

BRIAN EGOLF, HAKIM BELLAMY, MEL HOLGUIN,
MAURILIO CASTRO, and ROXANE SPRUCE BLY,

Plaintiff-Petitioners,

v.

D101-CV-2011-02942
D101-CV-2011-02944
D101-CV-2011-02945
County of Santa Fe
First Judicial District Court
(CONSOLIDATED)

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State,
SUSANA MARTINEZ, in her official capacity as New Mexico Governor,
JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant
Governor and presiding officer of the New Mexico Senate,
TIMOTHY Z. JENNINGS, in his official capacity as President
Pro-Tempore of the New Mexico Senate, and
BEN LUJAN, JR., in his official capacity as Speaker of the
New Mexico House of Representatives,

Defendant-Respondents.

**PLAINTIFFS' MAESTAS REPLY BRIEF IN OPPOSITION TO THE
APPOINTMENT OF A SPECIAL MASTER**

COMES NOW Plaintiff Representative Antonio Maestas et. al. and files this
Response to the Motion for Appointment of a Special Master. The request to appoint a
special master in this case should be denied for the reasons stated below.

I. **PROCEEDURAL HISTORY OF 2011 REDISTRICTING**
A. **Census, Legislature, Governor, Judiciary**

Maestas Plaintiffs object to the Movants' request for a special master, as it would
cause unnecessary and prejudicial delay to the Parties and would add unnecessary and

cost to this litigation. ¹As stated by Counsel of record at the scheduling conference, the Legislature completed its constitutional and statutory role in redistricting after adjourning and presented the redistricting legislation for the Governor to sign. The Governor chose to veto them.

The redistricting process in New Mexico has been going on for too long. The additional cost of time and expense should not be incurred because Defendant-Movants have abdicated their lawful obligations to redistrict Congressional, Senate, State House and the PRC districts. The process to redistrict dates back to March 15, 2011 when NM Census decennial data was released. After the Census, a number of field redistricting hearings were conducted through which the legislature received public input and had the opportunity to refine their constitutional districting plans to comport with the constitution and the Voting Rights Act. To wit, the following redistricting hearings were conducted in the following communities:

June 20 - Santa Fe, NM	Aug 4 - Laguna-Acoma
July 18 - Clovis	Aug 5 - Farmington
July 19 - Roswell	Aug 15 - Albuquerque
July 20 - Las Cruces	Aug 16 - Rio Rancho
	Aug 30-31 - Santa Fe

The New Mexico Legislature convened in special session on September 6, 2011. The first redistricting legislation was introduced on September 7, 2011 and the legislative process began. The special session, rather than focusing on redistricting addressed other proposed legislation. The session lasted approximately nineteen days as the House adjourned a day after the Senate adjourned. The New Mexico legislature passed a

¹ See e.g. attached No. 59322 In the Supreme Court of the State of Nevada and Case No. 110C 00042 1B September 21, 2011 In the First Judicial District Court of the State of Nevada in and for Carson City.

districting plan for State Senate and the House and the State Public Regulation Commission. The Governor then took several weeks to veto the legislation thus ending her Office's role in the redistricting process and leaving a districting system in place that is clearly unconstitutional and in violation of the law and abdicating her duty to the Judiciary where it should remain through the Supreme Court's appointment of your Honor.

As this Court is well aware, complaints, including those filed by Plaintiff Maestas seeking Declaratory relief was sought immediately. The New Mexico Supreme Court was asked to invoke its superintending control to keep this resolution of this matter on a fast track. The Supreme Court quickly appointed your Honor as the pro tem. They did not nor were they invited to by Movants to appoint a special master. This Court set a hearing quickly and at the time of this filing has already issued a scheduling order. A special master would only cause a regression in Plaintiff Maestas' and other's efforts to have this matter resolved in a timely manner by adding another bureaucratic layer to the process.

II. ARGUMENT

A. **The Obligation is on this Court to Decide These Constitutional Issues: The Court Should Hear and Decide This Now Not on De Novo Review of a Report**

Resolving Redistricting disputes that have not been resolved by the political branches of government is inherently a judicial task. See Reynolds v. Sims, 377 U.S. 533, 579 (1964) (stating, "a denial of constitutional protected rights demands judicial protections, our oath and our office require no less of us). Judicial review is presumably important because correction of malapportioned districts requires attention to difficult questions of law. Questions of redistricting given the Constitutional and legal

underpinnings certainly raise mixed questions of law and fact not suited for a special master because de novo review is inevitable. See, e.g. State v. Bond ---P.3d --- 2011 WL 1771078 (N.M. App. 2011, March 17, 2011) (on a suppression issue the court reviews an factual questions under a substantial evidence standard and review the application flow to the facts de novo).

Liability in this case is not disputed, that is, the current plans are unconstitutional. The facts in dispute do not go to liability they go to the remedy and whether that remedy (however offered by the Parties) is itself constitutional. In the instant case the constitutional questions arising from the complaint are answerable in light of contextual and not fixed facts, where different outcomes will turn on interpretation rather than disputed events shared by the parties.

The application in this case of a mix of law and fact is relevant to the discussion of the Court's role and inevitable increased delay and cost imposed by a Special Master. The standard of review a district court applies to the adoption of a special master's report differs depending on whether the district court is reviewing the special master's findings of fact or conclusions of law. Under SCRA 1-053 the district court must accept the special master's findings of fact unless they are clearly erroneous.

However, until Lozano v. GTE Lenkurt, Inc., 122 N.M. 103, 920 P.2d 1057 (N.M.Ct. App. 1996), the standard of review a district court should apply when considering the adoption of a special master's conclusions of law was not as clear. Id. SCRA 1-053 does not specify the appropriate standard of review but allows the court to "adopt the report or ... modify it or ... reject it in whole or in part or ... receive further evidence or ... recommit it with instructions." Id. at 108

The Lozano court turned to the federal law as more determinative of the question of what weight must be given to the special master's conclusions of law. Under federal law, a special master's conclusions of law carry no weight with the district court; rather, the court reviews a special master's conclusions of law de novo. Id. (relying on *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir.1994); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 697 (1st Cir.1992)). The Lozano Court concluded that the interpretation and construction that federal courts give Federal Rule of Civil Procedure 53, as it relates to the special master's conclusions of law, is persuasive authority for New Mexico courts applying SCRA 1-053.

If the only claims in this case regard malapportionment due to violations of one-person one vote perhaps a special master could be considered. However, this is not a contract dispute where parties are arguing over an accounting. This case does not present itself for use of a special master because, even if one could be chosen that could provide demographic data, that person could not reduce that to a map that comports with the Voting Rights Act without constant guidance by the Court.

For example, two of the Maestas Plaintiffs are Native American. A special master may present the Court with three Congressional districts with ideal population. That is fact is be reviewed by abuse of discretion. However, the obligation would be to make sure those districts comply with the Voting Rights Act and do not for example spread the Native American voters among the three districts to deny them a voice or compact them in a prohibited way. Movants proposal would have the Parties bouncing back and forth between the special master and the Court incurring twice the cost. This matter should remain where it is; consolidated in one case in front of one tribunal that knows the law objective in the facts.

In summary, the Court cannot visit the legal questions de novo without in effect a de novo review of the facts. This is exemplified in the awkwardness of Paragraph Four of the Nevada Court Order,

It is Ordered that the Special Master shall determine whether the following three precondition are met (1) whether any minority group (i.e. Hispanics) is "sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the minority group is "politically cohesive" and (3) in the absence of special circumstances, bloc voting yet the white majority usually defats the minority's preferred candidate... if the Special Masters determine these three preconditions are met, then the special Masters shall prepare a report for the Court indicating whether the totality of the circumstance s supports a finding of vote dilution in violation of Section 2 of the Voting Rights Act...

It is difficult to conceive how a special master can be delegated the task of finding if " the totality of circumstances support a judicial (both factual and legal) find of a violation of the Voting Rights Act. If so, the aggrieved party will have the opportunity for essentially a new trial in front of your Honor, and then an Appeal if required. A special master is both unnecessary and likely to cause serious delay in deciding these vital matters. I cannot conceive that the drafters of our Constitution wish the constitutional questions arising in connection with the rights of free citizens to vote be decided in two or three separate forums.

A special master may be appropriate if there was a need to decide facts based on independent legal questions not the interrelated questions presented by this major constitutional case. At issue in this case is whether voting demographics and resulting maps (numerical sound as they may be) actually infringe upon constitutional and statutory rights. In no way is a special master better qualified than this Court to isolate and to decide those many questions whose resolution will turn on such facts. Further, if

the Court chooses to immerse itself in the long record made while the matter was on its docket, even more time may be lost. It is the Maestas Plaintiffs' belief the Supreme Court of New Mexico understands that this Court is equipped to decide this issue given the mix of law and facts and this is the most efficient way to do it.

B. Appointing a Special Master will Result in Delay: Nevada is an Example

Contrary to what Movant argues, application of the New Mexico Rule Governing special masters shows that instigating such a practice at this point will cause delay. In addition, it appears the process invoked in Nevada resulting in the delays cautioned against in this Brief.

NMRA 1-053 provides,

D. Proceedings.

(1) When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

It must be noted, a special master does not diminish Maestas' plaintiff or any parties right to discovery or test of facts through an adversarial process. At the time of this filing the Parties are fifty days away from trial. We would be adding a layer of finding a special master, having another scheduling meeting and restarting the discovery process.

In Nevada, the issue of Special Master is being revisited or reviewed and given the timelines has not shown to be efficient. See e.g. No. 59322 (asking Movants to brief

“if the matter is one over which the judiciary can or should exercise authority, in addition to any other issues the Secretary wishes to address, **whether the district court’s delegation of authority to the panel of special masters comports with NRCP 53)** (emphasis added). According to the timelines outlined in these Orders, and a best reading of the Orders without knowing more, a special master was appointed in August and argument is set in November regarding the propriety of such a decision.

C. A Special Master Will Add to the Cost of this Litigation

Movants proposal of adding an additional layer to this litigation through appointment and compensation of a Special Master will at least double the costs of this litigation. Compensation to a Special master is governed as follows:

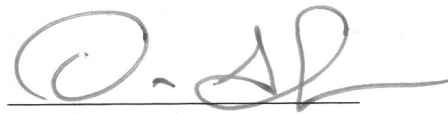
A. Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word “master” includes a referee, an auditor and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct...

The Nevada process again is a lesson in caution. Without know the exact reasons it seems compelling that as part of its Order the Court felt compelled to Order the state to pay the costs of the redistricting including the special master. See page two of the Carson City Order, “the Secretary of State for the State of Nevada shall apply to the Interim Finance Committee for the State of Nevada for funds to compensate the Special Masters and to pay for any and all costs incurred in this redistricting process... this is a Statewide issue which should be paid for by the State of Nevada.” With all due respect it is difficult to argue that inserting another fact finder into the process that is paid by the hour will somehow lower the costs of this litigation especially given the likelihood that given the

important constitutional and legal issues at stake a new trial will be sought by your Honor on whatever conclusions the special master reaches.

THEREFORE, Maestas Plaintiffs respectfully request that Movant's request for a special master be Denied.

Respectfully submitted,



David K. Thomson,
Thomson Law Office, P.C.
303 Paseo de Peralta
Santa Fe, New Mexico
87501 505-982-1873

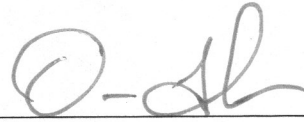
And

John Wertheim
The Jones Firm
1800 Old Pecos Trail
Santa Fe, NM 87505
505.982.0011

Stephen Durkovich
Law Office of Stephen
Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87505
505-986-1800

Certificate of Service

I HEREBY CERTIFY that on this 21st day of October, the foregoing was served by electronic means pursuant to the First Judicial Court E-filing system to counsel of record:

A handwritten signature in black ink, appearing to read "D. Thomson", written over a horizontal line.

David K. Thomson, Thomson Law Office, P.C.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSS MILLER, IN HIS CAPACITY AS
SECRETARY OF STATE FOR THE
STATE OF NEVADA,

Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND
FOR THE COUNTY OF CARSON CITY;
AND THE HONORABLE JAMES TODD
RUSSELL, DISTRICT JUDGE,

Respondents,

and

DORA J. GUY, AN INDIVIDUAL;
LEONEL MURRIETA-SERNA, AN
INDIVIDUAL; EDITH LOU BYRD, AN
INDIVIDUAL; SAMANTHA STEELMAN,
AN INDIVIDUAL; KEN KING, AN
INDIVIDUAL; SANCY KING, AN
INDIVIDUAL; ALLEN ROSHOFF, AN
INDIVIDUAL; B. ESTELA MOSER
VADEN, AN INDIVIDUAL; NEVADA
REPUBLICAN PARTY; ALEX GARZA, AN
INDIVIDUAL; AND LEAGUE OF WOMAN
VOTERS OF LAS VEGAS VALLEY,
Real Parties in Interest.

No. 59322

FILED

OCT 05 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING SUPPLEMENTAL BRIEFING AND ANSWER

This case comes before the court on an original petition for a writ of mandamus concerning the district court's order referring a redistricting matter to a special master. Under Article 4, Section 5 of the Nevada Constitution:

It shall be the mandatory duty of the Legislature at its first session after the taking of the decennial census of the United States in the year 1950, and

after each subsequent decennial census, to fix by law the number of Senators and Assemblymen, and apportion them among the several counties of the State, or among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.

In view of this provision, we direct the Secretary of State to supplement the petition by addressing the following issues: (1) whether the Legislature discharged its mandatory duty under Article 4, Section 5;¹ (2) if not, can or should the Nevada state courts engage in the act of redistricting as contrasted with reviewing a legislatively established plan;² and (3) if the matter is one over which the judiciary can or should exercise authority, in addition to any other issues the Secretary wishes to address,

¹As part of this issue, the Secretary shall address whether the governor's veto power under Article 4, Section 35 includes legislatively established redistricting plans.

²We note that judicial remedies considered in comparable redistricting cases have included: ordering that a special session of the legislature be called, see Dungan v. Sawyer, 250 F. Supp. 480 (D. Nev. 1965); directing at-large elections absent legislative adoption of a valid redistricting plan, id. at 490; but cf. Tam v. Colton, 94 Nev. 453, 461, 581 P.2d 447, 453 (1978) (noting equal protection challenges an at-large election may invite); adopting as a temporary court plan, for the imminent elections only, existing districts for state legislators and the legislatively enacted plan for United States House of Representatives, see Legislature v. Reinecke, 492 P.2d 385 (Cal. 1972); and creating a judicially fashioned plan with the aid of special masters. See Legislature of State v. Reinecke, 507 P.2d 626 (Cal. 1973). Here, the Secretary's supplement should address the appropriate and constitutionally permissible judicial remedies in this situation.

whether the district court's delegation of authority to the panel of special masters comports with NRCP 53.

The Secretary of State shall have until 4 p.m. on Friday, October 14, 2011, to file and serve his supplement.³ We further direct real parties in interest to answer the original writ and supplement thereto by 4 p.m. on Monday, October 24, 2011. Thereafter, the Secretary shall have until 4 p.m. on Thursday, November 3, 2011, to file and serve any reply, if deemed necessary. No extensions of time to the briefing schedule will be granted.

We direct the clerk of the district court to transmit to the clerk of this court a certified copy of the trial court record in electronic format in District Court Case No. 11OC000421B by 4 p.m. on Thursday, October 6, 2011.

Finally, we have determined that oral argument would be of assistance in resolving the issues presented by this petition, and we therefore direct the clerk of this court to schedule oral argument before the

³For this petition, we suspend the provisions of NRAP 25(a)(2)(B), which state that a document is timely filed if, on or before its due date, it is mailed to this court, dispatched for delivery within three calendar days by a third-party commercial carrier, or deposited in the supreme court drop box in Las Vegas. See NRAP 2. Accordingly, all documents shall be filed personally, electronically, or by facsimile transmission with the clerk in Carson City. Service must likewise be performed by one of these three methods.

en banc court on November 14, 2011, at 1:30 p.m. in Carson City. The argument shall be limited to 60 minutes.

It is so ORDERED.

Saitta, C.J.
Saitta

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Cherry, J.
Cherry

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. James Todd Russell, District Judge
Attorney General/Carson City
Koch & Scow, LLC
Hutchison & Steffen, LLC
Jones Vargas/Las Vegas
Perkins Coie, LLC
The Capitol Company
Denise A. Pifer
Carson City Clerk