19-3054

To Be Argued By:
STEVEN J. KOCHEVAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-3054

LEWIS Y. LIU,

Plaintiff-Appellant,

EQUAL VOTE AMERICA CORP.,

Plaintiff,

—v.—

UNITED STATES CONGRESS, NANCY PELOSI, in her official capacity as the Speaker of the House of Representatives, KEVIN MCCARTHY, in his official capacity as the Minority Leader of the House, MITCH MCCONNELL, in his official capacity as the Senate Majority Leader, CHARLES SCHUMER, (CHUCK) in his official capacity as the Senate Minority Leader,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

GEOFFREY S. BERMAN,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellees.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2715

STEVEN J. KOCHEVAR,
CHRISTOPHER CONNOLLY,
Assistant United States Attorneys,
Of Counsel.

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UNITED STATES CONGRESS, NANCY PELOSI, IN HER OFFICIAL CAPACITY AS THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, KEVIN MCCARTHY, IN HIS OFFICIAL CAPACITY AS THE MINORITY LEADER OF THE HOUSE, MITCH MCCONNELL, IN HIS OFFICIAL CAPACITY AS THE SENATE MAJORITY LEADER, CHARLES SCHUMER, (CHUCK) IN HIS OFFICIAL CAPACITY AS THE SENATE MINORITY LEADER,

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant Lewis Y. Liu challenges the constitutionality of the apportionment among states of seats in the United States House of Representatives. Liu seeks not only a declaratory judgment that the present statutory method of apportionment violates

various provisions of the Constitution, but also a judicial order directing defendants—Congress and Congressional leaders of each primary political party—to take legislative action implementing a new apportionment of House seats among states.

The district court correctly dismissed Liu's action. Liu, who brings suit merely as one of millions of similarly affected American voters, lacks constitutional standing to bring his claims. Even if Liu did have standing, his complaint was rightly dismissed because sovereign immunity bars his claims and the Speech or Debate Clause immunizes defendants from suit for perceived failures to legislate. And finally, even if Liu could overcome these jurisdictional hurdles, the Supreme Court has expressly held that the present statutory method of apportioning House seats among states is constitutional. For those reasons, the order of the district court should be affirmed.

Jurisdictional Statement

As explained below, the district court lacked subject matter jurisdiction over Liu's action. *See infra* Argument, Point I. The district court issued a final memorandum and order dismissing the complaint on September 3, 2019. (Dist. Ct. ECF No. 29). Liu filed a timely notice of appeal on September 23, 2019. (Dist. Ct. ECF No. 31). Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court properly concluded it lacked subject matter jurisdiction, because Liu lacks

Article III standing to challenge the constitutionality of the apportionment of seats in the United States House of Representatives.

2. Whether the district court lacked subject matter jurisdiction because this action is barred by both sovereign immunity and the Speech or Debate Clause.

3. Whether the action is subject to dismissal for failure to state a claim, because the Supreme Court has held that the current apportionment of seats in the United States House of Representatives is constitutional.

Statement of the Case

A. Procedural History

On January 11, 2019, Liu, who is proceeding *pro se* before this Court but was represented by counsel at all times before the district court, commenced this litigation by filing a complaint along with co-plaintiff Equal Vote America Corp., which has not joined the present appeal. (Dist Ct. ECF No. 1). On February 11, 2019, plaintiffs filed the operative First Amended Complaint. (Dist. Ct. ECF No. 9 ("First Am. Compl.")). On June 7, 2019, defendants moved to dismiss the First Amended Complaint. (Dist. Ct. ECF Nos. 21-22). On September 3, 2019, the district court (Colleen McMahon, C.J.) issued a memorandum decision and order granting the government's motion and dismissing the action. (Dist. Ct. ECF No. 29 ("Dist. Ct. Order")). On September 23, 2019, Liu filed a notice of appeal. (Dist. Ct. ECF No. 31).

B. The Apportionment of Seats in the United States House of Representatives

Under the Constitution, Congress apportions seats in the House. The Constitution imposes three specific requirements on the apportionment of House seats: "The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 447–48 (1992).

Since the adoption of the Constitution, Congress has employed various methods to apportion House seats. *See id.* at 448–52 (explaining and placing in historical context the different apportionment methods used by Congress). "In [1911] Congress . . . passed legislation that ultimately fixed the number of Representatives at 435." *Id.* at 451 & n.24 (citing 37 Stat. 13; 72 Stat. 345; 73 Stat. 8). In 1941, upon the recommendation of a committee of the National Academy of Sciences, Congress adopted and made self-executing the "method of equal proportions" to apportion House seats—the method still used today. 2 U.S.C. § 2a; *Montana*, 503 U.S. at 451–52. Of the various methods considered by the committee, "the method of equal proportions minimized the relative difference both between the size of congressional districts and between the number of Representatives per person," where the "[r]elative difference between two numbers consists of subtracting the smaller number from the larger number and then dividing the result by the smaller number." *Id.* at 454-55 & n.29 (footnote omitted). "In comparison with the other four methods considered [by the

committee], [the method of equal proportions] occupied an intermediate position in terms of favoring small States over large States." *Id.* at 455. After each decennial Census, the Executive calculates the number of Representatives allocated to each state and transmits the allocation to Congress. 2 U.S.C. § 2a.

C. The First Amended Complaint

Liu's amended complaint describes Liu only as a resident and registered voter in the state of New York. (First Am. Compl. 1, 5). Liu's amended complaint does not contain factual allegations concerning any discrete set of events or actions taken by defendants. Instead, the amended complaint presents, among other things, an account of the design and adoption of the Constitution and methods of apportioning House seats (First Am. Compl. 7–9); a critical perspective on the current method of apportioning House seats (First Am. Compl. 9–18); and a proposal for new methods of apportionment (First Am. Compl. 23–26). Specifically, the amended complaint advocates for an increase in the number of seats in the House and the adoption of a different method of apportioning House seats among states, on the grounds that most states are effectively underrepresented under the current method of apportionment. (First Am. Compl. 1-32). With respect to relief, the amended complaint asked the district court to declare the Apportionment Acts of 1911, 1929, and 1941 unconstitutional, and to hold Congress in contempt of court—and declare the Senate unconstitutional—if Congress did not pass a law allocating House seats according to plaintiffs' proposed method. (First Am. Compl. 27).

D. The District Court's Decision

On September 3, 2019, the district court concluded that it lacked jurisdiction over plaintiffs' challenges to the apportionment of seats in the House of Representatives and dismissed plaintiffs' complaint. (Dist. Ct. Order 1-13). The district court held that Liu failed to satisfy any of the three prongs of the well-established standing test: he had failed to allege a discrete injury; he had failed to establish a nexus of causation; and he had failed to show that a favorable outcome would provide redress. (Dist. Ct. Order 5-11); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court further held that Liu's claims were barred by sovereign immunity and the Speech or Debate Clause. (Dist. Ct. Order 11-12). Because the district court determined it lacked jurisdiction, it did not reach the question of whether Liu had plausibly stated a claim for relief. (Dist. Ct. Order 12). This appeal followed. (Dist. Ct. ECF No. 31).

Summary of Argument

The district court's order should be affirmed. To begin with, the district court correctly held that Liu lacks Article III standing. To establish standing, a plaintiff must demonstrate an injury in fact to a legally protected interest particular to that plaintiff, rather than a general grievance shared by a wide segment of the population. Liu's claim that his right to vote or his representation in the House is diminished by the apportionment of House seats fails that test, because the alleged injury is, by Liu's own account, shared by nearly all U.S. citizens. *See infra* Point I.A. Moreover,

Liu cannot satisfy the second and third prongs of the standing inquiry, as he cannot demonstrate that whatever injury he has suffered is causally connected to the actions of the defendants he has sued, or that the injury can be redressed by the courts, which cannot order Congress or its members to enact new legislation. *See infra* Point I.B.

Apart from the standing ground addressed by the district court, the courts lack subject matter jurisdiction for two independent reasons. First, sovereign immunity bars Liu's claims. *See infra* Point II.A. Second, the Constitution's Speech or Debate Clause immunizes defendants from the type of claims raised by Liu, which are based on the actions or lack of action by legislators. *See infra* Point II.B.

In any event, even if subject matter jurisdiction existed over this action, the complaint must be dismissed because it fails to state a claim. The Supreme Court has addressed essentially the same assertion that Liu now raises, and has concluded that the present statutory method of apportioning House seats is constitutional. *See infra* Point III. For all these reasons, the district court's order should be affirmed.

ARGUMENT

Standard of Review

This Court "review[s] a judgment of dismissal *de novo*, whether the judgment is based on a lack of subject matter jurisdiction or the failure to state a claim on which relief can be granted." *Ajlani v. Chertoff*, 545

F.3d 229, 233 (2d Cir. 2008). The Court may "affirm the judgment on any basis that is supported by the record." *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 95 (2d Cir. 2017) (quotation marks omitted).

POINT I

Liu Lacks Article III Standing

The Court should affirm the district court because Liu has failed to establish Article III standing. "[S]tanding is a federal jurisdictional question determining the power of the court to entertain the suit." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (quotation marks omitted). Standing requires "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent . . .; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180–81 (2000). "[A] plaintiff must demonstrate standing for each claim and form of relief sought." *Cacchillo*, 638 F.3d at 404. Liu has failed to allege any of the necessary elements of standing.

A. Liu's Grievance Against the Apportionment of House Seats Among States Is Not Sufficient to Establish Injury in Fact

Liu has failed to establish injury. This Court's holding in a similar lawsuit filed by Liu—challenging the constitutionality of the Electoral College—explains why Liu also does not have standing here:

> An injury in fact must be concrete and particularized, meaning that it affects the plaintiff in a personal and individual way and is actual or imminent, not conjectural or hypothetical. A voter fails to present an injury in fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate or other actor. Here, Liu admits that his alleged injury is widely shared by the vast majority of Americans . . . .

Liu v. Ryan, 724 Fed. App'x 92, 93 (2d Cir. 2018) (citations and quotation marks omitted).

In the present case, Liu has again admitted that the alleged injury is widely shared by the vast majority of Americans: the amended complaint repeatedly states that "over 95%" of Americans suffer from the alleged harms. (First Am. Compl. 14, 15, 17, 18, 19). And although the amended complaint offers historical observations and policy analysis concerning the apportionment of House seats, the complaint describes no stake *for Liu* in the constitutional issues as raised aside from Liu's status as an individual citizen and voter. Courts have routinely dismissed actions alleging such "abstract and widely shared" harm, particularly in the context of election-related challenges. *Liu*, 724 Fed. App'x at 93; *see, e.g.*, *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) (affirming dismissal, on standing grounds, of suit seeking broader access by candidates to national debates);

Berg v. Obama, 586 F.3d 234, 239 (3d Cir. 2009) (rejecting standing of individual voter to challenge eligibility of Barack Obama to serve as President); *Becker v. Fed. Election Commission*, 230 F.3d 381, 389-90 (1st Cir. 2000) (rejecting standing of third-party voters to challenge funding of presidential debates in context of Ralph Nader's candidacy for President).

Put simply, Liu's "complaint does virtually nothing to distinguish [Liu] from the millions of other . . . citizens all of whom are similarly impacted by" the present system of apportionment. *Hassan v. United States*, 441 Fed. App'x 10, 12 (2d Cir. 2011) (holding that plaintiff lacked standing to challenge constitutional requirement that President be natural born citizen); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). Accordingly, Liu has failed to adequately allege injury.

Liu's reliance on *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Wesberry v. Sanders*, 376 U.S. 1 (1964), to establish injury is misplaced. In each of these cases, the plaintiffs were residents or voters of particular counties affected by the apportionment of House or state legislature seats *within* a state. (Brief for Plaintiff-Appellant ("Br.") 22, 28-30, 32); *see Carr*, 369 U.S. at 204-05; *Reynolds*, 377 U.S. at 537, 541-42; *Wesberry*, 376 U.S. at 2. Accordingly, the plaintiffs in these cases asserted a particularized harm that differentiated them from the vast

majority of citizens. Liu—who asserts a grievance arising from the apportionment of House seats *among* states, which allegedly affects nearly all citizens across the United States—has not established the same sort of particularized harm asserted by voters in specific counties affected by intra-state apportionment schemes. *Baker*, *Reynolds*, and *Wesberry* therefore do not support standing for Liu's claim in the present case.

The Supreme Court's decisions adjudicating challenges to the apportionment of House seats among states on the merits also do not help Liu establish injury. *See, e.g.*, *Dep't of Comm. v. U.S. House of Representatives*, 525 U.S. 316, 328–43 (2012) (voters' interest in preventing dilution of their votes supported standing to challenge the use of statistical sampling in the Census); *Montana*, 503 U.S. at 444-45 (resolving on merits Montana's challenge to the use of the "method of equal proportions" to apportion House seats). As the Third Circuit explained in the context of claims similar to Liu's, the Supreme Court has held that the "'expected loss of a Representative to the United States Congress' based on redistricting ordered under [2 U.S.C.] § 2a" can establish voters' standing, but this injury is not necessarily present when a plaintiff proposes a nationwide increase in the number of seats in the House. *LaVergne v. Bryson*, 497 Fed. App'x 219, 221 (3d Cir. 2012) (quoting *Dep't of Comm.*, 525 U.S. at 331). Indeed, the Supreme Court has held that the federal courts lack jurisdiction over a challenge to the number of seats in the House. In *Clemons v. Department of Commerce*, 562 U.S. 1105 (2010), the Su-

preme Court summarily vacated and remanded a judgment from a three-judge panel sitting in the Northern District of Mississippi that had concluded it possessed jurisdiction to hear voters' claim that the Constitution required an increase in the number of House seats—although the three-judge panel rejected the challenge on the merits, *see Clemons v. Department of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss. 2010). In the present case, Liu proposes increasing the number of House seats nationwide (First Am. Compl. 23–26), and does not allege that any voter is in danger of having her vote diluted through the loss of a seat in the House. Accordingly, the Supreme Court precedents allowing certain challenges to the apportionment of House seats to proceed to the merits do not help Liu establish injury in the present case, and Supreme Court precedent forecloses an exercise of jurisdiction over a challenge to the number of House seats.

Liu's discussions of irrelevant historical decisions like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and the practices of authoritarian regimes do not meaningfully join issue with—and certainly do not prevail over—defendants' arguments concerning injury. (Br. 38-39). Specifically, despite Liu's protestations to the contrary,

> [the Supreme Court has] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and

> tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. at 573-74 (1992). Liu offers no argument explaining how he is differently situated from the vast majority of American citizens. Instead, he is "raising only a generally available grievance about government," *id.*, which has been further demonstrated by his attempts to add 223 new individual plaintiffs to this action based on these individuals' responses to an online survey about the present case. (Plaintiff-Appellant's Appendix ("PA") 24-30). Liu therefore has failed to establish an injury sufficient to support standing.

B. Liu Cannot Satisfy the Remaining Standing Requirements

Although the absence of injury in fact is itself sufficient to dismiss the complaint, Liu also cannot satisfy either of the remaining required elements of standing.

First, Liu has failed to establish the second required element, traceability. "The traceability requirement for Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and [plaintiff's] injury." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (quotation marks omitted). The present leaders of each political party in the House and Senate did not propose, pass, or enact any relevant part of the apportionment statutes challenged by plaintiffs. *Cf. Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 58 (D.D.C. 2001) (dismissing suit

against Senator for changing political parties, including because "his single vote could not by itself defeat or result in the enactment of any legislation"), *aff'd*, No. 02-5006, 2002 WL 1364311, at *1 (D.C. Cir. May 6, 2002); *see also Raines v. Byrd*, 521 U.S. 811, 830 n.11 (1997) (noting that it was "far from clear" that individual members of Congress could show "fairly traceable" injury arising out of legislative actions of their colleagues in passing act plaintiffs-congresspersons disfavored). And there is no guarantee that the President would sign any legislation passed by Congress, supported by the individual defendants or not, into law. Moreover, as the district court pointed out, it is the Executive, not the Congress or individual members thereof, that implements the apportionment laws Liu has challenged. (Dist. Ct. Order 10); U.S. Const. Art. II § 3. Liu's grievance is not traceable to the defendants' conduct.

Nor can Liu satisfy the third and final element of standing, that "there is a 'substantial likelihood that the relief requested will redress the injury claimed,'" *E.M. v. N.Y. City Dep't of Education*, 758 F.3d 442, 450 (2d Cir. 2014) (quoting *Duke Power Co. v. Carolina Environmental Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978)). Liu asked the district court to hold the present scheme of apportionment unconstitutional and to hold Congress in contempt—and the Senate unconstitutional—if it fails to pass an apportionment scheme approved by Liu. (First Am. Compl. 23–27). Even if the Court had the power to grant such relief—which, as explained further below, it does not—such relief would not redress plaintiffs' alleged harms. Indeed, the only certain effect of Liu's requested relief would be to

freeze in place the present allocation of House seats. Otherwise, neither this Court nor any other court has the power to direct Congress to pass new legislation. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1866) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department . . . ."); *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) ("[T]he universal rule . . . is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference."). Moreover, even assuming that—contrary to the separation of powers—an Article III court could somehow oblige Congress to pass legislation, a law passed by Congress must be signed by the President to become law. *See* U.S. Const., art. I, § 7. It would be speculative to conclude that the President would sign any particular piece of legislation passed by Congress into law. Accordingly, Liu has failed to establish redressability—or any of the necessary elements of standing—and the district court's dismissal of his suit should be affirmed.

POINT II

Even If Liu Had Standing, the District Court Was Correct to Dismiss the Complaint for Lack of Subject Matter Jurisdiction

A. Sovereign Immunity Bars Liu's Claims

Sovereign immunity also independently deprived the district court of jurisdiction over Liu's claims. "[T]he 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." *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) (ellipsis omitted). "The shield of sovereign immunity protects not only the United States but also its agencies and officers when the latter act in their official capacities." *Id.* (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *see McLean v. United Sates*, 566 F.3d 391, 401 (4th Cir. 2009) ("[S]overeign immunity extends to the United States Congress when it is sued as a branch of the government."). "The doctrine of sovereign immunity is jurisdictional in nature, and therefore to prevail, the plaintiff bears the burden of establishing that her claims fall within an applicable waiver." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citation omitted). Liu has sued the United States Congress and its senior leaders "on an ex official basis" (First Am. Compl. 1), but Liu can point to no waiver of sovereign immunity for his claims. None exists. Accordingly, the district court properly dismissed Liu's claim for want of jurisdiction.

B. Defendants Are Protected by the Speech or Debate Clause

The district court also lack subject matter jurisdiction under the Speech or Debate Clause of the Constitution. U.S. Const. art. I, § 6, cl. 1. The Clause acts as an "absolute bar to interference" into actions taken by Members of Congress that fall within the "legitimate legislative sphere." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975); *see also Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir.

2006) (en banc) (quoting *Doe v. McMillan*, 412 U.S. 306, 312 (1973) ("the actions upon which petitioners sought to predicate liability were 'legislative acts,' and, as such, were immune from suit." (citation omitted))); *accord Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 941 (D.C. Cir. 2013); *see also Maarawi v. U.S. Congress*, 24 Fed. App'x 43, 44 (2d Cir. 2001) ("We also have no jurisdiction over tort claims against members of Congress due to the legislative immunity created by the Speech or Debate Clause . . . . Under this immunity, legislators are free from civil liability for what they do or say in legislative proceedings." (citations omitted)).

The basis for Liu's suit is defendants' purported failure to adopt an alternative method of apportioning House seats. (First Am. Compl. 22-23). Their actions or inaction on that question are quintessentially legislative acts that the Speech or Debate Clause absolutely protects from judicial inquiry. "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). Thus, no lawsuit may be based on "those things generally said or done in the House or the Senate in the performance of official duties [or] the motivation for those acts." *Id.* In short, a court may not "inquire into how [a member of Congress] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *Id.* at 526; *accord Fields*, 459 F.3d at 9. Moreover, although this Court has not addressed the issue, other courts have held that Congress, which is a collection of the Members of the two Houses, is equally protected by Speech or Debate Clause immunity. *See Newdow v.*

Congress, 328 F.3d 466, 484 (9th Cir. 2003) ("[I]n light of the Speech and Debate Clause of the Constitution, . . . the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation."), *rev'd on other grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Freedom from Religion Foundation v. Congress*, No. 07-cv-356, 2008 WL 3287225, at *4 (D.N.H. Aug. 7, 2008) (dismissing claims against Congress on basis of Speech or Debate Clause).

In seeking to require Congress or its members to re-apportion House districts, Liu's suit attacks the heart of what the Speech or Debate Clause protects. His claims are thus categorically barred by the legislative immunity conferred by the Speech or Debate Clause. *See Eastland*, 421 U.S. at 503 ("[L]egislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." (citation and quotation marks omitted)); *see also Gravel v. United States*, 408 U.S. 606, 617 (1972) (Speech or Debate immunity "equally cover[s]" voting as it does actual speech or debate); *Common Cause v. Biden*, 748 F.3d 1280, 1283-84 (D.C. Cir. 2014) (Speech or Debate immunity would preclude suit challenging failure to pass legislation). Accordingly, Liu's claims are also properly subject to dismissal under the Speech or Debate Clause.

POINT III

The Current Statutory Method of Apportioning Seats in the House is Constitutional

Finally, if the Court were to reach the merits of Liu's claims—which it should not—those claims fail. The Supreme Court has expressly upheld the present method of apportioning House seats, namely the "method of equal proportions," against constitutional attack. *See Montana*, 503 U.S. at 444-45. In *Montana*, the state of Montana challenged the constitutionality of 2 U.S.C. § 2a, in the face of Montana's loss of a House seat. The Supreme Court rejected Montana's challenge, concluding that:

> The constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders. Article I, § 8, cl. 18, expressly authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. Its apparently 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.

> . . .
>
> The decision to adopt the method of equal proportions was made by Congress after decades of experience, experimentation, and debate about the substance of the constitutional requirement. Independent scholars supported both the basic decision to adopt a regular procedure to be followed after each census, and the particular decision to use the method of equal proportions. For a half century the results of that method have been accepted by the States and the Nation. That history supports our conclusion that Congress had ample power to enact the statutory procedure in 1941 and to apply the method of equal proportions after the 1990 census.

Montana, 503 U.S. at 464–66 (footnotes omitted). *Montana* controls the present case.

Liu's reliance on *Wesberry*, 376 U.S. 1, is misplaced. (Br. 19-20, 40). *Wesberry* concerned the apportionment of House seats *within* a state, not the allocation of House seats *between* states. *See Wesberry*, 376 U.S. at 3. As the Supreme Court explained in *Montana*, "[the Supreme Court's] cases applying the *Wesberry* standard have all involved disparities in the size of voting districts within the same State." *Montana*, 503 U.S. at 460. In *Montana*, the Supreme Court explained why the *Wesberry* standard of "'mak[ing] a good-faith effort to achieve precise mathematical equality,'" *id.* (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31

(1969)), could not be applied in the same way to the separate problem of apportioning seats between states: specifically, "[t]he constitutional guarantee of a minimum of one Representative for each State inexorably compels a significant departure from the ideal," *Montana*, 503 U.S. at 463. Because each State must receive at least one Representative, despite their significant differences in population, the mathematical problem posed by allocating representatives between states is fundamentally different from the task of allocating representatives within states. Thus, *Wesberry* does not directly apply here.

Separately, Liu failed to state a claim because no court, under any theory of liability, has ever recognized a cause of action against Congress or a Member of Congress for taking, or failing to take, legislative action to an individual's satisfaction. *See Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) (affirming *sua sponte* dismissal of claims asserted against Senator, because "[a] citizen's right to petition the government does not guarantee a response to the petition or the right to compel government officials to act on or adopt a citizen's views"); *Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988) (affirming dismissal of *pro se* claim because legislator's failure to assist constituent was "neither inappropriate nor actionable"); *Damato v. Rell*, No. 3:09-cv-1485 (AVC), 2010 WL 2475666, at *3 (D. Conn. June 14, 2010) ("The refusal of a [M]ember of Congress to assist a constituent . . . does not constitute a cognizable claim."); *De Masi v. Schumer*, 608 F. Supp. 2d 516, 525 n.12 (S.D.N.Y. 2009) (same; collecting cases). On this basis too, the district court's order dismissing Liu's claims may be affirmed.

CONCLUSION

The order of the district court should be affirmed.

Dated: New York, New York
January 29, 2020

Respectfully submitted,

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.

STEVEN J. KOCHEVAR,
CHRISTOPHER CONNOLLY,
Assistant United States Attorneys,
Of Counsel.