16-16162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY A. DEWITT,

Plaintiff-Appellant,

v.

CALIFORNIA CITIZENS REDISTRICTING COMMISSION and ALEX PADILLA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

No. 3:15-cv-05261-WHA
The Honorable William Alsup, Judge

ANSWERING BRIEF OF APPELLEES CALIFORNIA CITIZENS REDISTRICTING COMMISSION AND ALEX PADILLA

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-8050
Fax: (916) 324-8835
Email: George.Waters@doj.ca.gov
Attorneys for Appellees California Citizens Redistricting Commission and Alex Padilla

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

This brief is filed on behalf of defendants California Citizens Redistricting Commission and Alex Padilla, California Secretary of State.

INTRODUCTION

Plaintiff Timothy DeWitt, an attorney proceeding in pro per, made a number of extraordinary claims in the court below. Among other things, plaintiff sought an order allowing him to run for all 53 California congressional seats at the same time, to simultaneously run for the first congressional district in Wisconsin (currently held by Speaker of the House Paul Ryan), and to vote in congressional districts other than the district in which he resides. Plaintiff also moved for an order convening a three-judge panel because one of his ten claims challenged the congressional and state legislative districts drawn by the Commission in 2011. *See* 28 U.S.C. § 2284 (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").

This appeal concerns two dismissal orders. First, the district court entered a sua sponte order dismissing nine claims in the original complaint because it concluded that the claims could not possibly succeed. Second, after allowing plaintiff to amend the redistricting claim, the district court entered an order dismissing that claim, and denying the request to convene a

three-judge panel, because it found the claim "so clearly without merit that it would be a waste of judicial economy to require three judges to resolve the claim."

As set forth more fully below, plaintiff's claims are indeed frivolous and fully merited dismissal. The judgment should be affirmed.

JURISDICTIONAL STATEMENT

District court jurisdiction: The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). Plaintiff's claims were based on several provisions of the United States Constitution—the Elections Clause (U.S. Const. art. I, § 4, cl. 1), the Qualifications Clauses (*id*. art. 1, § 2, cl. 2; art 1, § 3, cl. 3), the First, Fifth, Tenth, Fourteenth and Nineteenth Amendments—and on 42 U.S.C. § 1983.

Appellate jurisdiction: This Court has jurisdiction under 28 U.S.C. § 1291.

Timeliness of appeal: Plaintiff's appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A). Judgment was entered on May 31, 2016. Appellees' Supplemental Excerpts of Record (SER) 13. Plaintiff's notice of appeal was filed June 29, 2016. SER 8.

Appeal from final judgment: The appeal is from a final judgment entered June 29, 2016. SER 13.

ISSUES PRESENTED

Whether the district court correctly concluded that the sole claim in plaintiff's amended complaint is "constitutionally insubstantial" and therefore could be dismissed without convening a three-judge panel.

Whether the district court correctly concluded that the claims in plaintiff's original complaint could not possibly succeed and therefore could be dismissed sua sponte.

STATEMENT OF THE CASE

I. ORIGINAL COMPLAINT

As alleged in the original complaint, plaintiff is a California resident, is over 35 years old, and is a "natural born citizen" of the United States by virtue of birth—in California—to citizen parents. SER 49, ¶ 4. Plaintiff desires to run for all 53 California congressional seats at the same time. SER 50, ¶ 5. Plaintiff also is considering making a simultaneous run for the first congressional district of Wisconsin. SER 50, ¶ 8. And he desires to vote in Congressional districts other than the district where he resides. SEER 51, ¶ 9.

In addition to the Commission and the Secretary, the named defendants were Paul Ryan, the Speaker of the United States House of Representatives; former California Governor Arnold Schwarzenegger; and Scott S. Harris,

Clerk of the Supreme Court of the United States. Plaintiff made nine claims that defendants had violated various provisions of the United States Constitution:

1. That 2 U.S.C. § 2c, which requires that all states' congressional delegations be elected from single-member districts, violates the Elections Clause (U.S. Const. art. I, § 4, cl. 1), the Tenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments. SER 56-58. Thus the Speaker of the House must recognize candidates elected from multi-member districts, should any present themselves. SER 58, ¶ 26.
2. That the Speaker of the House simultaneously holds two offices (Speaker of the House and his individual seat as a member of the House) in violation of Article I, Section 6, Clause 2. SER 59-61.
3. That former California Governor Arnold Schwarzenegger could not become President, should he choose to run, because he is not a natural born citizen as required by Article II, Section 1, Clause 5. SER 62-65.
4. That the Commission lacked authority to adopt California's present redistricting plans (adopted in 2011) because the

Commission is not a "legislature" within the meaning of the Elections Clause. SER 65-67.

5. That the Secretary of State enforces California's district residency laws, which require voters to vote in only one district and require candidates to run in only one district. As to congressional races, this violates the Qualifications Clauses (U.S. Const. art. 1, § 2, cl. 2; art. 1, § 3, cl. 3). SER 68-70.

6. That the Commission drew, and the Secretary of State enforces, California's 2011 redistricting plans. Those plans violate the "one person, one vote" principle of the Equal Protection Clause because they produced districts of equal population but unequal numbers of actual voters. SER 71-73.

7. That the Secretary's enforcement of single-member districts, in conjunction with California's districting plans, discriminates against female voters in violation of the First and Nineteenth Amendments. SER 73-75.

8. That the Secretary enforces California Elections Code section 8003(b), which requires that no person file nomination papers for more than one office at the same election. As to congressional

races, this violates the Qualifications Clauses (U.S. Const. art. 1, § 2, cl. 2; art. 1, § 3, cl. 3). SER 76-77.

9. That the Supreme Court Clerk's enforcement of Supreme Court Rule 18 (governing direct appeal to the Supreme Court from a district court) violates the Appellate Jurisdiction Clause (U.S. Const. art. III, § 2, cl. 2), the Due Process Clause of the Fifth Amendment, and the separation of powers doctrine. SER 78-81.

10. That injunctive and declaratory relief should be entered on all the above claims. SER 82-84.

II. SUA SPONTE ORDER DISMISSING ORIGINAL COMPLAINT AND DENYING REQUEST TO CONVENE THREE-JUDGE COURT

Shortly after the complaint was filed, plaintiff filed a request that the action be assigned to a three-judge court pursuant to 28 U.S.C. § 2284 (district court of three judges shall be convened when action is filed challenging the apportionment of congressional districts or statewide legislative body). SER 45. After a hearing on that request, the district court entered a sua sponte order dismissing the complaint and denying the request to convene a three-judge court. SER 44 (civil minutes), 35(order). The district court found that several of the claims were plainly foreclosed by Supreme Court precedent and that the rest failed for want of standing. SER

36-37. All claims save the sixth (the redistricting claim) were dismissed with prejudice. The court allowed plaintiff to amend the sixth claim to cure standing defects (plaintiff failed to allege that he lived in a district that suffered from vote dilution) because it presented a theory then before the Supreme Court in *Evenwel v. Abbott*, No. 14-940 (S.Ct.). SER 40-43.

As to the request that a three-judge court be convened, the request was denied without prejudice to a renewed request should plaintiff amend the sixth claim to cure the standing defect. SER 43.

III. AMENDED COMPLAINT

Plaintiff's amended complaint named only the Commission and the Secretary as defendants. SER 24. It repled the sixth claim to allege that:

- The Commission cannot draw districts to protect political minorities because an initiative measure prevents the Commission from considering the political make-up of the districts it draws. SER 28-29, ¶ 12.
- The Commission's districting plans deny equal protection to some voters because they produce districts of equal total population but unequal numbers of "actual voters." SER 30, ¶ 57.
- Some districts with high numbers of actual voters are predominantly Republican, while districts with the lowest

numbers of actual voters are predominantly Democratic. This constitutes viewpoint discrimination in violation of the First Amendment. SER 30, ¶ 58.

- In the Assembly, Senate, and Congressional Districts in which plaintiff resides (AD 15, SD 9, and CD 13), the number of actual votes cast in recent elections was much higher (up to 431% higher) than in some other districts (AD 59, SD 33, CD 33). SER 31, ¶ 58b.
- The Secretary assumes that voters who were born in the United States are in fact citizens of the United States. The Secretary does not investigate whether such voters are "subject to the jurisdiction" of the Unitized States within the meaning of the Fourteenth Amendment. This dilutes the vote of constitutionally-qualified voters. SER 32-33, ¶¶ 61-62.

Plaintiff again requested that a three-judge court be convened pursuant to 28 U.S.C. § 2284. SER 20.

IV. ORDER DISMISSING AMENDED COMPLAINT AND AGAIN DENYING REQUEST TO CONVENE THREE-JUDGE COURT

On April 15, 2016, the Commission and the Secretary moved to dismiss the amended complaint. SER 91(Docket # 33). The district court

immediately requested briefing on whether the motion could be heard without convening a three-judge panel. SER 91 (Docket # 34).

On May 31, 2016, the district court granted defendants' motion to dismiss and denied plaintiff's request to convene a three-judge panel. The court acknowledged that 28 U.S.C. § 2284 gives a single judge limited ability to review a redistricting case—such a case may be dismissed only if the district court lacks jurisdiction, the complaint is not justiciable, or the complaint is "wholly insubstantial and frivolous." SER 16 (quoting *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015)). Although the redrafted sixth claim arguably was based on three separate theories, the court found that each theory was "so clearly without merit that it would be a waste of judicial economy to require *three* judges to resolve the claim." SER 16 (emphasis in original).

Judgment for defendants was entered on May 31, 2016.

STANDARD OF REVIEW

Dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure is reviewed de novo, and factual findings relevant to that determination are reviewed for clear error. *Viewtech, Inc. v. United States*, 653 F.3d 1102, 1104 (9th Cir. 2011).

Dismissal for failure to state a claim under Rule 12(b)(6) is also reviewed de novo. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-1122 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). The Court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, the Court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended by* 275 F.3d 1187 (9th Cir. 2001); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

SUMMARY OF ARGUMENT

The redistricting claim in plaintiff's amended complaint is "constitutionally insubstantial" and therefore was properly dismissed without convening a three-judge panel. *See Shapiro*, 136 S. Ct. at 455-456; 28 U.S.C. § 2284.

The claims in plaintiff's original complaint could not possibly succeed and therefore were properly dismissed sua sponte. *Gambill v. United States*, 554 Fed. Appx. 558 (9th Cir. 2014) (citing *Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE AMENDED COMPLAINT WITHOUT CONVENING A THREE-JUDGE PANEL.

A. A Single Judge May Dismiss Apportionment Claims That Are Constitutionally Insubstantial or Not Justiciable.

Pursuant to 28 U.S.C. § 2284, plaintiff moved to convene a three-judge panel to adjudicate the amended complaint. SER 45, 20. Section 2284 states, in pertinent part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
>
> (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> > (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the

> request was presented, shall serve as members of the court to hear and determine the action or proceeding.

Section 2284 restricts—but does not eliminate—the ability of a single-judge district court to dismiss an apportionment claim. 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. Further, 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.'" *Id*. at 455 (quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974)).

As shown below, the amended complaint is frivolous and was properly dismissed by a single judge.

B. The Amended Complaint Is Constitutionally Insubstantial and Frivolous.

The amended complaint asserts a single claim challenging California's legislative and congressional districts. The claim can be read to assert three separate theories. No matter how it is read, the amended complaint is frivolous and does not require reference to a three-judge panel.

1. One Person, One Vote Theory

Plaintiff's first theory is that California's redistricting plans violate the constitutional principle of "one person, one vote" because the districts are drawn to have equal total population, as opposed to equal numbers of "actual voters." SER 40, ¶ 57. In *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), decided during the briefing on the motion to dismiss in the present action, the Supreme Court rejected a virtually identical challenge to Texas' state senate map, stating:

> [W]e reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.

Id. at 1126-1127. *Evenwel* also noted that congressional districts—plaintiff's focus in this case—may also be equalized by total population. *Id*. at 1129; *see also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (plain objective of the Constitution is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives").

To the extent that the amended complaint can be read to claim that the "one person, one vote" principle requires that districts be drawn to equalize *both* total population and eligible-voter population, that claim also was squarely rejected by the Supreme Court. *Evenwel*, 136 S. Ct. at 1133, n.15

("Insofar as appellants suggest that Texas could have roughly equalized both total population and eligible-voter population, this Court has never required jurisdictions to use multiple population baselines.").

Plaintiff suggests that *Evenwel* does not apply here because the difference in turnout between districts in a recent California election was up to 490 percent.[1] SER 31, ¶ 58b. This argument fails because *Evenwel* is not limited to its facts; *Evenwel* affirms a broad principle that "it is plainly permissible for jurisdictions to measure equalization by the total population . . . ." *Id*. at 1126-1127, 1129.

After *Evenwel*, plaintiff's one person, one vote theory is constitutionally insubstantial.

2. Viewpoint Discrimination Theory

Plaintiff's second theory is that some districts with high numbers of "actual voters" are composed primarily of Republicans, while some districts with lower numbers of "actual voters" are composed primarily of Democrats,

[1] The Court should note that plaintiff's estimates of significant variations in the number of "actual voters" among districts (up to 490 percent) is due in large part to the idiosyncratic methodology he employs. Plaintiff does not compare numbers of eligible voters or numbers of registered voters. *Cf. Evenwel*, 136 S.Ct.at 1125. Rather he compares the number of voters who actually voted at two elections. SER 31, ¶ 58b.

resulting in impermissible viewpoint discrimination in violation of the First Amendment. SER 30, ¶ 58.

It remains an open question whether viewpoint discrimination claims (also known as political gerrymander claims) are justiciable. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice White—whose plurality opinion was the narrowest ground for decision—concluded that a political gerrymander claim could succeed only where plaintiffs proved "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id*. at 127. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Court affirmed the dismissal of a political gerrymander claim but failed to produce a majority opinion. Four justices concluded that political gerrymander claims are not justiciable. *Id*. at 305-306 (Scalia, J., joined by JJ. Rehnquist, O'Connor, and Thomas). Five justices concluded that political gerrymander claims are justiciable, under various theories, but all agreed that such claims require a showing of intentional discrimination. *Id*. at 315 (Kennedy, J., concurring in judgment) (gerrymander that has "purpose and effect of imposing burdens on a disfavored party and its voters" may violate First Amendment); *id*. at 339 (Stevens, J., dissenting) (gerrymander claim requires showing that line-drawers "allowed partisan considerations to dominate and control the lines

drawn, forsaking all neutral principles"); *id*. at 350 (Souter, J., joined by Ginsburg, J., dissenting) (gerrymander claim requires showing that defendants acted intentionally to manipulate shape of district); *id*. at 367 (Breyer, J., dissenting) (partisan gerrymander may be shown where "partisan considerations render traditional line-drawing compromises irrelevant"). The bottom line is that a partisan gerrymander claim must allege—at the least—that district lines were intentionally drawn to disadvantage an identifiable political group.

The amended complaint does not allege intentional discrimination. Rather plaintiff's claim is that the Commission had a duty to consider the partisan makeup of districts, but did not do so because California law forbids it.[2] SER 28-29, ¶ 12 (California law prohibits the Commission from considering the partisan makeup of districts, thus "[stripping] Defendant COMMISSION of any ability to protect political minorities").

[2] California voters created the Commission in 2008 to draw state legislative lines, and in 2010 gave the Commission the added responsibility of drawing congressional lines. *See Vandermost v. Bowen*, 53 Cal. 4th 421, 438 (Cal. 2012) (describing origin of the Commission). The California Constitution now requires that districts "shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party." Cal. Const. art. XXI, § 2(e).

There is no support for the plaintiff's theory that the First Amendment requires the Commission to consider the partisan makeup of districts. The theory is frivolous.

3. Vote Dilution Theory

Plaintiff's third theory is that his vote is diluted because the Secretary does not investigate whether certain people born in the United States are actually lawful citizens and not what he refers to as "super-citizens." SER 32-33, ¶¶ 61-62.

The Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. In the *Slaughter-House Cases*, 83 U.S. 36, 73 (1872), the Supreme Court held that this section excludes from citizenship certain persons, mainly children of foreign diplomatic personnel, who were born in the United States: "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States." *Id*., p. 73. Apparently, plaintiff's claim is that certain children of foreign diplomatic personnel, even if born in this country, are not "subject to the

jurisdiction" of the United States, are not citizens, are not eligible to vote, and—assuming that they try to vote—should be prevented from voting.

This theory fails for several reasons. First, as the district court noted, it relies entirely on conclusory allegations that are not entitled to the presumption of truth on a motion to dismiss, and thus cannot support a plausible claim. SER 18 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)). The California Constitution requires voters to be citizens. Cal. Const. art. II, § 2 ("A United States citizen 18 years of age and resident in this State may vote."). State law requires that all persons registering to vote attest, under penalty of perjury, that they meet all voter eligibility requirements, including that they are United States citizens. (Cal. Elec. Code §§ 2101, 2102, 2150.) Plaintiff offers no material allegations to support the conclusion that the current registration system is inadequate, that there is any appreciable dilution of his vote, or that the State has an obligation to undertake the search for "super-citizens" that he desires. Second, because plaintiff does not plead any facts which would tend to show any impact on him, he lacks standing. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue"). Third, this theory is waived as plaintiff did not argue this theory in his opening brief on appeal. *See Cruz v. International Collection Corp.*, 673

F.3d 991, 998 (9th Cir. 2012) (court of appeals will review only issues argued specifically and distinctly in a party's opening brief).

Plaintiff's claim that his vote is diluted by the failure of the Secretary to investigate whether voters are "subject to the jurisdiction of the United States" is constitutionally insubstantial.

II. THE ORIGINAL COMPLAINT WAS PROPERLY DISMISSED SUA SPONTE BECAUSE IT COULD NOT POSSIBLY HAVE SUCCEEDED.

A "court may *sua sponte* dismiss an action for failure to state a claim without notice or an opportunity to respond where plaintiff cannot possibly win relief." *Gambill v. United States*, 554 Fed. Appx. 558 (9th Cir. 2014) (citing *Sparling*, 864 F.2d at 638).[3]

The district court dismissed sua sponte nine of the ten claims in the original complaint with prejudice, noting that several of the claims rely on legal theories that have been plainly foreclosed by Supreme Court precedent, and the remaining claims fail for lack of standing. The claims were

[3] The district court noted that since *Sparling* no decision restating this proposition has been selected for publication in West's Federal Reporter. Nevertheless, several decisions that appear in the Federal Appendix, which may be cited as precedent pursuant to FRAP 32.1, have cited and applied *Sparling*. SER 36, n.2 (citing *Howze v. Tanaka*, 585 Fed. Appx. 379, 379 (9th Cir. 2014); *Karboau v. Clark*, 577 Fed. Appx. 678, 679 (9th Cir. 2014); *Shoop v. Deutsche Bank Nat. Trust Co.*, 465 Fed. Appx. 646, 647 (9th Cir. 2012)).

dismissed before defendants Commission and Secretary appeared in the action. Several of the dismissed claims were not pled against these defendants.

Plaintiff does not appeal from the sua sponte dismissal order. Plaintiff's opening brief—an informal brief using the form in the Court's case opening package—addresses only the district court's denial of plaintiff's motion to convene a three-judge panel. Dkt. 4, pp. 7-8 (*see* § 5, under heading "What issues are you raising on appeal? What do you think the originating court did wrong?"). Accordingly, plaintiff has waived the right to appeal the sua sponte dismiss order. *See Cruz*, 673 F.3d at 998 (court of appeals will review only issues argued specifically and distinctly in a party's opening brief). Nonetheless, out of an excess of caution, defendants will show below that the nine dismissed claims could not possibly have succeeded and were properly dismissed.

A. Single-Member District Claim

The first claim asserts that 2 U.S.C. § 2c, which requires that all states' congressional delegations be elected from single-member districts, violates several provisions of the United States Constitution—the Elections Clause (U.S. Const. art. I, § 4, cl. 1), the Tenth Amendment, and the Due Process

Clauses of the Fifth and Fourteenth Amendments.[4] SER 56-58, ¶¶ 20-26. Plaintiff seeks injunctive and declaratory relief instructing the Speaker of the House to recognize candidates elected from multi-member districts, should any present themselves. SER 58, ¶ 26.

The district court dismissed this claim, stating:

> Attorney DeWitt's claim is plainly foreclosed by Section 4 of Article I of the Constitution, which provides that "Congress may at any time by Law make or alter such Regulations [as the manner of elections for Senators and Representatives], except as to the Place of chusing Senators." The Supreme Court has explicitly found that Section 2c falls within that authority: "Congress, as the text of the Constitution also provides, may set further requirements, and with respect to districting it has generally required single-member

[4] 2 U.S.C. § 2c states:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress.

> districts." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (citing 2 U.S.C. 2c).

SER 37. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

B. Ineligibility Clause Claim

The second claim asserts that the Speaker of the House simultaneously holds two offices (Speaker of the House and his individual seat as a member of the House) in violation of Article I, Section 6, Clause 2.[5] SER 59-61, ¶¶ 27-32.

The district court dismissed this claim, stating:

> The Supreme Court foreclosed Attorney DeWitt's theory more than a century ago:
>
> > Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the

[5] Article I, Section 6, Clause 2, states:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

> courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.
>
> *United States v. Mouat*, 124 U.S. 303, 307 (1888). The Speaker of the House is chosen by the House of Representatives, not by any of the procedures delineated in *Mouat*.

SER 38. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

C. Presidential Qualifications Claim

The third claim asserts that former California Governor Arnold Schwarzenegger could not become President, should he choose to run, because he is not a natural born citizen as required by Article II, Section 1, Clause 5 of the United States Constitution.[6] SER 62-65, ¶¶ 33-41.

The district court dismissed this claim, stating:

---

[6] Article II, Section 1, Clause 5, states:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

> To the extent comprehensible, Attorney DeWitt seeks declaratory judgment that Former Governor Schwarzenegger could not become President, should he ultimately decide to seek that office. Plainly, Attorney DeWitt lacks standing under Article III, inasmuch as any injury he could allege is not "actual or imminent" but "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

SER 38. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

D. Claim That Redistricting Commission Did Not Have Authority to Redistrict

The fourth claim asserts that the Commission lacked authority to adopt redistricting plans because it is not a "legislature" within the meaning of the Elections Clause (U.S. Const. art. I, § 4, Cl. 1).[7] SER 65-67, ¶¶ 42-47.

The district court dismissed this claim, stating:

> The Supreme Court held that a state may use an independent redistricting commission, vested with authority by citizen initiative, to conduct redistricting in

[7] Article I, Section 4, Clause 1, states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

> *Arizona State Legislature v. Arizona Indep. Redistricting Commission*, 576 U.S. __, 135 S. Ct. 2652, 2677 (2015). The Commission herein was created by citizen initiative. *See* Initiative Measure (Prop. 11, § 3.2, approved Nov. 4, 2008, eff. Nov. 5, 2008); Initiative Measure (Prop. 20, § 3.1, approved Nov. 2, 2010, eff. Nov. 3, 2010).

SER 39. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

E. District Residency Requirement Claim

The fifth claim asserts that California's district residency laws–which require voters to vote only in the district in which they reside–violate the Qualifications Clause (U.S. Const. art. 1, § 2, cl. 2)[8] when applied to congressional races. SER 68-70, ¶¶ 48-55.

The district court dismissed this claim, stating:

> District residency requirements for voters, provided they do not include a *durational* requirement, do not violate the Constitution. *Dunn v. Blumstein*, 405 U.S.

[8] Article I, Section 2, Clause 2, states:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

> 330, 343–44 (1972) ("An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.").

SER 39 (emphasis in original). Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

F. Redistricting Claim

The sixth claim asserts that California's 2011 redistricting plans violate the "one person, one vote" principle of the Equal Protection Clause because they produced districts of equal population but unequal numbers of actual voters. SER 71-73, ¶¶ 56-62.

The district court allowed plaintiff to replead this, which he did in his amended complaint. The amended claim was correctly dismissed for the reasons discussed in section I.B above.

G. Gender Bias Claim

Plaintiff's seventh claim alleges that the use of single-member districts results in districting plans that discriminate against female voters in violation of the First and Nineteenth Amendments. SER 73-75, ¶¶ 64, 63-69.

The district court's order does not explicitly refer to this claim. However, an appellate court is required to address standing even if lower

courts have not done so. *U.S. v. Hays*, 515 U.S. 737, 742 (1995). Plaintiff does not have standing to make this claim. Plaintiff does not claim to be female and is identified as male in the record. *See* SER 2 (transcript referring to "Mr. DeWitt"). He does not have standing to assert the rights of female voters. *See Baker v. Carr*, 369 U.S. 206 ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue"); *Hays*, 515 U.S. at 743–744 ("even if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct") (internal quotation marks and citations omitted).

This claim was correctly dismissed.

H. One Office Claim

Plaintiff's eighth claim alleges that California Elections Code section 8003(b)–which requires that no person file nomination papers for more than one office at the same election–violates the Qualifications Clause (U.S. Const. art. 1, § 2, cl. 2) when applied to congressional races. SER 76-77, ¶¶ 70-76.

The district court dismissed this claim, stating:

> In *Storer v. Brown*, 415 U.S. 724, 733 (1974), the Supreme Court considered the precursor to Section 8003(b), which also prohibited individuals from running

> multiple candidacies in the same election.[9] That decision upheld the statute in question on the basis that California had "an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Ibid.* (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

SER 39-40. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

I. Supreme Court Procedure Claim

Plaintiff's ninth claim alleges that the Supreme Court Clerk's enforcement of Supreme Court Rule 18 (allowing summary disposition on the merits of a direct appeal to the Supreme Court from a district court) violates several provisions of the United States Constitution: the Appellate Jurisdiction Clause (U.S. Const. art. III, § 2, cl. 2)[10], the Due Process Clause

---

[9] The precursor to section 8003(b), former California Elections Code section 6402, stated:

> No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

Storer v. Brown, 415 U.S. 724, 748-749 (1974).

[10] Article III, Section 2, Clause 2, states:

(continued…)

of the Fifth Amendment, and the Separation of Powers doctrine. SER 78-81, ¶¶ 77-86. Specifically, plaintiff contends that Rule 18 limits the jurisdiction of the Supreme Court, and that only Congress is authorized to do that.

The district court dismissed this claim, stating:

> Attorney DeWitt has failed to plead any injury as a result of Harris's enforcement of the Supreme Court's procedures (which the Supreme Court established pursuant to authority delegated by Congress pursuant to Section 2071 of Title 28 of the United States Code). Accordingly, he lacks standing, and his claim must therefore be DISMISSED.

SER 40. Plaintiff's opening brief on appeal does not respond to the district court's order.

This claim was correctly dismissed.

J. Claim for Declaratory and Injunctive Relief

Plaintiff's tenth claim seeks relief for the first nine claims. SER 82-84, ¶¶ 87-95. The district court dismissed the tenth claim because it is not an

---

(…continued)

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

independent claim, but a summary of other claims and a prayer for relief. SER 43, n.4.

This claim was correctly dismissed.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: January 6, 2017

Respectfully submitted,

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/S/ GEORGE WATERS

GEORGE WATERS
Deputy Attorney General
Attorneys for Appellees California Citizens Redistricting Commission and Alex Padilla

SA2016102765
12547417.docx

16-16162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY A. DEWITT,

Plaintiff-Appellant,

v.

CALIFORNIA CITIZENS REDISTRICTING COMMISSION and ALEX PADILLA,

Defendant-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: January 6, 2017

Respectfully Submitted,

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/S/ GEORGE WATERS

GEORGE WATERS
Deputy Attorney General
Attorneys for Appellants California Citizens Redistricting Commission and Alex Padilla

CERTIFICATE OF COMPLIANCE

I certify that the attached Answering Brief of Appellees' uses a 13 point Times New Roman font and contains 5,252 words.

Dated: January 6, 2017

Respectfully Submitted,

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/S/ GEORGE WATERS

GEORGE WATERS
Deputy Attorney General
Attorneys for Appellants California Citizens Redistricting Commission and Alex Padilla

CERTIFICATE OF SERVICE

Case Name: **DeWitt, Timothy A. v. California Citizens Redistricting Commission, et al. (APPEAL)** No. **16-16162**

I hereby certify that on January 6, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF OF APPELLEES CALIFORNIA CITIZENS REDISTRICTING COMMISSION AND ALEX PADILLA

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 January 6, 2017, 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

Honorable William Alsup
Northern District of California
450 Golden Gate Avenue
Courtroom 8, 19th Floor
San Francisco, CA 94102

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 January 6, 2017, at Sacramento, California.

Tracie L. Campbell
Declarant

Tracie Campbell
Signature

SA2016102765
12548573.doc12548573.doc