

1 XAVIER BECERRA, State Bar No. 118517
 Attorney General of California
 2 MARK R. BECKINGTON, State Bar No. 126009
 Supervising Deputy Attorney General
 3 GEORGE WATERS, State Bar No. 88295
 Deputy Attorney General
 4 1300 I Street, Suite 125
 P.O. Box 944255
 5 Sacramento, CA 94244-2550
 Telephone: (916) 210-6059
 6 Fax: (916) 324-8835
 E-mail: George.Waters@doj.ca.gov
 7 *Attorneys for Defendant Alex Padilla*

8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 **CITIZENS FOR FAIR**
 13 **REPRESENTATION; CITY OF FORT**
 14 **JONES; THE CALIFORNIA**
 15 **LIBERTARIAN PARTY; THE**
 16 **CALIFORNIA AMERICAN**
 17 **INDEPENDENT PARTY; THE MARIN**
 18 **COUNTY GREEN PARTY; MARK**
 19 **BAIRD; JOHN D'AGOSTINI; LARRY**
 20 **WAHL; SHASTA NATION INDIAN**
 21 **TRIBE; ROY HALL JR; WIN**
 22 **CARPENTER; KYLE CARPENTER;**
 23 **PATTY SMITH; KATHERINE**
 24 **RADINOVICH; DAVID GARCIA; LESLIE**
 25 **LIM; KEVIN MCGARY; TERRY**
 26 **RAPOZA; HOWARD THOMAS;**
 27 **MICHAEL THOMAS; STEVEN BAIRD;**
 28 **MANUEL MARTIN; OTHERS**
SIMILARLY SITUATED; AND DOES 1-
30,

Plaintiffs,

v.

25 **SECRETARY OF STATE ALEX**
 26 **PADILLA,**

Defendant.

2:17-cv-00973

DEFENDANT ALEX PADILLA'S
NOTICE OF MOTION & MOTION TO
DISMISS SECOND AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES [FRCP
12(b)(1)]

Date: June 15, 2018
 Time: 10:00 a.m.
 Dept: 3
 Judge: The Honorable Kimberly J.
 Mueller
 Trial Date: N/A
 Action Filed: 5/9/17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION	1
COUNSEL CERTIFICATION RE MEET AND CONFER.....	1
INTRODUCTION	2
BACKGROUND	2
I. Plaintiffs’ Allegations	2
II. California Law Governing Redistricting and the Size of Legislative Districts	5
III. Prior Litigation in this District Posing the Same Issue	6
IV. Prior Proceedings in the Present Action	6
LEGAL STANDARD	6
ARGUMENT	7
I. The Court Does Not Have Subject Matter Jurisdiction of Plaintiffs’ Claims.....	7
A. Plaintiffs Lack Article III Standing Because the Injury They Allege Is a General Grievance Shared by the Public at Large.	7
B. Plaintiffs’ Claims Are Barred by the Political Question Doctrine.....	9
CONCLUSION	12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Baker v. Carr
369 U.S. 186, 211 (1962).....9, 10, 11, 12

Chandler v. State Farm Mut. Auto. Ins. Co.
598 F.3d 1115 (9th Cir. 2010).....6

Corrie v. Caterpillar
503 F.3d 974 (9th Cir. 2007).....9

Drake v. Obama
664 F.3d 774 (9th Cir. 2011).....7, 9

Ex Parte Levitt
302 U.S. 633 (1937).....8

Hein v. Freedom From Religion Foundation, Inc.
551 U.S. 587 (2007).....8

Holder v. Hall
512 U.S. 874 (1994).....11

Kokkonen v. Guardian Life Ins. Co. of America
511 U.S. 375 (1994).....6

Lance v. Coffman
549 U.S. 437 (2007).....8

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992).....7

Marbury v. Madison
5 U.S. (1 Cranch) 137 (1803).....9

No GWEN Alliance of Lane County, Inc. v. Aldridge
855 F.2d 1380 (9th Cir. 1988).....9

People ex rel. Snowball v. Pendegast
96 Cal. 289 (1892) (1879 Constitution fixed membership of Senate at 40 and
Assembly at 80)5

Reynolds v. Sims
377 U.S. 533, 577 (1964).....11

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Schlesinger v. Reservists Comm. To Stop the War
418 U.S. 208, 217 (1974)7, 8

Summers v. Earth Island Institute
555 U.S. 488 (2009).....6

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.
454 U.S. 464 (1982).....7

Vandermost v. Bowen
53 Cal.4th 421 (2012)5

Vieth v. Jubelirer
541 U.S. 267 (2004).....10, 12

Warnken v. Schwarzenegger
2009 WL 4809880 (E.D. Cal., 2009).....6

Warren v. Fox Family Worldwide, Inc.
328 F.3d 1136 (9th Cir. 2003).....7

Warth v. Seldin
422 U.S. 490 (1975).....8

STATUTES

Voting Rights Act
§ 2.....11

CONSTITUTIONAL PROVISIONS

California Constitution
Article II, § 811
Article II, § 8(a).....10
Article IV, § 210
Article IV, § 2(a)5
Article IV, § 65
Article XXI, § 1.....5

COURT RULES

Federal Rules of Civil Procedure Rule
12(b)(1)1, 2, 6

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 15, 2018, at 10:00 a.m. in Courtroom 3, 15th Floor, of the United States Courthouse located at 501 I Street, Sacramento, CA, 95814, Defendant Alex Padilla will move to dismiss plaintiffs' second amended complaint with prejudice for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This motion is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, all records in this action and matters of which the Court may take judicial notice, and any argument to be heard by the Court.

COUNSEL CERTIFICATION RE MEET AND CONFER

The undersigned counsel certifies that he conferred with plaintiffs' counsel Scott Stafne on April 12, 2018. During those conferences, the grounds for this motion to dismiss, and related procedural issues, were explained and discussed. Meet and confer efforts now have been exhausted.

Dated: April 16, 2018

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/ George Waters

GEORGE WATERS
Deputy Attorney General
Attorneys for Defendant Alex Padilla

1 **INTRODUCTION**

2 Plaintiffs’ first complaint alleged that the present size of the California Legislature is too
3 small—and the resulting legislative districts too large—to represent California’s almost 40
4 million residents. That complaint was dismissed because it did not establish standing and because
5 it posed non-justiciable political questions. Plaintiffs now have drafted a second amended
6 complaint (SAC) that alleges that the California Legislature is too small—and the resulting
7 legislative districts too large—to provide adequate representation to California’s racial, ethnic,
8 political, and rural minority groups, and to “Californians who are not wealthy and lack effective
9 access to the political elites that dominate the legislature.”

10 This is a distinction without a difference. Plaintiffs still assert a claim common to all
11 Californians, and they still pose a non-justiciable political question concerning the proper size of
12 the California Legislature. The SAC should be dismissed with prejudice.

13 **BACKGROUND**

14 **I. PLAINTIFFS’ ALLEGATIONS**

15 Plaintiffs’ Second Amended Complaint (SAC) alleges that more than 150 years ago
16 California fixed the size of its Legislature at 40 Senators and 80 Assemblymembers, and did so to
17 discriminate against non-whites. SAC (Dkt. 39) at p. 2. Plaintiffs further allege that the “[b]y
18 maintaining these arbitrary caps, California has perpetuated a system of oligarchic governance”
19 that ignores their interests. (*Id.*)

20 Plaintiffs are:¹

- 21 • Citizens for Fair Representation (CFR), a nonprofit that educates Californians
22 regarding their right to participate in government. CFR is comprised of Californians
23 of various races, ethnicities, religions, and beliefs. CFR members have effectively
24

25
26 ¹ Several individuals and entities described as plaintiffs in the original complaint—the
27 City of Fort Jones, Siskiyou County, Terry Rapoza, Howard Thomas, Patty Smith, Katherine
28 Radanovich, Kevin McGary, the Shasta Tribe of Indians, Steve Baird, and Manuel Martin—are
not listed as plaintiffs in the SAC. *See* Dkt. 1 (Complaint) ¶¶ 3.4, 3.5, 3.13, 3.14, 3.15, 3.18,
3.20, 3.21. Apparently they no longer are plaintiffs.

1 been disenfranchised because their legislative districts are so large that their interests
2 are routinely ignored by the Legislature. SAC ¶ 1.0.

- 3 • Win Carpenter, Kyle Carpenter, and Roy Hall Jr., are Native Americans who reside in
4 Senate District 1. California’s large legislative districts, growing larger over time,
5 deny them an opportunity to elect a member of their race to a statewide body. SAC ¶
6 1.2.
- 7 • David Garcia is a Hispanic U.S. citizen who resides in Senate District 8. The cap on
8 the size of the Legislature is part of a constitutional/statutory framework that denies
9 Hispanics the ability to elect candidates of their choice to the Legislature. SAC ¶ 1.3.
- 10 • Raymond Wong and Leslie Lim are U.S. citizens of Asian descent who reside in
11 Senate Districts 32 and 21 respectively. The cap on the size of the Legislature is part
12 of a constitutional/statutory framework that dilutes their vote and the votes of other
13 Asians. SAC ¶ 1.4.
- 14 • Cindy Brown is a black U.S. citizen who resides in Senate District 37. The cap on the
15 size of the Legislature dilutes black political power. SAC ¶ 1.5.
- 16 • Mark Baird, the Carpenters, John D’Agostini, Mike Poindexter, Michael Thomas, and
17 Larry Wall reside in senate districts composed of eight or more counties. The cap on
18 the size of the Legislature dilutes their political power. They were injured by the
19 Legislature’s failure to timely address erosion of the spillway at Oroville Dam. SAC
20 ¶¶ 1.6, 3.33.
- 21 • The cities of Colusa and Williams are rural municipalities in Senate District 4, which
22 is composed of eight counties. SAC ¶ 1.6.
- 23 • The California American Independent Party and the California Libertarian Party are
24 political parties that have substantial numbers of members in California. The cap on
25 the number of legislators seriously undermines their ability to elect candidates of their
26 choice. SAC ¶ 1.7.

1 Defendants are California Secretary of State Alex Padilla, the California Citizens
2 Redistricting Commission, and the State of California.² SAC ¶¶ 1.9 – 1.11.

3 Plaintiffs allege that the membership of the state Legislature was fixed at 40 Senators and
4 80 Assemblymembers by statute in 1862 and by the Constitution in 1879 (SAC ¶ 3.0); that the
5 predominant purpose for limiting the membership was “to promote the white man’s interests by
6 the exclusion of non-white people from participating in California’s political process” (SAC
7 ¶ 3.14); that California has a long history of discriminating against minority groups (SAC ¶¶ 3.0 –
8 3.35); that presently each Assembly district contains almost 500,000 people and each Senate
9 district contains almost one million people (SAC ¶ 3.1); that the adverse effects of large
10 legislative districts are felt by all voters, particularly members of racial, ethnic, political, and rural
11 minority groups (SAC ¶ 3.27); and that the cap on the number of legislative districts has created
12 creates an unresponsive legislative oligarchy (SAC ¶ 3.35).

13 The complaint makes six claims:

- 14 1. ALL PLAINTIFFS—Equal Protection, Race Discrimination: The cap on the legislature’s
15 size was designed to discriminate against non-whites and dilute their votes. The resulting
16 discrimination will worsen as the State grows. (SAC ¶¶ 4.0 – 4.3);
- 17 2. NON-WHITE PLAINTIFFS—Equal Protection, Race Discrimination: White legislators
18 know that smaller districts will diminish their electoral prospects. A motivating factor to
19 maintain large districts has been to maintain the domination of a small cadre of political
20 elites. The resulting discrimination will worsen as the population grows. SAC ¶¶ 5.0 – 5.4.
- 21 3. ALL PLAINTIFFS—Equal Protection, Lack of Political Power: Legislative districts are so
22 large that voters have no meaningful influence over the Legislature. A Californian has less
23 political power than citizens of other States. The resulting discrimination will worsen as
24 the population grows. SAC ¶¶ 6.0 – 6.4.
- 25 4. ALL PLAINTIFFS—Due Process, Lack of Adequate Representation: California’s
26 legislative districts are so large that millions of state residents have no meaningful access to
27

28 ² As of the writing of this brief, neither the Commission nor the State has been served.

1 their representatives. A significant percentage of voters have greater difficulty obtaining
2 benefits and services than do voters with wealth and social status. SAC ¶¶ 7.0 – 7.2.

3 5. ALL PLAINTIFFS—First Amendment: The limit on the number of legislators was enacted
4 and is maintained to suppress and retaliate against residents who advocate viewpoints
5 contrary to the political elites. Plaintiff Baird lost his job as a deputy sheriff in part because
6 of his participation in this lawsuit. SAC ¶¶ 8.0 – 8.2.

7 6. ALL PLAINTIFFS—Guarantee Clause: The Guarantee Clause guarantees a republican
8 form of government. At the time it was written, the Guarantee Clause was commonly
9 understood to require small legislative districts that the people could monitor and control.
10 California does not have a republican form of government because its large districts assure
11 that the great majority of residents have no effective influence on their legislators. SAC
12 ¶¶ 9.0 – 9.9.

13 As relief, plaintiffs seek a declaration that the size of the Legislature is unconstitutional, and
14 an injunction requiring the number of legislators to be increased to a number that will insure that
15 voters who have been discriminated against on the basis of race, and voters in rural areas, have a
16 meaningful opportunity to elect their preferred candidates. SAC ¶¶ 10.0 – 10.3.

17 **II. CALIFORNIA LAW GOVERNING REDISTRICTING AND THE SIZE OF LEGISLATIVE**
18 **DISTRICTS**

19 The membership of the Legislature is fixed by the California Constitution at 40 Senators
20 and 80 Assemblymembers. Cal. Const. art. IV, § 2(a). The membership has been fixed at these
21 numbers since at least 1879. *People ex rel. Snowball v. Pendegast*, 96 Cal. 289, 291-92 [31 P.
22 103, 104] (1892) (1879 Constitution fixed membership of Senate at 40 and Assembly at 80).
23 Each legislator is elected from a separate district. Cal. Const. art. IV, § 6.

24 Redistricting of congressional, State Senatorial, Assembly, and Board of Equalization
25 districts is done by the Citizens Redistricting Commission. Cal. Const. art. XXI, § 1.
26 Redistricting occurs in the year following the year in which the national census is taken, at the
27 beginning of each decade. *Id.* The Commission adopted the current statewide maps in 2011.
28 *Vandermost v. Bowen*, 53 Cal.4th 421, 438 (2012). The Commission adopted an “ideal standard”

1 population of 702,905 for congressional districts, 465,674 for Assembly districts, 931,349 for
2 Senate districts, and 9,313,489 for Board of Equalization districts. Citizens Redistricting
3 Commission Final Report on 2011 Redistricting, August 15, 2011, at 9, 11.³

4 **III. PRIOR LITIGATION IN THIS DISTRICT POSING THE SAME ISSUE**

5 In 2009 a separate department of this Court decided a virtually identical case. *Warnken v.*
6 *Schwarzenegger*, 2009 WL 4809880 (E.D. Cal., 2009), *report and recommendation adopted* 2010
7 WL 1407796 (E.D. Cal., 2010). In *Warnken*, a Santa Barbara resident alleged that California
8 Assembly districts were so large that state government was inaccessible to most citizens, and
9 running for office was so expensive that it was out of reach for most citizens. *Id.*, 2009 WL
10 4809880 at *1. The case was dismissed for lack of subject matter jurisdiction. *Id.*, 2009 WL
11 4809880 at *8.

12 **IV. PRIOR PROCEEDINGS IN THE PRESENT ACTION**

13 Plaintiffs' original complaint was dismissed for want of subject-matter jurisdiction. The
14 Court found that plaintiffs' lacked standing to bring their claims and that their requested remedies
15 turned on the resolution of non-justiciable political questions. The Court granted plaintiffs leave
16 to file an amended complaint limited to 25 pages. Dkt. 32 at p. 11.

17 **LEGAL STANDARD**

18 A challenge to standing is properly raised in a Rule 12(b)(1) motion to dismiss for lack of
19 subject-matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th
20 Cir. 2010). Federal courts are courts of limited jurisdiction. Thus it is presumed that a cause lies
21 outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party
22 asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).
23 The plaintiff bears the burden of showing that each claim comes within the jurisdiction of a
24 federal court. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

25
26
27 ³ Available at
28 http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf (last visited 4/14/18).

1 **ARGUMENT**

2 **I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFFS’**
3 **CLAIMS.**

4 **A. Plaintiffs Lack Article III Standing Because the Injury They Allege Is a**
5 **General Grievance Shared by the Public at Large.**

6 Standing is “an essential and unchanging part of the case-or-controversy requirement of
7 Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warren v. Fox Family*
8 *Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Standing is not measured by the “intensity
9 of the litigant’s interest or the fervor of his advocacy.” *Valley Forge Christian College v.*
10 *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982). To
11 establish standing, a plaintiff must show:

12 (1) an injury in fact—an invasion of a legally protected interest which is (a) concrete
13 and particularized and (b) actual or imminent, not conjectural or hypothetical;

14 (2) a causal connection between the injury and the conduct complained of—the injury
15 has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the
16 result of the independent action of some third party not before the court; and

17 (3) it must be likely, as opposed to merely speculative, that the injury will be
18 redressed by a favorable decision.

19 *Drake v. Obama*, 664 F.3d 774, 779 (9th Cir. 2011), quoting *Lujan*, 504 U.S. at 560–61
20 (omissions in original) (internal quotation marks and citations omitted).

21 Plaintiffs do not meet the first prong of standing analysis because the injury they allege—
22 diluted representation in the Legislature—is a general grievance shared by the public at large.⁴
23 “[A] litigant’s interest cannot be based on the ‘generalized interest of all citizens in constitutional
24 governance.’” *Drake*, 664 F.3d at 774 (quoting *Schlesinger v. Reservists Comm. To Stop the*
25 *War*, 418 U.S. 208, 217 (1974)). “[A] plaintiff raising only a generally available grievance about
26 government—claiming only harm to his and every citizen’s interest in proper application of the
27 Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it
28 does the public at large—does not state an Article III case or controversy.” *Lujan*, 504 U.S. at

⁴ See Complaint ¶2.3: “*The People in California* have had their representation limited and capped and now have an Oligarchy at best and only a mere shadow of connection to the represented.” (Emphasis added).

1 573-74. “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal
2 measure by all or a large class of citizens, that harm alone normally does not warrant exercise of
3 jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

4 In case after case, the Supreme Court has held that a general grievance widely shared by the
5 public does not create Article III standing. For example, in *Lance v. Coffman*, 549 U.S. 437
6 (2007), the plaintiffs challenged a redistricting provision of the Colorado Constitution that limited
7 redistricting to once per census. The Court held that the plaintiffs lacked standing to pursue the
8 claim:

9 The only injury plaintiffs allege is that the law—specifically the Elections Clause—
10 has not been followed. This injury is precisely the kind of undifferentiated,
11 generalized grievance about the conduct of government that we have refused to
12 countenance in the past. It is quite different from the sorts of injuries alleged by
13 plaintiffs in voting rights cases where we have found standing. Because plaintiffs
14 assert no particularized stake in the litigation, we hold that they lack standing to bring
15 their Elections Clause claim.

16 *Lance*, 549 U.S. at 442. See also *Ex Parte Levitt*, 302 U.S. 633, 636 (1937) (challenge to Hugo
17 Black’s appointment to the Supreme Court dismissed where plaintiff alleged only “a general
18 interest common to all members of the public”); *Schlesinger v. Reservists Committee to Stop the*
19 *War*, 418 U.S. 208, 220-221 (1974) (Article III standing may not be predicated on an interest held
20 by all members of the public because such interest is necessarily abstract); *Hein v. Freedom From*
21 *Religion Foundation, Inc.* 551 U.S. 587, 598 (2007) (taxpayers lacked standing to challenge
22 President’s “faith-based initiatives” where their injury was not distinct from that suffered by other
23 taxpayers).

24 The original complaint was dismissed in part because the Court found that it alleged only a
25 generalized grievance. Dkt. 32 at 6. As the Court noted:

26 That the cap on state lawmakers has affected each named plaintiff differently does not
27 transform plaintiffs’ grievances from the general to the particular: *Although each*
28 *plaintiff alleges a particularized gripe*, such as how the legislative cap dilutes his or
her voice on a specific issue or encumbers the potential to run for office in a
particular area, *the threatened right to self-governance remains an injury common to*
all Californians.

Ibid. (emphasis added).

1 The same is true of the SAC. Plaintiffs concede that their underlying claim is that the size
2 of legislative districts harms all Californians. See, e.g., SAC ¶ 3.27 (“the adverse effects of
3 representative government by enormous legislative districts are felt by all California voters”);
4 SAC p. 2 (“California has perpetuated a system of oligarchic governance at odds with the norm of
5 self-representation at the heart of the U.S. Constitution”). Although some allegations are specific
6 to minorities, the term “minority” is broadly defined to include at the least “race, ethnicity,
7 political affiliation, or residence in more sparsely populated areas of the state” and “Californians
8 who are not wealthy and lack effective access to the political elites that dominate the legislature.”
9 SAC ¶¶ 3.27, 6.2. Plaintiffs again assert a harm to a right to self-governance shared by all
10 Californians.

11 Plaintiffs lack standing to pursue their claims in federal court because their asserted
12 injury—diluted representation in the state Legislature—is a general grievance shared by the
13 public at large. *Drake*, 664 F.3d at 774.

14 **B. Plaintiffs’ Claims Are Barred by the Political Question Doctrine.**

15 The political question doctrine originated in Chief Justice Marshall’s observation that
16 “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the
17 executive, can never be made in this court.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170
18 (1803). “The Supreme Court has since explained that ‘[t]he nonjusticiability of a political
19 question is primarily a function of the separation of powers.’” *Corrie v. Caterpillar*, 503 F.3d
20 974, 980 (9th Cir. 2007) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). The presence of a
21 political question deprives the court of subject matter jurisdiction. See *id.* at 980-82; see also *No*
22 *GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988) (“[T]he
23 presence of a political question precludes a federal court, under Article III of the Constitution,
24 from hearing or deciding the case presented.”).

25 In *Baker*, the Court set out a list of six independent tests that identify whether a political
26 question is raised in a particular case:

27 It is apparent that several formulations which vary slightly according to the settings in
28 which the questions arise may describe a political question, although each has one or
more elements which identify it as essentially a function of the separation of powers.

1 Prominent on the surface of any case held to involve a political question is found [1] a
2 textually demonstrable constitutional commitment of the issue to a coordinate
3 political department; or [2] a lack of judicially discoverable and manageable
4 standards for resolving it; or [3] the impossibility of deciding without an initial policy
5 determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a
6 court's undertaking independent resolution without expressing lack of the respect due
7 coordinate branches of government; or [5] an unusual need for unquestioning
8 adherence to a political decision already made; or [6] the potentiality of
9 embarrassment from multifarious pronouncements by various departments on one
10 question.

11 *Baker*, 369 U.S. at 217.

12 The second *Baker* test—the lack of judicially discoverable and manageable standards—
13 compels dismissal of plaintiffs’ claims. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme
14 Court affirmed the dismissal of a political gerrymander claim, holding that claims alleging
15 political gerrymandering are nonjusticiable where there is no judicially discernable and
16 manageable standard for adjudicating them. *Vieth*, 541 U.S. at 290, 305-306 (plurality opinion).⁵

17 The Court stated:

18 Sometimes, however, the law is that the judicial department has no business
19 entertaining the claim of unlawfulness—because the question is entrusted to one of
20 the political branches or involves no judicially enforceable rights.

21 * * * * *

22 One of the most obvious limitations imposed by that requirement is that judicial
23 action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative
24 Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must
25 be principled, rational, and based upon reasoned distinctions.

26 *Id.* at 277-278 (emphasis in original).

27 The size of the Legislature is fixed by the California Constitution. Cal. Const. art. IV, § 2.
28 Plaintiff alleges that the number of legislators remained at 40 Senators and 80 Assemblymembers
since 1862. Complaint ¶¶ 4.16-4.21. To increase this number would require a constitutional
amendment.⁶ Even if this number could be increased by court order, there is no “judicially

⁵ A fifth justice, Justice Kennedy, joined in the result and wrote a concurring opinion which agreed that there is no effective standard for measuring political gerrymander claims. *Id.* at 317.

⁶ The California Constitution may be amended by initiative. Cal. Const. art. II, § 8(a) (“The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them”).

1 discoverable and manageable standard” to determine what the size of the Legislature should be.
2 *See Baker*, 369 U.S. at 217 [factor 2]; *Holder v. Hall*, 512 U.S. 874, 881, 885 (1994) (size of
3 districts cannot be challenged under Section 2 of the Voting Rights Act because the wide range of
4 possibilities makes the choice “inherently standardless”). Further, it would be impossible to
5 decide the correct size “without an initial policy determination of a kind clearly for nonjudicial
6 discretion.” *See Baker*, 369 U.S. at 217 [factor 3].

7 The original complaint was dismissed in part because the remedy sought by plaintiffs
8 required resolution of non-justiciable political questions:

9 Increasing the numbers of legislators would appear to be susceptible to constitutional
10 amendment, *see* Cal. Const. art. II, § 8 (outlining initiative process for amending the
11 state constitution), yet plaintiffs bring this grievance to federal court, effectively
12 asking the court to usurp the electorate and unilaterally alter the state constitution.
13 Doing so would run afoul of the Supreme Court’s wisdom articulated in *Baker*: *It*
would require the court to legislate, a task committed to the legislative branch; it
would require the court to make policy determinations beyond the realm of judicial
reasoning; and it would require the court to fashion a remedy without judicially
discoverable and manageable standards to do so. *See Baker*, 369 U.S. at 210.

14 Dkt. 32 at 9 (emphasis added).

15 The same is true of the SAC. The SAC asks the Court to declare that the Constitutional
16 limit on the size of the Legislature is unconstitutional, and enter an injunction requiring that the
17 Legislature to be expanded to a constitutional size. SAC ¶¶ 10.0, 10.1, 10.2. As plaintiffs
18 acknowledge, whatever size districts the court were to choose for plaintiffs would have to be used
19 for all districts because the Equal Protection Clause requires that all districts be “as nearly of
20 equal population as is practicable.” SAC ¶ 3.26, quoting *Reynolds v. Sims*, 377 U.S. 533, 577
21 (1964). Thus plaintiffs ask the Court to perform the legislative task of determining the size of all

22 _____
23 In 2017 and 2018, a proposed initiative was circulated that would have increased the
24 membership of the Legislature. It did not qualify for the ballot. See the California Attorney
25 General’s webpage entitled “Initiatives—Inactive Measures,” Proposal #17-0002, available at
[https://oag.ca.gov/initiatives/inactive-](https://oag.ca.gov/initiatives/inactive-measures?field_initiative_date_value%5Bvalue%5D%5Byear%5D=2017&=Apply)
[measures?field_initiative_date_value%5Bvalue%5D%5Byear%5D=2017&=Apply](https://oag.ca.gov/initiatives/inactive-measures?field_initiative_date_value%5Bvalue%5D%5Byear%5D=2017&=Apply) (last visited
4/14/18).

26 A separate proposal to divide California into three smaller states is currently in
27 circulation. See the Secretary of State’s webpage entitled “Circulating Initiatives with 25% of
28 Signatures Reached,” Proposal #1814, available at [http://www.sos.ca.gov/elections/ballot-](http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/circulating-initiatives-25percent-signatures/)
[measures/initiative-and-referendum-status/circulating-initiatives-25percent-signatures/](http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/circulating-initiatives-25percent-signatures/) (last
visited 4/14/18). Plaintiffs suggest this as an alternate remedy to their claims. SAC p. 1.

1 California’s legislative districts; to make policy choices as to the size of those districts; and to
2 fashion a judicial remedy without manageable standards to do so.

3 This Court should not attempt to resolve this plainly political question. As the Supreme
4 Court stated in *Vieth*, “[s]ometimes, . . . the law is that the judicial department has no business
5 entertaining the claim of unlawfulness—because the question is entrusted to one of the political
6 branches or involves no judicially enforceable rights.” *Vieth*, 541 U.S. at 277; *see also Baker*,
7 *supra*, 369 U.S. at 210 (“the lack of satisfactory criteria for a judicial determination” is a
8 dominant consideration for application of the political question doctrine).

9 **CONCLUSION**

10 For the reasons set forth above, plaintiffs’ second amended complaint should be dismissed
11 without leave to amend.

12 Dated: April 16, 2018

Respectfully Submitted,

13
14 XAVIER BECERRA
Attorney General of California
15 MARK R. BECKINGTON
Supervising Deputy Attorney General
16

17 /s/ *George Waters*

18
19 GEORGE WATERS
Deputy Attorney General
20 *Attorneys for Attorneys for Defendant Alex
Padilla*

21 SA2017107016
22 13050588.docx
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Case Name: **Citizens for Fair Representation,
et al. v. Secretary of State Alex
Padilla** No. **2:17-cv-00973**

I hereby certify that on April 16, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT ALEX PADILLA'S NOTICE OF MOTION & MOTION TO DISMISS
SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND
AUTHORITIES [FRCP 12(b)(1)]**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 16, 2018, at Sacramento, California.

Tursun Bier
Declarant

/s/ Tursun Bier
Signature