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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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 SIMILARLY SITUATED; AND DOES 1-30,

Plaintiffs,

v.

SECRETARY OF STATE ALEX PADILLA,

Defendant.

2:17-cv-00973

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date:	September 8, 2017
Time:	10:00 a.m.
Courtroom:	3
Judge:	The Honorable Kimberly J. Mueller
Trial Date:	N/A
Action Filed:	5/9/17

INTRODUCTION

The appropriate size of the California Legislature is an important issue that merits serious consideration in the court of public opinion. However, the question cannot be answered by a federal court because it falls outside the constitutional bounds of federal subject matter jurisdiction, and because the question does not pose a federal claim.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS CAN BE ADDRESSED BY A SINGLE JUDGE.

28 U.S.C. § 2284 states that a "district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." However, § 2284 does not require referral to a three-judge court under two circumstances:

- A three judge panel "'is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts.'" *Shapiro v. McManus*, 136 S.Ct. 450, 455 (2015) (quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100, 95 S.Ct. 289 (1974)).
- Claims that are "constitutionally insubstantial"—a term defined as "essentially fictitious," "wholly insubstantial," "obviously frivolous," or "obviously without merit"—do not raise a substantial federal question and may be dismissed by a single judge. *Shapiro*, 136 S.Ct. at 455-456.

As explained in Defendant's opening brief and as further explained below, both criteria for dismissal by a single judge are met here.

II. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFFS' CLAIMS.

A. Plaintiffs Assert a General Grievance Shared by the Public at Large.

"[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at

large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

There is no doubt that plaintiffs' asserted injury—diluted representation in the state Legislature—would be, if meritorious, a general grievance shared by the public at large. Plaintiffs allege that "*The People in California* have had their representation limited and capped and now have an Oligarchy at best and only a mere shadow of connection to the represented." Complaint ¶ 2.3 (emphasis added).

Plaintiffs suggest that *Baker v. Carr*, 369 U.S. 186 (1962), "establishes dilution of a person's vote from malapportionment is a sufficiently concrete injury by itself to establish Article III standing." Opposition (Dkt. 16) at 11. Plaintiffs misread *Carr*. The situation in *Carr* was that Tennessee had not reapportioned either house of the state legislature since 1901, and that as a result of population growth, legislative districts had become grossly malapportioned. *Carr*, 369 U.S. at 193-194. The claim in *Carr* was not a general grievance shared by the public at large; it was a grievance specific to the voters of five counties. *Id*. at 205 (plaintiffs were residents of Davidson, Hamilton, Knox, Montgomery, and Shelby counties). *Carr* held that voters in those five counties had stated an equal protection claim vis-à-vis voters in other counties. *Id*. at 237.

Plaintiffs' claims in the present action amount to, at best, a "generally available grievance about government," and therefore do not state an Article III case or controversy. *See Lujan*, 504 U.S. at 573-74.

B. Plaintiffs' Claims Are Barred by the Political Question Doctrine.

The Supreme Court has identified six independent tests that identify whether a non-justiciable political question is raised in a particular case. *Baker*, 369 U.S. at 217. The second *Baker* test—"a lack of judicially discoverable manageable standards"—compels dismissal of plaintiffs' claims. *Id*. at 217. A determination that California's legislative districts are too large cannot be made without a judicial standard governing the size of legislative districts. There is no such standard, and plaintiffs have not volunteered one. *See Holder v. Hall*, 512 U.S. 874, 881,

885 (1994) (size of districts cannot be challenged under Section 2 of the Voting Rights Act because the wide range of possibilities makes the choice "inherently standardless").[1]

III. PLAINTIFFS' CLAIMS ARE FRIVOLOUS.

Defendant's opening brief explains why Plaintiffs' claims do not state a claim for relief. For two fundamental reasons, Plaintiffs' claims also are frivolous and may be dismissed by a single district court judge.

First, no one suggests that there is any precedent that has found a legislative body to be unconstitutionally small. Second, in an action claiming vote dilution under § 2 of the Voting Rights Act, a majority of the Supreme Court agreed that there is no discoverable benchmark for determining the appropriate size of legislative districts. *Holder*, 512 U.S. at 885, 891.

Under these circumstances, Plaintiffs' claims that the California Legislature is too small are frivolous. *Cf. Shapiro*, 136 S.Ct. at 456 ("Whatever 'wholly insubstantial,' 'obviously frivolous,' etc., mean, at a minimum they cannot include a plea for relief based on a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases.").

CONCLUSION

Plaintiffs' claims should be dismissed without leave to amend.

Dated: September 1, 2017

Respectfully submitted,

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S/ *George Waters*

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[1] There was no majority opinion in *Hall*. However, a majority of five justices agreed with the proposition that there is no discoverable benchmark for determining the appropriate size of legislative districts. *Hall*, 512 U.S. at 885 (opinion of Kennedy, Rehnquist, and O'Connor), 891 (concurring opinion of Thomas and Scalia).

CERTIFICATE OF SERVICE

Case Name: **Citizens for Fair Representation, et al. v. Secretary of State Alex Padilla** No. **2:17-cv-00973**

I hereby certify that on September 1, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 1, 2017, at Sacramento, California.

Chris A. McCartney	/S *Chris McCartney*
Declarant	Signature

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