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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **(Oakland/SF Division)**

10 _____
11 **TIMOTHY A. DeWITT, on behalf**
12 **of himself and others similarly situated,**
13 **Plaintiff,**
14 **vs.**

Case No. 3:15-cv-5261 WHA
THREE-JUDGE CASE (28 U.S.C. §2284)
OPPOSITION TO MOTION TO DISMISS
Date: May 26, 2016
Time: 8:00 a.m.
Place: Courtroom 8

15 **CALIFORNIA CITIZENS REDISTRICTING**
16 **COMMISSION, a California agency;**
17 **SECRETARY OF STATE OF THE STATE**
18 **OF CALIFORNIA, Alex Padilla;**

19 **And DOES 1 through 100, Defendants.**

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1 Order for some reason.). And these single-judge interlocutory dismissals “on the merits” were
2 entered *sua sponte*, with no prior notice to Plaintiff whatsoever, in the manner perhaps of the
3 archetypal life-tenured single U.S. District Judge the “Three-Judge Act” was established by the
4 United States Congress to protect against (and in the interests of *all* litigants before the courts, not
5 just governmental defendants), in the first place.

6 Thus, Section 2284(b)(3) expressly provides: “Any action of a single judge may be
7 reviewed by the full court at any time before final judgment.” (*Id.*) Notably, this continuing
8 plenary jurisdiction to review any of the single-judge’s actions, held exclusively by the Three-
9 Judge Court itself, applies automatically, whether any party/ the plaintiff ever requests the Three-
10 Judge Court actually exercise it or not. Plaintiff, however, in fact does intend to request that they
11 exercise it (perhaps even *sua sponte* even if only to preserve aesthetic symmetry in the action)
12 especially because many of the Court’s January 12, 2016, interlocutory dismissals were plainly
13 entered “on the merits”, and Plaintiff believes they were erroneously entered, both procedurally
14 and substantively. (Again, see 28 U.S.C. §2284(b)(3) (no “judgment on the merits” by single
15 judge), Appellate Jurisdiction Clause of U.S. Const.; Separation of Powers doctrine (Art. III vs.
16 Art. I); Due Process/ three-judge avoidance by single-judge results in impermissible one-way
17 ratchet against challenging plaintiffs’ substantive claims; Appellate Due Process/steering of
18 plaintiffs’ appeals to court preferred by Defendants or single-judge, away from court specified by
19 Congress/federal statute.)

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II.

EVEN ASSUMING ARGUENDO THE COURT WERE TO REACH THE MERITS OF THE MOTION, PLAINTIFF'S ALLEGATIONS ARE PROPER AND SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

On the merits, Defendants argue that the allegations in Plaintiff's Sixth Claim for Relief fails to state a claim upon which relief can be granted. They rely heavily on the recently decided case Supreme Court case of *Evenwel v. Abbott*, 577 U.S. __ (Apr. 4, 2016). Defendants' reliance on *Evenwel* is fundamentally misplaced, however, and does not justify dismissal of Plaintiff's claims here.

The Plaintiff-Appellant(s) in *Evenwel* presented a very specific proposition to the Supreme Court: rule that the Fourteenth Amendment of the U.S. Constitution affirmatively requires that the State of Texas drop/abandon "total population" as the districting principle in state legislative districting plan, and replace it wholesale, or *in toto*, with "voter population." (Slip opin., at pp. 6- 7 ("Plaintiffs' chosen metric" & "appellants insist").) In response to this very specific, singular request, voluntarily posed precisely in that matter by the litigants in that case themselves (notably, it was certainly open to the *Evenwel* plaintiffs to prepare and present a proposed plan that simultaneously fully embraced both representational equality and voting equality, but they obviously made a pointed and conscious decision *not* to do that for some reason), the Supreme Court responded unanimously "no", the Fourteenth Amendment does not affirmatively require Texas to abandon "total" population, and replace it (wholesale) with an entirely different definition of "population", voter population. (Slip opin., at pp. 7-8.)

In presenting this perhaps stark, black & white, almost Manichean, choice to the Supreme Court (of "total population" vs. "voting population"), the challenging plaintiffs in *Evenwel* necessarily, and unfortunately, "bought into" what in this Plaintiff's (actually long-held) view is a glaring (and carefully constructed) "false dichotomy" between the supposedly competing or mutually-exclusive constitutional values or principles of "voting equality", on the one hand, and "equality of representation", on the other. Presented with this kind of stark "false choice",

1 originating from the plaintiff-appellant(s) themselves, the Supreme Court arguably had no choice,
2 within the four corners of that case, but to accept Appellant's own premise themselves, and
3 conclude that "no", if you are telling us that it's only a question of one or the other (voting
4 equality/voter population, or equality of representation/ total population), the Fourteenth
5 Amendment does *not* affirmatively require the wholesale sacrifice of "equality of representation/
6 total population" at the altar of "voting equality/ voter population." (Slip opin., at pp. 7– 8.)

7 As indicated above (and expressly reflected in the allegations of Plaintiff's
8 Complaint in this action), this Plaintiff in this action in no way "buys into" the glaring "false
9 dichotomy", or stark, formally fallacious (and therefore, yes, invidious and irrational) "false
10 choice" argument, that the Fourteenth Amendment somehow requires either "voting equality", or
11 "equality of representation", but not both.

12 Fact is, these are not mutually exclusive values or objectives in fact, and neither
13 should be falsely raised offensively as a sword against the other. In the same way that the *Evenwel*
14 litigants should not have attempted to raise the sword of "voting equality" offensively to displace
15 or diminish the value of "equality of representation" (all presupposing the existence of "districts"
16 at all of course), the California defendants in this action should similarly not be permitted to raise
17 the sword of "equality of representation" offensively to displace or diminish the value of actual
18 "voting equality." As Plaintiff expressly alleges, the California Defendants, by their districting
19 practices here, falsely and offensively assert that plans drawn solely on the basis of "total
20 population" equality (under the principle or value solely of "equality of representation"), are
21 categorically protected by a kind of constitutional "safe harbor" (under not just the Fourteenth
22 Amendment (as in *Evenwel*), but also as specifically alleged here, the Voter Qualifications Clause
23 (congressional elections) (expressly based on voting rights, and therefore permitting of no even *de*
24 *minimus* deviation from equality under the "one person, one vote" precedents), and the First
25 Amendment (viewpoint discrimination), involved in the Supreme Court's decisions in both the
26 *Vieth v. Jubilirer*, 541 U.S. 267, 315 (2004), and *Shapiro* cases). This is so, even though by the

1 very act of treating “total population equality” so brazenly and categorically as a legal “safe
2 harbor”, and making no additional effort whatsoever beyond that simultaneously to minimize
3 variances in actual voting strength from district-to-district, dramatic, “outrageous” deviations or
4 variances (having a cumulative, systematic or skewing effect on electoral influence and results
5 across the entire State), of as high as 490% in some cases (state assembly districts), are created and
6 maintained with no effort at correction by these California Defendants whatsoever.

7 In fact, the mere 40% maximum deviation in voting equality present in the *Evenwel*
8 case, while admittedly substantial in its own right, is relatively miniscule compared to California’s
9 490% deviations challenged in this action, and strongly suggests that considerable work has
10 already been done in Texas to reduce variances in “voting equality” across those districting plans,
11 work that has never even been attempted with California’s districting plans being challenged in
12 this action. By way of comparison, and if it really came down to it, this Plaintiff would take a
13 mere 40% maximum deviation (as present in *Evenwel*) in actual voting equality across all of
14 *California’s* districting plans “in a heartbeat” over the current *status quo ante* in this State. It
15 must also be noted in this connection, however, that the Court in *Evenwel* expressly left open the
16 question whether a state legislature, as in California here (and, presumably, also an Art. III court
17 exercising jurisdiction over the same issues), permissively *may* resolve any perceived irresolvable
18 or residual conflict between the values and objectives of “voting equality”, on the one hand, and
19 “equality of representation” on the other, in favor of actual “voting equality.” (See slip opin., at p.
20 19.)

21 Simply put, the value of “equality of representation/ total population equality”, as
22 important and valid as it is in its own right, creates no constitutional “safe harbor” whatsoever for
23 the kind of dramatic, systematic deviations or variances in actual voting strength/ voting equality
24 we see under California’s districting plans today, which are being challenged in this action. The
25 Supreme Court’s carefully crafted decision in *Evenwel* certainly creates no such artificial “safe
26 harbor” itself. (E.g., slip opin., at pp. 7-8 (“neutral”, “nondiscriminatory”, “rational”, “not

1 invidiously discriminatory” plans affirmatively *required*.) To say or think otherwise would be to
2 sanction or invite even the most deliberate, potently efficacious, undisguised, and perniciously
3 partisan, efforts at actual-voter “vote packing” in selected districts, and not just in California, but
4 all across the nation. And to allow the exact same result as such undisguised deliberate or
5 intentional actual-voter vote packing, via the mechanism of the fictitious legal theory -- based on a
6 formally fallacious and contrived “false dichotomy”, that “voting equality” and “equality of
7 representation” are somehow unavoidable mortal enemies of each other, a “false choice” originally
8 deliberately constructed in Plaintiff’s view by legally trained minds for the purpose of using
9 “equality of representation” offensively as a sword against “voting equality” -- that “total
10 population equality”, by itself, and without anything more, establishes a categorical constitutional
11 “safe harbor” for the California defendants here, would be equally impermissible under the
12 Constitution. And this is especially the case under both the Voter Qualifications Clause
13 (congressional elections) (no even *de minimus* variances permitted), and the First Amendment
14 (viewpoint discrimination) (to protect a minority political party, or minority geographical region of
15 the state, against actual vote dilution), neither of which were at issue in the *Evenwel* case at all.

16 In short, and fact is, “voting equality” and “equality of representation” are not
17 mutually exclusive values or principles. Neither should be asserted offensively as a “safe harbor”
18 against the other. Neither should be raised offensively as a sword to diminish or displace the
19 other. Both should be promoted and pursued simultaneously. And, in this day and age, when we
20 have “self-driving” automobiles, and “AI” computers that are now able to defeat the best human
21 competitors at the most complex board games (like “Go”) ever devised by the human mind, there’s
22 no way we cannot substantially reduce, if not completely eliminate, deviations in actual voting
23 strength from district-to-district, currently as high as 490% (by the way, which is more than *ten*
24 *times* more severe than the maximum deviations in “voter population” present in *Evenwel*) under
25 California’s current districting plans, while simultaneously maintaining a constitutional
26 commitment to the “equality of representation” value under the Fourteenth Amendment. If we

1 refuse even to attempt to do so, especially grounded in a carefully constructed, formally fallacious
2 (and, yes, politically motivated irrational and invidious) “false choice” legal theory, then we are no
3 better than O.J. Simpson *actively willing the glove not to fit*, at the behest of his own highly trained
4 and sophisticated legal counsel, “in open court.”

5 In the end, if it need be gainsaid, eliminating all district-based restrictions (on those
6 who “may choose” or “be chosen” in an election, see Fed. Papers No. 52 & 60 (J. Madison & A.
7 Hamilton)), which Plaintiff plainly claims are separately and deeply Constitutionally infirm
8 elsewhere in this action (and over which claims the actual Three-Judge Court which has yet to be
9 convened in this action has plenary continuing jurisdiction (28 U.S.C §2284(b)(3))), would itself
10 automatically eliminate all numerical deviations in both “voting equality” and “equality of
11 representation”, simultaneously, and with complete mathematical exactness.

12 In this Plaintiff’s view, then, and under the wisdom that “two wrongs do not make a
13 right,” the *Evenwel* litigants should no more have embraced the glaring *false dichotomy* between
14 “voting equality”, on the one hand, and “equality of representation”, on the other, in an effort to
15 displace “equality of representation” as a districting value (in Texas), than the legal minds who
16 originally constructed that “false choice” argument (again, in Plaintiff’s view) (see, e.g., *Garza v.*
17 *County of L.A.*, 918 F.2d 763, 773-776 (9th Cir.1990)) should have done so, or should continue to
18 be doing so to this day, for the purpose of using it offensively as a sword to diminish or displace
19 actual “voting equality” as a fundamental constitutional principle (in California).

20 These two fundamental principles, although distinct from one another conceptually,
21 both must and plainly can be, maximized/ harmonized in practice and in fact simultaneously, and
22 certainly far more effectively than California’s current wholly unbalanced districting plans do. We
23 should frankly acknowledge that sometimes the U.S. Constitution requires us to “walk” and “chew
24 gum”, *at the same time*. California’s current plans are based solely on “equality of
25 representation/total population”, treating that one principle as a categorical “safe harbor” to be
26 used offensively as a sword against all other constitutional values, and do nothing additionally, or

1 any more than that, to promote or protect actual “voting equality” across the state. This is so even
2 in the face of dramatic numerical variances in numbers of actual voters from district-to-district.

3 Finally, Plaintiff presents claims and arguments in this case, including the
4 “remaining” Sixth Claim for Relief, based on entirely separate provisions of the Constitution,
5 which were not involved in the *Evenwel* case at all, and which the Supreme Court therefore simply
6 had no occasion to consider or rule upon in that case. Plaintiff presents a claim for “viewpoint
7 discrimination” against the disfavored minority political party of the state, the Republican Party,
8 under the First Amendment of the U.S. Constitution (see *Vieth v. Jubelirer*, 541 U.S. 267, 315
9 (2004) (Kennedy, J., concurring), cited in *Shapiro v. McManus*, supra, (slip opin., at p. 7)), based
10 among other things, on the fact that defendant California Redistricting Commission is formally
11 barred by the law that created it (itself passed by *majority* vote via California’s statewide initiative
12 process) from noticing, much less actually protecting, the disfavored *minority* Republican political
13 party, from both district-specific and systematic political vote-diluting effects caused by the
14 dramatic variances in actual voting strength that exist from district-to-district under their current
15 congressional and state legislative districting plans. (See SAC ¶58.) Ditto for disfavored deep
16 geographical minority populations and voters in the far northern part of the State (e.g., CA C.D. 1)
17 having dramatically higher (i.e., many multiples greater) actual voting strength than some
18 counterpart districts in the more favored, more populous southern region of the State. (SAC ¶58b.)
19 And these variances are not to be viewed in isolation, one-by-one. They cumulate systematically,
20 one on top of the other, across the entire State. These issues simply were not present or involved
21 in the *Evenwel* case at all.

22 Plaintiff also presents a claim for further vote dilution (which really transcends the
23 “districting” issue altogether, and affects all elections) based on the allegation that defendant
24 Secretary of State mistakenly considers some persons born geographically in the United States to
25 be citizens with full voting rights in the State, when as Plaintiff alleges, that is actually not the case
26 with respect to those persons under the U.S. Constitution. (See SAC ¶¶ 61 & 62.) And, finally,

1 Plaintiff challenges defendants' California *congressional* districting plan (see, e.g., SAC ¶58b)
2 under the Voter Qualifications Clause of the U.S. Constitution (where a no-*de minimus*-deviations
3 standard, rather than a 10%-deviation standard under the Fourteenth Amendment, applies under
4 the applicable precedents, because that clause is expressly grounded in voting rights) (see
5 *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)) a claim which was also simply not present at
6 all in the *Evenwel* case, which involved only Texas "State Senate" districts.

7 Finally, it should also be noted that the *Evenwel* Court expressly left open the entire
8 question, if and where it really comes down to it, of whether state legislatures permissibly *may*
9 draw their districting plans with the balance tipped in favor of voting or electoral equality (rather
10 than representational equality), a discretion which necessarily includes lower Article III courts
11 (such as the Three-Judge Court which has yet to be convened in this action), having jurisdiction
12 over the selfsame issues. (See slip opin., at p. 19.)

13 **CONCLUSION**


14 For all of the foregoing reasons, Plaintiff respectfully submits the Court must deny
15 Defendants' Motion to Dismiss. The Court, sitting as a single judge, simply lacks jurisdiction over
16 this (potentially finally dispositive) Motion to Dismiss, which jurisdiction is reposed exclusively in
17 the Three-Judge Court duly requested by Plaintiff, but which has yet to be convened in the action.
18 Further, on the merits (and *arguendo*), Plaintiff's allegations in his "remaining" Sixth Claim for
19 Relief are proper and sufficient to state a claim upon which relief can be granted.

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21 Dated: April 28, 2016.

22 Respectfully submitted,

23 TIMOTHY A. DeWITT (CA 150631)

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25 By:


26 Timothy A. DeWitt
Attorney/Plaintiff, *Pro Se*

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CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the State of California. I am over the age of 18 and the attorney/plaintiff in the within action. My address is 2729 Dwight Way, No. 402, Berkeley, CA 94704-3100.

I am familiar with the business practices of this office for collection and processing of mail with the United States Postal Service, whereby official mail is attached with the appropriate postage and placed in a designated area. Mail so collected and processed is deposited with the United States Postal Service that same day and in the ordinary course of business. On the below date, I served a true and correct copy of the accompanying

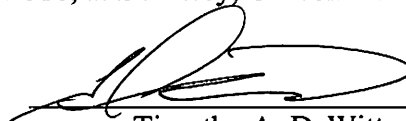
OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof in a sealed envelope in the designated area for outgoing mail addressed as follows:

**George Waters
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of April, 2016, at Berkeley, California.



Timothy A. DeWitt