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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(Oakland/SF Division)

TIMOTHY A. DeWITT, on behalf of himself and others similarly situated,

Plaintiff,

vs.

CALIFORNIA CITIZENS REDISTRICTING COMMISSION, a California agency; SECRETARY OF STATE OF THE STATE OF CALIFORNIA, Alex Padilla;

And DOES 1 through 100, Defendants.

//

Case No. 3:15-cv-5261 WHA

THREE-JUDGE CASE (28 U.S.C. §2284)

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE RE EVENWEL V. ABBOTT

Due: April 11, 2016
Time: Noon/ 12:00 p.m.
Place: Clerk's Office/Courtroom 8

RESPONSE TO ORDER TO SHOW CAUSE RE *EVENWEL v. ABBOTT*

On Monday, April 4, 2016, the U.S. Supreme Court issued its unanimous decision in the case of *Evenwel v. Abbott*, 578 U.S. __ (2016) (per Ginsburg, J.). The same day, this Court, sitting as a single judge, issued its Order to Show Cause requiring the Plaintiff in this action to show cause by Noon, April 11, 2016, why his remaining Sixth Claim for Relief should not be dismissed "in light of" the Supreme Court's decision in that case.

In brief, Plaintiff's remaining Sixth Claim for Relief should not be dismissed (1) because, in *Evenwel*, the Supreme Court decided specifically, and only, that the Fourteenth Amendment of the U.S. Constitution does not affirmatively require that the State of Texas drop or abandon "total population" equality as a districting principle in crafting state legislative districts, and replace it (wholesale) with "voting population" equality, as specifically claimed, urged, and argued by the Appellants in that action, and such a carefully and narrowly crafted decision of the Court (with perhaps the customary "overdose of [judicial] bombois" -- but that's what 1L is for) in no way precludes, or warrants dismissal of, *this Plaintiff's* purposefully very different and distinct claims, allegations, and arguments in *this action*, and (2) because this Court, still sitting as a single judge, simply lacks jurisdiction to enter any (especially any finally dispositive, and appealable) judgment "on the merits" of this action, including the proper application of the Supreme Court's decision in *Evenwel* to Plaintiff's remaining Sixth Claim (the ostensible subject matter of this Court's Order to Show Cause here). (See 28 U.S.C. §2284(b)(3) ("A single judge shall not… *enter judgment on the merits*." (emp. added.)); and *Shapiro v. McManus*, 577 U.S. __ (2015) (unanimous, per Scalia J).)

1. The Three-Judge District Court Which Has Yet to be Convened in this Action Retains Continuing Plenary Jurisdiction Over All Aspects of this Case, Including the Proper Substantive Review and Application of *Evenwel* to this Action, and this Court's January 12, 2016, Single-Judge Interlocutory Dismissals.

The fundamental jurisdictional limitation on the Court, still sitting as a single-judge, (under §2284(b)(3) and *Shapiro*) is especially trenchant on the procedural facts here. This Court, sitting as a single judge, has already entered substantive interlocutory dismissals (many of them plainly "on the merits") on each of Plaintiff's *other nine* Claims for Relief in this action (see Order, January 12, 2016), and those interlocutory dismissals would all become expressly prohibited final "judgments" under §2284(b)(3) by virtue of any final dismissal – again "on the merits" (i.e., under *Evenwel*) -- of Plaintiff's "remaining" Sixth Claim for Relief here.

Further, such a final dismissal would effectively vitiate the required Three-Judge Court's (whose identity is still wholly unknown) own continuing plenary jurisdiction over this entire action (to say nothing of potentially affecting the U.S. Supreme Court's own plenary direct appellate jurisdiction over this entire action, under 28 U.S.C. §1253). Under Section 2284(b)(3), the required Three-Judge Court has express continuing jurisdiction over this entire action, including the entire substance of this Court's January 12, 2016, Order in this case (whether "on the merits" or not, but especially the ones entered "on the merits") in which it dismissed fully nine of Plaintiff's ten claims for relief in this action (including a potentially historic, first-of-its-kind claim based expressly on the Nineteenth Amendment, which it declined to address or discuss *at all* in its Order for some reason.). And these single-judge interlocutory dismissals "on the merits" were entered *sua sponte*, with no prior notice to Plaintiff whatsoever, in the manner perhaps of the archetypal life-tenured single U.S. District Judge the "Three-Judge Act" was established by the United States Congress to protect against (and in the interests of *all* litigants before the courts, not

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

Concerning Plaintiff's original First Claim for Relief in this action (over which the required Three-Judge Court has continuing plenary jurisdiction in this action), please see *Hinds' Precedents of the House of Representatives*, Vol. 1, §310, Report of the Committee on Elections, March 15, 1844 (fully conceding Congress has no constitutional authority to direct or instruct state legislatures to draw single-member districting plans under Elections Clause of U.S. Constitution; report in fact followed by full House of Representatives; members of four separate state congressional delegations elected at-large in violation of first federal "single-member districts" statute in fact recognized and seated as full members of Congress as required by U.S. Constitution; no involvement by any Art. III court requested or required).)

2. The *Evenwel* Court Ruled Carefully and Only that the Fourteenth Amendment of the U.S. Constitution Does Not Affirmatively Require Texas to Adopt the *Evenwel* Litigants' Proposed Manichean Remedy, Namely, Drop or Abandon "Equality of Representation/ Total Population Equality" and Replace it Wholesale, or *In Toto*, with "Voting Equality/ Voter Population Equality" as a Constitutional Districting Value or Principle; Court's Ruling in No Way Warrants or Requires Dismissal of This Plaintiff's Far Deeper, Wider, and More Richly Textured – Expressly Non-Manichean – Claims and Arguments in this Action, Based on Dramatically Different Facts, in an Entirely Different State, California.

As discussed above, regardless of this Court's view, sitting as a single judge, of the proper application of the Supreme Court's careful and narrowly crafted (unanimous) opinion in the *Evenwel v. Abbott* case (which in this Plaintiff's view is entirely understandable and explainable by its own terms), this Court may not now, sitting as a single judge, enter a final dismissal/ judgment in this action, under both the express provisions of Section 2284(b)(3), and the Supreme Court's (perhaps even more thoroughly unanimous) decision in *Shapiro v. McManus*, *supra* -- which it should be noted was also cited approvingly by the *Evenwel* Court. These decisions are all for the required Three-Judge Court to make in this action.

Nonetheless, and *arguendo*, Plaintiff will also outline and discuss briefly "on the merits" (again) why the Supreme Court's recent decision in the *Evenwel* case in no way precludes, or warrants dismissal of, Plaintiff's "remaining" Sixth Claim for Relief in this action. The Plaintiff-Appellant(s) in *Evenwel* presented a very specific proposition to the Supreme Court: rule that the Fourteenth Amendment of the U.S. Constitution affirmatively requires that the State of Texas drop/abandon "total population" as the districting principle in state legislative districting plan, and replace it wholesale, or *in toto*, with "voter population." (Slip opin., at pp. 6- 7 ("Plaintiffs' chosen metric" & "appellants insist").) In response to this very specific, singular

request, voluntarily posed precisely in that matter by the litigants in that case themselves (notably, it was certainly open to the *Evenwel* plaintiffs to prepare and present a proposed plan that simultaneously fully embraced both representational equality and voting equality, but they obviously made a pointed and conscious decision *not* to do that for some reason), the Supreme Court responded unanimously "no", the Fourteenth Amendment does not affirmatively require Texas to abandon "total" population, and replace it (wholesale) with an entirely different definition of "population", voter population. (Slip opin., at pp. 7-8.)

In presenting this perhaps stark, black & white, almost Manichean, choice to the Supreme Court (of "total population" vs. "voting population"), the challenging plaintiffs in *Evenwel* necessarily, and unfortunately, "bought into" what in this Plaintiff's (actually long-held) view is a glaring (and carefully constructed) "false dichotomy" between the supposedly competing or mutually-exclusive constitutional values or principles of "voting equality", on the one hand, and "equality of representation", on the other. Presented with this kind of stark "false choice", originating from the plaintiff-appellant(s) themselves, the Supreme Court arguably had no choice, within the four corners of that case, but to accept Appellant's own premise themselves, and conclude that "no", if you are telling us that it's only a question of one or the other (voting equality/voter population, or equality of representation/ total population), the Fourteenth Amendment does *not* affirmatively require the wholesale sacrifice of "equality of representation/ total population" at the altar of "voting equality/ voter population." (Slip opin., at pp. 7– 8.)

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

Fact is, these are not mutually exclusive values or objectives in fact, and neither should be falsely raised offensively as a sword against the other. In the same way that the *Evenwel*

litigants should not have attempted to raise the sword of "voting equality" offensively to displace or diminish the value of "equality of representation" (all presupposing the existence of "districts" at all of course), the California defendants in this action should similarly not be permitted to raise the sword of "equality of representation" offensively to displace or diminish the value of actual "voting equality." As Plaintiff expressly alleges, the California Defendants, by their districting practices here, falsely and offensively assert that plans drawn solely on the basis of "total population" equality (under the principle or value solely of "equality of representation"), are categorically protected by a kind of constitutional "safe harbor" (under not just the Fourteenth Amendment (as in *Evenwel*), but also as specifically alleged here, the Voter Qualifications Clause (congressional elections) (expressly based on voting rights, and therefore permitting of no even *de minimus* deviation from equality under the "one person, one vote" precedents), and the First Amendment (viewpoint discrimination), involved in the Supreme Court's decisions in both the *Vieth v. Jubilirer*, 541 U.S. 267, 315 (2004), and *Shapiro* cases). This is so, even though by the very act of treating "total population equality" so brazenly and categorically as a legal "safe harbor", and making no additional effort whatsoever beyond that simultaneously to minimize variances in actual voting strength from district-to-district, dramatic, "outrageous" deviations or variances (having a cumulative, systematic or skewing effect on electoral influence and results across the entire State), of as high as 490% in some cases (state assembly districts), are created and maintained with no effort at correction by these California Defendants whatsoever.

In fact, the mere 40% maximum deviation in voting equality present in the *Evenwel* case, while admittedly substantial in its own right, is relatively miniscule compared to California's 490% deviations challenged in this action, and strongly suggests that considerable work has already been done in Texas to reduce variances in "voting equality" across those districting plans, work that has never even been attempted with California's districting plans being challenged in this action. By way of comparison, and if it really came down to it, this Plaintiff would take a mere 40% maximum deviation (as present in *Evenwel*) in actual voting equality across all of

California's districting plans "in a heartbeat" over the current *status quo ante* in this State. It must also be noted in this connection, however, that the Court in *Evenwel* expressly left open the question whether a state legislature, as in California here (and, presumably, also an Art. III court exercising jurisdiction over the same issues), permissively *may* resolve any perceived irresolvable or residual conflict between the values and objectives of "voting equality", on the one hand, and "equality of representation" on the other, in favor of actual "voting equality." (See slip opin., at p. 19.)

Simply put, the value of "equality of representation/ total population equality", as important and valid as it is in its own right, creates no constitutional "safe harbor" whatsoever for the kind of dramatic, systematic deviations or variances in actual voting strength/ voting equality we see under California's districting plans today, which are being challenged in this action. The Supreme Court's carefully crafted decision in *Evenwel* certainly creates no such artificial "safe harbor" itself. (E.g., slip opin., at pp. 7-8 ("neutral", "nondiscriminatory", "rational", "not invidiously discriminatory" plans affirmatively *required*).) To say or think otherwise would be to sanction or invite even the most deliberate, potently efficacious, undisguised, and perniciously partisan, efforts at actual-voter "vote packing" in selected districts, and not just in California, but all across the nation. And to allow the exact same result as such undisguised deliberate or intentional actual-voter vote packing, via the mechanism of the fictitious legal theory -- based on a formally fallacious and contrived "false dichotomy", that "voting equality" and "equality of representation" are somehow unavoidable mortal enemies of each other, a "false choice" originally deliberately constructed in Plaintiff's view by legally trained minds for the purpose of using "equality of representation" offensively as a sword against "voting equality" -- that "total population equality", by itself, and without anything more, establishes a categorical constitutional "safe harbor" for the California defendants here, would be equally impermissible under the Constitution. And this is especially the case under both the Voter Qualifications Clause (congressional elections) (no even *de minimus* variances permitted), and the First Amendment

(viewpoint discrimination) (to protect a minority political party, or minority geographical region of the state, against actual vote dilution), neither of which were at issue in the *Evenwel* case at all.

In short, and fact is, "voting equality" and "equality of representation" are not mutually exclusive values or principles. Neither should be asserted offensively as a "safe harbor" against the other. Neither should be raised offensively as a sword to diminish or displace the other. Both should be promoted and pursued simultaneously. And, in this day and age, when we have "self-driving" automobiles, and "AI" computers that are now able to defeat the best human competitors at the most complex board games (like "Go") ever devised by the human mind, there's no way we cannot substantially reduce, if not completely eliminate, deviations in actual voting strength from district-to-district, currently as high as 490% (by the way, which is more than *ten times* more severe than the maximum deviations in "voter population" present in *Evenwel*) under California's current districting plans, while simultaneously maintaining a constitutional commitment to the "equality of representation" value under the Fourteenth Amendment. If we refuse even to attempt to do so, especially grounded in a carefully constructed, formally fallacious (and, yes, politically motivated irrational and invidious) "false choice" legal theory, then we are no better than O.J. Simpson *actively willing the glove not to fit*, at the behest of his own highly trained and sophisticated legal counsel, "in open court."

In the end, if it need be gainsaid, eliminating all district-based restrictions (on those who "may choose" or "be chosen" in an election, see Fed. Papers No. 52 & 60 (J. Madison & A. Hamilton)), which Plaintiff plainly claims are separately and deeply Constitutionally infirm elsewhere in this action (and over which claims the actual Three-Judge Court which has yet to be convened in this action has plenary continuing jurisdiction (28 U.S.C §2284(b)(3))), would itself automatically eliminate all numerical deviations in both "voting equality" and "equality of representation", simultaneously, and with complete mathematical exactness. One area where we could afford to ease up on the "judicial bombois" in these cases is the apparent default or automatic (unexamined, and certainly never actually litigated) presupposition on the part of some

courts concerning the continued viability of the (artificial majoritarian, winner-take-all, inherently invidiously discriminatory) archaic, centuries-old, British-origin "single-member district" system of election itself within the American democratic process going forward, in the year 2016 (and that's saying nothing of the runaway elder or age discrimination that would result if we ever did abandon actual electoral equality as a core objective or value in the districting process).

For one thing, Congress could literally wake up one morning, as after having a sudden attack of constitutional conscience, not to mention self-awareness within our federal system of governance, conclude that it's wrong to presume to instruct separately sovereign state legislatures on how to conduct their own legislative business after all, and repeal the false federal mandate at 2 U.S.C. §2c altogether. Similarly, it may actually dawn on some court somewhere (as it did to "this reporter" about 28 years ago by now), that in the same way and for the same reason it has been openly acknowledged by everybody since about the year 1807 in this country that candidates for Congress may not be restricted to the one sub-state "district" where they reside within a State, all other substantive district-based restrictions associated with the "single-member district" system of election, appearing nowhere in the Constitution, are similarly fundamentally incompatible with the various Qualifications Clauses of the U.S. Constitution, which actually *are* a fundamental part of the Constitution. In a similar manner, concerning Plaintiff's original Third Claim for Relief in this action, Congress could again literally "wake up tomorrow" (under its plenary naturalization authority under the Immigration & Naturalization Clause of the U.S. Constitution), and declare everybody ever born on the "Kamchatka Peninsula", or the Province of Alberta, Canada (still not a constitutionally-admitted State of the United States), for that matter, to be full "U.S. Citizens" at or from birth. Such an action by that *political branch* of the federal government, however, would not mean that all such persons were, by reason of that legislation, somehow automatically eligible to serve as President, and Commander-in-Chief of all U.S. Armed Forces, directly under the Presidential Qualifications Clause of the U.S. Constitution. (Again, see Federalist Papers Nos. 52 & 60 (J. Madison & A. Hamilton); also, *United States v. Wong Kim Ark*,

169 U.S. 649 (1898) and *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).)

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

These two fundamental principles, although distinct from one another conceptually, both must and plainly can be, maximized/ harmonized in practice and in fact simultaneously, and certainly far more effectively than California's current wholly unbalanced districting plans do. We should frankly acknowledge that sometimes the U.S. Constitution requires us to "walk" and "chew gum", *at the same time*. California's current plans are based solely on "equality of representation/total population", treating that one principle as a categorical "safe harbor" to be used offensively as a sword against all other constitutional values, and do nothing additionally, or any more than that, to promote or protect actual "voting equality" across the state. This is so even in the face of dramatic numerical variances in numbers of actual voters from district-to-district.

Finally, Plaintiff presents claims and arguments in this case, including the "remaining" Sixth Claim for Relief, based on entirely separate provisions of the Constitution, which were not involved in the *Evenwel* case at all, and which the Supreme Court therefore simply had no occasion to consider or rule upon in that case. Plaintiff presents a claim for "viewpoint discrimination" against the disfavored minority political party of the state, the Republican Party, under the First Amendment of the U.S. Constitution (see *Vieth v. Jubelirer,* 541 U.S. 267, 315 (2004) (Kennedy, J., concurring), cited in *Shapiro v. McManus*, supra, (slip opin., at p. 7)), based among other things, on the fact that defendant California Redistricting Commission is formally

barred by the law that created it (itself passed by *majority* vote via California's statewide initiative process) from noticing, much less actually protecting, the disfavored *minority* Republican political party, from both district-specific and systematic political vote-diluting effects caused by the dramatic variances in actual voting strength that exist from district-to-district under their current congressional and state legislative districting plans. (See SAC ¶58.) Ditto for disfavored deep geographical minority populations and voters in the far northern part of the State (e.g., CA C.D. 1) having dramatically higher (i.e., many multiples greater) actual voting strength than some counterpart districts in the more favored, more populous southern region of the State. (SAC ¶58b.) And these variances are not to be viewed in isolation, one-by-one. They cumulate systematically, one on top of the other, across the entire State. These issues simply were not present or involved in the *Evenwel* case at all.

Plaintiff also presents a claim for further vote dilution (which really transcends the "districting" issue altogether, and affects all elections) based on the allegation that defendant Secretary of State mistakenly considers some persons born geographically in the United States to be citizens with full voting rights in the State, when as Plaintiff alleges, that is actually not the case with respect to those persons under the U.S. Constitution. (See SAC ¶¶ 61 & 62.) And, finally, Plaintiff challenges defendants' California *congressional* districting plan (see, e.g., SAC ¶58b) under the Voter Qualifications Clause of the U.S. Constitution (where a no-*de minimus*-deviations standard, rather than a 10%-deviation standard under the Fourteenth Amendment, applies under the applicable precedents, because that clause is expressly grounded in voting rights) (see *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)) a claim which was also simply not present at all in the *Evenwel* case, which involved only Texas "State Senate" districts.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits the Court substantively should not, and sitting as a single-judge, perhaps more importantly, procedurally *may not*, dismiss Plaintiff's "remaining" Sixth Claim for Relief in this action, "in light of" the Supreme Court's recent decision in *Evenwel v. Abbott*. First, nothing in the *Evenwel* decision warrants dismissal of this Plaintiff's very different claims, allegations, and arguments, based on substantially if not dramatically different facts (e.g., 490%, as opposed to 40% maximum deviations), in this action. Indeed, on deeper reflection, this new case decision actually strongly supports Plaintiff's long-standing non-dualist, non-Manichean, approach to the issues in this action. The Court re-affirmed again in its opinion that "neutral", "nondiscriminatory", "rational", "not invidiously discriminatory" plans are affirmatively *required* (slip opin., at pp. 7-8), and that "[m]aximum deviations *above 10%* [for state legislative districts] are *presumptively* impermissible." (*Id.* at 3-4 (citing to *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983))(emp. added).) Plaintiff respectfully submits that California's *490%* "maximum deviation" today is dramatically, outrageously, irrationally, and invidiously "above 10%", and therefore similarly entitled to a judicial presumption of impermissibility. And, in any case, of course, the Court expressly left open the question of whether, if push comes to shove, any perceived irresolvable or residual conflict between the values of electoral equality, on the one hand, and representational equality, on the other, *may permissively* be resolved by the state legislature (and thus necessarily also, lower Art. III courts having jurisdiction over the self-same issues) in favor of electoral equality, so under no known theory of the Universe could the *Evenwel* case possibly be construed to require outright "dismissal" even of Plaintiff's "Sixth Claim for Relief" here. (See slip opin., at p. 19.)

Second, and in any event, the Three-Judge Court that has yet to be convened in this case retains full continuing jurisdiction (under 28 U.S.C. §2284(b)(3)) over this entire action, including the Court's entire January 12, 2016, Order in the case, and the question of the proper

application of the *Evenwel* decision to Plaintiff's "remaining" Sixth Claim for Relief, at issue in the Court's OSC here. The question of the proper application of the *Evenwel* decision to Plaintiff's "remaining" claim for relief, at a minimum, clearly passes the expressly "low bar" of "constitutional []substantiality" established by the Supreme Court in *Shapiro v. McManus, supra* (slip opin., at p. 7) (per Scalia, J.). Thus, as Congress has made excruciatingly plain (and the Supreme Court cited approvingly in *Shapiro*) (which was itself cited approvingly by the Court in *Evenwel*) "[a] single judge *shall not … enter judgment* on the merits." (28 U.S.C. §2284(b)(3) (emp. added).) And this is fully consistent with Congress' other clear mandate, under both the Appellate Jurisdiction Clause and Separation of Powers doctrine, to Article III courts in this area: "*Any action* of a single judge may be reviewed by the full [three-judge] court *at any time* before final judgment." (*Id.* (emp. added).)

Dated: April 11, 2016.

Respectfully submitted,

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By: _____
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