

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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**REPLY BRIEF FOR PETITIONERS**

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Respondents do not—and could not—dispute that Secretary of State Coffman’s effort to enforce a uniform, statewide voting deadline serves compelling interests without severely burdening voters. *See Resps. Br.* at 10-11; *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (“Reasonable regulation of elections . . . *does* require [voters] to act in a timely fashion if they wish to express their views in the voting booth.”). Thus, respondents do not seriously defend the Colorado Supreme Court’s flawed holding that the Equal Protection Clause *requires* Secretary Coffman to count untimely cast ballots of Denver voters.<sup>1</sup> Moreover, the arguments that respondents do advance to oppose reversal of the judgment below are wholly without merit.

1. *Political Question*: Respondents initially contend (pp. 1-3) that the lawful selection of presidential electors is a political question entrusted to Congress and so the writ of certiorari should be dismissed as improvidently granted. That contention is clearly wrong.

*First*, in asserting that “[t]he only federal interest involved in this case [is] the interest to see that Article II is complied with” (p. 3), respondents completely ignore the Equal Protection challenge to the judgment below. As to that challenge, this Court has squarely held that the political question doctrine does not restrict exercise of the judicial power to prevent Equal Protection violations from infecting the presidential selection process. *See Williams v. Rhodes*, 393 U.S. 23, 24, 28 (1968). Indeed, respondents’ flawed argument would mean that, had the court below solely given *white* voters extra time to cast their ballots, only Congress, rather than this Court, could redress that Equal Protection violation.

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<sup>1</sup> In a footnote (p. 10 n.3), respondents do suggest that the Equal Protection Clause “may” require a state to remove obstacles to voting. But the cases they cite involved alleged obstacles created by the government *itself*. *See League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 726, 728 (N.D. Ohio 2005) (government allegedly “impos[ed] barriers to the ability or opportunity to vote” by, for example, failing to provide absentee ballots, not properly maintaining registration rolls, and providing nonfunctional voting machines); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (locality denied plaintiffs “a reasonable opportunity to vote” by drastically reducing the number of voting precincts, by assigning too many voters to certain precincts, and by providing insufficient judges). No such differential, governmentally-created obstacles are at issue here. To the contrary, as respondents recognize (pp. 10-11), the State has provided ample opportunities to vote both before and on election day, thereby minimizing any burden posed by section 1-7-101’s uniform deadline.

*Second*, as to petitioners’ Article II challenge, established precedent again forecloses respondents’ argument. *McPherson v. Blacker* expressly held that the political question doctrine does not bar resolution of an Article II claim. *See* 146 U.S. 1, 23-24 (1892). While respondents distinguish (p. 3) *McPherson* as a case involving an Article II challenge *against a state legislature* rather than a state court, *McPherson*’s political question holding did not turn on any such distinction; and nothing in the text, history, or prior interpretation of the Constitution even remotely supports respondents’ bizarre assertion that Congress has *exclusive* authority to review Article II compliance by state courts but not by state legislatures.

2. *Article II*: Respondents’ brief does not dispute that Article II prohibits the Colorado Supreme Court from *overriding* the Colorado Legislature’s duly enacted will by invoking substantive constraints in the Colorado Constitution or by engaging in flagrantly erroneous statutory interpretation. *See Petrs. Br.* at 11-16. And respondents’ arguments why the Colorado Supreme Court’s judgment was *authorized* by the Legislature are plainly erroneous.

Contrary to respondents’ suggestion (pp. 4-5), this case does not involve that court’s legislatively delegated power over “contests” concerning presidential electors: such *original jurisdiction* exists only *after* electors have been certified by the Secretary of State. *See* C.R.S. §§ 1-11-201, 1-11-204; COLO. R. CIV. P. 100. Moreover, the court’s role in such “contests” is solely to ascertain compliance with the election code; the contest provisions do not authorize the court *to displace* the Secretary’s reasonable interpretations of the code that the Legislature tasked him with enforcing, let alone authority *to invalidate or rewrite* the provisions of that code.<sup>2</sup>

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<sup>2</sup> To the extent that respondents suggest (p.4) that statutory provisions *outside* the election code reveal a legislative intent to allow the Colorado Supreme Court to *invalidate* Article II legislation that conflicts with the Colorado Constitution, that suggestion cannot be accepted: Article II legislation is *uniquely* protected from state-court circumscription and neither the general presumption that statutes are constitutional, *see* C.R.S. § 2-4-201, nor the general instruction that statutes should be severed rather than invalidated in their entirety, *see id.* § 2-4-204, relinquishes that protection.

Nor are respondents correct in arguing (pp. 5-7) that the court’s interpretation of the election code was “plausible.” Section 1-7-101 unambiguously declares that “[a]ny person arriving after 7 p.m. shall not be entitled to vote.” Although respondents claim (p. 6) that the statute does not “address the question of whether there exists equitable discretion in the Election Director to expand the hours of voting in response to an emergency situation,” the use of the mandatory “shall not” in section 1-7-101 in fact precludes such discretion; and, under established Colorado law, courts “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 relevant discretion conferred by the election code is the *Secretary of State’s interpretive discretion*, pursuant to which he can render reasonable interpretations binding on both local election officials and courts. *See Petrs. Br.* at 18.

Respondents’ reliance (pp. 5-7) on the “substantial compliance” doctrine—to which no reference was made in the decision below—is unavailing. A two-hour departure in only one county from a deadline that is intended to be *uniform* across the state utterly defeats the purposes of the law, *see Petrs. Br.* at 3-4, and thus cannot constitute “substantial” compliance. The cases that respondents cite make clear that such non-compliance—*i.e.*, non-compliance that vitiates the purpose of the law at issue— is not substantial compliance. *See Erickson v. Blair*, 670 P.2d 749, 757 (Colo. 1983) (failure to sign affidavit); *Meyer v. Lamm*, 846 P.2d 862, 878 (Colo. 1993) (incorrect first name or ballot location when writing in candidate).

3. *Equal Protection Clause*: Respondents primarily argue (pp. 7-10) that the Colorado Supreme Court’s order should be subject only to the deferential review applied to generally applicable and evenhanded regulations that do not severely burden voters. But the court’s order compelling Secretary Coffman to defer to the *ad hoc* decisions of local election officials is

plainly not a neutral, nondiscriminatory, generally-applicable voting regulation: it is rather a retrospective exception created on an *ad hoc* basis for only the untimely cast ballots of Denver residents—whether or not they were caused by the storm and resulting traffic—even though non-Denver residents who were equally affected by the storm and traffic were afforded no extra time to vote. Such a facially discriminatory restriction on the right to vote calls for the strictest of judicial scrutiny. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972) (“[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’” (citation omitted)). Indeed, this is precisely the kind of arbitrary and disparate treatment of similarly situated voters that this Court has invalidated. *See Petrs. Br.* at 7-11 (discussing *Bush v. Gore*, 531 U.S. 98, 104-10 (2000) (“*Bush II*”), and *O’Brien v. Skinner*, 414 U.S. 524, 529-30 (1974)).

Respondents additionally contend (pp. 8-10) that the court’s order should either survive heightened judicial scrutiny or be subject to rational basis review because “no non-Denver voter was precluded from casting a ballot.” But the basic premise of this argument is incorrect because non-Denver residents who arrived at the polls after 7 p.m. because of the storm-related traffic *were* “prevented from voting altogether.” Although those voters could have avoided that result by availing themselves of absentee balloting or early voting, *see Resps. Br.* 10-11, so too could the disparately disenfranchised voters in *Bush II* have avoided disenfranchisement by properly punching their ballots in the first instance. The critical point is that, at the time that mattered, the court’s order dispositively and discriminatorily bestowed the right to vote.<sup>3</sup>

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<sup>3</sup> Ironically, however, respondents’ emphasis on whether the differential treatment challenged prevents voters from casting ballots altogether directly refutes respondents’ repeated assertion (pp. 8, 11) that the court order at issue is indistinguishable from early voting laws with possible geographical disparities, *e.g., Corning v. Bd. of Elections*, 88 A.D.2d 411 (N.Y. App. Div. 1982); C.R.S. § 1-8-202—disparities in opportunities to vote *early* obviously cannot altogether prevent voters from casting ballots. Furthermore, the arbitrary and differential treatment created by the Colorado Supreme Court’s *ex post* order deferring to the *ad hoc* discretion of Denver

Respondents also attempt (p. 10) to downplay the differential treatment by asserting that there was a “sound justification for treating voters in Denver differently” because the “storm hit Denver harder than it hit any other area.” But this assertion blithely ignores that non-Denver residents commuting from Denver were *identically* affected by the storm. Whether or not it would have been consistent with the Equal Protection Clause to take “one step at a time” and provide extra time for *only* voters who were most seriously impacted by the storm, *see Resps. Br.* at 8, it is completely arbitrary and irrational to provide relief to only a preferred subset of those voters, as is the case here.<sup>4</sup>

Respondents alternatively suggest (p. 11) that the fault for this disparate treatment lies with non-Denver clerk and recorders who did not depart from the uniform statutory deadline. But Director Scarpello could have timely sought a court order to extend polling hours across the state or, at a minimum, for *all* similarly situated voters impacted by the storm. Instead, he chose to unilaterally give Denver voters—and only Denver voters—preferential treatment. In ratifying this preferential treatment rather than permitting Secretary Coffman to enforce the uniform and constitutional 7 p.m. voting deadline, the Colorado Supreme Court’s order violates the Equal Protection Clause—just as the Florida Supreme Court in *Bush II* unconstitutionally “ratified th[e] uneven treatment” of similarly situated voters in different counties, 531 U.S. at 107.

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(continued...)

election officials is a far cry from the *ex ante* exercise by legislatures and election officials of their expert judgment in administering elections through generally applicable rules and orders. *See, e.g., Bush II*, 531 U.S. at 109 (striking down arbitrary, *ex post* court order while reserving the question “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections”).

<sup>4</sup> There was no such arbitrary inequality in the Ohio court orders cited by respondents (pp. 8-9), because both of those orders involved *governmentally-created, location-specific* obstacles to voting: in the first, lack of ballots, *see* Amended Order at 2, *Obama for Am. v. Cuyahoga County Bd. of Elections*, No. 08-CV-562 (N.D. Ohio March 4, 2008); and, in the second, problems with polling equipment and absent precinct judges, *see* Order Granting in Part Plaintiff’s Motion for Temporary Restraining Order, *Ohio Democratic Party v. Cuyahoga County Bd. of Elections*, No. 1:06-CV-2692 (N.D. Ohio Nov. 7, 2006).

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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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