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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CITIZENS FOR FAIR REPRESENTATION; CITY OF FORT JONES; THE CALIFORNIA LIBERTARIAN PARTY; THE CALIFORNIA AMERICAN INDEPENDENT PARTY; THE MARIN COUNTY GREEN PARTY; MARK BAIRD; JOHN D'AGOSTINI; LARRY WAHL; SHASTA NATION INDIAN TRIBE; ROY HALL JR; WIN CARPENTER; KYLE CARPENTER; PATTY SMITH; KATHERINE RADINOVICH; DAVID GARCIA; LESLIE LIM; KEVIN MCGARY; TERRY RAPOZA; HOWARD THOMAS; MICHAEL THOMAS; STEVEN BAIRD; MANUEL MARTIN; OTHERS SIMI-LARLY SITUATED; AND DOES 1-30,

Plaintiffs,

v.

SECRETARY OF STATE ALEX PADILLA,

Defendant.

Case No.: 2:17-cv-00973-KJM-CMK

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Hearing Date: August 25, 2017
Hearing Time: 10 a.m.
Judge: Hon. Kimberly J. Mueller
Courtroom: 3

Trial Date: N/A
Action Filed: May 8, 2017

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I. INTRODUCTION

Plaintiffs allege California's constitutional prohibition on increasing the number of legislative members - beyond 40 in the senate and 80 in the assembly - no matter how large its population and legislative districts grow, is anti-democratic and anti-republican, and causes the votes of plaintiffs to be abridged and diluted[1]. Plaintiffs allege California's longstanding enforcement of this arbitrary cap, limiting the number of legislators ruling California, interferes with their personal right to participate in the standards of representative self-governance as they exist today under the U.S. Constitution, its Amendments, treaties, statutes, and customary international law.

Given the dramatic changes in personal voting and self-governance rights in the United States and the world since the American Revolution, Civil War, and World War II[2] the main focus of the controversy between defendant Padilla, California's Secretary of State (hereafter referred to as "Padilla or Secretary") is about the contours of these personal rights to vote and be governed as well as how that law applies in both the State and Federal governments.

California's history gives unique context to the consideration of these issues because of the way infamous invidious racial discrimination affected the substance of its 1849 and 1879 constitutions. All Plaintiffs allege over time California's maintenance of racially animated constitutional practices, including without limitation the arbitrary cap on the number of its legislators, has diluted their personal vote and minimized their personal rights to participate in self-

[1] As pointed out in note 1 to Plaintiffs' First Amended Complaint (FAC) over 35,500,000+ residents have been added to California's population since 1862 - yet California has not added a single representative to represent this vast body of people.

[2] *Compare* Richard Briffault, 2002, Review: "The Contested Right to Vote", Columbia University Academic Commons, https://doi.org/10.7916/D81C1X4G and FAC 10:1 -10.86. The article discusses the evolution and contraction of voting rights from the time of this nation's founding through 2002. Id., at pp. 1509 - 1531. The FAC also includes those domestic events documented in the article, but also includes world events and references to those treaties and conventions following World War II which shaped the evolution of self-governance rights as part of the norms civilized nations.

governance. This injury occurs because California's arbitrary and unconstitutional cap on the number of elected legislators has resulted in a situation where 120 elected officials do not and cannot represent the constituents in their arbitrarily bloated with people legislative districts. Each plaintiff claims he/she/it is personally aggrieved by legislator's inability to represent, i.e. serve, the large population of people living in each legislative district. The oligarchic system which has been created by the constitutional cap concentrates all legislative power in 120 people. This emphasizes the accumulation of money to get elected over performing the representative's primary duty, which is serving the constituents living in the legislative district.

The lead plaintiff is the Committee for Fair Representation (CFR), a non-profit corporation which educates people about the peoples' personal rights to representative self-governance under the United States and California Constitutions. Plaintiffs Win Carpenter, Kyle Carpenter, Roy Hall, Jr., and the Shasta Indian Nation (FAC ¶¶ 12.4 (C), & (H)) are Native American Indians who are personally injured by California's constitutional denial of their rights through invidious discrimination in its constitutions and subsequent enactment of legislation which have prevented them from participating in self-governance, even as it has evolved over time.

Plaintiffs and Leslie J. Lim and Raymond Wong (FAC ¶¶ 12.4 (J) & (S)) are persons of Chinese and Asian descent. They claim provisions of California's 1879 constitution were intended to invidiously discriminate against people of their race and to insure that white men, as opposed to people of all other races, retained the power to rule California, regardless of the number of non-whites which lived in California. Plaintiffs Cindy L. Brown and Kevin McGarry (FAC ¶¶ 12.4(B) & (K)) are African Americans. Plaintiff David Garcia is Hispanic (FAC ¶12.4 (G)). All allege California's invidiously race based constitutions, and the continued maintenance of invidiously race based practices contained therein (including the "cap"), have abridged and diluted the

value of their votes and adversely affected their personal ability to participate in representative self-governance and will continue to do so in the future until "the cap" is declared unconstitutional.

All plaintiffs allege the continued maintenance of the 120 member "cap" on the legislature, and those practices developed to maintain it (i.e. adding staff instead of needed additional legislators) has caused gross malapportionment. Further, all plaintiffs allege the creation and maintenance of a 120 member legislative oligarchy for all of California causes concrete, personal injuries to each of them (including the political parties, competitive political candidates and CFR) because this malapportionment frustrates each of those plaintiff's rights to participate in a constitutionally sufficient form of representative self-governance at the State level.

Many plaintiffs also allege they have been injured personally by California retaliating against them for exercising their rights to political free speech to denounce the "cap". Their allegations as well as the methods of retaliation vary widely.

People in Sutter, Yuba, and Butte Counties allege the failure to maintain the Oroville Spillway was retaliation against the people in these districts because of their challenges to the oligarchy, which refused to represent them and their interests. *See e.g.* ¶¶ 12.4(D); (M); (Q); & (R). Plaintiffs believe it will be difficult for the Secretary to seriously argue that being forced to evacuate from one's home because they and their neighbors politically challenged California's oligarchy is not a sufficiently concrete injury upon which to premise standing.

Similarly, people who vocally supported the Jefferson movement have alleged they were retaliated against personally by way of California officials threatening their county representatives not to challenge the oligarchy or risk the loss of economic aid. *Id.* ¶¶ 12.4 (F), (N), (Q), & R. *See also* FAC ¶¶ 12.4(A) ¶¶ 12.12-12.17. Indeed, even competitive political candidates have

alleged retaliation by the Oligarchy because when they ran for office against Democrats they suddenly found themselves being audited by government tax authorities. FAC ¶ 12.7. Of course, such retaliation and threats of harm chills the desire of people to run for office and hampers third parties ability to find candidates who truly want to represent the people in legislative districts.

II. CALFORNIA'S INFAMOUS, INVIDIOUS, DISCRIMINATORY CONSTITUTIONS

California's 1849 and 1879 Constitutions cannot be reconciled with the holding of *Even-wel v Abbott*, 136 S. Ct. 1120 (2016) that legislators under both the Federal and State systems were intended to represent ***all*** the people in their district, not just actual voters. California never rejected the principle of legislators representing ***all*** the people in their district.

"At the first State [California] Constitutional Convention, those assembled voted to eliminate the Indians' right to vote because they feared the control Indians might exercise.[3]" Disenfranchising Native Americans based on ethnicity is evidence California's founders did not want them to vote or be represented. This was confirmed shortly thereafter when, as Dwight Dutscke chronicles, the California legislature passed statutes which were utilized to make Native American Indians slaves and deprive them of their most basic liberties.

> In 1850, an Act for the Government and Protection of Indians was enacted by the first session of the State Legislature. This law set the tone for Indian-White relations to come.
>
> The act provided for the following: 1. The Justice of the Peace would have jurisdiction over all complaints between Indians and Whites; "but in no case shall a white man be convicted of any offense upon the testimony of an Indian or Indi-

[3] See FAC, ¶ 10.16; 10.29-30; See also Dwight Dutschke, "A History of American Indians in California", pp. 7, which can be accessed at http://ohp.parks.ca.gov/pages/1054/files/american%20indians%20in%20california.pdf

The article was reprinted from "Five Views: An Ethnic Historic Site Survey for California", NPS online books: https://www.nps.gov/search/?affiliate=nps&query=A+History+of+American+Indians+in+California. Because these are governmental web sites this Court may take judicial notice of the facts set forth therein.

> ans." ... 3. Whites would be able to obtain control of Indian children. (This section would eventually be used to justify and provide for Indian slavery.) 4. If any Indian was convicted of a crime, any White person could come before the court and contract for the Indian's services, and in return, would pay the Indian's fine. ... 6. Indians convicted of stealing a horse, mule, cow, or any other valuable could receive any number of lashes not to exceed 25, and fines not to exceed $200. (It should be noted that the law provided that abusing an Indian child by Whites was to be punished by no more than a $10 fine. It is hard to compare the penalty with the crime.)
>
> * * *
>
> In 1860, the law of 1850 was amended to state that Indian children and any vagrant Indian could be put under the custody of Whites for the purpose of employment and training. Under the law, it was possible to retain the service of Indians until 40 years of age for men and 35 years of age for women. *Id.*

Following ratification of the 1849 constitution California also enacted invidious unconstitutionally discriminatory legislation against persons of Chinese and Asian descent. The California Supreme Court declared some of these laws to be unconstitutional in 1862: "No one can read these [laws] and fail to see that they are all directed by the same spirit; hostility to the Chinese, and an intention to banish them from the country." *Lin Sing v. Washburn*, 20 Cal. 534, 538-9 (1862). *See also* FAC, ¶ 10.42 & note 12; Greg Seto, "'*The Chinese Must Go': The Workingmen's Party and the California Constitution of 1879*", pp. 9-10 (2013)[4].

After devastating the Native American race by enacting the 1849 constitution, the Californians were ready to disenfranchise the Asian races. By the 1870s there were calls for California's Constitution to be amended to discriminate against the Chinese, Mongolian, and Asiatic Coolieism so that they could be killed or banned from living in California. *Id.*, pp. 10-18. Tensions were so high about this issue that in 1877 the San Francisco Chronicle published the manifesto of the Workingmen's Party, which stated in part:

> We have made no secret of our intentions. We make none. Before you and before the world we declare that the Chinaman must leave our shores. We declare that ***white men, and women, and boys, and girls,*** cannot live as the people of the great

[4] Seto's article can be accessed: http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2013-Seto.pdf.

> republic should and compete with the single Chinese coolie in the labor market. We declare that we cannot hope to drive the Chinaman away by working cheaper than he does. . . . ***To an American, death is preferable to life on par with the Chinaman***. (Emphasis Supplied)

Id., p. 12. The leader of the Workingmen's party was arrested for threatening: "I will lead you to the city hall, clear out the police force, [and] hang the prosecuting attorney…" Id., 13. In November 1877 representatives of the Chinese communities wrote the Mayor of San Francisco:

> In the multitude of responsibilities which tax your time and strength, it may possibly have escaped your notice that large gatherings of the idle and irresponsible element of the population of this city are nightly addressed in the open streets by speakers who use the most violent, inflammatory, and incendiary language, *threatening in plainest terms to burn and pillage the Chinese quarter and kill our people unless, at their bidding, we leave this "**free republic**."* . . . [W]e (as on a former occasion) appeal to you, the mayor and chief magistrate of this municipality, to protect us to the full extent of your power in all our peaceful, constitutional and treaty rights against all unlawful violence and all riotous proceedings now threatening us.

Id., 13. (Emphasis Supplied)

Since the passage of the 1849 California Constitution, regular efforts had been made by the California Legislature to adopt a new constitution. *Id.*, 14. Such efforts failed in 1857, 1859, 1860, and 1873. *Id.* It was only in September, 1877, that a second constitutional convention was authorized, primarily for the purposes of protecting whites by discriminating against Chinese and other Asian people. *Id.* At that constitutional convention 50 of the 152 delegates were Workingmen's Party members, who professed racial animosity against non-whites. *Id.* 13 -14[5].

[5] The desire to have a constitutional anchor to discriminate against Chinese, Mongolians, and other Asiatic "Coolies" to benefit the white race was described as one of two reasons the 1879 constitutional convention was held. Id., 14 citing E.B. Willis and P.K. Stockton, stenographers, Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878, Vol. II,

The Constitutional provision dubbed "Art XIX: CHINESE"[6] was promptly found to be unconstitutional under the Fourteenth Amendment, the Supremacy Clause, and the Burlingame Treaty[7]. *See In re Parrott*, 1 F. 481, 6 Sawy. 349 (C.C.D. Cal. Mar. 1, 1880). California's racist delegates who ratified the provision appeared not to care. One of their reasons for including such racially inflammatory and obviously unconstitutional language in California's constitution was to make the people back "East" understand California had no intention of being constrained by the Fourteenth Amendment[8]. California continued to make this point clear until 1952 when Art. XIX was repealed.[9]

In 2009 California publicly owned the intentional, invidious discrimination it committed against the Chinese. *See* California Assembly Concurrent Resolution 42, Chapter 79[10]. CFR and plaintiffs contend this Resolution is an admission of the wrongdoing which occurred in the 1879 Constitution and resulted in the 120 member cap on the number of legislators. This cap caused the greatest malapportionment ever known in the United States. The purpose of this constitution-

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[6] To view: http://jhameia.tumblr.com/post/791838445/article-xix-chinese-section-1-the-legislature

[7] *See also* Seto, pp. 20-31.

[8] Seto reports:

> Clitus Barbour, a San Francisco attorney who was a delegate of Workingmen Party made it clear the new Constitution was intended to shock the sensibilities of the people of the East, so that they would realize that *the Californians were in earnest, even if barbarous and cruel*.

Seto, 17. See also *Id.*, pp. 18-20.

[9] When California officially apologized for its intentional, arbitrary, and unconstitutional discrimination it admitted that it knowingly enforced this provision for over 70 years.

> WHEREAS, Former Article XIX of the California Constitution, which was adopted in 1879 and unfairly targeted and discriminated against Chinese living in California, remained in effect for 73 years until it was repealed in 1952;

See note 6. *See also* Seto, 31-4. See also *Yick Wo v Hopkins*, 118 U.S. 356 (***1886***)(Emphasis supplied)

[10] Plaintiffs request this Court take judicial notice of this resolution which is on the legislature's web site at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/acr_42_bill_20090717_chaptered.html.

al "cap" was to insure that white men (women had not yet been granted suffrage) would always remain in control of California's legislature.

And the facts pleaded in the FAC show this purpose is still being achieved. See FAC:

> ¶4.2 According to the Census Bureau data 50% (18,517,830) of the people were males and 50% (18,736,126) were females.
> ¶4.3 Approximately 38% of California's population are Caucasian
> ¶4.4 Approximately 37% of California's population is Hispanic.
> ¶4.5 Approximately 13% of California's population is of Asian descent.
> * * *
> ¶4.7 Approximately 12.6 % of California's population is disabled.
> ¶4.8 Approximately 6% of California's population is African-American.
> ¶4.9. Less than 2% of California's population is indigenous and includes Native American
> * * *
> ¶5.1 Since 1862 the people of California have been represented by 40 Senators.
> ¶5.2 As of today 78% (31) of the Senators are men, and 22% (9) are women. 78% (31) of the Senators are Caucasian, 12.5% (5) are Hispanic; 5% (2) are Asian/Pacific Islander, and 5% (2) are African American. On information and belief no Senators are disabled. On information and belief no Native American Indians have ever been elected to the California Senate notwithstanding they once comprised the largest group of people living in California.
> ¶5.3. Since 1854 the people of California have been represented by 80 Assembly members. As of today 79% (63) of the Assembly members are men and 21% (17) are women. 46% (37) of the Assembly members are Caucasian, 28% (22) are Hispanic; 14% (11) are Asian/Pacific Islander, and 10% (8) are African American. On information and belief no Senators are disabled and none are identified as Native American Indians. On information and belief no Native American Indians have ever been elected to the California Assembly notwithstanding they once comprised the largest group of people living in California.

FAC, pp. 7-8.

The FAC also alleges California's ingrained arbitrary legislative 120 member "cap" for a population that is almost 40,000,000 and still growing violates both the federal structure and overall representational nature of our government. *See Evenwel*: "By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation [which involves] [s]erving constituents and supporting legislation that will benefit the district and individuals and

groups therein…" *Id*, 136 C. Ct. at 1132. This observation is true only to the point where a legislator can actually serve *and attempts to serve the constituents who live in his or her district.*

So far as plaintiffs know there is no evidence our founders after the Revolutionary and Civil Wars contemplated dialing for dollars to fund campaigns (which cost on average over $700,000 to win) in California would ever be a primary function of state legislators. The expectation was legislators would serve the people in their district and that their constituents would have meaningful access to their representatives

Plaintiffs FAC set forth facts indicating the people in Northern California began complaining about lack of representation, *i.e*. the legislative oligarchy, before World War II started and have continued to complain about lack of meaningful representation ever since. *See* FAC re: facts related to Jefferson movement at paragraphs ¶¶ 10.49-10.51; 10:70-10.84.

In 1940, one year before Pearl Harbor, the approximate population of California was 6,750,000; the population of a senate district was 173,750; and the population of an Assembly district was 86,875. See FAC Ex. 1.

For well over a half century the people in the Jefferson movement complained to their own legislators (as well as all 120 members of the by then California legislative oligarchy) that their legislative representation was so bad they wanted to invoke a State split pursuant to U.S. Const., Art. IV, § 3, cl. 1. They were treated as if they had proposed something illegal. They hadn't. How do you think Maine was created?

Most Californians realized by the early nineties the State's malapportioned 120 member oligarchy was not working for the people. In 1990 then former speaker of the Assembly Robert T. Monagan wrote a book titled The Disappearance of Representative Government: A California Solution, *see* FAC note 1. The book advocated significantly increasing representation beyond the

120 legislator "cap". Also in 1990 the people themselves passed proposition 140 which recognized that "[t]he increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative." The people also found that simply adding assistants to perform legislative duties was constitutionally unacceptable. *See Id.* citing to Proposition 140 (1990), California Constitution, Art. IV, Section 1.5.

Only once, in 1992 after 31 counties voted in favor of a State split, did a legislator introduce a bill to split the State, notwithstanding its overwhelming popular support in Northern California. The bill died in a committee without any consideration. FAC ¶ 10.71. (In 1990 the population of California was 29,950,000 and Senators were tasked with representing approximately 748,750 people in their districts. Assembly members were tasked with representing approximately 374,375 people who lived in their districts. FAC Exhibit A. The problem has only grown worse today with the addition of 10,000,000 more unrepresented people.

Since then petitions presented by citizens from all over the State have requested legislators honor that tie which requires them to represent the interests of constituents which live in their districts. But the citizens can't even get a response out of the oligarchs because increasing the number of legislators will the dilute the power of each of the 120 votes they control.

III. PLAINTIFFS HAVE STANDING

California Secretary of State Padilla argues "Plaintiffs lack Article III standing because the injury they allege, dilution of their vote, is a general grievance shared by the public at large." MTD, p. 7. Significantly, Padilla does not quibble with the fact plaintiffs have alleged California's 150+ year old practice of not increasing the size of the legislature dilutes every plaintiff's' vote and right to self-governance. Rather, the Secretary argues this Court has no subject matter jurisdiction because injuries to each plaintiff's vote and right to self-governance "is a general

grievance shared by the population at large." *Id.* Plaintiffs disagree that dilution of an individual's vote as a result of arbitrary malapportionment is ever a general injury[11] and therefore are grateful for the Secretary's concession that each of them has been injured in this way.

Article III of the U.S. Constitution's "case and controversy" requirement obligates federal courts to determine, as an initial matter, whether plaintiffs have standing to bring suit. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). At the pleading stage, to satisfy the standing requirement plaintiffs must allege: (1) that they have suffered an injury in fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged conduct; and (3) that the injury will likely be redressed by a favorable decision. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).

The Secretary cites no cases holding a lack of standing exists where dilution of an individual's vote as a result of malapportionment occurring over time is alleged. The only case the Secretary cites relating to voting is *Lance v. Coffman*, 549 U.S. 437, (2007). MTD, pp. 2, 8-9. In *Lance* the Court specifically observed *Baker v Carr* establishes dilution of a person's vote from malapportionment is a sufficiently concrete injury by itself to establish Article III standing.

> … [T]he problem with this allegation should be obvious: ***The only injury plaintiffs allege is that the law--specifically the Elections Clause --has not been followed.*** This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. ***It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.*** *See, e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 207-208, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim. (Emphasis Supplied)

Id., 549 U.S. at 441-442.

[11] All of the cases the Secretary cites for the proposition of "general injury" involve separation of powers issues, unrelated to vote malapportionment or vote dilution. See MTD, pp. 8-9.

The Supreme Court has held voters have standing to challenge malapportionment because "they are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes." *DOC v. United States House of Representatives*, 119 S. Ct. 765, 774 (1999) (quoting *Baker* v. *Carr*, 369 U.S. 186, 208, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (quoting *Coleman* v. *Miller*, 307 U.S. 433, 438, 83 L. Ed. 1385, 59 S. Ct. 972 (1939)). In sum, injury which abridges or dilutes the value of one's vote or right to self-governance is a sufficiently concrete injury to one's personal rights to invoke Article III standing. *See Evenwel*, 136 S. Ct. 1123-24, 1131 note 12[12]. *See also Whitmore* v. *Arkansas*, 495 U.S. 149, 155, (1990) ("The same distinct interest is at issue here: With one fewer Representative, Indiana residents' votes will be diluted."[13])

IV. THE PLAINTIFFS' INJURIES DO NOT INVOLVE A POLITICAL QUESTION

Citing an old gerrymander case, *Vieth v Jubelirer*, 541 U.S. 267 (2004) the Secretary argues this case is not justiciable because there is no judicially discoverable and manageable standard to determine how many people should be in a State legislature. MTD pp. 2, 10-11. But this case is not about gerrymandering[14], it is about malapportionment and different rules apply to

[12] The issue in *Evenwel* was whether apportionment should be based on district population generally or number of actual voters. It is difficult to imagine an issue less likely to apply to "everyone generally" than that one. Yet the Supreme Court resolved the merits of the malapportionment issue. The Supreme Court could not have resolved the merits of the malapportionment without having first determined it had subject matter jurisdiction to do so. *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006). Note 12 of *Evenwel* demonstrates the Court considered standing in malapportionment cases before it decided *Evenwel's* merits. As can be seen the Court left open the issue of whether non-voters, but people who are supposed to be benefitted from our system of representative self-governance have standing to challenge malapportionment.

[13] If the loss of a representative constitutes a concrete injury for purposes of standing, then the failure to add a representative for a population increase of approximately 39,000,000+ people must also constitute a concrete injury which abridges and/or dilutes plaintiff's votes in a malapportionment context.

[14]The Secretary blatantly attempts to mislead this Court into believing *Vieth* holds gerrymander cases are non-justiciable. This is not so. A majority of the judges in *Vieth* held gerrymander cases are justiciable, but denied the merits of that action. *See e.g. Whitford v Gill*, 218 F. Supp. 837, 856 (W.D. Wis. 2016) describing *Vieth*: "the [gerrymander] claim was justiciable, and that, '[u]ntil a majority of the Supreme

malapportionment cases. In *Evenwel*, which was decided twelve years after *Vieth*, the Supreme Court made clear that malapportionment cases remain justiciable and do not involve political questions.

> Just two years after Baker, in Wesberry v Sanders, 376 U.S. 1, 7-8 … (1964), the Court invalidated Georgia's malapportioned congressional map, under which the population of one congressional district was two to three times larger than the population of the others. … Later that same Term, in Reynolds v. Sims, 377 U. S. 533, 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Court upheld an equal protection challenge to Alabama's malapportioned state-legislative maps. "[T]he Equal Protection Clause," the Court concluded, "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Ibid*. Wesberry and Reynolds together instructed that jurisdictions must design both congressional and state-legislative districts with equal populations, ***and must regularly reapportion districts to prevent malapportionment.*** (Emphasis Supplied)

Evenwel, 136 S. Ct. at 1123-1124. The reason California, like all States, must regularly reapportion districts to prevent malapportionment is because "unconstitutional discrimination occurs ... when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). California's refusal to provide additional legislators to represent its people creates that malapportionment which it concedes constitutes a general injury to the people at large. As Thomas Paine wrote in his book *Common Sense*: "If the colony continue increasing, it will become necessary to augment the number of representatives, and that the interest of every part of the colony may be attended to,

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Court rules otherwise, lower courts must continue to search for a judicially manageable standard.'" *Id*, 218 F. Supp. 3d at 856, 927-930. *See also* Justin Levitt, "*Intent is Enough: Invidious Partnership Redistricting*" Legal Studies Paper No. 2017-24 59 Wm. & Mary Law Review L. Rev. __ (forthcoming 2017), 3-8 (Observing that gerrymander cases are justiciable, but the judicial standards for resolving them remain to be decided.)

it will be found best to divide the whole up into convenient parts, each part send its proper number…"[15]

This case is a 21st century version of *Baker v Carr*, which established the need for judicial vigilance to preserve constitutional apportionment. The population of California has grown from 400,000 to almost 40,000,000 and is still growing; but not one representative has been added to represent any of the 39+ million new people which live in California's vastly overpopulated legislative districts. Padilla's assertion there are no judicially manageable standards to determine the exact number of legislators a state must have disingenuously frames the issue into a State's rights issue; when it is in fact an issue which arises out of the federal structure of our government as modified by the Fourteenth and other voting rights amendments.

To be clear: Plaintiffs are not asking this Court pick any particular number of legislators. They are asking that California's arbitrary cap on legislators be declared unconstitutional and void. Further, plaintiffs are requesting the Court order California to establish that number of legislators which are capable of representing 40,000,000 people in a manner consistent with what the Federal Constitution requires.

> As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. See *supra*, at ___ - ___, 194 L. Ed. 2d, at 298-301. Nonvoters have an important stake in many policy debates — children, their parents, even their grandparents, for example, have a stake in a strong public-education system — and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation. See *McCormick* v. *United States*, 500 U. S. 257, 272, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.").

[15] This quote can be accessed at: http://www.let.rug.nl/usa/documents/1776-1785/thomas-paine-common-sense/some-writers-have-so-confounded.php

If California refuses to increase representation to that level which is constitutionally required, plaintiffs request California be penalized pursuant to § 2 of the Fourteenth Amendment.

California's creation and maintenance of an arbitrary "cap", which was born out of invidious discrimination aimed at achieving a total disenfranchisement of non-whites, cannot override the State's obligation to provide the people with representatives who serve them and not their own interests. *Id.*, See also *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) ("[O]ur system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.")

V. PLAINTIFFS CLAIMS ARE NOT TOO INSUBSTANTIAL TO BE HEARD BY A THREE JUDGE PANEL

A single judge court does not have the authority to dismiss this case on the merits pursuant to a Fed. R. Civ. Pro. 12(b)(6) motion. *Shapiro v. McManus*, 136 S. Ct. 450, 455-456 (2015). This Court has already found this malapportionment case should be heard by a three judge court. The Secretary is not satisfied with this Court's order requesting the chief judge of the Ninth Circuit convene a three judge court pursuant 28 U.S.C. § 2284(a) and has therefore moved to reconsider that order. The secretary argues plaintiffs' lack of standing and their claims are not justiciable under "political question" doctrine. Reconsideration on these grounds is ill advised because 1.) plaintiffs ***do have standing*** to bring this malapportionment case, *see supra*., pp. 10-13; and 2.) malapportionment cases ***do not involve political questions***. *See supra*., pp. 13-15. Here, the question is a simple one: Does California's arbitrary cap on the number of legislators violates the federal Constitution?

Following *Shapiro's* remand the First Circuit discussed the "constitutionally insubstantial" standard for dismissing cases pursuant to 28 U.S.C. 2284(a) in *Igartúa v. Obam*a , 842 F.3d 149, 156-9 (1st Cir. 2016). That Circuit concluded a claim is "constitu-

tionally insubstantial" only if "its unsoundness" results from previous decisions *of the Supreme Court* which foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. *Id.*, at 158. None of plaintiffs' causes of action are constitutionally insubstantial under this standard.

With regard to CFR's treaty and customary international law claims, the *Igartúa* court found similar claims made by Puerto Rico were not constitutionally insubstantial for purposes of 28 U.S.C. 2284(a) but likely had been previously dismissed or decided on the merits. *See Igartúa v. Obama*, 842 F.3d 149, 158-9 (1st Cir. 2016); *Igartúa v. United States*, 626 F.3d 592, 621-8, 638-639 (1st Cir. 2010)(Torruella dissenting); *Igartua-de la Rosa v. United States*, 417 F.3d 145, 169-192 (1st Cir. 2005)(Torruella dissenting). There is no dispositive Supreme Court ruling on the international causes of action raised here based on the conduct of civilized nations regarding self-governance following WW II.

CFR plaintiffs' causes of action are stronger here than in *Igartúa* because treaty law, customary international law, and America's conduct (including Constitutional Amendments and Supreme Court legal precedent) are all legally consistent and supportive of those self-governance norms virtually all civilized nations and global organizations have adopted since the end of WW II. The self-governance principles at issue in *Igartúa*, i.e. whether Puerto Rico was entitled to representation in the U.S. Congress, were arguably at odds with principles set forth in the US Constitution. This is not the case here.

Similarly the Secretary's argument that plaintiffs have not established any constitutionally substantial argument with regard to First Amendment injury must fail because it is based on the contention: "they [plaintiffs] concede that they have exercised their right to petition their state government." MTD p. 13. But that misses the mark because

plaintiffs also allege they were personally retaliated against and risk imminent retaliation for exercising their first amendment political rights to "push" for overthrowing the oligarchy by demanding constitutionally adequate legislative representation.

The three judge district court which heard *Shapiro's* case following the Supreme Court's remand found such allegations were sufficient to survive a motion to dismiss. *Shapiro v McManus*, 203 F. Supp 579, 585, 594-98 (D. Md. 2017). If claims of intentional retaliation for the exercise of political speech are arguably sufficient to survive a motion to dismiss they must have been "constitutionally substantial".

Plaintiffs' FAC clearly alleges the constitutional cap was based and continues to be maintained pursuant to invidious discrimination based on race. These allegations, if proven, are sufficient to require California to demonstrate that its discriminatory constitutional practices, including the "cap", are narrowly tailored to achieve a compelling State interest. *See Hunter v. Underwood*, 471 US 222 (1985); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270, 191 L. Ed. 2d 314 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)). These cases establish plaintiffs' claims of invidious discrimination which birthed the "cap" and subsequent practices designed to maintain it are "constitutionally substantial".

The Secretary argues plaintiffs' Fourteenth Amendment substantive due process claims should be dismissed because 1.) such claims should be brought under U.S. Const. Art IV, § 4 (guarantee of a republican form of government) and 2.) the US Constitution imposes no limit on the numerical size of a State legislature. MTD, pp. 12-13. Plaintiffs disagree with both arguments. *Evenwel* defines the meaning of representation within the system of self-governance established for the States. They are not the same, as exist for

the federal government; i.e. all branches of State legislature must be based on one man/one vote principles. Accordingly, under *Evenwel* both State senators and Assembly Members are responsible for serving ***all*** the constituents in their district. The Secretary cannot simply pretend this holding does not exist. Accordingly, the Secretary cannot show any Supreme Court precedent invalidates this controversy.

Also plaintiffs take issue with the Secretary's suggestion their substantive due process foundation must be anchored in Art. IV, § 4 (the Guarantee Clause), rather than the federal structure of the Constitution, which was created to protect, among other things, those liberties of the people (of which the right to vote is the most fundamental). *See Bond v. United States,* 564 U.S. 211, 222-224 (2011). California has no right to create an oligarchy based on and maintained by the "cap" which now discourages people from voting in federal, as well, as State elections. *See e.g.* FAC 12.4 (E) & (M) (Plaintiffs who don't vote in California because elections are "meaningless".) California's malapportioned districts which deter voting at the federal level, as well as the State level, violate Constitutional amendments, statutes, treaties and customary law intended to increase suffrage and encourage people to vote. *See* FAC ¶¶ 10.1-10.86.

Plaintiffs also dispute Padilla's contention the Privileges and Immunities Clause cannot be raised with regard to self-governance because this is foreclosed by the *Slaughter House Cases,* 83 U.S. 36 (1872) and *McDonald v City of Chicago,* 561 U.S. 742 (2010). The Slaughter House cases involved economic regulations. *McDonald* observed the longstanding and continuing criticism of *Slaughter House*'s "privilege and immunities" analysis, see 561 U.S. at 756-759. The Court decided it was not necessary to reconsider *Slaughter House* in *McDonald* because this case could be resolved via substantive

due process. *Id.* Justice Thomas concurred in the Court's judgment, but wrote a comprehensive analysis why the right to keep and bear arms is guaranteed as a privilege of American citizenship. *Id*., at 813- 858. Neither case applies to voting rights and suffrage, which is the most fundamental right citizens have because it is preservative of all rights. *Yick Wo v Hopkins*, 118 U.S. 356, 370 (1886). A strong argument can be made the Country as a whole has renounced the *Slaughter House Cases* at least with regard to voting by expanding the privilege of voting to citizens of the United States over and over again, thus indicating such rights are a privilege of citizenship. *See* Fifteenth, Nineteenth, Twenty-fourth, and Twenty-Sixth Amendments. So far as plaintiffs can tell the cumulative effect of these Amendments, as well as voting rights statutes, treaties, and changes in customary international law have never been reviewed by the Supreme Court. Therefore this case presents a very live controversy.

VI. CONCLUSION

Plaintiffs believe this case is the *Baker v Carr* of the 21st century.

Like *Baker* this case challenges a State's arbitrary practices, in place and developed since 1862, of limiting its legislature to only 40 Senators and 80 Assembly members *no matter how much its population grows.* When the "cap" started the 120 legislators represented only 400,000 people. Now this same number of legislators represents almost 40,000,000 people and the population of California continues to grow.

If this admittedly arbitrary system is not voided the very purposes underlying the one person/one vote principle, i.e. fair representation, will die as California can soon argue its invidious, arbitrary "cap" allows one person to represent billions of people - people no one legislator is capable of knowing or sharing any common connection with.

Ironically, the application of one person/one vote principle in this case does not resolve, but exacerbates, the problem of malapportionment. This is because California is misusing this principle to create an oligarchy, which concentrates power in the hands of a fixed few.

Certainly, creating an arbitrary unfair malapportioned and dysfunction system of representation was unlikely Baker's intent. This case presents the question whether California's "cap" abridges/dilutes votes of citizens of the United States while interfering with all plaintiffs' rights to self-governance by violating the federal Constitution, amendments thereto, statutes, treaties and/or customary international law.

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Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 8th Day of August, 2017.

By: __/s/ *Pam Miller*_____
Pam Miller, Paralegal