

1 IN THE NEVADA SUPREME COURT

2
3 ROSS MILLER, in his capacity as Secretary
4 of State for the State of Nevada,

5 Petitioner,

6 vs.

7 FIRST JUDICIAL COURT OF THE STATE
8 OF NEVADA, IN AND FOR CARSON CITY,
9 DEPARTMENT 1,

10 Respondent.

11 DORA J. GUY, an individual; LEONEL
12 MURRIETA-SERNA, an individual; EDITH
13 LOU BYRD, an individual; and SAMANTHA
14 STEELMAN, an individual, KEN KING, an
15 individual; SANCY KING, an individual;
16 ALLEN ROSOFF, an individual; B. ESTELA
17 MOSER VADEN, an individual, and the
18 NEVADA REPUBLICAN PARTY, ALEX
19 GARZA, an individual, LEAGUE OF
20 WOMEN VOTERS OF LAS VEGAS
21 VALLEY,

22 Real Parties in Interest.

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SUPREME COURT NO.

FIRST J.D. CASE NO. 11 OC 00042 1B
DEPT. I

**EMERGENCY PETITION FOR WRIT OF
MANDAMUS PURSUANT TO NRAP 27(e)**

**ACTION REQUIRED BY OCTOBER 12,
2011**

18 Petitioner Ross Miller, Secretary of State, by and through counsel, Catherine Cortez
19 Masto, Attorney General, and Kevin Benson, Deputy Attorney General, requests this Court to
20 issue a writ of mandamus to the First Judicial District Court, Department I, directing that court
21 to promptly decide certain questions of law that must be resolved prior to referring to the
22 special masters the task of redistricting, or in the alternative, to exercise this Court's original
23 jurisdiction and decide those questions.

24 This Petition is brought pursuant to NRAP 21 and is based on the attached
25 Memorandum of Points and Authorities, the attached Appendix, and the following grounds:

26 1. This Court has jurisdiction of original petitions for extraordinary writs, pursuant to
27 Nev. Const. Art. 6, § 4 and NRS 34.150. This Petition seeks a mandate that the respondent
28 District Court perform its constitutional duty to decide questions of law.



1 2. The case known as *Guy et al. v. Miller*, case no. 11-OC-00042-1B, is currently
2 pending in the First Judicial District Court, Department I, the Honorable James Todd Russell
3 presiding. The plaintiffs in that action and various plaintiff-intervenors have brought suit
4 challenging the constitutionality of Nevada's current congressional and state legislative
5 districts, and requesting the court to reapportion the districts in light of the 2011 Legislature's
6 failure to adopt a redistricting plan.

7 3. The District Court, in an order dated August 4, 2011, indicated that it would
8 appoint a panel of three special masters to carry out the task of map-drawing. That order also
9 indicated that the District Court would decide the critical legal questions that will dictate how
10 the maps must be drawn, prior to referring the actual map-making to the masters. The District
11 Court therefore directed briefing on those legal issues, and set deadlines for the parties'
12 expert witness disclosures and reports.

13 4. After receiving all the briefing and expert reports on September 21, 2011, the
14 District Court held a hearing where it heard argument on the legal issues. On the same day, it
15 entered an order referring all of the issues to the Special Masters, directing that they hold
16 public hearings on October 10 and 11, 2011, to hear evidence from the parties and public
17 comment, and thereafter to begin drawing the new maps. However, the September 21, 2011
18 order did not resolve many of the critical legal issues that will directly impact how the maps
19 must be drawn.

20 5. As a result, the District Court has impermissibly abdicated its duty to make these
21 rulings of law, which will cause the Special Masters to draw maps without any definitive
22 direction on key legal issues. This raises a substantial risk of delaying these proceedings
23 since the maps will likely have to be redrawn after the District Court rules on the legal issues.

24 6. Specifically, the District Court has failed to make any definitive ruling on the
25 following issues: (1) The correct population measure to use for determining whether the
26 Voting Rights Act requires drawing majority-minority districts; (2) the meaning of
27 "representational fairness" and the extent to which the Special Masters may use it when
28 drawing maps; and (3) whether the creation of additional majority-minority districts are

1 required by the Voting Rights Act. Each of these is discussed in more depth in the attached
2 Memorandum of Points and Authorities.

3 7. The circumstances of this matter are urgent because delay caused by having to
4 redraw the maps, combined with the near-certainty of an appeal, and potential post-appeal
5 redrawing of the maps, raise significant doubt about whether the redistricting process can be
6 completed in time to avoid disruption of the 2012 elections. There is no plain, speedy, and
7 adequate remedy at law, because an order improperly referring matters to special masters is
8 not an immediately appealable order.

9 WHEREFORE: the Secretary of State respectfully requests this Court to issue a Writ of
10 Mandamus directing the respondent District Court to:

11 1. Decide the appropriate measure of minority population for the purposes of the
12 Voting Rights Act (i.e., total population, voting age population, or citizen voting age population)
13 and to clearly direct the Special Masters as to which single measure they must use to
14 determine whether the first *Gingles* precondition can be met;

15 2. Either clearly define "representational fairness" and how the Special Masters
16 may or may not consider it, or to prohibit the Special Masters from considering it;

17 3. Require the Special Masters to promptly report to the District Court following the
18 public hearings on October 10 and 11, 2011 on their findings of fact concerning the three
19 *Gingles* preconditions;

20 4. Promptly determine whether those preconditions have been met, and to direct
21 the Special Masters to draw maps in accordance with that determination;

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1 5. Alternatively, to exercise this Court's original jurisdiction to decide those
2 questions of law and direct the District Court to instruct the Special Masters accordingly;

3 6. Comply with any other or further relief this Court deems just and proper.

4 Respectfully submitted this 3rd day of October, 2011.

5 CATHERINE CORTEZ MASTO
6 Attorney General

7 By: 
8 KEVIN BENSON
9 Deputy Attorney General
10 Nevada State Bar No. 9970
11 100 North Carson Street
12 Carson City, Nevada 89701-4717
13 (775) 684-1114
14 kbenson@ag.nv.gov
15 Attorneys for Petitioner
16 ROSS MILLER, Secretary of State

17 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
18 **OF EMERGENCY PETITION FOR WRIT OF MANDAMUS**

19 Petitioner Ross Miller, Secretary of State, by and through counsel, Catherine Cortez
20 Masto, Attorney General, and Kevin Benson, Deputy Attorney General, requests this Court to
21 issue a writ of mandamus to the First Judicial District Court, Department I, directing that court
22 to promptly decide certain questions of law that must be resolved prior to referring to the
23 special masters the task of redistricting, or alternatively, to exercise this Court's original
24 jurisdiction to resolve these questions, and then direct the District Court to instruct the Special
25 Masters accordingly.

26 I.

27 **FACTS**

28 On February 24, 2011, the case *Guy et al. v. Miller*, Case No. 11-OC-00042-1B was
commenced by Dora Guy and others ("Plaintiffs") in the First Judicial District Court,
Department I, in and for Carson City. See Appendix, p. 1. The complaint alleges that

1 Nevada's current state legislative and Congressional Districts are malapportioned to an extent
2 that Plaintiffs' votes are being diluted in violation of the Equal Protection Clause of the
3 Fourteenth Amendment. App. 3. On April 1, 2011, a motion to intervene and a Complaint-in-
4 Intervention were filed by Ken and Sancy King, and others ("Intervenors"). App. 13. The
5 Complaint-in-Intervention alleges claims very similar to those alleged in the Complaint.
6 App. 15. Additional intervenors have since also joined the action.

7 In an order dated July 12, 2011, the Respondent District Court indicated its intention to
8 appoint special masters to assist the District Court in redistricting, and directed the parties to
9 provide suggestions for people to appoint as masters, a list of legal issues for the Court to
10 decide, and recommended directives for the masters to use in the redistricting process.
11 App. 23. On August 3 and August 4, the Respondent entered an order and amended order
12 appointing three special masters (collectively "August Order"). App. 27, 33. Additionally, the
13 August Order provided:

14 IT IS ORDERED that the following legal issues will be determined
15 by the Court *prior to referral to the Special Masters*:

16 (4) factors, if any, to consider for representational fairness (e.g.,
17 election results the panel of Special Masters may use, requisite
18 level of representational fairness, if any, that the new districts must
19 meet, and considerations of incumbency);

20 (5) application of Section 2 of the Voting Rights Act of 1965, to
21 include whether the Act requires the creation of a majority-minority
22 congressional district and any other majority-minority legislative
23 districts in Nevada.

24 App. 34-35 (emphasis added).

25 The August Order additionally required the parties to provide briefing on these legal
26 issues no later than August 31, with five days to provide responses, and another five days to
27 reply to each others' briefs. App. 35. The August Order also set a date for a hearing and
28 directed that the parties may present expert testimony to the District Court at that hearing,
which may be by expert report, affidavit, videotaped deposition, or live testimony. *Id.*

The August Order then reiterated: "IT IS FURTHER ORDERED that *once the legal
issues outlined above have been resolved by the Court*, the matter of drawing maps and

1 related issues shall be referenced to the panel with an order to set the NRCP 53(d)(1)
2 meeting." *Id.* (emphasis added).

3 In accordance with the August Order, the parties submitted their briefs, along with
4 expert reports and affidavits. On September 21, 2011, the Respondent District Court held a
5 hearing where it heard arguments regarding the legal issues and the various experts'
6 conclusions. The same day, the Respondent issued an order referring the matter to the
7 Special Masters ("Referral Order"). App. 504.

8 However, the Referral Order does not resolve many of the most critical legal issues.
9 First, the Referral Order does not direct the Special Masters regarding the correct population
10 measure: total population, voting age population ("VAP"), or citizen voting age population
11 ("CVAP"). Second, the Referral Order does not define "representational fairness," nor give the
12 Special Masters any meaningful guidance on what they may or may not consider. Third, the
13 Referral Order directs the Special Masters to draw maps *before* any legal determination is
14 made on whether the Voting Rights Act requires the creation of majority-minority districts.
15 App. 506-08; 511-12.

16 Additionally, national events make it likely that Nevada's presidential caucuses will be
17 moved earlier in the year. On Friday, September 30, 2011, Florida voted to move its
18 presidential primary election to January 31, 2012. Las Vegas Sun, "Will Nevada's caucuses
19 be held on Christmas Eve or New Year's Eve?" (Sept. 30, 2011).¹ This is an attempt to jump
20 ahead of the four traditional early states: Iowa, New Hampshire, Nevada, and South Carolina.
21 Las Vegas Review Journal, "Nevada GOP moving presidential caucus to January" (Oct. 1,
22 2011).²

23 In response, New Hampshire will move its primary election earlier, to stay ahead of
24 Florida. *Id.*; *see also* NHRS 653:9 ("The presidential primary election shall be held on the
25 second Tuesday in March or on a date selected by the secretary of state which is 7 days or

26
27 ¹ Available at: <http://www.lasvegassun.com/news/2011/sep/30/will-nevadas-caucuses-be-held-christmas-eve-or-new/>
28 *new!* This Court may take judicial notice of facts that are generally known within the territorial jurisdiction of the
court or which are capable of ready determination by reference to sources whose accuracy cannot reasonably be
questioned. NRS 47.130.

² Available at: <http://www.lvrj.com/news/nevada-gop-moving-presidential-caucus-to-january-130923303.html>

1 more immediately preceding the date on which any other state shall hold a similar election,
2 whichever is earlier..."). This will likely move Nevada's presidential caucuses to January, if
3 not early December. *Id.*

4 II.

5 **STATEMENT OF ISSUES AND RELIEF SOUGHT**

6 A. **Statement of Issues.**

7 Did the Respondent District Court impermissibly abdicate its constitutional duty to
8 decide questions of law by ordering the Special Masters to redraw Nevada's congressional
9 and legislative districts before deciding critical legal issues that will necessarily impact how the
10 maps must be drawn?

11 B. **Relief Requested.**

12 The Petitioner respectfully requests this Court to issue a Writ of Mandamus, in
13 accordance with the prayer for relief in the Petition, directing the Respondent to carry out its
14 constitutional duty to decide legal questions rather than referring those questions to a panel of
15 non-jurists, or in the alternative, to exercise its original jurisdiction to decide these questions
16 and direct the Respondent to instruct the Special Masters accordingly.

17 III.

18 **ARGUMENT**

19 A. **Writ relief is appropriate because there is no speedy or adequate
20 remedy at law.**

21 This Court may issue writs of mandamus "to compel the performance of an act which
22 the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. A
23 writ of mandamus is an extraordinary remedy, and is therefore only available if there is no
24 plain, speedy, and adequate remedy at law. *Cote H. v. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d
25 906, 908 (2008); NRS 34.170.

26 The appointment of a special master pursuant to NRCP 53 is not an appealable order,
27 therefore there is no plain, speedy, and adequate remedy at law. *Russell v. Thompson*, 96
28 Nev. 830, 832-33, 619 P.2d 537, 538 (1980). As this Court held in *Thompson*, if the referral of

1 a matter to a special master exceeds the district court's authority, mandamus is the
2 appropriate remedy. *Id.*

3 Furthermore, even where appeal or other legal remedy exists, this Court may grant writ
4 relief "under circumstances of urgency or strong necessity, or when an important issue of law
5 needs clarification and sound judicial economy and administration favor the granting of the
6 petition." *Cote H.*, 124 Nev. at 39, 175 P.3d at 908; *State of Nevada v. Dist. Ct. (Ducham)*,
7 118 Nev. 609, 614, 55 P.3d 420, 423 (2002).

8 Like in *Thompson*, mandamus is proper here because: "To await rendition of the
9 master's report and the final judgment would result in the unnecessary expenditure of time,
10 money and judicial energy if, in an appeal subsequent to trial, it were determined that the
11 special master was erroneously appointed." *Id.*, 96 Nev. at 832-33, 619 P.2d at 538, n. 1. In
12 this case, the Respondent's Referral Order will cause the Special Masters to expend
13 significant time and resources drawing maps without definitive rules on such basic matters as
14 whether they must draw additional majority-minority districts.

15 Redistricting is a matter of statewide concern and the exigencies of creating new maps
16 in time for the 2012 elections merit this Court's exercise of its original jurisdiction to issue writs
17 of mandamus. See *Miller v. Burk*, 124 Nev. 579, 588, 188 P.3d 1112, 1118 (2008)
18 (entertaining writ petition where construction of term limits amendment presented an important
19 legal issue of statewide concern); *State of Nevada v. Eighth Judicial Dist. Court*, 116 Nev.
20 127, 134, 994 P.2d 692, 697 (2000) (entertaining writ petition where there was conflict of
21 decisions in lower courts on issues of statewide importance).

22 Here, the Respondent's failure to definitively rule on certain legal issues before
23 referring to the Special Masters the task of redrawing Nevada's political districts results in the
24 likelihood that the maps will need to be completely redrawn once those legal issues are
25 decided. Given the near-certainty of an appeal, and the possibility that the maps may need to
26 be redrawn yet again after appeal, the failure of the District Court to make timely legal
27 decisions guiding the Special Masters poses substantial risk of delaying the process to the
28 point of disrupting Nevada's 2012 elections.

1 The period for most candidates to file a declaration of candidacy for the 2012 elections
2 begins March 5, 2012, and closes March 16. NRS 293.177(1)(b). Most candidates are
3 required to have been residents of the respective districts they intend to represent for at least
4 30 days preceding the date of close of filing. NRS 293.1755. Thus most candidates will have
5 to live in their district as of February 15, 2012.

6 Quick resolution is also required because statewide referenda, statutory and
7 constitutional initiative petitions require a certain number of signatures to be gathered in each
8 of Nevada's petition districts. Senate Bill 133, § 2 (2011) (effective June 13, 2011). A
9 "petition district" is a congressional district. S.B. 133, § 1. Each petition document must
10 indicate a petition district (congressional district), and only registered voters of that district may
11 sign the document. S.B. 133, § 8(3).

12 Petitions for the 2012 ballot can already be filed with the Secretary of State, and
13 petitioners can begin collecting signatures. See Nev. Const. Art. 19 § 1(1) (referendum may
14 be filed on August 1 of the year preceding the general election); Art. 19 § 2(4) (constitutional
15 initiative may be filed on September 1 of the year preceding the general election). Referenda
16 and constitutional petitions must be turned into the county clerks for verification by June 19,
17 2012. S.B. 133, § 9. Since petitioners may already be circulating petitions, and those
18 petitions need not be turned in until June, 2012, the longer the delay in adopting the maps, the
19 greater the likelihood that the maps will change in mid-course of signature gathering.

20 Independent candidates who must circulate petitions to qualify to appear on the general
21 election ballot face a similar problem. They may file the form of their petition with the
22 appropriate filing officer beginning January 2, 2012. NRS 293.200(1)(a). It must be turned in
23 for signature verification by February 10, 2010. Like partisan candidates, they must reside in
24 the district they intend to represent. NRS 293.1755. Thus any change in district boundaries
25 after January 2 may impact the ability of independent candidates to qualify for the ballot.

26 Additionally, drawing of the maps will also affect the ability of the county clerks to
27 provide information to the political parties regarding the number of voters of each party per
28 precinct. Pursuant to NRS 293.133(2), the clerks are to provide these numbers as of 90 days

1 before the presidential caucuses. However, the clerks will need to redraw the precincts
2 following the adoption of new district maps. See App. 514. This will become especially
3 problematic because Nevada's presidential caucuses will be moved earlier in the year, as a
4 result of Florida holding an earlier primary election.

5 Finally, failure to timely adopt new maps invites the intervention of the federal judiciary.
6 Reapportionment is primarily a duty of the State, to be accomplished through its legislature or
7 other body. *Lawyer v. Department of Justice*, 521 U.S. 567, 576 (1997). Thus federal courts
8 will typically defer to state efforts to enact a valid redistricting plan. *Id.* But although federal
9 courts will stay their hand, they will only do so if the state is able to timely enact a valid plan
10 before the next federal election. *Scott v. Germano*, 381 U.S. 407, 409-10 (1965).

11 The Special Masters will hold hearings on October 10 and 11, 2011, during which they
12 may receive additional information and argument from the parties, as well as hear comments
13 from the public. See App. 511. Resolution from this Court on or before October 12, 2012 will
14 allow for prompt guidance to the Special Masters before they begin the actual process of
15 drawing the maps.

16 This is a matter of urgency and strong necessity because redistricting is an issue of
17 statewide importance which must be finished before candidates file for office. Writ relief is
18 warranted to require Respondent to act in a manner that will ensure that redistricting, including
19 resolution of likely appeals and possible post-appeal redrawing of the maps, can be
20 completed in time to avoid disruption of the 2012 elections.

21 B. Because the Respondent failed to make certain legal determinations, it is
22 likely the maps will have to be redrawn, causing significant delay.

23 The Respondent failed to make at least three critical legal determinations before
24 referring the map-drawing to the Special Masters. Each of these legal issues will impact how
25 the maps must be drawn.

26 1. Correct measure of minority populations for Voting Rights Act purposes.

27 Section 2 of the Voting Rights Act ("VRA") of 1965 prohibits a State from implementing
28 a "voting qualification or prerequisite to voting or standard, practice, or procedure ... which

1 results in a denial or abridgement of the right of any citizen of the United States to vote on
2 account of race or color." 42 U.S.C. § 1973(a). This prohibition extends to redistricting and
3 reapportioning plans that cause minorities to have less opportunity to participate in the political
4 process or to elect candidates of their choice. *Johnson v. De Grandy*, 512 U.S. 997, 1007
5 (1994).

6 In certain circumstances, § 2 of the VRA may require a State to create one or more
7 "majority-minority" districts, i.e., districts wherein "a minority group composes a numerical,
8 working majority of the voting-age population." *Bartlett v. Strickland*, 556 U.S. 1, ___, 129
9 S.Ct. 1231, 1242 (2009). Three preconditions must be met in order for a State to be required
10 under the VRA to create additional majority-minority districts: (1) the minority group must be
11 sufficiently large and geographically compact to constitute a majority in a single-member
12 district; (2) the minority group must be politically cohesive; and (3) the majority votes
13 sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate.
14 *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Only after a party has established all three
15 preconditions does a court go on to determine whether, based on the totality of the
16 circumstances, a violation of the Voting Rights Act occurred. *Bartlett*, 129 S.Ct. at 1241.

17 In the parties' briefs and at argument during the September 21, 2011 hearing, there
18 was substantial discussion concerning the proper measure of minority population for
19 determining whether the first *Gingles* precondition is met. See App. 39 – 503. Specifically,
20 there are three possibilities: total population, voting age population ("VAP"), or citizen voting
21 age population ("CVAP").

22 Although Hispanics comprise over 25% of Nevada's population, the Hispanic VAP is
23 only a fraction of that number, and the CVAP is a smaller number yet. See App. 370. As a
24 result, one cannot determine whether the minority group is "sufficiently large and
25 geographically compact" without first knowing whether group size must be measured by total
26 population, VAP, or CVAP. For example, the ideal number of people in each of Nevada's new
27 four congressional districts is 675,138. See App. 372. However, the Hispanic VAP in *all of*
28 *the Nevada* is only 213,000. App. 339. Therefore, if VAP (or CVAP), rather than the total

1 population, is the correct measure, it is readily apparent that it is impossible to draw a
2 Hispanic majority-minority congressional district. Although the population numbers are
3 different, the same analysis holds true for the state legislative districts.

4 Despite this issue being fully briefed and argued by the parties, the Respondent failed
5 to make any ruling on which population measure the Special Masters must use. As illustrated
6 above, this will necessarily influence not only what evidence is relevant, but will also impact
7 how the maps must ultimately be drawn.

8 2. Failure to define or give any clear direction on "representational fairness."

9 A major problem is that "representational fairness" is not well-defined. In its August
10 Order, the Respondent requested the parties to address "factors, if any, to consider for
11 representational fairness (e.g., election results the panel of Special Masters may use,
12 requisite level of representational fairness, if any, that the new districts must meet, and
13 considerations of incumbency)." App. 34.

14 The parties also thoroughly briefed and argued the issue of "representational fairness,"
15 including the meaning of that term. It may include, for example, notions of "political fairness,"
16 or political competitiveness of contests in certain districts. See App. 120. Or, it might be
17 defined as the concept of avoiding "unfairly favoring one political party over the other." See
18 App. 51.

19 The Intervenors apparently concede that representational fairness is not an issue for
20 state legislative districts. App. 52. However, they argued that representational fairness means
21 that Nevada's congressional districts should either be divided evenly between the two major
22 political parties, i.e., two districts would normally go to Republicans, and two would normally
23 go to Democrats, or they argued, the districted should be designed so that each party has one
24 "safe" district, while the other two are highly competitive. See App. 52. The Plaintiffs respond
25 that this approach is inappropriate, because such districts would serve the party's interest, but
26 not necessarily the will of the voters in those districts. See App. 191.

27 Additionally, the parties dispute whether it is appropriate for a court to make any sort of
28 consideration of political fairness when drawing new maps. *Contrast* App. 190 (arguing that

1 courts are forbidden to take into account purely political considerations, as these are only
2 appropriate for the legislature); *with* App. 215-18 (arguing it is appropriate to ensure that court-
3 drawn maps do not inadvertently unfairly favor one party).

4 After the extensive briefing and argument on this issue, the Respondent issued the
5 following order: "IT IS ORDERED that the Special Masters may review the issue of
6 representational fairness in the drawing of the maps, but are not to become enthralled in any
7 representative, racial or partisan gerrymandering." Referral Order, p. 5, 8.

8 This part of the Referral Order fails to give the Special Masters any meaningful
9 definition of "representational fairness" or guidance as to how to consider it. The reference to
10 "representative" and "racial" gerrymandering is especially perplexing. It is unknown what is
11 meant by "representative" gerrymandering, considering the order also includes a caution
12 against partisan gerrymandering, and racial issues were never discussed in the parties'
13 arguments regarding representational fairness. The Referral Order contains the same order
14 with regard to both state legislative districts (App. 511) and congressional districts (App. 508)
15 even though the parties seems to agree that considerations of representational fairness are
16 not appropriate for state legislative districts (App. 191; 218).

17 In short, this part of the Referral Order would permit the Masters to consider any
18 criteria, legitimate or not, as part of "representational fairness." It injects such uncertainty into
19 the guidelines for the Masters that a challenge to any resulting maps could be brought based
20 on improper consideration of representational fairness. This is inconsistent with the purposes
21 of Rule 53, which as discussed more fully below, does not permit such open-ended referrals
22 to special masters.

23 3. Failure to determine whether the VRA requires the drawing of
24 additional majority-minority districts.

25 As discussed above, the Voting Rights Act, in certain circumstances, requires States to
26 draw additional districts wherein a minority constitutes a numerical, working majority. See
27 *Strickland*, 129 S.Ct. at 1242. In order to be required to draw such districts, the three
28 preconditions identified in *Gingles* must all be met: (1) the minority group must be sufficiently

1 large and geographically compact to constitute a majority in a single-member district; (2) the
2 minority group must be politically cohesive; and (3) the white majority votes sufficiently as a
3 bloc to enable it to usually defeat the minority group's preferred candidate. *Gingles*, 478 U.S.
4 at 51.

5 The parties presented the Respondent with expert witness reports as to these factors.
6 App. 275-286; 351-398; 399-417. Whether the Voting Rights Act requires drawing additional
7 majority-minority districts is the most important issue in the case. The answer to this question
8 dictates how the new maps must be drawn. Therefore it is fundamentally important that this
9 question is resolved *before* the map-drawing process is referred to the Special Masters.
10 However, the Referral Order commits the process of map-making to the Masters without
11 resolving this issue, nor providing any method for it to be determined by the District Court prior
12 to map-making. As a result, it is likely that the maps will have to be redrawn, wasting valuable
13 time and resources.

14 C. The Respondent erred as a matter of law because Rule 53 does not
15 permit a district court to refer any and all matters to a special master.

16 Rule 53 makes clear that: "A reference to a master shall be the exception and not the
17 rule." NRCP 53(b). Additionally, the Rule provides that: "in actions to be tried without a jury,
18 save in matters of account and of difficult computation of damages, a reference shall be made
19 *only upon a showing that some exceptional condition requires it.*"³ *Id.* (Emphasis added.); see
20 also *Thompson*, 96 Nev. at 833, 619 P.2d at 539 (writ issued where Supreme Court found
21 nothing in the record showing exceptional conditions). The provisions of the rule must be
22 strictly construed. *In re Ray's Estate*, 79 Nev. 304, 310, 383 P.2d 372, 375 (1963).

23 Furthermore, the constitutional power of decision rests with the district court, not the
24 special master. *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962); see also
25 *Thompson*, 96 Nev. at 834, 619 P.2d at 539. "The district court, not the special master, is
26 primarily responsible for determining the rights of the parties." *Venetian Casino Resort, LLC*

27 _____
28 ³ Petitioner is not challenging the Respondent's referral of the actual, technical map-drawing process to the
Special Masters. Instead, Petitioner is challenging the referral of critical legal questions to the Special Masters
and the direction that they commence the map-drawing before those legal questions are resolved.

1 v. *Eighth Judicial Dist. Court*, 118 Nev. 124, 129, 41 P.3d 327, 330 (2002).

2 In *Thompson*, this Court issued a writ of mandamus where "the trial court made a
3 general reference of nearly all of the contested issues, giving the master the authority to
4 decide substantially all issues in the case, as well as be the fact finder." 96 Nev. at 834, 619
5 P.2d at 539. This, the court held, was improper because it reduced the function of the trial
6 court to that of a reviewing court. *Id.* The court further explained: "this type of blanket
7 delegation approaches an unallowable abdication by a jurist of his constitutional
8 responsibilities and duties." *Id.* Rule 53 does not purport to allow district courts to delegate
9 the duty of adjudication to a special master. *Id.*; *Cosner*, 78 Nev. at 246; 371 P.2d at 280.

10 In this case, the Respondent has the constitutional duty to make the necessary legal
11 determinations to resolve the case. *Id.*; *Venetian Casino*, 118 Nev. at 129, 41 P.3d at 330;
12 *Cosner*, 78 Nev. at 245, 371 P.2d at 279; *see also* Nev. Const. Art. 6, § 6 (district courts have
13 jurisdiction of all cases excluded from the jurisdiction of the justice courts).

14 Like in *Thompson*, the Respondent issued a blanket referral of the most critical legal
15 issues to the Special Masters. The referral was contrary to the Respondent's previous orders
16 that clearly stated the Respondent would resolve these legal questions *before* referring the
17 map-making to the Special Masters. Relying on the August Orders, the parties believed the
18 major legal issues would be determined by the Respondent prior to referral for the technical
19 process of actually drawing the maps. However, the blanket Referral Order, by failing to
20 resolve many primary legal issues, has impermissibly delegated adjudication of these issues
21 to the Special Masters.

22 There is nothing in the Referral Order explaining why Respondent deviated from its
23 August Order, nor is there any discussion of any "exceptional conditions" that justify having
24 the Special Masters determine these issues of law.⁴ This violates Rule 53's requirement that
25 referrals are to be the exception, not the rule, and that orders of referral must set forth the
26 exceptional circumstances that purport to justify it. NRCP 53(b); *Thompson*, 96 Nev. at 834-
27 35, 619 P.2d at 540.

28

⁴ As this Court explained in *Thompson*: "It is no answer that the master's report must be confirmed by the court before it becomes final, because the scope of review is so limited." 96 Nev. at 834, 619 P.2d at 539.


1 For these reasons, Respondent has impermissibly abdicated its constitutional duty to
2 adjudicate the rights of the parties. Since there is no plain, speedy or adequate remedy at
3 law, a writ of mandamus should issue to compel Respondent to perform the duty enjoined
4 upon it by law to decide the critical legal questions so that the Special Masters will have clear
5 direction when drawing Nevada's new electoral districts.

6 **CONCLUSION**

7 For the foregoing reasons, Petitioner respectfully requests this Court to issue a writ of
8 mandamus directing the Respondent to perform its constitutional duty to adjudicate certain
9 questions of law before referring the task of redistricting to the Special Masters, or to exercise
10 its original jurisdiction to determine these questions.

11 Respectfully submitted this 3rd day of October, 2011.

12 CATHERINE CORTEZ MASTO
13 Attorney General

14 By: 
15 KEVIN BENSON
16 Deputy Attorney General
17 Nevada State Bar No. 9970
18 100 North Carson Street
19 Carson City, Nevada 89701-4717
20 (775) 684-1114
21 kbenson@ag.nv.gov
22 Attorneys for Petitioner
23 ROSS MILLER, Secretary of State
24
25
26
27
28

1 NRAP 27(e) CERTIFICATE

2 Pursuant to NRAP 27(e), I hereby certify that I am counsel to Petitioner Ross Miller
3 Secretary of State, and further certify:

4 1. The contact information for the attorneys of the real parties in interest is:

5 Bradley S. Schragar, Esq.
6 Jones Vargas
7 3773 Howard Hughes Parkway
8 Third Floor South
9 Las Vegas, Nevada 89169
10 Attorneys for Plaintiffs
11 bschragar@jonesvargas.com

Mark A. Hutchison, Esq.
Jacob A. Reynolds, Esq.
Hutchison & Steffen
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff-Intervenors
Ken King, Sancy King, Allen Rosoff,
B. Estela Moser Vaden & Republican Party
mhutchison@hutchlegal.com
jreynolds@hutchlegal.com

10 Matthew M. Griffin, Esq.
11 Griffin, Rowe & Nave
12 1400 South Virginia Street
13 Suite A
14 Reno, Nevada 89502
15 Attorneys for Plaintiffs
16 mgriffin@thecapitolcompany.com

Denise Pifer, Esq.
3821 West Charleston Boulevard
Suite 250
Las Vegas, Nevada 89102
Attorney for Plaintiff-Intervenor
League of Women Voters of Las Vegas
Valley
denisepifer@aol.com

15 Marc E. Elias, Esq.
16 Kevin J. Hamilton, Esq.
17 *Pro Hac Vice*
18 700 Thirteenth Street N.W.
19 Washington, D.C. 20005-3960
20 melias@perkinscoie.com

David R. Koch, Esq.
Daniel H. Stewart, Esq.
Koch & Scow
11500 So. Eastern Avenue, Suite 210
Henderson, Nevada 89052
dkoch@kochscow.com
dstewart@kochscow.com

20 2. The facts showing the nature and cause of the emergency are set forth in the
21 Points and Authorities in Support of Emergency Petition for Writ of Mandamus. These facts
22 include the following:

23 a. That on September 21, 2011, contrary to its previous orders, the
24 Respondent District Court referred to the Special Masters several important questions of law
25 that will impact how the new maps must be drawn, rather than deciding these questions.
26 Therefore the maps will be drawn *before* these legal issues are determined by a court, and
27 substantial delay will result if the maps must be redrawn.

28 *////*

1 b. That Nevada law requires most candidates to be residents of their
2 districts 30 days prior to filing for candidacy, which requires they know their district by
3 February 15, 2012.

4 c. That Nevada law allows independent candidates to begin circulating
5 petitions on January 2, 2012, which may generally only be signed by registered voters or the
6 relevant district.

7 d. That on September 30, 2011, the State of Florida voted to move its
8 presidential primary election to January 31, 2012, which will cause New Hampshire and
9 Nevada to move their presidential caucuses to early January, 2012 or even late December
10 2011, in order to maintain their status as early primary states. Today, South Carolina
11 announced that it would move its presidential caucuses to January 21, 2012.

12 e. That Nevada law requires the county clerks to provide voter precinct
13 information to the parties ahead of the presidential caucuses, but that the clerks will need to
14 the new maps in order to redraw the precincts to provide accurate data to the parties.

15 3. Relief was not sought initially in the district court, because the Plaintiffs and
16 various Intervenors argued at length in their briefs and during the September 21, 2011
17 regarding the need for the Respondent District Court to promptly decide the issues of law.
18 Therefore the matter was brought to the Respondent's attention. Given the short time frame,
19 seeking reconsideration in the District Court would likely lead to only more delay.

20 4. I have notified the Respondent of this Emergency Writ Petition by emailing the
21 same to Chris Erven, Judicial Assistant, at approximately 3:30 p.m. on October 3, 2011. I
22 notified counsel for the real parties in interest by email to each of them at the addresses set
23 forth in section 1, above, at approximately 3:30 p.m. on October 3, 2011.

24 ////

25 ////

26 ////

27 ////

28 ////

1 CERTIFICATE OF SERVICE

2 I declare that I am an employee of the State of Nevada and on this 3rd day of October,
3 2011, I served a copy of the foregoing Emergency Petition for Writ of Mandamus and
4 Appendix Volumes 1, 2, and 3, by email to the addresses indicated.

5 Bradley S. Schrage, Esq.
6 Jones Vargas
7 3773 Howard Hughes Parkway
8 Third Floor South
9 Las Vegas, Nevada 89169
10 Attorneys for Plaintiffs
11 bschrager@jonesvargas.com

Mark A. Hutchison, Esq.
Jacob A. Reynolds, Esq.
Hutchison & Steffen
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff-Intervenors
Ken King, Sancy King, Allen Rosoff,
B. Estela Moser Vaden & Republican Party
mhutchison@hutchlegal.com
ireynolds@hutchlegal.com

11 Matthew M. Griffin, Esq.
12 Griffin, Rowe & Nave
13 1400 South Virginia Street
14 Suite A
15 Reno, Nevada 89502
16 Attorneys for Plaintiffs
17 mgriffin@thecapitolcompany.com

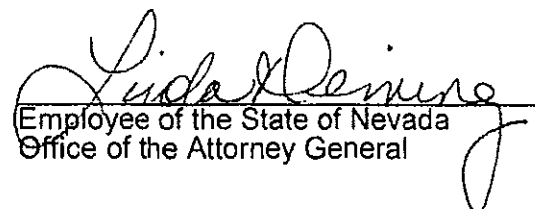
Denise Pifer, Esq.
3821 West Charleston Boulevard
Suite 250
Las Vegas, Nevada 89102
Attorney for Plaintiff-Intervenor
League of Women Voters of Las Vegas
Valley
denisepifer@aol.com

15 Marc E. Elias, Esq.
16 Kevin J. Hamilton, Esq.
17 *Pro Hac Vice*
18 700 Thirteenth Street N.W.
19 Washington, D.C. 20005-3960
20 melias@perkinscoie.com

David R. Koch, Esq.
Daniel H. Stewart, Esq.
Koch & Scow
11500 So. Eastern Avenue, Suite 210
Henderson, Nevada 89052
dkoch@kochscow.com
dstewart@kochscow.com

21 I further declare that on this 3rd day of October, 2011, that I hand-delivered a copy of
22 the foregoing Emergency Petition for Writ of Mandamus and Appendix Volumes 1, 2, and 3
23 on:

24 Chris Erven, Judicial Assistant
25 to Honorable Todd Russell
26 First Judicial District Court

27 
Employee of the State of Nevada
Office of the Attorney General