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Per Curiam

## SUPREME COURT OF THE UNITED STATES

Mock Case No. 1

JOHN MCCAIN, ET AL.  
v. BARACK OBAMA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI

[December 9, 2008]

### PER CURIAM

#### I.

The events leading up to the present controversy began on Election Day, November 4, 2008, when an especially severe and unusual winter storm hit the city of Denver in the mid-afternoon. The storm greatly affected driving conditions, making road travel treacherous even for drivers accustomed to winter weather. Although the storm caused minor delays in the outlying Denver suburbs, it disproportionately affected rush-hour traffic in Denver, causing extensive problems for voters trying to reach their polling places. In response, Denver Elections Director Michael Scarpello, with the approval of Denver's elected official responsible for administering elections, issued an email directive at 4:53 p.m. requiring that all polling places in Denver stay open an extra two hours, closing at 9:00 p.m. instead of the statutorily-prescribed time of 7:00 p.m. The direction provided that all ballots cast during the extended hours would be treated as provisional ballots.

At about 5:30 p.m., upon learning of the poll hour extension, Colorado's Secretary of State, Mike Coffman, filed suit in state district court seeking to enjoin the extension of polling hours beyond 7:00 p.m. The request for emergency relief was denied on the basis that the provisional ballots could be disqualified in later proceedings if the extension proved unlawful following more considered briefing and deliberation.

Secretary Coffman filed an immediate appeal to the Colorado Supreme Court. The Colorado Supreme Court issued a 5-2 ruling upholding the decision of the state district court. Secretary Coffman then sought an emergency injunction from this Court at 8:12 p.m. Our ruling, issued at 8:46 p.m. on election night, denied Coffman's application for an emergency injunction on the basis that "any such relief at this point would be moot." *Statement of the Case* ("*Statement*") at 6.

During the hours of the extension, 62,729 provisional ballots were cast in Denver County. There is no dispute that 92% of registered voters cast ballots in non-Denver

counties. If the provisional ballots are counted, 87% of registered voters in Denver County will have voted. If the provisional ballots are not counted, only 67% of registered voters in Denver will have voted.

With a 265-264 Electoral College vote divide, the determination of the Presidency in this election rests on Colorado's nine electoral votes. Without the provisional ballots cast in Denver pursuant to Director Scarpello's order extending polling hours, the electors for John McCain and Sarah Palin have a small but significant 13,363 vote lead over the electors for Barack Obama and Joe Biden. The provisional ballots have not been opened or counted; no one knows, therefore, whether these ballots would alter the outcome of the election in Colorado, but it is possible that they could.

On November 6, 2008, Secretary Coffman issued an administrative order that the certified results from Denver, which must be delivered to the Secretary of State by November 21, 2008, should not include any of the provisional ballots cast by persons arriving at the polls after 7:00 p.m. The following day, Director Scarpello sought a decree from the state district judge that would void Secretary Coffman's order and permit Denver election officials to process the provisional ballots and include all eligible votes in the official results submitted to the Secretary. The district judge referred the dispute to the Colorado Supreme Court for its instruction on the following question: "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 arriving at the polls after 7 p.m. pursuant to the directive of the Denver Elections Director, if there is no other basis for disqualifying those provisional ballots?" *Id.* at 9-10. The district court also ordered that while the matter was pending review, Denver officials were permitted to review the provisional ballots solely to determine whether each would be eligible apart from the issue in dispute, but the eligible ballots were not to be counted.<sup>1</sup> The order further prohibited the Secretary from issuing a final certification without first receiving a final order from the Colorado Supreme Court.

The Colorado Supreme Court scheduled oral argument on the question certified by the state district court. At this stage of the litigation, both the McCain and Obama campaigns intervened to protect their interests. After oral argument, the Colorado Supreme Court issued a 4-3 decision holding that "[i]t would deny Denver voters Equal Protection not to count these provisional ballots." *Id.* at 11. The Court further held that the Colorado Constitution requires this same conclusion because a citizen's equal right to vote is a "fundamental right of the first order" under the State's Constitution. *Id.* Finally, the Court concluded that there is some flexibility in the statutorily-dictated 7:00 p.m. poll-closing time for "true emergencies" because the Colorado Legislature instructed its courts to construe Colorado's Election Code "liberally . . . so that eligible electors may be permitted to vote." *Id.* at 11-12 (citing Colorado Revised Statute, section 1-1-103(1)). The dissent focused exclusively on the language in section 1-7-101, which the dissent contended could not be interpreted to permit an extension of the polls beyond 7:00 p.m.

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<sup>1</sup> The record does not reveal the precise number of eligible, provisional ballots. However, there is no dispute that most of the 62,729 ballots have been found eligible and that the precise figure is well in excess of the 13,363 difference in votes between Senators McCain and Obama without the provisional ballots.

under any circumstance. The Colorado Supreme Court then remanded the case to the district court with instructions that it enter an order requiring the Secretary to accept vote totals from Denver including the provisional ballots and to include these totals in the final certification. The Court stayed the effect of its mandate to permit our review.

The petitions for certiorari filed by the campaigns and consolidated by this Court present the following questions: whether the counting of contested provisional ballots cast in Denver pursuant to extended polling hours limited to Denver voters violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and whether the Colorado Supreme Court’s decision violates Article II’s specific grant of authority to the Colorado Legislature to “direct” the “Manner” of appointing the state’s presidential electors. Because we find no constitutional violation under the Equal Protection Clause and no Article II concern with the Colorado Supreme Court’s interpretation of state law, we affirm.

## II.

### A.

We first address jurisdiction. Respondents contend that the issue in this case presents a nonjusticiable political question entrusted to the United States Congress for resolution – specifically, the determination of the award of Colorado’s nine electoral votes. Respondents misperceive the question before us. Although our decision ultimately may affect how those votes are awarded, we do not decide today how to award Colorado’s electoral votes. That decision must await action by the Colorado Secretary of State and the United States Congress. All we decide here is whether the order of the Colorado Supreme Court requiring counting of the provisional ballots is consistent with the Equal Protection Clause of the Fourteenth Amendment and Article II of the United States Constitution. Because both the Equal Protection and Article II issues presented here involve the application of judicially-manageable standards to the narrow question of whether to count the contested provisional ballots, and because no serious separation of powers concern is presented by our resolution of this question, we hold that the political question doctrine does not bar our review in these circumstances.

The political question doctrine provides that even when all other jurisdictional and justiciability requirements are met, a certain class of cases should not be adjudicated by the federal courts because these controversies have been entrusted for decision to the politically accountable branches – Congress and the President. The political question doctrine is a prudential one, concerned primarily with the separation of powers. *Baker v. Carr*, 369 U.S. 186, 211 (1962). As a means of determining whether a particular question is a “political question,” we have looked to “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination [as the] dominant

considerations.”<sup>2</sup> *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939) (plurality opinion). The doctrine has been employed sparingly. The Court previously has found a political question to exist in cases involving foreign policy and affairs, *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); the Guaranty Clause and the electoral process, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); self-regulation of Congress’s internal processes, *Field v. Clark*, 143 U.S. 649 (1892); ratification of constitutional amendments, *Coleman*, 307 U.S. at 450; instances where the federal courts are incapable of shaping effective equitable relief, *Gilligan v. Morgan*, 413 U.S. 1 (1973); and challenges to the impeachment process, *Nixon v. United States*, 506 U.S. 224 (1993).

Determining the precise questions posed and the posture of the particular case are important preliminary components of any justiciability analysis. *See generally Baker*, 369 U.S. at 211-12, 217 (“[T]he cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case.”). The issue before us does not involve the question of who should win the presidential election or who should be on Colorado’s slate of presidential electors,<sup>3</sup> but rather whether certain votes cast in Denver pursuant to a localized poll-hour extension can be counted in the Secretary of State’s certification of results under federal law, specifically the Equal Protection Clause and Article II. *Cf. Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (noting that while the state was permitted to order a recount for a senatorial election even though Article I makes the Senate the “judge of the elections [for the Senate],” it cannot determine which candidate is entitled to a seat in the Senate because this presents a nonjusticiable political question).

Furthermore, the particular constitutional issues raised are similar to those that courts routinely address and for which there are judicially-manageable standards and doctrines. We have consistently found jurisdiction over Equal Protection claims raised in the election and voting contexts and have rejected application of the political question doctrine to these disputes. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Baker v. Carr*, 369 U.S. 186, 209-10 (1962)

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<sup>2</sup> In *Baker*, we further explained the circumstances in which the political question doctrine requires the Court to defer judgment to a coordinate branch:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

<sup>3</sup> It bears repeating that we are rendering our opinion without knowledge of whom the provisional ballots ultimately will favor in the presidential election as well as the many other election contests included on the Denver November ballot.

(“[j]udicial standards under the Equal Protection Clause are well-developed and familiar”); and *Bush v. Gore*, 531 U.S. 98, 106 (2000) (*Bush II*). In *Williams*, we held that the political question doctrine did not apply to prevent judicial review of possible equal protection violations in the presidential election process. 393 U.S. at 28. These decisions alone should foreclose any further discussion of nonjusticiability. Indeed, it would be astonishing to divest this Court of jurisdiction to determine whether the counting of the ballots was permissible under the Equal Protection Clause – counsel for Respondents conceded as much at argument. Oral Argument Tr. at 27. With respect to the Equal Protection claim, we unquestionably have jurisdiction.

Our ability to review the Article II issue presented in these circumstances is similarly well established. See *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892) (political question doctrine did not bar resolution of a claim about the extent of the legislature’s power under Article II), *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). The inapplicability of the political question doctrine is particularly clear when the question is the narrow one of whether Article II is compromised by the Colorado Supreme Court’s decision to require the counting of the provisional ballots. As is evident from our analysis of the issue below, judicially-manageable standards are available – a deferential review to assess whether the state court’s interpretation of Colorado’s election law substantially complied with the Legislature’s will. Such a deferential standard ensures that this Court will rarely be placed in a position where its interpretation of state law differs from state decision-makers, with the potential of drawing the Court into conflict with political departments of the state and federal governments.

In short, in view of the precise questions presented under the Equal Protection Clause and Article II, we hold that the political question doctrine has no application. The Court has jurisdiction and, therefore, a duty to resolve the constitutional claims presented.

## B.

The central claim in Petitioners’ case is that the Colorado Supreme Court’s order requiring that the Secretary of State count the provisional ballots of voters who arrived at the Denver polls after 7:00 p.m. violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Their equal protection claim rests solely on the premise that the extension of the voting time for Denver residents resulted in unequal treatment of and a deprivation of an important right for all eligible Colorado voters who live outside of Denver and did not vote but might have voted had they too been provided the extra time. The record contains affidavits from individual residents in neighboring suburbs who make such a claim. In no other electoral district did the local authority declare such an emergency extension of poll hours or ask the Secretary of State to do so.

We do not find Petitioners’ equal justice claim to be a substantial one. In general, the residents of other electoral districts in Colorado were not “similarly situated” to those in Denver. The record states with respect to Denver that “after-work rush hour traffic [was] exceptionally gridlocked, [while] Denver’s suburbs, as well as the rest of the state,

largely escaped the full brunt of the freakish storm.” *Statement* at 2. 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. . . .” *Id.* In these circumstances we cannot conclude that the Colorado Supreme Court’s sanctioning of the Denver Election Director’s decision to extend poll hours for Denver residents alone constituted an “arbitrary and unjustified disparate treatment of qualified voters” in other districts not similarly affected by the storm. It was rather a reasonable response to an unanticipated and location-specific natural phenomenon. While it is certainly true, as Petitioners argue, that uniform voting rules within a state are highly desirable, and purposeful deviations without cause may in some circumstances rise to the level of a constitutional violation, the realities of holding elections in 64 districts will occasionally mean that unexpected events like severe weather, power outages, and voting machine breakdowns may require immediate adjustments to general rules of time and place to serve the overarching goals of equal access to the ballot box and facilitation of maximum voter participation. Indeed, Petitioners’ counsel conceded at argument that if government-controlled conditions produced temporary inaccessibility to the polls, extension of voting hours would be permissible to make up for the time lapses, but he insisted that if similar periods of inaccessibility were caused by natural causes, the same extensions would amount to a violation of the Equal Protection Clause. Oral Argument Tr. at 8-9. This distinction makes little sense to us.

Local election officials have authority to act only for their districts. The Colorado Legislature has provided for such districts and for the election of local officials to run elections within them. These officials are required to draw up local emergency plans for dealing with unexpected events that may disrupt normal voting practices. *See Colo. Election R. 43.10, 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). If citizens feel they need extra time to vote due to such conditions, it is to those officials they must look initially, and if relief is not forthcoming, to the Secretary of State who has power to prescribe statewide rules. If an emergency strikes, those local officials can deal only in general responses that affect the majority of voters in their districts; they are in no position to single out those voters who, due to special individual circumstances such as location or work hours, will be especially injured by the storm. We might be faced with a different question eliciting a different response if districts equally affected by the storm responded differently in terms of granting or denying extensions, but no such differential occurred here. Like the Colorado Supreme Court, we do not view the limited response of a two-hour extension for Denver voters hit disproportionately by serious traffic congestion from a “freakish” storm as anything approaching a constitutional violation. We note that the number of provisional ballots cast after 7:00 p.m. in Denver brought its total vote count to 87% of “active” voters (as defined by the Colorado Secretary of State), in line with but below the 92% count in “non-Denver counties.” *Statement* at 9. Had the Denver polls closed at 7:00 p.m., some 60,000 fewer votes would have been recorded, yielding a far lower percentage (67%) of “active” voters participating in this election. *Id.* These figures suggest to us that the extension succeeded merely in bringing to par the

participation of Denver voters with their neighboring county residents, not in conferring a preferential impact or disadvantage on either.

Petitioners are concerned with the alleged deprivation of extra voting time to some unknown number of voters in neighboring counties. Yet, the remedy Petitioners request, were their equal protection claim recognized, is most troublesome. Petitioners ask this Court to reject over 60,000 votes cast in good faith by Denver voters after they had been told by their local official that poll hours had been extended. Would not these 60,000 plus voters then have plausible claims that they had been deprived of their right to vote by this misinformation? And the same ballots that would be rejected in the contest for Presidential electors could prove determinative in their absence from the contests for local and statewide officials which were on the same ballot. *See infra* note 7. The cure, it seems to us, would be worse than the malady.

In so concluding we follow the contours of our past cases in which we have expressed reluctance to intervene in state electoral processes unless there has been a demonstrated burden placed on an identifiable group of voters, as well as reticence to supervise minutiae of elections unless there has been a significant impact on voters' accessibility to the polls. *See Crawford v. Marion County Bd. of Election*, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring) (rejecting "detailed judicial supervision of the election process, [which] would flout the Constitution's express commitment of the task to the States," stating that the Court must defer to state legislatures unless a statute "imposes a severe and unjustified burden on the right to vote, or is intended to disadvantage a particular class," and noting that "weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence"); *see generally* *Clingman v. Beaver*, 544 U.S. 581, 592 (2005) ("not every electoral law that burdens associational rights is subject to strict scrutiny . . . strict scrutiny is appropriate only if the burden is severe"); *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931) (as a general matter "[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints"). Here we find no undue burden or disparate impact such as to require our intervention.<sup>4</sup>

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<sup>4</sup> Our decision in *Bush v. Gore*, 531 U.S. 98 (2000), does not require a contrary result. *Bush v. Gore* governs a distinctive sub-category of election cases, and this case does not fall into that group. In that case, large numbers of local officials applied an indeterminate standard throughout the state over a period of time. Here, by contrast, one unambiguous rule was issued for one district and no further discretion was permitted. The Court in *Bush v. Gore* concluded that the recount could have been "conducted in compliance with the requirements of equal protection and due process," if the state had adopted "adequate statewide standards for determining what is a legal vote, and practical procedures to implement them," and had provided for an "orderly judicial review of any disputed matters that might arise." *Id.* at 110. Because these types of deficiencies are simply not implicated here, *Bush v. Gore* would have little precedential force in this case, even if that opinion had not explicitly been limited to its particular facts. *Id.* at 109.

In sum, we decline to impose our views as to how elections should be run, district by district, on the State of Colorado under these circumstances.

### C.

Petitioners' last point claims that the Colorado Supreme Court's judgment unconstitutionally usurps the Legislature's exclusive authority under Article II to set the time at which the state's polling places are to close. We also reject this argument.

The United States Constitution provides in relevant part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. CONST. art. II, § I, cl. 2. Petitioners assert that the Colorado Legislature has, as to the time during which the polls shall be open, "directed" the "Manner" of "appointing Electors" through this provision:

All polls shall be opened continuously from 7 a.m. until 7 p.m. of each election day. . . . The polls shall remain open after 7 p.m. until every eligible voter who was at the polling 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.

COLO. REV. STAT. § 1-7-101 (1). Petitioners argue that because Article II "leaves it to the legislature exclusively to define the method of effecting the object" of selecting a state's presidential electors, *McPherson*, 146 U.S. at 27, and the Colorado Legislature has done so with respect to the hours when the polls shall be open, neither a local election judge nor any trial or appellate court member of the state judiciary may constitutionally direct a contrary closing time. Moreover, while the Colorado Secretary of State has, pursuant to authority granted by the Legislature, both promulgated rules requiring local contingency plans for certain disasters<sup>5</sup> and issued a guide discussing how to deal with emergencies and disasters that may affect voting,<sup>6</sup> neither mentions altering polling place hours. Thus, Petitioners say, regardless of whether extended hours were a practical, or even appropriate, response to the winter storm, and regardless of whether any voter's equal protection rights were affected by the extension of voting hours in one county but not another, such an order would be unconstitutional unless the Legislature provided for it by statute. As to the Presidential election, therefore, no provisional ballot from Denver may be counted.<sup>7</sup>

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<sup>5</sup> Election Rule 43.10 requires each local election authority to develop and file with the Secretary of State a "contingency plan" that addresses "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." Colo. Election R. 43.10, *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).

<sup>6</sup> COLO. SECT'Y OF STATE, *Emergency and Disaster Planning: Best Practices Guide*, *available at* <http://www.elections.colorado.gov/DDefault.aspx?tid=1029>.

<sup>7</sup> Petitioners make no claim regarding the disposition of the provisional ballots insofar as they contain votes for candidates for other offices, including the United States Senate and United States House of

We assume, without deciding, that the “Manner” of choosing electors sweeps broadly enough to vest a state legislature with the right to exclusive constitutional authority over all details of electoral administration, including specifically the hour at which the polls must close. We further recognize that Article II “operat[es] as a limitation upon the State in any attempt to circumscribe the legislative power.” *McPherson*, 146 U.S. at 25. In modern times, the Supreme Court has unanimously recognized that Article II limits, at least to some extent, the authority of a State Constitution to “circumscribe the legislative power” over presidential elector selection. *Bush v. Gore*, 531 U.S. 70, 77 (2000) (*Bush I*). But even so broad a mandate does not divest the coordinate branches of the State’s government of all authority, especially when the legislature expressly delegates authority to administer elections to these other branches. Here, the Colorado Legislature has conferred upon the Colorado Supreme Court “original jurisdiction for the adjudication of contests concerning presidential electors,” COLO. REV. STAT. § 1-11-204, and has delegated the responsibility of supervising the election itself to the executive branch, COLO. REV. STAT. § 1-1-107. Similarly, in *Bush v. Gore*, the Florida Legislature had “delegated the authority to run the elections and to oversee election disputes to the Secretary of State and to state circuit courts.” *Bush II*, 531 U.S. at 113-14 (citations omitted). Chief Justice Rehnquist, concurring for three justices in that case, opined that Article II still left some interpretative role for the state judiciary in such circumstances: “Though we generally defer to state courts on the interpretation of state law[,] there are of course areas in which the Constitution requires this Court to take an independent, if still deferential, analysis of state law. . . . [W]e would . . . in the present case . . . hold that the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.” *Id.* at 114, 115 (citation omitted).

Even if we accept Chief Justice Rehnquist’s view of Article II and give only limited deference to the state court’s interpretation of state law, we cannot conclude that the Colorado Supreme Court’s construction of the relevant provisions amounts to an “impermissibl[e] distort[ion]” of the Colorado Election Code. Relying on § 1-1-103(1) of the Colorado Revised Statutes, which mandates in part that the Election Code “shall be liberally construed so that all eligible voters may be permitted to vote . . .,” as well as its view that the literal interpretation adopted by Petitioners would bring the statute into conflict with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Colorado Constitution’s protection of a citizen’s equal right to vote, the Colorado Supreme Court concluded that the provision in question “should not be construed to prohibit the extension of polling hours when emergencies require it.” *Statement* at 12. The specified 7:00 p.m. closing time was merely “a general rule,” not a blanket prohibition against local initiative to protect voter access in exigent circumstances. *Id.*

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Representatives. Whether or not such votes should count merely because they were cast by voters not in line by 7:00 p.m. is entirely a question of state law upon which the judgment of the Supreme Court of Colorado would be final, regardless of our disposition of Petitioners’ Article II claim.

Whether we would interpret the Colorado Election Code in the same manner were this question left initially to us, or whether we agree with the rationale articulated by the state court to support its interpretation, are both beside the point. Under our federal system, at least some deference is due to the state judicial interpretation of state law. We cannot say that this interpretation was so novel or so strained as to fall short of constituting a “fair reading” of the state law.

For these reasons, we hold that Article II of the United States Constitution does not compel the rejection of the provisional ballots in this case.

### III.

The judgment of the Colorado Supreme Court is affirmed.