No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and

STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

JOINT RESPONSE BY NEW MEXICO *AMICI* IN SUPPORT OF JOINT MOTION OF THE COMPACTING STATES TO UNSEAL

The New Mexico *amici*[1] hereby respond in support of the Joint Motion of the Compacting States to Unseal the Proposed Settlement Decree and Supporting Declarations ("Joint Motion to Unseal"), filed on November 23, 2022, Docket No. 728.[2] The New Mexico *amici* are the principal

[1] New Mexico *amici* include the City of Las Cruces ("Las Cruces"), the New Mexico Pecan Growers ("New Mexico Pecan Growers"), the Southern Rio Grande Diversified Crop Farmers Association ("Row Croppers"), New Mexico State University ("NMSU"), and the Albuquerque Bernalillo County Water Utility Authority ("Water Authority").

[2] New Mexico *amici* are only responding in support of the States' Joint Motion to Unseal. Pursuant to the Special Master's orders, none of the New Mexico *amici* have seen the United States' Motion to Strike (filed under seal) and they are not responding to that filing. Any references to the United States' positions seeking to prevent the states' settlement from proceeding are only general in nature and are offered herein because they are the "flip side" of the coin to the States' Joint Motion to Unseal filings related to the proposed Consent Decree.

water users within the Lower Rio Grande Underground Water Basin in New Mexico. The documents filed under seal set forth the terms of the settlement reached by the states of New Mexico, Texas, and Colorado, together with a proposed Consent Decree and supporting evidence from technical witnesses.[3]

The documents under seal are of great public interest and importance because they provide the context under which future intrastate administration within New Mexico will occur. There are approximately 15,000 water rights claimants in the Lower Rio Grande and administration of their water rights will be affected in perpetuity by the settlement of this case. In addition, concerns remain among tens of thousands of water rights owners above Elephant Butte Reservoir about potential impacts of the settlement. Right now, outside of the New Mexico legal team and New Mexico *amici* counsel, only ten actual water users are privy to the settlement documents – a minuscule fraction of those potentially impacted. It makes no sense.

Resolution of this original action involving the Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785, will affect millions of people who rely on a municipal water supply in New Mexico and Texas and an agricultural economy in Southern New Mexico and West Texas worth hundreds of millions of dollars. Under the *parens patriae* doctrine, New Mexico represents the interests of its citizens. *See, e.g., Kansas v. Colorado*, 185 U.S. 125, 142 (1902). Accordingly, all of New Mexico's citizens must have access to the settlement documents in order to effectively interact with New Mexico on future proceedings and the administration of water rights that will ensue.

The United States bears the burden of establishing a legal and factual justification to overcome the "strong presumption in favor of public access to judicial proceedings." *In re L.A.*

[3] The proposed Consent Decree is a settlement among the three states – the three parties – to the Rio Grande Compact. The United States' confidentiality claims make no legal sense and are a sideshow aimed to subverting the three-states settlement by preventing the Special Master from hearing the substantive issues resolved by the states. The United States will have the opportunity to address its role in relation to Rio Grande Project operations as a substantive matter when it sets forth its position in opposition to the states' motion to adopt the proposed Consent Decree.

Times Comms. LLC, 28 F.4th 292, 296-97 (D.C. Cir. 2022). It fails to do this. Instead, what the United States seeks in keeping secret the States' proposed Consent Decree is veto power over the settlement and a controlling role in New Mexico's intrastate administration. Relying on the provisions of the Confidentiality Agreement, that was agreed to within the *context of settlement negotiations*, it unreasonably seeks to prevent all publicly available data, information, and individuals' thoughts and ideas that culminated in the proposed Consent Decree from *ever* seeing the light of day – that is, unless the United States consents. This is untenable. If a confidentiality agreement executed in the normal course of settlement negotiations allowed such super-veto powers, litigants would never agree to them. What attorney would advise a *public* client in a multi-party litigation that it should proceed with 10 months of settlement negotiations, costing federal and state taxpayers millions of dollars, with the knowledge that another party could veto its ability to settle claims based on ideas shared, or offers made, during settlement negotiations? None would – it would be negligence to do so.

Here, the United States' positions are not only contrary to the public's welfare, but it also cannot show that it has ownership of any idea, thought, data, or idea contained in the proposed Consent Decree. It cannot show any need to protect trade secrets, patented or trademarked information, or that any information contained in the proposed Consent Decree, or its appendices, is owned by it or any of its experts. It simply seeks to hold the States hostage because it did not get the deal it wanted with respect to issues that can be resolved in other forums. *See United States v. Nevada*, 412 U.S. 534, 538-540 (1973). Its hostage-taking attempt should be rejected.

Further, under the United States' theory of confidentiality, no settlement can be reached and approved by the Court, over the objection of any party to the mediation, so long as the settlement terms included issues discussed in settlement. Even if no term of the proposed Consent Decree is attributed to the United States, the Special Master is disallowed from considering the proposed

Consent Decree over the United States' objection. A whole new settlement would need to be reached, based on terms never considered or negotiated in mediation. This position effectively means that there can be no settlement of this interstate case among the three States, holding them hostage and forcing them either to settle on the United States' terms or to go to trial after they have determined that trial is unnecessary.[4]

Recent precedent in the Court's original jurisdiction has permitted litigating states to settle without the United States. *See generally Florida v. Georgia,* 138 S. Ct. 2502 (2018). If the settling States here are forced to go to trial, the United States seeks to prohibit them from advocating anything that was subject of the mediation. No proposals or "good ideas" formulated during the mediation may be presented and advanced before the Special Master. The States would find themselves back at square one, compelled to take their respective original adversarial positions that they already agreed to resolve, but must keep secret. The United States' position is indefensible and not supported by law or common sense. It is not supported by either Fed. R. Evid. 408 or the terms of the Confidentiality Agreement. Moreover, the Court has "[t]ime and again….counselled States engaged in litigation with one another before [the] Court that their dispute 'is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States which are vitally interested than by proceedings in any court however constituted.'" *See Texas v. New Mexico,* 462 U.S. 554, 575 (1983).

As set forth in the Joint Motion to Unseal, nothing in the sealed documents discloses the United States' settlement positions. The United States simply does not, and cannot, meet the high burden of showing that the documents should be shielded from the public. The need for public access

[4] Other states should be aware of the United States' position in this respect before entering into settlement discussions with the federal government. In addition, the next time the United States seeks to intervene in an original action, the Court should be aware of the United States' unique position regarding its power to veto any settlement to which it is not a party but has participated in settlement negotiations.

to the proposed Consent Decree and accompanying documents significantly outweighs any purported interest in maintaining secrecy.

For all the reasons stated in the Joint Motion to Unseal, the proposed Consent Decree, Declarations and other documents held under seal should be unsealed and made available to the public.

Respectfully submitted this 5th day of December 2022.

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NEW MEXICO *AMICI'S*
CERTIFICATE OF SERVICE

This is to certify that on the 5th day of December 2022, I caused a true and correct copy of the *Joint Response by New Mexico Amici in Support of Joint Motion of the Compacting States to Unseal* to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of December 2022.

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