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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CITIZENS FOR FAIR REPRESENTATION, et. al., Plaintiffs. vs. **SECRETARY OF STATE ALEX PADILLA,** Defendant	**Case No.: 2:17-cv-00973-KJM-CMK** **NOTICE OF MOTION AND MOTION TO CONVENE A 3 JUDGE COURT** **NOTE for Hearing Date: June 1, 2018** **Hearing Time: 10 a.m.** **Judge: Hon. Kimberly J. Mueller** **Courtroom: 3** **Trial Date: N/A** **Action Filed: May 8, 2017**

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 1, 2018, at 10:00 a.m. in Courtroom 3, 15th Floor, of the United States Courthouse located at 501 I Street, Sacramento, CA 95814, Plaintiffs, Citizens For Fair Representation, et. al. (CFR) will move the Court for an Order to Convene a

3-Judge Court, pursuant to 28 USC §2284 to preside over the oral argument of Defendant Alexander Padilla's Fed. R. Civ. Pro. 12 (b)(1) facial motion to dismiss plaintiffs' complaint, which is currently scheduled to be heard by a single judge on June 15, 2018.

This Motion to Convene a 3 Judge Court is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all records in this action, those matters which this Court may judicially notice, and the oral argument scheduled to be heard on this matter.

COUNSEL CERTIFICATION RE MEET AND CONFER

The undersigned counsel certify that on April 23, 2018 they conferred with counsel for Defendant Padilla (Padilla), George Waters, regarding the grounds for a Motion to Convene a 3-Judge Court to hear Padilla's 12 (b)(1) motion to dismiss, and related procedural issues. Mr. Waters indicated that he believed having a hearing on this issue prior to the already scheduled oral argument on Padilla's motion to dismiss would not be in his client's best interests, thus we mutually agreed to disagree with regard to the timing of this Plaintiffs' motion. During the telephone conference we agreed that our obligations to meet and confer had been complied with and exhausted and thus concluded our meeting.

Dated: April 30, 2018

Respectfully submitted,

X *s/Scott E. Stafne*
SCOTT E. STAFNE - WSBA #6964

X *s/Gary L. Zerman*
GARY L. ZERMAN - CABA #112825
Attorneys for CFR, et.al.

MEMORANDUM OF POINTS AND AUTHORITIES

Relief Requested. CFR plaintiffs respectfully request this Court immediately convene a three judge court to resolve defendant Alexander Padilla's Fed. R. Civ. Pro. 12(b)(1) motion to dismiss pursuant to 28 U.S.C. §2284, currently scheduled for argument on June 15, 2018.

Issue: Does a single active Article III judge have subject matter jurisdiction to decide a facial Fed. R. Civ. Pro 12(b)(1) jurisdictional motion to dismiss a complaint challenging the constitutionality of the apportionment of any statewide legislative body based on intentional racial discrimination in violation of the Fourteenth Amendment?

Evidence Relied Upon: As defendant Padilla makes a facial challenge under Fed. R. Civ. Pro. 12 (b)(1) CFR plaintiffs rely on the allegations of their complaint as well as on Padilla's motion to dismiss, which accepts as true that California's cap on its legislature was enacted and has been maintained for intentional, racially discriminatory purposes.

Facts: See CFR's amended complaint (Dkt 39), Request for 3 Judge Court (Dkt 40) and Padilla's Fed. R. Civ. Pro. 12(b)(1) motion to dismiss (Dkt. 42)

Argument:

Congress established three judge district courts as early as 1903 to expedite litigation of controversies it determined were of great and general importance to the Nation. David P. Currie, "The Three-Judge District Court in Constitutional Litigation[1]," 32 University of Chicago Law Review 1, 3-12 (1964). In 1976 when Congress substantially curtailed the circumstances under which a three-judge district court is required, it mandated that a three judge district court be

[1] Last accessed April 25, 2018 at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5905&context=journal_articles

convened for "an action . . . challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." *Shapiro v. McManus*, 136 S. Ct., 250, 453 (2015), As this Court recognized, when it initially convened a three judge court pursuant to CFR plaintiffs' second request, this case and controversy challenges the constitutionality of California's statewide legislative bodies. *See* Dkts 1, 12 & 14; *See also* Plaintiffs' Response to Secretary's Ex Parte Application To Reconsider Appointment of Three Judge Court District Court, Dkt 19.

Because the judicial branch of government is required to limit its jurisdiction to only that which Congress provides, U.S. Const. Art III, § 2, it is particularly important that single judges consider the exact wording of 28 U.S.C. §2284 when carrying out their specific duties thereunder. 28 U.S.C. provides:

> (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.
>
> **(2)** If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.
>
> **(3)** *A single judge may conduct all proceedings except the trial*, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall

> remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. *A single judge shall not ... enter judgment on the merits*. Any action of a single judge may be reviewed by the full court at any time before final judgment.

The Supreme Court last construed the meaning of this jurisdictional statute in 2015 in *Shapiro v McManus*, 136 S. Ct. 450 (2015). In an opinion written by Justice Scalia a unanimous Supreme Court observed:

> Rare today, three-judge district courts were more common in the decades before 1976, when they were required for various adjudications, including the grant of an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute . . . upon the ground of the unconstitutionality of such statute." 28 U. S. C. §2281 (1970 ed.), repealed, Pub. L. 94-381, §1, 90 Stat. 1119. *See Currie*, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 3-12 (1964). Decisions of three-judge courts could, then as now, be appealed as of right directly to the United Supreme Court. 28 U. S. C. §1253.
>
> In 1976, Congress substantially curtailed the circumstances under which a three-judge court is required. It was no longer required for the grant of an injunction against state statutes, see Pub. L. 94-381, §1, 90 Stat. 1119 (repealing 28 U. S. C. §2281), but was mandated for "an action . . . challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." *Id.*, §3, now codified at 28 U. S. C. §2284(a).

The Court purposely discussed the language of the new amendments to the statute. The *Shapiro* opinion observes that the prior 3 judge court jurisdictional statute had provided: "The district judge to whom the application for injunction or other relief is presented shall constitute one member of [the three-judge] court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges" to serve. 28 U. S. C. §2284(1) (1970 ed.). The amended statute construed by *Shapiro* provides: "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" to serve. 28 U. S. C. §2284(b)(1) (2012 ed.) (emphasis added). The dispute in both this case and in *Shapiro* concerns the meaning of the above italicized text: "unless he [the federal judge] determines that the three judges are not required…"

Padilla argues a single federal judge can dismiss this case because 1.) Plaintiffs have no standing as they have only a generalized grievance which all Californians share (Dkt. 42, pp. 7-9) and 2.) apportionment involves a "political question". *Id*., pp. 9-12.

Neither this court previously nor defendant Padilla have explained why, under the circumstances of plaintiffs' challenge to the apportionment of California's state legislative bodies, a single judge can presume the authority of three judges in this type of case which Congress has mandated be heard by three judges. The only language in the present version of 28 U.S.C. §2248 upon which this Court could possibly rely to usurp the duty of three judges to adjudicate this type of apportionment case is the language "unless he [a federal judge] determines three judges are not required".

An argument tethered to this language was made to the Supreme Court in *Shapiro*. Scalia paraphrased this argument as being:

> [Shapiro contends] Congress declined to specify a standard to constrain the exercise of this authority [not to convene a three judge court]. Choosing, as the District Judge did, the familiar standard for dismissal under Federal Rule of Civil Procedure 12(b)(6) best serves the purposes of a three-judge court, which (in respondents' view) is to protect States from "hasty, imprudent invalidation" of their statutes by rogue district judges acting alone. Brief for Respondents 27.

Shapiro, 136 S. Ct. at 454 (2015).

Then Scalia ripped that argument apart from its seams.

> Whatever the purposes of a three-judge court may be, respondents' argument needlessly produces a contradiction in the statutory text. That text's

> initial prescription could not be clearer: "A district court of three judges *shall be convened* . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ." 28 U. S. C. §2284(a) (emphasis added). Nobody disputes that the present suit is "an action . . . challenging the constitutionality of the apportionment of congressional districts. It follows that the single district judge of this district court, if she is to follow Art. III, § 2 mandates allowing Congress to determine this court's jurisdiction is "*required* to refer the case to a three-judge court, for §2284(a) admits of no exception, and "the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion. [cites]
>
> The subsequent provision of §2284(b)(1), that the district judge shall commence the process for appointment of a three-judge panel "unless he determines that three judges are not required," need not **and therefore should not be read as a grant of discretion to the district judge to ignore §2284(a).** It is not even framed as a proviso, or an exception from that provision, but rather as an administrative detail that is entirely compatible with §2284(a). The old §2284(1) triggered the district judge's duty to refer the matter for the convening of a three-judge court "[o]n the filing of the application" to enjoin an unconstitutional state law. By contrast, the current §2284(b)(1) triggers the district judge's duty "[u]pon the filing of a *request* for three judges" (emphasis added). But of course a party may — whether in good faith or bad, through ignorance or hope or malice — file a *request* for a three-judge court even if the case does not merit one under §2284(a). **Section 2284(b)(1) merely clarifies that a district judge need not unthinkingly initiate the procedures to convene a three-judge court without first examining the allegations in the complaint.** In short, all the district judge must "determin[e]" is whether the "request for three judges" is made in a case covered by §2284(a) — no more, no less.
>
> That conclusion is bolstered by §2284(b)(3)'s explicit command that "[a] single judge shall not . . . enter judgment on the merits." It would be an odd interpretation that allowed a district judge to do under §2284(b)(1) what he is forbidden to do under §2284(b)(3). More likely that Congress intended a three-judge court, and not a single district judge, to enter all final judgments in cases satisfying the criteria of §2284(a).

Id., 454-455. (Italicized emphasis in original; bolded emphasis supplied)

Although *Shapiro* did not involve a claim of lack of jurisdiction, the opinion makes clear that merely filing a motion, a Fed. R. Civ. Pro. 12(b)(1) motion, without more, is not the touchstone for a federal judge exercising subject matter jurisdiction where Congress has

specifically given that responsibility to three judges - not one. This is apparent from the following *Shapiro* analysis and cases the Court cites supporting it:

> We have long distinguished between failing to raise a substantial federal question for jurisdictional purposes—which is what *Goosby* addressed—and failing to state a claim for relief on the merits; only "wholly insubstantial and frivolous" claims implicate the former. *Bell* v. *Hood*, 327 U. S. 678, 682-683, 66 S. Ct. 773, 90 L. Ed. 939 (1946); see also *Hannis Distilling Co.* v. *Mayor and City Council of Baltimore*, 216 U. S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482 (1910) ("obviously frivolous or plainly insubstantial"); [*456] *Bailey* v. *Patterson*, 369 U. S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962) (*per curiam*) ("wholly insubstantial," "legally speaking non-existent," "essentially [**286] fictitious"); *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("frivolous or immaterial"). Absent such frivolity, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell*, *supra,* at 682, 66 S. Ct. 773, 90 L. Ed. 939. Consistent with this principle, *Goosby* clarified that "'[c]onstitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" 409 U. S., at 518, 93 S. Ct. 854, 35 L. Ed. 2d 36 (citations omitted). And the adverbs were no mere throwaways; "[t]he limiting words 'wholly' and 'obviously' have cogent legal significance." *Ibid.*
>
> Without expressing any view on the merits of petitioners' claim, we believe it easily clears *Goosby*'s low bar; after all, the amended complaint specifically challenges Maryland's apportionment "along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [*v. Jubelirer*, 541 U. S. 267, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)]."

Id. at 455-56.

In *Goosby v. Osser*, 409 U.S. 512 (1973) the complaint alleged specific provisions of the Pennsylvania Election Code violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. These provisions denied persons who had been arrested and incarcerated (but not convicted) the right to register or vote. At oral argument before a single judge, the State defendants (but not the municipal defendants) conceded the complaint alleged practices which violated the Fourteenth Amendment. (As is explained below this is precisely the same situation we have here because California officials do not dispute CFR allegations in their

amended complaint that the constitutional cap challenged here was intentionally imposed on California's statewide legislative bodies for purposes invidiously discriminating against non-whites and that the effects of this evil continue into the present.)

In *Goosby* the district court found that this concession by the state officials of the illegality of the statutes destroyed its subject matter jurisdiction because that admission of wrongdoing established there was no case or controversy under Article III to be resolved by the Court. The Supreme Court unanimously reversed this decision holding in an opinion written by Justice Brennan that the municipal defendants support for the statute was sufficient to create a case and controversy:

> Thus, there is satisfied the requisite of Art. III that "the constitutional question . . . be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969).As between petitioners and the municipal officials, the District Court was "called upon to adjudge the legal rights of litigants in actual controversies," *Liverpool, N. Y. & P. S. S. Co*. v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885), and "the interests of [petitioners' class] require the use of . . . judicial authority for [petitioners'] protection against actual interference." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 90 (1947). Since the municipal officials persist in their asserted right to enforce the challenged provisions of the Election Code, there is a "real and substantial controversy" "touching the legal relations of parties having adverse legal interests," *Aetna Life Ins. Co*. v. *Haworth*, 300 U.S. 227, 240-241 (1937), in which circumstance the concession of the Commonwealth officials could not have the effect of dissipating the existence of a case or controversy. *Cf. In re Metropolitan Railway Receivership*, 208 U.S. 90, 107-108 (1908).

Goosby, 409 U.S.at 517.

Goosby and the Supreme Court's use of it in *Shapiro* indicate that single judge courts should not be resolving jurisdictional issues in cases Congress has determined should be decided by three judge courts unless federal jurisdictional claims (like claims going to the merits in *Shapiro*) are wholly insubstantial and/or frivolous. This is because federal courts have broad

adjudicatory authority over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. *See also* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998)[2]; *Baker v. Carr*, 369 U.S. 186, 199-202 (1962).

"Because of this extensive power, jurisdictional dismissals in actions predicated on federal questions are 'exceptional'." *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 974-75 (9th Cir. 2012) quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (quoting *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 140 (9th Cir. 1983))

Indeed, in *Bell v. Hood*, one of the seminal decisions addressing the contours of subject matter jurisdiction, the Supreme Court held that a claim alleged to arise under federal law should not be dismissed for lack of subject matter jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. 678, 685 (1946). Consequently, a federal court may dismiss a federal question claim for lack of subject matter jurisdiction only if: (1) "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction"; or (2) "such a claim is wholly insubstantial and frivolous." *Id*. at 682-83.

In addition to *Goosby* and *Bell* the Supreme Court also cited *Steel Co v Citizens for Better Env't*, supra, at page 89, in *Shapiro*, supra, at 455-459, for the proposition that only those

[2] In addition to *Goosby* the Supreme Court also cited *Steel Co v Citizens for Better Env't*, supra, at page 89, in *Shapiro*, supra, at 455-459, for the proposition that only those cases qualifying for a three judge court in which the federal jurisdiction is wholly insubstantial or frivolous can be dismissed by a single judge.

cases where federal question jurisdiction is alleged that are wholly insubstantial or frivolous can be dismissed.

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case. [cite] As we stated in *Bell* v. *Hood,* 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946), "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the District Court has jurisdiction if "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," *id.*, at 685, *unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.*" *Id.*, at 682-683; [cites] Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." [cites] Here, respondent wins under one construction of EPCRA and loses under another, and JUSTICE STEVENS does not argue that respondent's claim is frivolous or immaterial -- in fact, acknowledges that the language of the citizen-suit provision is ambiguous. *Post*, at 21.

Steel Co., 523 .U.S. at 89-90. (emphasis supplied)

Padilla does not argue in his 12(b)(1) motion to dismiss that CFR's intentional discrimination claims resulting in malapportionment are "insubstantial" or "frivolous". And, indeed, they are not insubstantial or frivolous. In *Davis v. Bandemer*, 478 US 109 (1986) the Supreme Court observed unconstitutional discrimination occurs "when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence in the political process as a whole." *Id*., 478 U.S. at 132.

So far as plaintiffs' counsel can determine there has never been a case since the passage of the Fourteenth Amendment where (as here) a State or State official has conceded intentional discrimination resulting in malapportionment based on race that has been held to be outside the

parameters of federal question jurisdiction. On the other hand, there have been numerous cases which hold federal courts have jurisdiction to resolve cases challenging harm resulting from State based invidious intentional discrimination based on race and ethnicity. *See e.g.* *Hunter v. Underwood*, 471 U.S. 222 (1985); *See also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach*, 730 F.3d 1142, 1160-62 (9th Cir. 2013). *Cf.* *Snyder v. Louisiana*, 552 U.S. 472, 485-86 (2008).

Another reason this court cannot dismiss this case on jurisdictional grounds is because the invidious discrimination justifying federal question jurisdiction is so tied up with of merits of the these claims under the Fourteenth Amendment, that both will require a resolution of those types of merits issues Congress intended should be resolved by a three judge court. 28 U.S.C. §2248.

Given this Court had a sua sponte duty to review the allegations of the complaint when the request for a three judge court was received; and given that Padilla has not argued CFR plaintiffs' merits and jurisdictional claims are wholly insubstantial or frivolous; this Court must convene a three judge panel to decide Padilla's Fed. R. Civ. Pro. 12(b)(1) motion to dismiss. To do otherwise, would leave this single judge court aggrandizing to itself the authority to dismiss this apportionment case notwithstanding Congress has so clearly indicated this task should be performed only by a three judge district court. *Shapiro, supra.*

Conclusion

This Court should convene a three judge court pursuant to 28 U.S.C. §2284 to adjudicate defendant Padilla's facial Fed. R. Civ. Pro. 12(b)(1) motion to dismiss. The federal question jurisdiction based on invidious discrimination alleged in CFR's complaint is not frivolous and

turns on the resolution of those merits issues upon which plaintiffs constitutional challenges to the apportionment of California's statewide legislative bodies are based. This single judge court does not have the constitutional authority to resolve CFR's merits claims, which for purposes of this 12(b) motion must be accepted as true.

Dated: April 30, 2018

Location: Arlington, Washington

Respectfully submitted,

/s/ Scott E. Stafne
Scott Stafne, *Pro Hac Vice*

/s/ Gary L. Zerman
Gary L. Zerman, Attorney.

Attorneys for Plaintiffs
Citizens for Fair Representation, et. el

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing documents with the Clerk of the Court using the electronic court filing system (ECF) utilized by the United States District Court for the Eastern District of California, Sacramento Division, which will provide service of these documents to those attorneys of record. All other parties (if any) shall be served pursuant to the Federal Rules of Civil Procedure.

DATED this 30th day of April, 2018 at Arlington, Washington.

BY: /s/ *Pam Miller*

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