

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEWIS Y. LIU,

Plaintiff,

– *versus* –

SECRETARY OF THE U.S. DEPARTMENT OF
COMMERCE,

Defendant.

No. 26 Civ. 2496 (JHR) (OTW)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
THE COMPLAINT**

JAMES M. MCDONALD
United States Attorney for the
Southern District of New York
Counsel for Defendants
86 Chambers Street, 3rd Floor
New York, New York 10007

Of Counsel:

BRIAN E. HILBURN
Assistant United States Attorney

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PRELIMINARY STATEMENT

In his complaint, Plaintiff purports to assert seven constitutional claims challenging the Federal apportionment method enacted by Congress based on disparities in representational weight between States following the 2020 Census, and asks this Court to enjoin the continued use of the method. The core of the complaint is that the current product of the federal apportionment method violates the constitutional principle, articulated in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that districts in the U.S. House of Representatives are to be equal in population “as nearly as is practicable.” But that argument is unavailing, as it attempts to apply the legal standard for the allocation of House seats *within* a State (*i.e.*, districting) to a case supposedly about the allocation of House seats *between* States (*i.e.*, apportionment); the Supreme Court rejected the same argument over thirty years ago in *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992), and, in doing so, upheld the very method that Plaintiff takes issue with here. Even if this argument were not so plainly foreclosed by Supreme Court precedent, it is—at best—half-baked, as it calls for extraordinary relief on constitutional grounds without offering any serious analysis of the meaning of the relevant constitutional text. All of Plaintiff’s other, related constitutional arguments are similarly underdeveloped, and none justify the extraordinary relief Plaintiff seeks.

This Court need not consider the merits of any of Plaintiff’s constitutional claims, as the complaint suffers from the same threshold defects that the Second Circuit identified in a similar case Plaintiff filed previously in *Equal Vote America Corp. v. Congress*, 397 F. Supp. 3d 503 (S.D.N.Y. 2019), *aff’d sub nom. Liu v. United States Congress*, 834 F. App’x 600 (2d Cir. 2020). In particular, the Second Circuit concluded that Plaintiff failed to establish standing on traceability and redressability grounds with respect to the same constitutional claims. *See also Clemons v.*

Dep't of Com., 562 U.S. 1105 (2010) (summarily dismissing a challenge to the statutory cap on the number of House seats for lack of subject-matter jurisdiction).

Plaintiff has not cured those defects simply by changing the caption with what is now his third bite at the apple.¹ Plaintiff yet again challenges the legislative enactment of the formula Congress prescribed in 2 U.S.C. § 2a(a)—even going so far as to openly identify that enactment as the “root source of the representational injury” ECF No. 1 ¶ 12—but the Second Circuit has already determined that he may not sue Congress over this claim, *Liu II*, 834 F. App’x at 604-06, and he has failed to provide any allegations that explain either how the Secretary of Commerce could be considered a proper Defendant for this challenge or how the requested relief, alone, would redress his alleged injury.

Accordingly, the complaint should ultimately be dismissed with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted, as Plaintiff’s claims are substantively foreclosed by the Supreme Court’s decision in *U.S. Department of Commerce v. Montana*. At the very least, Plaintiff’s claims should be dismissed without prejudice at this stage pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, consistent with *Liu II* and *Clemons*. Because Plaintiff’s constitutional claims are plainly foreclosed by binding precedent and his complaint fails to establish subject-matter jurisdiction, a single judge may resolve this motion and need not convene a three-judge court under 28 U.S.C. § 2284.

¹ Plaintiff’s previous two challenges to the structure of federal representation were: *Liu v. Ryan*, 724 F. App’x 92 (2d Cir. 2018) (“*Liu I*”) (challenging the Electoral College) and *Equal Vote Am. Corp. v. Congress*, 397 F. Supp. 3d 503 (S.D.N.Y. 2019), *aff’d sub nom. Liu v. United States Congress*, 834 F. App’x 600 (2d Cir. 2020) (“*Liu II*”) (challenging the Apportionment Acts of 1911, 1929, and 1941). Both were dismissed for lack of standing.

BACKGROUND

A. The Constitutional and Statutory Framework

Under the U.S. Constitution, seats in the House of Representatives are to be “apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” U.S. Const. amend. XIV, § 2, cl. 1. To obtain those numbers, the Constitution calls for an “actual Enumeration” to be conducted “within every . . . Term of ten Years” in “such Manner as [Congress] shall by Law direct.” U.S. Const. art. I, § 2, cl. 3. Congress, in turn, has directed the Secretary of Commerce to take a decennial census of the population “every 10 years . . . as of the first day of April . . . in such form and content as he may determine.” 13 U.S.C. § 141(a). Congress has further directed that the “tabulation of total population by States . . . be completed within 9 months after the census date and reported by the Secretary to the President.” *Id.* § 141(b).

For his part, the President is then tasked by statute with transmitting to Congress, within the first week of the first regular session of Congress, (1) “a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census,” and (2) “the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives² by the method known as *the method of equal proportions*,” with “no State to receive less than one Member.” 2 U.S.C. § 2a(a) (emphasis added).³ Each state is then “entitled[] . . . to the number of Representatives shown” in the President’s statement. *Id.* § 2a(b).

² The “then existing number of Representatives” referred to in 2 U.S.C. § 2a(a) is 435. *See Clemons v. U.S. Dep’t of Com.*, 710 F. Supp. 2d 570, 572 (N.D. Miss. 2010) (“In 1911, Congress set the number of seats at 433 and provided that when New Mexico and Arizona became States, the number would become 435. There it has remained other than for a brief increase to 437 when Alaska and Hawaii became States in 1959.” (citations omitted)).

³ The method of equal proportions is a highest-averages apportionment method that aims to proportionally allocate seats and minimize the percent difference in the number of constituents represented by each legislator. In

That statutorily-prescribed method of apportionment—the method of equal proportions (sometimes called the “Huntington-Hill method”)—has been used since 1941 and is now the subject of this lawsuit.

B. Plaintiff’s Prior Litigation

This is Plaintiff’s third lawsuit raising similar legal issues.

In 2017, Plaintiff sued the leaders of Congress challenging the Electoral College, alleging that “his vote, cast in New York during the 2016 presidential election, received less weight than votes cast in less populous states.” *Liu I*, 724 F. App’x 92, 93 (2d Cir. 2018). The Second Circuit affirmed dismissal for lack of standing, holding that the alleged injury “is widely shared by the vast majority of Americans.” *Id.*

In 2019, Plaintiff and an organization he leads sued Congress and its leaders challenging the Apportionment Acts of 1911, 1929, and 1941 on an underrepresentation theory materially identical to the one pleaded here. The district court dismissed for lack of subject-matter jurisdiction. *Equal Vote Am. Corp. v. Congress*, No. 19 Civ. 311 (CM) (S.D.N.Y. Sept. 3, 2019). The Second Circuit affirmed, holding that although Plaintiff had alleged an injury in fact, he had failed to plead traceability and redressability. *Liu II*, 834 F. App’x at 606. The court remanded for entry of dismissal without prejudice. *Id.*

C. The Present Complaint

Plaintiff now alleges that, as a citizen of the United States and a resident of New York, he is currently subjected to unconstitutional vote dilution on account of disparities in representational weight across states as a result of the application of the method of equal proportions following the

broad strokes, the method operates as follows: first, each state is guaranteed one seat in the House of Representatives; then, the remaining seats are assigned one at a time to the state with the then-highest average district population; and, each time a state is assigned a seat, that state’s priority value is reduced. This process continues until all seats have been assigned.

2020 Census. ECF No. 1 ¶¶ 2, 4, 39, 44, 57. Despite the multiple constitutional claims Plaintiff attempts to assert, *see id.* ¶¶ 34–49, the “narrow constitutional question presented,” according to Plaintiff, is whether the application of the method of equal proportions “violates the constitutional framework that guarantees representation in the House be based on population ‘as nearly as is practicable’ and the Fifth Amendment’s prohibition on arbitrary federal action.” ECF No. 1 ¶ 3 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964)). Insisting that it does, Plaintiff asks this Court to “[d]eclare that the current apportionment system, as applied following the 2020 Census,” is unconstitutional, and to “[e]njoin [its] continued use.” *Id.* ¶¶ 58–59. Notably, he does not ask the Court “to prescribe a specific apportionment system.” *Id.* ¶ 56.

APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(1)

“A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the [Court] lacks the statutory or constitutional power to adjudicate it.” *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002). Jurisdiction is a threshold question that must be resolved before the merits, *see Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–102 (1998), and “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action,” Fed. R. Civ. P. 12(h)(3).

As the party asserting this Court’s subject-matter jurisdiction, Plaintiff “has the burden of proving by a preponderance of the evidence that [subject-matter jurisdiction] exists.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). That burden must be carried “affirmatively,” *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011), and “that showing is not made by drawing from the pleadings inferences favorable to the [plaintiff],” *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). While the Court accepts the complaint’s material factual allegations as true, “argumentative inferences

favorable to the party asserting jurisdiction should not be drawn.” *Atl. Mut. Ins. Co. v. Balfour MacLaine Int’l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992).

Where the defendant raises a factual challenge to jurisdiction, the Court “may consider affidavits and materials beyond the pleadings to resolve jurisdictional questions,” *Robinson v. Gov’t of Malaysia*, 269 F.3d 133, 141 n.6 (2d Cir. 2001), without converting the motion into one for summary judgment, *see Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.à.r.l.*, 790 F.3d 411, 417 (2d Cir. 2015). The party invoking jurisdiction “must support [its] allegations with ‘competent proof’ if a party opposing jurisdiction properly challenges those allegations.” *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998).

B. Rule 12(b)(6)

To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must “allege[] facts that, taken as true, establish plausible grounds to sustain a plaintiff’s claim for relief.” *Cornelio v. Connecticut*, 32 F.4th 160, 168 (2d Cir. 2022); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaint must plead “enough facts to state a claim to relief that is plausible on its face”); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The cause of action must also be “judicially cognizable.” *Kittay v. Kornstein*, 230 F.3d 531, 537 (2d Cir. 2000).

Documents attached to or incorporated in the complaint are “deemed part of the pleading” and may be considered. *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Where the complaint’s allegations are contradicted by such documents, the documents control. *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

ARGUMENT

I. The Complaint Should Be Dismissed for Lack of Subject Matter Jurisdiction Because Plaintiff Fails to Establish Standing.⁴

“Article III, Section 2 of the Constitution limits the subject-matter jurisdiction of federal courts to ‘Cases’ and ‘Controversies,’” *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020), and a key requirement is that litigants must have standing, *see id.*; *see also California v. Texas*, 593 U.S. 659, 668 (2021) (explaining that the power bestowed on federal courts “includes the requirement that litigants have standing”).

To satisfy the test for standing, a plaintiff “must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). “‘At the pleading stage, the plaintiff must clearly allege facts in his complaint demonstrating each element of standing,’ and ‘[t]o survive a . . . motion to dismiss, the complaint’s factual allegations of standing must be plausible and nonconclusory.’” *Miller v. Lamanna*, 169 F.4th 118, 127 (2d Cir. 2026) (alteration in original) (quoting *Lugo v. City of Troy*, 114 F.4th 80, 87 (2d Cir. 2024)). Thus, the plaintiff bears the burden of “affirmatively” establishing standing and subject-matter jurisdiction, *see Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011), and “that showing is not made by drawing from the pleadings inferences favorable to the [plaintiff],” *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). Furthermore, the plaintiff bears this burden of affirmatively “demonstrat[ing] standing for *each* claim and form of relief sought.” *Cacchillo v. Insmmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (emphasis added).

⁴ Although the Complaint should be dismissed with prejudice pursuant to Rule 12(b)(6), as discussed below, this brief addresses subject matter jurisdiction first because it is a threshold question that must be resolved before the merits. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–102 (1998).

In this case, the complaint fails to affirmatively demonstrate traceability *and* redressability for all of Plaintiff's claims.⁵

A. The Complaint Fails to Establish that Any Alleged Injury Is Traceable to the Actions of the Secretary.

The Court should dismiss the Complaint for lack of subject matter jurisdiction because Plaintiff fails to establish that any alleged injury he suffered is traceable to any acts of the Secretary. To adequately demonstrate traceability at the pleading stage, plaintiff must put forward allegations that plausibly establish “a sufficiently direct causal connection between the conduct of [the defendant] and the injury he alleges.” *Liu II*, 834 F. App'x at 604. Notably, an injury is not fairly traceable to a defendant if it was caused instead by the actions “of some absent third party,” *id.* at 605 (quoting *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc)), or if the “chain of causation” between the defendant's actions and the injury is too attenuated or broken at some point, *see Doe v. Hochul*, 139 F.4th 165, 187–88 (2d Cir. 2025).

In this case, the complaint challenges the statutorily-prescribed apportionment method and, in particular, the absence of some limiting principle and the results of its application following the 2020 Census. ECF No. 1 ¶¶ 1–3, 12, 30–31, 33, 57. But it cannot be disputed that *Congress* adopted the method of equal proportions as the apportionment method, that the *President* officially transmitted the results of the method to Congress, and that the Secretary merely conducted the population count and then reported the tabulation to the President. *See Franklin v. Massachusetts*,

⁵ In *Liu II*, despite ultimately recognizing that Plaintiff failed to adequately allege standing overall, the Second Circuit noted that Plaintiff's vote-dilution allegations were sufficient with respect to the injury-in-fact element of standing. 834 F. App'x at 603. Even so, the Second Circuit made clear that Plaintiff cannot rest any claim to relief on vote dilution allegedly experienced by residents of other states. *See id.* (“To the extent Liu alleges injury based on vote dilution suffered by residents of other states, he ‘cannot rest his claim to relief on the legal rights or interests of third parties.’ (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975))). The same is true here: to the extent that any of the claims articulated in the complaint hinge on the rights or interests of third parties, they do not satisfy Plaintiff's injury-in-fact requirement.

505 U.S. 788, 798–99 (1992) (explaining that the Secretary’s report to the President “carries no direct consequences for reapportionment” and that, “[f]or potential litigants . . . the ‘decennial census’ still presents a moving target, even after the [Secretary] reports to the President,” “until the President submits the information to Congress”); *see also id.* at 800 (“2 U.S.C. § 2a provides that the [Secretary] cannot act alone; [it] must send [its] results to the President, who makes the calculations and sends the final apportionment to Congress. That the final act is that of the President is important to the integrity of the process and bolsters [the] conclusion that [the President’s] duties are not merely ceremonial or ministerial.”). The Third Circuit, rejecting a materially identical challenge to § 2a, put the point directly: “Congress acted within its authority by delegating the ministerial tasks of implementing the method of equal proportions, for redistricting, to the Department of Commerce and its employees.” *LaVergne v. Bryson*, 497 F. App’x 219, 222–23 (3d Cir. 2012) (emphasis added).

Despite naming the Secretary as the (sole) defendant in this case, Plaintiff has not offered any explanation plausibly tying his alleged injury to any particular action by the Secretary, who merely implements the directions of Congress and the Constitution. Rather, Plaintiff readily acknowledges “that the legislative enactment of the apportionment formula by Congress is the root source of the representational injury.” ECF No. 1 ¶ 12. Thus, by his own account, Plaintiff disagrees with Congress’ legislative decision to enact 2 U.S.C. § 2a and, because the Second Circuit ruled that he could not raise this disagreement in a lawsuit against Congress, *see Liu II*, 834 F. App’x at 604-05, Plaintiff now seeks to repackage the same non-justiciable claims in a lawsuit against the Secretary, who, in reality, plays but an intermediate role under the system established by Congress in 2 U.S.C. § 2a. Plaintiff’s third bite at the apple fares no better than his first two attempts, as he cannot show any connection between his alleged harm and any conduct

of the Secretary. Plaintiff's own explanation for the change in defendant confirms as much. He states that he refiles "in strict adherence to the guidance and jurisdictional roadmap provided by the Second Circuit." ECF No. 1 ¶ 12. That guidance identified "those actors responsible for the census and for redistricting," *Liu II*, 834 F. App'x at 605, as actors whose conduct a plaintiff might be able to theoretically challenge. But merely identifying a defendant with some role in the census does not establish traceability where, as here, Plaintiff does not challenge the Secretary's conduct. Further, Plaintiff challenges neither the census nor New York's districting. He has changed the caption without changing the theory. *Cf. Clemons v. U.S. Dep't of Com.*, 710 F. Supp. 2d 570, 572–73 (N.D. Miss. 2010) (three-judge court) (challenge sought "invalidation of the relevant part of 2 U.S.C. § 2a"), vacated for lack of jurisdiction, 562 U.S. 1105 (2010). Notably, the plaintiff in *LaVergne* sued the Secretary, among others who arguably fit this guidance, and Third Circuit nonetheless held that he lacked standing, because he alleged at most "a type of institutional injury . . . which necessarily damages all United States voters equally." 497 F. App'x at 222 (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).

In sum, because every count in the complaint essentially takes issue with the legislative adoption of an apportionment method, and not any action by the Secretary, the complaint should be dismissed in its entirety for its failure to demonstrate traceability.

B. The Complaint Fails to Establish that Any Alleged Injury Is Redressable by this Court.

Even if Plaintiff could establish an injury in fact that is traceable to some action of the Secretary, Plaintiff has failed to demonstrate that the injury is redressable by the Court. To adequately demonstrate redressability at the pleading stage, a plaintiff must plausibly show that it is "likely," and "not speculative," that a favorable decision by the court granting the requested

relief “would provide meaningful redress” for the alleged injury. *Knight v. City of New York*, 164 F.4th 173, 178 (2d Cir. 2026).

The complaint in this case asks the Court for two forms of relief for an alleged injury of vote dilution stemming from the 2020 Census: (1) a declaration “that the current apportionment system [is unconstitutional]” and (2) an order “[e]njoin[ing] [its] continued use.” ECF No. 1 ¶¶ 58–59. But what the complaint understands this relief to mean, and envisions in the event of such an outcome, remains unclear. The direct impact of the requested relief would be to freeze in place the present allocation of House seats (which, by itself, would not remedy his alleged vote dilution injury) unless and until Congress enacts a new apportionment system (which is both speculative and not something that the judicial branch can direct). *See Liu II*, 834 F. App’x at 606 (“Finally, a declaration that the Apportionments Acts of 1911, 1929, and 1941 are unconstitutional would not remedy Liu’s asserted injury because it would not change the apportionment of representatives. Rather, it would leave the current apportionment in place until such time as the Congress enacts a new apportionment statute. Because the possibility that Congress would enact such a statute—and that the President would sign it—is speculative, we conclude that Liu failed plausibly to allege [redressability].”); *see also id.* at 606 (“[F]ederal courts lack the power to compel the Congress to exercise its legislative powers. . . . Because passing a statute is a quintessentially legislative power, the federal courts may not compel the Congress to exercise it.”). Thus, the relief that Plaintiff seeks from this court would not remedy his alleged vote dilution injury, which is backward-looking and would require legislative action to remedy. *See E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014) (“An abstract decision without remedial consequence seems merely advisory, an unnecessary expenditure of judicial resources that burdens the adversary and carries

all the traditional risks of making ad hoc law and trespassing on the provinces of the executive and legislature.” (internal quotation marks and citations omitted)).

Accordingly, the complaint should be dismissed in its entirety for lack of subject matter jurisdiction because it fails to affirmatively demonstrate redressability for any of the claims.

C. The Supreme Court’s Decision in *Clemons v. Department of Commerce* Confirms that Plaintiff’s Complaint Should Be Dismissed for Lack of Subject-Matter Jurisdiction

The Supreme Court’s summary ruling in *Clemons v. Department of Commerce* requiring dismissal of a similar lawsuit challenging the apportionment scheme established by Congress further supports dismissal of Plaintiff’s claims for lack of subject matter jurisdiction. There, a group of voters from the states of Mississippi, Delaware, Montana, South Dakota, and Utah had challenged the 435-seat cap on the number of House seats, as established by the Apportionment Act of 1911, Pub. L. 62–5, 37 Stat. 13, and incorporated into the current apportionment scheme by 2 U.S.C. § 2a(a). *See Clemons v. U.S. Dep’t of Com.*, 710 F. Supp. 2d 570, 572 (N.D. Miss. 2010); *see also supra* note 2. The challengers’ central argument was that the 435-seat cap resulted in unconstitutional disparities in population among the districts in different States. *See Clemons*, 710 F. Supp. 2d at 572–73. The three-judge panel⁶ that heard the case in the first instance determined that the political question doctrine did not apply—meaning, the constitutional dispute

⁶ The Court is not required by 28 U.S.C. § 2284 to convene a three-judge panel to adjudicate this motion because Plaintiff fails adequately to plead subject matter jurisdiction. Under 28 U.S.C. § 2284(a), “[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts.” *See also* § 209(b) & (e)(1), Pub. L. No. 105-119, 111 Stat. 2440, 2481–82 (allowing challenges to be brought against the use of statistical methods for determining the population for purposes of apportionment or redistricting, and establishing that any such actions under § 209 “shall be heard and determined by a district court of three judges in accordance with [28 U.S.C. § 2284]”). However, because Plaintiff’s complaint does not invoke these authorities, request a three-judge panel (*see* 28 U.S.C. § 2284(b)(1)), or adequately plead subject-matter jurisdiction as explained herein, this Court need not convene such a panel. *See Equal Vote Am. Corp. v. Cong.*, 397 F. Supp. 3d 503, 512 (S.D.N.Y. 2019) (“Plaintiffs’ failure to plead subject matter jurisdiction also establishes this Court’s authority to decide the motion [to dismiss] without convening the three judge panel required to decide an apportionment case on the merits.”); *Liu II*, 834 F. App’x at 602–06 (remanding for dismissal without prejudice for lack of subject-matter jurisdiction without addressing the issue of whether a three-judge panel was required under 28 U.S.C. § 2284).

was justiciable—but concluded that the decision to cap the number of House seats at 435 was within Congress’ legislative discretion. *See id.* at 573–90. On appeal, however, the Supreme Court summarily vacated the judgment and remanded the case “with instructions to dismiss the complaint for lack of jurisdiction.” *Clemons v. Dep’t of Com.*, 562 U.S. 1105 (2010).

Although the Supreme Court did not clarify whether its jurisdictional determination in *Clemons* was based on standing, the political question doctrine, and/or some other ground(s), the summary ruling strongly supports the conclusion that federal courts lack subject-matter jurisdiction to hear Plaintiff’s present challenge, which similarly challenges the apportionment scheme established by Congress on the basis of representational disparities. At the absolute very least, the Supreme Court’s decision in *Clemons* forecloses Plaintiff’s claims insofar as they directly or indirectly challenge the 435-seat cap on House seats and call that aspect of 2 U.S.C. § 2a(a) to be held unconstitutional.

II. The Complaint Should Be Dismissed With Prejudice for Failure to State a Claim Upon Which Relief May Be Granted

The Court should further dismiss the Complaint because it fails to state a claim upon which relief may be granted. To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must “allege[] facts that, taken as true, establish plausible grounds to sustain a plaintiff’s claim for relief.” *Cornelio v. Connecticut*, 32 F.4th 160, 168 (2d Cir. 2022); *see also Kittay v. Kornstein*, 230 F.3d 531, 537 (2d Cir. 2000) (explaining that a cause of action must be “judicially cognizable” to survive a Rule 12(b)(6) motion to dismiss). Plaintiff’s complaint does not clear this bar with respect to any of its counts for the following reasons.

A. *Montana* Forecloses Plaintiff’s Central Theory

First, Plaintiff’s claims are barred as a matter of law because in *U.S. Department of Commerce v. Montana*, the Supreme Court upheld the constitutionality of the method of equal proportions against a challenge based on apportionment discrepancies between the States, *see* 503 U.S. at 465–66 (“Congress had ample power to enact the statutory procedure [including the method of equal proportions] in 1941 and to apply the method of equal proportions after the 1990 census.”). That binding precedent plainly governs the instant lawsuit and mandates its dismissal.

Indeed, the Court need not decide whether some hypothetical interstate disparity could ever exceed constitutional limits, because the disparities Plaintiff alleges fall well within what the Supreme Court has already sustained. The apportionment upheld in *Montana* was one in which, as the Court put it, “whether Montana has one district or two, its variance from the ideal will exceed 40 percent.” 503 U.S. at 464. Plaintiff’s headline grievance is a 26% disparity. ECF No. 1 ¶ 19. Nor does the Constitution supply a measure by which to call one figure permissible and the other not: “[t]he polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course,” *id.* at 463, and Congress’ “apparently good-faith choice of a method of apportionment . . . commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard,” *id.* at 464.

B. The Complaint’s Reliance on *Wesberry* Is Misplaced

Second, the complaint’s reliance on the *Wesberry* standard (*i.e.*, that congressional districts be drawn “as nearly as is practicable” equal in population) is misplaced, as *Wesberry* concerned the allocation of House seats *within* a state, not the allocation of House seats *between* states. 376 U.S. at 3. Although the lower court in the *Montana* litigation accepted the proposition that the *Wesberry* standard ought to extend to the apportionment of representatives between states, *see*

State of Mont. v. U.S. Dep't of Com., 775 F. Supp. 1358, 1362 (D. Mont. 1991), the Supreme Court emphatically declined to do the same, *see U.S. Dep't of Com. v. Montana*, 503 U.S. at 459–65. Instead, the Supreme Court took great care to explain the deficiencies of the lower court's view, writing as follows:

Our cases applying the *Wesberry* standard have all involved disparities in the size of voting districts within the same State. In this case, however, Montana contends . . . that the *Wesberry* standard also applies to apportionment decisions made by Congress There is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well. . . . [W]e might well find that the requirement that Representatives be apportioned among the several States 'according to their respective Numbers' would also embody the same principle of equality. Yet [t]he constitutional guarantee of a minimum of one Representative for each State inexorably compels a significant departure from the ideal. . . . Moreover, the need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50. Accordingly, although common sense supports a test requiring a good-faith effort to achieve precise mathematical equality *within* each State, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole. This commonsense understanding of a characteristic of our Federal Government must have been obvious to the masters of compromise who framed our Constitution. . . . 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.

Id. (internal quotation marks and citations omitted); *see also id.* (“[Congress’] apparently good-faith choice of 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.”). This latest attempt to superimpose the *Wesberry* standard onto a dispute about interstate apportionment should likewise be rejected, and, because Plaintiff’s complaint appears to rest upon the *Wesberry* standard, it should be dismissed pursuant to Rule 12(b)(6).⁷

⁷ A single district judge, as opposed to a three-judge panel, may also dismiss where the constitutional claim is “essentially fictitious,” “wholly insubstantial,” “obviously frivolous,” or “obviously without merit”—terms the

C. Dismissal Under Rule 12(b)(6) Should Be With Prejudice

Because Plaintiff's claims are foreclosed by binding Supreme Court precedent rather than by any curable pleading deficiency, amendment would be futile, and a Rule 12(b)(6) dismissal should be entered with prejudice. The Government notes, however, that a dismissal for lack of Article III standing should be entered without prejudice. *See Liu II*, 834 F. App'x at 606 (remanding for entry of dismissal without prejudice, citing *Katz v. Donna Karan Co.*, 872 F.3d 114, 121 (2d Cir. 2017)).

CONCLUSION

For the foregoing reasons, the Court should decline to convene a three-judge panel and dismiss the complaint with prejudice for failure to state a claim pursuant to Rule 12(b)(6) or, in the alternative, without prejudice for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

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New York, New York

Respectfully submitted,

JAMES M. MCDONALD
United States Attorney
Southern District of New York

By: /s/ Brian E. Hilburn
BRIAN E. HILBURN
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
(212) 637-2614
brian.hilburn@usdoj.gov

Supreme Court has explained as limited to claims whose “unsoundness so clearly results from the previous decisions of th[e Supreme] Court as to foreclose the subject.” *Shapiro v. McManus*, 577 U.S. 39, 45–46 (2015) (citation omitted) (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)). This description fits here. As explained above, Plaintiff's theory is foreclosed by *Montana*, which upheld the very method challenged here.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 5,351 words.