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

23 Plaintiffs,

24 v.

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

27 Defendant.
 28

2:17-cv-00973

**DEFENDANT SECRETARY OF
 STATE'S OPPOSITION TO MOTION
 TO CONVENE 3-JUDGE COURT**

Date: June 1, 2018
 Time: 10:00 a.m.
 Dept: 3
 Judge: The Honorable Kimberly J.
 Mueller
 Trial Date: N/A
 Action Filed: 5/8/17

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INTRODUCTION

On April 16, 2018, defendant Alex Padilla filed a motion to dismiss the second amended complaint and noticed it for hearing on June 15, 2018.¹ Dkt. 42. Two weeks later, plaintiffs Citizens for Fair Representation et al. filed the instant motion to convene a three-judge court, and noticed the motion for June 1, 2015. Dkt. 43. Plaintiffs’ motion asks the Court to refer this case to a three-judge court immediately, before the hearing on defendant’s motion to dismiss.

Plaintiffs get things backwards. This Court clearly has jurisdiction to resolve the pending motion to dismiss, which is a jurisdictional challenge under Rule 12(b)(1). *Shapiro v. McManus*, 136 S.Ct. 450, 455 (2015). A ruling on plaintiff’s three-judge court motion should wait until after the jurisdictional issue is resolved. If the motion to dismiss is granted, there will be no need to consider the three-judge court motion.

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I. DEFENDANT’S PENDING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION CAN AND SHOULD BE ADDRESSED BY A SINGLE JUDGE. PLAINTIFFS’ THREE-JUDGE COURT MOTION SHOULD BE CONTINUED UNTIL THE JURISDICTIONAL ISSUES ARE RESOLVED.

28 U.S.C. § 2284 states that a “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.” However, § 2284 does not require referral to a three-judge court under two circumstances:

- 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.” *Shapiro* 136 S.Ct. at 455 (quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100, 95 S.Ct. 289 (1974)).
- Claims that are “constitutionally insubstantial”—a term defined as “essentially fictitious,” “wholly insubstantial,” “obviously frivolous,” or “obviously without

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¹ The motion to dismiss was filed with two months’ notice because defendant’s counsel offered plaintiffs’ counsel (both of whom do not reside in the Eastern District) a choice among three dates for the hearing. Plaintiffs chose the latest date. Waters Decl., Exh. 1. Plaintiffs then noticed their motion for a three-judge court for an earlier date.

1 merit”—do not raise a substantial federal question and may be dismissed by a single
2 judge. *Shapiro*, 136 S.Ct. at 455-456.

3 Defendant’s pending motion to dismiss argues that the Court lacks subject matter
4 jurisdiction of the complaint and that that the complaint is not justiciable. Dkt. 42. A single
5 judge can resolve both issues. *Shapiro*, 136 S.Ct. at 455 (three-judge court not required where
6 district court lacks jurisdiction or complaint is not justiciable); Dkt. 32, p. 11 (“the court
7 DISMISSES the complaint under Rule 12(b)(1) based on lack of subject-matter jurisdiction”).
8 The pending motion to dismiss can and should be heard by this Court acting alone. If the motion
9 to dismiss is granted, the three-judge court issue will become moot.

10 Plaintiffs argue that a single judge cannot decide defendant’s 12(b)(1) motion because
11 defendant “does not argue in his 12(b)(1) motion to dismiss that CFR’s intentional discrimination
12 claims resulting in malapportionment are ‘insubstantial’ or ‘frivolous’.” Dkt 43, p. 11. Here
13 plaintiffs misread *Shapiro*. *Shapiro* held that § 2284 requires that redistricting claims going to the
14 merits cannot be granted simply for failure to state a claim (the 12(b)(6) standard); rather such
15 claims can be dismissed only where they are “insubstantial” or “frivolous” or the like. *Id.* at 455-
16 456. But *Shapiro* also makes clear a single judge also can reach jurisdictional claims such as
17 those made in defendant’s pending motion to dismiss. *Shapiro*, 136 S.Ct. at 455 (three-judge
18 court not required where district court itself lacks jurisdiction of the complain or complaint is not
19 justiciable).

20 Plaintiffs’ three-judge court motion should be continued until the defendant’s motion to
21 dismiss is resolved.²

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24 ² Defendant’s previous motion to dismiss was filed under both 12(b)(1) and 12(b)(6).
25 Dkt. 9. As to the 12(b)(6) motion, defendant argued that plaintiffs’ claims were frivolous and
26 should be dismissed on the merits under the second *Shapiro* standard. Dkt. 24. The Court denied
27 the 12(b)(6) motion without prejudice “subject to renewal should this case proceed before a three-
28 judge court at some time in the future.” Dkt. 32, p. 11. Accordingly, the pending motion to
dismiss does not raise 12(b)(6) and does not argue that plaintiffs’ claims are frivolous. Dkt. 42.
Nonetheless, defendant remains of the opinion that the claims are frivolous and would be
delighted to brief that issue, should the Court be inclined to hear that argument some time in the
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CONCLUSION

Plaintiffs’ motion to convene a three-judge court should be continued until the Court has resolved defendant’s pending motion to dismiss.

Dated: May 17, 2018

Respectfully Submitted,

XAVIER BECERRA
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/s/ George Waters
GEORGE WATERS
Deputy Attorney General
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CERTIFICATE OF SERVICE

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

I hereby certify that on May 17, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT SECRETARY OF STATE'S OPPOSITION TO MOTION TO CONVENE
3-JUDGE COURT**

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 May 17, 2018, at Sacramento, California.

Tracie L. Campbell
Declarant

/s/ Tracie Campbell
Signature