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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12
 13

14 **TIMOTHY A. DEWITT,**

Plaintiff,

15
 16 v.

17 **CALIFORNIA CITIZENS**
 18 **REDISTRICTING COMMISSION, a**
 19 **California agency; SECRETARY OF**
 20 **STATE OF THE STATE OF**
 21 **CALIFORNIA, ALEX PADILLA,**

Defendants.

3:15-cv-05261-WHA

**NOTICE OF MOTION AND MOTION
 TO DISMISS; MEMORANDUM OF
 POINTS AND AUTHORITIES**

Date: May 26, 2016
 Time: 8:00 a.m.
 Dept: 8, 19th Floor
 Judge: Hon. William Alsup
 Trial Date: None Assigned
 Action Filed: Nov. 17, 2015

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF:

PLEASE TAKE NOTICE THAT defendants California Citizens Redistricting Commission and California Secretary of State hereby move this Court for an order dismissing plaintiff's Second Amended Complaint (Dkt. # 24) in its entirety pursuant to rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The hearing on the motion will take place at 8:00 a.m. on May 26, 2016, or as soon thereafter as may be heard, before the Honorable William Alsup in Courtroom 8 on the 19th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102.

This motion to dismiss is made on the grounds that California's most recent redistricting was done on the basis of population, and redistricting by population does not violate the "one person, one vote" principle; that the districts of which plaintiff claims were drawn without consideration of the partisan makeup of the districts and therefore cannot constitute impermissible viewpoint discrimination; that the State has no obligation to conduct the investigation into the citizenship status of voters that plaintiff desires; and that plaintiff does not have standing to make these claims.

This motion is based on this Notice, the Memorandum of Points and Authorities, the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Dated: April 15, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/ George Waters
GEORGE WATERS
Deputy Attorney General
*Attorneys for Defendants California
Citizens Redistricting Commission and
California Secretary of State*

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

This motion is filed by defendants California Citizens Redistricting Commission (Commission) and California Secretary of State Alex Padilla (Secretary).

This case began with an omnibus complaint that made many disparate election-related claims against various state and federal officials. The Court earlier dismissed most claims with prejudice, but allowed plaintiff to amend his sixth claim for vote dilution. Plaintiff then filed a Second Amended Complaint (SAC) amending the sixth claim. Plaintiff's theory is that California's Assembly, Senate, and Congressional Districts were apportioned to have equal population, as opposed to equal numbers of "actual voters." This, he alleges, results in districts with very different numbers of "actual voters," in violation of the fundamental constitutional principle of "one-person, one-vote."

On April 4, 2016, the United States Supreme Court rejected a virtually identical challenge to Texas' state senate districts. The Court held that it is "plainly permissible" to equalize district populations by total population. *Evenwel v. Abbott*, ___ U.S. ___, 2016 WL 1278477, at *5 (Apr. 4, 2016.) As will be shown below, *Evenwel* requires that plaintiff's sole remaining claim be dismissed.

To the extent that the SAC attempts to assert claims for viewpoint discrimination in redistricting, and for vote dilution stemming from an alleged failure to investigate whether persons born in the United States are in fact entitled to vote, those claims are not plausible on their face and, in any event, plaintiff lacks standing to make those claims.

STATEMENT OF THE CASE**I. ORIGINAL COMPLAINT**

Plaintiff's original complaint made nine claims that various public officials had violated various provisions of the United States Constitution: (1) that 2 U.S.C. § 2c, which requires that all states' congressional delegations be elected from single-member districts, violates the Elections Clause, the Tenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments; (2) that the current Speaker of the House holds two offices (Speaker and his

1 individual seat as a Representative) in violation of Article I, Section 6; (3) that former Governor
2 Arnold Schwarzenegger could not become President because he is not a natural born citizen as
3 required by Article II, Section 1; (4) that the California Citizens Redistricting Commission lacked
4 authority to adopt redistricting plans because it is not a “Legislature” within the meaning of the
5 Election Clause (U.S. Const. art. 1, § 7, cl. 1); (5) that district residency requirements for voters
6 violate the Qualifications Clauses (U.S. Const. art. 1, § 2, cl. 2; art. 1, § 3, cl. 3) by imposing de
7 facto residency requirements on candidates; (6) that California’s redistricting plans violate the
8 “one person, one vote” principle of the Equal Protection Clause because, although the districts
9 have equal population, they have widely different numbers of actual voters; (7) that California’s
10 election system systematically discriminates against female voters in violation of the First and
11 Nineteenth Amendments; (8) that California’s requirement that an individual may run only for
12 one office in a single election violates the Qualifications Clauses (U.S. Const. art. 1, § 2, cl. 2; Art.
13 1, § 3, cl. 3); and (9) that the Clerk of the Supreme Court’s enforcement of Supreme Court Rule
14 18 (direct appeal from district court) violates Article II, Section 2, Clause 2. Named as
15 defendants were the Speaker of the House, the Redistricting Commission, the California
16 Secretary of State; former Governor Arnold Schwarzenegger, the Clerk of the Supreme Court,
17 and Does 1 through 100. Plaintiff also requested that all claims (save the ninth claim against the
18 Supreme Court Clerk) be assigned to a three-judge court pursuant to 28 U.S.C. § 2284.

19 The Court entered a sua sponte order dismissing all claims and denying the request to
20 appoint a three-judge panel. (Dkt. # 17.) Plaintiff was allowed to seek leave to amend the sixth
21 claim for vote dilution. The Court subsequently entered an order allowing granting plaintiff’s
22 motion to file an amended complaint. (Dkt. # 23.)

23 Once the Supreme Court issued the *Evenwel* decision, the Court entered an order requiring
24 plaintiff to show cause why the sole remaining claim (the sixth claim) should not be dismissed in
25 light of that decision. (Dkt. # 31.) Plaintiff filed a response to the OSC. (Dkt. # 32.) There has
26 been no ruling on the OSC.

1 **II. SECOND AMENDED COMPLAINT**

2 Plaintiff's Second Amended Complaint (SAC, Dkt. # 24) names the Redistricting
3 Commission and the Secretary as defendants. The SAC alleges that:

4 ¶ 12 The Commission has no ability to protect political minorities because it is
5 prohibited by an initiative measure from considering the political make-up of the
6 districts it draws.

7 ¶ 57 The Commission's districting plans "fall wildly short of the mark of actual voting
8 equality required by the fundamental constitutional principle of 'one person, one
9 vote'" because the districts are drawn to have equal total populations, as opposed
10 to equal numbers of "actual voters." Some districts in the northern part of the state
11 have four-and-one-half times the number of "actual voters" than districts in the
12 southern part of the state.

13 ¶ 58 Some districts with the highest numbers of "actual voters" are comprised
14 predominantly of members of the minority Republican political party, while
15 districts with the very lowest numbers of actual voters are comprised
16 predominantly of members of the majority Democratic Party. This constitutes
17 viewpoint discrimination in violation of the First Amendment.

18 ¶ 58a Plaintiff resides and is registered to vote in the 13th Congressional District, the 15th
19 Assembly District, and the 9th Senate District. He intends to vote for ballot-
20 qualified candidates in those districts in the 2016 primary and general elections.

21 ¶ 58b In the Assembly, Senate, and Congressional Districts in which plaintiff resides
22 (AD 15, SD 9, and CD 13), the number of actual votes cast in recent elections was
23 much higher (up to 431% higher) than in some other districts (AD 59, SD 33, CD
24 33). The number of actual votes cast in two other districts in the northern part of
25 the state (AD 10 and CD 1) was much higher (up to 490% higher) than the votes
26 cast in two districts in the southern part of the state (AD 59 and CD 34). The 1st
27 Congressional District (in which plaintiff does not reside) is a "high voting
28 strength" district represented by "a member of Plaintiff's minority Republican

1 political party,” while three “comparatively low voting strength” districts (34th
2 CD, 59th AD, 33rd SD) are predominantly comprised of “members of the majority
3 political party.”

4 ¶¶ 61-62 Defendant Secretary of State makes no effort to determine whether persons born in
5 the United States are actually citizens entitled to vote. The Secretary does not
6 investigate whether such persons were born “subject to the jurisdiction” of the
7 United States within the meaning of the 14th Amendment. This failure dilutes the
8 vote of constitutionally-qualified voters.

9 As relief, plaintiff seeks monetary damages and injunctive relief.

10 LEGAL STANDARDS

11 I. RULE 12(B)(1)

12 Rule 12(b)(1) allows a party to raise the defense that the court lacks “jurisdiction over the
13 subject matter” of a claim. “A motion to dismiss for lack of subject matter jurisdiction may either
14 attack the allegations of the complaint or may be made as a ‘speaking motion’ attacking the
15 existence of subject matter jurisdiction in fact.” *Thornhill Publ’g Co. v. Gen. Tel. & Elecs.*, 594
16 F.2d 730, 733 (9th Cir. 1979) (citations omitted). The instant Rule 12(b)(1) motion attacks the
17 allegations of the complaint. In such cases, and similar to the standards applicable to Rule
18 12(b)(6) motions, the district court must accept the allegations of the complaint as true. *Chandler*
19 *v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). However, where a
20 Rule 12(b)(1) motion is brought, the burden of proof is on the party asserting federal subject
21 matter jurisdiction. *Ibid.*

22 II. RULE 12(B)(6)

23 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
24 plaintiff’s “failure to state a claim upon which relief can be granted.” A motion to dismiss under
25 Rule 12(b)(6) tests the legal sufficiency of a complaint. *See Iletto v. Glock, Inc.*, 349 F.3d 1191,
26 1199-1200 (9th Cir. 2003). A complaint may be dismissed as a matter of law for two reasons: (1)
27
28

1 lack of a cognizable legal theory, or (2) insufficient facts under a cognizable theory. *See Navarro*
2 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

3 In reviewing the motion, the Court will assume the truth of all factual allegations and will
4 construe them in the light most favorable to the nonmoving party. *See Gompper v. VISX, Inc.*,
5 298 F.3d 893, 895 (9th Cir. 2002). However, the court is not bound to accept as true a legal
6 conclusion couched as a factual allegation. “When there are well-pleaded factual allegations, a
7 court should assume their veracity and then determine whether they plausibly give rise to an
8 entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009). However, the conclusions
9 contained in the pleading “are not entitled to the assumption of truth.” *Id.* In other words,
10 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
11 dismiss.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (citation and internal quotation
12 marks omitted). Moreover, “[f]actual allegations must be enough to raise a right to relief above
13 the speculative level, on the assumption that all the allegations in the complaint are true (even if
14 doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

15 In ruling on a motion under Rule 12(b)(6), the court may consider facts which may be
16 judicially noticed, *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987),
17 and matters of public record, including pleadings, orders, and other papers filed with the court.
18 *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

19 ARGUMENT

20 I. THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF 21 JURISDICTION AND FOR FAILURE TO STATE A CLAIM.

22 A. Under *Evenwel*, Districts Drawn to Have Equal Total Populations Do Not 23 Violate the “One Person, One Vote” Principle.

24 The SAC alleges that California’s redistricting plans violate the constitutional principle of
25 “one person, one vote” because the districts are drawn to have equal total populations, as opposed
26 to equal numbers of “actual voters.” (SAC ¶ 57.) In the recent *Evenwel* opinion, the Supreme
27 Court rejected a virtually identical challenge to Texas’ state senate districts, stating:

28 we reject appellants’ attempt to locate a voter-equality mandate in the Equal
Protection Clause. As history, precedent, and practice demonstrate, it is plainly

1 permissible for jurisdictions to measure equalization by the total population of state
2 and local legislative districts.

3 *Evenwel*, ___ U.S. ___, 2016 WL 1278477, at *5 (Apr. 4, 2016.) It is also plainly permissible to
4 measure equalization of congressional districts by total population. *Id.* at 18; *Wesberry v.*
5 *Sanders*, 376 U.S. 1, 18 (1964) (plain objective of the Constitution is to make “equal
6 representation for equal numbers of people the fundamental goal for the House of
7 Representatives.”) Thus the SAC does not state a claim for violation of the one-person, one-vote
8 principle.¹

9 **B. The Complaint Fails to Allege Intentional Viewpoint Discrimination in
10 Violation of First Amendment**

11 The SAC alleges that some districts with high numbers of “actual voters” are composed
12 primarily of Republicans, while some districts with lower numbers of “actual voters” are
13 composed primarily of Democrats, resulting in impermissible viewpoint discrimination in
14 violation of the First Amendment. (SAC ¶ 58.)

15 The Supreme Court has struggled with question of whether political gerrymander claims are
16 justiciable. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice White—whose plurality opinion
17 was the narrowest ground for decision—concluded that a political gerrymander claim could
18 succeed only where plaintiffs proved “both intentional discrimination against an identifiable
19 political group and an actual discriminatory effect on that group.” *Id.* at 127. In *Vieth v.*
20 *Jubelirer*, 541 U.S. 267 (2004), the Court affirmed the dismissal of a political gerrymander claim
21 but failed to produce a majority opinion. Four justices concluded that political gerrymander
22 claims are not justiciable. *Id.* at 305-306 (Scalia, J., joined by JJ. Rehnquist, O’Connor, and
23 Thomas). Five justices concluded that political gerrymander claims are justiciable, under various
24 theories, but all agreed that such claims require a showing of intentional discrimination. *Id.* at

25 ¹ The Court should note that plaintiff’s estimate of the variation in the number of “actual
26 voters” among districts (up to 450%) is due in large part to the idiosyncratic methodology he
27 employs. Plaintiff does not base his estimates on the number of registered voters, or on voting-
28 age population, or on citizen voting-age population. Rather he bases his estimates on the number
of people who actually voted at two separate elections. (See SAC ¶ 58b.) Common sense
dictates that the number of voters at an individual election can vary widely based on a number of
factors, such as whether there is an incumbent in the race and whether the race is contested by
both major political parties.

1 315 (Kennedy, J., concurring in judgment: gerrymander that has “purpose and effect of imposing
2 burdens on a disfavored party and its voters” may violate First Amendment); *id.* at 339 (Stevens,
3 J., dissenting: gerrymander claim requires showing that line-drawers “allowed partisan
4 considerations to dominate and control the lines drawn, forsaking all neutral principles”); *id.* at
5 350 (Souter, J., joined by Ginsburg, J., dissenting: gerrymander claim requires showing that
6 defendants acted intentionally to manipulate shape of district); *id.* at 367 (Breyer, J., dissenting
7 (partisan gerrymander may be shown where “partisan considerations render traditional line-
8 drawing compromises irrelevant”). The bottom line is that a partisan gerrymander claim must
9 allege—at the least—that district lines were intentionally drawn to disadvantage an identifiable
10 political group.

11 The SAC does not allege intentional discrimination. Rather plaintiff’s claim is that the
12 Redistricting Commission had a duty to consider the partisan makeup of districts, but did not do
13 so because California law forbids it. (SAC ¶ 12 (“Defendant Commission is also (impermissibly
14 and unconstitutionally) required, by initiative vote of a *simple-majority* of California voters
15 statewide, literally to turn a formal “blind-eye” to the partisan or political characteristics of their
16 districts”) (emphasis in original).)

17 Plaintiff is correct that the Commission could not and did not consider the partisan makeup
18 of the districts it drew. California voters created the Commission in 2008 to draw state legislative
19 lines, and in 2010 gave the Commission the added responsibility of drawing congressional lines.
20 Cal. Const., art. XXI, § 1; Proposition 11, approved November 4, 2008; Proposition 20, approved
21 November 2, 2010. The California Constitution requires that districts “shall not be drawn for the
22 purpose of favoring or discriminating against an incumbent, political candidate, or political
23 party.” Cal. Const., art. XXI, § 2, subd. (e). The SAC does not allege intentional discrimination
24 and therefore does not state a claim for political gerrymandering.

25 Further, plaintiff does not have standing to make this claim. *See Baker v. Carr*, 369 U.S.
26 186, 206 (1962) (“voters who allege facts showing disadvantage to themselves as individuals
27 have standing to sue”). Plaintiff alleges that he resides and votes in the 15th Assembly District,
28 the 9th Senate District, and the 13th Congressional District, and further alleges that these are high-

1 turnout districts. (SAC ¶ 58b.) Plaintiff does not allege that these districts are composed
 2 primarily of Republicans, thus he does not allege that he—as a Republican—has been injured by
 3 packing Republicans into these districts.²

4 **C. The Complaint Fails to Allege a Claim for Vote Dilution Through Failure**
 5 **to Investigate Whether Persons Born in the United States Are Lawful**
 6 **Citizens**

7 Plaintiff also claims that his vote is diluted because the Secretary does not investigate
 8 whether certain people born in the United States are actually lawful citizens and not what he
 9 refers to as “super-citizens.” (SAC ¶¶ 61-62.) This claim is made under the 14th Amendment,
 10 which states that “[a]ll persons born or naturalized in the United States, and subject to the
 11 jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S.
 12 Const. amend. XIV, § 1. In the *Slaughter-House Cases*, 83 U.S. 36, 73 (1872), the Supreme
 13 Court held that this section excludes from citizenship certain persons, mainly children of foreign
 14 diplomatic personnel, who were born in the United States: “The phrase, ‘subject to its
 15 jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and
 16 citizens or subjects of foreign States born within the United States.” *Id.*, p. 73. Apparently,
 17 plaintiff’s claim is that certain children of foreign diplomatic personnel, even if born in this
 18 country, are not “subject to the jurisdiction” of the United States, are not citizens, and are not
 19 eligible to vote.³

20 ² In fact, these districts all elected Democrats in the elections of which plaintiff
 21 complains. See Statement of Vote, November 4, 2014, General Election, p. 9 (AD 15), p. 6 (CD
 22 13), available at <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf>;
 Statement of Vote, November 6, 2012, General Election, p. 9 (SD 9), available at
<http://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> .

23 ³ As plaintiff explained in his Response to Order to Show Cause,

24 Plaintiff also presents a claim for further vote dilution (which really transcends the
 25 “districting” issue altogether, and affects all elections) based on the allegation that
 26 defendant Secretary of State mistakenly considers some persons born geographically
 27 in the United States to be citizens with full voting rights in the State, when as Plaintiff
 28 alleges, that is actually not the case with respect to those persons under the U.S.
 Constitution.

(Dkt. # 32, p. 12.)

1 As the Court stated in its sua sponte order dismissing the complaint, this allegation suffers
2 from the same standing defect as the remainder of the claim—plaintiff does not plead any facts
3 which would tend to show any impact on him. (Dkt. # 17, at 6, fn. 3.) Also, the allegation is
4 entirely conclusory and therefore is not entitled to the presumption of truth. *See Fayer v. Vaughn,*
5 *supra*, 649 F.3d at 1064.

6 The California Constitution requires voters to be citizens. Cal. Const. art. II, § 2 (“A
7 United States citizen 18 years of age and resident in this State may vote”). Additionally, state law
8 requires that all persons registering to vote attest, under penalty of perjury, that they meet all
9 voter eligibility requirements, including that they are United States citizens. (Cal. Elec. Code
10 §§ 2101, 2102, 2150.) The State has no legal obligation to undertake the investigation and search
11 for “super-citizens” that plaintiff desires. And even if it did, plaintiff has pled no facts to support
12 the conclusion that the current statutory system is inadequate.

13 **CONCLUSION**

14 For the reasons set forth above, the motion to dismiss should be granted without leave to
15 amend.

16 Dated: April 15, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/ George Waters
GEORGE WATERS
Deputy Attorney General
Attorneys for Defendants California
Citizens Redistricting Commission and
California Secretary of State

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **DeWitt, Timothy A. v. California Citizens Redistricting Commission, et al.**

No.: **3:15-cv-05261-WHA**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

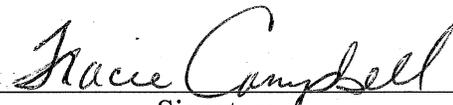
On April 15, 2016, I served the attached **NOTICE OF MOTION AND MOTION TO DISMISS; ;MEMORANDUM OF POINTS AND AUTHORITIES** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

Timothy A. DeWitt
2729 Dwight Way, No. 402
Berkeley, CA 94704

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 15, 2016, at Sacramento, California.

Tracie L. Campbell

Declarant



Signature