

No. 08-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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MIKE COFFMAN, JOHN MCCAIN, ET AL.

*Petitioners,*

v.

MICHAEL SCARPELLO, BARACK OBAMA, ET AL.

*Respondents.*

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**On Writ of Certiorari  
to the Colorado Supreme Court**

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**BRIEF FOR PETITIONERS**

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## QUESTIONS PRESENTED

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.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES .....	iii
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THE SECRETARY OF STATE TO COUNT THE DISPUTED BALLOTS .....	3
II.   THE COLORADO SUPREME COURT’S ORDER REQUIRING THE COUNTING OF THE DISPUTED BALLOTS ITSELF VIOLATES THE EQUAL PROTECTION CLAUSE.....	6
III.  THE STATE-LAW BASIS FOR THE COLORADO SUPREME COURT’S JUDGMENT ALSO VIOLATES ARTICLE II OF THE U.S. CONSTITUTION .....	11
A.   Article II Vests State Legislatures With The Exclusive Authority To Select The Manner In Which Presidential Electors Are Appointed .....	11
B.   The Colorado Supreme Court’s State-Law Holding Impermissibly Circumscribed The Colorado Legislature’s Exclusive Article II Authority .....	16
CONCLUSION.....	19

## TABLE OF AUTHORITIES

Page

### FEDERAL CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	3
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	3, 5
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	7, 8, 10, 11, 12, 13, 15, 16, 17, 18
<i>Bush v. Palm Beach County Canvassing Bd.</i> , 531 U.S. 70 (2000).....	13
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980).....	5, 7
<i>Colo. Gen. Assembly v. Salazar</i> , 541 U.S. 1093 (2004) .....	15
<i>Crawford v. Marion County Election Bd.</i> , 128 S. Ct. 1610 (2008) .....	6
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972) .....	7
<i>Griffin v. Roupas</i> , 385 F.3d 1128 (7th Cir. 2004).....	6
<i>Hawke v. Smith</i> , 253 U.S. 221 (1920).....	12
<i>Indiana ex rel. Anderson v. Brand</i> , 303 U.S. 95 (1938) .....	16
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892) .....	12, 13, 16
<i>O'Brien v. Skinner</i> , 414 U.S. 524 (1974) .....	7
<i>Ohio ex rel. Davis v. Hildebrant</i> , 241 U.S. 565 (1916) .....	15
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	11
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973) .....	4
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932) .....	15
<i>Southerland v. Fritz</i> , 955 F. Supp. 760 (E.D. Mich. 1996).....	6
<i>Storer v. Brown</i> , 415 U.S. 724 (1974) .....	3
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	5

**TABLE OF AUTHORITIES**

(continued)

**Page**

**STATE CASES**

*Coffman v. Colo. Common Cause*, 102 P.3d 999 (Colo. 2004) .....17

*Colo. for Family Values v. Meyer*, 936 P.2d 631 (Colo. Ct. App. 1997).....18

*Kentucky ex rel. Dummit v. O'Connell*, 181 S.W.2d 691 (Ky. 1944) .....14, 15

*Missouri ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000).....6

*Nebraska ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948) .....14, 17

*In re Opinion of Justices*, 113 A. 293 (N.H. 1921).....14

*People v. Holland*, 708 P.2d 119 (Colo. 1985).....19

*Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002).....6

*Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000) .....18

**FEDERAL CONSTITUTION AND STATUTES**

U.S. CONST. art. I, § 4, cl. 1 .....13

U.S. CONST. art. II, § 1, cl. 2.....11

U.S. CONST. art. II, § 1, cl. 3.....19

3 U.S.C. § 1.....19

3 U.S.C. § 2.....19

**COLORADO STATUTES**

C.R.S. § 1-1-103 .....17, 18

C.R.S. § 1-1-107 .....10, 18

C.R.S. § 1-1-110 .....10, 18

C.R.S. § 1-5-108 .....18

C.R.S. § 1-7-101 .....4, 5, 17

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
C.R.S. § 1-8-102 .....	5
C.R.S. § 1-8-104 .....	5
C.R.S. § 1-8-202 .....	5
C.R.S. § 1-10-105 .....	18
C.R.S. § 1-11-107 .....	18

**OTHER STATE STATUTES**

Ark. Code Ann. § 7-5-304 .....	6
Mich. Comp. Laws § 168.720.....	6
Mo. Rev. Stat. § 115.407 .....	6

**MISCELLANEOUS**

<i>Baldwin v. Trowbridge</i> , 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess. (1870) .....	13, 14
RICHARD H. FALLON, JR. <i>ET AL.</i> , HART & WECHSLER’S THE FEDERAL COURTS & THE FEDERAL SYSTEM (5th ed. 2003) .....	15
Nelson Lund, <i>The Unbearable Rightness of Bush v. Gore</i> , 23 CARDOZO L. REV. 1219 (2002).....	5

## SUMMARY OF ARGUMENT

The question in this case is whether the Colorado Secretary of State may be judicially compelled to count provisional ballots that were cast in Denver after the Denver Clerk and Recorder kept the polls open past the uniform statewide deadline due to traffic congestion caused by a severe storm. Exercising his statutory authority to construe and administer Colorado's election laws, Secretary Coffman ruled that such provisional ballots should not be counted, because (i) Colorado election law does not allow for extensions of the uniform statewide deadline and (ii) only citizens in Denver were given the opportunity to vote after the deadline. In holding that the U.S. and Colorado constitutions nonetheless required the Secretary to count the untimely cast ballots, the Colorado Supreme Court committed three federal constitutional errors.

*First*, the federal Equal Protection Clause does not require states to grant exemptions from uniform voting deadlines. Uniform voting deadlines serve compelling government interests by ensuring consistent and even-handed treatment of voters, thereby protecting the actual and perceived integrity of elections. Moreover, Colorado's uniform voting deadline imposes only a minimal burden on voters, who are given ample time to vote both before and on election day. There is no proper federal constitutional basis for requiring untimely cast ballots to be counted, particularly where the alleged obstacle to timely voting is not government action, but merely increased traffic from inclement weather. The Colorado Supreme Court's contrary judgment would imperil countless election regimes across the country and compel courts to draw difficult lines in post-election litigation among the many non-governmentally created obstacles to timely voting, lines that are more properly left to state legislatures to draw in advance of those elections.

*Second*, while state legislatures might constitutionally choose to provide for deadline extensions in appropriate circumstances, the federal Equal Protection Clause prohibits the kind

of arbitrary and unjustified disparate treatment of qualified voters that the Colorado Supreme Court ordered here. The order is wholly arbitrary and irrational in requiring the counting of ballots cast by Denver voters after the 7 p.m. deadline—whether or not those voters were delayed by the storm—when non-Denver voters *identically* affected by the storm were not even allowed to vote after the deadline. In addition, the court’s order lacks the minimum safeguards that this Court has said are constitutionally required to ensure equal treatment of voters: it is standardless in that it fails both to define the circumstances in which a constitutional exception to a uniform deadline is mandated and the way to determine the length of such exceptions; and, rather than providing for centralized decisionmaking by the Secretary of State to ensure consistent, rational, and equal treatment of voters, it contemplates that 64 different local officials will make the judgments about when extensions will be granted and how long they will be.

*Third*, Article II of the U.S. Constitution bars this kind of judicially imposed extension of a statutory voting deadline in a presidential election. Article II vests the manner of appointment of presidential electors exclusively in the Colorado Legislature. The Colorado Supreme Court’s holding that the Colorado Constitution compels the Secretary to depart from the terms of the election code impermissibly circumscribes the Legislature’s federally delegated authority to fix poll closing times. Nor can that holding be recast as a permissible interpretation of the Colorado election code, as the court admitted that its so-called construction of the code was dependent on its perception of constitutional mandates. Indeed, because the Colorado election code cannot possibly be construed to permit individual county clerk and recorders to extend poll hours at their discretion to remedy perceived exigencies, had the Colorado Supreme Court so held, such a plainly erroneous distortion of the code would strip the Legislature of its federally delegated authority and thereby also require reversal under Article II.

## ARGUMENT

### I. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THE SECRETARY OF STATE TO COUNT THE DISPUTED BALLOTS

Contrary to the Colorado Supreme Court’s conclusion that the Equal Protection Clause *requires* counting the untimely cast ballots, the Secretary of State’s directive that those ballots be disallowed is perfectly constitutional. The judgment below is wrong in this regard.

This Court has long recognized the importance and validity of a state’s interest in creating *ex ante*, uniform, and generally applicable voting laws. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (“We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.”). Although any rule respecting the voting process “inevitably affects—at least to some degree—the individual’s right to vote,” this Court repeatedly has held that “the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Id.* at 788; *accord Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (upholding uniform ban on write-in ballots and noting the state interest that “elections are operated equitably and efficiently”); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[T]here must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”).

Uniform voting deadlines are the paradigmatic example of “evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *Anderson*, 460 U.S. at 788 n.9. Fixed voting deadlines (i) give voters clear notice of when the polls will close and encourage early voting; (ii) shield states from the need to draw difficult distinctions among voters—such as deciding which excuses warrant an extension and how long each extension should be—and thereby avoid the risk that such election-day decisions might imperil the integrity of elections

due to actual or perceived unfairness; (iii) protect the integrity of elections by reducing opportunities for fraud and strategic campaigning; and (iv) foreclose extended election litigation over the propriety of exceptions, thus ensuring compliance with federal presidential electoral deadlines, providing certainty to the electorate, and maximizing the transition time of successful candidates. Thus, a state may require that polls close at a uniform time state-wide, just as it “is certainly justified in imposing some reasonable cutoff point for [voter] registration or party enrollment,” *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

For these reasons, Colorado’s uniform voting deadline is perfectly constitutional, both on its face and as the Secretary has sought to apply it. It unambiguously announced that “[a]ny person arriving after 7 p.m. shall not be entitled to vote.” C.R.S. § 1-7-101(1). Moreover, except for the unauthorized actions of the Denver Clerk and Recorder, it was evenhandedly applied to all Colorado voters: Denver polling stations, like non-Denver polling stations, were open and fully functional for the statutorily mandated 12-hour period. And no state action prevented Denver voters (or other Colorado voters) from getting to the polls during these hours. There simply is no proper constitutional basis for the suggestion that, in seeking to hold all voters equally to the same deadline, the Secretary somehow has treated voters unequally in violation of the Equal Protection Clause.

Contrary to the Colorado Supreme Court’s fundamental premise, the fact that a storm made it more difficult for some Denver voters to get to the polls before 7 p.m. did not create a constitutional obligation for the State to give any—much less all—Denver residents *extra* time to vote, in order to “equal[ize] [their] opportunity to cast a ballot when compared to voters elsewhere in the state.” *Statement of the Case* (“*Statement*”) at 11. The Equal Protection Clause does not require a state to grant *preferential* treatment to everyone who is disparately affected by

a neutral voting law, *see City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion), just as it does not require a state to offset the adverse effects of a neutral employment law, *see Washington v. Davis*, 426 U.S. 229, 242 (1976). Nor is a state constitutionally required to survey the many different obstacles that voters face in getting to the polls—*e.g.*, weather, disabilities, child-care responsibilities, work schedules, transportation issues—and set staggered voting deadlines aimed at accommodating each different kind of obstacle. *See Nelson Lund, The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1250 (2002) (“Rural voters . . . must on average travel farther to their polling places than urban voters, but the Court has not required that election officials somehow correct this inequality.”). Rather, because of the compelling interests served by uniformity, this Court repeatedly has sustained generally applicable election regulations even though they “invariably impose some burden upon individual voters.” *Burdick*, 504 U.S. at 433.

Indeed, here, Colorado’s election code not only gave all voters 12 hours on election day to get to the polls, it also gave them ample opportunity to vote before election day—through early voting and absentee ballots. *See* C.R.S. §§ 1-7-101, 1-8-102, 1-8-104(3), 1-8-202. Thus, the uniform 7 p.m. deadline imposed throughout the state placed a truly *de minimis* burden on the ability of voters generally to cast their ballot. To be sure, for those voters who did not take advantage of the many opportunities that the State afforded for timely voting and instead attempted to vote at the last minute—including those who were delayed in traffic by the late afternoon storm—the deadline took on greater importance. But the State is responsible neither for those voters’ procrastination nor for the increased traffic caused by the storm. And, as noted above, such traffic is but one of the many minor obstacles of life with which voters must individually contend in getting to their polling places to timely vote. It plainly does not

“represent a significant increase over the usual burdens of voting.” *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) (opinion of Stevens, J.); *cf. Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (refusing to exempt “working mothers” from voting in person because their hardship is the same as that faced by “emergency-room and other medical personnel, persons who work at the other end of a large county from their precinct, persons who work at two jobs, and those who are caring for a sick or disabled family member”).

Any other construction of the Constitution would call into doubt longstanding and widespread electoral practices throughout the country. Numerous state laws, like section 1-7-101, require all voters to cast their ballots during an allotted time—without exception. *See, e.g.*, Ark. Code Ann. § 7-5-304; Mich. Comp. Laws § 168.720; Mo. Rev. Stat. § 115.407. Furthermore, courts repeatedly have interpreted these statutes to preclude court-ordered extensions based on election-day anomalies. *See, e.g., Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002); *Missouri ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000); *Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996). Whether or not to create an exception to these laws is “quintessentially a legislative judgment,” *Griffin*, 385 F.3d at 1131, and requiring *ad hoc* extensions from uniform deadlines would result in a radical, extensive, and unprecedented judicial involvement in the electoral process—yielding disparate, unpredictable, and untoward results. There is no warrant for so construing the federal Equal Protection Clause.

## **II. THE COLORADO SUPREME COURT’S ORDER REQUIRING THE COUNTING OF THE DISPUTED BALLOTS ITSELF VIOLATES THE EQUAL PROTECTION CLAUSE**

What is unconstitutional here is not the Secretary of State’s directive that Denver and non-Denver voters both be held to the pre-established and uniform voting deadline, but the Colorado Supreme Court’s order that Denver voters be given a preferential exemption from that deadline. That order transgresses fundamental equal-protection principles.

This Court has long recognized that “the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters.” *Bolden*, 446 U.S. at 77 (plurality opinion) (collecting cases). As a corollary, the State has an “obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam) (“*Bush I*”).

Thus, in *O’Brien v. Skinner*, this Court held that New York’s absentee voting laws—under which only those pretrial detainees held *outside* their county of residence could cast absentee ballots—violated the Equal Protection Clause because, depending on their county of residence, “two citizens awaiting trial . . . sitting side by side in the same cell, may receive different treatment as to voting rights.” 414 U.S. 524, 529 (1974). New York’s laws, in other words, “discriminate[d] between two categories of qualified voters in a way that . . . [wa]s wholly arbitrary.” *Id.* at 530; *see also Dunn v. Blumstein*, 405 U.S. 330, 334-35 (1972) (invalidating durational residence law that distinguished between “old . . . and new residents”).

Similarly, in *Bush II*, this Court held that the Florida Supreme Court’s ordering of a statewide manual recount of all undervotes (where voting machines identified no vote) did not “satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right” to vote on equal terms. 531 U.S. at 105. *First*, this Court found that the Florida order arbitrarily called for recounts only of undervotes and not analytically indistinguishable overvotes (where voting machines identified more than one vote), even though manual examination of overvotes could “reveal the requisite indicia of intent [of the voter].” *Id.* at 108. Relatedly, the Florida order had accepted results in three counties where overvotes had been included and contemplated the inclusion of results from counties in which only partial recounts were completed. *Id.* *Second*, the recount was to be performed under an “abstract”

standard of “intent of the voter,” but the court had not provided “specific standards to ensure its equal application.” *Id.* at 106. Not only did this omission raise the prospect that “the standards for accepting or rejecting contested ballots might vary . . . from county to county,” but the Florida court had in fact certified results from “counties [that had] used varying standards to determine what was a legal vote.” *Id.* at 106, 107. *Third*, although the Florida Supreme Court had “the power to assure uniformity,” the actual process that it had established allowed ballot counting by “*ad hoc* teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots.” *Id.* at 109. In sum, the Florida Supreme Court had “accord[ed] arbitrary and disparate treatment to voters in its different counties.” *Id.* at 107; *see also id.* at 134 (Souter, J., dissenting) (agreeing that “unjustifiably disparate standards [were being] applied in different electoral jurisdictions to otherwise identical facts”); *id.* at 145 (Breyer, J., dissenting) (noting that the “absence of a uniform, specific standard to guide the recounts . . . implicate[d] principles of fundamental fairness”).

The Colorado Supreme Court’s order here similarly runs afoul the Equal Protection Clause. If anything, the Colorado Supreme Court’s order is more egregious than that of the Florida Supreme Court: whereas the latter’s concerned only the *method* by which votes were counted, the former’s concerns the underlying *right* to vote at all, like the New York law invalidated in *O’Brien*.

*First*, in extending voting time for *all* Denver voters but *only* Denver voters, the Colorado Supreme Court’s order arbitrarily treats similarly situated voters differently. Non-Denver voters *identically* affected by the storm and the resulting bad traffic were accorded no relief for the sole reason that they lived outside of Denver. *See Statement* at 10 n.9. Take, for example, Foley and Lowenstein. Foley lives just outside of Denver in Englewood, and therefore is in the Arapahoe

County voting district; Lowenstein lives and votes in Denver. Foley and Lowenstein typically carpool together to their nearby offices in downtown Denver and both leave work together on the afternoon of the election to go to their respective polling stations. Because of the traffic caused by the storm, Foley does not drop Lowenstein off at his Denver polling station until 7:15 p.m., and does not arrive at his own polling station in Englewood until 7:30 p.m. Lowenstein is able to vote and have his vote counted; Foley is not able to vote at all. Like the distinction between in-county and out-of-county confinement in *O'Brien* and the distinction between undervotes and overvotes in *Bush II*, the Colorado Supreme Court has ordered differential treatment of identically situated voters that is wholly arbitrary and irrational. Indeed, the arbitrariness of the court's order is heightened by its overinclusiveness: it requires the counting of ballots of Denver voters who did not attempt to go to the polls during voting hours, who were outside the storm's path, and/or who would have walked to their polling stations in all events.

*Second*, even more than the Florida Supreme Court's order in *Bush II*, the Colorado Supreme Court's order is standardless. It makes no effort to define what constitutes "wrongful disenfranchisement" or "extreme weather conditions" or "[t]rue emergencies." *Statement* at 11-12. Its acceptance of increased traffic as such an exigency, along with its examples of "localized power outages" and "water main break[s]," indicates that a wide variety of election-day disruptions could conceivably warrant a deviation from Colorado's otherwise uniform voting deadline. *See id.* at 12. But the court provided no definitions, criteria, or even guidelines to assist in determining (i) whether a "true emergency" even exists; (ii) how to determine the appropriate length of any extension; or (iii) which voters should receive the extension. Indeed, the court held that it was "obligate[d]" to defer to individual determinations on these issues by each of the State's 64 clerk and recorders. *Id.* Not only is there no basis in state law for this

deference,<sup>1</sup> but this decentralized decisionmaking authority creates the same kind of arbitrary, differential treatment of voters throughout the state that was held unconstitutional in *Bush II*. If, say, the exact same storm hit the Denver area in 2012, the Colorado Supreme Court would presumably accept Denver’s decision to extend voting for two hours; Arapahoe County’s decision to extend voting for four hours; and Jefferson County’s decision not to extend voting at all. This is tantamount to the Florida Supreme Court’s “ratifi[cation]” of recount standards that varied from “county to county.” *Bush II*, 531 U.S. at 106-07.

*Third*, the process by which this extension was granted (and future extensions are to be granted) lacks the minimal procedural safeguards that this Court has said are necessary to protect the equal right to vote. As noted, under the Colorado Supreme Court’s order, county clerk and recorders are now constitutionally compelled to create election-day exceptions to section 1-7-101 in order to “equal[ize] [the] opportunity to cast a ballot when compared to voters elsewhere in the state.” *Statement* at 11. But, in addition to lacking any discernible standards to apply, an individual clerk and recorder cannot possibly ensure “equality” across the state, since he does not consider, and cannot address, circumstances outside of his county. Such a decision could only sensibly be made by the Secretary of State, who could take into account conditions throughout the state and ensure consistent and equal treatment of all similarly-situated Colorado voters. In addition, like the *ad hoc* recount teams criticized in *Bush II*, clerk and recorders have no training and no perspective with which to make determinations about “true emergencies.” Indeed, granting elected clerk and recorders broad discretion to craft their own idiosyncratic interpretations of the court’s amorphous standard simply raises the unwelcome prospect of *ex*

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<sup>1</sup> This deference is unfounded since county clerk and recorders have no authority with respect to the certification or counting of votes and their authority to interpret the Colorado election code is expressly limited by “the rules and orders promulgated by the secretary of state.” C.R.S. § 1-1-110. The Secretary has authority to review and countermand “the practices and procedures of county clerk and recorders,” and he has exercised that authority in this case. *Id.* § 1-1-107(2)(b); *see also id.* § 1-1-107(1)(a)-(c).

*post* politicization. It is not difficult to imagine a “race to midnight,” with, say, the Clerk and Recorder of Logan County (70% Republican in 2004 election) deciding to extend voting hours there in light of an extension by the Denver Clerk and Recorder (70% Democrat in 2004 election), and vice versa. In contrast to the evenhanded application of section 1-7-101 as written, the regime established by the Colorado Supreme Court has yielded—and cannot but yield—disparate and arbitrary results.

In sum, as in *O’Brien* and *Bush II*, similarly situated voters have arbitrarily been treated differently. And, as in *Bush II*, a “state court with the power to assure uniformity” has issued an order that lacks “minimal procedural safeguards.” 531 U.S. at 109. The order thus violates the Equal Protection Clause; and, because it does, it cannot be sustained under Colorado constitutional or statutory law. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

### **III. THE STATE-LAW BASIS FOR THE COLORADO SUPREME COURT’S JUDGMENT ALSO VIOLATES ARTICLE II OF THE U.S. CONSTITUTION**

Given that the Equal Protection Clause certainly did not require Secretary Coffman to count the late votes from Denver, *see* Part I *supra*, the only remaining basis supporting the Colorado Supreme Court’s judgment was its determination that the Colorado Constitution compelled those votes to be counted, notwithstanding the literal terms of section 1-7-101. But that alternative state-law holding, in addition to violating the Equal Protection Clause, *see* Part II *supra*, also violates Article II of the U.S. Constitution, which vests the Colorado Legislature with plenary power to decide how presidential electors are selected.

#### **A. Article II Vests State Legislatures With The Exclusive Authority To Select The Manner In Which Presidential Electors Are Appointed**

Article II provides that a state’s presidential electors “shall [be] appoint[ed] in such Manner as the Legislature thereof may direct.” U.S. CONST. art. II, § I, cl. 2. “[T]he framers of the Constitution clearly understood and carefully used the terms in which that instrument

referred to the action of the Legislatures of the states.” *Hawke v. Smith*, 253 U.S. 221, 228 (1920). Thus, while ordinarily “the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law,” appointing presidential electors is one of “a few exceptional cases in which the Constitution . . . confers a power on a particular branch of a State’s government.” *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

Accordingly, this Court in *McPherson v. Blacker* unanimously confirmed that Article II “leaves it to the *legislature exclusively* to define the method of effecting the object [of appointing presidential electors].” 146 U.S. 1, 27 (1892) (emphasis added); *see also id.* at 25 (“[T]he legislature possesses plenary authority to direct the manner of appointment . . .”). This Court observed that the plain import of the constitutional text was reflected in the unbroken practice of presidential elections: “from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.” *Id.* at 35; *see also id.* at 29 (“No question was raised [in early elections] as to the power of the state to appoint in any mode its legislature saw fit to adopt.”).

Of critical importance here, *McPherson* twice declared explicitly that Article II’s grant of exclusive authority to state legislatures could not be encroached upon by state constitutional restrictions: This Court explained that, unlike “in the ordinary sense of the [U.S.] constitution,” where “[w]hat is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist,” in the specific context of Article II, the phrase ““in such manner as the legislature thereof may direct”” “operat[es] as a limitation upon the state in respect of *any attempt to circumscribe the legislative power.*” 146 U.S. at 25 (emphasis added). And later, lest there be any doubt, the Court approvingly quoted a Senate Report that unambiguously confirmed that state constitutions are not exempt from Article II’s

proscription of state attempts to circumscribe the legislative power: “‘The appointment of these [presidential] electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and *cannot be taken from them or modified by their state constitutions* any more than can their power to elect senators of the United States.’” *Id.* at 34-35 (emphasis added; quoting S. Rep. No. 395, 43d Cong., 1st Sess. (1874)).<sup>2</sup>

*McPherson*’s conclusion that state constitutions cannot circumscribe the state legislature’s Article II powers was also the basis for this Court’s *per curiam* judgment in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (“*Bush I*”). There, after quoting *McPherson*, this Court unanimously remanded to the Florida Supreme Court because that court’s opinion was unclear as to the extent that the Florida Constitution had been held to circumscribe the election code promulgated by the Florida legislature. *See id.* at 76-78.

*McPherson* also accords with the longstanding view of Congress that state constitutions cannot constrain state legislatures that are exercising functions directly delegated by the U.S. Constitution. In 1866, the House of Representatives resolved a disputed congressional election that turned on whether Article I, section 4, clause 1 of the U.S. Constitution—which provides that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”—authorized the Michigan Legislature to pass a statute permitting absentee voting by soldiers even though the Michigan Constitution forbade such voting. *See Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc.

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<sup>2</sup> Justice Stevens thus erred in *Bush II* by interpreting *McPherson*’s phrase “forbidden or required . . . under state constitutions” to support the proposition that, even when exercising Article II functions, “state legislatures . . . [are] creatures born of, and constrained by, their state constitutions.” 531 U.S. at 123 (dissenting opinion). As the full passage from *McPherson* makes clear, the plain text of Article II alters the normal allocation of state power by “operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power.” 146 U.S. at 25. Notably, Justice Stevens did not address this critical language from *McPherson*.

Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1870). The House seated the candidate who relied on votes cast under the statute because, as summarized by the clerk to the committee on elections, “[w]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing [the] place of elections, the power of the legislature is paramount.” *Id.* at 46.

Likewise, state supreme courts have held that state constitutions cannot abrogate duly enacted state laws implementing Article II. *See Nebraska ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286-87 (Neb. 1948) (free-elections clause of state constitution could not invalidate state law barring nomination of independent candidates for presidential electors); *Kentucky ex rel. Dummit v. O’Connell*, 181 S.W.2d 691 (Ky. 1944) (state constitutional ban on absentee voting could not circumscribe state law permitting military absentee voting for presidential electors); *In re Opinion of Justices*, 113 A. 293, 297-98 (N.H. 1921) (same). Consistent with the plain text of Article II, the unqualified language of *McPherson*, and the reasoning of Congress in *Baldwin*, these courts upheld state laws against state constitutional attack regardless of whether the state constitution was invoked to extend voting rights, as in *Marsh*, or to limit them, as in *O’Connell*.

The broad repudiation of state constitutional constraints by this Court, Congress, and state supreme courts reflects the fact that, if a state constitution were permitted to impose *any limits* on a legislature’s Article II discretion, then the state constitution could just as well *completely strip* the legislature of its Article II authority by mandating the legislative enactment of a specific manner of appointment. There is no principled reason, for example, why a state constitution could not require a legislature to provide for popular election of presidential electors, if that constitution could dictate the voting procedures employed during an election. Article II leaves these judgments to the state legislatures.<sup>3</sup>

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<sup>3</sup> Thus, the *Clerk’s Memorandum* is wrong in asserting (p.49) that “a state constitutional commitment to equal voting rights . . . would not be an ‘undue’ or ‘inappropriate’ constraint on the state legislature’s power.”

To be sure, this Court has held that a state constitution can require that state legislatures acting pursuant to federally delegated lawmaking authority enact laws “in accordance with the *method* which the state has prescribed for legislative enactments,” because the U.S. Constitution does not “render[] inapplicable the conditions which attach to the *making* of state laws.” *Smiley v. Holm*, 285 U.S. 355, 365, 367 (1932) (emphases added). Thus, in *Smiley*, this Court held that proposed Article I legislation was not exempt from a generally applicable gubernatorial veto, *id.* at 368, and, similarly, in *Ohio ex rel. Davis v. Hildebrant*, this Court held that proposed Article I legislation was not exempt from a generally applicable veto by popular referendum, 241 U.S. 565, 566-69 (1916). But, as the Kentucky Supreme Court in *O’Connell* explained when interpreting *Smiley*, even though “a legislature must function in the *method* prescribed by the State Constitution in directing the times, places, and manner of holding elections for [presidential electors],” that does not mean that when the legislature is “functioning in the manner prescribed by the State Constitution, the *scope* of its enactment on the indicated subjects is also limited by the provisions of the State Constitution.” 181 S.W.2d at 694 (emphases added). On the contrary, while state constitutions may dictate the general procedures that Legislatures must follow in duly enacting laws, they may not, with respect to legislation enacted pursuant to Articles I or II, constrain the substantive decisions that a Legislature makes. *See Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari).

Finally, while Article II does not divest state courts of state-law jurisdiction to *interpret* the state’s election code, it does require that this Court “undertake an independent, if still deferential, analysis of state law,” in order to prevent state courts’ interpretation of “elections laws [from] *impermissibly distort[ing]* them beyond what a fair reading require[s].” *Bush II*, 531 U.S. at 114, 115 (Rehnquist, C.J., concurring) (emphasis added). Across a variety of contexts,

this Court has employed that type of independent review to prevent the impairment of federal rights by erroneous decisions on antecedent issues of state law. *See id.* at 114-15 & n.1; *see also* RICHARD H. FALLON, JR. *ET AL.*, HART & WECHSLER’S THE FEDERAL COURTS & THE FEDERAL SYSTEM 498, 523-41, 546-65 (5th ed. 2003). For example, “in order that the constitutional mandate” against the state-impairment of contracts “may not become a dead letter,” this Court is “bound to decide for [itself] whether a contract was made” under state law and to reject contrary state-court determinations. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). Notably, although the dissenting Justices in *Bush II* believed that the concurring Justices were insufficiently deferential in practice, *see* 531 U.S. at 137-43 (Ginsburg, J., dissenting), the dissenters did not dispute that Article II challenges were the type of “cases in which the proper application of federal law may hinge on interpretations of state law,” such that “this Court must . . . examine state law in order to protect federal rights,” *id.* at 137.

In sum, because Article II “leaves it to the legislature exclusively” to decide the manner of appointing presidential electors, *McPherson*, 146 U.S. at 27, state courts run afoul of Article II when they “circumscribe the legislative power,” *id.* at 25, by invoking substantive constraints in state constitutions or by engaging in statutory interpretation of state election laws that “impermissibly distort[s] them beyond what a fair reading require[s],” *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

**B. The Colorado Supreme Court’s State-Law Holding Impermissibly Circumscribed The Colorado Legislature’s Exclusive Article II Authority**

Here, the state-law basis for the Colorado Supreme Court’s judgment plainly violated Article II by using the “Colorado Constitution[’s] . . . protect[ion of] a citizen’s equal right to vote” to circumscribe the Colorado Legislature’s authority to mandate uniform poll closing times. *See Statement* at 11. Just as the Nebraska Supreme Court held that, under *McPherson*,

independent candidates for presidential elector could not invoke the free-elections clause of the Nebraska Constitution, *see Marsh*, 34 N.W.2d at 286-87, so does Article II prevent the Colorado Supreme Court from invoking the voting-rights protections of the Colorado Constitution to revise the Colorado election code.

Nor can it be argued that the Colorado Supreme Court independently interpreted section 1-7-101 to permit the extension of Denver polling hours such that its constitutional holding was unnecessary to its judgment. The court never would have passed on the constitutional question if that were the case, since it consistently has declared that “constitutional questions that are not essential to the resolution of issues before us should not be addressed.” *See, e.g., Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004). In light of that settled practice, the fact that the court’s constitutional analysis *preceded* its statutory interpretation, *see Statement* at 11-12, belies any conceivable claim that the constitutional analysis was not critical to its holding. Indeed, even when the court finally purported to interpret section 1-7-101, it was quite explicit that it had “*combined . . . the constitutional principles [it had] already mentioned*” with its reliance on the liberal construction instruction of C.R.S. § 1-1-103(1). *See id.* (emphasis added).

In any event, had the Colorado Supreme Court purported to rely exclusively on the election laws as promulgated by the Legislature, such an interpretation would have “impermissibly distort[ed] them beyond what a fair reading required, in violation of Article II.” *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring). Section 1-7-101 unambiguously declares that “polls shall be opened continuously . . . until 7 p.m. of each election day” and that “[a]ny person arriving after 7 p.m. shall not be entitled to vote.” In claiming that this provision merely set forth a “general rule” subject to unspecified, *ad hoc* “exceptions” for “true emergencies,” *Statement* at 12, the court contravened its well-settled rule that it “should not read a statute to

create an exception that the plain language does not suggest, warrant, or mandate,” *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 35 (Colo. 2000). Indeed, the existence of an unspecified statutory exception in the election code for “true emergencies” is utterly belied by C.R.S. § 1-5-108, which expressly authorizes and regulates deviations from the location of polling places because of emergencies.

Further exacerbating the Colorado Supreme Court’s flagrant departure from the statutory text, the Court rejected Secretary of State Coffman’s interpretation of the statute and instead held that it was “obligated to uphold” Director Scarpello’s determination, *see Statement* at 12, even though it is the Secretary of State who has the statutory duty and power to make uniform interpretations of the election code, enforce the code, supervise the conduct of elections, review the practices of the county clerk, and certify the results of an election. C.R.S. §§ 1-1-107(1)(a)-(c), 1-1-107(2)(b), 1-10-105(1), 1-11-107. The county clerk is simply supposed to “consult with the secretary of state and follow [his] rules and orders.” *Id.* § 1-1-110(1). Thus, the “great deference” to which the Secretary of State is entitled when interpreting election laws that he enforces was utterly absent, *see, e.g., Colo. for Family Values v. Meyer*, 936 P.2d 631, 633 (Colo. Ct. App. 1997), and the lack of the requisite deference was especially egregious given that the Secretary’s reading was the obvious one, *see Bush II*, 531 U.S. at 119-20.

In the face of this statutory text and structure, the Colorado Supreme Court’s heavy reliance on the liberal construction exhortation in section 1-1-103 is blatantly erroneous, because section 1-7-101 contains no ambiguity to construe. Rather, section 1-7-101 unequivocally forecloses the counting of the untimely cast Denver ballots, and any interpretation to the contrary would be an impermissible distortion that violates Article II.<sup>4</sup>

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<sup>4</sup> It is irrelevant that the Governor and a few members of the Legislature agree with the Colorado Supreme Court’s blatantly erroneous interpretation of section 1-7-101. *See Statement* at 14. Their view of course does not

## CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed, and the case should be remanded with instructions to dismiss with prejudice.

Respectfully submitted,

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(continued...)

reflect the authoritative view of the current Legislature, which can only be expressed through a duly enacted statute. Moreover, even if the current Legislature were to codify its view of what the statute meant on election day, that view, just like the view of the Colorado Supreme Court, could not trump the *unambiguous* text passed by a prior Legislature, because “subsequent legislative declarations concerning the intent of an earlier statute are not controlling.” *People v. Holland*, 708 P.2d 119, 120-21 (Colo. 1985). Nor could the current Legislature create a *new* rule for appointing this year’s presidential electors at this late date, since Congress, acting pursuant to its Article II power to select the time of appointment, mandated that the appointment be made on November 4th and so the choice made in that day’s election is conclusive. *See* U.S. CONST. art. II, § 1, cl.3; 3 U.S.C. §§ 1-2.