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

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

Plaintiffs,

v.

SECRETARY OF STATE ALEX
PADILLA,

Defendant.

2:17-cv-00973

DEFENDANT SECRETARY OF
STATE'S REPLY IN SUPPORT OF
MOTION TO DISMISS

Date: June 14, 2018¹
 Time: 2:30 p.m.
 Courtroom: 3
 Judge: The Honorable Kimberly J.
 Mueller
 Trial Date: N/A
 Action Filed: 5/9/17

¹ The original hearing date was vacated and advanced to the date and time above by Docket 49.

1 **INTRODUCTION**

2 The appropriate size of the California Legislature is an important issue that merits serious
3 consideration in the court of public opinion. However, the question cannot be answered by a
4 federal court because it falls outside the constitutional bounds of federal subject matter
5 jurisdiction, and because the question does not pose a federal claim.

6 The original complaint was dismissed because plaintiffs lacked standing to bring their
7 claims and because the complaint posed non-justiciable political questions. Dkt. 32. The Second
8 Amended Complaint (SAC) suffers from the same defects.² Having failed twice to present a
9 justiciable complaint, the SAC should be dismissed with prejudice.

10 **ARGUMENT**

11 **I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OF PLAINTIFFS’
12 CLAIMS.**

13 **A. Plaintiffs Do Not Have Standing Because They Assert a General Grievance
14 Shared by the Public at Large.**

15 “[A] plaintiff raising only a generally available grievance about government—claiming
16 only harm to his and every citizen’s interest in proper application of the Constitution and laws,
17 and seeking relief that no more directly and tangibly benefits him than it does the public at
18 large—does not state an Article III case or controversy.” *Lujan v. Defenders of Wildlife*, 504 U.S.
19 555, 573-74 (1992).

20 As the Court noted in its first dismissal order, “Although each plaintiff alleges a
21 particularized gripe, such as how the legislative cap dilutes his or her voice on a specific issue or
22 encumbers the potential to run for office in a particular area, the threatened right to self-
23 governance remains an injury common to all Californians.” Dkt. 32 at 6. Plaintiffs concede that
24 the same is true of the SAC. *See, e.g.*, SAC ¶ 3.27 (“the adverse effects of representative
25 government by enormous legislative districts are felt by all California voters”); SAC p. 2
26 (“California has perpetuated a system of oligarchic governance at odds with the norm of self-
27 representation at the heart of the U.S. Constitution”). Some allegations refer to minorities, but the

28 ² The SAC adds two defendants, the California Citizens Redistricting Commission and the State of California. To the undersigned counsel’s knowledge, neither has been served.

1 term is broadly defined to include virtually everyone. The term “minority” refers, at the least,
2 “race, ethnicity, political affiliation, or residence in more sparsely populated areas of the state”
3 and “Californians who are not wealthy and lack effective access to the political elites that
4 dominate the legislature.” SAC ¶¶ 3.27, 6.2.

5 In their Opposition, Plaintiffs identify two Californians—Mark Zuckerberg and Nancy
6 Pelosi—who are not harmed by the size of California legislative districts. Opp. at 13. As
7 Plaintiffs see it, Mr. Zuckerberg and Ms. Pelosi are not harmed because they are wealthy and live
8 in geographically-concentrated legislative districts. *Id.* But this statement Plaintiffs’ Opposition
9 contradicts the SAC, which concedes that ALL Californians are injured by California’s large
10 districts. SAC ¶ 3.27. And because Plaintiffs define the term “minority” so broadly, it would
11 appear that even Mr. Zuckerberg and Ms. Pelosi could qualify as minorities. There are no hard
12 edges to the terms that Plaintiffs use in the SAC.

13 Plaintiffs’ claims in the SAC are a “generally available grievance about government” and
14 therefore do not state an Article III case or controversy. *See Lujan*, 504 U.S. at 573-74.

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

16 The Supreme Court has identified six independent tests that identify whether a non-
17 justiciable political question is raised in a particular case. *Baker v. Carr*, 369 U.S. 186, 217
18 (1962). The second *Baker* test—“a lack of judicially discoverable manageable standards”—
19 compels dismissal of plaintiffs’ claims. *Id.* at 217. A determination that California’s legislative
20 districts are too large cannot be made without a judicial standard governing the size of legislative
21 districts. There is no such standard, and plaintiffs have not volunteered one. *See Holder v. Hall*,
22 512 U.S. 874, 881, 885 (1994) (size of districts cannot be challenged under Section 2 of the
23 Voting Rights Act because the wide range of possibilities makes the choice “inherently
24 standardless”).³

25 _____
26 ³ There was no majority opinion in *Hall*, but a majority of five justices agreed with the
27 proposition that there is no discoverable benchmark for determining the appropriate size of
28 legislative districts. *Hall*, 512 U.S. at 881 (opinion of Kennedy and Rehnquist), 885 (O’Connor
concurring in part and concurring in the judgment), 891 (Thomas and Scalia concurring in the
judgment).

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CONCLUSION

Plaintiffs' claims should be dismissed without leave to amend.

Dated: June 8, 2018

Respectfully submitted,

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Supervising Deputy Attorney General

/s/ George Waters
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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 June 8, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT SECRETARY OF STATE'S REPLY IN SUPPORT OF MOTION TO DISMISS

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 June 8, 2018, at Sacramento, California.

Eileen A. Ennis

Declarant

/s/ Eileen A. Ennis

Signature