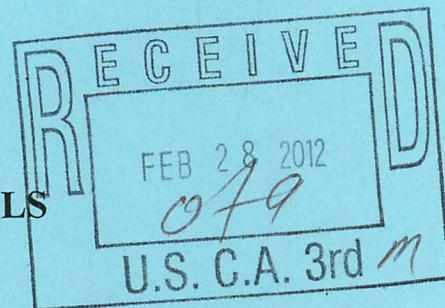


THE UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT



No. 12-1171

EUGENE MARTIN LaVERGNE, *individually*,

Appellant,

vs.

JOHN BRYSON *in his official capacity as the Secretary the United States Department of Commerce;* **JOHN GROVER** *in his official capacity as the Director of the United States Census Bureau;* **KAREN L. HAAS** *in her official capacity as the Clerk of the United States House of Representatives;* **JOHN BOEHNER** *in his official capacity as the Speaker of the United States House of Representatives;* **DANIAL INOUE** *in his official capacity as the President Pro Tempore of the United States Senate;* **JOSEPH BIDEN** *in his official capacity as the President of the Senate, and* **DAVID FERRIERO** *in his official capacity as the Archivist of the United States of America,*

Appellees.

BREIF OF APPELLANT AND APPENDIX VOLUME I

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION:

The District Court and this Court have subject matter jurisdiction to hear appellant's Federal Constitutional claims pursuant to 28 *U.S.C.* 1331 and 28 *U.S.C.* 2284(a). The District Court and this Court have authority to enter the declaratory and injunctive relief requested by appellant pursuant to 28 *U.S.C.* 2201 and 28 *U.S.C.* 2202 (the "Federal Declaratory Judgment Act"), by 28 *U.S.C.* 1361 (the "Federal Mandamus Act"), and by the general and equitable powers of this Court. This Court has Appellate Jurisdiction to hear this appeal pursuant to 28 *U.S.C.* 1291.

STATEMENT OF ISSUES:

Whether Appellant, individually, has Article III standing to challenge the overall Constitutional validity of the 2010 Decennial Apportionment of the House of Representatives?

Whether the District Court erred in summarily and *sua sponte* dismissing Appellant's Complaint in that Appellant correctly argued that as a matter of fact and law that:

- The manner in which the number of seats the House of Representatives was determined and then apportioned among the 50 States after the 2010 Decennial Census pursuant to the "automatic process" in 2 *U.S.C.* 2a is unconstitutional as a violation of the "Separation of Powers Doctrine" and the "Non-Delegation Doctrine"; and
- "Article the First" was indeed contemporaneously and validly ratified during 1789-1792 under the standards of the Constitution's Article V, so even if the 2 *U.S.C.* 2a "automatic process" used to "create" and "enact" the Federal law establishing the apportionment was constitutionally permissible, the actual apportionment violates the specific and mandatory ratio of 1 Representative for every 50,000 persons required by the "Article the First" amendment to the Constitution.

Whether the District Court erred in failing to convene a Three Judge Court pursuant to 28 U.S.C. 2284?

Whether the District Court erred in refusing to grant the preliminary injunctive relief requested?

STATEMENT OF FACTS AND THE CASE:

This case involves undisputed questions of fact and two very specific questions of law to be determined in the context of the undisputed facts. The two legal issues have never before been raised or considered by any Court.

The first legal issue to be determined is whether the manner in which the number of seats in the House of Representatives were determined and then apportioned among the 50 States after the 2010 Decennial Census pursuant to the “automatic process” in 2 U.S.C. 2a is unconstitutional as a violation of the “Separation of Powers Doctrine” and the “Non-Delegation Doctrine”.

The second legal issue to be determined (or, actually simply to be “*acknowledged*”) is whether as a matter of historical fact “Article the First” (hereinafter “Article 1”) was contemporaneously validly ratified during 1789-1792 under the standards of the Constitution’s Article V such that it is part of the United States Constitution. As will be shown, “history” acknowledges that, with the Legislatures of 11 of the then 14 States *having reported and notified* the Federal Government of their ratification votes on the multiple amendments, that Legislatures of 10 of the then 14 States ratified Article 1, that Legislatures of 11 the then 14 States ratified Articles 3

through 12 (today commonly called "*Amendments*" 1 through 10, or "The Bill of Rights"), and that the Legislatures of 6 of the then 14 States ratified Article 2. With regard to the 12 originally proposed articles of amendment to the Constitution as proposed to the States by Congress in the *real* "Bill of Rights" (ie. the 12 originally proposed Articles of Amendment), it has generally been accepted in "history" that during the ratification process of 1789-1792 the Constitution's Article V's base number of "several States" was 14 (the original 13 States and Vermont), and the Constitution's Article V's "three fourths" threshold for enactment of an article of amendment into law required the affirmative ratification vote of 11 Legislatures of the 14 States. Therefore, with those standards, "history" treats the ratifications of the Legislatures of 11 of the then 14 States as the Constitution's Article V's "three fourths" requirement for full ratification and enactment as part of the Constitution. By these standards, "history" then advises that Articles 3,4,5,6,7,8,9,10,11&12 (today commonly known as "*Amendments*" 1 through 10, or "The Bill of Rights") as having become part of the Constitution in 1791, and "history" advises that Articles 1 and 2 did not become part of the Constitution *at that time*. We know without factual or legal question that 203 years after it was originally proposed as an amendment, Article 2 was "certified" by the Archivist of the United States as the 27th Amendment in 1992. Therefore, only Article 1 is viewed by "history", and therefore by the people, as having failed ratification

during the process of 1789-1792, and since. As will be shown, “history” was and is wrong.

In short, Appellant has discovered the previously unknown or “*unacknowledged*” facts in history that the Connecticut State Legislature effectively ratified Article 1 by the Constitution’s Article V’s standards at the May 1790 Legislative Session held at Hartford, Connecticut and never *notified* or *reported* this action to the Federal Government (*see infra.* and copies of documents from Connecticut State Archives and Library submitted herewith through declaration / certification of Appellant) and also that Kentucky, upon becoming the 15th State on June 1, 1792, also ratified Article 1 on June 27, 1792 and never *notified* or *reported* this action to the Federal Government (*see infra.* and copies of documents from Kentucky State Archives and Library submitted herewith through declaration / certification of Appellant). With what is known now, the actual historical fact is that during the process of 1789-1792, and when there were 14 States, the Legislatures of *11 States* ratified Article 1, and when there were 15 States, the Legislatures of *12 States* ratified Article 1. Under *any possible* interpretation one could subscribe to the Constitution’s Article V’s “several States” and “three fourths” standards, Article 1 was duly ratified as of November 3, 1791, or alternatively as of June 27, 1792. Therefore, Article 1 is indeed a valid part of the Constitution.

Article III Courts are required to enforce the Constitution as it exists, not as it is understood, or rather not as it has been *misunderstood* in history. As such, whether or

not the 2 U.S.C. 2a “automatic process” is unconstitutional, the Appellant’s first Constitutional argument is really secondary and indeed is almost irrelevant as to the Constitutional validity of the 2010 Decennial Apportionment of the House of Representatives as the ratio that the 2 U.S.C. 2a process has created results in an *average* ratio of in excess of 1 Representative for every 720,000 people. Article 1, as applied today, fixes a mandatory ratio of 1 Representative for every 50,000 persons, which ratio the present apportionment clearly violates, rendering the present apportionment unconstitutional if Appellant is correct with his history assertion of fact that Article 1 was indeed enacted as an amendment to the Constitution. From a simple and objective review of the records now retrieved from the State Archives being brought forward, there is no question that Appellant is correct.

THE DISTRICT COURT’S RULING:

Upon receipt and review of Appellant’s Complaint and proposed Order to Show Cause, rather than convene a Three Judge Court to consider the substance of Appellant’s factual and legal arguments, the District Court *sua sponte*, and without any notice, and without affording Appellant any right to be heard, completely ignored Appellant’s arguments, completely ignored the new historical information regarding Kentucky and Connecticut, and simply entered an Order dismissing Appellant’s Complaint. In so doing, the District Court stated as justification for the summary dismissal in total as follows:

Here, the convention of a three-judge panel is not required for several reasons. First, recent case law suggests otherwise. See *Clemons v. U.S. Dep't of Commerce*, 710 *F.Supp.2d* 570, *vacated and remanded* by 131 *S.Ct.* 821 (2010).¹ Second, Plaintiff's standing is questionable when his interest is considered in relation to individuals such as New Jersey Governor Chris Christie, who implemented the redistricting;² Congresspersons

¹ Appellant does not have any understanding as to how the District Court possibly reads *Clemons v. United States Department of Commerce*, 710 *F.Supp.* 570 (N.D. Miss. 2011) (3 Judge Court), *vacated and remanded* (No. 10-291 December 13, 2010), ___ *U.S.* ___, 131 *S.Ct.* 821 (2010) as case law that supports the District Court's statement that the convening of a three-judge panel was not required in Appellant's case and that Appellant's standing was "questionable". First, in *Clemons*, a three-judge panel *was actually convened*, and the plaintiffs in *Clemons* were all individual voters like Appellant whose Article III standing to bring that Constitutional challenge to an Apportionment of the House of Representatives was clearly acknowledged by the Court. Moreover, *Clemons* had nothing to do with, and the plaintiffs in *Clemons* never attempted to raise, the "Separation of Powers" and "Non Delegation" Constitutional arguments Appellant raises herein, nor was the Court in *Clemons* aware of the fact that there were contemporaneous ratifications of Article 1 previously undiscovered sitting in the State Archives of Connecticut and Kentucky waiting to be acknowledged by someone.

² Ironically contrary to the District Court's observations, the actual fact is that New Jersey Governor Chris Christie plays absolutely no role whatsoever in "implementing" the New Jersey State Congressional Redistricting. Appellant knows this specifically because in 1992 appellant was lead counsel in a redistricting case in the New Jersey Supreme Court, *Save Our Shore District v. New Jersey Redistricting Commission*, 131 *N.J.* 594, 622 *A.2d* 843 (1992) where appellant successfully argued that the 1992 New Jersey State Law that resulted in the creation and adoption of the then newly proposed Federal Congressional Districts in New Jersey after the 1990 Decennial Census was unconstitutional and in violation of the *New Jersey State Constitution* (1947) separation of powers principles. As a direct result of the Supreme Court's opinion in that case (where Appellant's State Constitutional arguments were specifically adopted as law by the Supreme Court in their decision), the New Jersey Legislature proposed an Amendment to the *New Jersey State Constitution* to overcome the constitutional infirmity in the process. This proposed amendment was approved by the voters at the November 7, 1995 General Election. See *New Jersey Constitution* (1947) as amended,

whose seats were abolished; and presidential candidates who may fear an election result like that of Vice President Gore, who had won the popular vote but lost in the electoral college vote to George Bush. Third, the ability of a pro se Plaintiff who is suspended from the practice of law to professionally and adequately present such a case which effects *(sic)* every state is tenuous. (foot note omitted)³ *Finally, the long standing principles*

Article II, Section II, paragraphs 1 through 7. In accordance with the now Amended State Constitution, a 13 Member “Redistricting Commission” draws the Congressional Districts within New Jersey. The Governor plays absolutely no role in the process at any stage. New Jersey Governor Chris Christie in his official capacity as Governor, who was touted by the District Court as a plaintiff with perhaps “better” Article III standing than appellant, actually would clearly not have *any* Article III standing to pursue such arguments.

³ The District Court noted in a footnote as follows: “*I recall when I was practicing, Mr. LaVergne was always a very competent and professional adversary; however, this case is of a different ilk.*” District Court Memorandum and Order at page 3 (*see*A5). It is true that Appellant has, in part due to a costly and protracted divorce, consciously chosen at the moment to stop practicing law, desiring after 20 years to voluntarily temporarily stop practicing law to try to change professions to teaching and writing, rather than spend another 20 years as a solo practitioner in what has become, at least in New Jersey, an overtly hostile professional environment saturated with too many lawyers, not enough paying clients, and professional fees and subjective regulation that make practicing law simply impractical from an economic standpoint. Appellant does not feel the need to explain personal decisions further than that. Appellant simply and clearly asserts that while he has the experience of a 20 year Civil Rights attorney with extensive trial and appellate experience and many published cases (including 2 cases briefed in the United States Supreme Court), Appellant is appearing in this case as a *pro se* plaintiff citizen, a voter, an individual, not as an attorney, and he has every right to do so. Appellant, individually, as an American citizen and voter whose Constitutional rights are being violated, has every right to bring the claims he brings herein in a *pro se* capacity. The probable fact that the 20 years experience noted has made appellant the most qualified person in the nation to understand the relevant Constitutional issues and bring such a case is noted in passing as perhaps just an odd example of Shakesperian irony. If nothing else, this Court should expect a quality of work that exceeds that normally submitted by the typical *pro se* litigant.

establishing representation in our republican form of government have been thoroughly evaluated since the Constitutional Convention. (Emphasis added).

[District Court Memorandum and Order of December 16, 2011 at page 3 (*See A5*)].

Appellant thereafter filed a timely notice of appeal. (*See A1 and A2*).

STATEMENT OF RELATED CASES AND PROCEEDINGS:

There have been no previous appeals in this case. There have been no prior cases that ever addressed the legal issues that appellant seeks to raise herein. There are no related cases or other related proceedings currently before this Court.

STATEMENT OF THE STANDARD OF APPELLATE REVIEW:

The standard of review on appeal of a District Court's dismissal of a Complaint under *F.R.Civ.P.* 12(b)(6) is *de novo*. *Phillips v. County of Allegheny*, 515 *F.3d* 224, 230 (3d Cir. 2008); *Omnipoint Communications Enters., L.P. v. Newton Township*, 219 *F.3d* 240, 242 (3d Cir. 2000).

SUMMARY OF ARGUMENT:

Appellant has Article III Standing to raise the Constitutional Claims that he is asserting as to the validity of the 2010 Decennial Apportionment of the House of Representatives in accordance with well established Supreme Court precedent.

The 2010 Decennial Apportionment of the House of Representatives, conducted pursuant to the procedures and in accordance with the standards as outlined and contained in 2 *U.S.C.* 2a operates in clear violation of the "Separation of Powers

Doctrine” and the “Non Delegation Doctrine” and is not any legitimate or valid form of “Federal Law”. As such, the 2010 Decennial Apportionment is unconstitutional.

Next, Appellant has discovered from a search of the State Archives of Connecticut and Kentucky that both of those States in fact ratified Article 1 during the process of 1789-1792 and never reported this action to the Federal Government. When these then contemporaneous ratifications are counted, it is clear that Article 1 in fact was then contemporaneously ratified by any possible interpretation of the Constitution’s Article V’s “several States” and “three fourths” standards and therefore is Federal Constitutional Law. As such, irrespective of the “Separation of Powers” and “Non Delegation Doctrine” Arguments, in any event the 2010 Decennial Apportionment of the House of Representatives is unconstitutional as clearly violating the mandatory standards in Article 1.

For the reasons just stated, the District Court therefore erred in refusing to convene a “three Judge Court”, in refusing to grant the preliminary injunctive relief requested, and in *sua sponte* dismissing Appellant’s Complaint.

ARGUMENT:

POINT I:

APPELLANT INDIVIDUALLY CLEARLY HAS ARTICLE III STANDING:

Without any analysis whatsoever, and only an indirect citation to *Clemons*, a case that’s only relation to the claims made in this case are that both were a Constitutional

challenge to an Apportionment of Congress, *see* footnote 1, *supra*, the District Court stated that "... Plaintiff's standing *is questionable* ...". (Emphasis added) *See* District Court Memorandum and Order of December 16, 2011 at page 3 (*See* A5). The District Court then, rather than specifically address whether Appellant as an individual actually has Article III standing to proceed with his Constitutional claims, merely posited without any citation that perhaps certain elected Government officials or political candidates or "others" might have "better" standing to assert in an Article III Court the Constitutional claims that Appellant brings herein. *See* footnote 2, *supra*. Strangely, the District Court does not state that Appellant's claims have no merit, but rather that it might be better if such claims were brought by others. Whether others may or may not have standing is certainly not the issue. Notwithstanding the District Court's *ad hominem* postulations, the threshold issue in this case is quite simply whether *Appellant* has Article III standing, and whether *Appellant* has the right, to challenge the Constitutionality of the 2010 Decennial Apportionment of the House of Representatives conducted pursuant to the "automatic procedure" outlined in 2 *U.S.C.* 2a. And Appellant clearly does.

In this case Appellant specifically firstly alleges that he is a resident and qualified voter of the State of New Jersey. Appellant also alleges that as a result of what he claims to be an unconstitutional Reapportionment, that the State of New Jersey will lose a member in the House of Representatives (from 13 Members after the 2000 Census to

12 Members after the 2010 Census), and that as such, the effectiveness of Appellant's vote for a Member of the House of Representatives and for President and Vice-President in the Electoral College will be unconstitutionally diluted. Appellant further specifically alleges that the manner in which the 2010 Decennial Reapportionment of the House of Representatives was conducted (or in this case, was *not actually* conducted) by Congress and the President was unconstitutional for two specific reasons, neither of which have ever before been addressed by any Court.

The question of whether a litigant such as Appellant has Article III standing in a case such as this was already conclusively addressed by the Supreme Court in a decision that is binding on the District Court and this Court. Specifically, in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), the United States Supreme Court ruled that an individual voter who alleged that his State would lose a seat in the House of Representatives as the result of a Reapportionment plan had Article III standing to raise a Constitutional challenge in Federal Court to that Reapportionment plan. As the Supreme Court stated, a voter plaintiff pleading the

... expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Baker v.*

Carr, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 422, 438 (1939)).

[*Department of Commerce v. United States House of Representatives*, 525 U.S. at 331-332].

Therefore, Appellant maintains that there is no question but that the District Court was clearly in error when ruling that Appellant lacks Article III standing (or that Appellant's standing was "questionable") to bring the within claims and should therefore be reversed. *Department of Commerce v. United States House of Representatives, supra.*; see also *Bond v. United States*, 564 U.S. ____ (2011) (No. 09-1227, slip opinion at 10-11).

POINT II

2 U.S.C. 2a UNCONSTITUTIONALLY VIOLATES THE "SEPARATION OF POWERS DOCTRINE" AND THE "NON DELEGATION DOCTRINE":

A. HOW 2 U.S.C. 2a ACTUALLY "WORKS":

The present existing statutory "automatic Federal Law making process" for determining and implementing the 2010 Decennial Apportionment of the House of Representatives, codified at 2 U.S.C. 2a and challenged as unconstitutional herein, was first enacted in June 1929, see Act of June 18, 1929, Chapter 28, Section 22 (46 Stat. 26) and thereafter amended by Act of April 25, 1940, Chapter 152 (54 Stat. 162) and by Act of November 15, 1941, Chapter 470, Section 1 (55 Stat. 761), as was last amended by *Public Law* 104-186, title II, Section 201, August 20, 1996 (110 Stat. 1724).

The “automatic process” that Appellant challenges as unconstitutional has been used consistently since 1929 without exception. As originally enacted the law required the identical “automatic process” as used today and challenged by Appellant as unconstitutional with the sole exception being that as originally enacted the Apportionment Chart was prepared by the Federal Civil Service employees in the Census Bureau using *two* math formulas: (1) The “Method of Equal Proportions” and (2) the “Method of Major Fractions”, and Congress reserved the right to chose one or the other, and if Congress took no action, the “Chart” created by the “Method of Major Fractions” would become law. When the first Chart was sent to the President and Congress after the 1930 Decennial Census, both math formulas resulted in identical results anyway, so no action was taken, and the Apportionment as determined by both math formulas (or technically, as determined by “The Method of Major Fraction”) went into effect. After the 1940 Decennial Census the same process was followed again, except this time under the “Method of Major Fractions” the State of Arkansas would loose 1 Representative and the State of Michigan would gain that 1 Representative, whereas under the “Method of Equal Proportions” no State would loose or gain, and the Apportionment would be identical to the Apportionment as “enacted” after the 1930 Decennial Census notwithstanding vast growths and large migrations in the National population. As such, by Act of April 25, 1940, Chapter 152 (54 *Stat.* 162), the Method of Equal Proportions was chosen by Congress and the President so as to keep the status

quo as to the 1940 Decennial Apportionment, and then by Act of November 15, 1941, Chapter 470, Section 1 (55 Stat. 761), Congress and the President permanently designated the “Method of Equal Proportions” as the sole method that would be used to “automatically apportion” for all future apportionments. This math formula, – the “Method of Equal Proportions”, was the only math formula used by the Federal Civil Service employees at the Census Bureau to make the “Chart” after the 1950, 1960, 1970, 1980, 1990, 2000 and 2010 Decennial Census. See *Distinguishing Montana, infra*. The only other change in the statute was in 1996 when a non-substantive change was made by deleting all references to the person in charge of the “cloak room” from the statute. See *Public Law 104-186*, title II, Section 201, August 20, 1996 (110 Stat. 1724).

Now codified at 2 *U.S.C.* 2a, and as easily explained, the statute operates as follows:

First: The Bureau of Census conducts the Decennial Census, a literal counting of every person in the United States, and arrives at the total population of the Nation. For 2010, the Official Census Population was 309,183,463 persons.

Second: Unelected and unknown career Federal Civil Service employees in a special section within the Census Bureau, working at a Federal Government building located in Suitland-Silver Hill, Maryland, then take the total Official Census Population number (here, 309,183,462 persons), the number of “435” (the total number of Seats in the House of Representatives as effectively fixed by 2 *U.S.C.* 2a), and the number “50” (the total number of States in the Union) and apply those numbers to a complex mathematical formula called the “Method of Equal Proportions” to initially allocate the 435 Seats in the House of Representatives among the 50 States.

Third: After the seats are initially allocated by this mathematical formula as described above, these unelected and unknown career Federal Civil Service employees in this special section within the Census Bureau in Maryland prepare a 1 page "Census Apportionment Chart", (hereinafter simply referred to as "Chart") which Chart lists each State in alphabetical order, with a dash after each State and a number after the dash, the number being the number of Representatives allocated to a given State as the result of this "process" and as determined automatically by the "Method of Equal Proportions". As a result of this "process", New Jersey was allocated 12 Representatives effective January 3, 2013, a loss of 1 Representative since the 2000 Decennial Census and automatic Apportionment "process". (See A45).

Fourth: The Chart is then sent by these unelected and unknown career Federal Civil Service employees in this special section within the Census Bureau in Maryland to their "boss", the Director of the Census Bureau whose office is also located in the same building, but on a different floor, of this Federal Government building located in Suitland-Silver Hill, Maryland. (See A45).

Fifth: Once the Director of the Census Bureau receives a copy of the Chart, the Director of the Census Bureau has absolutely no authority to change or alter the Chart as already created. The Director of the Census Bureau is rather merely charged by law, specifically 2 U.S.C. 2a, with the simple ministerial task of then sending the Chart on to his "boss", the Secretary of Commerce at the Department of Commerce Building located on Constitution Avenue, N.W., in Washington D.C. (See A44)

Sixth: Once the Secretary of Commerce receives a copy of the Chart, the Secretary of Commerce has absolutely no authority to change or alter the Chart as already created. The Secretary of Commerce does not publish the Chart in the Federal Register, and rather is charged by law, specifically 2 U.S.C. 2a, with the ministerial task of then sending the Chart on to his "boss", the Article II President of the United States. (See A49)

Seventh: Once the Article II President receives a copy of the Chart, the Article II President has absolutely no authority to change or alter, and absolutely no authority to approve or veto, the Chart. Rather, the Article II President is charged by law, specifically 2 U.S.C. 2a, with the ministerial task of then sending copies of the Chart - with a one 1 page 1 sentence cover letter - on to the Article I President *Pro Tempore* of the Senate and to the Article I Speaker of the House of Representatives. (See A57).

Eighth: Once the President *Pro Tempore* of the Senate and the Speaker of the House receive a copy of the Chart from the President, they and other members of Congress

have no authority to do anything except acknowledge receipt of the Chart. This was done on January 2011 by printing the President's 1 page 1 sentence cover letter (*but not a copy of the actual Chart!*) in the Congressional Record. A copy of the actual Chart was not printed in the Congressional Record, was not given to each member of the Senate and House of Representatives, nor were any Resolutions "approving" or "disapproving" the Chart ever considered or passed. Rather, the unpublished Chart and President's Cover letter were merely transmitted to a Legislative Committee to be filed away "somewhere" without any action, and in the House only, the Speaker of the House of Representatives was required by law (2 U.S.C. 2a) to give a copy of the Chart to the Clerk of the House of Representatives (in this case, defendant Karen L. Haas).

Ninth. The Clerk of the House of Representatives is charged by law (2 U.S.C. 2a) with looking at the substantive contents of the Chart, and from the information in the Chart in turn preparing 50 separate "Clerk's Certificates" (1 per State) which is the only manner that the States are "officially" and specifically informed of how many seats their State has been Apportioned out of the 435 effective January 3, 2013. This "Clerk's Certificate" also thereby *unofficially* informed each State how many delegates their State will be allowed to elect to the Electoral College at the November 2012 General Election (the number of Representatives in the "Clerk's Certificate +2"). The Clerk of the House of Representatives then sends the "Clerk's Certificate" to the Governors of each State. As noted, New Jersey's "Clerk's Certificate" indicates 12 Representatives as opposed to the 13 Representatives now Apportioned to New Jersey. At this point, the automatic "Federal law making process" is completed. (*See A53, A54*)

Tenth. Upon receipt of the "Clerk's Certificate" by each State's Governor, thereafter each State commences their own intrastate "Redistricting" process, wherein Congressional Districts within each State are drawn based upon the number of Representative a given State is Apportioned. In New Jersey the "Clerk's Certificate" is not published or otherwise made public in any way. Indeed, Appellant was required to file an Open Public Records Act request under New Jersey State Law to obtain a copy of the "Clerk's Certificate" from the New Jersey Secretary of State.

Eleventh. At the November 2012 General Election, each State will then elect Representatives in the number as reflected on their State's "Clerk's Certificate", and will elect delegates to the Electoral College to select the President and Vice President of the United States in a number equal to the number reflected on the "Clerk's Certificate" *plus 2*.

B. VALID FEDERAL LAW MAKING UNDER ARTICLES I & II OF THE CONSTITUTION:

Federal Laws are required to be created by the elementary procedure as outlined in Article I and II of the Constitution. All laws must initiate in the Article I Senate or House of Representatives (with the exception being that all appropriations bills must initiate in the House of Representatives), and all proposed laws must be affirmatively approved by a majority vote in *both* the Senate and the House of Representatives, and once this occurs, then and only then is the proposed law sent to the Article II President for his approval and signature, and if signed by the President, the proposal now approved become “Federal Law”. Only after this procedure and at this point is the proposal actually binding and Constitutionally valid “Federal Law”. If however the Article II President rejects the proposal (known as a “veto”), at that point the proposal is sent back to the Article I Senate and House of Representatives to be voted on again, this time requiring a supermajority of an affirmative vote of 2/3 of each house to pass, and if approved by at least 2/3 in the Senate and the House of Representatives at this point, the proposal becomes binding and Constitutionally valid “Federal Law”. This secondary procedure for approval over Presidential objection is commonly referred to as “overriding a veto”. This clearly defined Article I and II procedure is the only valid and Constitutional Federal Law making process permitted by the United States Constitution save for the unique Article V Federal Constitutional Law making process (which

requires levels of both direct Federal and State participation) not directly applicable to the 2 *U.S.C.* 2a claims made herein. *See infra.*

C. THE “SEPARATION OF POWERS DOCTRINE” AND THE “NON DELEGATION DOCTRINE”:

An objective review of 2 *U.S.C.* 2a evidences that this statute delegates the Article I, Section 2 Constitutional responsibility of Congress to Apportion the Representatives in the House of Representatives after each Decennial Census automatically and exclusively to a Bureau within a Cabinet Department within the Article II Executive Branch of Government to the exclusion of the Article I Legislative Branch of Government and to the exclusion of the Article II Executive Branch President. 2 *U.S.C.* 2a operates such that what is actually occurring is that career Federal Civil Service Employees in a Bureau within a Cabinet Department under the Article II President sitting in an office in Maryland are literally preparing the actual Decennial Apportionment which is then put into effect without any review or vote by Congress or the President and then treated as “Federal Law”. This bizarre process of a “law to automatically create law”⁴ is nonetheless still in the end creating Federal Law –

⁴ The closest – and indeed the only – other “hybrid federal law making process” plaintiff could find in history not yet ruled unconstitutional that is in any way analogous to what takes place with this “automatic” Decennial Apportionment is the statutory law defining the “special” law making process through which Congress and the President and the Department of Defense (DOD), working in consort, together determine which military bases to realign or close. *See* “Defense Base Closure and realignment Act of 1990”, 104 *Stat.* 1808, as amended, note following 10 *U.S.C.* 2687. However, unlike the statute at issue in this case, the BRAC process and statute require that the initial

a new Federal Law that is specifically Constitutionally mandated to be enacted by Congress and the President every 10 years after the Decennial Census.⁵

As the manner in which 2 *U.S.C.* 2a “works” as described above, and as the clear and elementary Article I and II Constitutional law making process is easily understood, this “automatic apportionment process” in 2 *U.S.C.* 2a is conducted in such a way as to

DOD BRAC Recommendations be published in the Federal Register and be subject to several public hearings at locations throughout the nation and also subject to public comment in writing at all points, all before the Final BRAC Recommendations are presented to the President (ie. the Article II Executive Branch) for his *express approval*, and then sent to the Congress (ie. the Article I Legislative Branches) for their *express “disapproval”*. If both the Senate and the House pass a “disapproval resolution” the recommendations would fail to become law. If no “disapproval Resolution” is passed, the recommendations become Federal Law and are published as such in the Code of Federal Regulations. While this is indeed a somewhat inverted Federal Law Making process, nonetheless both the Article I Legislative Branch and Article II Executive Branch substantively consider and vote on the law as a condition of enactment. With reference to the last two sentences in footnote 3 *supra*, it is noted that appellant was lead counsel of record in *Jon Corzine, United States Senator, et als. v. 2005 Defense Base Closure and Realignment Commission*, 545 *U.S.* 1163, 126 *S.Ct.* 32 (2005), case below at 388 *F.Supp.2d* 446 (D.N.J. 2005), *aff’d* No. 05-4127 (3d. Cir. 2005). It is a safe bet that Appellant is probably the only person who was ever both lead counsel of record in a lawsuit involving the validity and Constitutionality of a State Redistricting law *and* lead counsel in a Federal lawsuit involving the validity and Constitutionality of a Federal BRAC decision.

⁵ This was the case after the first Decennial Census held in 1790, and after each Decennial Census taken in 1800, 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1880, 1890, 1900 and 1910. In this regard, “... early Congressional practice [] provides contemporaneous and weighty evidence of the Constitution’s meaning.” *Alden v. Maine*, 527 *U.S.* 706, 743-744 (1999) (quotations omitted). It has been noted directly in the Apportionment Context by the Supreme Court itself that “...[t]he interpretations of the Constitution by the First Congress are *persuasive*[.]” (emphasis added) *Franklin v. Massachusetts*, 505 *U.S.* 788, 803 (1992).

clearly violate the “Separation of Powers Doctrine” and “Non Delegation Doctrine” generally, and Article I Section 2, the Fourteenth Amendment, Section 2, Article I, Section 1 (“Vesting Clause”); Article I, Section 7, Clause 2 (“Bicamerality Clause”); Article I, Section 7, Clause 3 (“Presentment Clause”), and Article II, Section I, and Twelfth and Twenty Third Amendments (Fair Representation in “Electoral College”) of the United States Constitution specifically. As to “Separation of Powers Doctrine”, *see Clinton v. City of New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); *I.N.S. v. Chada*, 462 U.S. 919 (1983); *United States Senate v. Federal Trade Commission*, 463 U.S. 1216 (1983); *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); as to “Non Delegation Doctrine”, *see Whitman v. American Trucking Association*, 531 U.S. 457 (2001); *Clinton v. City of New York*, 524 U.S. 417 (1998) (Kennedy, J., concurring); *Mistretta v. United States*, 448 U.S. 361, 416 (1989); *Field v. Clark*, 143 U.S. 649 (1892); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (Rhenquist, J., concurring); *American Textiles Manufacturers Institute v. Donovan*, 542 U.S. 490, 547 (1981) (Rhenquist, J., dissenting). The District Court’s refusal to even

consider the substantive validity of Appellant's Constitutional arguments in this regard is clear error and must be reversed.

D. DISTINGUISHING *MONTANA*:

In *United States Department of Commerce v. Montana*, 503 U.S. 442 (1992) the United States Supreme Court addressed a legal challenge that was brought by Montana to the portion of 2 U.S.C. 2a that was enacted in 1941, specifically Act of November 15, 1941, Chapter 470, Section 1 (55 Stat. 761), where Congress and the President fixed the math formula of "The Method of Equal Proportions" to be used exclusively and permanently.

In *Montana* a three judge Court was convened (District Court Judge Lovell, Senior District Court Judge Battin, and Circuit Court Judge O'Scannlin) to hear the case. Two Judges (Lovell and Battin) found that the specific challenge by Montana to the 2 U.S.C. 2a "process" of automatically relying upon the math formula of the "Method of Equal Proportions", specifically Act of November 15, 1941, Chapter 470, Section 1 (55 Stat. 761), resulted in an unjustifiable deviation from the "ideal" of equal representation and was therefore unconstitutional. *See Montana v. United States Department of Commerce*, 775 F.Supp. 1358 (D. Mont. 1991). No challenge was brought by *Montana* to the section of 2 U.S.C. 2a that is specifically challenged by Appellant here (Act of June 18, 1929, Chapter 28, Section 22 (46 Stat. 26)), nor were the "Separation of Powers Doctrine", the "Non Delegation Doctrine", or Article 1 ever

mentioned. This was strictly a legal fight over the Constitutional propriety of the *substantive political decision* of Congress and the President to chose one math formula versus the others available. This was not a challenge to the overall procedural process in 2 U.S.C. 2a which was specifically *not challenged* in *Montana*, but which procedural process is *specifically challenged* by Appellant here. The dissent (Circuit Judge O’Scannlin) agreed that it was correct to convene a 3 Judge Court, agreed that the plaintiffs all had Article III Standing, and agreed that the plaintiff’s claims were justiciable. However, Judge O’Scannlin believed that no matter what math formula was chosen that there would inevitably be deviations and differing levels of inequity, and he further felt that the decision as to how or whether to address these inevitable deviations and inequities was a political question more properly decided by the Article I and II Branches. While acknowledging the deviations and inequities argued, Judge O’Scannlin believed that the plaintiffs had failed to meet their burden to show that the “Method of Equal Proportions” was inequitable or unreasonable to a Constitutional level.

The United States Supreme Court reversed, essentially agreeing with Judge O’Scannlin’s dissent. In an opinion by Justice Stevens, the Supreme Court traced the history of apportionment but never even noted the existence of Article 1 in the historical reference section. The Supreme Court then stated as follows:

The District Court suggested that the *automatic character of the application of the method of equal proportions* was inconsistent

with Congress' responsibility to make a fresh legislative decision after each census. We find no merit in this suggestion. Indeed, if a *set formula* is otherwise constitutional, it seems to us that the use of a procedure that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it. To the extent that potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served, *provided of course, that such rule remains open to challenge or change at any time.* We see no constitutional obstacle preventing Congress from adopting such a sensible *procedure.* * * * ...[H]istory supports our conclusion that Congress had ample power *to enact the statutory procedure in 1941* and to *apply the method of equal proportions* after the 1990 census.

[*United States Department of Commerce v. Montana, supra, 503 U.S. at 465-466*].

Justice Stevens specifically reaffirmed that the “procedure” being discussed and challenged in *Montana* was the “substantive procedure” of using the “Method of Equal Proportions” exclusively, even citing specifically to 55 *Stat.* 761, now codified as the portion of 2 *U.S.C.* 2a that did just that. Conversely, the portion of 2 *U.S.C.* 2a being challenged by Appellant is not that section at all, but rather is the strictly procedural “process” of the Federal Civil Service employees in the Census Bureau creating the “Chart” and process of the Clerk of the House of Representatives who prepares the “Clerk’s Certificate” as originally enacted in 1929 in Act of June 18, 1929, Chapter 28, Section 22 (46 *Stat.* 26). The specific “Separation of Powers” and “Non Delegation Doctrine” arguments raised by Appellant in this case were neither raised before nor considered by the 3 Judge District Court or the 9 member Supreme Court in *Montana.*

Further, as the Supreme Court noted, even the exclusive use of the “Method of Equal Proportions” is a rule that “... *remains open to challenge or change at any time.*” *Id.* As such, no matter how *Montana* is read, it can not be read to operate to foreclose Appellant from raising the Arguments that he raises now.

POINT III:
AS A MATTER OF UNQUESTIONABLE HISTORY
“ARTICLE THE FIRST” WAS CONTEMPORANEOUSLY
RATIFIED DURING 1789-1792 AND THEREFORE WAS
ENACTED AS A VALID AND PERMANENT AND
ENFORCEABLE PART OF THE CONSTITUTION:

Article 1, the first of 12 amendments proposed by Congress in September 1789 (*see 1 Stat. 97 (1789)*) was proposed at a time when there were 11 States in the Union. By 1791 there were now 14 States actually admitted to the Union as at this point North Carolina and Rhode Island had ratified the Constitution and joined the Union and Vermont became the 14th State as of March 4, 1791. Also as of February 1791 Kentucky had already been *formally approved* by Act of Congress signed by the President to become the 15th State, but the actual *official date* of Kentucky’s *admission* to the Union was deferred until 15 months later on June 1, 1792.

As of November 3, 1791, the Legislatures of 10 States had contemporaneously ratified Article 1 *and had reported that ratification action to the Federal Government*, the Legislatures of 11 States had contemporaneously ratified Articles 3 through 12 *and had reported that ratification action to the Federal Government*, while the Legislatures

of only 6 States had contemporaneously ratified Article 2 *and had reported that ratification action to the Federal Government.*

If Kentucky, *approved* as a State, but not to *become* a State until June 1, 1792, was not to be included in the Constitution's Article V definition of "... the several States ..." until June 1, 1792 when *actually admitted* as a State, then after March 4, 1791 and until May 31, 1792 there were 14 States that were included in the Constitution's Article V definition of "... the several States ...". From that number of 14 States, the Legislatures of "three fourths" of 14 were required to ratify for an article of amendment to be enacted into Federal Constitutional Law. With 14 States and Article V's additional requirement that "three fourths" of the Legislatures ratify an amendment for it to become law, "three fourths" of 14 equaled 10.5 (14 X "three fourths" (ie. .75) = 10.5).

We know that United States Secretary of State Thomas Jefferson contemporaneously interpreted Article V as not including Kentucky until June 1, 1792. This meant that the base number of States under Article V was 14, "two thirds" which resulted in a whole number of 10 with a remaining fractional number of ".5" of the "several States". Jefferson interpreted the Constitution's Article V standards in this context to mean that 10 State's Legislature's ratifications were required for an article of amendment to be enacted into Federal Constitutional Law. Secretary of State Jefferson's Article V interpretation is known historical fact as he specifically stated his

position on the Constitution's Article V's enactment standards in writing in an official Government letter on August 8, 1791. Secretary of State Jefferson, correctly understanding that the Massachusetts State Legislature had already duly ratified certain of the 12 articles of amendments but had not yet reported such action to the Federal Government, wrote a letter to Christopher Gore, United States Attorney for Massachusetts asking for assistance in obtaining from the Massachusetts State Government official proof as to which of the 12 articles of amendment had been ratified and approved by the Legislature. In that letter Secretary of State Jefferson stated the following:

* * * ...the legislature of Massachusetts having been the 10th State which has ratified, makes up the threefourth of the legislatures whose ratification was to suffice. Consequently so much as they have approved, has become law, and it is proper that we should have it duly promulgated for the information of the judges, legislators, and citizens generally. * * * (emphasis added).

[See photographic copy of actual original letter at Library of Congress web site, *The Thomas Jefferson Papers*, Series 1, General Correspondence, 1651-1827, Thomas Jefferson to Christopher Gore, August 8, 1791, Image 914].

As the Article II Federal Official in the first instance interpreting Article V, United States Secretary of State Jefferson's initial official and contemporaneous interpretation of Article V's "several States" standard was that as of August 8, 1791 there were 14 States (not counting Kentucky in that number), and also interpreting Article V's "three fourths" standard as requiring the ratification of the Legislatures of

10 States to become law. This Article V factual and legal interpretation by Jefferson was, and to this day still is, entitled to a legal presumption of validity. It is not understood exactly “who” in 1792 or thereafter was to say that Secretary of State Jefferson’s contemporaneous interpretation of Article V standards were “wrong”. It would be 11 more years before the Supreme Court’s decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) established the principle of judicial review, which principle may or may not be retroactive.

However, in any event, today we have the benefit of knowing facts that even Secretary of State Jefferson did not know: That in addition to the ratifications of Article 1 by the 10 State Legislatures that had contemporaneously ratified Article 1 and *contemporaneously notified* the Federal Government of their Legislature’s actions (those 10 States being New Jersey, North Carolina, Maryland, New Hampshire, South Carolina, New York, Rhode Island, Pennsylvania, Virginia and Vermont), the Connecticut State Legislature also validly ratified Articles 1 (and also Articles 3,4,5,6,7,8,9,10,11&12, all but Article 2) at the May 1790 Legislative Session in Hartford and simply never notified the Federal Government of that action, and Kentucky, after formally becoming the 15th State on June 1, 1792, the Kentucky Legislature ratified Article 1 (actually, all 12 Articles) on June 27, 1792 and simply never notified the Federal Government of that action. *See* documents at Declaration / Certification of Appellant in support of Appellate Motions submitted herewith.

Therefore, under any possible interpretation of the facts and the Constitution's Article V's "several States" and "two thirds" standards, with what is now known, it is historical fact that Article 1 was duly enacted as an amendment to the United States Constitution either on November 3, 1791 when the Legislatures of 10 of the 14 States ratified *and reported* (as was contemporaneously understood by Secretary of State Jefferson), or alternatively on November 3, 1791 when the Legislatures of 11 of the 14 States ratified (10 reporting, 1 not reporting), or again alternatively on June 27, 1792 when the Legislatures of 12 of the 15 States ratified (10 reporting, 2 not reporting). It is just that "history" has failed to acknowledge Secretary of State Thomas Jefferson's contemporaneous interpretations of the Constitution's Article V's "several states" and "three fourths" standards, and also failed to acknowledge that Connecticut and Kentucky failed to ratify Article I. Not only did "history" fail to acknowledge the Kentucky Legislature's June 1792 ratifications, even *Kentucky* failed to acknowledge their 1792 Legislature's ratification of Articles 1 through 12! The 1996 Kentucky State Legislature, unaware of the 1792 Kentucky Legislature's prior ratification votes on June 27, 1792, "post ratified" (*or so they thought*) Article 2, which had at that point already "officially" become the 27th Amendment in May of 1992. *See* POM-624 - A joint resolution adopted by the General Assembly of the Commonwealth of Kentucky; to the Committee on the Judiciary, found at Congressional Record – Senate, page S6661, June 21, 1996.

In the face of these facts as brought forward by Appellant, supported by copies of State Government Documents from the Connecticut State Archives and the Kentucky State Archives, all confirmed as valid, true and accurate by each State's Archives, the District Court's statement that "...the long standing principles establishing representation in our republican form of government have been *thoroughly evaluated* since the Constitutional Convention" (December 16, 2011 Memorandum Opinion and Order at page 3 (*See A5*)) melts in the illuminating light of the actual true historical reality of the matter. If this case serves to prove anything, this case serves to prove that simply saying something is true without knowing all of the supporting and accurate facts does not make it true, even when the person making the statement is wearing the hat of the historian or the robe of the jurist.⁶

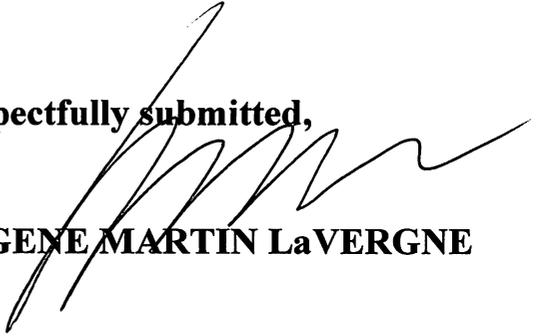
CONCLUSION:

The remaining issues in this case as listed on page 1 of this Merits Brief, namely whether the District Court erred in failing to convene a Three Judge Court pursuant to

⁶ Upon filing this Merit's Brief Appellant is simultaneously filing a motion for injunctive relief or in the alternative for expedited review of this appeal. For purposes of appeal Appellant must simply demonstrate that the District Court erred in dismissing the factual claims regarding the ratification of Article 1 without further inquiry or hearing. For appellate injunctive relief or expedited review the threshold is much higher, and the Brief submitted in support of those motions contains a more detailed recitation of the facts and a legal analysis as to the ratification of Article 1. In the event that the motion for injunctive relief is denied but the motion for expedited review is granted, or in the event both motions are denied, Appellant hereby incorporates by reference herein the factual chronology and arguments made in the motion Brief filed simultaneously herewith.

28 U.S.C. 2284 and whether the District Court erred in refusing to grant the preliminary injunctive relief requested, are answered in Appellant's favor by the previous arguments. However, as the facts are not reasonably in dispute and the law is not reasonably in dispute, Appellant requests that as a remedy for the District Court's improper *sua sponte* dismissal that this Circuit Court determine Appellant's Constitutional claims *de novo* in a summary manner. The purpose of the three judge court statute is so that there will not be a scenario where only one Federal Judge alone has the power to rule an Apportionment plan unconstitutional and invalid. This Court, consisting of 3 Article III Judges, addresses Congress' concerns. Further, this will allow this case to be decided expeditiously so that there will be adequate time for the Article I and II Political Branches of Federal Government to take appropriate action to comply with the Constitution so that the 2012 General Elections for President and Vice President and for Representatives in the House of Representatives can go forward without question as to Constitutional validity and legitimacy, and so that at long last, our "National Truth" can be acknowledged and implemented.

Respectfully submitted,


EUGENE MARTIN LaVERGNE

COMBINED CERTIFICATIONS:

EUGENE MARTIN LaVERGNE, *Pro Se* Appellant, hereby certifies as follows:

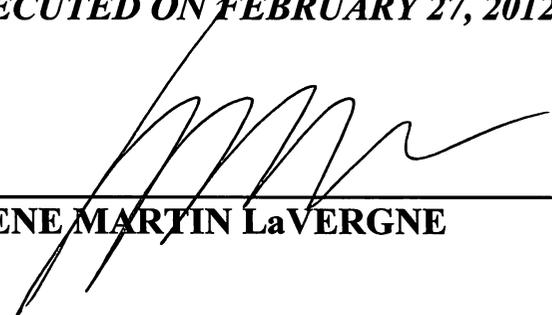
- 1. BAR MEMBERSHIP:** I am a member of the Bar of the Third Circuit Court of Appeals. I am presently temporarily suspended from the practice of law by the State of New Jersey. I am representing myself *pro se* as Appellant in this case so the Temporary Suspension in New Jersey has no effect on my right to proceed with my claims and to represent myself *pro se* when doing so.
- 2. WORD COUNT:** The word count complies with the Federal Rules of Appellate Procedure and the Third Circuit Local Appellate Rules.
- 3. SERVICE UPON COUNSEL:** A copy of the Appellant's Merit's Brief and Appendix are being served simultaneous to the filing with the Third Circuit Clerk upon the following:

**United States Attorney for New Jersey
402 East State Street
Trenton, New Jersey 08608**

- 4. IDENTICAL COMPLIANCE OF BRIEFS:** The original and 9 paper copies (total 10) of the Merit's Brief and the original and 3 paper copies (total 4) of the Appendix are identical.
- 5. VIRUS CHECK:** The PDF papers electronically filed have been checked with McAfee® and are clear of any virus.

I DECLARE AND CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON FEBRUARY 27, 2012.

DATED: FEBRUARY 29, 2012



EUGENE MARTIN LaVERGNE