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ATTORNEYS FOR PLAINTIFFS

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION**

**CITIZENS FOR FAIR  
REPRESENTATION; CITY OF  
COLUSA; CITY OF WILLIAMS; THE  
CALIFORNIA INDEPENDENT PARTY;  
THE CALIFORNIA LIBERTARIAN  
PARTY; MARK BAIRD; CINDY  
BROWN; WIN CARPENTER; KYLE  
CARPENTER; JOHN D'AGOSTINI;  
DAVID GARCIA; ROY HALL, JR;  
LESLIE LIM; MIKE POINDEXTER;  
LARRY WAHL; AND RAYMOND  
WONG,**

Plaintiffs.

vs.

**ALEX PADILLA, SECRETARY OF  
STATE FOR CALIFORNIA;  
CALIFORNIA CITIZENS  
REDISTRICTING COMMISION AND  
THE STATE OF CALIFORNIA AS A  
SOVERIEGN STATE OF THE UNITED  
STATES,**

Defendants.

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

PLAINTIFFS' EX PARTE  
APPLICATION FOR REQUEST  
FOR STAY OF PROCEEDINGS IN  
DISTRICT COURT DUE TO NEW  
SUPREME COURT CASES THAT  
IMPACT THE 6/14/18 HEARING  
WITH RULINGS UNDER  
SUBMISSION/PENDING AND DUE  
TO A PENDING WRIT OF  
MANDAMUS IN THE UNITED  
STATES SUPREME COURT RE  
APPOINTMENT OF 3-JUDGE  
COURT; MEMO OF POINTS &  
AUTHORITIES; DECLARATION  
OF GARY L. ZERMAN IN  
SUPPORT

Judge: Hon. Kimberly J. Mueller  
Courtroom: 3

Trial Date: N/A  
Action Filed: 5/8/17

Plaintiffs by and through and through their counsel of record Gary L. Zerman and Scott E. Stafne, hereby file this Ex Parte Application for a Stay of Proceedings in this District Court<sup>1</sup> - on the grounds: (1) that on June 19, 2018, Plaintiffs filed in this Court an Ex Parte Application to file Briefing on the issue of appointment of a three-judge court and First Amendment Standing, respectively, regarding the recent United States Supreme Court decisions in *Gill v. Whitford* (Decided June 18, 2018) and *Lozman v. City of Riviera Beach, Florida* (Decided June 18, 2018); and, (2) that Plaintiffs will shortly be filing a Writ of Mandamus in the United States Supreme Court requiring this Court to perform its ministerial duties to appoint and convene a three-judge district court to decide this malapportionment case, as is required under 28 USC § 2284(a). See *Abbott v. Perez*, Nos. 17-586, 17-626, 2018 U.S. LEXIS 3846, at \*5 (June 25, 2018); *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

On June 14, 2018, this Court conducted oral argument on Defendant Padilla's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC") and

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<sup>1</sup> Plaintiffs would ask that the Stay order except and allow the parties to file supplemental briefs on the just decided United States Supreme Court cases that impact this Court's pending decision on the matters heard at the June 14, 2018 hearing – to aide this Court in its decisions. Those cases are *Gill v. Whitford and Lozman v. City of Riviera Beach* (both decided on June 18, 2018) and *Abbott v. Perez* (decided on June 25, 2018).

Plaintiff CFR's Request and Motion for Appointment of a three-judge court. A transcript of that argument is attached hereto as Exhibit A.

Following oral argument, the Court took the matter under advisement, stating it would attempt to issue an order as quickly as possible. Since the conclusion of oral argument, the Supreme Court has issued at least three (3) material controlling authorities, which plaintiffs claim are directly applicable to this case.

Based upon the recently obtained transcript of the oral argument; the three recent decisions of the Supreme Court decided after oral argument; and thus far this Court declining to allow briefing with regard to the impact of those controlling Supreme Court authorities on the issues presently before it from the June 14, 2018 hearing, and this Court's stated intention to promptly issue its rulings on those issues, Plaintiffs CFR, et. al., are presently preparing and intend to file shortly, a writ of mandamus against this Court requiring it to perform its ministerial duties necessary to convene a three-judge court.

Dated: June 26, 2018

Respectfully submitted,

*s/Gary L. Zerman*

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Gary L. Zerman, Attorney for Plaintiffs  
CITIZENS FOR FAIR REPRESENTATION, et. el.

*s/Scott E. Stafne*

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Scott Stafne, Attorney for Plaintiffs  
CITIZENS FOR FAIR REPRESENTATION, et. el.

**MEMORANDUM OF POINTS & AUTHORITIES**

**Relief Requested.** Plaintiffs are requesting this Court Stay the proceedings in this case – particularly Stay the issuance of its decision and rulings on the hearing that took place on June 14, 2018, on (1) Defendant Padilla’s Motion to Dismiss Plaintiff CFR’s SAC – with prejudice; and, (2) Plaintiffs CFR’s Request and Motion to appoint a three-judge court, pursuant to 28 USC § 2284(a).

Plaintiffs’ request for a stay is based on: (1) Plaintiffs’ June 19, 2018 Ex Parte Application to file briefing with this Court on their standing as it relates to political gerrymandering based on the Supreme Court’s recent decision in *Gill v. Whitford*; (2) Plaintiffs’ June 19, 2018 Ex Parte Application to file briefing with this Court on their standing based on the First Amendment and First Amendment retaliation under the recent Supreme Court decision in *Lozman v. City of Riviera Beach*; and, (3) the Supreme Court’s recent decision in *Abbot v Perez* announced yesterday clarifying standing in racial gerrymandering cases and when three judge courts are required in cases alleging invidious intentional racially based gerrymandering has diminished the value of minorities votes, rights to self- representation, and the requirement that three judge district courts be convened to decide malapportionment caused by intentional and invidious race discrimination.

**Issue.** Should this Court stay issuing its decision and order regarding the June 14, 2018 hearing (excepting allowing further briefing on new Supreme Court decisions), where following the June 14, 2018 oral argument in this Court, the United States Supreme Court has issued controlling precedents - which this Court must take into account - in ruling on the issues before it and thus far has not asked for or allowed any supplemental briefing with regard to them, where plaintiffs contend any merits decision should be decided by a three-judge court pursuant to 28 U.S.C. 2284(a) and plaintiffs intend to promptly to file a writ of mandamus with the United States Supreme Court requiring this Court to convene a three-judge court to decide the malapportionment issues raised by Plaintiffs?

**Facts.** This Court, sitting as a single judge, stated during oral argument that it has been advised by Ninth Circuit personnel, including the chief judge of the Ninth Circuit, that it should determine whether the court has jurisdiction over this apportionment matter - just as she would do - in other non-apportionment cases. Exhibit A, Transcript at 30:5-10. The single judge who has determined to hear this case on her own also stated during oral argument that the apportionment challenges made in the complaint were not frivolous. Exhibit A, Transcript at 29:20-21.

**Argument.** “The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681,

706 (1997). That power applies “especially in cases of extraordinary public moment,” when “a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in the consequences of the public welfare or convenience will thereby be promoted.” *Id.* at 707.

The Ninth Circuit in *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962), set forth the various factors that should be considered when evaluating a motion to stay.

Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. See Landis v. North American Co., 299 U.S. 248, 254-255, 57 S.Ct. 163, 81 L.Ed. 153.

As to the last factor, courts frequently grant stays when resolution of another action may “bear upon the case,” because a stay is most “efficient for [the court’s] own docket and the fairest course for the parties[.]” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9<sup>th</sup> Cir. 1979). Where such a stay is considered, the court need not find that the two cases possess identical issues or that resolution of one will control the other; simply finding that the cases present

substantially similar issues is sufficient. See *Landis v. N. Am. Co.*, 299 U.S. 248, 2544 (1936); *Leyva*, 593 F.2d at 864.

*Gill*, *Lozman*, and *Abbott*, all of which were decided within the same week of one another, consider issues raised by the CFR plaintiffs SACA and Padilla's motion to dismiss it with prejudice. This Court cannot properly resolve the issues before it now, i.e. the necessity for a three judge court to resolve the non-frivolous jurisdiction questions before it, including whether plaintiff's invidious discrimination claims constitute only a general grievance, without considering these cases.

Accordingly, good cause exists for granting the Stay of proceedings in this case in this Court, so that plaintiffs can obtain guidance from the United States Supreme Court by way of a mandamus proceeding to determine whether the duty of this Court and the Ninth Circuit is a ministerial one, with which they did not comply, under the circumstances of this case.

### **Conclusion**

Based on the foregoing, Plaintiffs CFR request a Stay of the proceedings in the District Court to allow further briefing on the recent Supreme Court cases of *Gill v. Whitford*, *Lozman v. City of Riviera Beach*, and *Abbot v. Perez*, and to allow Plaintiffs to be promptly filed Writ of Mandamus to go forward.

Dated: June 26, 2018

Respectfully submitted,

s/Gary L. Zerman

Gary L. Zerman, Attorney for Plaintiffs  
CITIZENS FOR FAIR REPRESENTATION, et. el.

Dated: June 26, 2018

Respectfully submitted,

s/Scott E. Stafne

Scott Stafne, Attorney for Plaintiffs  
CITIZENS FOR FAIR REPRESENTATION, et. el.

**DECLARATION OF GARY L. ZERMAN**

I, GARY L. ZERMAN, declare:

1. That I am counsel of record for Plaintiffs in this case, along with Scott Stafne; am over eighteen (18) years of age; am not a party in this case; could and would testify truthfully to the matters stated herein; and I have prepared this declaration in support of Plaintiffs' Ex Parte Application for a Request for a Stay of Proceedings in the District Court because plaintiffs intend to file a Writ of Mandamus directing the single judge currently presiding over this apportionment action to notify the chief judge of the Ninth Circuit that a three-judge court has been requested to decide this apportionment action and directing the Chief Judge



of the Ninth Circuit to designate two other judges to decide this case. See 28 USC § 2284(a).

2. **Need for an Ex Parte Order.** An Ex Parte Order is necessary here because without it this Court may be deprived of briefing by the parties related to recent Supreme Court decisions<sup>2</sup> directly applicable to the issues currently pending before this Court from the June 14, 2018 hearing, to wit: (1) Defendant Padilla's Motion Dismiss CFR's SAC with prejudice; and, (2) CFR's Request and Motion for this Court to appoint a three-judge court pursuant to 28 USC § 2284(a). Those matters were taken under submission by this Court upon conclusion of the hearing.

3. **Inability of the filer to obtain a stipulation from other counsel.** On the morning of June 25, 2018, I called Mr. Waters to inform him that Plaintiffs were preparing and would shortly be filing a Writ of Mandamus to the United States Supreme Court on the issue of appointment of a three-judge court. He was out; I got his voice recording; so I left him a voice message informing him that Plaintiffs were preparing and would be filing in the very near future a Writ of Mandamus to the United States Supreme Court on this issue of appointment of a

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<sup>2</sup> Those Supreme Court case are *Gill v. Whitford* and *Lozman v. City of Riviera Beach, Florida*; both decided on June 18, 2018 - after the June 14, 2018 hearing before this Court. On June 19, 2018, CFR filed an Ex Parte Application re Request to file briefing with this Court (ECF#53) and ruling from the Court on that Request is pending.

three-judge court and that Plaintiffs were also preparing and would be filing in the next day or two an Ex Parte Application for a Request of a Stay of proceedings in the District Court because of the Writ of Mandamus. Finally, I informed Mr. Waters I was calling to find out his/Defendant's position regarding the Writ and Stay, i.e., whether he would agree to, not object to, or would be opposing the Writ and Stay. Finally, I requested that he get back to me promptly with his position.

4. At 11:02 am I sent Mr. Waters an email memorializing my above phone message to him, which concluded (a copy of that email is attached at Exhibit B):

Finally, recall at the 6/14/18 Hrg - you stated that , "... The Secretary of State's position throughout [this case] has been this is any extremely important question of public policy ..." In considering your position on the above two CFR proposed filings, I provide you here the link to a 12/8/15 scotusblog.com piece ***Opinion Analysis: Removing discretion in convening three-judge district courts*** on *Shapiro v. McManus* written by attorney Howard B. Wasserman - for your consideration. <http://www.scotusblog.com/2015/12/opinion-analysis-removing-discretion-in-convening-three-judge-district-courts/>

Shortly thereafter, I received a reply email from Mr. Waters that stated (a copy of that email is attached as Exhibit C):

I will be out of the office until Tuesday, June 26. During my absence, please contact my secretary, Tracie Campbell, at 916/210-6068, or [tracie.cambell@doj.ca.gov](mailto:tracie.cambell@doj.ca.gov).

I then promptly called Ms. Campbell, advised her of my call/message and email to Mr. Waters and asked her to inform Mr. Waters of those and that I was requesting he get back to me as soon as possible regarding his position. Ms. Campbell

advised she would give him the information and informed me that Mr. Waters should be in at around 8:30 am tomorrow, Tuesday June 26, 2018.

5. At about 8:30 am on June 26, 2018, Mr. Waters returned my call. I advised him of my clients' intention to file Writ of Mandamus and the Ex Parte Application for a Stay of Proceedings in the trial/district court and referred him to my June 25, 2018 email, then inquired what was his/his client's position on those two matters. He informed me had not spoken with his client yet, but that most probably he/his client would be opposing both. I then asked that he consider the December 8, 2015 scotusblog piece *Opinion Analysis: Removing discretion in convening three-judge district courts* <http://www.scotusblog.com/2015/12/opinion-analysis-removing-discretion-in-convening-three-judge-district-courts/> on the *Shapiro v. McManus* case, that was/is referenced in my June 25, 2018 email to him written by attorney Howard B. Wasserman - for your consideration. He advised he would get back to me promptly, if his client's position changed. Shortly thereafter, I sent an email to Mr. Waters memorializing our conversation and a copy is attached as Exhibit D.

6. **Why this request cannot be noticed on the court's regular motion calendar.** A noticed motion requires at least twenty-eight (28) days' notice and by that time this Court may have decided the issues presently under submission from

the June 14, 2018 hearing, without consideration of the recent Supreme Court decisions *Gill V. Whitford* and *Lozman v. Riviera Beach*, and would interfere with Plaintiff CFR's Writ of Mandamus to the United States Supreme Court.

7. That attached Exhibits A, B, C and D are true and correct copies, respectively, of the Reporter's Transcript of the June 14, 2018 hearing, of my June 25, 2018 email to Mr. Waters, of Mr. Waters' June 25, 2018 email to me, and my June 26, 2018 email to Mr. Waters.

8. As of this date (June 26, 2018) at time I have not received any additional notification from Mr. Waters.

I declare under the laws of the State of California that the forgoing is true and correct.

Executed this 26<sup>th</sup> day of June, 2018, at Valencia, California.

s/Gary L. Zerman

Gary L. Zerman - Declarant