH ARTICLE II OF THE UNITED STATES CONSTITUTION'S CONFERRAL OF AUTHORITY UPON THE COLORADO LEGISLATURE TO "DIRECT" THE "MANNER" OF APPOINTING THE STATE'S PRESIDENTIAL ELECTORS.

A. The Colorado Supreme Court Issued Its Decision in the "Manner" Directed by the Colorado Legislature Pursuant to Article II.

The Colorado Supreme Court's issuance of a decision in this case did not violate Article II of the U.S. Constitution. Article II requires that each state's appointment of presidential electors be determined "in such a manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. Colorado's legislature directed the process of appointing presidential electors by enacting its Elections Code, which includes procedures for resolving any disputes that arise from the administration of this framework. Specifically, the Elections Code confers upon the Colorado Supreme Court "original jurisdiction for the adjudication of contests concerning presidential electors" and the mandate to "prescribe rules for practice and proceedings in such contests." Colo. Rev. Stat. § 1-11-204 (2008).

Though the legislature could have designated a special legislative committee or the state House and Senate as a whole or an official of the Executive Branch, such as the Secretary of State, as the arbiter of contests regarding presidential electors, it expressly chose instead the state's courts as the final process for resolving disputes like this. The Colorado legislature also contemplated that its Supreme Court would resolve those disputes by interpreting and applying the full range of Colorado laws, including its Constitution, when it granted the court jurisdiction over contests concerning presidential electors. *See* Colo. Rev. Stat § 2-4-201 (indicating the legislature's presumption that all statutes it enacts are constitutional); Colo. Rev. Stat. § 2-4-204 (granting permission to the courts to sever unconstitutional statutory provisions to preserve legislative intent).

Here, the Colorado Supreme Court followed the process directed by the legislature in the state's Elections and Legislative Codes. The Colorado electors were thus chosen in the "Manner" directed by the legislature. Review by the Colorado Supreme Court, and application of state constitutional as well as statutory law, was thus entirely consistent with the mandate of Article II.

B. The Colorado Supreme Court's Decision Ensured the Appointment of Electors in a Manner that was Substantively Consistent with the Legislature's Framework.

The Colorado Supreme Court's interpretation of § 1-7-101 of the Elections Code is in accordance with Article II because it is a plausibly interpreted Colorado law governing the administration of elections. The legislature intended that the Elections Code be "liberally construed so that all eligible electors may be permitted to vote." Colo. Rev. Stat. § 1-1-103(1). To that end, the legislature required a standard of substantial—not strict—compliance with the Code to be carried out by elections officials on election days. *See* Colo. Rev. Stat. § 1-1-103(3) ("Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies."). The Colorado Supreme Court has consistently applied the legislature's "substantial compliance" standard in interpreting the Elections Code to avoid "needless disenfranchisement" of voters "especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing." *Erickson v. Blair* 670 P.2d 749, 754-55 (Colo. 1983) (finding that a standard of substantial compliance reflected the legislature's goals for absent voter legislation, where a standard of strict compliance would have produced results adverse to those goals); *see Meyer v. Lamm*, 846 P.2d 862, 876 (Colo.1993) (applying the substantial compliance standard to uphold counting write-in ballots).

In this case, the Denver Elections Director substantially complied with the Elections Code by moving the polls' closing time to 9 p.m. The provision of Section 1-7-101 stating that

voters arriving after 7 p.m. "shall not be entitled to vote" does not preclude the state Supreme Court from sustaining the decision made by the Elections Director extending the closing time until 9 p.m. because of the emergency situation.

Section 1-7-101 does two things: it establishes the normal statewide voting hours as 7 a.m. to 7 p.m. and it deals with the issue of closing time queuing by providing that those who are in the que at closing time shall be permitted to vote, but those who arrive at the polling place after the time for voting has ended shall not be permitted to vote. Neither provision addresses the question of whether there exists equitable discretion in the Elections Director to expand the hours of voting in response to an emergency situation. Indeed, the Colorado legislature has never addressed the question of whether an emergency is an adequate reason for altering the normal voting hours.

If one first concludes that nothing precludes an emergency extension of the normal voting hours, and that the Elections Director was thus within his authority in extending the hours until 9 p.m., then the question arises whether anyone who arrived "after 7 p.m." may be permitted to vote. Here, the provision of the law dealing with the rules governing closing time queuing—providing that those who are in line " at 7 p.m." shall be permitted to vote and those arriving "after 7 p.m." shall not be allowed to vote—should obviously be read to apply those same queuing rules to the adjusted closing time of 9 p.m. The standard closing time of 7 p.m. is used in the provision governing closing time queuing as shorthand for actual closing time. If the actual closing time is lawfully moved—and nothing precludes that emergency power—then the provision of 1-7-101 is given effect by precluding anyone from voting who arrives after the adjusted closing time of 9 p.m.

Whether or not this Court would have reached the same conclusion as the Colorado court on this question is not the point. As long as it was one plausible interpretation of the Code for the Colorado Supreme Court to conclude that voters arriving ***before*** the "closing time," whenever that might be, should be entitled to cast ballots and that voters arriving after "closing time," whenever that might be, should not be permitted to cast ballots, then no violation of Article II has occurred. The extraordinary circumstances of Denver's weather on Election Day rendered the Denver Elections Director's decision appropriate. The Colorado Supreme Court therefore struck the proper balance between adherence to the letter of the Code and the broader (and more important, from a Constitutional perspective) legislative intent of active enfranchisement of eligible voters when it affirmed the Denver Elections Director's decision and correctly permitted the provisional ballots to be counted. If the court had decided otherwise and rigidly interpreted § 1-7-101, it would have subverted the legislature's intent to enfranchise eligible voters. Therefore, Colorado's presidential electors have been determined as the legislature directed as required by Article II.

III. THE COLORADO SUPREME COURT'S DECISION WAS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Standard of Review.

The Equal Protection Clause should not be used as a weapon against nonpartisan, nondiscriminatory efforts to facilitate voting. Instead, its principles must be flexibly applied in order to further attempts at making the voting process easier and more accessible. *See Bush*, 531 U.S. at 126 (Stevens, J., dissenting) ("The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.") (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501

(1931)). Although "unavoidable inequalities in treatment" may arise whenever votes are cast, often as a result of efforts to administer the voting process in an orderly manner, such inequalities are not necessarily unconstitutional. *See Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004) (recognizing that, wherever geographic boundaries are drawn, such that voters on one side of a line will have access to additional voting mechanisms and those on the other side will not, permissible inequalities will result).

Indeed, as long as such efforts are non-invidious, to strike them down in the name of equal protection would be perverse. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) (noting that the process of facilitating voting rights occurs gradually and that a scheme designed to meet that end need not be struck down "simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked"). The decision to count the ballots at issue here is, of course, far from invidious; polling hours in Denver were extended because of the weather alone. No impermissible motive has been proffered here, and none exists. *Cf. Bush*, 531 U.S. at 128 (Stevens, J., dissenting) (assuming the impartiality of the judges tasked with carrying out an election-related mandate).

B. Under Any Level of Scrutiny, the Colorado Supreme Court's Decision was Consistent with the Equal Protection Clause.

Exercising the flexibility necessary when confronting election-related issues, a number of courts have allowed for the extension of voting hours so as to accommodate geographic disparities. For instance, the highest court in New York endorsed a state statute that, in order to ameliorate overcrowding and accommodate "the special needs of commuters," provided an additional six hours of voting time at polling stations in particular areas of the state. *See Corning v. Bd. of Elections of Albany County*, 440 N.E.2d 1326, 1327 (N.Y. 1982) (adopting the decision of the lower court). Earlier this year, a federal court in Ohio made an Election Day decision to

extend voting hours in certain precincts due, in part, to severe bad weather. *See* Order Granting Motion for Temporary Restraining Order at 1, *Obama for Am. v. Cuyahoga Bd. of* Elections*,* No. 08-CV-562 (N.D. Ohio March 4, 2008), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/Obamafor AmericavCuyahoga.php (allowing for a 90-minute extension of the poll-closing time); *see also* Order Granting in Part Plaintiff's Motion for Temporary Restraining Order at 1-3, *Ohio Democratic Party v. Cuyahoga County Bd. of Elections*, No. 1:06-CV-2692 (N.D. Ohio Nov. 7, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/cuyahogaboe.php (extending voting hours at certain polling stations due to long lines and malfunctioning voting equipment, among other things).

Here, Denver officials allowed voters struggling to make it to their polling stations in the face of a severe storm to cast their ballots—62,729 in all—after 7:00 p.m. Every eligible voter arriving between 7:00 p.m. and 9:00 p.m. was allowed to vote, and the results of the Denver votes did not become known until all the ballots, including the provisional ones, were cast. The decision to count the provisional ballots does not constitute so severe a burden on the equal protection rights of non-Denver voters as to necessitate any heightened form of scrutiny. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (noting that "the rigorousness of [the Supreme Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights").

Instead, because these votes were cast pursuant to an order that was both reasonable and nondiscriminatory, the state's compelling interest in facilitating Denver voters' fundamental right to vote easily justifies the nonpartisan actions taken on account of the unprecedented inclement weather, which was principally localized to the Denver area, and particularly acute in

Denver itself.[3] *See id.* ("[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the . . . rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624-25 (2008) (Scalia, J., concurring) (noting that a deferential standard of review is appropriate for "nonsevere, nondiscriminatory restrictions," while strict scrutiny is reserved for laws that severely restrict the right to vote).

Even under a more rigorous standard of review, such as the one applied in *Bush v. Gore*, the decision to count the ballots would survive. To the extent that *Bush v. Gore* is applicable to this case—a fact that Respondents do not concede—it would require this Court to determine that there existed a sound justification for treating voters in Denver differently from those in the rest of the state. *See Bush*, 531 U.S. at 109. The fact that the winter storm hit Denver harder than it hit any other area in the state provides this justification.

Important differences exist between this case and ones in which some voters were impermissibly prevented from voting altogether. *See*, *e.g.*, *O'Brien v. Skinner*, 414 U.S. 524, 530-31 (1974) (striking down an absentee ballot program that denied some pretrial detainees the right to vote based upon the counties in which they resided). Here, no non-Denver voter was precluded from casting a ballot. Indeed, such voters were given ample opportunity to make themselves heard: every registered voter eligible to participate in the election could have taken advantage of Colorado's mail-in voting program, and all of them could have cast their ballots in

[3] Far from violating the principles of the Equal Protection Clause, the decision to count the provisional ballots may, in fact, be required thereunder. When voting conditions in some areas of a state are substantially better than those in others, the failure to remove obstacles from the negatively affected areas may be unconstitutional. *See League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005) ("Inaction that diminishes the right to vote equally may be as actionable as direct and overt acts treating the franchise unequally."). Similarly, when election officials fail to provide some voters with adequate facilities in which to cast their ballots, they violate the Equal Protection Clause. *See Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969).

person at one of the state's many early voting locations. That the Denver Elections Director sought accommodation for the voters under his jurisdiction did not prevent election directors outside of Denver—particularly those in the suburbs most affected by the storm—from doing the same. Had they chosen to do so, the Colorado Supreme Court may well have ordered the counting of the provisional ballots from those areas. Perhaps the non-Denver voters' true quarrel is not with the Colorado Supreme Court but, instead, with the election officials in their area.

Moreover, Colorado law allows voting hours to vary throughout the state. A state statute requires individual jurisdictions to make early voting available "during regular business hours," but it also allows them "by resolution [to] increase the hours that the early voters' polling place may be open." Colo. Rev. Stat. § 1-8-202. If this disparity in voting hours survives analysis under the Equal Protection Clause, so, too, must the decision at issue here.