IN THE NEVADA SUPREME COURT

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LEAGUE OF WOMEN VOTERS OF LAS VEGAS VALLEY,

Petitioner,

vs.
FIRST JUDICIAL COURT OF THE

STATE OF NEVADA, IN AND FOR CARSON CITY, DEPARTMENT I,

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, ROSS

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

Real Parties in Interest

Electronically Filed Oct 19 2011 02:58 p.m. Tracie K. Lindeman Clerk of Supreme Court

SUPREME COURT NO. 59322

FIRST J.D. CASE NO. 11-OC-0042-1B DEPT. I

) PETITIONER'S SUPPLEMENTAL BRIEF
) AND ANSWER TO THE COURT'S
) OCTOBER 5, 2011 ORDER

Per the Nevada Supreme Court's October 5, 2011 Order to the "real parties in interest," the League of Women Voters of Las Vegas Valley hereby submits our "answer."

This Court is interested in the law concerning three issues:

1. Must our State Legislature complete its work and draw our final redistricting boundary lines?

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2. If the boundary lines that the Democratically controlled State Legislature draws, offend Governor Sandoval, may our Governor veto the bill that created these boundary lines?

3. What happens when elected officials/representatives cannot agree on a redistricting plan?

Fortunately, the following three cases answer all of these questions.

Article 4, Section 3(b) of the Illinois Constitution is almost a precise duplication of Article 4, Section 5 of the Nevada Constitution; therefore, the 7th Circuit decision below applies to our Nevada situation, and the first two questions above. What gives strength to this argument is there are no countervailing on point Nevada or 9th Circuit cases.

So the answers to the three questions are: 1. No, the
Legislature does not have to complete its work. 2. Yes,
Governor Sandoval may veto the Legislators' redistricting bill.

3. Yes, any properly designated Court, including the First
Judicial District Court in Carson City, may finish the
redistricting work that was not completed in the last
Legislative session. See:

Hastert v. Illinois State Board of Election Commissioners, 28 F.3d 1430 at 1435, Footnotes 1 and 2 (7th Cir. 1993). These issues are fleshed out in Williams v. Kerner, 195 N.E. 2d 680 (1963). The practical requirement for Courts to step in when

elected officials/representatives cannot agree on a redistricting plan has long been acknowledged; this necessity was reiterated in *Johnson v. Miller*, 922 F.Supp. 1556 at 1559 (S.D. Ga. 1995).

The League did this research and wrote the legal paragraphs above on October 14th; on October 17th we read Kevin Benson's outstanding 14 page brief on this same subject. The League agrees with everything in Mr. Benson's "Supplemental Brief" except his conclusion in his final paragraph.

When you read the October 14th concluding report of the Special Masters, only one thing comes to mind: Thomas Sheets Esquire, is sharper than a lot of other attorneys. In fact his legal knowledge, common sense, and understanding of redistricting is greater than the combined knowledge of all the attorneys that advised the Democrats and Republicans during the past legislative fiasco. And, the other two members of this redistricting panel are also heavyweights. Additionally, Kathy Steinle and Brian Davie had this panel's back; that's like having the brightest people on the planet having your back!

Our criticism of Judge Russell is that he *instructed the*Special Masters in one area of the law - where he could not have been more wrong - not that he failed to instruct the panel. As bad as Judge Russell's instructions were on the first issue, we would have hated to see him move to the other legal issues.

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As pointed out on page 3 of our September 16th "Final Response," almost any maps would have passed muster. The most recent and consecutive 12 U.S. Supreme Court (SC) cases that we cite on page 3, all hold in favor of the following principal: "They did their best, and that is good enough for us." The product the Special Masters produced could have been a lot worse and SC would have given their effort a green-light. Folks with far less training and lower IQs than the Special Masters could have satisfied the minimal requirements of the SC.

So there was no danger or legal problem in letting this high quality panel draw these maps. The problem was that Judge Russell bound their hands before they got started.

This case, Case Number 11-OC-00042-1B is basically over; but the League of Women Voters of Las Vegas Valley believes it is important to put something new in the record. We need to talk about the conduct of Judge James Todd Russell. The League, both locally and nationally, has never witnessed a judge perform like Judge Russell performed in this case.

Despite repeated submittals from the League on the importance of Abrams v. Johnson, 521 U.S. 74 (1997), and Brown v. Thompson, 462 U.S. 835 (1983), Judge Russell consistently refused to discuss or acknowledge these controlling Supreme Court cases. In 1997 Abrams set the acceptable and permissible numerical population deviations for Congressional Districts within a state. In 1983 Brown did the same thing with regards

to state Legislative races - hereafter, this *Brown* rule was known as the 10% rule, and it has proved *very helpful* to the people who have *done redistricting* for the last 28 years.

To give the Nevada Supreme Court a count of how many times the League has cited *Abrams*, and how many times Judge Russell has ignored or suppressed *Abrams*, we will list our submittals below:

Motion to Intervene - Filed on July 15th; Answer and

Response - Filed on July 19th; Reply to the Court's August 3,

2011 Order - Filed on August 10th; Response to the Other Parties'

Briefs - Filed on September 14th; Final Response to "The Other

Parties' Briefs" - Signed and mailed on September 16th, resigned and re-mailed on October 17th; Proposed Directives to the Special Masters - Filed on September 19th; Motion for Reconsideration - Filed on September 29th; Emergency Motion to Compel - Filed on October 6th.

The map that the League favored had a smallest to largest CD deviation of 183 people, but because of Judge Russell's Order to his Special Masters, our map could not be considered by the panel.

The League really felt that after our October 6th Motion to Compel, Judge Russell would rule on our September 27th Motion for Reconsideration, which was filed on September 29th. We were wrong. To this day, Judge Russell has never responded to our Motion. If Judge Russell answered this Motion he would have had

to discuss Abrams, and there is no way to examine Abrams without admitting that it is controlling. In the last paragraph of Abrams the SC states that there are "myriad factors" that will allow any state, at any time, to deviate from Congressional District (CD) numerical perfection - and that is what the SC meant! This was not an idle comment by the SC. To see how serious the Court was, one only needs to read the four member minority's dissenting opinion!

Since 1997 there has not been a single successful challenge to Congressional District (CD) population deviations; although Vieth had to get things straightened out in the Supreme Court - Vieth v. Jubelirer, 541 U.S. 267 (2004).

Abrams specifically allows any state to have a population deviation between their smallest to largest CDs of up to 0.35%. However, Abrams implies that this deviation could go as high as a full 1%, if a state has a good reason for doing so. Arkansas went to a full 1% deviation in 2001.

As of October 15, 2011 the 20 States listed in the following table have published Congressional District (CD) maps produced by their respective authorized procedures (e.g., Legislatures or independent commissions). Some are being challenged in the Courts, but the plans upon which these numbers are based are intended to be final. Of the 50 States, 7 have only one CD and do not have to change anything after the 2010

Census. Twenty-three of the remaining 43 States have not published any redistricting plans.

A common misconception is that our U.S. Constitution requires CD population differences to be close to zero. This misconception rests on a number of SC decisions, finishing off with Karcher v. Daggett, 462 U.S. 725 (1983). The next time the SC wrote about permissible deviations was in Abrams in 1997; and at that time the SC laid waste to the equal population theory. No longer were CDs required to have the same, or nearly the same, population numbers. From the table below, it is clear that one-fourth of these States followed Abrams. Three of these states have a population difference larger than the 183 in the Grassroots proposal.

State	Ideal	Deviation	Percentage
Alabama	682,819	1	0.00%
Arizona	710,224	1	0.00%
Arkansas	728,980	427	0.06%
California	702,905	1	0.00%
Georgia	691,975	2	0.00%
Hawaii	680,151	691	0.10%
Illinois	712,813	1	0.00%
Indiana	720,422	1	0.00%
Iowa	761,589	76	0.01%
Louisiana	755,562	162	0.02%
Michigan	705,974	1	0.00%

State	Ideal	Deviation	Percentage	
Nebraska	675,138	0	0.00%	
North Carolina	733,499	1	0.00%	
Ohio	721,032	1	0.00%	
Oklahoma	750,270	1	0.00%	
Oregon	766,215	2	0.00%	
South Carolina	660,766	1	0.00%	
Texas	698,488	1	0.00%	
West Virginia	617,665	4,871	0.79%	
Wisconsin	710,873	1	0.00%	

As noted above, West Virginia has a difference of 4,871 people, with a deviation 0.79% - West Virginia did not want to split its counties.

The League would have had no problem with Judge Russell's Order to the Special Masters if he had said something like: "I prefer that your four CD's get down to a one person difference, but a case called Abrams v. Johnson allows for a smallest to largest CD population deviation of up to 0.35%; if you chose to do so, for the sake of a better looking map, you may draw CDs within the allowable Abrams' limits. The same is true for your Legislative Districts. I would like you to get down to a few people difference between your Assembly and your Senate Districts, but a case called Brown v. Thompson allows for a smallest to largest deviation of up to 10%; so in drawing these

districts, I will allow you to follow the limits described in Brown."

The Nevada Supreme Court would not be reading our evaluation of Judge Russell if the Judge had given similar instructions to the Special Masters.

To bolster our analysis of Judge Russell we ask this Court to read the transcript, starting on page 12, from the September 21st hearing in Judge Russell's Courtroom. If you read these few pages about *Abrams*, and permissible Legislative population deviations, this Court will understanding our negative feelings and shock concerning Judge Russell.

I am sorry that I was not in the Carson City courtroom on September $21^{\rm st}$ to refute Marc Elias's description of *Abrams* - but the League was only informed of this hearing by Judge Russell's staff on September $20^{\rm th}$; and I had a full court calendar the next day in Las Vegas.

On Saturday, October 15th the Las Vegas Review-Journal had a story about the work of the Special Masters. The article by Ed Vogel, and the picture that accompanied this article, show that the Special Masters had finished their work on the boundary lines for all of their political districts. All of the panel's back-up information has been posted on the Nevada State Legislative Website, under the title of "Special Masters."

Compared to the highly gerrymandered, ugly, sharks-teeth CD boundary lines offered by the Democrats and Republicans during

the Legislative session, the work of the redistricting panel was a visible improvement. But the panel's CD maps could have been cleaner and sharper, with more easily recognized boundary lines if Judge Russell had allowed the Special Masters to deviate by a few hundred people between CDs - as allowed by Abrams.

Because of Judge Russell's de minimis requirements regarding Nevada State Assembly and Senate Districts, the work of the Special Masters, in this area, is marginal at best.

Allowing the panel to follow the 10% rule would have made a big difference in the look of their maps, the convenience to voters and elections officials, and the quality of their product.

Now, the League would like to discuss the 500 pound gorilla in the room - politics. Any decision concerning redistricting has a large political component. The last figures from the Clark County Election Department were published on 10/17/11, and they are as follows: Democrats 421,128; Republicans 286,003; for a difference of 135,125 voters, or 19.2%. Considering these numbers, the Democrats should have had a good chance to take all three Southern Nevada CDs - but when the Special Masters finished cutting these districts, this did not happen.

As of last Friday night, Joe Heck lives in a new geographic CD-3. This new CD-3, like Joe's last CD-3, is entirely within Clark County, but his political numbers have changed dramatically! Joe's new district had a Democratic registration advantage of 2.62% as of the 2010 General Election, but, this is

With this Republican advantage, a Democrat will never win in CD-3. The new CD-3 is nearly as Republican as CD-2 - but this time, in a heavily Democratic County! It takes creative work to make something like this happen - but, it is not illegal.

If you are a strongly partisan Republican Judge with the power to appoint, good things happen to Republicans - but, it is not illegal. The League has never made a secret of the fact that we like competitive races; we believe elected officials are more attentive to the needs of their constituents if they might lose their next race.

The Special Masters had an opportunity to carve three nongerrymandered highly competitive CDs in Southern Nevada; this is
precisely what the second "Grassroots" map did. But they chose
a different route. After this next general election, Nevada
will have two permanent Democratic Congressional
Representatives. These Reps will never again face a serious
challenge from anyone in either party. And as of last Friday
night our two Republican Congressmen are in the same position.
None of these four Nevadans will need to answer their mail or

return their phone calls to keep their jobs; for all intents and purposes, they will be permanent fixtures in Washington, DC.

Because this case is basically over, I have been directed by the leadership of the League to forgo a trip to Carson City on November 14th to make an oral presentation to the Nevada Supreme Court. Unless something extraordinary happens, this will be the League's last submittal in this case.

Additionally, the League notes that Judge Russell filed an Order on October 14th asking for "each party to this action" to file their "opposition briefs" by October $24^{\rm th}$ to the work of the Special Masters. The League will not be filing a formal opposition brief. The brief above will serve as our unofficial response, and the League will not be participating in Judge Russell's hearing on October 27th.

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Respectfully submitted this 19th day of October, 2011.

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CERTIFICATE OF SERVICE

I declare that on this 19th day of October, 2011, I served a copy of the foregoing Supplemental Brief and Answer to the Supreme Court's October 5, 2011 Order in re SUPREME COURT NO. 59322 and FIRST J.D. CASE NO. 11-OC-0042-1B DEPT. I by electronic mail to all parties, including the Nevada Supreme Court, with one exception. Per the request of the First Judicial District Court, their copy was sent this day by U.S. Mail.

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