

1 **MICHAEL C. WARNKEN,**
SUA SPONTE
2 3324 STATE STREET
SUITE "C"
3 SANTA BARBARA, CA 93105
Tel: (805) 705-4177
4 Fax: ~~(805) 000-0001~~

5 PLAINTIFF(S);
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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
11 **SACRAMENTO DIVISION**

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14 **MICHAEL C. WARNKEN, et. al.**
15 **PLAINTIFF,**
16 **vs.**
17 **SCHWARZENEGGER, et. al.**
18 **DEFENDANTS.**

CASE No.: 2:08-CV-2891 LKK EFB PS

**OPPOSITION TO ASSEMBLY
MEMBERS MOTION TO
DISMISS; MEMORANDUM
OF POINTS & AUTHORITIES,
AND DECLARATION OF
MICHAEL C. WARNKEN**

Date: January 21, 2008 **Time:** 10:00 a.m.
Dept: 25 **Judge:** Edmund F. Brennan
Filed: December 1, 2008 **Trial:** None Set

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23 *"If it be said that the legislative body are themselves the constitutional judges of their own powers,*
24 *and that the construction they put upon them is conclusive upon the other departments, it may be*
25 *answered, that this cannot be the natural presumption, where it is not to be collected from any*
26 *particular provisions in the Constitution . . . It is far more rational to suppose, that the courts were*
27 *designed to be an intermediate body between the people and the legislature, in order, among other*
28 *things, to keep the latter within the limits assigned to their authority." Federalist 78*

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I. INTRODUCTION

Contrary to opposing counsels' assertions, the questions presented in the complaint is similar to many which have been adjudicated over decades at least since *Baker v. Carr*, 396 U.S. 186 in 1962. It is more likely, the first apportionment case should be credited to Chief Justice John Marshall who writing for a Unanimous U.S. Supreme Court in *Loughborough v. Blake*, 18 U.S. 317 (1820) stated:

“ . . . according to the common understanding of mankind, there can be no difference of opinion . . . that they must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation . . . The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation . . . is too obvious not to present itself to the minds of all.” Justice Marshall, *Loughborough v. Blake*, (Id. at 324)

The body of law supporting the Courts ability to hold jurisdiction into this matter is quite vast and too weighty to controvert though opposing counsel has a duty to place up an opposition for his clients and represent them vigorously regardless of how flaccid his (their) arguments may be.

Finally only the issue of the Assembly to apportioning its own district might be mooted. However, Plaintiff shall seek leave to amend this portion of the suit. The current districts are still tainted and for the same reasons as Plaintiff asserts in his Motion to enjoin Self-Apportionment. Therefore, the current districts must be redrawn. They are clearly aimed to entrench incumbents fully and they are too large.

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II. FACTUAL BACKGROUND

Plaintiff as a citizen voter and taxpayer petitioned the Governor, the Secretary of State, the Attorney General and the Assembly to increase the number of members in the California Assembly and articulated numerous reasons in law and history as to why (See **Addendum I, A-1 to A-4**) and received no response from any of those he petitioned. Follow up petitions were sent to each party noted above as well (See **Add.¹ I, B-1 to B-4**) and they went unanswered. Finally Plaintiff sent two petitions to the

¹ “Add” is substituted for “Addendum” “Art” for “Article” and “Amend” for “Amendment.”

1 State Senate (**See Add I D-1 to D-2**) and received one response from the Secretary of the Senate
2 commending Plaintiff for his efforts stating his “. . . *arguments are well-taken and your interest in good*
3 *government is deeply appreciated.*”The Secretary of the Senate stated in his letter that the petitions
4 were sent to the Senate Committee on Elections, Reapportionment and Constitutional Amendments
5 (**See Add I, D-3**), however no response was given ever after.

6 Plaintiff also petitioned numerous representatives in the California Assembly on matters that
7 directly affect him, his welfare and his well-being (**See Add I, E-1 to E-8 and F-1 and F-2**). Included
8 in these petitions was a request for information on matters within the jurisdiction of the various
9 committees the members oversee. I asked Assembly member Jose Solorio (**See Add. I, E-1 to E-8 and**
10 **F-1 and F-2**) about the Ongoing article series in the San Jose Mercury News called “*Tainted Trial*
11 *Stolen Justice*” where the series claimed **one in three criminal cases in the Santa Clara Justice system**
12 **was marred by official misconduct.** I asked directly what hearings his committee held on the matter
13 since something similar to this happened to me. When I phoned the committee, the young Lady who
14 was in charge of the committee merely told me that “they did not get the San Jose Mercury News!”

15 A recent hospital visit was extremely expensive. I was told this was largely due to a nursing
16 shortage. Part of the reason was because the State Colleges were not able to raise salaries to attract
17 more nursing instructors. I was on the Board of Trustees for the Santa Barbara City College in 1998
18 and the Head Nursing Instructor had told me the same thing. So, I petitioned both Assembly members
19 Dymally and Portatino (**See Add I, E-3 and E-4**) about this matter and neither responded.

20 There has been a shortage of Judges in California (**See Benchmark Add, Exhibit 13**) as noted
21 by Chief Justice Ronald George. As such, there is an inability for them to hold probable cause hearings
22 for those arrested, so the burden falls on the person arrested to either come up with bail or otherwise
23 sit in jail for 48 hours until released. Since each Judge in California has a salary of over \$175,000 per
24 year (**See Benchmark Add., Exhibit 14**), adding judges is quite expensive and may not be feasible,
25 especially for a State that is \$16 Billion deficit. This causes many to have their civil liberties placed in
26 jeopardy including my own which has been damaged in this manner.

27 I advanced a solution to re-enact the old Justices of the Peace system that California used to have
28 and that many States still do. Their salaries are quite low and they could take the current burden off the

1 Superior Court Judges. I petitioned Assembly members Solorio and Jones, chair persons of the Public
2 Safety and Judiciary Committees as these minor Judges could oversee both civil and criminal matters.
3 I never heard back from either of them which seems to be the standard procedure.

4 Recently, I had my car impounded (after I had sent the petitions on the Justices of the Peace) and
5 the decision was apparently made by the officer himself. No hearing no process no nothing, they just
6 take your car. I felt lucky that nothing worse happened to me. So, it seems that the legislature enacts
7 laws knowing that there are not enough judges and have handed judicial powers to officers. This is a
8 power to which our founders did not want members of the executive branch to have. It was also not
9 intended for the Legislature to grant the executive branch such judicial powers and yet they are.

10 I petitioned my representative, Pedro Nava (**See Add. I, F-1 and F-2**) directly about all of the
11 petitions noted above, the original petitions to the Governor and other Chief Executives as well as the
12 Assembly itself on increasing the number of members in the Assembly. I also asked about the Assembly
13 member Lois Wolk pushing the vote button for her district and her neighbors district when viewed the
14 Assembly from the Gallery. To follow that up I asked if he had ever allowed the member sitting next
15 to him to do the same. No response was sent to me on any of these matters.

16 The fact that no response is given can only be due to one of two reasons: 1. **The defendants have**
17 **no capacity to answer the petitions** of their constituents since each representative has 475,000 people
18 in their districts or 2. **They choose not to or have no incentive to do so** since they do not lose their
19 elections and as such they themselves will not enter any controversial matters. Ironically, this has likely
20 pulled the courts into numerous cases since the legislature cannot deal with such matters. Therefore
21 those in office get re-elected anyway. This is another fact not asserted in the opposition and that is that
22 **no Assembly member has lost election in over 4 election cycles**. Plaintiff has demonstrated the high
23 correlation of district size and re-election rates. Those who hold office are able to raise large war chests
24 of money and challengers do not enjoy the same advantage (**See Add. II, A-2**). This is particularly
25 noticeable in California where winners outspend losers on average by a factor of 10 to 1. Also, the
26 various Assembly members sit over so many matters they cannot possibly do their duties.

27 The first petition was served on the Chief Clerk (Dotson) for the Assembly and a later petition was
28 served directly on a legislative aid named "Eric Johnson" (**See Add. I, C-1 and C-2**) and no response

1 was given to either of those petitions. It is likely that many of the other petitions went through the hands
2 of several other staff members. It needs to be determined if these individuals intentionally with-held
3 those petitions from going to the representatives for consideration or if the Representatives ignored
4 them out of their own volition. This is why they are included in this case as Does.

5 Plaintiff has moves the court to form a three judge panel as this matter deals with apportionment
6 directly. Other matters sued over are succinctly stated in the Attorney Generals Motion to dismiss:

7 “Specifically, plaintiff asserts the districts lines were unlawfully drawn by the legislature, resulting in
8 districts that are too large and uncompetitive elections within the districts.”I shall add other matters:

9 The districts are unconstitutionally large as they inhibit other constitutional rights such as the right
10 to petition and associate with their representative as per Amend. I. The size of the districts invidiously
11 devalue each citizens vote value. These large districts leave numerous tax-paying districts such as
12 Counties which pay State taxes, without a representative which violates Art. I §2 of the Constitution.
13 Adding Staff members in lieu of adding more members of the Assembly is invidious to the value of each
14 citizens vote and inhibits equal access to the representatives. Last, Plaintiff sent numerous petitions to
15 several members of the Assembly and all petitions went ignored. This violates the original intent of the
16 petition clause of Amend. I. For these and other reasons, Plaintiff has asks that Art. IV, Sec. 2 of the
17 California Constitution be declared repugnant to the U.S. Constitution and therefore void.

18 19 III. LEGAL STANDARDS

20 The Federal Courts are indeed intended to be Courts of limited Jurisdiction. However, the issues
21 presented here fall squarely within the Jurisdictional bounds of consideration by this Court. In fact, the
22 Plaintiffs in Baker v. Carr (infra) assert one similar cause of action left un-resolved:

23 *“Between 1901 and 1961, Tennessee has experienced substantial growth and*
24 *redistribution of her population. In 1901 the population was 2,020,616, of whom*
25 *487,380 were eligible to vote. The 1960 Federal Census reports the State's population*
26 *at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the*
27 *counties in terms of qualified voters have changed significantly. It is primarily the*
28 *continued application of the 1901 Apportionment Act to this shifted and enlarged*
voting population which gives rise to the present controversy.” Mr. Justice Brennan,
Baker v. Carr 369 U.S. 186 at 189

The Court in Baker did not address the district size issue and it could not without standards such

1 the Plaintiff has advanced. Further, how could the issue of district size be considered unless the districts
2 were of equitable size. So it was appropriate for the court to side-step that issue, until now.

3 When Baker v. Carr (supra) was first adjudicated, a similar affirmative bar to litigation was raised
4 by the Defendants in that case and the court over-ruled their assertion accordingly:

5 *“It is clear that the cause of action is one which ‘arises under’ the Federal*
6 *Constitution. The complaint alleges that the 1901 statute effects an apportionment that*
7 *deprives the appellants of the equal protection of the laws in violation of the Fourteenth*
8 *Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of*
9 *the subject matter would, therefore, be justified only if that claim were ‘so attenuated*
10 *and unsubstantial as to be absolutely devoid of merit,’ Newburyport Water Co. v.*
11 *Newburyport, 193 U.S. 561, 579, or ‘frivolous’ Bell v. Hood, 327 U.S. 678, 683. That*
12 *the claim is unsubstantial must be ‘very plain.’ Hart v. Keith Vaudeville Exchange, 262*
13 *U.S. 271, 274.” Baker v. Carr 369 U.S. 186 at 199*

14 Plaintiff asks if the current districts have at least 475,000 persons and likely be as many as half a
15 million within a few years “*so attenuated and unsubstantial as to be absolutely devoid of merit,*”? Is
16 the fact that Plaintiff has demonstrated that the size of the districts affects electoral outcomes (See Add.
17 **II,) “devoid of merit”? Is the fact that not a single incumbent has lost in Four (4) election cycles**
18 *“frivolous”*? Is our intent that citizens were to have greater access to the legislature than the courts and
19 thus have more members in the legislature than judges (See Federalist 49) “*devoid of merit*”?

17 **IV. THE MATTER IS WITHIN THE COURTS JURISDICTION**

18 **A. Plaintiff has Standing**

19 Large districts and use of assistants denigrates access to the representatives and is a violation of
20 equal protection as this causes a circumstance in which some people have access to the representatives
21 directly and other may only have access to the aids and assistants. Others still like myself have no access
22 at all. This does not serve a legitimate interest of the State and is a violation of the 14th Amendment.

23 *“ . . . these plaintiffs and others similarly situated, are denied the equal protection of*
24 *the laws accorded them by the Fourteenth Amendment to the Constitution of the United*
25 *States by virtue of the debasement of their votes,” Baker v. Carr, 369 U.S. 186, 188*

26 The Assembly has a duty to send a response and they did not do so. I argue that they do not have
27 to even get a relevant response, even if the question or matter I am petitioning is in bad taste, one
28 response saying so and explaining the petitioning process should be given. If I sent more of the same,
then they would have just cause to ignore me. Only in the instance in which a petitioner has suggested

1 something lude should a petition be flatly ignored. Since Petitioning and Assembly are First Amendment
2 rights, high scrutiny must be observed in review.

3 “It is firmly established that a significant impairment of First Amendment rights must
4 survive exacting scrutiny.’ *Buckley v. Valeo*, 424 U.S. at 64-65; *NAACP v. Alabama*,
5 357 U.S. 499, 460-461 (1958). ‘This type of scrutiny is necessary even if any deterrent
6 effect on the exercise of First Amendment rights arises, not through direct government
7 action, but indirectly as an unintended but inevitable result of the government’s conduct
8’ *Buckley v. Valeo*, *supra*, at 65. Thus encroachment ‘cannot be justified upon a
9 mere showing of a legitimate state interest.’ *Kusper v. Pontikes*, 414 U.S. at 58. ‘The
10 interest advanced must be paramount, one of vital importance, and the burden is on the
11 government to show the existence of such an interest.’” *Buckley v. Valeo*, *supra*, at 94

8 **B(1). Matters are more appropriately decided by the Courts at this time.**

9 Defense counsel creates numerous Straw man arguments and then declares himself victorious
10 though his arguments do not touch on the matter we are dealing with. Plaintiff stated in his Judicial
11 Address that the Courts have to enter numerous matters because the Legislatures do not have capacity
12 to even look into them. This is because Representation has not increased with the population. Those
13 are mere attempts to stall and confuse. I hope this does not gain traction!

14 The matters complained about IN THIS CASE, represent issues that may be adjudicated as per
15 Art III of the U.S. Constitution under 28 U.S.C. 1331 “*The district courts are given a broad grant of*
16 *jurisdiction by 28 U.S.C. 1331,*” *Powell v. McCormack*, 395 U.S. 486 (1969). The Federal Courts have
17 already decided cases that increased and decreased representation. As was noted by the US Supreme
18 Court: “*There are cases where judicial reapportionment has effectuated . . . changes in a legislature’s*
19 *size.*” *Minnesota Senate v. Beens*, 406 U.S. 187 at 198 example cases are in its footnotes:

20 “*Sims v. Amos*, 336 F. Supp. 924, 936, 937 (MD Ala. 1972) (house reduced from 106
21 to 105 so as to have three times the number of senate seats); *Schaefer v. Thomson*, 251
22 F. Supp. 450 (Wyo. 1965), *aff’d*, 383 U.S. 269 (1966) (senate increased from 25 to 30
23 on agreement of the parties and in accord with the state constitution); *Klahr v.*
24 *Goddard*, 250 F. Supp. 537 (Ariz. 1966) (senate reduced from 31 to 30 and house from
25 80 to 60. The preservation of county lines, as prescribed by the State’s constitution, Art.
26 4, pt. 2, 1, was an announced consideration in this substantial house reduction which
27 no one opposed. No appeal was taken); *Herweg v. Thirty Ninth Legislative Assembly*,
28 246 F. Supp. 454 (Mont. 1965) (senate reduced from 56 to 55 and house increased
from 94 to 104. A constitutional provision, Art. VI, 3, prohibiting the division of
counties, was thereby observed); *Paulson v. Meier*, 246 F. Supp. 36 (ND 1965) (senate
reduced from 53 to 49 and house from 106 to 98. The State’s constitution, Art. II, 26,
mandated a senate of 49 members). In other cases federal courts have altered the size
of existing legislatures by approximating the number of legislators specified in new
plans that the courts were nullifying. *Swann v. Adams*, 263 F. Supp. 225 (SD Fla.
1967); *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (SDNY 1965), *aff’d*, 283 U.S. 4
(1965).” *Minnesota Senate v. Beens*, 406 U.S. 187, 198 to 199

1 **B(2). Political Question Doctrine**

2 Ultimately this is a “Constitutional Question” and not a “Political Question” as opposing Counsel
3 suggests and the courts are well within their bounds to answer. In effect I am asking if the right of the
4 citizens to petition and receive and answer to their petitions should be denigrated because representation
5 has not advanced with the population. Stated another way, under Amend. IX, the citizens have a
6 reasonable expectation for an adequate and rational level of representation, one that is at least capable
7 of handling petitions for redress of Grievances. Political rights have been distinguishable by the Federal
8 Courts before: “. . . *the nature of political rights reserved to the people by the Ninth . . . Amendment*
9 *[is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party .*
10 *. . . to further his own political views.”* *United Public Workers v. Mitchell*, 330 U.S. 75, 95 (1947). A
11 more proper question is what circumstances must exist for a representative to be relieved of their duties?

12 Further it is clear to me that there are those who do have access to their representatives. Bills and
13 later Statutes are drafted to satisfy needs of other persons as we speak, mine aren’t! The question comes
14 down to whether this exclusion or denial of access to some of the voter-taxpayer promotes a legitimate
15 state interest, “. . . *the Court must determine whether the exclusions are necessary to promote a*
16 *compelling state interest.”* *Kramer v. Union Free School District*, 395 U.S. 621, 627

17 If they are excluding my petitions, how can it be expected that they would redress this issue of
18 poor representation? They will not and it is folly to suggest that they will! The US Founders noted that
19 this form of question would fall to the Courts and noted, “. . . *it is far more rational to suppose, that*
20 *the courts were designed to be an intermediate body between the people and the legislature, in order,*
21 *among other things, to keep the latter within the limits assigned to their authority.”* (*Federalist 78*).
22 It is a well settled Maxim in that one cannot act as the Judge of their own properties.

23 Federalist 78 also establishes a standard to which encroachment exist when there are fewer Judges
24 than members of the Judiciary. Today, there are more Federal Judges than Assembly members!

25 “. . . *power is of an encroaching nature, and that it ought to be effectually restrained*
26 *from passing the limits assigned to it. After discriminating, therefore, in theory, the*
27 *several classes of power, as they may in their nature be legislative, executive, or*
judiciary, the next and most difficult task is to provide some practical security for each,
against the invasion of the others.” *Federalist 48 (See Judicial Level of Representation)*

28 Thus it is appropriate for Federal Judges to act in this case as Publius suggests these matters

1 1. First, that he has to have “suffered an injury in fact, - An invasion of a legally protected interest which
2 is (a) concrete and particularized. . .and (b) actual or imminent, not conjectural or hypothetical.”

3 A. The Assembly districts are non-competitive due to the fact that they drew their own districts
4 and for decades never increased the number of districts. Further, they made them uncompetitive .²

5 B. My vote has been devalued as the districts grow larger. Through the years as the population
6 grows and the representation in the Assembly does not, my vote loses value.³

7 C. I as a voter-tax payer in a large tax paying district, The County of Santa Barbara shares a
8 representative. We do not have our own. Other large districts do not have their own representative.

9 D. My Constitutionally protected right (as per Amendment I) to petition and get information from
10 the Government I support has been diminished. Particularly in the branch of the legislature (The
11 Assembly as the most numerous legislative branch) the common citizen was supposed have access.⁴

12
13 2. There is a causal connection between the injury and the conduct complained of– the injury has to be
14 fairly traceable to the challenged action of the defendant, and not . . . the result of the independent
15 action of some third party not before the court.”

16 A. No one in the Assembly has lost since they last redrew their districts after the 2000 census for
17 the 2002 elections (**See Exhibit A**). This is autocratic and against the competitive system intended. The
18 Assembly districts which the Assembly has helped to draw and the number of members in the Assembly
19 has not been increased with the population in over 150 years.

20 B. I have an interest in maintaining the value of my vote and such has not been maintained as the
21

22
23 ² “*The people find and declare that the Founding Fathers established a system of represen-*
24 *tative government based upon free, fair, and competitive elections. The increased concentration of*
political power in the hands of incumbent representatives has made our electoral system less free,
less competitive, and less representative.” California Constitution Art. 4 Sec.1.5

25 ³ “. . . a plain, direct and adequate interest in maintaining the effectiveness of their votes,”
26 *Coleman v. Miller, 307 U.S. 433, 438.*

27 ⁴ “*Jefferson in a letter to Madison, dated December 20, 1787, posed the question ‘whether*
peace is best preserved by giving energy to the government, or information to the people,’ and then
28 *answered, ‘This last is the most certain, and the most legitimate engine of government.’” 6 Writ-*
ings of Thomas Jefferson 392 (Memorial ed. 1903).

1 districts have grown larger and the representation has not gone increased (See Exhibit A & B showing
2 the Assembly district size increased from 397,000 in 1996 election to 475,000 for the 2008 election.).⁵

3 C. Population growth without increases in the Assembly have left numerous counties without a
4 representative. The state collects taxes at the county level so each county should have a representative.
5 Plaintiff has an interest in his county (Santa Barbara) and other counties having proper representation.

6 D. I never received a single response from an elected representative (See Addendum I)⁶

7
8 3. Third, that it is likely ‘as opposed to merely speculative,’ that the injury will be redressed by a
9 favorable decision.

10 A. Newly drawn districts that are in greater number and greater number of representatives would
11 be competitive. It is demonstrated that in Addendum II A-1 and A-2 that as districts get larger, the turn-
12 over rate at elections goes down. New Hampshire’s districts have 33% to 36% turn over whereas the
13 Assembly districts in California have between 3% and 0%. A Special Master should confirm this.

14 B. An increase in representation in the Assembly will proportionally increase the value of my vote.

15 C. Increases in representation will give other counties their own representative (See 18 U.S. 317).

16 D. Representational increases will give Plaintiffs vote value and the would be more receptive to
17 answering his petitions and part . My vote is of no value, thus they do not respond.⁷

18
19 **C. Count 1 is not moot**, the districts are still tainted as they were self-apportioned and their
20 propriety is questionable and must be redrawn (See Motion to enjoin Self Apportionment).

21 Plaintiff will seek leave to amend Count 2 or drop the issue from this suit. However, since the
22 districts were self drawn and no one has lost a seat since then, the current districts are highly suspect.

23
24 ⁵ “Population variances do invidiously devalue the individual’s vote at some point or level
25 in size . . .” *White v. Weiser*, (412 U.S. 783,784).

26 ⁶ “When the people do not know what their government is doing, those who govern are not
27 accountable for their actions - and accountability is basic to the democratic system.” *Secrecy in a
28 Free Society*, 213 Nation 454, 456 (1971). This is part of their “Informing Function.”

⁷ “. . . the political franchise of voting’ is ‘a fundamental political right, because’ it is the
preservative of all rights.’ 118 U.S., at 370.” cited by *Reynolds v. Sims*, 377 U.S. 533, 561-562

1 **V. THE DOCTRINE OF LEGISLATIVE IMMUNITY IS NOT APPLICABLE HERE**

2 **A. State Legislators are corporate office holders and as such have Constitutionally mandated**
3 **duties. Failure to perform such duties has consequences to be determined.**

4 Blackstone clarifies this entire matter and notes that Parliament is called for one specific purpose,
5 that is to redress grievances. That is also the one basic duty of the representatives:

6 *“AND this by the ancient statutes of the realm, he is bound to do every year, or oftener,*
7 *if need be. Not that he is, or ever was, obliged by these statutes to call a new parliament*
8 *every year; **but only to permit a parliament to sit annually for the redress of***
9 ***grievances, and dispatch of business, if need be. . . . And by the statute 1. W. & M. St.***
10 ***2. c. 2. it is declared to be one of the rights of the people, that for redress of all***
11 ***grievances, and for the amending, strengthening, and preserving the laws, parliaments***
12 ***ought to be held frequently.” Blackstone’s Commentaries Bk 1, Ch 2, On Parliament***

13 Justice Story connects this same right for the citizens and duty to the office holders in the United
14 States through the first Amendment:

15 *“The provision was probably borrowed from the declaration of rights in England, on*
16 *the revolution of 1688, in which the right to petition the king for a redress of grievances*
17 *was insisted on; and the right to petition parliament in the like manner has been*
18 *provided for, and guarded by statutes passed before, as well as since that period. Mr.*
19 *Tucker has indulged himself in a disparaging criticism upon the phraseology of this*
20 *clause, as savouring too much of that style of condescension, in which favours are*
21 *supposed to be granted. But this seems to be quite overstrained; since it speaks the*
22 *voice of the people in the language of prohibition, and not in that of affirmance of*
23 *a right, supposed to be unquestionable, and inherent.” Justice Story’s Commentaries*
24 *§ 1888 On the First Amendment of the U.S. Constitution.*

25 If they do not have the ability to answer their petitions or choose not to, then this needs to be
26 discovered. There needs to be sufficient incentive for them to do their job which is to take petitions and
27 answer them for redress of Grievances. They are even supposed to delve into controversial matters
28 which apparently they do not. They are not even able to settle the budget and we are in fiscal ruin due
to this. Plaintiff is moving for the defendants to perform their duties of office or if they cannot, assert
such publicly so we can remedy this circumstance. If they do not have enough Assistants to do the
duties they have, that needs to be advanced as well. The defendants are paid a salary to do the duties
of their offices. It is a reasonable expectation for them to do their duties, especially if they are to be a
“Professional Legislature.” As a professional legislature (as opposed to a part time legislature such as
New Hampshire and Texas), they should be held to a higher Standard. They are paid in part according
to the duties as per California Constitution Article 3, Sec. 8:

1 “(a) The California Citizens Compensation Commission is hereby created and shall
2 consist of seven members . . . The commission shall establish the annual salary and the
3 medical, dental, insurance, and other similar benefits of state officers.

(h) In establishing or adjusting the annual salary and the medical, dental, insurance, and
4 other similar benefits, the commission shall consider all of the following:

5 (1) **The amount of time directly or indirectly related to the performance of the**
6 **duties, functions, and services of a state officer.** : ‘State officer,’ as used in this
7 section, means the Governor, Lieutenant Governor, Attorney General, Controller,
8 Insurance Commissioner, Secretary of State, Superintendent of Public Instruction,
9 Treasurer, member of the State Board of Equalization, **and Member of the**
10 **Legislature.**”California Constitution Article 3, Sec. 8:

11 Since they have salaries and they are given clearly defined duties, they need to perform them as
12 per the U.S. Constitution. If they do not, then they should be removed someone else should take their
13 spots. Since there is substantial proof that they have not performed their duties (see all the unanswered
14 petitions in Addendum I), they are subject to removal.⁸ This was asserted in the Complaint. Thus, the
15 Speech and debate clauses and other similar protections do not exist here as they generally would.

16 There is a process to which the members of the Assembly may investigate their own members for
17 transgressions. I assert this in the Complaint. This is well within their jurisdiction to do so. However,
18 since they do not answer their petitions from me, how can I initiate such an action? I cannot, so I am
19 moving the court to do so and remand the issue to the legislature to deal with. Opposing counsel has
20 not argued it is not in their power to do this. Or has he? The power of the legislature to judge its own
21 elections and hold its own members accountable is ancient and important. It is equally important for the
22 public know what their rights and expectations are with regards to the Assembly and how it as a body
23 or individually will treat petitions. If they do not address our petitions, why should the citizens in turn
24 be civil? Why should we pay taxes and support a government we have no access to. Particularly the
25 State Government since it was supposed to be the place that the citizens would have direct access.

26 The speech and debate clause was intended to protect those in office who were performing their
27 duties so they could vigorously debate matters of State and the chief intent of the Speech and debate
28 was protection from the Executive Branch not as a shield to be delinquent in their duties:

⁸ Sir Edward Coke listed three grounds for forfeiture: 1. Abuse of Office, 2. Non-use of
Office, and 3. Refusal to exercise an Office. *See Henry v. Barkley, (1596) 79 Eng. Rep. 1223, 1224*
(K.B.); see also R v. Bailiffs of Ipswich, (1706) 91 Eng. Rep. 378 (K.B.) (holding that the recorder
of a corporation forfeits his office if he fails to attend corporate meetings); see 16 Charles Viner,
a General Abridgement of Law and Equity 121 (London, 1793) (“If he does contrary to the duty
of his office, as if he doth not do right to the parties, this misfeasance is forfeiture.”).

1 *“The privilege of legislators to be free from arrest or civil process for what they do or*
2 *say in legislative proceedings has taproots in the Parliamentary struggles of the*
3 *Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence*
 *from the Crown, its statement of the privilege grew stronger.”**Tenney v. Brandhove, 341*
 U.S. 367 at 372 (1951)

4 This case has to do with them not fulfilling their chief duty and that is to take petitions either
5 because they chose not to or because they cannot. Either way, this is discoverable.

6 The Federal Courts have overseen matters that have brushed the edge of the Speech and Debate
7 clause and have held jurisdiction into matters with regards to the removal of legislative members. This
8 includes overturning the removal of one of its members jurisdictional cognizance of the Federal Courts:

9 *“4. The Court has subject matter jurisdiction over petitioners' action.*
10 *(a) The case is one ‘arising under’ the Constitution within the meaning of Art. III, since*
11 *petitioners' claims ‘will be sustained if the Constitution . . . [is] given one construction*
12 *and will be defeated if it [is] given another.’* *Bell v. Hood, 327 U.S. 678*
13 *(b) **The district courts are given a broad grant of jurisdiction by 28 U.S.C. 1331 (a),***
 over "all civil actions wherein the matter in controversy . . . arises under the
 ***Constitution . . .**” and while that grant is not entirely co-extensive with Art. III, there*
 is no indication that 1331 (a) was intended to foreclose federal courts from entertaining
 suits involving the seating of Congressmen.” *Powell v. McCormack, 395 U.S. 486, 487*

14 The intent here in this aspect of the case is to give the proper incentives to the members of the
15 legislature to add more members. If they knew they might lose their seats because they could not
16 perform their duties, they would likely move to add more members. The founders were aware of the
17 need for such incentives: *“This policy of supplying, by opposite and rival interests, the defect of better*
18 *motives, might be traced through the whole system of human affairs, private as well as*
19 *public.”*(*Federalist 51*) Otherwise, what incentive do they have other than to continue to consolidate
20 their power and add more assistants. As Thomas Jefferson noted, *“ . . . the judgment that legislators*
21 *ought not to stand above the law they create but ought generally to be bound by it as are ordinary*
22 *persons.”* *T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92-1, p. 437 (1971).*

23

24 **B. Legislators in their Administrative Capacity**

25 It is essential to note that each of the petitions was sent to the representatives named in the suit
26 in their administrative capacity as they sat as chair people on their committees, they are administrators.
27 The taking of petitions is administrative and legislative. The reading and debating petitions is purely
28 legislative. Refusing to answer bonafide petitions is an administrative act and is open to suit and not

1 covered by the Speech and Debate immunity.⁹

2 “ . . . the doctrine of legislative immunity, having its roots as it does in the Speech or
3 Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)
4 that legislators engaged ‘ . . . in the sphere of legitimate legislative activity,’ . . . ‘This Court has held, however, that this doctrine is less absolute, although applicable, when applied to officers . . . of a legislative body,’” *Dombrowski v. Eastland*, 387 U.S. 82, 84

5 The petitions to Pedro Nava to review the Petitions sent to the other members of the Legislature
6 was also within the administrative duties of Mr. Nava’s position in the California Assembly. He had a
7 duty to investigate or turn the petitions over to the Speaker of the Assembly. An act such as that would
8 have been legislative. However, with that legislative act would have been the Administrative act of
9 alerting that the petitions were sent to the Speaker. This is just as the Secretary of the Senate did in his
10 response to me. He let me know that he forwarded the petitions to my Senator and the Committee on
11 Elections, Reapportionment and Constitutional Amendments as was his administrative duty to do so!

12 13 **C. The same principles apply to the Legislative Aides & Assistants**

14 The Supreme Court has noted these persons are not as well covered by the Speech and Debate
15 Clause. The Court notes in *Dombrowski v. Eastland*, “. . . the doctrine, in respect of a legislator,
16 ‘deserves greater respect than where an official acting on behalf of the legislature is sued’ (341
17 U.S. , at 378.) Cf. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).” 387 US 82, at 86.

18 There needs to be incentive for the aids and assistants to do their duties. The persons named in
19 this suit as well as Chief Clerk Dotson and Eric Johnson not only had a duty to make sure that the
20 petitions were properly delivered, but responded to. They did not. In fact, in both instances, they
21 attempted not to take the petitions from Plaintiff. This is simply repugnant. How can Plaintiff be
22 required to pay taxes and yet not have access to the representative portion of his Government?

23 **VI. CONCLUSION**

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25 _____
26 ⁹ Compare to *Forrester v. White*: “*Judges have long enjoyed absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. It is the nature of the function performed - adjudication - rather than the identity of the actor who performed it - a judge - that determines whether absolute immunity attaches to the act.*” 484 U.S. 219, 219-220
27
28

1 The founders assumed that representation would advance with the population:

2 *“At present some of the States are little more than a society of husbandmen. Few of*
3 *them have made much progress in those branches of industry which give a variety and*
4 *complexity to the affairs of a nation. These, however, will in all of them be the fruits*
5 *of a more advanced population, and will require, on the part of each State, a fuller*
6 *representation. The foresight of the convention has accordingly taken care that the*
7 *progress of population may be accompanied with a proper increase of the*
8 *representative branch of the government.” Federalist 56*

9 *“THE remaining charge against the House of Representatives, which I am to examine,*
10 *is grounded on a supposition that the number of members will not be augmented from*
11 *time to time, as the progress of population may demand. It has been admitted, that this*
12 *objection, if well supported, would have great weight.” Federalist 58*

13 .History has shown that representation has not increased with population growth, at least for 150
14 years, which is outrageous considering the population has gone from just over 200,000 when the last
15 increase occurred to a population of over 38,351,000 as of January 1, 2009. There are numerous mal
16 effects to this which includes the fact that I cannot get a single answer to my petitions. Other people
17 send petitions and hear back with the representative telling them they don't agree. I don't even get that.
18 The petition clause was written at a time when there were no cars or mass transit. It was written when
19 there were no means of transportation of data other than by mail or hand. Today, the representatives
20 are capable of receiving this information through mail, email, radio wave and so forth and yet they have
21 not answered me! They have a duty to inform, even if inaccurate.

22 If opposing counsel's assertions (which are apparently the feelings of the representatives in the
23 Assembly) were to prevail in this case, the Legislature itself would have sole discretion of its duties,
24 which includes whether or not they had to answer petitions regardless of what the First Amendment
25 states. It would seem to be the case that only the courts should be burdened with answering petitions!

26 Plaintiff hereby, moves the court to deny the Assembly's motion to dismiss.

27 Respectfully Submitted,

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Michael C. Warnken Date

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DECLARATION OF MICHAEL C. WARNKEN

I, Michael C. Warnken, declare:

- 1. I am a Plaintiff in this action.
- 2. I have prepared this declaration in support of this pleading.
- 3. If called as a witness, I could and would testify competently to the matters stated herein.
- 4. The Exhibits herein showing election results are true and correct copies.

Exhibit A shows data from the Secretary of States website showing that after 2000, no incumbent has lost election and generally, as the districts get larger, there is less electoral participation by 3rd party opponents and greater margins of victory.

Exhibit B shows data from followthemoney.org and its compilations of monies by political candidates. It demonstrates that as the districts get larger, the winners (generally incumbents all either Republicans or Democrats) are able to out raise their opponents by a factor as of as much as 10 to 1.

I have reviewed the Exhibits and they are true copies of what is represented herein.

I declare under Penalty of Perjury under the Laws of the United States, that the foregoing is true and correct. Executed on January 7, 2009, in Solano County California.

Michael C. Warnken, declarant

Date

Financing for California Assembly Races

Election Year	1998	2000	2002	2004	2006	2008
State Population	32,720,000	33,920,000	35,200,000	36,000,000	36,800,000	38,000,000
Square Miles in State	163,696	163,696	163,696	163,696	163,696	163,696
Number of Representatives	80	80	80	80	80	80
Population Density (per sq mile)	200	207	215	220	225	232
Persons per Representative	409,000	424,000	440,000	450,000	460,000	475,000
Ave. Sq. Miles/Representative	2,046	2,046	2,046	2,046	2,046	2,046

Total Stats	1998	2000	2002	2004	2006	2008
Median	\$ 186,581	\$ 150,800	\$ 175,769	\$ 328,354	\$ 223,080	\$ 253,648
1st Quartile	\$ 23,563	\$ 13,466	\$ 22,442	\$ 21,782	\$ 16,521	\$ 12,906
3rd Quartile	\$ 401,837	\$ 422,052	\$ 479,055	\$ 602,059	\$ 577,886	\$ 520,340
Lower Limit	\$ 99	\$ 7	\$ 88	\$ 105	\$ 20	\$ 305
Upper Limit	\$ 968,908	\$ 1,032,638	\$ 1,106,351	\$ 1,418,509	\$ 1,399,454	\$ 1,267,622

Winner's Statistics	1998	2000	2002	2004	2006	2008
Median	\$ 438,598	\$ 470,854	\$ 564,164	\$ 601,723	\$ 640,792	\$ 529,999
1st Quartile	\$ 323,163	\$ 341,817	\$ 419,034	\$ 480,525	\$ 504,940	\$ 396,090
3rd Quartile	\$ 678,959	\$ 910,070	\$ 714,777	\$ 861,587	\$ 746,711	\$ 788,064
Lower Limit	\$ 120,150	\$ 150,550	\$ 88	\$ 193,841	\$ 264,330	\$ 88,635
Upper Limit	\$ 1,209,123	\$ 1,758,562	\$ 1,106,351	\$ 1,355,459	\$ 1,399,454	\$ 1,267,622
Winners median is higher by	\$ 252,017	\$ 320,054	\$ 388,395	\$ 273,369	\$ 417,712	\$ 276,351
than the total median	\$ 186,581	\$ 150,800	\$ 175,769	\$ 328,354	\$ 223,080	\$ 253,648
Winner median is higher by	\$ 388,033	\$ 447,399	\$ 532,406	\$ 537,618	\$ 593,158	\$ 507,123
than the loser median	\$ 50,565	\$ 23,455	\$ 31,758	\$ 64,105	\$ 47,634	\$ 22,876

Losers Statistics	1998	2000	2002	2004	2006	2008
Median	\$ 50,565	\$ 23,455	\$ 31,758	\$ 64,105	\$ 47,634	\$ 22,876
1st Quartile	\$ 8,500	\$ 5,357	\$ 9,511	\$ 7,281	\$ 6,711	\$ 7,889
3rd Quartile	\$ 180,711	\$ 151,049	\$ 170,398	\$ 306,307	\$ 219,737	\$ 209,367
Lower Limit	\$ 99	\$ 7	\$ 250	\$ 105	\$ 20	\$ 305
Upper Limit	\$ 413,078	\$ 351,879	\$ 393,339	\$ 709,462	\$ 533,482	\$ 443,586
The losers median is lower by	\$ 136,016	\$ 127,345	\$ 144,011	\$ 264,249	\$ 175,446	\$ 230,772
than the total median	\$ 186,581	\$ 150,800	\$ 175,769	\$ 328,354	\$ 223,080	\$ 253,648
The losers median is lower by	\$ 388,033	\$ 447,399	\$ 532,406	\$ 537,618	\$ 593,158	\$ 507,123
than the winners median	\$ 438,598	\$ 470,854	\$ 564,164	\$ 601,723	\$ 640,792	\$ 529,999

Money spent per Person	1998	2000	2002	2004	2006	2008
Winners Statistics	\$ 1.07	\$ 1.11	\$ 1.28	\$ 1.34	\$ 1.39	\$ 1.12
Losers Statistics	\$ 0.12	\$ 0.06	\$ 0.07	\$ 0.14	\$ 0.10	\$ 0.05
Turn Over Data	2.50%	1.25%	0.00%	0.00%	0.00%	0.00%

ASSEMBLY ELECTIONS 1996-2008

	Assembly Election Year						
	1996	1998	2000	2002	2004	2006	2008
Estimated District Population (on Average)	<u>397,000</u>	<u>409,000</u>	<u>424,000</u>	<u>440,000</u>	<u>450,000</u>	<u>460,000</u>	<u>475,000</u>
Increase in District Size	N/A	12,000	15,000	16,000	10,000	10,000	15,000
Special Electoral Event(s)							
Presidential/Gubernatorial Election	President	Governor	President	Governor	President	Governor	President
Total Number of Seats	80	80	80	80	80	80	80
Incumbent Losses	2	2	1	0	0	0	0
Races with only one Major Party Contestant	5	5	3	7	6	7 (6)*	8
Margins of Victory by Election Winner							
Less than 5%	9	3	3	3	2	2	5
5% to less than 10%	5	6	4	2	3	2	4
10% to less than 20%	20	14	10	5	9	9	13
20% or Greater	46	57	63	70	66	67	58
Third Party Candidates							
American Independent	1	2	0	0	0	0	0
Green	1	2	4	1	4	2	1
Independent	0	0	3	2	0	1**	0
Libertarian	21	37	51	36	33	3	15
Natural Law	24	11	16	0	0	0	0
Peace and Freedom	5	5	0	0	1	2	3
Reform	2	5	4	1	0	0	0
Total Third Party Participation	54	62	78	40	38	8	19
Number of Third Party's in the Election	6	6	5	4	3	3 (4)**	3

* Republican Challenger was a write-in effectively giving the race away.

** Single person third party write-in with almost no effect or few if any votes at all.