No. 12-1171

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EUGENE LAVERGNE,

Plaintiff-Appellant,

v.

JOHN BRYSON et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF FOR EXECUTIVE BRANCH AND SENATE APPELLEES

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BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is a *pro se* challenge to the constitutionality of longstanding aspects of the process for apportioning the House of Representatives. Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. § 2284(a). On December 16, 2011, the district court entered a final judgment dismissing plaintiff's suit. A5-A6. On January 17, 2012,

plaintiff filed a timely notice of appeal from that judgment. A1. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff is a New Jersey resident who seeks, among other things, a judicial determination that the Constitution requires the House of Representatives to have at least 6,163 members. The issues are:

1. Whether plaintiff's constitutional claims are insubstantial.

2. Whether plaintiff lacks standing to pursue his claims.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. The government is aware of no related cases.

STATEMENT OF THE CASE

Plaintiff filed this suit in the District of New Jersey challenging longstanding aspects of the apportionment of seats in the U.S. House of Representatives. A40-A44. The district court *sua sponte* dismissed the suit, finding plaintiff's claims wholly lacking in merit. A5-A6. Plaintiff appeals. After he filed his appeal, plaintiff moved in this Court for a preliminary injunction and for this appeal to be heard on an expedited basis. This Court on March 8, 2012, denied that motion.

STATEMENT OF FACTS

I. Background

The Constitution provides that seats in the House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers," and that "[t]he Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative." Art. I, § 2, cl. 3; *see also* Amend. 14, § 2. Since the Founding, Congress has by legislation, and based on population figures derived from the decennial census, determined the number of seats in the House and allocated them to the States. *See United States* v. *Montana*, 503 U.S. 442, 448-55 (1992). Between 1790 and 1850, Congress keyed the number of House seats to per-district population. *See id.* at 449-51. Under that approach, the number of Representatives started at 105 in 1790, and grew to 233 by 1850. *Id.* at 449, 451 n.22.

Beginning in 1850, Congress set the overall size of the House in advance, and then distributed that fixed number of seats among the States proportionally. Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1025 (1929). Because

Congress ensured that no State would lose a Representative even as population increased, the size of the House increased steadily until Congress in 1911 fixed its size at 435 members, where it has remained ever since. *See Montana*, 503 U.S. at 451 & n.24.

After the 1920 census, however, Congress failed to enact a new apportionment, in part because of concerns that increasing the size of the House beyond 435 members would make the House "too large and unwieldy." H.R. Rep. No. 70-2010, at 3 (1929). To avoid another political deadlock after the 1930 census, *id.* at 4, Congress in 1929 enacted a statute providing for a self-executing means of apportioning the 435 House seats among the States based on the census. *See* Pub. L. No. 71-13, 46 Stat. 21, 26 (1929).

That statute, as amended in 1941, and now codified at 2 U.S.C. § 2a, has governed every apportionment conducted since. *See Montana*, 503 U.S. at 452-53. Section 2a provides that, following each decennial census, "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the

method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. 2a. The method of equal proportions is a mathematical formula used to allocate the 435 seats to the various States given their relative populations. *See Montana*, 503 U.S. at 455-56. Since the number of House seats was fixed at 435 when Congress enacted this statute, the number of Representatives—with the exception of a brief period after Alaska and Hawaii were admitted as new States, *id.* at 451 n.24—has remained at 435 ever since.

II. This Lawsuit

Plaintiff is a New Jersey citizen who, proceeding *pro se*, filed this lawsuit in New Jersey U.S. District Court in December 2011. A9. Plaintiff's suit challenges the constitutionality of the current statutory method of apportioning Representatives to the States established by 2 U.S.C. § 2a. Count I of the complaint claims that § 2a violates the separation of powers. A40-A42. Count II claims that § 2a is an unconstitutional delegation of legislative power to the Executive Branch of government. A42. Count III claims that § 2a violates the "one person, one vote" principle. A43-A44. Count III further argues that the Constitution establishes a mandatory ratio of individuals each

Representative must represent, which § 2a also purportedly violates. A44-A45. The last count of the complaint claims that an unratified proposed amendment to the original Constitution—known then as "Article the First"—was indeed ratified and is in fact actually part of the Constitution. A46.

Plaintiff appears to believe that Article the First, if it had been ratified, would have established "a mandatory ratio of 1 Representative for every 50,000 persons" whereas the current average ratio is greater than "1 Representative for every 720,000 people." Pl. Br. 5. Plaintiff contends that, as a result, the number of Representatives "must consist of no less than 6,163 voting members apportioned among the 50 States." Pl. Mot. for Prelim. Injun. and to Expedite Appeal at 3.

The district court dismissed the complaint. The district court rejected plaintiff's request for expedited treatment of the case, noting that plaintiff's "core contentions involve the constitutionality of an eighty-two year old federal statute and the potential enactment of an amendment to the U.S. Constitution two hundred and nineteen years ago." A4. "As these issues have waited a combined thirty decades to reach their ultimate resolution," the district court stated, "there seems

to be no reason why they cannot wait until the end of the standard motion cycle." A4.

The district court next rejected plaintiff's argument that it should convene a three-judge district court, which generally has jurisdiction over actions challenging the constitutionality of an apportionment. *See* 28 U.S.C. § 2284(a). The district court observed that convening a three-judge court was not required here because plaintiff's claims were "'wholly insubstantial or completely without merit.'" A5 (quoting *United States* v. *Saint Landry Parish Sch. Bd.*, 601 F.3d 859, 863 (5th Cir. 1979)).

SUMMARY OF ARGUMENT

1. Plaintiff challenges the constitutionality of a statute first enacted in 1929 that establishes a self-executing formula for apportioning seats in the House of Representatives, contending that it unconstitutionally delegates legislative power to the Executive Branch. The statute does nothing of the kind, however, because the apportionment formula it establishes is nondiscretionary and sets forth a determinate and intelligible principle for the Executive Branch to apply.

Plaintiff further attacks the apportionment statute on the ground that it unconstitutionally fixes the size of the House at 435 members, which, plaintiff believes, is too small. Article I § 2 of the Constitution, however, requires only that the House have a minimum of one representative for each State, and a maximum size of one Representative for every 30,000 people in a congressional district (approximately 10,307 Representatives given the population figures from the 2010 census). Beyond those two extremes, there is no constitutional restriction on Congress's broad discretion to set the size of the House.

2. Because plaintiffs' claims are insubstantial, the district court properly dismissed the suit, and there is no need for the Court to proceed further in order to affirm the district court's judgment. In any event, plaintiff also has not adequately established his standing to sue. Plaintiff never explains how he, as a New Jersey voter, has a particularized interest in increasing the size of the House. He has not shown that such an increase, which would provide *all* States additional seats in Congress, will result in a relative increase of political power for the State of New Jersey.

STANDARD OF REVIEW

This appeal presents questions of law that the Court reviews *de novo*. *United States* v. *Amirnazmi*, 645 F.3d 564, 572 n.11 (3d Cir. 2011).

ARGUMENT

I. The District Court Correctly Dismissed Plaintiff's Claims As Wholly Insubstantial.

Plaintiff mounts a sweeping constitutional challenge to longstanding aspects of the process for apportioning seats in the House of Representatives to the States. This challenge is based, in large part, on plaintiff's contention that he has uncovered historical evidence demonstrating that a constitutional amendment proposed in 1789 as one of the original 12 proposed amendments to the Constitution, but never actually ratified by the States, was actually ratified. Because plaintiff's claims are wholly insubstantial, the district court correctly dismissed them without convening a three-judge district court, which under 28 U.S.C. § 2284(a) generally has jurisdiction over constitutional challenges to the apportionment process. *See Page* v. *Bartels*, 248 F.3d 175, 191 (3d Cir. 2001) (citing *Goosby* v. *Osser*, 409 U.S. 512, 518

(1973), and *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (*per curiam*)) (no jurisdiction under § 2284(a) over insubstantial claims). Similarly, the absence of a substantial federal claim also deprived the district court of jurisdiction under 28 U.S.C. § 1331. *See, e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (explaining that if a purported federal claim is "wholly insubstantial," there is no federal-question jurisdiction (internal quotation marks omitted)).

A. Section 2a Does Not Unconstitutionally Delegate Legislative Power To The Executive.

Following the 1920 census, a political stalemate prevented Congress, for the first time in the Nation's history, from enacting a new apportionment based on the changes in the population of the Nation reflected in the decennial census. In 1929, Congress broke the logjam by enacting a self-executing process for apportioning seats in the House of Representatives, which is today codified in 2 U.S.C. § 2a. Section 2a provides that, following each decennial census, "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then

existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. 2a. It was well within Congress's authority to establish a self-executing procedure for apportioning seats to avoid the politically divisive and disruptive process of enacting a new apportionment after each census. *See Montana*, 503 U.S. at 465.

Plaintiff nonetheless contends that this statute unconstitutionally delegates legislative power to the Executive Branch and thus violates the separation of powers. Pl. Br. 18-20. This contention is insubstantial. A statute delegates legislative power to the Executive only if the law enacted by Congress lacks an "intelligible principle" to guide the Executive's exercise of discretion under the statute. *See*, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001). Far from conveying an undue amount of discretion on the Executive, § 2a requires the President to apportion representatives according to a precise and well-defined mathematical formula that is entirely nondiscretionary—the method of equal proportions. *See Montana*, 503

U.S. at 455.[1] Although plaintiff complains that "unelected and unknown" federal employees are carrying out this process, Pl. Br. 15, there is no cogent separation-of-powers objection to those employees' following a nondiscretionary process for conducting the apportionment set forth in a duly enacted federal statute.

The Supreme Court has rejected nondelegation challenges to statutes conveying authority on the Executive Branch that was far more discretionary than that created by 2 U.S.C. § 2a. *See Whitman*, 531 U.S. at 472 (rejecting nondelegation challenge to statute authorizing the Environmental Protection Agency to set air quality standards that "allow[] an adequate margin of safety" and "are requisite to protect the public health"); *Touby* v. *United States*, 500 U.S.

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[1] Under that method, one seat is initially assigned to every State. Then, each State's population is divided by a series of "divisors," all of which represent a potential additional seat for the state—for the *n*th seat in a state, the "divisor" is equal to $\sqrt{n(n-1)}$. The resulting quotients are listed in a "priority list," ordered from largest to smallest, and the top 385 are selected. Those 385 seats, plus the initial 50, constitute the 435 congressional seats. *See Montana*, 503 U.S. at 452 n.26. The priority list from the 2010 redistricting is available on the Census Bureau's website. *See Priority Values for 2010 Census*, http://www.census.gov/population/apportionment/data/files/Priority%20Values%202010.pdf.

160, 165-66 (1991) (rejecting nondelegation challenge to statute permitting the Attorney General to add substance to the banned list if doing so is "necessary to avoid an imminent hazard to public safety" (internal quotation marks omitted)); *United States* v. *Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011) (rejecting nondelegation challenge to statute permitting the President to declare an emergency if there is an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States" (internal quotation marks omitted)). And to the extent plaintiff's objection is to the self-executing character of § 2a, the Supreme Court in *Montana* found "no merit" to the suggestion that "the automatic character of the application of the method of equal proportions" was unconstitutional, noting 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." 503 U.S. at 465. Plaintiff provides no basis for revisiting *Montana* or any of the cases consistently upholding far more expansive delegations of authority to the Executive.

B. There Is No "Mandatory Ratio" Of Representatives To Congressional-District Population In The Constitution.

Plaintiff further argues that this congressionally established process for apportioning House seats is unconstitutional because the Constitution prescribes a "mandatory ratio" of one Representative to 50,000 people for each district, which would require the House to "consist of no less than 6,163 voting members apportioned among the 50 States." Pl. Mot. for Prelim. Injun. and to Expedite Appeal at 3. Plaintiff contends that, because the size of the House is currently fixed at 435 Representatives, the average ratio is currently one Representative for every 720,000 persons. *Id.* Plaintiff derives this "mandatory ratio" from Article the First—an amendment proposed to the Constitution in 1789—and claims that he has uncovered heretofore unknown historical evidence demonstrating that this unratified amendment is actually part of the Constitution, Pl. Br. 24-29.

Plaintiff's historical arguments are beside the point because neither the unratified constitutional amendment known as "Article the First," nor any provision of the actual Constitution, establishes a mandatory ratio requiring Congress to radically increase the size of the

House. The only requirements the Constitution sets forth regarding the size of the House are that each State must have at least one Representative, and that the size of the House "shall not exceed one for every thirty Thousand." Art. I, § 2, cl. 3; *see Montana*, 503 U.S. at 447-48. In other words, the Constitution sets a minimum size of 50 and a maximum size of one Representative for every 30,000 people (or approximately 10,307 Representatives given the population figures from the 2010 census), which the current figure of 435 House members falls comfortably within. The Constitution sets no limit on Congress's discretion to set the House's overall size in between those two dramatic extremes.

The provisions of Article I § 2 regarding the maximum and minimum size of the House were the product of a compromise between those Framers who, like James Madison, feared a House that would be too large, and those who feared it would be too small. *See* David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 129 (1997) (noting that the original draft of the Constitution had set a "precise ratio" of Representatives, but that "it was altered in response to Madison's argument that as population increased a fixed

apportionment formula would produce an unwieldy House"); *Clemons* v. *U.S. Dep't of Commerce*, 710 F. Supp. 2d 570, 577 (N.D. Miss.), *vacated and remanded with instructions to dismiss complaint for lack of jurisdiction*, 131 S. Ct. 821 (2011); *Whelan* v. *Cuomo*, 415 F. Supp. 251, 256-58 (E.D.N.Y. 1976). And since the Founding, Congress has exercised its discretion to establish a House ranging from 105 members in the first congressional apportionment, to the 435 members that exist today. *See Montana*, 503 U.S. at 449-51. At no point has the exercise of that discretion hewed to any "mandatory ratio" and there is no basis for plaintiff's request to overturn centuries of apportionment practice. *See id.* at 450 & n.18 (noting the variety of ratios Congress has employed over the years).

In 1789, Congress proposed twelve amendments to the original Constitution and presented them to the States for ratification. Res. 3, 1 Stat. 97 (1789). The first of those amendments, then known as "Article the First," provided:

> After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than

> one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; *after which the proportion shall be so regulated by Congress, that there shall be not less than two hundred Representatives, nor more than one Representative for every fifty thousand persons*.

1 Stat. 97 (emphasis added). The first two of these amendments were not originally ratified by the required three-fourths of the States. 2 Department of State, *Documentary History of the United States of America*, 1789-1870, at 390 (1894); *Dillon* v. *Gloss*, 256 U.S. 368, 375 (1921). The final ten original proposed amendments became what is now known as the Bill of Rights, and the second proposed amendment, concerning congressional pay, became the Twenty-Seventh Amendment when it was ratified, at long last, in 1992. *See Clemons*, 710 F. Supp. 2d at 580 & n.5.

Article the First, contrary to plaintiff's contentions, neither proposed nor created a "mandatory ratio" of Representatives to district population and thus provides no support for plaintiff's contentions. The last clause of this complexly worded amendment would have, once the House reached a size of 200, set a constitutional minimum for the House (at 200), and reduced the constitutional maximum from the one-to-30,000 ratio specified in Article I § 2 of the original Constitution to a

ratio of one to 50,000. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 15 (1998); *Clemons*, 710 F. Supp. 2d at 579-80.

Article the First thus would have changed the constitutional minimum and maximum between which Congress could fix the size of the House. It would not, however, have changed Congress's discretion to set the House's size in between those extremes. And, as it happens, the current size of the House of Representatives (435) is fully consistent with the minimum and maximum figures proposed by Article the First, since the House has "not less than two hundred Representatives, nor more than one Representative for every fifty thousand persons." 1 Stat. 97. Plaintiff's challenge to the historical fact that Article the First was never ratified and is not part of the Constitution, Pl. Br. 24-29, therefore does not support his contention that the House must consist of a minimum of 6,163 Representatives.

C. Article The First Is Not Part Of The Constitution.

Although there is no need for the Court to sort out plaintiff's historical and factual arguments concerning the ratification of Article the First in order to affirm, we note that those arguments are likewise

entirely devoid of merit. Indeed, the arguments plainly fail as a historical matter. And in any event, plaintiff's proposed inquiry is a political question that is not properly addressed to the courts.

1. The question of whether a state legislature has validity ratified a constitutional amendment, and properly made it part of the Constitution, has long been held to be a question exclusively for the political branches to decide. Ever since the Founding, the method for a constitutional amendment to become part of the Constitution is for an Executive Branch official to acknowledge the amendment's ratification upon official notification by each state legislature that ratified the document. When the Bill of Rights was originally ratified by the States, for example, then-Secretary of State Thomas Jefferson acknowledged that fact by transmitting a letter to all state governors containing authenticated copies of the provisions of the Bill of Rights that the States had ratified. *See* 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1203 (1971). Congress formalized that practice in 1818, when it provided by statute that the Secretary of State shall publish and certify the valid ratification of a constitutional amendment upon receiving official notification from the States. Act of

Apr. 20, 1818, 3 Stat. 439. Today, the authority to certify the valid ratification of a constitutional amendment has been delegated by statute to the Archivist of the United States. 1 U.S.C. § 106b.

The Supreme Court held in *Leser* v. *Garnett*, 258 U.S. 130 (1922), that courts may not reexamine the validity of a State's ratification of a constitutional amendment. The petitioners in that case contended that the ratification of the Nineteenth Amendment, granting women suffrage, was invalid because two States—Connecticut and Vermont—had ratified the amendment in violation of their state rules of legislative procedure. *Id.* at 136-37. The Court rejected that contention because a State's official notification of ratification of a constitutional amendment "duly authenticated" was "conclusive," and once certified by the Executive, "is conclusive upon the courts." *Id.* at 137; *see also United States* v. *Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986); *Field* v. *Clark*, 143 U.S. 649, 669 (1892). "Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value." *United States* v. *Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in the judgment).

2. Here, plaintiff does not dispute that Article the First was never certified as a validly ratified constitutional amendment by any official, nor that fewer than three-fourths of the States have submitted authenticated notifications of their ratification. Instead, plaintiff contends that it was constitutionally sufficient that 10 of the first 14 States ratified Article the First. Pl. Br. 26-27. Article V of the Constitution, however, provides that a constitutional amendment must be ratified by "three fourths of the several States." Three-fourths of 14 is 10.5, meaning that, at the time, ratifications by 11 States was the constitutional minimum.

Plaintiff cites a letter that Thomas Jefferson wrote in August of 1791 in which, plaintiff contends, Jefferson suggested that ratifications by 10 out of 14 States would be constitutionally sufficient. Pl. Br. 26. Although plaintiff appears to be correct that Jefferson in that letter implied that ratifications by 10 States would suffice, *see* Letter from Thomas Jefferson to Christopher Gore (Aug. 8, 1791), *in* 22 *The Papers of Thomas Jefferson* 15 (Charles T. Cullen ed. 1986), plaintiff reads far too much into Jefferson's apparent implication. At the time Jefferson was writing, Vermont had become a State in March of that same year.

Pl. Br. 24. It is far more likely that Jefferson in the letter simply overlooked that there were now 14 States, meaning that 11 States (rather than the original 10 out of 13) would be required for ratification, than that he believed that 10 is greater than 10.5. Indeed, the fact that Jefferson's official notice of ratification that he promulgated in 1792 omitted Article the First—though by that point 10 out of 14 States had officially transmitted to the federal government notice that they had ratified the first article[2]—is conclusive proof that Jefferson did not believe that 10 out of 14 States was enough. *See* 2 Schwartz, *supra,* at 1203.

3. Plaintiff further suggests, based on a single undifferentiated citation to a number of documents he has attached to his appellate filings, that the Connecticut legislature validly ratified Article the First, but simply never notified the federal government of that fact. Pl.

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[2] *See* 2 Department of State, *Documentary History of the United States of America*, 1789-1870, at 326-27 (1894) (New Jersey); *id.* at 330-32 (Maryland); *id.* at 335-37 (North Carolina); *id.* at 340-42 (South Carolina); *id.* at 345-46 (New Hampshire); *id.* at 357-58 (New York); *id.* at 363-64 (Rhode Island); *id.* at 367-69 (Pennsylvania); *id.* at 373-74 (Vermont); *id.* at 383 (Virginia). Delaware declined to ratify Article the First. *Id.* at 347.

Br. 27. The basis for this contention, based on "Exhibit B" to plaintiff's appellate motion for a preliminary injunction, appears to be the fact that the two Houses of the Connecticut legislature ratified the amendment in different legislative sessions. *See* Exhibit B, at xxiv-xxvi. These facts have been known for some time and, indeed, were reported to the 75th Congress in an official congressional document authored by a Yale historian. *See* Thomas H. LeDuc, *Connecticut and the First Ten Amendments to the Federal Constitution*, S. Doc. No. 75-96, at 2-3 (1937); *see also* David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, at 108 & n.76 (1996) (noting that "over the course of three sessions" in Connecticut, "one house or the other approved most of the amendments but the other failed to concur"); Christopher Collier, *Liberty, Justice, and no Bill of Rights: Protecting Natural Rights in a Common-Law Commonwealth*, *in The Bill of Rights and the States* 121 (Patrick T. Conley & John P. Kaminski ed. 1992) (similar).

In October 1789, the lower house of the Connecticut legislature ratified all of the first twelve proposed constitutional amendments

(except for the second), but the upper house deferred consideration of the matter until the following legislative session. S. Doc. No. 75-96, at 2. When a newly constituted lower house again took up the matter in the May 1790 legislative session, the lower House this time only ratified the final 10 amendments, and rejected the first two, including Article the First. *Id.* at 3. The upper house refused to agree. *Id.* The position of the upper house was apparently that all 12 amendments should be ratified, or none at all, for later that same session the upper house passed a bill ratifying all 12 amendments. *Id.* The lower house, however, refused to assent to the upper house's proposal to ratify all 12 amendments and the matter was again deferred to the following legislative session. *Id.* In the following session, the lower house rejected all the amendments, and the matter was apparently not taken up again. *Id.* The result was that Connecticut ratified none of the first 12 amendments to the Constitution, apparently because its legislature was unable to resolve disagreements over the first two. *See id.* at 6 (noting that "each house of the Connecticut legislature voted for those 10 amendments but disagreed over the first 2").

Plaintiff is of the view that these actions by the Connecticut legislature were sufficient to ratify Article the First. *See* Exhibit B, at xxiii-xxv. That view seems entirely incorrect because the two houses of the Connecticut legislature never agreed to ratify those amendments in a single bill enacted in the same legislative session. More important, however, it is not for the courts to second-guess Connecticut's failure to transmit official notification of ratification to Secretary of State Thomas Jefferson, or Jefferson's decision not to certify Article the First as part of the Constitution. *See Leser*, 258 U.S. at 137.

4. Plaintiff also points out that Kentucky ratified Article the First but never transmitted official notification of that fact to the federal government. Pl. Br. 27. That is not a revelation, but a known historical fact. *See* Kyvig, *supra*, at 464 & n.9. At the time Kentucky ratified Article the First in 1792, however, only ten other States had ratified that Amendment, *see supra* p.22 n.2, bringing the total to 11 out of 15 States, one short of the required three-fourths minimum. And even apart from that fact, Kentucky's undisputed failure to transmit a certified, authenticated copy of that ratification to the federal government would preclude a court from ordering the Constitution

amended based on Kentucky's unreported ratification. *See Leser*, 258 U.S. at 137.[3]

II. Plaintiff Lacks Standing To Assert His Claims.

There is no need for this Court to proceed any further if it agrees that the district court correctly declined to exercise jurisdiction because plaintiff's constitutional claims are insubstantial. Indeed, because there is no "unyielding jurisdictional hierarchy," *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 578 (1999), courts may properly dismiss a claim for lack of statutory jurisdiction without assessing a plaintiff's Article III standing, *see Lance* v. *Coffman*, 549 U.S. 437, 439 & n.* (2007) (per curiam). The district court's judgment, however, could also be affirmed on the ground that plaintiff has not carried his burden of demonstrating standing to sue.

In order to have standing to seek the type of prospective injunctive relief plaintiff seeks here, plaintiff would have to

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[3] Although plaintiff's complaint claims that the current apportionment process unconstitutionally dilutes his vote, A44, plaintiff does not pursue this claim in his appellate brief, which is therefore waived and need not be addressed. *E.g.*, *United States* v. *Pendleton*, 636 F.3d 78, 83 n.2 (3d Cir. 2011).

demonstrate that the relief he seeks in this lawsuit would redress some concrete and particularized injury he is currently suffering as the result of the alleged constitutional defects in the apportionment statute. *See*, *e.g., Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Plaintiff inadequately explains how he is suffering a cognizable injury as the result of his claim that the House is unconstitutionally too small. Plaintiff alleges that he is "resident and qualified voter of the State of New Jersey," and 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)." Pl. Br. 10-11. It is unclear, however, that the proper remedy for plaintiff's constitutional claims—that 2 U.S.C. § 2a unconstitutionally delegates legislative power to the Executive and that the size of the House is unconstitutionally too small—would be to revert to the apportionment that prevailed following the 2000 census. Plaintiff seeks to increase the size of the House to some 6,163 members. Pl. Mot. for Prelim. Inj. and to Expedite Appeal at 3. But a larger House would not result in a gain of relative political power for New Jersey voters. It would result in

every State obtaining more House seats; the additional seats would be distributed among the several States proportionally according to population. Plaintiff does not explain how, as a New Jersey voter, he would be benefitted in any particularized way simply because every State would have more seats in Congress. *See Raines* v. *Byrd*, 521 U.S. 811, 821 (1997) (holding that individual members of Congress had no standing to challenge the Line Item Veto Act because they "do not claim that they have been deprived of something to which they *personally* are entitled" (emphasis in original)).

This is not a case like *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316 (1999). In that case, the Supreme Court held that voters had standing to challenge a method of apportioning the fixed number of 435 House seats among the States because the voters had presented evidence that, under the method of apportionment they contended was constitutionally required, their States would obtain additional House seats. *Id.* at 331-32. Here, however, the result of plaintiff prevailing would not be that New Jersey would gain a House seat that would have otherwise been awarded to another State (and thus that New Jersey would gain political power relative to other

States). It would be that *all* States would gain House seats. Unlike in *Department of Commerce*, then, plaintiff has not shown that, by prevailing in this suit, he would gain political power relative to voters in other States.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 in 14-point Century Schoolbook font. I further certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 5,394 words according to the count of Corel WordPerfect X5.

The text of the hard copy of this brief and the text of the "PDF" version of the brief filed electronically through ECF ("the E-brief") are identical. A virus check was performed on the E-brief, using Microsoft Forefront Endpoint Protection software, and no virus was detected.

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CERTIFICATE OF BAR MEMBERSHIP

Counsel for the United States are federal government attorneys and are not required to be members of the Bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, I caused the foregoing brief to be filed with the Court by CM/ECF and sent 10 copies of the brief to the Court via FedEx overnight delivery. I also certify that I sent two copies of this brief to plaintiff, who is proceeding *pro se*, by FedEx overnight delivery at the following address:

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