

than the prompt and comprehensive schedule laid out by this Court. Finally, the wealth of collateral litigation as a result of the district court's 2011 appointment of a 3-person-panel of special masters in Nevada demonstrates the problems inherent in such an appointment, and concern that such an appointment will inadvertently slow or delay the process to which this Court has been ordered to oversee. Nothing in New Mexico's redistricting history, or currently, lends support to the idea that this Court is not best-suited to preside over this decade's redistricting trials, and nothing presented in the Motions for appointment of a special master indicate why this Court should abdicate its authority and ability in favor of a special master. As grounds in support of denying the Governor's and the James-Plaintiffs' [hereinafter "Movants"] Motions for Appointment of Special Master, the Egolf Plaintiffs state as follows:

A. This Court is uniquely tasked with adjudicating the redistricting matters before it and has been ordered, via issuance of an extraordinary writ by the New Mexico Supreme Court, to adjudicate the Legislative, Congressional, and Public Regulation Commission redistricting.

This Court has not only the constitutional power and authority to hear the redistricting matters before it, *see* N.M. Const. art. VI, § 13; *Marchman v. NCNB Texas Nat. Bank*, 120 N.M. 74, 83-84, 898 P.2d 709, 718-19 (1995), the New Mexico Supreme Court explicitly chose and tasked this Court with the responsibility to oversee and ensure our State's constitutional duty to fairly reapportion its Congressional, Legislative, and Public Regulation Commission districts. As set forth herein, the State's constitutional responsibility to reapportion its districts following each decennial census is vested first with the Legislature and, failing action by the Legislature, with our State courts. In this case, the Supreme Court has specifically selected this Court to adjudicate the reapportionment of those districts for the next decade. Nothing raised by the Movants justifies this Court abdicating its responsibility to a third-party special master.

Our republic's history demonstrates that the redrawing of legislative and congressional

boundaries as a result of each decennial U.S. Census is a duty and responsibility tasked to our state legislatures and state courts. It is the primary right and responsibility of our state courts to require valid reapportionment or to formulate a valid redistricting plan where a state legislature fails to do so in a timely fashion. *Grove v. Emison*, 507 U.S. 25, 33-34 (1993); *Branch v. Smith*, 538 U.S. 254, 261-62 (2003) (same); see *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“It is well settled that ‘reapportionment is primarily the duty and responsibility of the State.’”) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). “The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the U.S. Supreme] Court but appropriate action by the States in such cases has been specifically encouraged.” *Scott v. Germano*, 381 U.S. 407, 409 (1965). “A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity.” *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 576 (1997) (citing *Grove*, 507 U.S. at 34).

Given that the timely and fair reapportionment of New Mexico’s Congressional, Legislative, and Public Regulation Commission districts is of paramount importance, it would be irresponsible to abdicate the reapportionment responsibilities to third parties. In this case, the Supreme Court recognized the importance of these matters and sought to ensure that they proceed in an efficient, timely fashion. Consequently, the Court took the unusual step of issuing an extraordinary writ and specifically providing that the reapportionment process and decision-making be effected in this Court, and none other.¹

¹ Interestingly, the moving parties here were parties to the Supreme Court’s consideration of issuing a Writ of Superintending Control. While each of them filed papers with the Supreme Court, none of them raised the possibility of having the Supreme Court appoint, along with this Court, a special master or masters. Clearly, if movants had any special procedures in mind, they could have, and should have, raised them as something that should be included in the Writ.

Finally, the issues raised by the numerous complaints here involve important questions of constitutional law, constitutional facts and statutory construction. These issues are the fodder for courts and judges, and are not ones uniquely suited to a special master. Indeed, a special master is not likely to bring any special expertise superior to that of an experienced state court judge to resolve the issues in these cases. There simply is no need for a special master.

B. Because the procedures incident to proceeding before a special master, including those proposed by Movants, will result in more delay and collateral litigation than the efficient and rigorous schedule set out by this Court’s Scheduling Order, appointment of a special master is improper.

That this once-in-a-decade process of redistricting is an “exception” to normal, everyday litigation is apparent on its face. In issuing a Writ of Superintending Control, our Supreme Court necessarily took into consideration these exceptional circumstances, as it limits its “exercise of the power of superintending control to exceptional circumstances, such as cases in which ‘the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and unusual burdens of expense.’” *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 624, 904 P.2d 1044, 1049 (1995) (citation omitted). Therefore, to argue that exceptional circumstances exist, necessitating the appointment of a special master, wholly ignores how the parties arrived here, in one, consolidated proceeding, before one specific judge, who was hand-picked by our Supreme Court. And while the motioning parties argue that this obvious “exceptional condition” requires the appointment of a special master, neither Motion provides any evidentiary support that this Court is not as able, capable, or efficient as a special master to facilitate the proper redistricting for this decade.

As provided by Rule 1-053 NMRA, proceedings conducted by a special master in no way eliminate the time, expense, and efforts of counsel and this Court to oversee New Mexico’s

redistricting, and, in fact, add layers of procedure that could serve only to delay these proceedings. Rule 1-053 provides that a special master can rule on the admissibility of evidence, hear and examine witnesses under oath, require production of documents by the parties, make a record of evidence offered and excluded, and require parties or witnesses to answer interrogatories. The Rule further provides that the special master will prepare a report on the matters before it, and allows for the parties to prepare and submit findings of fact and conclusions of law for the special master to consider in preparing its report for the district court judge. However, after the special master prepares its report for the district court, the Rule provides that within 10 days of the filed report the parties are permitted to make written objections and request further hearing from the district court. Rule 1-053(E)(2). Additionally, after conducting a hearing, the district court may adopt, modify, or reject the report, and may receive further evidence from the parties. This process does not eliminate procedure, but serves only to add procedure to the adjudicatory process.

Following Rule 1-053, the Governor's special-master proposal provides that the parties will spend time picking proposed special-master candidates, spend time commenting on the other parties' choices of candidates, spend time submitting proposed instructions or criteria, and that the district court would then rule on the appropriate instructions for the special master to follow.² *See* Gov's Motion at 9-10. Once the special master comes up with its redistricting plans, the parties, according to the Governor's plan, will then have the opportunity to provide written objections and comments to the Court, and the Court will hold an evidentiary hearing, or bench trial, in which the parties could present evidence and present fact and expert-witness testimony

² The James-Plaintiffs' special-master proposal provides specific dates, but is even less specific than the Governor's plan in the appointment, process, and proceedings if a special master is appointed. *See* James-Plaintiffs' Motion at 4-5.

as to the plans presented. Gov's Motion at 10.³ The appointment of a special master under Rule 1-053, or under Movants' plans, not only fails to eliminate the time, expense, and efforts of counsel and this Court to oversee these proceedings, such an appointment appears more likely to add a host of layers to a process that this Court is ultimately responsible to oversee.

Additionally, while all Movants claim that this process will somehow, in some unspecified manner, save the State money, none fully explain or provide any evidentiary support for their speculative assertions that a special master procedure will save the State money. Moreover, no Movant identifies where the money to pay for a special master or masters will come from. Indeed, were this Court to entertain the motions, and appoint a master, or masters, who was a demographer, statistician, or both, clearly such a qualified person could not work for free and maintain an appearance of objectivity or impropriety. Movants fail to demonstrate how adding yet another paid party to the adjudicative process would save money, or provide any level of efficiency to the already efficient process outlined by this Court.

Nothing in New Mexico's redistricting history, or what is currently before the Court, supports the idea that this Court cannot carefully and efficiently carry out its duties in the absence of a special master. None of the parties in favor of the appointment of a special master indicate why a special master would be a superior finder of fact over this Court, and none provide any support as to why the redistricting trials pending before this Court are not the most

³ While the Governor's proposal states that the Court, in reaching its decision, "will not be bound in any way by the findings of the special master," Gov's Motion at 10, this is not the standard of review our courts must follow. The standard of review a district court must apply to the adoption of a special master's report differs depending on whether the district court is reviewing a special master's findings of fact or conclusions of law; the district court reviews a special master's conclusions of law de novo, and is required to accept a special master's findings of fact unless they are "clearly erroneous." *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 16, 122 N.M. 103, 920 P.2d 1057.

timely and judicially efficient use of taxpayer funds.⁴ The New Mexico Supreme Court has chosen this Court—and none other—to oversee and ensure our State’s duty to properly apportion its districts based on constitutional requirements and objective standards, and to minimize the potential for political manipulation or impermissible gerrymandering. While the Court may modify a special master’s report or reject it in whole or in part or receive further evidence or recommit a report with instructions, “it is well-settled that a special master may not displace the court.” *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 15, 122 N.M. 103, 920 P.2d 1057. As such, this Court is the ultimate arbiter charged with ensuring that fair and constitutional redistricting plans are produced for this decade, and should proceed to oversee and adjudicate this process as ordered by the New Mexico Supreme Court.

While the Governor’s brief states that a “more fair process” will result from the appointment of a special master, Gov’s Motion at 9, the Governor does not, and cannot, explain why this Court would be any less fair or objective than a special master. Just as redistricting was properly and efficiently managed by trials before a district court in New Mexico ten years ago, so too will this Court preside fairly and efficiently over this decade’s redistricting trials.⁵ The Scheduling Order issued by this Court on October 19, 2011, demonstrates that this Court is ready, willing, and able to objectively, efficiently, and timely resolve the redistricting matters

⁴ To suggest the redistricting trials currently before this Court are analogous to a “beauty contest” or “beauty pageant” does not recognize our courts’ long and venerable history of fair, objective and proper adjudication of our State’s constitutional obligations to redistrict. *See James-Plaintiffs’ Motion* at 2, 4.

⁵ It should not escape mention that here, as in the last decade, the parties representing Republican interests seek an alternative process to redistricting in State Court, namely, by a United States District Court Judge, or Federal court. In the 2001 redistricting litigation, the Republican parties—including the then Republican Governor—sought to have all redistricting litigation decided in Federal court; however, as it was required to do, the Federal District Court deferred to the State Court’s timely efforts to redistrict New Mexico’s Congressional and State House of Representatives districts. While a State Court is best suited to determine these important issues, delay could result in these proceedings being decided by the Federal courts.

before it. As set forth above, the appointment of a Special Master does nothing to speed that process or otherwise make it more efficient. In all likelihood, the additional layer(s) inherent in the decision-making and decision-affirming processes attendant to the appointment of a special master will serve only to delay final resolution of the proceedings beyond the procedure set forth in this Court's Scheduling Order.

To now circumvent the New Mexico Supreme Court's mandate that all redistricting litigation proceed in this Court, before one Judge, as proposed by Movants, would result in only more delay, additional costs, and protracted litigation encumbered by collateral issues needing this Court's attention, as currently evidenced in Nevada's redistricting under a 3-person-panel of special masters.⁶

C. Movants' prime example in support of their motion—Nevada—demonstrates that the special master approach to redistricting only results in a more drawn out, protracted process that will ultimately be resolved with more, not less, litigation.

The Governor and the James-Plaintiffs seek to "sell" the idea of a special master on the basis of efficiency. The current situation in Nevada regarding the district court's appointment of a 3-person-panel of special masters to oversee its redistricting process is a telling example of the problems inherent in such an appointment, and why the likely result is not efficiency, but delay and increased expense.⁷ In Nevada, the district court judge assigned to oversee the redistricting

⁶ None of the out-of-state authority cited by Movants is relevant to how Movants propose this Court proceed. For example, *Larios v. Cox*, 306 F.Supp.2d 1212, 1213 (N.D.Ga. 2004), cited by Movants, regarded the appointment of a former Chief Judge of the United States Court of Appeals for the Eleventh Circuit to oversee redistricting proceedings. See also *Rodriguez v. Pataki*, 207 F.Supp.2d 123, 124 (S.D.N.Y. 2002) (presiding was 3-person-panel of United States District Court judges); *Diaz v. Silver*, 978 F.Supp. 96, 97 (E.D.N.Y. 1997) (presiding was 3-person-panel of United States District Court judges).

⁷ At this Court's Scheduling Conference, counsel in support of a special master suggested that Minnesota was also an example of the procedure to adopt here. In Minnesota, however, neither the district court nor the Supreme Court of Minnesota appointed a special master to oversee redistricting; the Minnesota Supreme Court appointed a panel of 5 judges, as permitted by

proceedings for this decade appointed a 3-person-panel of special masters in August 2011, none of whom are judges, to oversee the proceedings. The district court's appointment of the panel, however, has not only failed to facilitate the redistricting process, it has generated an intense amount of collateral litigation that has stalled the process that the district court was originally tasked to oversee.⁸

The special masters in Nevada are currently far afield from the task to which they were appointed, namely, map drawing, because of the wealth of ancillary issues that have arisen as a result of that appointment. Despite the appointment of the panel in August of this year, as of the time of this writing, the parties in Nevada are petitioning the Nevada Supreme Court to decide issues regarding the district court's referral order (or guidance) that was given to the special masters. Issues currently plaguing the redistricting process that are before the Nevada Supreme Court, inter alia, are whether the referral order properly directs the special masters regarding the correct population measure, whether the referral order gave proper guidance on the definition of "representational fairness," and whether the special masters received "meaningful guidance" on what they were allowed to consider in making their recommendations. *See* Ex. G, at 6, attached.⁹ At this moment in time the redistricting process has been catapulted out of the hands

statute. *See* Ex. A, Minnesota Supreme Court Order, Jun. 1, 2011 (appointing 5-panel group of judges to implement judicially-determined redistricting plans in the event the Legislature and Governor failed to enact redistricting plans), attached.

⁸ *See* Ex. B, Editorial, *The Redistricting Train Wreck*, Las Vegas Review-Journal, Oct. 6, 2011, attached; Ex. C, Steve Sebelius, *In Redistricting Case, Judge Decides to Punt on Third Down*, Las Vegas Review-Journal, Sep. 23, 2011, attached; Ex. D, Jon Ralston, *If There's No Special Session, High Court Should Step In*, Las Vegas Sun, Oct. 5, 2011, attached; Ex. E, Geoff Dornan, *Special Master Suggests Parties in Redistricting Battle Work It Out*, Nevada Appeal, Oct. 12, 2011, attached; Ex. F, Editorial, *Redistricting Panel*, Las Vegas Review-Journal, Jul. 14, 2011, attached (opining that the appointment of a special-master panel "simply can't take the politics out of an inherently political process").

⁹ Ex. G is the Emergency Petition for Writ of Mandamus filed by Deputy Atty. General Kevin Benson, Oct. 3, 2011, in the Nevada Supreme Court, Case No. 59,322 [Doc. No. 2011-30130].

of both the special masters and the district court such that that the Nevada Supreme Court can resolve the issues created by that appointment.

As a result of the appointment of the special-master panel in Nevada, the redistricting process has been unnecessarily tangled in collateral litigation that is currently delaying the process it was intended to facilitate. By creating another layer at arm's length from the district court, the (undoubtedly) well-intentioned appointment of the 3-person special-master panel has derailed the redistricting process from its moorings.¹⁰ Like Nevada, any appointment of a special master, or masters, will undoubtedly create additional layers of delay, costs, and protracted litigation encumbered by a wide-range of collateral issues needing this Court's attention. The Motions for Appointment of Special Master must be denied.

Conclusion

For the foregoing reasons, the Governor's and James-Plaintiffs' Motions to Appoint a Special Master must be denied, and this Court should proceed, as ordered by our New Mexico Supreme Court, with the redistricting trials currently before it, and oversee and ensure our State's duty to properly apportion its districts based on constitutional requirements and objective standards applied by Courts.

The Petition asks the Nevada Supreme Court to decide whether the district court impermissibly abdicated its constitutional duty to decide questions of law in ordering the special masters to redraw Nevada's congressional and legislative maps before deciding critical legal issues that impact how the maps must be redrawn. *See* Ex. G, at 7.

¹⁰ *See* Ex. H, Editorial, *Governor, Lawmakers Let a Judge Do the Job They Are Supposed To Do*, Las Vegas Sun, Oct. 1, 2011, attached (stating the district court judge in Nevada "concocted an odd plan, appointing three 'special masters' with no particular experience in the complexities of redistricting to draw the maps").

Respectfully submitted,

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I hereby certify that on October 21, 2011, I filed the foregoing electronically through the Tyler Tech System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing; all counsel of record were additionally today served via email.

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