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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** **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS** **Hearing Noted: June 15, 2018** **Judge: Hon. Kimberly J. Mueller** **Courtroom: 3** **Trial Date: None** **Action Filed: 5/8/17**

Plaintiffs' Response to Defendant's Motion to Dismiss

In moving to dismiss the Second Amendment Complaint [SAC] for lack of standing and justiciability, Defendant's arguments essentially are the same made by the dissents in *Baker v. Carr*, 369 U.S. 186 (1982). Justice Frankfurter decried the attack on malapportionment as based

on "hypothetical" claims, "abstract because the Court does not vouchsafe . . . guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate." *Id.* at 267 (Frankfurter, J., dissenting).

For the same reasons that the Supreme Court decided that voters whose political power had been diluted by malapportionment were entitled to relief in federal court, Plaintiffs present justiciable claims that this court is obligated to resolve.

I. Standing

A. Article III does not preclude standing for all claims involving injuries shared widely by the public

Defendant argues that the SAC presents only "a generalized grievance shared by the public at large." (Defendant's Motion to Dismiss (MTD), at 7) To begin with, Article III standing may be found even if the claimed injuries are widespread in the population. "In recent decades," the Court has analyzed cases involving "adjudication of generalized grievances more appropriately addressed in the representative branches" as a question for the "'prudential" branch of standing, not as an imperative of Article III. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386, (2014) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

Moreover, in considering whether to dismiss a case "on grounds that are 'prudential,' rather than constitutional," the Court has emphasized that the "request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc.*, 134 S.Ct. at 1386 (quoting *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013)). *See Duke Power Co. v. Carolina*

Environ. Study Group, Inc., 438 U.S. 59, 80–81 (1978) ("[T]he basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.").

To establish Article III standing, Plaintiffs must show that they have or will imminently suffer an "'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical. . . ." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Friends of Earth, Inc. v. Laidlaw Environ. Serv. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1548 (2016).

Defendant quotes several cases denying standing when plaintiffs "alleged only 'a general interest common to all members of the public,'" MTD, at 8 (quoting *Ex Parte Levitt*, 302 U.S. 633, 636 (1937)). However, as the Court observed in *FEC v. Atkins*, this "kind of judicial language . . . invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the "common concern for obedience to law." 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pacific R. Co.,* 311 U.S. 295, 303 (1940)). Notably, *FEC v. Atkins* was referring to the very cases cited by Defendant. *See id.* at 23–24; MTD, pp. 7–8.

In one of Defendant's cites, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), the Court barred plaintiffs from suing as citizens and taxpayers to determine if members of Congress could serve in the military reserves; they claimed no injuries not shared equally by the entire country. Likewise, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475–479 (1982), plaintiffs lacked

standing as taxpayers to challenge the free transfer of government property to a religious college; they claimed no injuries beyond a sheer concern that the Establishment Clause was violated.

Another of Defendant's authorities, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), was an effort to contest federal funding of a dam in Egypt as a violation of the Endangered Species Act. Plaintiffs did not have standing as none of their asserted harms counted as "actual injuries" to themselves. *Warth v. Seldin*, 422 U.S. 490, 504 (1975), rebuffed a challenge to a restrictive zoning law; plaintiffs did not show that their inability to obtain affordable housing had "resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions."

Defendant also relies on cases after *FEC v. Atkins*. In *Lance v. Coffman*, 549 U.S. 437, 442 (2007), plaintiffs could not challenge a Colorado law limiting redistricting to once per census, as "[t]he only injury [they] allege is that . . . the Elections Clause. . . has not been followed." *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), was basically the same as *Valley Forge Christian College*; the Court held that plaintiffs could not sue solely as taxpayers to contest the President's faith-based initiatives. In short, both cases involved mere demands that the law be followed.

Finally, Defendant quotes two Ninth Circuit decisions, only one of which is remotely relevant to determining when plaintiffs can challenge laws that involve grievances common to many people. In *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), plaintiffs claimed that Barack Obama was ineligible to be President as he allegedly was not a natural-born citizen. None of the plaintiffs had asserted any kind of concrete injury that was not speculative or moot, leaving only a generalized interest in the Constitution being obeyed. However, the court agreed that the

plaintiffs who had been political opponents of Obama in the election or presidential electors might have had "competitive standing" to claim he was ineligible for office, but once his presidency commenced, the "Plaintiffs' competitive interest in running against a qualified candidate had lapsed."[1]

The Court has adjudicated the merits of many constitutional claims in which the plaintiffs' injuries were shared by the public at large, or at least by all eligible voters. *See FEC v. Akins*, 524 U.S. at 24 ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact'"). Consider these examples:

1. Invalidation of poll taxes: In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court overturned Virginia's poll tax, which was required for *all* voters. The basis of the decision was the Court's conclusion that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." It made no difference whether the voter could afford the tax. *Every* voter in the state was aggrieved by the poll tax and could assert the same cause of action, even though the law "'was born of a desire to disenfranchise'" black people. *Id*. at 666 (quoting *Harman v. Forssenius*, 380 U.S. 528, 543 (1965)).

2. Challenges to census results that affect legislative apportionments: In *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), voters from several states were allowed standing to attack the planned use of statistical sampling for the upcoming census. A voter in Indiana would suffer Article III injuries in that the sampling technique was

[1] Defendant also cites *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003), but the court merely held that the plaintiff lacked sufficient ownership interests to challenge use of his musical compositions as violations of federal copyright law.

"virtual[ly] certain" to result in the state losing a seat in the House of Representatives. *Id.* at 330. In addition, voters from specific counties in several states had standing on the ground that census data was used to allocate representatives in their legislatures, and their counties predictably would lose seats, resulting in "expected intrastate vote dilution." *Id.* at 334. Thus, *every* voter in Indiana and *every* voter in the affected counties would suffer vote dilution and consequently have the same injuries. Nonetheless, the Court upheld standing: these voters were "asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Id.* at 331–32 (quoting *Baker v. Carr*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

3. Racial gerrymanders in redistricting: Racial gerrymanders spawned by redistricting legislative districts violate the Equal Protection Clause regardless of whether they are "explicit," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), or inferable from the context of a facially race-neutral districting scheme. Such gerrymanders "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id*. at 643. *Any voter* in the such districts has standing to sue, including whites, because the stigmatization and racial animus resulting from race-based redistricting affects voters of all races. *See Miller v. Johnson*, 515 U.S. 900, 909 (1995) (white voters could sue to invalidate congressional districts designed to increase black representation); *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (Any resident of a district drawn by "racial criteria. . . has standing to challenge the legislature's action."). *Every voter* within the affected districts shares a common grievance over the racial classifications, yet all have standing.

4. Suits seeking information for the public benefit: Government agencies often are required by law to release information to the public on request. Literally any member of the

public can be "aggrieved" when an agency refuses disclosure. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (denial of public records request "constitutes a sufficiently distinct injury to provide standing to sue.").

Similarly, various laws require private parties to submit information to government agencies, which in turn must be released to the public. In *FEC v. Atkins*, the plaintiffs were a group of voters who contended that the American Israel Public Affairs Committee (AIPAC) was required to comply with provisions of federal election law, including disclosure requirements. These plaintiffs, who had "often opposed" AIPAC politically, had standing to vindicate an "informational injury," 524 U.S. at 24, even though their grievance was "shared in substantially equal measure by all or a large class of citizens." *Id*. at 23 (quoting Ptr's Brief). *Any voter* had standing to complain.

5. Taxpayer suits in Establishment Clause cases: Although plaintiffs suing as taxpayers to challenge government spending usually do not have standing, the Court *in Flast v. Cohen*, 392 U.S. 83 (1968), allowed such suits to challenge government spending via legislative action that is prohibited by specific constitutional provision. Numerous cases have authorized taxpayers to contest government spending by legislative appropriation on Establishment Clause grounds. In *Flast*, taxpayers had standing to sue over a statute providing funds for instruction, materials, and textbooks used in religious schools. The Court said that there was "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."). *Id.* at 101.

Note the seeming tension between *Flast* and another decision akin to those cited by Defendant, *United States v. Richardson*, 418 U.S. 166 (1974). *Richardson* dismissed a taxpayer's

challenge to the secrecy of the CIA's budget as violating Article I, § 9, cl. 7 of the Constitution, which requires that "a regular statement of Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Court held that the taxpayers asserted only a "generalized grievance" inasmuch as they did not "claim that appropriated funds [were] being spent in violation of a 'specific constitutional limitation upon the . . . taxing and spending power.'" *Id.* at 175 (quoting *Flast v. Cohen*, 392 U.S. at 104).

As *FEC v. Atkins* explained, *see* 524 U.S. at 22, the key to reconciling *Flast* and cases like *Richardson* (and those cited by Defendant) is not to focus on the fact that if one taxpayer had standing, then every taxpayer could assert the same. That was true in both. Rather, the difference is that in *Richardson* the taxpayer's only grievance was an abstract interest in the Constitution being followed. In *Flast*, the plaintiff taxpayers suffered a specific injury forbidden by the Establishment Clause, the forced support of religion.

6. Facial challenges to statutes under First Amendment overbreadth doctrine: If a law limiting free expression is substantially overbroad, it "may not be enforced against anyone, including the party before the court." *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985). In asserting that a law is "'incapable of any valid application,'" *Village of Hoffman Estates*, 455 U.S. at 494 n.5 (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)), the challenger stands for every person in the jurisdiction, and thus is raising a general grievance. The purpose behind the overbreadth doctrine is to avoid chilling the public's free public expression. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, . . . harming not only themselves but society as a whole.

. . .").

B. Plaintiffs Have Standing

Defendant does not dispute that Plaintiffs have alleged concrete injuries that are neither conjectural nor hypothetical. Nor could he with any success. At "the pleading stage, general factual allegations of injury resulting from the Defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (In "ruling on a motion to dismiss for want of standing, . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

Plaintiffs have alleged a variety of injuries recognized by the Court as sufficient for standing: dilution of a person's voting strength due to race, political views or geographic location (SAC ¶¶ 1.2–1.7; 3.32), and the consequent inability to obtain state services and assistance on an equal basis, including that "the legislature often refuses to provide for their safety." (¶ 3.33); "grave economic, social, and stigmatic injuries as members of a racial and ethnic minority," whose interests are less well protected than whites (SAC ¶ 1.3); "increased fees and costs to access voters in large geographical areas" (SAC ¶3.32); inability to elect minority members to the legislature or for minorities to obtain office (SAC ¶¶ 1.2–1.3); and retaliation by state actors for participating in this suit and otherwise objecting to the size of the legislature (SAC ¶ 8.0–8.2).

Plaintiffs are not asserting "a generally available grievance about government—claiming

only harm to . . . every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lance v. Coffman*, 549 U.S. at 439.

There is nothing "abstract," "conjectural" or "hypothetical" about Plaintiffs' injuries, as they have occurred and continue to do so. The kinds of injuries claimed by Plaintiffs are indistinguishable from those averred in cases concerning reapportionment, racial gerrymandering, and restrictions on voting by means such as poll taxes. In those cases, the Court accepted impairment of voting and dilution of voting power as actual injuries in themselves due to the fact that loss of political power has predictable economic, social and personal effects. *See Shaw v. Reno*, 509 U.S. 630, 640–41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences. . . .").

The Court specifically has held that those complaining of vote dilution "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,'" *Baker v. Carr*, 369 U.S. 186, 207–08 (quoting *Coleman v. Miller*, 307 U.S. at 438 (1939)), "not merely a claim of 'the right possessed by every citizen 'to require that the government be administered according to law." *Id.* (quoting at *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

In *Rogers v. Lodge*, 458 U.S. 613 (1982), for example, the Court upheld the district court's determination that an at-large voting system for a Georgia county's board of commissioners perpetuated racial discrimination. No black person ever had been elected to the

board, even though they comprised more than half the county's population. The resulting harms to black residents paralleled those alleged by Plaintiffs in the SAC: the all-white board was "unresponsive and insensitive to the needs of the black community," in ways that shock the conscience. *Id.* at 625. The Court approved the district court's order to transform the electoral system into single-member district, which predictably would give blacks a realistic chance to elect officials of their own race. This remedy was "tailored to cure the 'condition that offends the Constitution.'" *Id.* at 628 (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).

Plaintiffs are not suing as taxpayers or citizens but as individual voters or political parties and municipalities litigating on behalf of voters. Further, they do not claim that their grievance about the size of the legislature is "held in common by all members of the public." *Lance v. Coffman*, 549 U.S. at 441. Each of the causes of action asserted in the SAC applies to certain members of the California voting population, not to all. Further, as will be explained, there are many California voters who would lack standing to raise any challenges to the caps on California's legislature, much less the claims raised in the SAC. In fact, they benefit from the status quo.

Count One—Intentional race discrimination in capping the legislature's size:

Plaintiffs allege, and Defendant does not dispute, that California's legislative caps "were enacted to ensure that a small group of white males would control the state legislature." SAC ¶ 4.0 This original sin became self-perpetuating "because current members of the California legislature would dilute their own political power by amending the state constitution to increase the sizes of the Assembly and Senate." SAC ¶ 4.2

It makes no difference to this analysis that the caps themselves are race neutral—they

also were in *Rogers v. Lodge*, 458 U.S. 613 (1982). Likewise, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court struck a provision of the Alabama Constitution that since 1901 had denied voting to persons convicted of crimes of "moral turpitude." Despite being facially race neutral, the law was enacted to disenfranchise blacks, and consequently it became the state's burden "to demonstrate that the law would have been enacted without this factor," which Alabama failed to do. Alabama's constitutional provision was of general applicability—it could disenfranchise literally anyone convicted of the many crimes considered to show "moral turpitude," such as passing a bad check or vagrancy. *See id.* at 223 n.** & 226–27. Complainants included blacks and whites, who like Plaintiffs here suffered the effects of a long-ago effort to maintain white supremacy.

Count Two—Intentional discrimination in maintaining the caps on the legislature:

Plaintiffs allege, and Defendant does not contest, that the caps not only harm the non-white plaintiffs, but given the racial politics characteristic of California, white legislators have strong incentives against expanding the legislature, "as any significant shrinkage of their districts would likely result in much greater minority voting strength, to the detriment of their political careers." SAC ¶ 5.2 This scenario parallels *Rogers v. Lodge*, where the Court approved the district court's finding that even if the system was "'neutral in origin,'" it "'ha[d] been subverted to invidious purposes.'" 458 U.S. at 626 (quoting district court's findings).

Count Three—Denial of equal protection by diluting political power:

Plaintiffs allege without opposition that they are members of "underrepresented populations" systematically underserved by legislators from massive electoral districts. They include "members of minority political parties, residents of rural areas with sparse populations,

Native American tribes and their members, and rural municipalities, as well as Californians who are not wealthy." SAC ¶ 6.2

Obviously only a subset of the California population has standing to make this claim. Mark Zuckerberg or Nancy Pelosi, to name only two among a great many wealthy Californians living in geographically-concentrated legislative districts, do not qualify, even if they personally might agree with Plaintiffs for ideological reasons. For that matter, such persons may (and some certainly must) benefit personally from a small legislature as it allows them to focus their influence on fewer decisionmakers.

Count Four—Violation of the Due Process Clause by diminishing fundamental political rights:

Plaintiffs assert without contradiction that "a significant percentage of California voters have substantially greater difficulty obtaining benefits and services from the state than voters whose wealth and social status give them access to legislators for political purposes." SAC ¶ 7.2 Voter turnout and the willingness to run for office are thereby adversely affected. SAC ¶ 7.1 Again, far from every Californian can make this claim. But the Plaintiffs can: they are representatives of "ordinary Californians" who have little or no incentive to run for office or even vote. They literally can be—and have been—ignored by the entrenched political elites of the state. SAC ¶ 7.2

Count Five—Violation of the First Amendment:

Plaintiffs assert, and Defendant does not deny, that the legislative caps have "been maintained at least in part for the purpose of suppressing and retaliating against the political expression of state residents who advocate viewpoints contrary to the political elites that control the legislature." SAC ¶ 8.0 Plaintiffs assert not only that large legislative districts are maintained

intentionally to suppress the viewpoints of voters with minority viewpoints, but that complaints about the issue are met with official retaliation. SAC ¶ 8.1 The result is an insidious perpetuation of viewpoints that are favored by the politicians who can ignore voters with contrary ideas and retaliate against them for complaining about the system. SAC ¶ 8.1–8.2

As a three-judge federal court in Maryland recently concluded in a case asserting that political gerrymandering violated the First Amendment,

> diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success because of the political views they have expressed through their voting histories and party affiliations. . . implicates the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise.

Shapiro v. McManus, 203 F.Supp.3d 579, 595 (D.C. Md. 2016).

Only a minority of California voters realistically can assert this claim, even though millions are adversely affected. Plaintiff Baird, for example, has been discriminated against due to his criticism of California's lack of statewide legislative representation, including loss of government employment. SAC ¶ 8.2

Count Six—Violation of the Guarantee Clause of Article IV:

Plaintiffs will prove at trial that the structure of the California legislature violates the intent of the Framers of the Guarantee Clause, which was inserted in the Constitution precisely to assure that states would not "become monarchical or oligarchical forms of government, in which political power was controlled by the hands of a few." SAC ¶ 9.2

California's population soon will exceed forty million people. SAC ¶ 3.2 In 1870, the state had somewhat over a half-million residents,[2] approximately the size of a single Assembly

[2] *See Population of States and Counties of the United States 1790–1990*, at 3 (1996) (560,247

district today. SAC ¶ 3.1 Yet the same number of legislators now represent a vastly larger population, not to mention controlling an economy that would be the world's fifth largest if California were a country (eclipsing even Great Britain).[3]

Plaintiffs assert not only that a significant percentage of California voters have no influence over either the election or actions of legislators; they can be ignored by their representatives. SAC ¶ 9.4 They will prove at trial that this system was the very type of oligarchic government that the Guarantee Clause was meant to prevent by *requiring* redress from the United States. The only question is whether a federal court should play that role, which Plaintiffs submit is a matter of justiciability, not standing.

Perhaps any Californian could complain theoretically that the state no longer is a functioning "republican form of government" as the Framers understood that term. Yet as the Framers would have recognized, oligarchical governments actually benefit elites, whose phone calls are promptly returned by legislators or aides due to their wealth and status. None of the plaintiffs can be so described. They literally are ignored by the same legislature that imposes taxes on them. Sound familiar?

II. Justiciability

Defendant argues that the SAC presents only "political" questions under *Baker v. Carr*, 369 U.S. 186 (1962), despite quoting the Court's statement that "the nonjusticiability of a political question is primarily a function of separation of powers." MTD, at 9 (quoting *Baker*,

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residents).

[3] *See The Pleasure and Pain of Being California, the World's 5th-Largest Economy*, New York Times, May 7, 2018 (https://www.nytimes.com/2018/05/07/us/california-economy-growth.html?login=email&auth=login-email).

369 U.S. at 211). Plaintiffs are complaining not about the actions of a coordinate branch, but a state's ossified political system. This in theory might raise *federalism* concerns, but those were put to rest by *Baker v. Carr* and its progeny.

Defendant contends that there is a "lack of judicially discoverable and manageable standards" to determine a constitutionally-acceptable size for the legislature.[4] MTD, at 10 Further, increasing the number of legislators "would require a constitutional amendment." *Id.* He suggests that Plaintiffs persuade legislators to reform the system through constitutional amendment or bring an initiative to change the state constitution. *Id.*, at 10–11 n.6.

The fact that remedying the size of the state legislature would require a state constitutional amendment is irrelevant. If that were a barrier to justiciability, the Court could not have decided some of its landmark reapportionment decisions (and many others), in which state constitutional provisions were reviewed. In *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964), for example, the apportionment plan struck by the Court was prescribed by the state constitution. *See Id.* at 715–18. State apportionment schemes often have involved a combination of constitutional mandates and legislative actions. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 537–40 (1964) (Alabama system).

As to the suggestion that Plaintiff's pursue a constitutional amendment either through legislative action or initiative, exactly the same was urged by the *dissents* in the great reapportionment cases. Putting aside the unlikelihood of legislators acting to diminish their own

[4] Defendant relies on the plurality in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which concluded that political gerrymandering cases present only political questions, see MTD, at10, ignoring that Justice Kennedy's fifth vote left that question unresolved, *see id.* at 313–14, and that the issue is currently before the Court. *See Gill v. Whitford*, 137 S.Ct 2268 (2017) (postponing jurisdiction until hearing on merits).

power, the Court in *Lucas* firmly rejected the relevance of political remedies to the issue of justiciability: "Except as an interim remedial procedure, justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature." 377 U.S. at 736.

At best, "a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum." *Id.* This is precisely the remedy Plaintiffs seek: a declaration by this court that the caps on California's legislature are unconstitutional, with a period thereafter for the state to cure the violation. It is entirely possible that this court will need do no more than declare the status quo unconstitutional. "Judicial authority enters only when local authority defaults." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (U.S. 1971).

The remaining issue is whether there are justiciable standards for determining the minimum size of the legislature. Defendant cites the *plurality* in *Holder v. Hall*, 512 U.S. 874, 881, 885 (1994), for the proposition that "[t]he wide range of possibilities makes the choice "inherently standardless." MTD, at 11. Only three members of the Court agreed on this point. In any event, *Holder v. Hall* concerned whether the size of a local legislative body was subject to a challenge under the Voting Rights Act, not the question presented here: is there is a constitutionally- acceptable minimum number of legislators in California?

This court does not need to determine the minimum constitutionally acceptable legislative size to declare that the current system is unconstitutional. Plaintiffs submit that the

question of minimum legislative size would only arise in shaping an appropriate injunctive remedy. The feasibility of such relief is an issue for trial with the benefit of expert testimony and specific facts. As with any remedy, "[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

Expert testimony from political scientists will demonstrate that increasing the sizes of the Assembly and Senate would cure or greatly relieve Plaintiffs' injuries. This inquiry would be akin to that routinely used in cases determining whether legislative redistricting plans would give racial minorities "'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Thornburg v. Gingles*, 478 U.S. 30, 36 1986) (quoting Voting Rights Act, § 42 U.S.C 1973(b) (now 52 U.S.C. 10301(b)).

California's experience shows that minorities gain political power when there are more legislative districts. "[R]acial minorities in California have more favorable representation in the Assembly than in the Senate, [which] demonstrates that as the population of legislative districts decreases, non-whites have a significantly greater chance of electing candidates of their choice." SAC ¶ 3.31 As in redistricting cases, political scientists can determine what minimum number of legislative districts will assure that minority groups will have reasonable opportunities to elect candidates of their choice or at least have a substantial enough influence on legislative races to command attention. The same will be true for minority political parties with significant popular support and rural voters.

The absence of "fixed or even substantially fixed guidelines," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 28, does not preclude a court of equity from acting to

redress a proven constitutional violation. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

It is not unusual for a court to determine whether a certain amount of something or some number of people is a legal violation, or that a remedy using specific numbers adequately cures or reduces the resulting injuries. *See, e.g.*, 402 U.S. at 25 ("very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court"). In challenges to waiting periods to switch political parties, for example, the Court did not dictate a precise number of days, but invalidated unacceptable ones until the waiting period corresponded to the state's legitimate interests. *Compare Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (23-month wait struck) *with Rosario v. Rockefeller*, 410 U.S. 752, 760–61 (1973) (11-month wait sustained). The same approach was taken in assessing waiting periods for new residents to vote. *Compare Dunn v. Blumstein*, 05 U.S. 330 (1972)(one-year wait unconstitutional) *with Marston v. Lewis*, 410 U.S. 679 (1973) (fifty-day waiting period upheld as necessary to insure accurate voting lists).

In reapportionment cases, Justice Frankfurter was proven wrong. As case law developed under the "one-person, one-vote" standard, the Court eventually accepted that deviations in population size for state legislative districts of under ten per cent required no justification. *See White v. Regester*, 412 U.S. 755, 764 (1973) (total variation of 9.9% sufficient to make "prima facie case of invidious discrimination").

Conclusion

For all its noble purposes, reapportionment exacerbated the dilution of votes in California by requiring that the legislative districts be substantially the same size. With a steadily rising population, the caps on the size of the Assembly and Senate have left significant portions of the people with an increasingly meaningless franchise. It would be ironic if federal courts could not intervene to remedy a problem partly of their own creation.[5]

Plaintiffs respectfully request this court to dismiss Defendant's Motion to Dismiss.

Dated: May 24, 2018

Respectfully submitted,

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

/s/ Gary L. Zerman
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[5]Older cases indicate that Guarantee Clause claims may be nonjusticiable, but more recently the Court "has suggested that perhaps not all claims under the Guarantee Clause present nonjustibciable political questions." *New York v. United States,* 505 U.S. 144, 185 (1992). In *Reynolds v. Sims,* the Court stated that "questions raised under the Guarantee Clause are nonjusticiable, were 'political' in nature and where there is a clear absence of judicially manageable standards." 377 U.S. 533, 582 (1964) For reasons stated in text, Plaintiffs' claims are no more "political" than those in *Reynolds*, and there are objective standards to determine appropriate relief. Substantial scholarly commentary supports the justiciability of some Guarantee Clause claims, including reapportionment. See *New York*, 505 U.S. at 185 (citing authorities); Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justicable*, 65 U. Colo. L. Rev. 849 (1994).

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 24th day of May, 2018 at Arlington, Washington.

BY: /s/ *Pam Miller*
Pam Miller, Paralegal