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7 ATTORNEYS FOR PLAINTIFFS

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10 **SACRAMENTO DIVISION**
11

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

26 Plaintiffs,

27 v.

28 **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

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1

2

I. INTRODUCTION

3 Plaintiffs allege California’s constitutional prohibition on increasing the number of legis-
4 lative members - beyond 40 in the senate and 80 in the assembly - no matter how large its popu-
5 lation and legislative districts grow, is anti-democratic and anti-republican, and causes the votes
6 of plaintiffs to be abridged and diluted¹. Plaintiffs allege California’s longstanding enforcement
7 of this arbitrary cap, limiting the number of legislators ruling California, interferes with their per-
8 sonal right to participate in the standards of representative self-governance as they exist today
9 under the U.S. Constitution, its Amendments, treaties, statutes, and customary international law.
10

11 Given the dramatic changes in personal voting and self-governance rights in the United
12 States and the world since the American Revolution, Civil War, and World War II² the main fo-
13 cus of the controversy between defendant Padilla, California’s Secretary of State (hereafter re-
14 ferred to as “Padilla or Secretary”) is about the contours of these personal rights to vote and be
15 governed as well as how that law applies in both the State and Federal governments.
16

17 California’s history gives unique context to the consideration of these issues because of
18 the way infamous invidious racial discrimination affected the substance of its 1849 and 1879
19 constitutions. All Plaintiffs allege over time California’s maintenance of racially animated con-
20 stitutional practices, including without limitation the arbitrary cap on the number of its legisla-
21 tors, has diluted their personal vote and minimized their personal rights to participate in self-
22

23

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

26 ² Compare Richard Briffault, 2002, Review: “The Contested Right to Vote”, Columbia University Aca-
27 demic Commons, <https://doi.org/10.7916/D81C1X4G> and FAC 10:1 -10.86. The article discusses the
28 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.

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

11 The lead plaintiff is the Committee for Fair Representation (CFR), a non-profit corpora-
12 tion which educates people about the peoples’ personal rights to representative self-governance
13 under the United States and California Constitutions. Plaintiffs Win Carpenter, Kyle Carpenter,
14 Roy Hall, Jr., and the Shasta Indian Nation (FAC ¶¶ 12.4 (C), & (H)) are Native American Indi-
15 ans who are personally injured by California’s constitutional denial of their rights through invid-
16 ious discrimination in its constitutions and subsequent enactment of legislation which have pre-
17 vented them from participating in self-governance, even as it has evolved over time.

20 Plaintiffs and Leslie J. Lim and Raymond Wong (FAC ¶¶ 12.4 (J) & (S)) are persons of
21 Chinese and Asian descent. They claim provisions of California’s 1879 constitution were intend-
22 ed to invidiously discriminate against people of their race and to insure that white men, as op-
23 posed to people of all other races, retained the power to rule California, regardless of the number
24 of non-whites which lived in California. Plaintiffs Cindy L. Brown and Kevin McGarry (FAC ¶¶
25 12.4(B) & (K)) are African Americans. Plaintiff David Garcia is Hispanic (FAC ¶12.4 (G)). All
26 allege California’s invidiously race based constitutions, and the continued maintenance of invid-
27 iously race based practices contained therein (including the “cap”), have abridged and diluted the
28

1 value of their votes and adversely affected their personal ability to participate in representative
2 self-governance and will continue to do so in the future until “the cap” is declared unconstitu-
3 tional.
4

5 All plaintiffs allege the continued maintenance of the 120 member “cap” on the legisla-
6 ture, and those practices developed to maintain it (i.e. adding staff instead of needed additional
7 legislators) has caused gross malapportionment. Further, all plaintiffs allege the creation and
8 maintenance of a 120 member legislative oligarchy for all of California causes concrete, personal
9 injuries to each of them (including the political parties, competitive political candidates and
10 CFR) because this malapportionment frustrates each of those plaintiff’s rights to participate in a
11 constitutionally sufficient form of representative self-governance at the State level.
12

13 Many plaintiffs also allege they have been injured personally by California retaliating
14 against them for exercising their rights to political free speech to denounce the “cap”. Their alle-
15 gations as well as the methods of retaliation vary widely.
16

17 People in Sutter, Yuba, and Butte Counties allege the failure to maintain the Oroville
18 Spillway was retaliation against the people in these districts because of their challenges to the
19 oligarchy, which refused to represent them and their interests. *See e.g.* ¶¶ 12.4(D); (M); (Q); &
20 (R). Plaintiffs believe it will be difficult for the Secretary to seriously argue that being forced to
21 evacuate from one’s home because they and their neighbors politically challenged California’s
22 oligarchy is not a sufficiently concrete injury upon which to premise standing.
23

24 Similarly, people who vocally supported the Jefferson movement have alleged they were
25 retaliated against personally by way of California officials threatening their county representa-
26 tives not to challenge the oligarchy or risk the loss of economic aid. *Id.* ¶¶ 12.4 (F), (N), (Q), &
27 R. *See also* FAC ¶¶ 12.4(A) ¶¶ 12.12-12.17. Indeed, even competitive political candidates have
28

1 alleged retaliation by the Oligarchy because when they ran for office against Democrats they
2 suddenly found themselves being audited by government tax authorities. FAC ¶ 12.7. Of course,
3 such retaliation and threats of harm chills the desire of people to run for office and hampers third
4 parties ability to find candidates who truly want to represent the people in legislative districts.
5

6 **II. CALIFORNIA’S INFAMOUS, INVIDIOUS, DISCRIMINATORY CONSTITUTIONS**

7
8 California’s 1849 and 1879 Constitutions cannot be reconciled with the holding of *Even-*
9 *wel v Abbott*, 136 S. Ct. 1120 (2016) that legislators under both the Federal and State systems
10 were intended to represent all the people in their district, not just actual voters. California never
11 rejected the principle of legislators representing all the people in their district.
12

13 “At the first State [California] Constitutional Convention, those assembled voted to elim-
14 inate the Indians' right to vote because they feared the control Indians might exercise.³” Disen-
15 franchising Native Americans based on ethnicity is evidence California’s founders did not want
16 them to vote or be represented. This was confirmed shortly thereafter when, as Dwight Dutsche
17 chronicles, the California legislature passed statutes which were utilized to make Native Ameri-
18 can Indians slaves and deprive them of their most basic liberties.
19

20 In 1850, an Act for the Government and Protection of Indians was enacted
21 by the first session of the State Legislature. This law set the tone for Indian-White
22 relations to come.

23 The act provided for the following: 1. The Justice of the Peace would have
24 jurisdiction over all complaints between Indians and Whites; "but in no case shall
25 a white man be convicted of any offense upon the testimony of an Indian or Indi-

26 ³ See FAC, ¶ 10.16; 10.29-30; See also Dwight Dutschke, “A History of American Indians in California”,
27 pp. 7, which can be accessed at
28 <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>. Be-
cause these are governmental web sites this Court may take judicial notice of the facts set forth therein.

1 ans." ... 3. Whites would be able to obtain control of Indian children. (This section
2 would eventually be used to justify and provide for Indian slavery.) 4. If any Indi-
3 an was convicted of a crime, any White person could come before the court and
4 contract for the Indian's services, and in return, would pay the Indian's fine. ... 6.
5 Indians convicted of stealing a horse, mule, cow, or any other valuable could re-
6 ceive any number of lashes not to exceed 25, and fines not to exceed \$200. (It
7 should be noted that the law provided that abusing an Indian child by Whites was
8 to be punished by no more than a \$10 fine. It is hard to compare the penalty with
9 the crime.)

10 * * *

11 In 1860, the law of 1850 was amended to state that Indian children and any va-
12 grant Indian could be put under the custody of Whites for the purpose of employ-
13 ment and training. Under the law, it was possible to retain the service of Indians
14 until 40 years of age for men and 35 years of age for women. *Id.*

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

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

28 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.

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

5 *Id.*, p. 12. The leader of the Workingmen’s party was arrested for threatening: “I will lead you to
6 the city hall, clear out the police force, [and] hang the prosecuting attorney...” *Id.*, 13. In No-
7 vember 1877 representatives of the Chinese communities wrote the Mayor of San Francisco:

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

18 *Id.*, 13. (Emphasis Supplied)

19 Since the passage of the 1849 California Constitution, regular efforts had been made by
20 the California Legislature to adopt a new constitution. *Id.*, 14. Such efforts failed in 1857, 1859,
21 1860, and 1873. *Id.* It was only in September, 1877, that a second constitutional convention was
22 authorized, primarily for the purposes of protecting whites by discriminating against Chinese and
23 other Asian people. *Id.* At that constitutional convention 50 of the 152 delegates were Working-
24 men’s Party members, who professed racial animosity against non-whites. *Id.* 13 -14⁵.

25
26
27 ⁵ The desire to have a constitutional anchor to discriminate against Chinese, Mongolians, and other Asiatic
28 “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 Proceed-
ings of the Constitutional Convention of the State of California, Convened at the City of Sacramento,
Saturday, September 28, 1878, Vol. II,

1 The Constitutional provision dubbed “[Art XIX: CHINESE](#)”⁶ was promptly found to be
2 unconstitutional under the Fourteenth Amendment, the Supremacy Clause, and the Burlingame
3 Treaty⁷. See *In re Parrott*, 1 F. 481, 6 Sawy. 349 (C.C.D. Cal. Mar. 1, 1880). California’s racist
4 delegates who ratified the provision appeared not to care. One of their reasons for including such
5 racially inflammatory and obviously unconstitutional language in California’s constitution was to
6 make the people back “East” understand California had no intention of being constrained by the
7 Fourteenth Amendment⁸. California continued to make this point clear until 1952 when Art. XIX
8 was repealed.⁹

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

19 _____
20 ⁶ To view: <http://jhameia.tumblr.com/post/791838445/article-xix-chinese-section-1-the-legislature>

21 ⁷ See also Seto, pp. 20-31.

22 ⁸ Seto reports:

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

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

27 ⁹ When California officially apologized for its intentional, arbitrary, and unconstitutional discrimination it
28 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, re-
mained 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 sup-
plied)

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.

1 al “cap” was to insure that white men (women had not yet been granted suffrage) would always
2 remain in control of California’s legislature.
3

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

5 ¶4.2 According to the Census Bureau data 50% (18,517,830) of the people were
6 males and 50% (18,736,126) were females.

7 ¶4.3 Approximately 38% of California’s population are Caucasian

8 ¶4.4 Approximately 37% of California’s population is Hispanic.

9 ¶4.5 Approximately 13% of California’s population is of Asian descent.

*

*

*

10 ¶4.7 Approximately 12.6 % of California’s population is disabled.

11 ¶4.8 Approximately 6% of California’s population is African-American.

12 ¶4.9. Less than 2% of California’s population is indigenous and includes Native
13 American

*

*

*

14 ¶5.1 Since 1862 the people of California have been represented by 40 Senators.

15 ¶5.2 As of today 78% (31) of the Senators are men, and 22% (9) are women. 78%
16 (31) of the Senators are Caucasian, 12.5% (5) are Hispanic; 5% (2) are
17 Asian/Pacific Islander, and 5% (2) are African American. On information and be-
18 lief no Senators are disabled. On information and belief no Native American Indi-
19 ans have ever been elected to the California Senate notwithstanding they once
20 comprised the largest group of people living in California.

21 ¶5.3. Since 1854 the people of California have been represented by 80 Assembly
22 members. As of today 79% (63) of the Assembly members are men and 21% (17)
23 are women. 46% (37) of the Assembly members are Caucasian, 28% (22) are
24 Hispanic; 14% (11) are Asian/Pacific Islander, and 10% (8) are African Ameri-
25 can. On information and belief no Senators are disabled and none are identified as
26 Native American Indians. On information and belief no Native American Indians
27 have ever been elected to the California Assembly notwithstanding they once
28 comprised the largest group of people living in California.

FAC, pp. 7-8.

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

1 groups therein...” *Id.*, 136 C. Ct. at 1132. This observation is true only to the point where a legis-
2 lator can actually serve *and attempts to serve the constituents who live in his or her district.*

3
4 So far as plaintiffs know there is no evidence our founders after the Revolutionary and
5 Civil Wars contemplated dialing for dollars to fund campaigns (which cost on average over
6 \$700,000 to win) in California would ever be a primary function of state legislators. The expect-
7 ation was legislators would serve the people in their district and that their constituents would
8 have meaningful access to their representatives

9
10 Plaintiffs FAC set forth facts indicating the people in Northern California began com-
11 plaining about lack of representation, *i.e.* the legislative oligarchy, before World War II started
12 and have continued to complain about lack of meaningful representation ever since. *See* FAC re:
13 facts related to Jefferson movement at paragraphs ¶¶ 10.49-10.51; 10:70-10.84.

14
15 In 1940, one year before Pearl Harbor, the approximate population of California was
16 6,750,000; the population of a senate district was 173,750; and the population of an Assembly
17 district was 86,875. *See* FAC Ex. 1.

18
19 For well over a half century the people in the Jefferson movement complained to their
20 own legislators (as well as all 120 members of the by then California legislative oligarchy) that
21 their legislative representation was so bad they wanted to invoke a State split pursuant to U.S.
22 Const., Art. IV, § 3, cl. 1. They were treated as if they had proposed something illegal. They
23 hadn't. How do you think Maine was created?

24
25 Most Californians realized by the early nineties the State's malapportioned 120 member
26 oligarchy was not working for the people. In 1990 then former speaker of the Assembly Robert
27 T. Monagan wrote a book titled The Disappearance of Representative Government: A California
28 Solution, *see* FAC note 1. The book advocated significantly increasing representation beyond the

1 120 legislator “cap”. Also in 1990 the people themselves passed proposition 140 which recog-
2 nized that “[t]he increased concentration of political power in the hands of incumbent representa-
3 tives has made our electoral system less free, less competitive, and less representative.” The peo-
4 ple also found that simply adding assistants to perform legislative duties was constitutionally un-
5 acceptable. *See Id.* citing to Proposition 140 (1990), California Constitution, Art. IV, Section 1.5.
6

7
8 Only once, in 1992 after 31 counties voted in favor of a State split, did a legislator intro-
9 duce a bill to split the State, notwithstanding its overwhelming popular support in Northern Cali-
10 fornia. The bill died in a committee without any consideration. FAC ¶ 10.71. (In 1990 the popu-
11 lation of California was 29,950,000 and Senators were tasked with representing approximately
12 748,750 people in their districts. Assembly members were tasked with representing approximate-
13 ly 374,375 people who lived in their districts. FAC Exhibit A. The problem has only grown
14 worse today with the addition of 10,000,000 more unrepresented people.
15

16 Since then petitions presented by citizens from all over the State have requested legisla-
17 tors honor that tie which requires them to represent the interests of constituents which live in
18 their districts. But the citizens can’t even get a response out of the oligarchs because increasing
19 the number of legislators will dilute the power of each of the 120 votes they control.
20

21 **III. PLAINTIFFS HAVE STANDING**

22 California Secretary of State Padilla argues “Plaintiffs lack Article III standing because
23 the injury they allege, dilution of their vote, is a general grievance shared by the public at large.”
24 MTD, p. 7. Significantly, Padilla does not quibble with the fact plaintiffs have alleged Califor-
25 nia’s 150+ year old practice of not increasing the size of the legislature dilutes every plaintiffs’
26 vote and right to self-governance. Rather, the Secretary argues this Court has no subject matter
27 jurisdiction because injuries to each plaintiff’s vote and right to self-governance “is a general
28

1 grievance shared by the population at large.” *Id.* Plaintiffs disagree that dilution of an individu-
2 al’s vote as a result of arbitrary malapportionment is ever a general injury¹¹ and therefore are
3 grateful for the Secretary’s concession that each of them has been injured in this way.
4

5 Article III of the U.S. Constitution's "case and controversy" requirement obligates federal
6 courts to determine, as an initial matter, whether plaintiffs have standing to bring suit. *Lance v.*
7 *Coffman*, 549 U.S. 437, 439 (2007). At the pleading stage, to satisfy the standing requirement
8 plaintiffs must allege: (1) that they have suffered an injury in fact that is (a) concrete and particu-
9 larized, and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly
10 traceable to the defendant's challenged conduct; and (3) that the injury will likely be redressed by
11 a favorable decision. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,
12 528 U.S. 167, 180-81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).
13
14

15 The Secretary cites no cases holding a lack of standing exists where dilution of an indi-
16 vidual's vote as a result of malapportionment occurring over time is alleged. The only case the
17 Secretary cites relating to voting is *Lance v. Coffman*, 549 U.S. 437, (2007). MTD, pp. 2, 8-9. In
18 *Lance* the Court specifically observed *Baker v Carr* establishes dilution of a person’s vote from
19 malapportionment is a sufficiently concrete injury by itself to establish Article III standing.
20

21 ... [T]he problem with this allegation should be obvious: ***The only injury plain-***
22 ***tiffs allege is that the law--specifically the Elections Clause --has not been fol-***
23 ***lowed.*** This injury is precisely the kind of undifferentiated, generalized grievance
24 about the conduct of government that we have refused to countenance in the past.
25 ***It is quite different from the sorts of injuries alleged by plaintiffs in voting***
26 ***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)

27 *Id.*, 549 U.S. at 441-442.
28

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.

1
2 The Supreme Court has held voters have standing to challenge malapportionment be-
3 cause "they are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of
4 their votes.'" *DOC v. United States House of Representatives*, 119 S. Ct. 765, 774 (1999) (quot-
5 ing *Baker v. Carr*, 369 U.S. 186, 208, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (quoting *Coleman v.*
6 *Miller*, 307 U.S. 433, 438, 83 L. Ed. 1385, 59 S. Ct. 972 (1939)). In sum, injury which abridges
7 or dilutes the value of one's vote or right to self-governance is a sufficiently concrete injury to
8 one's personal rights to invoke Article III standing. *See Evenwel*, 136 S. Ct. 1123-24, 1131 note
9 12¹². *See also Whitmore v. Arkansas*, 495 U.S. 149, 155, (1990) ("The same distinct interest is at
10 issue here: With one fewer Representative, Indiana residents' votes will be diluted."¹³)

11 12 **IV. THE PLAINTIFFS' INJURIES DO NOT INVOLVE A POLITICAL QUESTION**

13 Citing an old gerrymander case, *Vieth v Jubelirer*, 541 U.S. 267 (2004) the Secretary ar-
14 gues this case is not justiciable because there is no judicially discoverable and manageable stand-
15 ard to determine how many people should be in a State legislature. MTD pp. 2, 10-11. But this
16 case is not about gerrymandering¹⁴, it is about malapportionment and different rules apply to

17
18
19
20 ¹² The issue in *Evenwel* was whether apportionment should be based on district population generally or
21 number of actual voters. It is difficult to imagine an issue less likely to apply to "everyone generally"
22 than that one. Yet the Supreme Court resolved the merits of the malapportionment issue. The Supreme
23 Court could not have resolved the merits of the malapportionment without having first determined it had
24 subject matter jurisdiction to do so. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Note 12 of *Even-*
25 *wel* demonstrates the Court considered standing in malapportionment cases before it decided *Evenwel*'s
26 merits. As can be seen the Court left open the issue of whether non-voters, but people who are supposed
27 to be benefitted from our system of representative self-governance have standing to challenge malappor-
28 tionment.

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.

¹⁴The 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) de-
scribing *Vieth*: "the [gerrymander] claim was justiciable, and that, '[u]ntil a majority of the Supreme
PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS 12

1 malapportionment cases. In *Evenwel*, which was decided twelve years after *Vieth*, the Supreme
2 Court made clear that malapportionment cases remain justiciable and do not involve political
3 questions.
4

5 Just two years after *Baker*, in *Wesberry v Sanders*, 376 U.S. 1, 7-8 ... (1964), the
6 Court invalidated Georgia's malapportioned congressional map, under which the
7 population of one congressional district was two to three times larger than the
8 population of the others. ... Later that same Term, in *Reynolds v. Sims*, 377 U. S.
9 533, 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the Court upheld an equal pro-
10 tection challenge to Alabama's malapportioned state-legislative maps. "[T]he
11 Equal Protection Clause," the Court concluded, "requires that the seats in both
12 houses of a bicameral state legislature must be apportioned on a population ba-
13 sis." *Ibid.* *Wesberry* and *Reynolds* together instructed that jurisdictions must de-
14 sign both congressional and state-legislative districts with equal populations, **and**
15 **must regularly reapportion districts to prevent malapportionment.** (Emphasis
16 Supplied)

17 *Evenwel*, 136 S. Ct. at 1123-1124. The reason California, like all States, must regularly
18 reapportion districts to prevent malapportionment is because "unconstitutional discrimi-
19 nation occurs ... when the electoral system is arranged in a manner that will consistently
20 degrade a voter's or a group of voters' influence on the political process as a whole." *Da-*
21 *vis v. Bandemer*, 478 U.S. 109, 132 (1986). California's refusal to provide additional leg-
22 islators to represent its people creates that malapportionment which it concedes consti-
23 tutes a general injury to the people at large. As Thomas Paine wrote in his book [*Common*](#)
24 [*Sense*](#): "If the colony continue increasing, it will become necessary to augment the num-
25 ber of representatives, and that the interest of every part of the colony may be attended to,
26

27 Court rules otherwise, lower courts must continue to search for a judicially manageable standard." *Id.*,
28 218 F. Supp. 3d at 856, 927-930. See also Justin Levitt, "[Intent is Enough: Invidious Partnership Redis-](#)
[tricting](#)" 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 re-
main to be decided.)

1 it will be found best to divide the whole up into convenient parts, each part send its prop-
2 er number...”¹⁵
3

4 This case is a 21st century version of *Baker v Carr*, which established the need for judi-
5 cial vigilance to preserve constitutional apportionment. The population of California has grown
6 from 400,000 to almost 40,000,000 and is still growing; but not one representative has been add-
7 ed to represent any of the 39+ million new people which live in California’s vastly overpopulat-
8 ed legislative districts. Padilla’s assertion there are no judicially manageable standards to deter-
9 mine the exact number of legislators a state must have disingenuously frames the issue into a
10 State’s rights issue; when it is in fact an issue which arises out of the federal structure of our
11 government as modified by the Fourteenth and other voting rights amendments.
12

13 To be clear: Plaintiffs are not asking this Court pick any particular number of legislators.
14 They are asking that California’s arbitrary cap on legislators be declared unconstitutional and
15 void. Further, plaintiffs are requesting the Court order California to establish that number of leg-
16 islators which are capable of representing 40,000,000 people in a manner consistent with what
17 the Federal Constitution requires.
18

19 As the Framers of the Constitution and the Fourteenth Amendment comprehend-
20 ed, representatives serve all residents, not just those eligible or registered to vote.
21 See *supra*, at ___ - ___, 194 L. Ed. 2d, at 298-301. Nonvoters have an important
22 stake in many policy debates — children, their parents, even their grandparents,
23 for example, have a stake in a strong public-education system — and in receiving
24 constituent services, such as help navigating public-benefits bureaucracies. By en-
25 suring that each representative is subject to requests and suggestions from the
26 same number of constituents, total-population apportionment promotes equitable
27 and effective representation. See *McCormick v. United States*, 500 U. S. 257, 272,
28 111 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>

1 If California refuses to increase representation to that level which is constitutionally re-
2 quired, plaintiffs request California be penalized pursuant to § 2 of the Fourteenth Amendment.
3

4 California’s creation and maintenance of an arbitrary “cap”, which was born out of invid-
5 ious discrimination aimed at achieving a total disenfranchisement of non-whites, cannot override
6 the State’s obligation to provide the people with representatives who serve them and not their
7 own interests. *Id.*, See also *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (“[O]ur system of repre-
8 sentative democracy is premised on the assumption that elected officials will seek to represent
9 their constituency as a whole, rather than any dominant faction within that constituency.”)
10

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

13 A single judge court does not have the authority to dismiss this case on the merits pursu-
14 ant to a Fed. R. Civ. Pro. 12(b)(6) motion. *Shapiro v. McManus*, 136 S. Ct. 450, 455-456 (2015).
15 This Court has already found this malapportionment case should be heard by a three judge court.
16 The Secretary is not satisfied with this Court’s order requesting the chief judge of the Ninth Cir-
17 cuit convene a three judge court pursuant 28 U.S.C. § 2284(a) and has therefore moved to recon-
18 sider that order. The secretary argues plaintiffs’ lack of standing and their claims are not justicia-
19 ble under “political question” doctrine. Reconsideration on these grounds is ill advised because
20 1.) plaintiffs **do have standing** to bring this malapportionment case, *see supra.*, pp. 10-13; and
21 2.) malapportionment cases **do not involve political questions**. *See supra.*, pp. 13-15. Here, the
22 question is a simple one: Does California’s arbitrary cap on the number of legislators violates the
23 federal Constitution?
24
25

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

1 tionally insubstantial” only if “its unsoundness” results from previous decisions *of the*
2 *Supreme Court* which foreclose the subject and leave no room for the inference that the
3 questions sought to be raised can be the subject of controversy. *Id.*, at 158. None of plain-
4 tiffs’ causes of action are constitutionally insubstantial under this standard.
5

6 With regard to CFR’s treaty and customary international law claims, the *Igartúa*
7 court found similar claims made by Puerto Rico were not constitutionally insubstantial
8 for purposes of 28 U.S.C. 2284(a) but likely had been previously dismissed or decided on
9 the merits. *See Igartúa v. Obama*, 842 F.3d 149, 158-9 (1st Cir. 2016); *Igartúa v. United*
10 *States*, 626 F.3d 592, 621-8, 638-639 (1st Cir. 2010)(Torruella dissenting); *Igartua-de la*
11 *Rosa v. United States*, 417 F.3d 145, 169-192 (1st Cir. 2005)(Torruella dissenting). There
12 is no dispositive Supreme Court ruling on the international causes of action raised here
13 based on the conduct of civilized nations regarding self-governance following WW II.
14

15 CFR plaintiffs’ causes of action are stronger here than in *Igartúa* because treaty
16 law, customary international law, and America’s conduct (including Constitutional
17 Amendments and Supreme Court legal precedent) are all legally consistent and support-
18 ive of those self-governance norms virtually all civilized nations and global organizations
19 have adopted since the end of WW II. The self-governance principles at issue in *Igartúa*,
20 i.e. whether Puerto Rico was entitled to representation in the U.S. Congress, were argua-
21 bly at odds with principles set forth in the US Constitution. This is not the case here.
22

23 Similarly the Secretary’s argument that plaintiffs have not established any consti-
24 tutionally substantial argument with regard to First Amendment injury must fail because
25 it is based on the contention: “they [plaintiffs] concede that they have exercised their
26 right to petition their state government.” MTD p. 13. But that misses the mark because
27
28

1 plaintiffs also allege they were personally retaliated against and risk imminent retaliation
2 for exercising their first amendment political rights to “push” for overthrowing the oli-
3 garchy by demanding constitutionally adequate legislative representation.
4

5 The three judge district court which heard *Shapiro’s* case following the Supreme
6 Court’s remand found such allegations were sufficient to survive a motion to dismiss.
7
8 *Shapiro v McManus*, 203 F. Supp 579, 585, 594-98 (D. Md. 2017). If claims of intention-
9 al retaliation for the exercise of political speech are arguably sufficient to survive a mo-
10 tion to dismiss they must have been “constitutionally substantial”.

11 Plaintiffs’ FAC clearly alleges the constitutional cap was based and continues to
12 be maintained pursuant to invidious discrimination based on race. These allegations, if
13 proven, are sufficient to require California to demonstrate that its discriminatory constitu-
14 tional practices, including the “cap”, are narrowly tailored to achieve a compelling State
15 interest. *See Hunter v. Underwood*, 471 US 222 (1985); *Ala. Legislative Black Caucus v.*
16 *Alabama*, 135 S. Ct. 1257, 1270, 191 L. Ed. 2d 314 (2015) (quoting *Miller v. Johnson*,
17 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)). These cases establish
18 plaintiffs’ claims of invidious discrimination which birthed the “cap” and subsequent
19 practices designed to maintain it are “constitutionally substantial”.
20
21

22 The Secretary argues plaintiffs’ Fourteenth Amendment substantive due process
23 claims should be dismissed because 1.) such claims should be brought under U.S. Const.
24 Art IV, § 4 (guarantee of a republican form of government) and 2.) the US Constitution
25 imposes no limit on the numerical size of a State legislature. MTD, pp. 12-13. Plaintiffs
26 disagree with both arguments. *Evenwel* defines the meaning of representation within the
27 system of self-governance established for the States. They are not the same, as exist for
28

1 the federal government; i.e. all branches of State legislature must be based on one
2 man/one vote principles. Accordingly, under *Evenwel* both State senators and Assembly
3 Members are responsible for serving all the constituents in their district. The Secretary
4 cannot simply pretend this holding does not exist. Accordingly, the Secretary cannot
5 show any Supreme Court precedent invalidates this controversy.
6

7
8 Also plaintiffs take issue with the Secretary’s suggestion their substantive due
9 process foundation must be anchored in Art. IV, § 4 (the Guarantee Clause), rather than
10 the federal structure of the Constitution, which was created to protect, among other
11 things, those liberties of the people (of which the right to vote is the most fundamental).
12 *See Bond v. United States*, 564 U.S. 211, 222-224 (2011). California has no right to cre-
13 ate an oligarchy based on and maintained by the “cap” which now discourages people
14 from voting in federal, as well, as State elections. *See e.g.* FAC 12.4 (E) & (M) (Plaintiffs
15 who don’t vote in California because elections are “meaningless”.) California’s malap-
16 portioned districts which deter voting at the federal level, as well as the State level, vio-
17 late Constitutional amendments, statutes, treaties and customary law intended to increase
18 suffrage and encourage people to vote. *See* FAC ¶¶ 10.1-10.86.
19

20
21 Plaintiffs also dispute Padilla’s contention the Privileges and Immunities Clause
22 cannot be raised with regard to self-governance because this is foreclosed by the *Slaugh-*
23 *ter House Cases*, 83 U.S. 36 (1872) and *McDonald v City of Chicago*, 561 U.S. 742
24 (2010). The Slaughter House cases involved economic regulations. *McDonald* observed
25 the longstanding and continuing criticism of *Slaughter House*’s “privilege and immuni-
26 ties” analysis, see 561 U.S. at 756-759. The Court decided it was not necessary to recon-
27 sider *Slaughter House* in *McDonald* because this case could be resolved via substantive
28

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

16 VI. CONCLUSION

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

18 Like *Baker* this case challenges a State's arbitrary practices, in place and developed since
19 1862, of limiting its legislature to only 40 Senators and 80 Assembly members *no matter how*
20 *much its population grows*. When the "cap" started the 120 legislators represented only 400,000
21 people. Now this same number of legislators represents almost 40,000,000 people and the popu-
22 lation of California continues to grow.

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

