No. A-

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Applicants,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Applicants submit this supplemental memorandum in support of their emergency application for a stay of enforcement of the judgment below pending the filing and disposition of a petition for a writ of certiorari to the Supreme Court of Florida.

The events that occurred in Leon County Circuit Court last night, following the Florida Supreme Court majority's decision to order further selective and standardless recounts, powerfully demonstrate the need for a stay of the judgment below. Shortly before midnight—and after the trial judge who heard all the evidence in this case recused himself—another Leon County Circuit Court judge announced how the Florida Supreme Court's decision would be applied. (A copy of the transcript of that ruling is attached hereto and cited as "Tr.")

The following was ordered to commence as of 8:00 a.m. this morning:

1. Sixty-four Florida county canvassing boards, most of which have not before been parties to this case, or to any other election proceeding, and which therefore may be indirectly the subject of the order below, are to begin segregating their "undervotes" with a goal of completing a recount by 2:00 p.m. on Sunday, December 10. Tr. 5, 7, 9.

2. No uniform, statewide method for identifying and segregating undervotes was provided—each canvassing board has been ordered to develop "some indication of the protocol purported or proposed" to segregate undervotes by Noon today. Tr. at 8.

3. No instruction has been given to prevent double counting of previously counted ballots.[1]

4. Sixty-four different vote-counting standards will almost certainly be applied in this recount. With no guidance whatsoever, each of the 64 counties will have to determine what standards to apply in counting votes. A "dimple," a "swinging chad," a "hanging chad," a clear punch, and/or "dimple" accompanied by a pattern of "dimples" may be counted differently in different counties. In manifest disregard of Florida's law,

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[1] When Miami-Dade attempted to "segregate" its undervotes, pursuant to court order in this case, it did so by reviewing and recounting ballots previously identified as "undervotes" through a machine "sort." Every time punchcard ballots are machine tabulated, however, they are degraded, causing some chads to fall out and other to become lodged in previously empty holes. Ballots with hanging chads can be counted as votes in one tabulation (because they swing open) and as non-votes in the next (because they swing shut). As a result of this machine "sort," it appears that Miami-Dade ended up with at least 20 precincts with *more* undervotes than it had had on the previous counts. Therefore, some of those ballots had apparently *previously been counted for candidates Bush or Gore* (or another candidate), but now were reclassified as "undervotes," and then (presumably), *upon manual inspection would be counted again* for either candidate Bush or Gore. Thus, each of those ballots would count as *two votes* for the candidate of choice, diluting the votes of all other Florida voters.

which provides that the Secretary of State "is the chief election officer of the State" and who has an explicit responsibility under Florida law to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," Fla. Stat. § 97.012(1), the judgment below has removed the Secretary of State from the process and mandated a regime of inconsistent and standardless election procedures, with no one responsible for uniformity or consistency.

5. Each of the 64 counties, with no uniform standards or guidance, will have to determine who counts the ballots. Despite the careful statutory provisions under Fla. Stat. 102.166 for impartiality of manual recounts, no provision whatsoever is allowed under the court's order for any objection to any appointed counter, partisan or otherwise. Instead, the trial court asked that judges in other counties assist in the recount process in order "to give *some* objectivity and partiality [sic] to the process itself, to reduce, to the extent possible any objections to the manner in which [the recount] was conducted." Tr. 9 (emphasis added). Although the trial judge stated that observers could attempt to raise objections about ballot counting to him in writing after the count, he has expressly *forbidden objections to the vote recounts as they occur*. Tr. 8, 9.

6. If there are multiple counters in each of the 64 counties, which the trial court's schedule certainly implies, no provision has been made to ensure uniformity among those counters. Each county, presumably, could have as many standards as it has counters.

7. The Leon County Supervisor of Elections is to begin counting only the "undervotes" from Miami-Dade. Tr. 5. The standard the Supervisor will apply—

whether it will be the Leon County standard, the Miami-Dade standard (which has been applied to an unrepresentative 20% of the Miami-Dade precincts), or some other, newly-designed standard—is unclear.

8. *After* the Miami-Dade counting begins, the Leon County Circuit Court *may* hear evidence as to the possible spoliation of the evidence and the improper handling and segregation of the Miami-Dade ballots, which, if established, would prove double counting of votes. Tr. 10-11.

9. The only counties in which recounting will *not* commence are Palm Beach, Volusia, and Broward, where Vice President Gore has already gained hundreds of votes, which were added (as to Palm Beach and Broward Counties) only pursuant to the November 21 decision of the court below that was subsequently vacated by this Court. Notwithstanding the fact that Applicants filed an affirmative defense challenging illegal votes included in the election results (due to the extremely relaxed and ever-changing counting standards) from those counties, those three counties were the only ones omitted from the recount.

10. Two sets of votes will not be recounted: the 20% of Miami-Dade precincts (all overwhelmingly Democratic) that were already counted under highly subjective and arbitrary standards—and which the Florida Supreme Court simply declared by to be valid votes—and the ballots of the overseas military voters, which a federal court had ordered included but which the Leon County procedures inexplicably omitted.

11. One county— Miami-Dade—will be subject to a bizarre hybrid process, in which ballots from 20% of its precincts (the most heavily Democratic precincts) will all

have been manually counted, and ballots from the remaining 80% of its precincts (largely Hispanic and more heavily Republican) will follow another procedure, having only their undercounts manually counted.

These developments are the natural outgrowth of the decision of the Florida Supreme Court sought to be challenged in this Court. As Chief Justice Wells explained in his dissent, "the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates." Slip Op. at 41 (Wells, C.J., dissenting).

CONCLUSION

If Applicants, and the voters of Florida and the Nation, are subjected to the indisputably inconsistent and unprecedented process arising out of the Florida Supreme Court majority's decision, and which is not based on any process provided by the Florida legislature, the harm will be substantial and irreparable. If this confusing, inconsistent and largely standardless process is not stayed pending this Court's review, the integrity of this presidential election could be seriously undermined. Whatever tabulations result from this process will be incurable in the public consciousness and, once announced,

cannot be retracted. The results would be arbitrary and unpredictable, and they would be contrary to federal law and this Court's prior opinion.

Respectfully submitted.

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