IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-1171

EUGENE M. LaVERGNE,
Appellant,

v.

JOHN BRYSON, SECRETARY OF COMMERCE, et al.,
Appellees.

On Appeal from a Final Order of the U.S. District Court
for the District of New Jersey

BRIEF OF APPELLEES JOHN A. BOEHNER AND KAREN L. HAAS, SPEAKER AND CLERK OF THE U.S. HOUSE OF REPRESENTATIVES

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Christine Davenport, Sr. Assistant Counsel
Kirsten W. Konar, Assistant Counsel
Todd B. Tatelman, Assistant Counsel
Mary Beth Walker, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)

Counsel for Appellees John A. Boehner and Karen L. Haas

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STATEMENT OF ISSUES

1. Did the District Court err in dismissing appellant Eugene M. LaVergne's claims against appellees John A. Boehner and Karen L. Haas, the Speaker and Clerk respectively of the U.S. House of Representatives (collectively, "House Defendants"), for lack of Article III standing? Answer: No.
2. Does the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, bar Mr. LaVergne's claims against the House Defendants? Answer: Yes.
3. Are Mr. LaVergne's claims against the House Defendants barred by the doctrine of sovereign immunity? Answer: Yes.
4. Did the District Court lack personal jurisdiction over the House Defendants? Answer: Yes.
5. Is Mr. LaVergne's request that the Speaker be enjoined to seat 13 Representatives at the beginning of the 113th Congress in January 2103 not ripe? Answer: Yes.
6. Is Mr. LaVergne's claim that "Article the First" actually was ratified a non-justiciable political question? Answer: Yes.
7. Does 2 U.S.C § 2a violate the separation of powers doctrine? Answer: No.
8. Does 2 U.S.C § 2a violate the "non-delegation" doctrine? Answer: No.
9. Is 2 U.S.C. § 2a constitutional even had "Article the First" been ratified? Answer: Yes.

STATEMENT OF THE CASE

In 2010, pursuant to authority delegated to it by Congress, the U.S. Census Bureau conducted the 2010 decennial census. *See* 13 U.S.C. §§ 1, *et seq*. Thereafter, the President (or his designees), pursuant to a different statute, prepared a report showing the apportionment population for each of the 50 States, and determined the decennial apportionment of the 435 seats in the House of Representatives among the 50 States, using the method known as "the method of equal proportions." 2 U.S.C. § 2a(a); *see also* Act of Aug. 8, 1911, Pub. L. No. 62-5, 37 Stat. 13, 14 (1911) (setting number of House seats at 435).[1]

On January 5, 2011, also pursuant to 2 U.S.C. § 2a(a), the President reported the new apportionment figures for each of the 50 States to the House and Senate. *See* H.R. Doc. No. 112-5 (2011). The Speaker of the House then transmitted that report to the Clerk of the House.[2] Within 15 days thereafter, pursuant to 2 U.S.C. §

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[1] The 1911 statute fixed the total number of Members at 433, but specifically allowed for one additional Representative each when Arizona and New Mexico were admitted to the Union (which they were in 1912), 37 Stat. 14, § 2 (1911), thereby increasing the number to 435. Subsequently, the number of Representatives was temporarily increased to 437 following the admission of Alaska and Hawaii in 1959, but was reduced back to 435 after the 1960 census. *See* Alaska Statehood Act, Pub. L. No. 85-508 § 9, 72 Stat. 345 (1959); Hawaii Statehood Act, Pub. L. No. 86-3 § 8, 73 Stat. 8 (1959).

[2] While the Speaker is not specifically named in the statute, the plain language of 2 U.S.C. § 2a requires that the President transmit the results of the

(*Continued . . .*)

2a(b), the Clerk provided to each State's executive a certificate showing the number of Representatives to which that State is entitled under the new decennial apportionment. And thereafter, the States began – and now mostly have completed – the process of redrawing intra-State congressional district lines to take account of population and apportionment changes. The new apportionment, and the redrawn intra-State congressional district lines, will apply for the first time in the 2012 general election which will take place on November 6, 2012, approximately six and one-half months from now.

On December 6, 2011 – long after the 2010 census had been completed; long after the President had reported to Congress, pursuant to 2 U.S.C. § 2a(a); long after the Clerk had sent apportionment certificates to the States, pursuant 2 U.S.C. § 2a(b); and long after the States had begun their redistricting processes – Mr. LaVergne elected to challenge the new decennial apportionment and, more specifically, the statute pursuant to which that apportionment of seats was determined (2 U.S.C. § 2a). *See* Verified Compl., *LaVergne v. Bryson, et al*., No. 3:11-cv-07117 (D.N.J. Dec. 6, 2011) (ECF No. 1), reproduced in App. Vol. II A10-A70 (Feb. 28, 2012) ("App. II") (ECF No. 003110823974). Mr. LaVergne, a resident of New Jersey which lost one House seat as a result of the 2010

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apportionment to "the Congress." The Speaker, as the highest ranking official in the House of Representatives, is the recipient of that communication.

apportionment (down from 13 to 12), sued three Executive Branch officials (the Secretary of the Department of Commerce, the Director of the Census Bureau, and the Archivist of the United States), the President and President *Pro Tempore* of the Senate, and the two House Defendants. His complaint asserts that 2 U.S.C. § 2a violates the separation of powers doctrine, *id*. ¶¶ 50-52; App. II at A40-A42; the non-delegation doctrine, *id*. ¶ 53; App. II at A42; and the principles of one-man, one-vote, and "equitable ratio." *Id*. ¶¶ 54-58; App. II at A43-A45.[3]

Mr. LaVergne's complaint also asserts that "Article the First" – a constitutional amendment proposed by James Madison in the First Congress, and submitted to the States in 1789 but never ratified (or at least never recognized as ratified)[4] – was actually ratified by the requisite number of States in 1792. *See id*.

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[3] Mr. LaVergne did not raise either the one-man, one-vote principle or the "equitable ratio" principle in the opening brief he filed with this Court. *See* Br. of Appellant (Feb. 28, 2012) (ECF No. 003110822198) ("Appellant's Br."). As a result, those claims have been waived – *see United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (same) – and we do not discuss them further.

[4] "Article the First" provided as follows:

> 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

(*Continued . . .*)

¶¶ 26-49, 59; App. II at A34-A40, A46. According to Mr. LaVergne's reading of "Article the First" – a reading that is in fact a misreading, *see infra* Section III.B.– "Article the First" would "ensur[e] that there would never be a House of Representatives where any one representative represented more than 50,000 people." *Id*. ¶ 31; App. II at A35-A36. Thus, if Mr. LaVergne were correct that "Article the First" actually was ratified and is, or should be deemed, a part of our Constitution, and if it means what he says it means, the size of the House of Representatives would expand radically from the current 435 Members to approximately 6,183 Members (given the total 2010 census figure of approximately 309,180,000). Needless to say, the consequences of that would be far-reaching indeed.

By way of relief, Mr. LaVergne modestly asked that the District Court, among other things:

- declare the most recent apportionment unconstitutional, *id.* p. 38, ¶¶ (B), (C); App. II at A47;

> 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 not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

1 Stat. 97 (1789).

- declare 2 U.S.C. § 2a unconstitutional, *id.* p. 38-39, ¶¶ (D), (E); App. II at A47-A48;
- order the Speaker and President *Pro Tempore* of the Senate to "forthwith immediately take measures to create and enact a [new] Apportionment Law relative to the 2010 Decennial Census," *id.* p. 40, ¶ (I); App. II at A49;
- order the Speaker to "continue to seat 13 Representatives from the State of New Jersey with full voting rights and other full and unrestricted rights of participation in the United States House of Representatives as of January 13, 2013," *id.* p. 40, ¶ (J); App. II at A49;
- declare that "the State of New Jersey shall continue to have 15 votes in the Electoral College until further order of the Court," *id.* p. 40, ¶ (K); App. II at A49; and
- declare that "Article the First" "has been ratified as a codicil amendment to the United States Constitution," *id.* p. 41, ¶ (L); App. II at A50.

In other words, Mr. LaVergne wants the federal judiciary to (i) rewrite 223 years of American constitutional history; (ii) usurp the legislative functions of the Article I branch of the federal government; (iii) effectively, although not explicitly compel

the President to sign legislation; and (iv) throw the country into an historically unprecedented state of political chaos, a mere six and one-half months out from the 2012 general election – among other things.

Ten days after Mr. LaVergne filed his complaint – and prior to any service of process on, or appearances or arguments by, any of the defendants – the District Court dismissed *sua sponte* all of Mr. LaVergne's claims for lack of Article III standing. *See* Mem. and Order of the Ct., *LaVergne v. Bryson, et al.*, 3:11-cv-07117 (D.N.J. Dec. 16, 2011) (ECF No. 3) ("Dist. Ct. Order"), reproduced in App. A3-A6 (Feb. 28, 2012) ("App. I") (ECF No. 3110822198). Mr. LaVergne then appealed the dismissal order to this Court. *See* Notice of Appeal, *LaVergne v. Bryson, et al.*, No. 3:11-cv-7117 (D.N.J. Jan. 17, 2012) (ECF No. 4); App. I at A3-A6.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The House Defendants are not aware of any related proceedings before this Court or any other court.

STANDARD OF APPELLATE REVIEW

The standard of review is *de novo*. *See, e.g.*, *Phillips v. Cnty of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008); *Omnipoint Commc'ns Enters., L.P. v. Newton Township*, 219 F.3d 240, 242 (3d Cir. 2000).

SUMMARY OF ARGUMENT

The District Court was correct in dismissing Mr. LaVergne's complaint.

First, as to the House Defendants, the District Court correctly concluded that Mr. LaVergne does not have Article III standing to challenge the apportionment statute because he failed two of the required three prongs of Article III standing: causation and redressability. In addition, Mr. LaVergne lacked standing to complain about "Article the First" because he has not been injured by the non-ratification of "Article the First."

Second, there exist five other jurisdictional flaws that precluded the District Court from considering Mr. LaVergne's claims.

- The House Defendants are absolutely immune from suit under the Speech or Debate Clause, U.S. Const. art. 1, § 6, cl. 1 because the actions of the House Defendants that are challenged here, and the relief sought against them, all relate to functions the Constitution specifically commits to Congress.
- Suit against the House Defendants is barred by the doctrine of sovereign immunity because Mr. LaVergne has not provided any evidence of such a waiver of sovereign immunity.
- The district court lacked personal jurisdiction over the House Defendants, because neither the New Jersey long-arm statute nor the

strictures of due process permit finding personal jurisdiction in New Jersey over the out-of-state House Defendants.

- Mr. LaVergne's request that the Speaker be enjoined to seat 13 Representatives at the beginning of the 113th Congress in January 2013 is not ripe because the House is not a continuing body and the Speaker of the 113th Congress will not be chosen until January 2013.
- Mr. LaVergne's claim regarding the ratification of "Article the First" is a non-justiciable political question.

Third, Mr. LaVergne's claims that the current apportionment and 2 U.S.C. § 2a are unconstitutional fail on the merits. The statute is not a violation of the separation of powers doctrine because the statute does not encroach or aggrandize Congress's powers at the expense of any other branch. Also, the statute does not violate the "non-delegation doctrine" because it does not delegate any discretion or "legislative power," and because it contains the required "intelligible principle." Finally, even if this Court were to judicially ratify "Article the First," Congress would retain plenary discretion over both the ultimate number of Representatives and the apportionment method currently used. As a result, even under a ratified "Article the First," 2 U.S.C. § 2a would be constitutional as would the current apportionment.

ARGUMENT

I. The District Court Correctly Dismissed Mr. LaVergne's Complaint, as Against the House Defendants, for Lack of Article III Standing.

Article III, § 2 of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." *See Allen v. Wright*, 468 U.S. 737, 750 (1984). To be justiciable, cases and controversies must be "definite and concrete, touching the legal relations of parties having adverse legal interests . . . admitting of specific relief through a decree of a conclusive character." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted). As a result, Article III standing is a jurisdictional prerequisite to suit in federal court. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982).

"The irreducible constitutional minimum of Article III standing consists of three elements[:] . . . [1] a concrete, particularized injury-in-fact, which must be actual or imminent, [2] . . . [which] must be fairly traceable to the challenged action . . . [3] that a favorable decision likely would redress . . . ." *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137-38 (3d Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (quotation marks omitted).

Here, Mr. LaVergne cannot demonstrate injury-in-fact with respect to his claim that "Article the First" has been ratified, and he cannot demonstrate

causation or redressability with respect of his claims that the current apportionment and 2 U.S.C. § 2a are unconstitutional.

A. MR. LAVERGNE HAS NOT BEEN INJURED BY THE NON-RATIFICATION OF "ARTICLE THE FIRST."

Mr. LaVergne, relying exclusively on *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999) ("*Sampling Case*"), asserts that he had Article III standing by virtue of the fact that New Jersey lost a congressional seat as a result of the most recent apportionment of congressional seats. *See* Appellant's Br. at 11-12. The *Sampling Case* stands, at most, for the proposition that loss of a congressional seat satisfies the "injury in fact" element with respect to apportionment-related claims, *see* 525 U.S. at 331-32, and we are prepared to assume, for purposes of this brief, that Mr. LaVergne has established injury in fact with respect to his claims that the decennial apportionment and 2 U.S.C. § 2a are unconstitutional.

However, Mr. LaVergne's claim that "Article the First" has been ratified is different. That is not an apportionment-related claim which, at bottom, is a claim that one State has experienced a diminution of political power in the House of Representatives relative to one or more other States. Instead, Mr. LaVergne's "Article the First" claim asserts that the total size of the House of Representatives is, or should be, 6,183 (give or take), rather than the current 435. And Mr. LaVergne has not suggested, because he cannot, any respect in which he

personally and concretely has been, or will be, injured by the fact that the House consists of 435 Members rather than 6,183 (give or take).

B. MR. LAVERGNE HAS NOT DEMONSTRATED ANY CAUSAL CONNECTION BETWEEN HIS ASSERTED INJURY AND THE HOUSE DEFENDANTS.

The causation prong of the standing analysis – which Mr. LaVergne does not address, much less analyze – requires him to demonstrate that the harm suffered is "'fairly traceable to the challenged action of the defendant.'" *Toll Bros.*, 555 F.3d at 137-38 (quoting *Lujan*, 504 U.S. at 560). Here, by Mr. LaVergne's own admission, the minimal role the House Defendants play in the apportionment process is purely "ministerial." Appellant's Br. at 15-16. The Speaker merely lays before the House the message from the President, while the Clerk simply provides certification letters to the States. *See* 2 U.S.C. § 2a(b). Neither of the House Defendants has any authority or discretion to alter or amend the apportionment, which is calculated according to a statutorily-established mathematical formula know as the "method of equal proportions." *Id*. § 2a(a).[5] Accordingly, Mr. LaVergne's sole injury – New Jersey's loss of a Representative – was not caused

[5] In *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 446 (1991), the Supreme Court rejected an Article I, § 2 challenge to the "method of equal proportions." The Court said that "a good faith choice of a method of apportionment of Representatives among the several States 'according to their respective numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.* at 464.

by the House Defendants in any sense of that word. Rather, New Jersey's loss of a seat was occasioned by changes in New Jersey's population that are reflected in the 2010 census.

The *Sampling Case* is of no assistance to Mr. LaVergne, contrary to his suggestion otherwise. *See* Appellant's Br. at 11-12. In that case, plaintiffs sued the Census Bureau and its parent agency, the Department of Commerce – but not any Legislative Branch Member or employee[6] – to challenge the Bureau's intended use of a statistical tool known as "sampling" to conduct the 2000 census. *See* 525 U.S. at 320. According to the Court, "[t]here is undoubtedly a 'traceable' connection between the use of sampling [by the Census Bureau] in the decennial census and Indiana's expected loss of a Representative." *Id.* at 332.

Mr. LaVergne, however, is not challenging the methodology by which the Census Bureau conducted the 2010 decennial census. Rather, he challenges the constitutionality of 2 U.S.C. § 2a, which contains the mathematical formula and procedures by which the apportionment is effectuated, once the census count is complete. *See* Compl. ¶¶ 52-53; App. II at A41-42 Appellant's Br. at 13. As the House Defendants played no role in effectuating the actual apportionment, pursuant to the statutorily-prescribed "method of equal proportions," they have

[6] Indeed, the House of Representatives was one of the *plaintiffs* in that case.

done nothing that reasonably can be said to have "caused" New Jersey's loss of a Representative.

C. MR. LAVERGNE'S INJURY IS NOT REDRESSABLE AS AGAINST THE HOUSE DEFENDANTS.

The redressability prong of the standing analysis – which Mr. LaVergne also does not address or analyze – requires that he demonstrate that "the injury will be redressed by a favorable decision." *Toll Bros., Inc.*, 555 F.3d at 142 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Because he seeks no relief at all from the Clerk, it follows that he has not satisfied the redressability prong of the standing analysis with respect to the Clerk.

Mr. LaVergne also cannot satisfy this prong of the standing analysis as against the Speaker. As noted above, the only relief Mr. LaVergne seeks against the Speaker are injunctions that the Speaker (i) "forthwith immediately take measures to create and enact a [new] Apportionment Law relative to the 2010 Decennial Census," Compl. p. 40, ¶ (I); App. II at A49; and (ii) "continue to seat 13 Representatives from the State of New Jersey with full voting rights and other full and unrestricted rights of participation in the United States House of Representatives as of January 13, 2013," *id.* p. 40, ¶ (J); App. II at A49.

The federal judiciary, however, plainly lacks the authority to direct the Speaker to propose or enact legislation, or to dictate to the Speaker whom (or how many) to seat in the House of Representatives. As explained in detail below, the

relief Mr. LaVergne seeks as against the Speaker is barred absolutely by the Speech or Debate Clause. *See infra* Section II.A.; *see also Franklin v. Massachusetts,* 505 U.S. 788, 827 (1992) (Scalia, J., concurring); *Orta Rivera v. Congress*, 338 F. Supp. 2d 272, 279 (D.P.R. 2004) (Court "has no authority to order Congress to take action on matters specifically delegated to Congress by the Constitution"); *Trimble v. Johnston,* 173 F. Supp. 651, 653 (D.D.C. 1959) ("[T]he Federal courts may not issue an injunction or a writ of mandamus against the Congress."). If all the relief Mr. LaVergne seeks against the Speaker is constitutionally unavailable – as it is – then it follows that he cannot establish redressability as against the Speaker.

Moreover, even if the Court could order the Speaker to propose and enact legislation (which it cannot), such an order would not result in relief for Mr. LaVergne because the Speaker by himself quite obviously cannot enact legislation – that requires a majority vote in the House, passage in the Senate, and a signature by the President. *See* U.S. Const. art. I, § 7; *I.N.S. v. Chadha*, 462 U.S. 919, 944-51 (1983). And the whole House, the whole Senate, and the President – all of whom are needed to enact legislation – are not parties to this action. Standing self-evidently does not exist where redress "depend[s] on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict." *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS*

Inc., 465 F.3d 1123, 1125 (9th Cir. 2006); *see also Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 694-95 (9th Cir. 2010) ("Neither the President nor any high-ranking member of the executive branch is a party to this suit. Accordingly, any judgment entered in this case would not bind executive officials.").

Similarly, even if the Court could compel the Speaker to seat 13 Members from New Jersey next January (which it cannot), that would not redress Mr. LaVergne's asserted injury. This is so because the Court also would need to compel the State of New Jersey to *elect* 13 Members to the House in November, and New Jersey – also "an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict," *Glanton*, 465 F.3d at 1125 – also is not a party to this action.[7]

For all these reasons, District Court properly dismissed Mr. LaVergne's complaint for lack of Article III standing as against the House Defendants.

II. This Court May, and Should, Affirm the District Court on Alternative Jurisdictional Grounds That Warrant Dismissal of Mr. LaVergne's Claims as Against the House Defendants.

Although the District Court dismissed Mr. LaVergne's complaint solely on the ground that he lacked Article III standing, this Court is free to consider

[7] We note that Mr. LaVergne's request that the Court force the Speaker to seat 13 Members from New Jersey in the next Congress is wholly inconsistent with his request that the Court declare unconstitutional 2 U.S.C. § 2a because that statute was used to apportion Representatives, not only in 2010, *but also in 2000*, when New Jersey was apportioned 13 Representatives.

alternative grounds that would warrant dismissal of the complaint. *See, e.g.*, *Dunleavy v. New Jersey*, 251 F. App'x 80, 83 n.2 (3d Cir. 2007) ("Although the District Court considered different grounds for dismissal . . . , we affirm, as we may, on an alternative basis supported by the record."); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988) ("An appellate court may affirm a correct decision by a lower court on grounds different than those used by the lower court in reaching its decision."); *Doctors, Inc. v. Blue Cross of Greater Phila.*, 490 F.2d 48, 54 n.13 (3d Cir. 1973) (Third Circuit "free to consider . . . [additional] legal arguments as an alternative basis for affirming the dismissal" made by a district court).

Here, there are five alternative grounds that warrant affirmance of the District Court's dismissal order as against the House defendants: Speech or Debate Clause immunity; sovereign immunity; lack of personal jurisdiction; the ripeness doctrine (as to Mr. LaVergne's request that the Court order the Speaker to seat 13 Representatives from the State of New Jersey at the beginning of the next Congress); and the political question doctrine (as to Mr. LaVergne's "Article the First" claim).

A. MR. LAVERGNE'S CLAIMS AS AGAINST THE HOUSE DEFENDANTS ARE BARRED ABSOLUTELY BY THE SPEECH OR DEBATE CLAUSE.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any

other Place." U.S. Const. art. I, § 6, cl. 1. This Clause provides several broad protections to Members of Congress (and their aides), one of which is pertinent here: an immunity from suit for all actions "within the 'legislative sphere,' . . . ." *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (quoting *Gravel v. United States*, 408 U.S. 606, 624 (1972)). As we now explain, the Clause applies here to bar every aspect of Mr. LaVergene's claims against both House Defendants.

1. History and Purpose of the Clause.

The Speech or Debate Clause is rooted in the epic struggle for parliamentary independence in 16th- and 17th-century England. *See, e.g.*, *United States v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951). As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders and reflected in the Speech or Debate Clause of our Constitution. *Id*. at 372.

> The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.
> . . . .
> [T]he "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . .

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975) (quoting *Gravel*, 408 U.S. at 617). "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately

established by the Founders." *Johnson*, 383 U.S. at 178; *see also United States v. Helstoski*, 442 U.S. 477, 491 (1979); *Youngblood v. DeWeese*, 352 F.2d 836, 839 (3d Cir. 2003); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980).

Because "the guarantees of th[e] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court has, "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; *see also McMillan*, 412 U.S. at 311; *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

2. Scope of the Clause.

The protections afforded to Members by the Speech or Debate Clause apply to all activities "within the 'sphere of legitimate legislative activity,'" *Doe v. McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which includes all activities that are:

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). Importantly, the protections of the Clause apply "not only to [] Member[s], but also to [their] aides

insofar as the conduct of the latter would be a protected legislative act if performed by the Member[s] [themselves]." *Gravel*, 408 U.S. at 618; *see also Eastland*, 421 U.S. at 507.[8]

The courts have broadly construed the concept of "legislative activity" – as in the "processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation" – to include much more than words spoken in debate. The "cases have plainly not taken a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and *the act of voting* are equally covered." *Gravel*, 408 U.S. at 617, 625 (emphasis added). "'The legislative process at the least includes delivering an opinion, uttering a speech, or haranguing in debate; *proposing legislation; voting on legislation*; making, publishing, presenting, and using

[8] The Courts repeatedly have held that officers of the House and Senate – including the House Clerk – are protected aides for purposes of the Speech or Debate Clause when they engage in legislative or other activities that would be protected if engaged in by Members. *See, e.g.*, *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 931 (D.C. Cir. 1986) (Clause applies to House Clerk), *overruled on other grounds by Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350-51 (D.C. Cir. 1975) (Clause applies to House and Senate Sergeants at Arms); *Howard v. Office of the Chief Administrative Officer*, 793 F. Supp. 2d 294, 303-04 (D.D.C. 2011) (Clause applies to Chief Administrative Officer of House), *appeal pending*; *CNN v. Anderson*, 723 F. Supp. 835, 841 (D.D.C. 1989) (Clause applies to House Clerk); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981) (same).

legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing material at Committee hearings.'" *Jewish War Veterans of the United States of America, Inc. v. Gates*, 506 F. Supp. 2d 30, 53 (D.D.C. 2007) (quoting *Field*s, 459 F.3d at 10-11) (emphasis added).

In addition to such quintessential "legislative activities," however, the Clause also protects, as noted above, all activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . with respect to . . . *other matters which the Constitution places within the jurisdiction of either House*." *Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625) (emphasis added). The courts have rightly held that these "other constitutional matters," to which the protections of the Speech or Debate Clause also apply, include Discipline (U.S. Const. art. I, § 5, cl. 2);[9] Impeachment (U.S. Const. art. I, § 2, cl. 5);[10] Impeachment Trials (U.S. Const.

[9] *See, e.g.*, *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1204-05 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *Ray v. Proxmire*, 581 F.2d 998, 1000 (D.C. Cir. 1978); Order *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (Addendum 1 at Add. 002) (reversing lower court order requiring House committee to produce information in response to subpoena notwithstanding that such information was protected by the Speech or Debate Clause); *FEC v. Wright*, 777 F. Supp. 525, 530 (N.D. Tex. 1991); *United States v. Eilberg*, 465 F. Supp. 1080, 1083 (E.D. Pa. 1979).

[10] *See, e.g.*, *In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1446 (11th Cir. 1987).

art. I, § 3, cl. 6);[11] Advice and Consent – Supreme Court Appointments (U.S. Const. art. II, § 2, cl. 2);[12] Advice and Consent – Treaty Ratification (U.S. Const. art. II, § 2, cl. 2);[13] and Rulemaking (U.S. Const. art. 1, § 5, cl. 2).[14]

These "other matters which the Constitution places within the jurisdiction of either House" also include two other matters that are particularly pertinent here. *Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). First, the Constitution vests in the Congress the overall responsibility for the decennial enumeration and apportionment. *See* U.S. Const. art. I, § 2, cl. 3; amend XIV, §§ 2, 5.

Second, the House has a constitutional obligation to assemble and organize itself at the beginning of each Congress. *See* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."); U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall choose their Speaker and other Officers."); U.S. Const. art. I, § 5, cl. 1 ("Each House shall

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[11] *See, e.g.*, *Hastings v. U.S. Senate, Impeachment Trial Comm.*, 716 F. Supp. 38, 42 (D.D.C. 1989), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989).

[12] *See, e.g.*, Report and Recommendation of U.S. Mag., *Lee v. Biden*, No. 88-cv-2090 (C.D. Cal. 1988) (Addendum 2 at Add. 008-009).

[13] *See, e.g.*, *Smith v. Eagleton*, 455 F. Supp. 403, 405 (W.D. Mo. 1978).

[14] *See, e.g.*, *Consumer's Union of U.S., Inc.*, 515 F.2d at 1347-50; *CNN*, 723 F. Supp. at 839-42.

be the Judge of the Elections, Returns and Qualifications of its own Members."); U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

The Speaker plays a vital role in this constitutionally mandated process. After the Clerk receives the credentials of the Representatives-elect; prepares and calls the official roll on the first day of the session; and records the presence of a quorum, she receives nominations for the new Speaker, conducts the vote, tallies the results and declares the winner.[15] Thereafter, the new Speaker administers the oath of office to the other Representatives-elect. *See also* 2 U.S.C. § 25 (providing that the Speaker administers the oath of office). It is only at this point that the Representatives-elect became Members of the House – *see* U.S. Const. art. VI, cl. 3; 1 *Deschler's Precedents of the U.S. House of Representatives*, H. Doc. 94-661, Ch. 2, § 5, at 115 (1977) – which then enables the House to adopt rules and proceed to conduct the legislative and other business of the House.

3. The Protections of the Clause.

The Speech or Debate Clause provides three broad protections to those to whom it applies, only one of which is relevant here: an immunity from suit for all

[15] *See* Rule II.2(a), Rules of the House of Representatives (112th Cong.), *available at* http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf (describing Clerk's duties at the commencement of the first session of each Congress).

actions within the "legislative sphere," *McMillan* 412 U.S. 312-13, which sphere, as noted above, encompasses both quintessentially legislative activities and "other matters which the Constitution places within the jurisdiction of either House." *Id.* at 313.[16]

This immunity from suit extends to all civil actions, "whether for an injunction or damages." *Eastland*, 421 U.S. at 503; *see also Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 630 (1st Cir. 1995) (legislative immunity protects legislators "'from suits for either prospective relief or damages'") (quoting *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731 (1980)). Similarly, the Speech or Debate Clause protects against suits for declaratory relief. *See, e.g.*, *Eastland*, 421 U.S. at 496-97, 512 (directing district court to dismiss, as barred by Speech or Debate Clause, complaint seeking injunctive and declaratory relief); *Consumers Union*, 446 U.S. at 732 & n.10 (applying Speech or Debate principles to actions seeking declaratory or injunctive relief).

[16] The Clause also provides an evidentiary non-use protection which bars prosecutors in a criminal case – and parties to a civil suit – against a Member from using "information as to a legislative act" to advance their case, *Helstoski*, 442 U.S. at 490; *Johnson*, 383 U.S. at 173, and a non-disclosure privilege that protects Members from having privileged information seized from them, and from being forced to produce privileged records or testify as to privileged matters. *See, e.g.*, *Gravel*, 408 U.S. at 615-16; *Helstoski*, 442 U.S. at 484-86; *United States v. Rayburn House Office Bldg*, 497 F.3d 654, 660 (D.C. Cir. 2007); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420-21 (D.C. Cir. 1995); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988).

Speech or Debate Clause immunity serves not merely as "a defense on the merits[,] but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969) (citing *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam)). Thus, "once it is determined that Members are acting within the 'legitimate legislative sphere[,]' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503; *see also id*. at 507, 509-10, & n.16; *Gravel*, 408 U.S. at 624 n.14.

4. Application of the Clause to the House Defendants Here.

The "factual allegations" in Mr. LaVergne's complaint that concern the House Defendants are that the Speaker received the President's apportionment report and transmitted it to the Clerk, Compl. ¶ 23(H), (J); App. II at A25, and that Clerk then sent the statutorily-mandated apportionment certificates to the executives of each State. *Id*. ¶ 23(J); App. II at A26. Notwithstanding the meagerness of these allegations, the activities in which Mr. LaVergne says the House Defendants engaged plainly were part and parcel of the apportionment function that the Constitution assigns to the Congress. *See supra* Section II.A.2. And because Mr. LaVergne's action against the House Defendants – at least to the extent he challenges the constitutionality of the apportionment and 2 U.S.C. § 2a – is directly predicated on their involvement in carrying out this constitutional function, they are immune from suit.

The "relief" Mr. LaVergne seeks from the Speaker – as noted above, he seeks no relief from the Clerk – also is barred by the Speech or Debate Clause. The order Mr. LaVergne seeks from the Court directing the Speaker to "take measures to create and enact a[] [new] Apportionment Law relative to the 2010 Decennial Census," Compl. p. 40, ¶ (I); App. II at A49, clearly relates to legislative activity in its simplest and purest form. *See supra* at II.A.3.

Similarly, the order Mr. LaVergne seeks from the Court directing the Speaker to "continue to seat 13 Representatives from the State of New Jersey with full voting rights and other full and unrestricted rights of participation in the business of the United States House of Representatives as of January 13, 2013," Compl. p. 40, ¶ (J); App. II at A49, plainly concerns the House's constitutional authority to assemble and organize itself and, in particular, to its constitutional authority "be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1; see also *supra* Section II.A.2.

Accordingly, Mr. LaVergne's claims for relief as against the House Defendants clearly are barred by the Speech or Debate Clause.

B. MR. LAVERGNE'S SUIT AGAINST THE HOUSE DEFENDANTS IS BARRED BY SOVEREIGN IMMUNITY.

Mr. LaVergne's suit against the House Defendants also is barred by the doctrine of sovereign immunity. "The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any

court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). This immunity extends to Members of Congress and Legislative Branch officials acting in their official capacities. *See, e.g.*, *Rockefeller v. Bingaman*, 234 F. App'x 852, 855-56 (10th Cir. 2007) (sovereign immunity applies to Legislative Branch as well as legislative branch officials in their official capacities); *Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (same); *Travelers Ins. Co. v. SCM Corp.*, 600 F. Supp. 493, 497 (D.D.C. 1984) ("[A] claim against a federal employee in his or her 'official capacity' is in effect a claim against the government. The sovereign immunity doctrine cannot be evaded by changing the label on the claims or the parties.").

The House Defendants plainly have been sued in their official capacities, *see* Compl. ¶¶ 6-7; App. I at A12-A13, and accordingly, they enjoy the protections of Congress's sovereign immunity. Sovereign immunity is a bar to the exercise of jurisdiction by this Court absent an "unequivocally expressed" waiver of that immunity. *United States v. King*, 395 U.S. 1, 4 (1969), superseded by statute as recognized in *Claude F. Atkins Enters., Inc. v. United States*, 15 Cl. Ct. 644, 647 n.4 (Cl. Ct. 1988); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980). Here, Mr. LaVergne has not alleged the existence of any relevant waiver of sovereign immunity, and we are not aware of any.

C. THE DISTRICT COURT LACKED PERSONAL JURISDICTION OVER THE HOUSE DEFENDANTS.

A federal court may exercise *in personam* jurisdiction over a defendant only if there is "a constitutionally sufficient relationship between the defendant and the forum," as well as "authorization for service of [a] summons on the defendant." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *see also ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir. 1997), *cert. denied sub nom.*, *Centricut, LLC v. ESAB Group, Inc.*, 523 U.S. 1048 (1998); *Apollo Techs. Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1188 (D.N.J. 1992); *Electro–Catheter v. Surgical Spec. Instr. Co.*, 587 F. Supp. 1446, 1449 (D.N.J. 1984).

Rule 4(e) of the Federal Rules of Civil Procedure governs a District Court's authority to serve process upon, and thereby exercise personal jurisdiction over, out-of-state defendants such as the House Defendants. "Under Federal Rule of Civil Procedure 4(e), a federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 155 (3d Cir. 2010).

In this Circuit, the existence of personal jurisdiction over a nonresident defendant turns on two inquiries: (1) whether the long-arm statute of the state in which the suit was brought confers jurisdiction over the nonresident defendant; and

(2) whether the exercise by that state's courts of personal jurisdiction over the defendant comports with the strictures of due process. *See Metcalfe v. Renaissance Marine, Inc.,* 566 F.3d 324, 330 (3d Cir. 2009). Because Mr. LaVergne filed his complaint in the District Court for the District of New Jersey, the "inquiry is collapsed into a single step because the New Jersey long-arm statute permits the exercise of personal jurisdiction to the fullest limits of due process." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).

1. The District Court Lacked General Personal Jurisdiction Over the House Defendants.

The District Court could not exercise general personal jurisdiction over the House Defendants unless they, "maintain systematic and continuous contacts with the forum state." *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 & n. 8 (1984)); *see also IMO Indus., Inc.*, 155 F.3d at 259 (plaintiff must show sufficient "minimum contacts" with the forum) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). And Mr. LaVergne did not – because he could not – allege that either House Defendant resides, performs work, or maintains other continuous contact with New Jersey.

The Speaker of the House is an elected Representative from the State of Ohio. He resides in Ohio and Washington, D.C.; works in an office in the U.S. Capitol in Washington, D.C.; and maintains two district offices in Ohio. The Clerk

of the House resides in Maryland and works in an office in the U.S. Capitol in Washington, D.C. Neither House Defendant resides in, or has systematic and continuous contacts with, the State of New Jersey. *See generally Eaton Corp. v. Maslym Holding Co.*, 929 F. Supp. 792, 796 (D.N.J. 1996) (where only contacts were occasional site visits, audits, and payments made in forum state, no systematic and continuous contacts existed for purposes of general jurisdiction); *Helicopteros*, 466 U.S. at 417–18 (business activities in forum state, "even if occurring at regular intervals, are not enough" to confer general jurisdiction over out-of-state defendant).

Accordingly, the District Court lacked general personal jurisdiction over both House Defendants.

2. The District Court Lacked Specific Personal Jurisdiction Over the House Defendants.

In this Circuit, there are two tests to determine whether due process permits the exercise of specific personal jurisdiction over a nonresident defendant: the "traditional" test, and the "effects" test. *See Marten*, 499 F.3d at 296-97; *Penn. Mut. Life Ins. Co. v. BNC Nat'l. Bank*, No. 10-00625, 2010 WL 3489386, at *2 (E.D. Pa. Sept. 2, 2010). The effects test, as laid out by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 788-90 (1984), relates to the commission of an *intentional tort* by a nonresident defendant, which has some effect upon a plaintiff within the forum state. *See Vist Fin. Corp. v. Tartaglia*, No. 08-4116, 2010 WL

2776832, at *5 (D.N.J. July 14, 2010) (citing *IMO Indus., Inc.*, 155 F.3d at 261). Because there is no allegation here of an intentional tort, this Court need only consider the "traditional" test.

Under the "traditional" test, a district court may only exercise jurisdiction over one who has "minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The traditional test has three prongs:

> First, the defendant must have purposefully directed [its] activities at the forum. Second, the litigation must arise out of or relate to at least one of those activities. And third, if the first two requirements have been met, a court may consider whether the exercise of jurisdiction otherwise comport[s] with fair play and substantial justice.

D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 102 (3d Cir. 2009) (internal citations and quotation marks omitted); *see also Burger King Corp.*, 471 U.S. at 472.

The first prong of this analysis requires the Court to determine whether the House Defendants deliberately directed their actions toward residents of the forum state, such that they purposefully availed themselves of the privilege of conducting activities within the forum state, which "deliberately target[] the forum state."

Piano Wellness, LLC v. Williams, No. 11-1601, 2011 WL 6722520, at *5 (D.N.J. Dec. 21, 2011). Plainly they did not.

The Speaker's actions pursuant to 2 U.S.C. § 2a – transmission of the President's report to the Clerk – self-evidently entailed *no contact* with the forum state. While the Clerk caused an apportionment certificate to be delivered to the governor of New Jersey, pursuant to 2 U.S.C. § 2a(b), such a ministerial transmission of information or documents to the forum state, without more, does not constitute purposeful availment of the forum. *See Michael Williams Consulting LLC v. Wyckoff Heights Med. Ctr.*, slip op., No. 09-4328, 2010 WL 2674425, at *4 (D.N.J. June 30, 2010) ("The Third Circuit has established that 'telephone communications or mail sent by a defendant "[do] not trigger personal jurisdiction if they do not show purposeful availment."') (quoting *Machulsky v. Hall*, 210 F. Supp. 2d 531, 539 (D.N.J. 2002), *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999), and *Mellon Bank (E.) PSFS, N.A. v. DiVeronica Bros., Inc.*, 983 F.2d 551, 556 (3d Cir. 1993)).

The second prong of the analysis is whether this litigation "is related to or arises out of activities by the defendant that took place within the forum state." *D'Elia v. Grand Caribbean Co., Ltd.*, No. 09–1707, 2011 WL 6153704, at *3 (D.N.J. Dec. 12, 2011). With respect to the House Defendants, the answer plainly is no since they did not engage in any activities in New Jersey. Moreover, the

Clerk's reporting of apportionment figures to the State of New Jersey is not what triggered this litigation; rather, it was the 2010 census and the resulting apportionment that gave rise to Mr. LaVergne's claims. Thus, because this litigation does not arise out of the House Defendants' – non-existent – contacts with New Jersey, the second prong of the specific personal jurisdiction analysis also is not satisfied.

Finally, the third prong of the specific jurisdiction analysis – that the exercise of such jurisdiction must comport with notions of fair play and substantial justice, *Piano Wellness*, 2011 WL 6722520, at *3 (citing *Burger King Corp.*, 471 U.S. at 476) – applies only if the first two prongs have been successfully established. *See id.* (only "[o]nce the Court determines that the defendant has minimum contacts with the forum state" does it consider the due process prong). Because the first two prongs plainly have not been satisfied here, this Court need not reach the question of fair play and substantial justice.

D. MR. LAVERGNE'S REQUEST FOR AN ORDER DIRECTING THE SPEAKER TO SEAT 13 REPRESENTATIVES FROM THE STATE OF NEW JERSEY IN THE NEXT CONGRESS IS NOT RIPE.

As noted above, one form of relief Mr. LaVergne seeks as to the Speaker is an order enjoining the Speaker to "seat 13 Representatives from the State of New Jersey with full voting rights and other full and unrestricted rights of participation in the United States House of Representatives as of January 13, 2013." Compl. p.

40, ¶ (J); App. II at A49. This particular claim for relief is not ripe because Mr. Boehner is the Speaker of the House only for the current Congress, the 112th, and that Congress ends at noon on January 3, 2013. *See* U.S. Const. amend. XX § 1. The 113th Congress will commence at noon on January 3, 2013, *id*., and only then will the Speaker of the House for the 113th Congress be elected. *See supra* pp. 22-23.[17]

For a case to be considered ripe there must be a "real, substantial controversy between parties" involving a "dispute definite and concrete." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (citation omitted). A ripeness determination turns on whether the facts alleged show that there is a substantial controversy, between parties having adverse legal interests, "of sufficient immediacy and reality" to justify judicial resolution. *See Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 434 (3d Cir. 2003) (citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Since the House – unlike Executive Branch agencies – is not a continuing body, *see Gojack v. United States*, 384 U.S. 702, 706 n. 4 (1966) ("[n]either the House of Representatives nor its committees are continuing bodies"); *see also Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d

[17] Mr. Boehner, of course, may be reelected as Speaker of the 113th Congress, but he is not now the Speaker of the 113th Congress.

53, 97 (D.D.C. 2008) (same), there is not now a Speaker of the 113th Congress against whom the injunction Mr. LaVergne seeks could run. Accordingly, his request that "the Speaker" be ordered to "seat 13 Representatives from the State of New Jersey . . . as of January 13, 2013" is not ripe as there is no controversy of sufficient intimacy and reality between Mr. LaVergne and the as yet unelected "Speaker" of the non-existent 113th Congress**.** *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations omitted).

E. MR. LAVERGNE'S CLAIMS SPECIFICALLY REGARDING RATIFICATION OF "ARTICLE THE FIRST" RAISE A NON-JUSTICIABLE POLITICAL QUESTION.

Finally, Mr. LaVergne's claim that he is entitled to judicial ratification of a constitutional amendment first proposed in 1789 and never deemed ratified in the succeeding 223 years of our history, is a non-justiciable political question. *See* Compl. ¶ 59; App. II at A46; Appellant's Br. 24-29. The Supreme Court explained in *Baker v. Carr*, 369 U.S. 186 (1962), that the political question doctrine is "essentially a function of the separation of powers," *id.* at 217, as it is derived from the "relationship between the judiciary and the coordinate branches of the Federal Government," *id.* at 210. The Court in *Baker* identified six "formulations" that

signal the presence of a question that the Constitution commits to the political branches:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217; *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (suggesting that "political question" inquiry may be limited to first two *Baker* formulations). While *Baker* requires that only "one of these formulations [be] inextricable from the case at bar," 369 U.S. at 217, in order for the political question doctrine to apply, here, there are at least two.

First, the question of whether an amendment to the Constitution properly has been ratified is a question for which there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department," *id*. Indeed, the Supreme Court has held that "the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments . . . ." *Coleman v. Miller*, 307 U.S. 433, 450 (1939). In addition, the

Supreme Court has held that the federal courts have no jurisdiction to reexamine the validity of a State's ratification of a constitutional amendment. *See Lesser v. Garnett*, 258 U.S. 130, 136-37 (1922) ("official notice to the Secretary, duly authenticated, that [Tennessee and West Virginia had adopted resolutions of ratification] was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.") (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669-73 (1892)); *see also United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986) (treating as conclusive the Secretary of State's certification that the Nineteenth Amendment had been properly ratified).

Second, given the timing of this litigation – the complaint was filed nearly a year after the Clerk notified the States of the results of the apportionment, and well after the vast majority of States completed their redistrictings – a judicial ruling in Mr. LaVergne's favor would require a new apportionment which in turn would require new congressional districts in all states with multiple Members. Such a ruling almost certainly would render the November 2012 general election impossible to complete as scheduled. Accordingly, there is "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217.

For these reasons, Mr. LaVergne's claim that "Article the First" was actually ratified more than 200 years ago – and his request that the Court so declare – raises a political question which this Court should decline to address.

III. Mr. LaVergne's Claims Regarding the Constitutionality of 2 U.S.C. § 2a Are Substantively Meritless.

Even if this Court could get past the multitude of jurisdictional and other problems that plague this case, articulated above, and even if the Court chose to reach the merits of Mr. LaVergne's claims, those claims in fact have no merit.

A. 2 U.S.C. § 2a DOES NOT VIOLATE THE "SEPARATION OF POWERS DOCTRINE" OR THE "NON-DELEGATION DOCTRINE."

Mr. LaVergne's separation of powers and non-delegation arguments both are premised on the notion that Article I, § 2 of the Constitution mandates that Congress adopt a new apportionment law after every decennial census before an apportionment can take place. Compl. ¶ 50; App. II at A40; Appellant's Br. at 19. This premise is wrong.

Article I, § 2 vests Congress with the authority to conduct a decennial enumeration of persons "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. In addition, § 2 of the Fourteenth Amendment requires that representatives to the House "be apportioned among the several States according to their respective numbers . . . . ," *id*., amend. XIV, § 2, while § 5 of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation, the

provisions of [the Fourteenth Amendment]." *Id.* at § 5. Thus, there is no constitutional requirement that Congress adopt, and the President sign, a new law after every enumeration before an apportionment may take effect. Article I and the Fourteenth Amendment both provide Congress with the authority and plenary discretion to adopt a self-executing statute (2 U.S.C. § 2a(a)) that "is administered efficiently and that avoids partisan controversy," *Montana*, 503 U.S. at 446.

In addition, Mr. LaVergne's separation of powers and non-delegation doctrine arguments are wrong on their own terms, even aside from the flawed premise upon which both rest.

1. *2 U.S.C. § 2a Does Not Contravene the Doctrine of Separation of Powers.*

Mr. LaVergne's specific contention that 2 U.S.C. § 2a runs afoul of the separation of powers doctrine, Appellant's Br. at 18-20, fails because nothing in 2 U.S.C. § 2a encroaches on or "aggrandiz[es Congress's] power at the expense of another branch." *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991).[18]

[18] *See also Mistretta v. United States*, 488 U.S. 361, 409 (1989) (upholding statute on grounds that it does not unconstitutionally prevent judicial branch from performing its constitutionally assigned functions); *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (upholding a statute against charge that it "impermissibly interferes with the President's exercise of his constitutionally appointed functions"); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (holding statute unconstitutional because it "intruded into the executive function"); *Myers v. United States*, 272 U.S. 52, 176 (1926) (finding statute unconstitutional because it encroached on President's removal power).

Mr. LaVergne does not advance any argument that 2 U.S.C. § 2a is either an encroachment by Congress into the powers of another branch, or an aggrandizement of its own powers at the expense of another branch. Indeed, he cannot because that argument was rejected in *Montana*, 503 U.S. 442. In that case, the State of Montana specifically alleged that the apportionment that followed the 1990 census was unconstitutional "because [the] reapportionment is effected 'through application of a mathematical formula by the Department of Commerce and the *automatic transmittal of the results to the states*.'" *Id*. at 446 (quoting State of Montana's Complaint) (emphasis added). The Court rejected this argument, concluding that there was "no merit" to the lower court's suggestion of a separation of powers issue because of the self-executing nature of 2 U.S.C. § 2a. *Id.* at 465. Moreover, the Court said that "the use of a procedure [2 U.S.C. § 2a] that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it." *Id.*

Accordingly, Mr. LaVergne's separation of powers argument fails.

2. 2 U.S.C. § 2a Does Not Violate the Non-Delegation Doctrine.

The non-delegation doctrine holds that Article I, § 1 of the Constitution vests "[a]ll legislative Powers . . . in a Congress of the United States" and, thus, permits no delegation of those powers. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)). For the

"non-delegation doctrine" to apply, Congress must delegate "legislative power" or "decisionmaking authority." *Whitman*, 531 U.S. at 472. Mr. LaVergne never articulates a legal argument as to why 2 U.S.C. § 2a constitutes a delegation of "legislative power" or "decisionmaking authority." And in fact it does not.

The statute does not give the President any legislative power or discretionary authority. It simply mandates the transmission of a report showing the number of Representatives allotted to each State in accordance with a mathematical "method known as the method of equal proportions." 2 U.S.C. § 2a(a). The President has no discretion over which formula is to be used to generate the apportionment and is not authorized to make any choices or decisions with respect to the execution of the apportionment. As 2 U.S.C. § 2a contains no delegation of "legislative power" or "decisionmaking authority," the non-delegation doctrine does not apply.

Moreover, the non-delegation doctrine is not violated when "Congress . . . 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Congress, by adopting 2 U.S.C. § 2(a), clearly has supplied such an "intelligible principle," directing the President specifically to use the "method of equal proportions" in

constructing the statement that is to be submitted to Congress.[19] This unambiguous direction by Congress to the President to use a specific formula in carrying out Congress's command clearly satisfies the Court's established test for an "intelligible principle." This "intelligible principle" has been fully understood and adhered to by Presidents, without incident, since its adoption by Congress in 1941. *See* Act of Nov. 15, 1941, Pub. L. No. 77-291, § 1, 55 Stat. 761-62 (1941) (codified at 2 U.S.C. § 2a); *see also Montana*, 503 U.S. at 452 n.25.

B. EVEN HAD "ARTICLE THE FIRST" BEEN RATIFIED, 2 U.S.C. § 2a STILL WOULD BE CONSTITUTIONAL.

The Constitution requires that "each State shall have at Least one Representative," but it also provides that the size of the House "shall not exceed

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[19] Mr. LaVergne consistently references the fact that the actual mathematical calculations are performed by "unknown career Federal Civil Service employees," as if this fact were constitutionally significant. Appellant's Br. at 14-16, 23. It is not. The statute delegates to "the President" the responsibility for preparing the apportionment using the "method of equal proportions," 2 U.S.C. § 2a(a), and federal law elsewhere authorizes the President:

> to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law . . . .

3 U.S.C. § 301. Accordingly, the President's delegation to the Secretary of Commerce and/or the Director of the Census Bureau of his responsibility to crunch numbers and prepare the apportionment statement raises no constitutional issues.

one for every thirty Thousand." U.S. Const. art. I, § 2, cl. 3. What this means is that the Constitution provides a range for the total size of the House of Representatives. *See* David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 Nw. U. L. Rev. 606, 613 (1996) ("[T]he most natural reading of this language is that it limits the total number of seats, and the history of the provision leaves no doubt that this was its purpose.") (cited by *Clemons v. U.S. Dep't. of Commerce*, 710 F. Supp. 2d 570, 577 (N.D. Miss. 2010), *vacated on jurisdictional grounds sub nom.*, *Clemons v. Dep't of Commerce*, 131 S. Ct. 821 (2010)).

Given that the 2010 apportionment population reported by the Census Bureau was approximately 309 million, *see* App. II at A60, the Constitution effectively allows for a House of Representatives that ranges in size from 50 to approximately 10,300 Members (309,000,000/30,000). Because the Constitution does not specifically prescribe the number of Representatives, the responsibility falls to Congress to fix that number, and Congress steadily increased that number from the initial 65 Members to the current 435 in 1911. *See* 37 Stat. 13, 14 (1911).

Contrary to Mr. LaVergne's reading, "Article the First" does not establish a fixed ratio of Representatives to voters. *See* Appellant's Br. at 5. Rather, "Article the First" merely would effectively replace the "shall not exceed one for every thirty Thousand" language in Article I, § 2, cl. 3 with the language "no more than

one Representative to every fifty thousand persons." 1 Stat. 97 (1789). Nothing in "Article the First" suggests that it was intended to alter Congress's discretion regarding the overall size of the House of Representatives. And, according to the plain language of "Article the First," when the size of the House reached 200 Members, "the proportion *shall be so regulated by Congress*, that there shall not be less than two hundred Representatives, nor more than one Representative to every fifty thousand persons." *Id.* (emphasis added). That is, "Article the First," had it been ratified, merely would have adjusted the minimum number of Representatives from one per state to 200 total, and the maximum number of Representatives from one Representative for every 30,000 persons, to one Representative for every 50,000 persons.

In terms of the 2010 apportionment population, "Article the First," had it been ratified, would allow today for a House of Representatives that ranges in size from 200 to approximately 6,183. But "Article the First," had it been ratified, would leave the determination of the *exact size* of the House to Congress's discretion and says nothing about the formula or method to be used to apportion the seats among the States. Accordingly, the current size of the House, which is set by law at 435 Members, is wholly consistent Article I, § 2, cl. 3, and also would be wholly consistent with "Article the First," had it been ratified. And the "method

of equal proportions," upheld as constitutional in *Montana*, would remain constitutional, even had "Article the First" been ratified.

In short, even if Mr. LaVergne's history is correct, his legal analysis is not. His attack on 2 U.S.C. § 2a still fails; the size of the House of Representatives remains the same; and the number of seats apportioned to New Jersey as a result of the 2010 decennial census remains 12, a net loss of one from the 2000 census/apportionment.

CONCLUSION

This Court should rebuff Mr. LaVergne's quixotic quest to have the judiciary rewrite our constitutional history and remake our constitutional democracy in one fell swoop. Mr. LaVergne plainly believes there is something fundamentally wrong with the prevailing Representatives-to-represented ratio. That is a perfectly reasonable belief, and we do not question the sincerity with which it is held. However, an ardent belief, no matter how passionately held, does not a judicially remediable claim make. If Mr. LaVergne wishes to see the ratio of Representatives to represented lower than it now is, his remedy is either at the ballot box or on the soap box not at the courthouse.

For all the foregoing reasons, this Court should affirm the judgment of the District Court.

Respectfully submitted,

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
CHRISTINE M. DAVENPORT
Senior Assistant Counsel
KIRSTEN W. KONAR
Assistant Counsel
/s/ Todd B. Tatelman
TODD B. TATELMAN
Assistant Counsel
MARY BETH WALKER
Assistant Counsel

OFFICE OF GENERAL COUNSEL
UNITED STATES HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Appellees John A. Boehner and Karen L. Haas

April 18, 2012

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 12,328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point, Times New Roman font style.

/s/ Todd B. Tatelman
Todd B. Tatelman

CERTIFICATE OF BAR MEMBERSHIP

Attorneys in the Office of General Counsel, U.S. House of Representatives are not required to be members of the bar of this court. *See* 2 U.S.C. § 130f(a).

CERTIFICATE OF SERVICE

I certify that on April 18, 2012, I electronically filed the foregoing Brief of Appellees John A. Boehner and Karen L. Haas, Speaker and Clerk of the U.S. House of Representatives, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system; and that I sent 10 copies of the brief to the Court via Federal Express overnight delivery. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Todd B. Tatelman
Todd B. Tatelman

Addendum 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1508

UNITED STATES OF AMERICA,

Appellee
v.

JOSEPH M. McDADE,

Defendant

CUSTODIAN OF RECORDS,
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT,
UNITED STATES HOUSE OF REPRESENTATIVES,
Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DIRECTING THE PRODUCTION OF RECORDS PURSUANT TO FED.R.CRIM.P. 17(c), AT CRIMINAL NO. 92-249

ARGUED: July 12, 1996
BEFORE: Becker, Stapleton and Greenberg, Circuit Judges.

ORDER

It appearing to the Court that:

(1). The district court has ruled that the documents at issue are protected by the privilege conferred by the Speech or Debate Clause, and that ruling has not been challenged before us;

(2). With this determination made, our decision in In re: Grand Jury Proceedings, 587 F.2d 589 (3d. Cir. 1977) ("Eilberg") neither required nor authorized disclosure to the government;

(3). It was error for the district court to require production of the documents at issue to the government at the time of the district court's order;

It is hereby ORDERED that the portions of the district court's order of June 5, 1996 appealed from are VACATED.*

BY THE COURT:

Circuit Judge

DATED: JUL 12 1996

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*. If in the course of future proceedings, the district court determines that a legitimate issue exists as to whether there has been a valid waiver of the Committee's privilege, nothing here said is intended to preclude the district court from ordering the documents at issue produced for its inspection in camera in connection with the resolution of that issue.

Addendum 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MONTE LEE, Plaintiff, v. JOSEPH R. BIDEN, JR., et al., Defendants.	NO. CV 88-2090-RG(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is submitted to the Honorable Richard A. Gadbois, Jr., pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

SUMMARY OF PROCEEDINGS

Plaintiff filed his Complaint on April 18, 1988. Defendants filed a motion to dismiss on June 17, 1988. Plaintiff filed opposition to the motion to dismiss on June 27, 1988.

By Order dated July 5, 1988, the Court vacated the previously scheduled July 11 hearing on defendants' motion to dismiss and announced the Court's intention to decide the matter without oral argument. The same Order granted Plaintiff until July 11, 1988 within which to file any additional papers in opposition to the motion. On July 8, 1988, Plaintiff filed an additional "Memorandum in Support of Opposition to Defendants' Motion to Dismiss Action."

DISCUSSION

For the reasons discussed herein, this action should be dismissed with prejudice.

I. Summary of Plaintiff's Allegations

Plaintiff alleges that Defendants (Members of the Committee on the Judiciary of the United States Senate) acted in bad faith in connection with Defendants' favorable recommendation to the Senate of the President's nomination of Judge Anthony M. Kennedy to serve as an Associate Justice of the United States Supreme Court (Complaint, pp. 5-6). Plaintiff apparently believes that Judge Kennedy acted improperly in connection with prior litigation involving Plaintiff and that the Senate Judiciary Committee failed or refused to investigate or act upon evidence of Judge Kennedy's allegedly improper behavior.

Plaintiff alleges that Defendants' actions violated

various laws and constitutional provisions (Complaint, pp. 8-9). Plaintiff seeks recompense for the prior litigation's alleged negative impact upon the marketability of a motion picture owned by Plaintiff (Complaint, pp. 8-9).

II. Plaintiff Lacks Standing to Bring This Action

Article III, Section 2 of the United States Constitution restricts adjudication in federal courts to "Cases" and "Controversies." Johnson v. Secretary, 88 Daily Journal D.A.R. 8286 (9th Cir. June 27, 1988). The "case or controversy" limitation "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976); see generally 10A Wright, Miller & Kane, Federal Practice & Procedure § 2757 (2d ed. 1983).

The prior litigation of which Plaintiff complains cannot be traced to the challenged action of the Defendants. Plaintiff's litigation-related injury pre-dated the Senate Judiciary Committee's actions regarding Judge Kennedy. Plaintiff suffered no "actual or threatened injury" as a result of the Defendants' recommendation of Judge Kennedy. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Conversely, unfavorable action on the President's nomination would not have prevented or undone the damage that Plaintiff allegedly suffered.

00124

Plaintiff alleges that Defendants' actions violated various statutory and constitutional provisions. However, the Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984); see Johnson v. Secretary, supra ("A mere interest in a problem, no matter how longstanding the interest and how qualified the plaintiff is in evaluating the problem, is not sufficient by itself to confer standing") (citations and quotations omitted).

III. The Constitution's Speech or Debate Clause Provides an Absolute Bar to This Action

The "Speech or Debate Clause" of the United States Constitution provides that: "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., Art. I, § 6, clause 1. "Once it is determined that legislators are acting within the 'legitimate legislative sphere,' the clause is an absolute bar [to civil and criminal liability]." Schultz v. Sundberg, 759 F.2d 714, 717 (9th Cir. 1985); see Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502(1975).

> "We utilize a two-part test to determine whether an activity is within the 'legitimate legislative sphere.' The activity must (1) be 'an integral part of the deliberative and

communicative process by which Members participate in Committee and House proceedings,' and (2) 'address proposed legislation or some other subject within [the legislature's] constitutional jurisdiction.'" Schultz, supra, 759 F.2d at 717.

The Senate Judiciary Committee's investigation and recommendation were integral to a process that addressed a subject within the Senate's constitutional jurisdiction: confirmation of a Supreme Court nominee. Thus, Defendant's actions were within the "legitimate legislative sphere" and, as such, must be accorded absolute immunity. See Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (Senate Subcommittee's investigatory actions are absolutely immune from judicial interference); Gravel v. United States, 408 U.S. 606, 624 (1972) (dicta indicating that voting, committee reports and conduct at committee hearings are protected from civil suit by the Speech and Debate Clause); Schultz v. Sundberg, supra, 759 F.2d at 717 (legislator's actions in connection with confirmation vote on proposed appointee held absolutely immune from civil rights litigation).*

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* Legislators may be liable for defamatory statements made outside of the legislative sphere. See Hutchinson v. Proxmire, 443 U.S. 111 (1979). However, the challenged action in the present case does not involve defamation and falls squarely within the legislative sphere.

00126

IV. The Complaint Should Be Dismissed With Prejudice

"A *pro se* litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Parviz Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations omitted). In the present case, it is absolutely clear that Plaintiff could not by amendment cure the fundamental deficiencies in the Complaint. Plaintiff is without standing and Defendants are clothed with absolute immunity.

CONCLUSION AND RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that final judgment be entered dismissing the Complaint and action with prejudice.

DATED: July 15, 1988.

CHARLES F. EICK
United States Magistrate

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party

to file objections as provided in the Local Rules Governing the Duties of Magistrates and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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