

1 GARY L. ZERMAN, CA BAR#: 112825
2 23935 PHILBROOK AVENUE, VALENCIA, CA 91354
3 TEL: (661) 259-2570

4 SCOTT STAFNE, WA BAR#: 6964 *Pro Hac Vice*
5 239 NORTH OLYMPIC AVE ARLINGTON, WA 98223
6 TEL: (360) 403-8700

7 ATTORNEYS FOR PLAINTIFFS

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

11
12 **CITIZENS FOR FAIR**
13 **REPRESENTATION, et. al.,**
14 **Plaintiffs,**

15 vs.

16
17 **SECRETARY OF STATE ALEX**
18 **PADILLA,**

19 **Defendant.**

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

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS
(previously filed [as ECF 46] on May 24,
2018 jointly with Plaintiffs'
REPLY to Defendant's Opposition to
Plaintiffs' Motion to Convene
Three-Judge Court, ECF 47)

Hearing Noted: June 15, 2018
Judge: Hon. Kimberly J. Mueller
Courtroom: 3

Trial Date: None
Action Filed: 5/8/17

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24 **Plaintiffs' Response to Defendant's Motion to Dismiss**

25 In moving to dismiss the Second Amendment Complaint [SAC] for lack of standing and
26 justiciability, Defendant's arguments essentially are the same made by the dissents in *Baker v.*
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1 Carr, 369 U.S. 186 (1982). Justice Frankfurter decried the attack on malapportionment as based
2 on “hypothetical” claims, “abstract because the Court does not vouchsafe . . . guidelines for
3 formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that
4 today’s umbrageous disposition is bound to stimulate.” *Id.* at 267 (Frankfurter, J., dissenting).
5

6 For the same reasons that the Supreme Court decided that voters whose political power
7 had been diluted by malapportionment were entitled to relief in federal court, Plaintiffs present
8 justiciable claims that this court is obligated to resolve.

9 **I. Standing**

10 **A. Article III does not preclude standing for all claims involving injuries shared**
11 **widely by the public**

12 Defendant argues that the SAC presents only “a generalized grievance shared by the
13 public at large.” (Defendant’s Motion to Dismiss (MTD), at 7) To begin with, Article III
14 standing may be found even if the claimed injuries are widespread in the population. “In recent
15 decades,” the Court has analyzed cases involving “adjudication of generalized grievances more
16 appropriately addressed in the representative branches” as a question for the “prudential” branch
17 of standing, not as an imperative of Article III. *Lexmark Int’l, Inc. v. Static Control Components,*
18 *Inc.*, 134 S. Ct. 1377, 1386, (2014) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1,
19 12 (2004)).
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22 Moreover, in considering whether to dismiss a case “on grounds that are ‘prudential,’
23 rather than constitutional,” the Court has emphasized that the “request is in some tension with
24 our recent reaffirmation of the principle that ‘a federal court’s obligation to hear and decide’
25 cases within its jurisdiction ‘is virtually unflagging.’” *Susan B. Anthony List v. Driehaus*, 134 S.
26 Ct. 2334, 2347 (2014) (quoting *Lexmark Int’l, Inc.*, 134 S.Ct. at 1386 (quoting *Sprint*
27
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1 *Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013)). See *Duke Power Co. v. Carolina*
2 *Environ. Study Group, Inc.*, 438 U.S. 59, 80–81 (1978) (“[T]he basic practical and prudential
3 concerns underlying the standing doctrine are generally satisfied when the constitutional
4 requisites are met.”).

5
6 To establish Article III standing, Plaintiffs must show that they have or will imminently
7 suffer an “‘injury in fact’ that is concrete and particularized; the threat must be actual and
8 imminent, not conjectural or hypothetical. . . .” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493
9 (2009) (quoting *Friends of Earth, Inc. v. Laidlaw Environ. Serv. (TOC), Inc.*, 528 U.S. 167,
10 180–181 (2000)). “For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal
11 and individual way.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

12
13 Defendant quotes several cases denying standing when plaintiffs “alleged only ‘a general
14 interest common to all members of the public,’” MTD, at 8 (quoting *Ex Parte Levitt*, 302 U.S.
15 633, 636 (1937)). However, as the Court observed in *FEC v. Atkins*, this “kind of judicial
16 language . . . invariably appears in cases where the harm at issue is not only widely shared, but is
17 also of an abstract and indefinite nature—for example, harm to the “common concern for
18 obedience to law.” 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pacific R. Co.*,
19 311 U.S. 295, 303 (1940)). Notably, *FEC v. Atkins* was referring to the very cases cited by
20 Defendant. See *id.* at 23–24; MTD, pp. 7–8.

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22 In one of Defendant’s cites, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S.
23 208 (1974), the Court barred plaintiffs from suing as citizens and taxpayers to determine if
24 members of Congress could serve in the military reserves; they claimed no injuries not shared
25 equally by the entire country. Likewise, in *Valley Forge Christian College v. Americans United*
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1 | *for Separation of Church and State, Inc.*, 454 U.S. 464, 475–479 (1982), plaintiffs lacked
2 | standing as taxpayers to challenge the free transfer of government property to a religious college;
3 | they claimed no injuries beyond a sheer concern that the Establishment Clause was violated.
4 |

5 | Another of Defendant’s authorities, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992),
6 | was an effort to contest federal funding of a dam in Egypt as a violation of the Endangered
7 | Species Act. Plaintiffs did not have standing as none of their asserted harms counted as “actual
8 | injuries” to themselves. *Warth v. Seldin*, 422 U.S. 490, 504 (1975), rebuffed a challenge to a
9 | restrictive zoning law; plaintiffs did not show that their inability to obtain affordable housing had
10 | “resulted, in any concretely demonstrable way, from respondents’ alleged constitutional and
11 | statutory infractions.”
12 |

13 | Defendant also relies on cases after *FEC v. Atkins*. In *Lance v. Coffman*, 549 U.S. 437,
14 | 442 (2007), plaintiffs could not challenge a Colorado law limiting redistricting to once per
15 | census, as “[t]he only injury [they] allege is that . . . the Elections Clause. . . has not been
16 | followed.” *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), was basically
17 | the same as *Valley Forge Christian College*; the Court held that plaintiffs could not sue solely as
18 | taxpayers to contest the President’s faith-based initiatives. In short, both cases involved mere
19 | demands that the law be followed.
20 |

21 | Finally, Defendant quotes two Ninth Circuit decisions, only one of which is remotely
22 | relevant to determining when plaintiffs can challenge laws that involve grievances common to
23 | many people. In *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), plaintiffs claimed that Barack
24 | Obama was ineligible to be President as he allegedly was not a natural-born citizen. None of the
25 | plaintiffs had asserted any kind of concrete injury that was not speculative or moot, leaving only
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1 a generalized interest in the Constitution being obeyed. However, the court agreed that the
2 plaintiffs who had been political opponents of Obama in the election or presidential electors
3 might have had “competitive standing” to claim he was ineligible for office, but once his
4 presidency commenced, the “Plaintiffs’ competitive interest in running against a qualified
5 candidate had lapsed.”¹
6

7 The Court has adjudicated the merits of many constitutional claims in which the
8 plaintiffs’ injuries were shared by the public at large, or at least by all eligible voters. *See FEC v.*
9 *Akins*, 524 U.S. at 24 (“[W]here a harm is concrete, though widely shared, the Court has found
10 ‘injury in fact’”). Consider these examples:
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12 1. Invalidation of poll taxes: In *Harper v. Virginia Board of Elections*, 383 U.S. 663
13 (1966), the Court overturned Virginia’s poll tax, which was required for *all* voters. The basis of
14 the decision was the Court’s conclusion that “[t]o introduce wealth or payment of a fee as a
15 measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.” It made no
16 difference whether the voter could afford the tax. *Every* voter in the state was aggrieved by the
17 poll tax and could assert the same cause of action, even though the law ““was born of a desire to
18 disenfranchise”” black people. *Id.* at 666 (quoting *Harman v. Forssenius*, 380 U.S. 528, 543
19 (1965)).
20

21 2. Challenges to census results that affect legislative apportionments: In *Department of*
22 *Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), voters from several states
23 were allowed standing to attack the planned use of statistical sampling for the upcoming census.
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27 ¹ Defendant also cites *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003), but
28 the court merely held that the plaintiff lacked sufficient ownership interests to challenge use of
his musical compositions as violations of federal copyright law.

1 A voter in Indiana would suffer Article III injuries in that the sampling technique was
2 “virtual[ly] certain” to result in the state losing a seat in the House of Representatives. *Id.* at 330.
3 In addition, voters from specific counties in several states had standing on the ground that census
4 data was used to allocate representatives in their legislatures, and their counties predictably
5 would lose seats, resulting in “expected intrastate vote dilution.” *Id.* at 334. Thus, *every* voter in
6 Indiana and *every* voter in the affected counties would suffer vote dilution and consequently have
7 the same injuries. Nonetheless, the Court upheld standing: these voters were “asserting ‘a plain,
8 direct and adequate interest in maintaining the effectiveness of their votes.’” *Id.* at 331–32
9 (quoting *Baker v. Carr*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939))).
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12 3. Racial gerrymanders in redistricting: Racial gerrymanders spawned by redistricting
13 legislative districts violate the Equal Protection Clause regardless of whether they are “explicit,”
14 *Shaw v. Reno*, 509 U.S. 630, 643 (1993), or inferable from the context of a facially race-neutral
15 districting scheme. Such gerrymanders “threaten to stigmatize individuals by reason of their
16 membership in a racial group and to incite racial hostility.” *Id.* at 643. *Any voter* in the such
17 districts has standing to sue, including whites, because the stigmatization and racial animus
18 resulting from race-based redistricting affects voters of all races. *See Miller v. Johnson*, 515 U.S.
19 900, 909 (1995) (white voters could sue to invalidate congressional districts designed to increase
20 black representation); *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (Any resident of a
21 district drawn by “racial criteria. . . has standing to challenge the legislature’s action.”). *Every*
22 *voter* within the affected districts shares a common grievance over the racial classifications, yet
23 all have standing.
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26 4. Suits seeking information for the public benefit: Government agencies often are
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1 required by law to release information to the public on request. Literally any member of the
2 public can be “aggrieved” when an agency refuses disclosure. *See Pub. Citizen v. U.S. Dep’t of*
3 *Justice*, 491 U.S. 440, 449 (1989) (denial of public records request “constitutes a sufficiently
4 distinct injury to provide standing to sue.”).

5
6 Similarly, various laws require private parties to submit information to government
7 agencies, which in turn must be released to the public. In *FEC v. Atkins*, the plaintiffs were a
8 group of voters who contended that the American Israel Public Affairs Committee (AIPAC) was
9 required to comply with provisions of federal election law, including disclosure requirements.
10 These plaintiffs, who had “often opposed” AIPAC politically, had standing to vindicate an
11 “informational injury,” 524 U.S. at 24, even though their grievance was “shared in substantially
12 equal measure by all or a large class of citizens.” *Id.* at 23 (quoting Ptr’s Brief). *Any voter* had
13 standing to complain.
14

15 5. Taxpayer suits in Establishment Clause cases: Although plaintiffs suing as taxpayers to
16 challenge government spending usually do not have standing, the Court in *Flast v. Cohen*, 392
17 U.S. 83 (1968), allowed such suits to challenge government spending via legislative action that is
18 prohibited by specific constitutional provision. Numerous cases have authorized taxpayers to
19 contest government spending by legislative appropriation on Establishment Clause grounds. In
20 *Flast*, taxpayers had standing to sue over a statute providing funds for instruction, materials, and
21 textbooks used in religious schools. The Court said that there was “no absolute bar in Article III
22 to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending
23 programs.”). *Id.* at 101.
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26 Note the seeming tension between *Flast* and another decision akin to those cited by
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1 Defendant, *United States v. Richardson*, 418 U.S. 166 (1974). *Richardson* dismissed a taxpayer's
2 challenge to the secrecy of the CIA's budget as violating Article I, § 9, cl. 7 of the Constitution,
3 which requires that "a regular statement of Account of the Receipts and Expenditures of all
4 public Money shall be published from time to time." The Court held that the taxpayers asserted
5 only a "generalized grievance" inasmuch as they did not "claim that appropriated funds [were]
6 being spent in violation of a 'specific constitutional limitation upon the . . . taxing and spending
7 power.'" *Id.* at 175 (quoting *Flast v. Cohen*, 392 U.S. at 104).

9 As *FEC v. Atkins* explained, *see* 524 U.S. at 22, the key to reconciling *Flast* and cases
10 like *Richardson* (and those cited by Defendant) is not to focus on the fact that if one taxpayer had
11 standing, then every taxpayer could assert the same. That was true in both. Rather, the difference
12 is that in *Richardson* the taxpayer's only grievance was an abstract interest in the Constitution
13 being followed. In *Flast*, the plaintiff taxpayers suffered a specific injury forbidden by the
14 Establishment Clause, the forced support of religion.

16 6. Facial challenges to statutes under First Amendment overbreadth doctrine: If a law
17 limiting free expression is substantially overbroad, it "may not be enforced against anyone,
18 including the party before the court." *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985). In
19 asserting that a law is "incapable of any valid application," *Village of Hoffman Estates*, 455
20 U.S. at 494 n.5 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)), the challenger stands
21 for every person in the jurisdiction, and thus is raising a general grievance. The purpose behind
22 the overbreadth doctrine is to avoid chilling the public's free public expression. *See Virginia v.*
23 *Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden
24 (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose
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1 simply to abstain from protected speech, . . . harming not only themselves but society as a whole.
2 . . .”).

3 **B. Plaintiffs Have Standing**

4 Defendant does not dispute that Plaintiffs have alleged concrete injuries that are neither
5 conjectural nor hypothetical. Nor could he with any success. At “the pleading stage, general
6 factual allegations of injury resulting from the Defendant’s conduct may suffice, for on a motion
7 to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary
8 to support the claim.’” *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Defenders of*
9 *Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871,
10 889 (1990)). See *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (In “ruling on a motion to dismiss for
11 want of standing, . . . courts must accept as true all material allegations of the complaint, and
12 must construe the complaint in favor of the complaining party.”).

13 Plaintiffs have alleged a variety of injuries recognized by the Court as sufficient for
14 standing: dilution of a person’s voting strength due to race, political views or geographic location
15 (SAC ¶¶ 1.2–1.7; 3.32), and the consequent inability to obtain state services and assistance on an
16 equal basis, including that “the legislature often refuses to provide for their safety.” (¶ 3.33);
17 “grave economic, social, and stigmatic injuries as members of a racial and ethnic minority,”
18 whose interests are less well protected than whites (SAC ¶ 1.3); “increased fees and costs to
19 access voters in large geographical areas” (SAC ¶3.32); inability to elect minority members to
20 the legislature or for minorities to obtain office (SAC ¶¶ 1.2–1.3); and retaliation by state actors
21 for participating in this suit and otherwise objecting to the size of the legislature (SAC ¶
22 8.0–8.2).

1 Plaintiffs are not asserting “a generally available grievance about government—claiming
2 only harm to . . . every citizen’s interest in proper application of the Constitution and laws, and
3 seeking relief that no more directly and tangibly benefits [them] than it does the public at large.”
4 *Lance v. Coffman*, 549 U.S. at 439.

5
6 There is nothing “abstract,” “conjectural” or “hypothetical” about Plaintiffs’ injuries, as
7 they have occurred and continue to do so. The kinds of injuries claimed by Plaintiffs are
8 indistinguishable from those averred in cases concerning reapportionment, racial
9 gerrymandering, and restrictions on voting by means such as poll taxes. In those cases, the Court
10 accepted impairment of voting and dilution of voting power as actual injuries in themselves due
11 to the fact that loss of political power has predictable economic, social and personal effects. *See*
12 *Shaw v. Reno*, 509 U.S. 630, 640–41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S.
13 544, 569 (1969)) (“The right to vote can be affected by a dilution of voting power as well as by
14 an absolute prohibition on casting a ballot.”); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982)
15 (“Voting along racial lines allows those elected to ignore black interests without fear of political
16 consequences. . . .”).

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19 The Court specifically has held that those complaining of vote dilution “are asserting ‘a
20 plain, direct and adequate interest in maintaining the effectiveness of their votes,’” *Baker v.*
21 *Carr*, 369 U.S. 186, 207–08 (quoting *Coleman v. Miller*, 307 U.S. at 438 (1939)), “not merely a
22 claim of ‘the right possessed by every citizen ‘to require that the government be administered
23 according to law.’” *Id.* (quoting at *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

24
25 In *Rogers v. Lodge*, 458 U.S. 613 (1982), for example, the Court upheld the district
26 court’s determination that an at-large voting system for a Georgia county’s board of
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1 commissioners perpetuated racial discrimination. No black person ever had been elected to the
2 board, even though they comprised more than half the county’s population. The resulting harms
3 to black residents paralleled those alleged by Plaintiffs in the SAC: the all-white board was
4 “unresponsive and insensitive to the needs of the black community,” in ways that shock the
5 conscience. *Id.* at 625. The Court approved the district court’s order to transform the electoral
6 system into single-member district, which predictably would give blacks a realistic chance to
7 elect officials of their own race. This remedy was “tailored to cure the ‘condition that offends the
8 Constitution.’” *Id.* at 628 (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).
9

10
11 Plaintiffs are not suing as taxpayers or citizens but as individual voters or political parties
12 and municipalities litigating on behalf of voters. Further, they do not claim that their grievance
13 about the size of the legislature is “held in common by all members of the public.” *Lance v.*
14 *Coffman*, 549 U.S. at 441. Each of the causes of action asserted in the SAC applies to certain
15 members of the California voting population, not to all. Further, as will be explained, there are
16 many California voters who would lack standing to raise any challenges to the caps on
17 California’s legislature, much less the claims raised in the SAC. In fact, they benefit from the
18 status quo.
19

20 Count One—Intentional race discrimination in capping the legislature’s size:

21 Plaintiffs allege, and Defendant does not dispute, that California’s legislative caps “were
22 enacted to ensure that a small group of white males would control the state legislature.” SAC ¶
23 4.0 This original sin became self-perpetuating “because current members of the California
24 legislature would dilute their own political power by amending the state constitution to increase
25 the sizes of the Assembly and Senate.” SAC ¶ 4.2
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1 It makes no difference to this analysis that the caps themselves are race neutral—they
2 also were in *Rogers v. Lodge*, 458 U.S. 613 (1982). Likewise, in *Hunter v. Underwood*, 471 U.S.
3 222 (1985), the Court struck a provision of the Alabama Constitution that since 1901 had denied
4 voting to persons convicted of crimes of “moral turpitude.” Despite being facially race neutral,
5 the law was enacted to disenfranchise blacks, and consequently it became the state’s burden “to
6 demonstrate that the law would have been enacted without this factor,” which Alabama failed to
7 do. Alabama’s constitutional provision was of general applicability—it could disenfranchise
8 literally anyone convicted of the many crimes considered to show “moral turpitude,” such as
9 passing a bad check or vagrancy. *See id.* at 223 n.** & 226–27. Complainants included blacks
10 and whites, who like Plaintiffs here suffered the effects of a long-ago effort to maintain white
11 supremacy.
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13
14 Count Two—Intentional discrimination in maintaining the caps on the legislature:

15 Plaintiffs allege, and Defendant does not contest, that the caps not only harm the
16 non-white plaintiffs, but given the racial politics characteristic of California, white legislators
17 have strong incentives against expanding the legislature, “as any significant shrinkage of their
18 districts would likely result in much greater minority voting strength, to the detriment of their
19 political careers.” SAC ¶ 5.2 This scenario parallels *Rogers v. Lodge*, where the Court approved
20 the district court’s finding that even if the system was “neutral in origin,” it “ha[d] been
21 subverted to invidious purposes.” 458 U.S. at 626 (quoting district court’s findings).
22

23
24 Count Three—Denial of equal protection by diluting political power:

25 Plaintiffs allege without opposition that they are members of “underrepresented
26 populations” systematically underserved by legislators from massive electoral districts. They
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1 include “members of minority political parties, residents of rural areas with sparse populations,
2 Native American tribes and their members, and rural municipalities, as well as Californians who
3 are not wealthy.” SAC ¶ 6.2

4 Obviously only a subset of the California population has standing to make this claim.
5 Mark Zuckerberg or Nancy Pelosi, to name only two among a great many wealthy Californians
6 living in geographically-concentrated legislative districts, do not qualify, even if they personally
7 might agree with Plaintiffs for ideological reasons. For that matter, such persons may (and some
8 certainly must) benefit personally from a small legislature as it allows them to focus their
9 influence on fewer decisionmakers.
10

11
12 Count Four—Violation of the Due Process Clause by diminishing fundamental political rights:

13 Plaintiffs assert without contradiction that “a significant percentage of California voters
14 have substantially greater difficulty obtaining benefits and services from the state than voters
15 whose wealth and social status give them access to legislators for political purposes.” SAC ¶ 7.2
16 Voter turnout and the willingness to run for office are thereby adversely affected. SAC ¶ 7.1
17 Again, far from every Californian can make this claim. But the Plaintiffs can: they are
18 representatives of “ordinary Californians” who have little or no incentive to run for office or
19 even vote. They literally can be—and have been—ignored by the entrenched political elites of
20 the state. SAC ¶ 7.2
21

22
23 Count Five—Violation of the First Amendment:

24 Plaintiffs assert, and Defendant does not deny, that the legislative caps have “been
25 maintained at least in part for the purpose of suppressing and retaliating against the political
26 expression of state residents who advocate viewpoints contrary to the political elites that control
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1 the legislature.” SAC ¶ 8.0 Plaintiffs assert not only that large legislative districts are maintained
2 intentionally to suppress the viewpoints of voters with minority viewpoints, but that complaints
3 about the issue are met with official retaliation. SAC ¶ 8.1 The result is an insidious perpetuation
4 of viewpoints that are favored by the politicians who can ignore voters with contrary ideas and
5 retaliate against them for complaining about the system. SAC ¶ 8.1–8.2
6

7 As a three-judge federal court in Maryland recently concluded in a case asserting that
8 political gerrymandering violated the First Amendment,

9 diluting the weight of certain citizens’ votes to make it more difficult for
10 them to achieve electoral success because of the political views they have
11 expressed through their voting histories and party affiliations. . . .
12 implicates the First Amendment’s well-established prohibition against
13 retaliation, which prevents the State from indirectly impinging on the
14 direct rights of speech and association by retaliating against citizens for
15 their exercise.

16 *Shapiro v. McManus*, 203 F.Supp.3d 579, 595 (D.C. Md. 2016).

17 Only a minority of California voters realistically can assert this claim, even though
18 millions are adversely affected. Plaintiff Baird, for example, has been discriminated against due
19 to his criticism of California’s lack of statewide legislative representation, including loss of
20 government employment. SAC ¶ 8.2

21 Count Six—Violation of the Guarantee Clause of Article IV:

22 Plaintiffs will prove at trial that the structure of the California legislature violates the
23 intent of the Framers of the Guarantee Clause, which was inserted in the Constitution precisely to
24 assure that states would not “become monarchical or oligarchical forms of government, in which
25 political power was controlled by the hands of a few.” SAC ¶ 9.2

26 California’s population soon will exceed forty million people. SAC ¶ 3.2 In 1870, the
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1 state had somewhat over a half-million residents,² approximately the size of a single Assembly
2 district today. SAC ¶ 3.1 Yet the same number of legislators now represent a vastly larger
3 population, not to mention controlling an economy that would be the world’s fifth largest if
4 California were a country (eclipsing even Great Britain).³

5
6 Plaintiffs assert not only that a significant percentage of California voters have no
7 influence over either the election or actions of legislators; they can be ignored by their
8 representatives. SAC ¶ 9.4 They will prove at trial that this system was the very type of
9 oligarchic government that the Guarantee Clause was meant to prevent by *requiring* redress from
10 the United States. The only question is whether a federal court should play that role, which
11 Plaintiffs submit is a matter of justiciability, not standing.

12
13 Perhaps any Californian could complain theoretically that the state no longer is a
14 functioning “republican form of government” as the Framers understood that term. Yet as the
15 Framers would have recognized, oligarchical governments actually benefit elites, whose phone
16 calls are promptly returned by legislators or aides due to their wealth and status. None of the
17 plaintiffs can be so described. They literally are ignored by the same legislature that imposes
18 taxes on them. Sound familiar?

19 20 **II. Justiciability**

21 Defendant argues that the SAC presents only “political” questions under *Baker v. Carr*,

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24 ² See *Population of States and Counties of the United States 1790–1990*, at 3 (1996) (560,247
25 residents).

26 ³ See *The Pleasure and Pain of Being California, the World’s 5th-Largest Economy*, New York
27 Times, May 7, 2018
28 (<https://www.nytimes.com/2018/05/07/us/california-economy-growth.html?login=email&auth=login-email>).

1 369 U.S. 186 (1962), despite quoting the Court’s statement that “the nonjusticiability of a
2 political question is primarily a function of separation of powers.” MTD, at 9 (quoting *Baker*,
3 369 U.S. at 211). Plaintiffs are complaining not about the actions of a coordinate branch, but a
4 state’s ossified political system. This in theory might raise *federalism* concerns, but those were
5 put to rest by *Baker v. Carr* and its progeny.
6

7 Defendant contends that there is a “lack of judicially discoverable and manageable
8 standards” to determine a constitutionally-acceptable size for the legislature.⁴ MTD, at 10
9 Further, increasing the number of legislators “would require a constitutional amendment.” *Id.* He
10 suggests that Plaintiffs persuade legislators to reform the system through constitutional
11 amendment or bring an initiative to change the state constitution. *Id.*, at 10–11 n.6.
12

13 The fact that remedying the size of the state legislature would require a state
14 constitutional amendment is irrelevant. If that were a barrier to justiciability, the Court could not
15 have decided some of its landmark reapportionment decisions (and many others), in which state
16 constitutional provisions were reviewed. In *Lucas v. Forty-Fourth General Assembly of*
17 *Colorado*, 377 U.S. 713 (1964), for example, the apportionment plan struck by the Court was
18 prescribed by the state constitution. *See Id.* at 715–18. State apportionment schemes often have
19 involved a combination of constitutional mandates and legislative actions. *See, e.g., Reynolds v.*
20 *Sims*, 377 U.S. 533, 537–40 (1964) (Alabama system).
21

22 As to the suggestion that Plaintiff’s pursue a constitutional amendment either through
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25 ⁴ Defendant relies on the plurality in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which concluded
26 that political gerrymandering cases present only political questions, see MTD, at 10, ignoring that
27 Justice Kennedy’s fifth vote left that question unresolved, *see id.* at 313–14, and that the issue is
28 currently before the Court. *See Gill v. Whitford*, 137 S.Ct 2268 (2017) (postponing jurisdiction
until hearing on merits).

1 legislative action or initiative, exactly the same was urged by the *dissents* in the great
2 reapportionment cases. Putting aside the unlikelihood of legislators acting to diminish their own
3 power, the Court in *Lucas* firmly rejected the relevance of political remedies to the issue of
4 justiciability: “Except as an interim remedial procedure, justifying a court in staying its hand
5 temporarily, we find no significance in the fact that a nonjudicial, political remedy may be
6 available for the effectuation of asserted rights to equal representation in a state legislature.” 377
7 U.S. at 736.

8
9 At best, “a court of equity might be justified in temporarily refraining from the issuance
10 of injunctive relief in an apportionment case in order to allow for resort to an available political
11 remedy, such as initiative and referendum.” *Id.* This is precisely the remedy Plaintiffs seek: a
12 declaration by this court that the caps on California’s legislature are unconstitutional, with a
13 period thereafter for the state to cure the violation. It is entirely possible that this court will need
14 do no more than declare the status quo unconstitutional. “Judicial authority enters only when
15 local authority defaults.” *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (U.S.
16 1971).

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19 The remaining issue is whether there are justiciable standards for determining the
20 minimum size of the legislature. Defendant cites the *plurality* in *Holder v. Hall*, 512 U.S. 874,
21 881, 885 (1994), for the proposition that “[t]he wide range of possibilities makes the choice
22 “inherently standardless.” MTD, at 11. Only three members of the Court agreed on this point. In
23 any event, *Holder v. Hall* concerned whether the size of a local legislative body was subject to a
24 challenge under the Voting Rights Act, not the question presented here: is there is a
25 constitutionally- acceptable minimum number of legislators in California?
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1 This court does not need to determine the minimum constitutionally acceptable
2 legislative size to declare that the current system is unconstitutional. Plaintiffs submit that the
3 question of minimum legislative size would only arise in shaping an appropriate injunctive
4 remedy. The feasibility of such relief is an issue for trial with the benefit of expert testimony and
5 specific facts. As with any remedy, “[t]he controlling principle consistently expounded in our
6 holdings is that the scope of the remedy is determined by the nature and extent of the
7 constitutional violation.” *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).
8

9 Expert testimony from political scientists will demonstrate that increasing the sizes of the
10 Assembly and Senate would cure or greatly relieve Plaintiffs’ injuries. This inquiry would be
11 akin to that routinely used in cases determining whether legislative redistricting plans would give
12 racial minorities “less opportunity than other members of the electorate to participate in the
13 political process and to elect representatives of their choice.” *Thornburg v. Gingles*, 478 U.S.
14 30, 36 1986) (quoting Voting Rights Act, § 42 U.S.C 1973(b) (now 52 U.S.C. 10301(b)).
15

16 California’s experience shows that minorities gain political power when there are more
17 legislative districts. “[R]acial minorities in California have more favorable representation in the
18 Assembly than in the Senate, [which] demonstrates that as the population of legislative districts
19 decreases, non-whites have a significantly greater chance of electing candidates of their choice.”
20

21 SAC ¶ 3.31 As in redistricting cases, political scientists can determine what minimum number of
22 legislative districts will assure that minority groups will have reasonable opportunities to elect
23 candidates of their choice or at least have a substantial enough influence on legislative races to
24 command attention. The same will be true for minority political parties with significant popular
25 support and rural voters.
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1 The absence of “fixed or even substantially fixed guidelines,” *Swann v. Charlotte-*
2 *Mecklenburg Bd. of Ed.*, 402 U.S. at 28, does not preclude a court of equity from acting to
3 redress a proven constitutional violation. “The essence of equity jurisdiction has been the power
4 of the Chancellor to do equity and to mould each decree to the necessities of the particular case.
5 Flexibility rather than rigidity has distinguished it.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329
6 (1944).
7

8 It is not unusual for a court to determine whether a certain amount of something or some
9 number of people is a legal violation, or that a remedy using specific numbers adequately cures
10 or reduces the resulting injuries. *See, e.g.*, 402 U.S. at 25 (“very limited use made of
11 mathematical ratios was within the equitable remedial discretion of the District Court”). In
12 challenges to waiting periods to switch political parties, for example, the Court did not dictate a
13 precise number of days, but invalidated unacceptable ones until the waiting period corresponded
14 to the state’s legitimate interests. *Compare Kasper v. Pontikes*, 414 U.S. 51, 61 (1973)
15 (23-month wait struck) *with Rosario v. Rockefeller*, 410 U.S. 752, 760–61 (1973) (11-month wait
16 sustained). The same approach was taken in assessing waiting periods for new residents to vote.
17 *Compare Dunn v. Blumstein*, 05 U.S. 330 (1972)(one-year wait unconstitutional) *with Marston v.*
18 *Lewis*, 410 U.S. 679 (1973) (fifty-day waiting period upheld as necessary to insure accurate
19 voting lists).
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22 In reapportionment cases, Justice Frankfurter was proven wrong. As case law developed
23 under the “one-person, one-vote” standard, the Court eventually accepted that deviations in
24 population size for state legislative districts of under ten per cent required no justification. *See*
25 *White v. Regester*, 412 U.S. 755, 764 (1973) (total variation of 9.9% sufficient to make “prima
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1 facie case of invidious discrimination”).

2
3 **Conclusion**

4 For all its noble purposes, reapportionment exacerbated the dilution of votes in California
5 by requiring that the legislative districts be substantially the same size. With a steadily rising
6 population, the caps on the size of the Assembly and Senate have left significant portions of the
7 people with an increasingly meaningless franchise. It would be ironic if federal courts could not
8 intervene to remedy a problem partly of their own creation.⁵

9
10 Plaintiffs respectfully request this court to dismiss Defendant’s Motion to Dismiss.

11 Dated: May 24, 2018

12 Respectfully submitted,

13 /s/ Scott E. Stafne

14 Scott Stafne, *Pro Hac Vice*

15 /s/ Gary L. Zerman

16 Gary L. Zerman, Attorney.

17 *Attorneys for Plaintiffs*

18 *Citizens for Fair Representation, et. el*

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20
21 _____
22 ⁵Older cases indicate that Guarantee Clause claims may be nonjusticiable, but more recently the
23 Court “has suggested that perhaps not all claims under the Guarantee Clause present
24 nonjustibciable political questions.” *New York v. United States*, 505 U.S. 144, 185 (1992). In
25 *Reynolds v. Sims*, the Court stated that “questions raised under the Guarantee Clause are
26 nonjusticiable, were ‘political’ in nature and where there is a clear absence of judicially
27 manageable standards.” 377 U.S. 533, 582 (1964) For reasons stated in text, Plaintiffs’ claims
28 are no more “political” than those in *Reynolds*, and there are objective standards to determine
appropriate relief. Substantial scholarly commentary supports the justiciability of some
Guarantee Clause claims, including reapportionment. See *New York*, 505 U.S. at 185 (citing
authorities); Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justicable*, 65 U.
Colo. L. Rev. 849 (1994).

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CERTIFICATE OF 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 1st day of June, 2018 at Arlington, Washington.

BY: /s/ Pam Miller
Pam Miller, Paralegal