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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DEWITT, Plaintiff, **v.** **CALIFORNIA CITIZENS REDISTRICTING COMMISSION, a California agency; SECRETARY OF STATE OF THE STATE OF CALIFORNIA, ALEX PADILLA,** Defendants.	3:15-cv-05261-WHA **DEFENDANTS' RESPONSE TO COURT'S REQUEST FOR BRIEFING ON THREE-JUDGE PANEL** Date: N/A Time: N/A Dept: 8, 19th Floor Judge: Hon. William Alsup Trial Date: N/A Action Filed: Nov. 17, 2015

Defendants California Redistricting Commission (Commission) and California Secretary of State Alex Padilla (Secretary) offer this response to the Court's request for briefing addressing whether defendants' motion to dismiss can be addressed by a single judge without convening a three-judge panel.

DEFENDANTS' MOTION TO DISMISS CAN BE ADDRESSED BY A SINGLE JUDGE WITHOUT CONVENING A THREE-JUDGE PANEL

28 U.S.C. § 2284 states that a "district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." However, not all apportionment claims trigger the need to convene a three-judge panel. Claims that are constitutionally insubstantial—a concept equated with concepts such as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit"—do not raise a substantial federal question for jurisdictional purposes and may be dismissed by a single judge. *Shapiro v. McManus*, ___ U.S. ___, 136 S.Ct. 450, 456-457 (2015).

The sole remaining claim in the Second Amended Complaint (SAC) can be read to make three different claims. No matter how it is read, the SAC is frivolous and does not require reference to a three-judge panel.

I. THE "ONE PERSON, ONE VOTE" ALLEGATIONS ARE FRIVOLOUS AND DO NOT REQUIRE REFERRAL TO A THREE-JUDGE PANEL.

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

> we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.

Evenwel v. Abbott, ___ U.S. ___, 136 S.Ct. 1120, 1126-27 (2016). *Evenwel* also noted that it is plainly permissible to measure equalization of congressional districts by total population. *Id.* at 1129; *see also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (plain objective of the Constitution is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives"). The Court's opinion in *Evenwel* was joined by six justices. While there were two concurring opinions, both agreed that districting on the basis of total population is plainly permissible. *Id.* at 1133 (Thomas, J., concurring: "I agree with the majority that our precedents

do not require a State to equalize the total number of voters in each district[;] [s]tates may opt to equalize total population"); *id.* at 1142 (Alito, J., concurring: "Both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule").

To the extent that the SAC can be read to claim that the "one person, one vote" principle requires that districts be drawn to equalize both total population and eligible-voter population, that claim also is squarely rejected by *Evenwel*. *Evenwel*, 136 S.Ct. at 1133, fn. 15 ("Insofar as appellants suggest that Texas could have roughly equalized both total population and eligible-voter population, this Court has never required jurisdictions to use multiple population baselines").

After *Evenwel*, plaintiff's one person, one vote claim is frivolous.

II. THE VIEWPOINT DISCRIMINATION ALLEGATIONS ARE FRIVOLOUS AND DO NOT REQUIRE REFERRAL TO A THREE-JUDGE PANEL.

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

The Supreme Court has struggled with question of whether political gerrymander claims are justiciable. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice White—whose plurality opinion was the narrowest ground for decision—concluded that a political gerrymander claim could succeed only where plaintiffs proved "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Court affirmed the dismissal of a political gerrymander claim but failed to produce a majority opinion. Four justices concluded that political gerrymander claims are not justiciable. *Id.* at 305-306 (Scalia, J., joined by JJ. Rehnquist, O'Connor, and Thomas). Five justices concluded that political gerrymander claims are justiciable, under various theories, but all agreed that such claims require a showing of intentional discrimination. *Id.* at 315 (Kennedy, J., concurring in judgment: gerrymander that has "purpose and effect of imposing burdens on a disfavored party and its voters" may violate First Amendment); *id.* at 339 (Stevens,

J., dissenting: gerrymander claim requires showing that line-drawers "allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles"); *id.* at 350 (Souter, J., joined by Ginsburg, J., dissenting: gerrymander claim requires showing that defendants acted intentionally to manipulate shape of district); *id.* at 367 (Breyer, J., dissenting: partisan gerrymander may be shown where "partisan considerations render traditional line-drawing compromises irrelevant"). The bottom line is that a partisan gerrymander claim must allege—at the least—that district lines were intentionally drawn to disadvantage an identifiable political group.

The SAC does not allege intentional discrimination. Rather plaintiff's claim is that the Redistricting Commission had a duty to consider the partisan makeup of districts, but did not do so because California law forbids it. (SAC ¶ 12 ("categorically failing or refusing even to consider the partisan political make-up of various areas or regions across the state . . . strips Defendant COMMISSION of any ability to protect political minorities (e.g., members of the minority Republican political party in the state)[.] . . . Defendant Commission is also (impermissibly and unconstitutionally) required, by initiative vote of a *simple-majority* of California voters statewide, literally to turn a formal "blind-eye" to the partisan or political characteristics of their districts") (emphasis in original).)

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

In *Shapiro*, the Court held that § 2284 required the appointment of a three-judge court where the complaint challenged an apportionment of congressional seats "along the lines suggested by Justice Kennedy" in his concurrence in *Vieth*. *Shapiro*, *supra*, 136 S.Ct. at 456.

Although the *Vieth* plurality thought all political gerrymander claims nonjusticiable, Justice Kennedy's concurrence concluded that a claim could be stated where it was alleged that a gerrymander had the "'purpose and effect'" of imposing burdens on a disfavored party and its voters. *Id.*, quoting *Vieth*, 541 U.S. at 315.) *Shapiro* concluded that this was enough to trigger a three-judge court: "Whatever 'wholly insubstantial,' 'obviously frivolous,' etc., mean, at a minimum they cannot include a plea for relief based on a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases." *Ibid.* In contrast to *Shapiro*, here there is no support whatsoever for plaintiff's theory that the Commission's *failure* to consider the partisan makeup of districts constitutes unconstitutional viewpoint discrimination. This theory is contradicted by all members of the *Vieth* court, four of whom concluded that political gerrymander claims are not justiciable, and five of whom concluded that such claims are justiciable where district lines are intentionally drawn to disadvantage an identifiable political group.

Further, plaintiff does not have standing to make this claim. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue"). Plaintiff alleges that he resides and votes in the 15th Assembly District, the 9th Senate District, and the 13th Congressional District, and further alleges that these are high-turnout districts. (SAC ¶ 58b.) Plaintiff does not allege that these districts are composed primarily of Republicans; thus he does not allege that he—as a Republican—has been injured by packing Republicans into these districts.

III. THE VOTE DILUTION ALLEGATIONS DO NOT RELATE TO APPORTIONMENT AND THEREFORE DO NOT REQUIRE REFERRAL TO A THREE-JUDGE PANEL.

The SAC alleges that plaintiff's vote is diluted because the Secretary does not investigate whether certain people born in the United States are actually lawful citizens and not what he refers to as "super-citizens." (SAC ¶¶ 61-62.) This claim is made under the 14th Amendment, which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. In the *Slaughter-House Cases*, 83 U.S. 36, 73 (1872), the Supreme

Court held that this section excludes from citizenship certain persons, mainly children of foreign diplomatic personnel, who were born in the United States. *Id.* at 73. Apparently, plaintiff's claim is that certain children of foreign diplomatic personnel, even if born in this country, are not "subject to the jurisdiction" of the United States, are not citizens, and are not eligible to vote.

Section 2284 requires a three-judge court only when an action is filed "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Plaintiff's vote-dilution allegations do not challenge the apportionment of California's congressional and legislative districts and therefore do not require referral to a three-judge panel.

Dated: April 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **DeWitt, Timothy A. v. California Citizens Redistricting Commission, et al.** No. **3:15-cv-05261-WHA**

I hereby certify that on April 21, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' RESPONSES TO COURT'S REQUEST FOR BRIEFING ON THREE-JUDGE PANEL

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On April 22, 2016, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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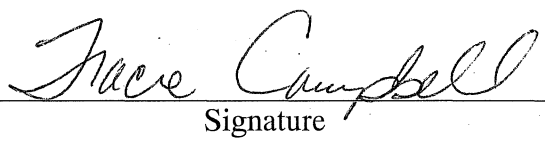
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 22, 2016, at Sacramento, California.

Tracie L. Campbell
Declarant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