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 8 *of State*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12
 13

14 **TIMOTHY A. DEWITT,**

Plaintiff,

v.

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 16
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 18 **CALIFORNIA CITIZENS**
REDISTRICTING COMMISSION, a
 19 **California agency; SECRETARY OF**
STATE OF THE STATE OF
 20 **CALIFORNIA, ALEX PADILLA,**

Defendants.

3:15-cv-05261-WHA

**DEFENDANTS' RESPONSE TO
 COURT'S REQUEST FOR BRIEFING
 ON THREE-JUDGE PANEL**

Date: N/A
 Time: N/A
 Dept: 8, 19th Floor
 Judge: Hon. William Alsup
 Trial Date: N/A
 Action Filed: Nov. 17, 2015

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 22
 23 Defendants California Redistricting Commission (Commission) and California Secretary of
 24 State Alex Padilla (Secretary) offer this response to the Court's request for briefing addressing
 25 whether defendants' motion to dismiss can be addressed by a single judge without convening a
 26 three-judge panel.
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 28

1 **DEFENDANTS’ MOTION TO DISMISS CAN BE ADDRESSED BY A SINGLE JUDGE**
 2 **WITHOUT CONVENING A THREE-JUDGE PANEL**

3 28 U.S.C. § 2284 states that a “district court of three judges shall be convened . . . when an
 4 action is filed challenging the constitutionality of the apportionment of congressional districts or
 5 the apportionment of any statewide legislative body.” However, not all apportionment claims
 6 trigger the need to convene a three-judge panel. Claims that are constitutionally insubstantial—a
 7 concept equated with concepts such as “essentially fictitious,” “wholly insubstantial,” “obviously
 8 frivolous,” and “obviously without merit”—do not raise a substantial federal question for
 9 jurisdictional purposes and may be dismissed by a single judge. *Shapiro v. McManus*, ___ U.S.
 10 ___, 136 S.Ct. 450, 456-457 (2015).

11 The sole remaining claim in the Second Amended Complaint (SAC) can be read to make
 12 three different claims. No matter how it is read, the SAC is frivolous and does not require
 13 reference to a three-judge panel.

14 **I. THE “ONE PERSON, ONE VOTE” ALLEGATIONS ARE FRIVOLOUS AND DO NOT**
 15 **REQUIRE REFERRAL TO A THREE-JUDGE PANEL.**

16 The SAC alleges that California’s redistricting plans violate the constitutional principle of
 17 “one person, one vote” because the districts are drawn to have equal total population, as opposed
 18 to equal numbers of “actual voters.” (SAC ¶ 57.) In the Supreme Court’s recent *Evenwel* opinion,
 19 the Court rejected a virtually identical challenge to Texas’ state senate districts, stating:

20 we reject appellants’ attempt to locate a voter-equality mandate in the Equal
 21 Protection Clause. As history, precedent, and practice demonstrate, it is plainly
 22 permissible for jurisdictions to measure equalization by the total population of state
 23 and local legislative districts.

24 *Evenwel v. Abbott*, ___ U.S. ___, 136 S.Ct. 1120, 1126-27 (2016). *Evenwel* also noted that it is
 25 plainly permissible to measure equalization of congressional districts by total population. *Id.* at
 26 1129; *see also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (plain objective of the Constitution is
 27 to make “equal representation for equal numbers of people the fundamental goal for the House of
 28 Representatives”). The Court’s opinion in *Evenwel* was joined by six justices. While there were
 two concurring opinions, both agreed that districting on the basis of total population is plainly
 permissible. *Id.* at 1133 (Thomas, J., concurring: “I agree with the majority that our precedents

1 do not require a State to equalize the total number of voters in each district[;] [s]tates may opt to
2 equalize total population”); *id.* at 1142 (Alito, J., concurring: “Both practical considerations and
3 precedent support the conclusion that the use of total population is consistent with the one-person,
4 one-vote rule”).

5 To the extent that the SAC can be read to claim that the “one person, one vote” principle
6 requires that districts be drawn to equalize both total population and eligible-voter population,
7 that claim also is squarely rejected by *Evenwel*. *Evenwel*, 136 S.Ct. at 1133, fn. 15 (“Insofar as
8 appellants suggest that Texas could have roughly equalized both total population and eligible-
9 voter population, this Court has never required jurisdictions to use multiple population baselines”).

10 After *Evenwel*, plaintiff’s one person, one vote claim is frivolous.

11 **II. THE VIEWPOINT DISCRIMINATION ALLEGATIONS ARE FRIVOLOUS AND DO NOT**
12 **REQUIRE REFERRAL TO A THREE-JUDGE PANEL.**

13 The SAC alleges that some districts with high numbers of “actual voters” are composed
14 primarily of Republicans, while some districts with lower numbers of “actual voters” are
15 composed primarily of Democrats, resulting in impermissible viewpoint discrimination in
16 violation of the First Amendment. (SAC ¶ 58.)

17 The Supreme Court has struggled with question of whether political gerrymander claims are
18 justiciable. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice White—whose plurality opinion
19 was the narrowest ground for decision—concluded that a political gerrymander claim could
20 succeed only where plaintiffs proved “both intentional discrimination against an identifiable
21 political group and an actual discriminatory effect on that group.” *Id.* at 127. In *Vieth v.*
22 *Jubelirer*, 541 U.S. 267 (2004), the Court affirmed the dismissal of a political gerrymander claim
23 but failed to produce a majority opinion. Four justices concluded that political gerrymander
24 claims are not justiciable. *Id.* at 305-306 (Scalia, J., joined by JJ. Rehnquist, O’Connor, and
25 Thomas). Five justices concluded that political gerrymander claims are justiciable, under various
26 theories, but all agreed that such claims require a showing of intentional discrimination. *Id.* at
27 315 (Kennedy, J., concurring in judgment: gerrymander that has “purpose and effect of imposing
28 burdens on a disfavored party and its voters” may violate First Amendment); *id.* at 339 (Stevens,

1 J., dissenting: gerrymander claim requires showing that line-drawers “allowed partisan
2 considerations to dominate and control the lines drawn, forsaking all neutral principles”); *id.* at
3 350 (Souter, J., joined by Ginsburg, J., dissenting: gerrymander claim requires showing that
4 defendants acted intentionally to manipulate shape of district); *id.* at 367 (Breyer, J., dissenting:
5 partisan gerrymander may be shown where “partisan considerations render traditional line-
6 drawing compromises irrelevant”). The bottom line is that a partisan gerrymander claim must
7 allege—at the least—that district lines were intentionally drawn to disadvantage an identifiable
8 political group.

9 The SAC does not allege intentional discrimination. Rather plaintiff’s claim is that the
10 Redistricting Commission had a duty to consider the partisan makeup of districts, but did not do
11 so because California law forbids it. (SAC ¶ 12 (“categorically failing or refusing even to
12 consider the partisan political make-up of various areas or regions across the state . . . strips
13 Defendant COMMISSION of any ability to protect political minorities (e.g., members of the
14 minority Republican political party in the state)[.] . . . Defendant Commission is also
15 (impermissibly and unconstitutionally) required, by initiative vote of a *simple-majority* of
16 California voters statewide, literally to turn a formal “blind-eye” to the partisan or political
17 characteristics of their districts”) (emphasis in original).)

18 Plaintiff is correct that the Commission could not and did not consider the partisan makeup
19 of the districts it drew. California voters created the Commission in 2008 to draw state legislative
20 lines, and in 2010 gave the Commission the added responsibility of drawing congressional lines.
21 Cal. Const., art. XXI, § 1; Proposition 11, approved November 4, 2008; Proposition 20, approved
22 November 2, 2010. The California Constitution now requires that districts “shall not be drawn
23 for the purpose of favoring or discriminating against an incumbent, political candidate, or
24 political party.” Cal. Const. art. XXI, § 2, subd. (e). The SAC does not allege intentional
25 discrimination and therefore does not state a claim for political gerrymandering.

26 In *Shapiro*, the Court held that § 2284 required the appointment of a three-judge court
27 where the complaint challenged an apportionment of congressional seats “along the lines
28 suggested by Justice Kennedy” in his concurrence in *Vieth*. *Shapiro, supra*, 136 S.Ct. at 456.

1 Although the *Vieth* plurality thought all political gerrymander claims nonjusticiable, Justice
2 Kennedy's concurrence concluded that a claim could be stated where it was alleged that a
3 gerrymander had the "purpose and effect" of imposing burdens on a disfavored party and its
4 voters. *Id.*, quoting *Vieth*, 541 U.S. at 315.) *Shapiro* concluded that this was enough to trigger a
5 three-judge court: "Whatever 'wholly insubstantial,' 'obviously frivolous,' etc., mean, at a
6 minimum they cannot include a plea for relief based on a legal theory put forward by a Justice of
7 this Court and uncontradicted by the majority in any of our cases." *Ibid.* In contrast to *Shapiro*,
8 here there is no support whatsoever for plaintiff's theory that the Commission's *failure* to
9 consider the partisan makeup of districts constitutes unconstitutional viewpoint discrimination.
10 This theory is contradicted by all members of the *Vieth* court, four of whom concluded that
11 political gerrymander claims are not justiciable, and five of whom concluded that such claims are
12 justiciable where district lines are intentionally drawn to disadvantage an identifiable political
13 group.

14 Further, plaintiff does not have standing to make this claim. *See Baker v. Carr*, 369 U.S.
15 186, 206 (1962) ("voters who allege facts showing disadvantage to themselves as individuals
16 have standing to sue"). Plaintiff alleges that he resides and votes in the 15th Assembly District,
17 the 9th Senate District, and the 13th Congressional District, and further alleges that these are high-
18 turnout districts. (SAC ¶ 58b.) Plaintiff does not allege that these districts are composed
19 primarily of Republicans; thus he does not allege that he—as a Republican—has been injured by
20 packing Republicans into these districts.

21 **III. THE VOTE DILUTION ALLEGATIONS DO NOT RELATE TO APPORTIONMENT AND**
22 **THEREFORE DO NOT REQUIRE REFERRAL TO A THREE-JUDGE PANEL.**

23 The SAC alleges that plaintiff's vote is diluted because the Secretary does not investigate
24 whether certain people born in the United States are actually lawful citizens and not what he
25 refers to as "super-citizens." (SAC ¶¶ 61-62.) This claim is made under the 14th Amendment,
26 which states that "[a]ll persons born or naturalized in the United States, and subject to the
27 jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S.
28 Const. amend. XIV, § 1. In the *Slaughter-House Cases*, 83 U.S. 36, 73 (1872), the Supreme

1 Court held that this section excludes from citizenship certain persons, mainly children of foreign
2 diplomatic personnel, who were born in the United States. *Id.* at 73. Apparently, plaintiff’s claim
3 is that certain children of foreign diplomatic personnel, even if born in this country, are not
4 “subject to the jurisdiction” of the United States, are not citizens, and are not eligible to vote.

5 Section 2284 requires a three-judge court only when an action is filed “challenging the
6 constitutionality of the apportionment of congressional districts or the apportionment of any
7 statewide legislative body.” Plaintiff’s vote-dilution allegations do not challenge the
8 apportionment of California’s congressional and legislative districts and therefore do not require
9 referral to a three-judge panel.

10 Dated: April 22, 2016

Respectfully submitted,

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13 MARK R. BECKINGTON
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15 /s/ *George Waters*
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CERTIFICATE OF SERVICE

Case Name: **DeWitt, Timothy A. v.**

No. **3:15-cv-05261-WHA**

California Citizens

Redistricting Commission, et al.

I hereby certify that on April 21, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' RESPONSES TO COURT'S REQUEST FOR BRIEFING ON THREE-JUDGE PANEL

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On April 22, 2016, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Timothy A. DeWitt
2729 Dwight Way, No. 402
Berkeley, CA 94704

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 April 22, 2016, at Sacramento, California.

Tracie L. Campbell
Declarant


Signature