### IN THE NEVADA SUPREME COURT

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ROSS MILLER, in his capacity as Secretary) of State for the State of Nevada,

Petitioner.

VS.

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

Respondent.

DORA J. GUY, an individual; LEONEL MURRIETA-SERNA, an individual; EDITH LOU BYRD, an individual; and SAMANTHA STEELMAN, an individual, KEN KING, an individual; SANCY KING, an individual; ALLEN ROSOFF, an individual; B. ESTELA MOSER VADEN, an individual, and the NEVADA REPUBLICAN PARTY, ALEX GARZA, an individual, LEAGUE OF WOMEN VOTERS OF LAS VEGAS VALLEY.

Real Parties in Interest.

Electronically Filed Oct 06 2011 03:58 p.m. Tracie K. Lindeman Clerk of Supreme Court

SUPREME COURT NO. 59322

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

PETITIONER'S EMERGENCY MOTION UNDER NRAP 27(e) FOR LIMITED STAY OF DISTRICT COURT PROCEEDINGS

ACTION REQUIRED BY OCTOBER 12, 2011

Petitioner Ross Miller, Secretary of State, by and through counsel, Catherine Cortez Masto, Attorney General, and Kevin Benson, Deputy Attorney General, requests this Court to issue a limited stay of the proceedings in the First Judicial District Court, Department I, which are the subject of the Emergency Petition for Writ of Mandamus.

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### FACTS AND PROCEDURAL HISTORY

On October 3, 2011, the Secretary of State filed an Emergency Petition for Writ of Mandamus with this Court, relative to the proceeding in the case *Guy et al. v. Miller*, Case No. 11-OC-00042-1B in the First Judicial District Court, Department I, in and for Carson City. The basis of the Petition is that the Respondent District Court, by failing to make certain legal determinations before referring the redistricting process to the Special Masters, has failed to carry out its constitutional duty to decide questions of law.

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The Respondent directed that the Special Masters will hold hearings on October 10 and 11, 2011, during which they may receive additional information and argument from the parties, as well as hear comments from the public. Appendix at p. 511. The Special Masters are then to meet privately to actually draw the maps. *Id.* These meetings are to be confidential. *Id.* The report and the maps are to be given to the District Court on or before October 21, 2011. App. 512.

On October 5, 2011, this Court entered an order directing supplemental briefing on several issues, including the Nevada judiciary's role in redistricting litigation, and whether the District Court's delegation of authority to the Special Masters comports with NRCP 53. However, the Order did not address the immediate timing issue pertaining to the District Court's Referral Order.

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### **ARGUMENT**

### A. <u>STANDARD FOR STAY OF ORDER.</u>

Generally, an appellant may secure a stay by posting a supersedeas bond.

Nev.R.Civ.P. 62(d). However, the State of Nevada and other public agencies need not post security for a stay pending appeal. Nev.R.Civ.P. 62(e).

Application for a stay should usually be made in the first instance to the district court. NRAP 8(a)(1). However, a stay may be requested from this Court in the first instance if first moving in the district court would be impractical. NRAP 8(a)(2)(A)(i).

A request for stay under Rule 8 applies equally to appeals and to original writ petitions. NRAP 8; *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

The Supreme Court considers the following factors when determining whether to grant a stay in a civil case: "(1) whether the object of the writ will be defeated if the stay or injunction is denied; (2) whether petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether petitioner is likely to prevail on the merits in the appeal."

NRAP 8(c); Hansen, 116 Nev. at 657, 6 P.3d at 986.

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## B. A LIMITED STAY OF THE MAP-DRAWING PROCESS UNTIL THE DISTRICT COURT RULES ON THE LEGAL ISSUES IS APPROPRIATE.

### 1. Requesting relief in the District Court would be impractical.

This request for stay is being sought in this Court in the first instance because moving in the District Court would be impractical. As discussed in the Petition for Writ of Mandamus, the Referral Order is contrary to the Respondent's previous orders indicating it would decide the legal issues prior to referring the map making to the Special Masters. The Plaintiffs and the Intervenors argued at length during the September 21, 2011 hearing, as well as in their briefs, regarding whether the Respondent must make those determinations before referring the map-making to the Masters. Accordingly, the Respondent was apprised of the matter, yet has already determined to refer *all* issues, including legal questions, to the Masters.

Therefore it would be impractical to first request a stay of that order from the District Court.

### 2. The object of the Petition will be defeated if the stay is not granted.

The Petition seeks to require the District Court to decide the important issues of law before the Masters are tasked with the actual map-drawing process. This ensures that time is not wasted by drawing maps without the necessary guidance as to the legal criteria they must adhere to. If the portion of the Referral Order directing the Masters to commence map-making is not stayed, the purpose of the Writ will be defeated, since the Masters will begin that process without the necessary legal decisions having been made by the court.

Staying the actual map-drawing until the District Court decides the necessary legal questions will avoid potentially having to redraw the maps again. It will also necessitate the Masters to promptly report any relevant findings of fact to the District Court, and likewise encourage the District Court to promptly decide those issues so that the maps can be produced by the October 21, 2011 deadline.

### 3. <u>Serious harm will result if the stay is not issued.</u>

As discussed in the Petition, the District Court has impermissibly abdicated its duty to make rulings of law and guide the Masters. The failure of the District Court to give any

meaningful direction to the Masters on three key legal parameters for the maps threatens to delay the redistricting by requiring redrawing of the maps and opening them up to additional legal challenges because of the unclear direction on "representational fairness." A stay of the map-drawing process until the District Court has addressed these issues, while still allowing the Masters to proceed with the public hearings to collect evidence from the parties and public comment, will avert those problems and allow the Masters to be prepared to draw the maps once they do receive the necessary guidance, as requested by the Petition. There is value in the public hearings and allowing the Masters to continue with their obligations short of map drawing. By simply staying map drawing, the Court will enable the Masters to "promptly" report their finding of facts concerning the three *Gingles* preconditions as requested by the Secretary in the Petition, p. 3 lines 17-19. More importantly, the limited stay will avoid the harm that will occur if the Masters draw and submit a map prior to the court's guidance and will prevent the submission of a map is burdened with challengeable legal insufficiencies.

### 4. The Secretary is likely to succeed on the merits.

The Secretary is likely to succeed on the merits, because the constitutional power of decision rests with the district court, not the special master. *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962). NRCP Rule 53 does not permit an unfettered delegation of judicial functions to a special master. Indeed, in a non-jury case, the Rule only permits referral to a special master, "only upon a showing that some exceptional condition requires it." NRCP 53. As this Court held in *In re Ray's Estate*, 79 Nev. 304, 310, 383 P.2d 372, 375 (1963), the provisions of the rule must be strictly construed. Therefore the "exceptional condition" requiring referral must appear in the record. *See Russell v. Thompson*, 96 Nev. 830, 833, 619 P.2d 537, 539 (1980) (writ issued where Supreme Court found nothing in the record showing exceptional conditions).

In this case, there is nothing in the record indicating why the District Court could not decide the critical legal questions before referring the map-making to the Special Masters. In fact, the District Court appeared to recognize that doing so would be the proper order of

things, given its August Orders, stating it would decide those issues before referral. App. 35.

No exceptional conditions have since arisen that would warrant a different course of action.

#### CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Mandamus, the Secretary respectfully requests that this Court issue a limited stay of the map-drawing process by the Masters pending a determination on the legal issues identified in the Petition by the Respondent District Court. This will address the immediate timing problems raised in the Petition if map-drawing commences without adequate legal direction to the Masters.

DATED this 6th day of October, 2011.

CATHERINE CORTEZ MASTO Attorney General

Bv:

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#### NRAP 27(e) CERTIFICATE

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

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

Bradley S. Schrager, Esq. Jones Vargas 3773 Howard Hughes Parkway Third Floor South Las Vegas, Nevada 89169 Attorneys for Plaintiffs bschrager@jonesvargas.com

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- 2. The facts showing the nature and cause of the emergency are set forth in the Points and Authorities in Support of Emergency Petition for Writ of Mandamus. These facts include the following:
- a. That on September 21, 2011, contrary to its previous orders, the Respondent District Court referred to the Special Masters several important questions of law that will impact how the new maps must be drawn, rather than deciding these questions. Therefore the maps will be drawn *before* these legal issues are determined by a court, and

substantial delay will result if the maps must be redrawn.

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- That Nevada law requires most candidates to be residents of their b. districts 30 days prior to filing for candidacy, which requires they know their district by February 15, 2012.
- That Nevada law allows independent candidates to begin circulating C. petitions on January 2, 2012, which may generally only be signed by registered voters or the relevant district.
- d. That on September 30, 2011, the State of Florida voted to move its presidential primary election to January 31, 2012, which will cause New Hampshire and Nevada to move their presidential caucuses to early January, 2012 or even late December 2011, in order to maintain their status as early primary states. Today, South Carolina announced that it would move its presidential caucuses to January 21, 2012.
- e. That Nevada law requires the county clerks to provide voter precinct information to the parties ahead of the presidential caucuses, but that the clerks will need to the new maps in order to redraw the precincts to provide accurate data to the parties.
- 3. Relief was not sought initially in the district court, because the Plaintiffs and various Intervenors argued at length in their briefs and during the September 21, 2011 regarding the need for the Respondent District Court to promptly decide the issues of law. Therefore the matter was brought to the Respondent's attention. Given the short time frame. seeking reconsideration in the District Court would likely lead to only more delay.
  - 4. I have notified the Respondent of this Emergency Writ Petition by emailing the

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same to Chris Erven, Judicial Assistant, at approximately 4:00 p.m. on October 6, 2011. I notified counsel for the real parties in interest by email to each of them at the addresses set forth in section 1, above, at approximately 4:00 p.m. on October 6, 2011.

Respectfully submitted this 6th day of October, 2011.

CATHERINE CORTEZ MASTO Attorney General

BY: VENUE DENICON

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### CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 6th day of October,

2011, 2011, I served a copy of the foregoing Petitioner's Emergency Motion Under

NRAP 27(e) for Limited Stay of District Court Proceedings, by email to the addresses

indicated.

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I further declare that I caused to be hand-delivered via Reno-Carson Messenger

Service, a copy of the foregoing Petitioner's Emergency Motion Under NRAP 27(e) for Limited

Stay of District Court Proceedings to:

Christine Erven

Judicial Assistant to Hon, James T. Russell c/o First Judicial District Court Clerk

885 East Musser Street

Carson City, Nevada 89701

Employee of the State of Nevada Office of the Attorney General