No. 12- _____

IN THE
SUPREME COURT OF THE UNITED STATES

Eugene Martin LaVergne,

Petitioner,

v.

John Bryson, Secretary of the United States Department of Commerce, *el al.,*

Respondents.

On Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Third Circuit

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Petitioner *Pro Se*

QUESTIONS PRESENTED

Since 1939 and this Court's plurality decisions in *Coleman* v. *Miller* 307 U.S. 433 (1939) and the companion case of *Chandler* v. *Wise* 307 U.S. 474 (1939), the reality is that the Article III Courts (including members of this Court), the members of the Article I and Article II Political Branches, and academic commentators can not agree in any way on exactly what *Coleman* means, to what extent if any *Coleman* applies, and whether indeed today *Coleman* has *any* application or affect whatsoever on the justiciability of claims regarding the Constitution's Article V amendment process. Indeed, in 1982 this Court already once granted *certiorari* in the two Equal Rights Amendment Case (*National Organization for Women* v. *Idaho* and *Carmen, Administrator of General Services* v. *Idaho,* 455 U.S. 918 (1982)) to clarify the exact same identical questions now presented again in this case, that being whether or to what extent Article V legal claims are jusdiciable under *Coleman.* However, because the time extension for ratification of the Equal Rights Amendment expired without a sufficient number of State Legislatures ratifying the Amendment, the petitions for *certiorari* were dismissed on motion of the Solicitor General as moot (459 U.S. 809 (1982) (both cases)). Therefore, this Court missed the opportunity to clarify these important constitutional issues and missed the opportunity to settle once and for all the disagreements among the various Circuit Courts of Appeals as to the actual correct meaning and application of *Coleman.*

Since the dismissal of *certiorari* in the Equal Rights Amendment Cases, the disagreements and

confusion in the Article III Courts and in the Article I and Article II Political Branches and among academic commentators as to what *Coleman* means has only gotten worse. The contentious process leading up to the May 18, 1992 "Archivist's Certification" promulgating the full ratification of "Article the Second" as an amendment to the Constitution only highlights the sustaining dispute and disagreement on the meaning of *Coleman. See infra.*

The specific questions presented in this case will serve to settle once and for all these extremely important yet unresolved constitutional issues and will allow this Court to resolve the splits among the various Circuit Courts of Appeals on the issue of the extent and the continuing applicability of this Court's *Coleman* decision. The specific questions presented by Petitioner in this case are as follows:

1. Whether a proposed amendment to the Constitution has been validly ratified by a sufficient number of the State Legislatures and become a permanent part of the Constitution is at all times and under all circumstances a "political question" that is never subject to judicial review by the Article III Courts?

2. Whether this Court's plurality opinion in *Coleman* v. *Miller* 307 U.S. 433 (1939) established a precedent that the Article I Congress has exclusive, complete and unreviewable control over the entirety of the Constitution's Article V amendment process from start to finish, with any and all questions regarding the Article V amendment

process from start to finish, under all circumstances, "political questions" that can never be subject to judicial review by the Article III Courts?

3. Whether Petitioner has Article III standing pursuant to *Department of Commerce* v. *United States House of Representatives,* 525 U.S. 316 (1999) to bring a legal claim that the 2010 Decennial Apportionment of the House of Representatives is unconstitutional?

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Page

Cases:

U.S. Constitution:

Statutes, Laws and Court Rules:

Other Sources:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2012

No. 12-

EUGENE MARTIN LaVERGNE,

Petitioner,

v.

JOHN BRYSON in his official capacity as the Secretary of the United States Department of Commerce, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Eugene Martin LaVergne prays that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Eugene Martin LaVergne, individually, the Appellant below, and John Bryson in his official

capacity as the Secretary of the United States Department of Commerce; John Grover in his official capacity as the Director of the United States Census Bureau; Karen L. Haas in her official capacity as the Clerk of the United States House of Representatives; John Boehner in his official capacity as the Speaker of the United States House of Representatives; Daniel Inouye in his official capacity as the President Pro Tempore of the United States Senate; Joseph Biden in his official capacity as the President of the United States Senate; and David Ferriero in his official capacity as the Archivist of the United States of America, all Appellees below. There are no corporations involved in this case.

OPINIONS BELOW

The Memorandum & Order of the United States District Court for the District of New Jersey dated December 16, 2011 entered by the Honorable Peter G. Sheridan, U.S.D.J. is not reported and is reprinted in *Appendix* E.

The Order of the United States Court of Appeals for the Third Circuit denying petitioner's appellate motion for an order entering a Preliminary Injunction and Mandamus or alternatively for an Order directing that the pending appeal be heard on an Expedited basis dated March 7, 2012 entered by Circuit Judges Thomas Ambro, Kent Jordan and Thomas Vanskie, is not reported and is reprinted in *Appendix* D.

The *En Banc* Order of the United States Court of Appeals for the Third Circuit denying petitioners motion for Expedited Initial *En Banc* review or Alternatively Expedited Initial Panel

Review dated May 17, 2012 and entered by the Third Circuit *En Banc* (Chief Judge Theodore McKee and Circuit Judges Delores Sloviter, Anthony Scirica, Marjorie Rendell, Thomas Ambro, Julio Fuentes, D. Brooks Smith, D. Michael Fisher, Michael Chargres, Kent Jordan, Thomas Hardiman, Joseph Greenaway and Thomas Vanskie) is not reported and is reprinted in *Appendix* C.

The *Per Curiam* Not Precedential Opinion of the United States Court of Appeals for the Third Circuit affirming the Memorandum & Order of the District Court dated September 20, 2012 entered by the Honorable D. Brooks Smith and Michael Chargres, Circuit Judges, and the Honorable Lee H. Rosenthal, U.S.D.J. for the Southern District of Texas sitting by designation, is not reported and is reprinted in *Appendix* A. The final Judgment, also dated September 20, 2012 is not reported and is reprinted in *Appendix* B.

JURISDICTION

The United States Supreme Court has jurisdiction to review the Opinion and Judgment of the United States Circuit Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution (commonly known as the "Vesting Clause") provides in relevant part as follows:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 2 of the United States Constitution in its original form provides in relevant part as follows:

> "Representatives and direct taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers which shall be determined by adding to the whole Number of free Persons, including those bound to Serve for a Term of Years, and excluding Indians not taxed,[2] three fifths of all other

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[1] The Constitutional requirement in Article I, Section 2 that "Taxes" be apportioned among the States according to their respective numbers was made inoperative by the full ratification and consummation into law of the 16th Amendment.

[2] The Constitutional requirement in Article I, Section 2 and the Fourteenth Amendment, Section 2 that "…Indians not taxed …" were exempt and were not to be counted in the official Census was rendered moot in 1940 when the United States Attorney General issued a Formal Opinion declaring

> Persons.[3] The actual Enumeration shall be made within three Years after the first Meeting of Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law Direct. The number of Representatives shall not exceed one for every thirty Thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

Article II, Section I of the United States Constitution provides as follows:

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that as a matter of law that there were no longer any Indians that met this definition. *See* 39 *Op. Att'y General* 518 (1940).

[3] The Fourteenth Amendment, Section 2, ratified and consummated into law required that starting with the 1870 Decennial Census and each Decennial Census thereafter that each former slave, to that point counted as 3/5 of a person for Census purposes, would now be counted as 1 "whole person" for Article I, Section 2 Census purposes.

> "Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same term, be elected as follows Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: But no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Article II, Section 7, Clause 2 of the United States Constitution (commonly known as the "Bicamerality Clause") provides in relevant part as follows:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States."

Article II, Section 7, Clause 3 of the United States Constitution (commonly knows as the "Presentment Clause") provides in relevant part as follows:

> "Every Order, Resolution, or vote to which the concurrence of the Senate

> and the House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill."

Article V of the United States Constitution provides as follows:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State,

> without its Consent, shall be deprived of its equal Suffrage in the Senate."

On September 25, 1789, after months of contentious debate and constant revisions, a Joint Resolution of Congress proposing 12 "Articles of Amendments", with all 12 separate proposed amendments proposed together in the same Joint Resolution, was approved in final agreed upon text version by a two thirds vote in both the House of Representatives (who affirmatively voted to approve the 12 Articles by a two thirds vote on September 24, 1789) and the United States Senate (who affirmatively voted to approve the 12 Articles by a two thirds vote on September 25, 1789). Directly relevant to this case is "Article the First", the so called apportionment amendment, the first in sequence of the twelve proposed amendments, proposed first because the apportionment amendment was deemed by the 1789 Congress as the most important of the 12 proposals. The actual final approved text of "Article the First" reads as follows:

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

> Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than two hundred representatives, nor less than one Representative for every fifty thousand persons.[4]

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[4] Rule 34(5) of the Supreme Court indicates that when a federal law is at issue and is not classified in the United States Code, the citation should *ordinarily* be to the United States Statutes at Large. However, the Rule continues, stating that "… Additional or alternative citation should be provided *only if there is a particular reason* why the citations are relevant to the argument." (emphasis added) *Id.* In this case there is such a reason. That reason is that the text of "Article the First" as contained in the United States Statutes at Large, specifically at 1 Stat. 97 (1789), first printed in 1845 (56 years after the actual events at issue) is in error. On August 22, 1789 the House of Representatives approved the final version of text of "Article the First". *See* (A-53-69). Thereafter, the Senate proposed an alternate version of "Article the First", which version also contained a guarante of perpetual growth of the size of the House of Representatives, but at Line 3 (or "Clause 3") the ratio would be 1 additional Representative apportioned to a State for every increase in population of 60,000 persons. In the Legislative Process the House expressly rejected this alternate proposal, and the Senate agreed to the House version. A joint committee of 6 was convened to resolve the remaining disagreements between the two Houses which at this point now was limited to the final text version of "Article the Third" and "Article the Eighth". Though "Article the First" was agreed upon and settled and was not even before the Joint Conference Committee, during the process it was noticed that there was a possible flaw in the text of "Article the First" at Line 2 (the second of the three Lines, or "Clauses"). With inclusion of the negative word "less" at Line 2, the 40,000 ratio was actually a "ceiling" ratio when in fact at Line 2 the 40,000 number was intended to be a "floor" ratio, so that once the growth or population progressed so that the Nation was at Line 2, the

ratio would be between 40,000 and 50,000, but not "less" than 40,000. These were smart men, and they quickly realized that there was a simple way to correct this hard to recognize flaw so that the intent of what was actually approved would be guaranteed. All that had to be done was to exchange the new word "more" for the existing word of "less" in Line 2. Indeed, the Final Report made such a recommendation, and this is what was voted on and approved by Congress as the final form of text of "Article the First". However, thereafter some Clerk misunderstood the Final Report and did not know what a penultimate was (and apparently then incorrectly read the "Article the First" text linearly as printed in the Broadside, and not as the three "Lines" or Clauses referred to by the Joint Committee and understood by Congress) and took it upon themselves to paraphrase *what they thought* the Final Report *meant* when referring to the Final Report in the *House Journal*, rather than simply memorialize the verbatim text of the actual Final Report that was voted on and approved. The actual Final Report directed that the change be made as follows:

> * * *
>
> The Committees were also of opinion it would be proper for both Houses to agree to amend the First Article, *by striking out the word "less" in the last line but one, and inserting in its place the word "more"*, and accordingly recommend that the said Article be reconsidered for that purpose. (Emphasis added)

[*See* (A-60-63); see also text reprint in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress,* edited by Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, Johns Hopkins University Press, Baltimore, Maryland (1991) at pages 49 -50]

The phrase "… last line *but one* …" refers to the penultimate line, the second of the total of three lines or clauses in the series that made up the entirety of the text of "Article the First": Not the "last" line, or the last place in the last line, but in the last line "but one". However, this original Senate Report was locked away in Senate Records never to be seen again until after 1934 when the records were transferred to the National Archives. However, the *Journal of the House*

1 U.S.C. § 106b in its present form provides as follows:

> "Whenever official notice is received by the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been

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of Representatives (in the commercially published Gales & Seaton version first published in 1820 that would have been available to check) incorrectly reflects that the change was to have been made "… in the last place of the said first article …". *See Id.* at page 121 This was also what was reported (incorrectly) in the *Annals of Congress – House* commercially published after 1834. *See Id* at page 948. This Clerk's Mistake was converted into a Scrivener's and Printer's Error and created much confusion in history on the "less" to "more" change. *See* incorrect text version in "Official" printings at (A-64-70) and at 1 Stat. 97 (1789). Petitioner discounts the Statutes at Large and the "Official Government Printings" as historically inaccurate as to the proper correct text of "Article the First" (just as the "Official Government Printings" were also inaccurate as to the accuracy of the text "Article the Tenth" regarding the "imprisonments" vs. "punishments" issue, *see* Editorial Comment at (A-64-70)) and rather relies upon the original House version approved by the House and the Senate (A-53-69) with the changes made at the actual location in the text as directed by the Final Report and as actually approved by Congress. (A-60-63)

> adopted, and the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

2 U.S.C. § 2a in its present form[5] provides as follows:

> "*Sec.* 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duties of clerk.
>
> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and on each fifth Congress thereafter, the President shall transmit to the Congress a Statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing

[5] The automatic reapportionment statute was originally enacted by Congress as Act of June 18, 1929, Chapter 28, Section 22 (46 Stat. 26), was thereafter amended by Act of April 25, 1940, Chapter 152 (54 Stat. 162), again amended by Act of November 15, 1941, Chapter 470, Section 1 (55 Stat. 761), and last amended by Public Law 104-186, title II, Section 201, August 20, 1996 (110 Stat. 1724). This is the present form of the automatic reapportionment statute.

number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled in the Eighty –Third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of the Clerk, such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts provided by the law of such State, and if any of them are elected from the

> State at large they Shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives from the districts then provided by the law of such State; (3) if there is a decrease in the number of representatives but the number of districts in each State is equal to such decreased number of Representatives, they shall be elected from the districts then provided by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by law of such state; (5) if there is a decrease in the number of Representatives and number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

The President of the United State's official cover letter enclosing the Department of Commerce's Census Bureau's 2010 Decennial Apportionment "Chart", reprinted as 112th Congress, 1st Session, House Document 112-5, together provide as follows:

[Page 1]

To the Congress of the United States:

Pursuant to title 2, United States Code, section 2a(a), I transmit herewith the statement showing the apportionment population for each State as of April 1, 2010, and the number of Representatives to which each State would be entitled.

BARACK OBAMA

THE WHITE HOUSE, *January 5, 2011.*

[page 2]

2

U.S. Department of Commerce
U.S. Census Bureau

APPORTIONMENT POPULATION AND NUMBER OF REPRESENTTIVES, BY STATE: 2010 CENSUS

STATE	APPORTIONMENT POPULATION (April 1, 2010)	NUMBER OF APPORTIONED REPRESENTATIVES BASED ON 2010 CENSUS	CHANGE FROM CENSUS 2000 APPORTIONMENT
Alabama	4,802,983	7	0
Alaska	721,523	1	0
Arkansas	6,412,700	9	+1
California	37,341,989	53	0
Colorado	5,044,930	7	0
Connecticut	3,581,628	5	0
Delaware	900,877	1	0
Florida	18,900,773	27	+2
Georgia	9,727,566	14	+1
Hawaii	1,366,862	2	0
Idaho	1,573,499	2	0
Illinois	12,864,380	19	-1
Indiana	6,501,582	9	0
Iowa	3,053,787	4	-1

Kansas	2,863,813	4	0
Kentucky	4,350,606	6	0
Louisiana	4,553,962	6	-1
Maine	1,333,074	2	0
Maryland	5,789,929	8	0
Massachusetts	6,559,644	9	-1
Michigan	9,911,626	14	-1
Minnesota	5,314,879	8	0
Mississippi	2,978,240	4	0
Missouri	6,011,478	8	-1
Montana	994,416	1	0
Nebraska	1,831,825	3	0
Nevada	2,709,432	4	+2
New Hampshire	1,321,445	2	0
New Jersey	8,807,501	12	-1
New Mexico	2,067,273	3	0
New York	19,421,055	27	-2
North Carolina	9,565,781	13	0
North Dakota	675,905	1	0
Ohio	11,568,495	16	-2
Oklahoma	3,764,882	5	0
Oregon	3,848,606	5	0
Pennsylvania	12,734,905	18	-1
Rhode Island	1,055,247	2	0
South Carolina	4,645,975	7	+1
South Dakota	819,761	1	0
Tennessee	6,375,431	9	0
Texas	25,268,418	36	+4
Utah	2,770,765	4	+1
Vermont	630,337	1	0
Virginia	8,037,736	11	0
Washington	6,753,369	10	+1
West Virginia	1,859,815	3	0
Wisconsin	5,698,230	8	0
Wyoming	588,300	1	0
TOITAL APPORTIONMENT POPULAITON (*1)	309,183,463	435	

(*1) Includes the resident population for the 50 states, as ascertained by the Twenty-Third Decennial Census under Title 13, United States Code, and counts of overseas U.S. military and federal civilian employees (and their dependents living with them) allocated to their home state, as reported by the employing federal agencies. The apportionment population excludes the population of the District of Columbia.

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The 2010 Decennial Apportionment "Clerk's Certificate" sent to each of the 50 States was in the same form as that used for the State of New Jersey, which lost 1 Representatives (from 13 down to 12) as a result of the automatic reapportionment process implemented pursuant to 2 U.S.C. § 2a The "Clerk's Certificate" is reproduced here and reads as follows:

Certificate of Entitlement
HOUSE OF REPRESENTATIVES
Office of the Clerk
Washington, D.C.

I, Karen L. Haas, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a(b), that the State of

NEW JERSEY

Shall be Entitled, in the One Hundred Thirteenth Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

TWELVE REPRESENTATIVES

in the House of Representatives of the Congress of the United States.

In Witness Whereof I Hereto Affix My Name and the Seal of the House of Representatives of the United States of America this Eleventh Day of January, Anno Domini 2011, in the City of Washington, District of Columbia.

[Seal of the U.S. House of Representatives]

/s/ Karen L. Haas
Clerk of the House of Representatives
of the United States

STATEMENT OF THE CASE

The facts in this case are not in dispute. In May 1790 the Connecticut Legislature ratified "Article the First" by the Constitution's Article V's standards and never reported such action to the Federal Government or the other States. (*See* A-25 to A-36). In June 1792 the Kentucky State Legislature also ratified "Article the First" by the Constitution's Article V's standards and never reported such action to the Federal Government or the other States. (*See* A-37 to A-52).

When the two *unreported* ratification votes of "Article the First" by the Connecticut and Kentucky State Legislatures are added to the ten State Legislatures already long on record with the Federal Government as having ratified "Article the First" (namely the State Legislatures of New Jersey, Maryland, North Carolina, South Carolina, New Hampshire, New York, Rhode Island, Pennsylvania, Virginia and Vermont)[6] this means

[6] *See* the actual original ratification documents from the State Legislatures sent to President Washington, and then by him transferred to the custody of the Secretary of State, now in custody of the National Archives, confirming ratification of "Article the First" by the Legislatures of New Jersey, Maryland, North Carolina, South Carolina, New Hampshire, New York, Rhode Island, Pennsylvania, Virginia

that as of June 1792 the Legislatures of 12 of the then 15 States had affirmatively ratified "Article the First". Three fourths of 15 States equals 11.25 in pure numbers, or a whole number of 11 and a remaining fractional number of ".25". Whether 11.25 is "11" or "12" for Article V purposes is of no moment as 12 State Legislatures ratified "Article the First" when there were 15 States, comfortably in excess of the Constitution's Article V's "three

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and Vermont, today on file with the National Archives and Records Administration at NATIONAL ARCHIVES MICROFILM PUBLICATIONS, Microscopy No. 338, "Certificates of Ratification of the Constitution and the Bill of Rights, Including Related Correspondence and Rejections of Proposed Amendments (1787-1792)", The National Archives, National Archives and Records Service, General Services Administration, Washington: 1960; *See also* Official Department of State text publication of the Official Documents then on file with the Secretary of State as of 1894 (all transferred from the Department of State to the National Archives after 1934) confirming the ratification of "Article the First" by the Legislatures of New Jersey, Maryland, North Carolina, South Carolina, New Hampshire, New York, Rhode Island, Pennsylvania, Virginia and Vermont at *Documentary History of the Constitution of the United States of America, 1786-1870, Derived from the Records, Manuscripts, and Rolls Deposited in the Bureau of Rolls and Library of the Department of States,* Volume I (1894), Volume II (1894), Volume III (1900), Volume IV (1905) & Volume V (1905) published by the United States Department of State, Washington, D.C., at Volume II, pages 321-390. As of 1894, the Department of State stated as part of an editorial comment on page 390 as follows: "There is no evidence of the ratifications of these amendments by Massachusetts, Connecticut, and Georgia." Why, knowing this, no one in the Department of State bothered to check the State Archives of these three States is not known. It is only known that they did not bother to check. No comment is made regarding Kentucky or Tennessee and the amendments.

fourths" requirement of 11.25 (whether this requires ratification by 11 or 12 States).

Though somehow lost in history (Petitioner knows exactly how, when and why this actually happened) the actual fact of history nonetheless is that "Article the First" was and still is law (the Constitution's Article V is clear that proposed amendments are valid "when ratified"), and has been so since at least June 1792. Moreover, as applied today, application of the actual "Article the First" standards to the 2010 Decennial statutory "automatic" 2 U.S.C. §2a apportionment and the number of Representatives apportioned to each State – and therefore the number of electors for each State in the Electoral College - demonstrates that both the 2010 Decennial Apportionment of the House of Representatives and the composition of the Electoral College are both unconstitutional. These questions neither are nor can be subject to reasonable factual and historical dispute. Ignoring this historical reality will neither change reality nor make the issue "go away".

The only questions are then whether this Court can do anything about what Petitioner has discovered in the face of the Article I and Article II branches refusal to take *any* action, and whether Petitioner has Article III standing to do something about it and seek a remedy in an Article III Court. In short, can there indeed be a "wrong" of such constitutional magnitude with this Court nonetheless powerless to interpret and apply the Constitution's Article V and to "say what the law is", with this Court powerless to enter a "remedy"? Does this Court's opinion in *Coleman v. Miller* as fairly read and interpreted in context as the plurality opinion it is, really operate to render any

and all possible Article V claims – including those specifically brought by Petitioner here - nonjusticiable "political questions" beyond the reach of this Court and all Article III Courts? And if *Coleman v. Miller* does so hold, should *Coleman* be overruled or otherwise clarified and limited to the facts and context of that case? That is what this case is *really* about.

Having said all that, this case can simply be described as a constitutional challenge by Petitioner, a qualified voter and resident of the State of New Jersey, to the Constitutionally and validity of the 2010 "automatic" 2 U.S.C. §2a Decennial Apportionment of the House of Representatives. As the result of the statutory "automatic" 2010 Apportionment, New Jersey will lose 1 Representative in the House of Representatives (from 13 Representatives statewide to 12 Representatives statewide) effective January 2013, and the State of New Jersey will therefore also loose 1 vote in the "electoral college" (from 15 votes to 14 votes).

In this case Petitioner reviewed the history and law in detail, and concluded that the precedents of this Court confirmed that the 2 U.S.C. §2a "automatic" statutory process is unconstitutional as violating (1) the separation of powers doctrine, and (2) the non delegation doctrine.[7] More importantly, during his research

[7] Further, Petitioner also was able to easily determine that in the 2010 Decennial Apportionment the State of Texas gained 4 additional Representatives, but that under the method of equal proportions the 4th Representative apportioned to Texas – a State who already was gaining 3 Representatives – was still "automatically" apportioned to Texas despite the mathematical fact that Texas had a smaller

Petitioner discovered many errors and outright falsehoods taught as truths in history. For this reason Petitioner felt compelled to personally check the early American Legislative Records in the State Archives of Massachusetts, Connecticut, Georgia, Kentucky and Tennessee to see if he could determine if there was any evidence that any of those State Legislatures at any time during 1789 and 1796 actually ratified "Article the First" and simply failed to notify the Federal Government and the other State of their actions. To Petitioner's utter amazement, as already noted, he discovered that both the Connecticut State Legislature and the Kentucky State Legislature indeed both had ratified "Article the First" by the Constitutions Article V standards and never reported their ratifications to the Federal Government or to the other States.

Moreover, Petitioner also discovered that there was in fact a Clerk's Mistake inadvertently converted into a Scrivener's Error and Printer's Error in the text of Article the First that was presented to the State Legislatures for ratification. *See* footnote 4, *supra.* What effect this has, if any, will have to be determined by "someone", and the process of determination of this issue – "what the

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remaining fractional number than New Jersey and Louisiana and yet both States still lost 1 Representative while Texas gained 4. Stated simply, the 4th Seat apportioned to Texas by a supposedly mathematically objective formula was in actuality improperly taken away from either New Jersey or Louisiana as confirmed by simple math. This is because it is a mathematical fact that the method of equal proportions, over time and increases in population, operates to favor larger populated states to the detriment of smaller populated states.

law is" - can hardly be described as a nonjusticiable "political question".

The Third Circuit's Ruling On The Justiciability of Petitioner's Article V Claims in this Case

All that being said, Petitioner has to date not had a single adverse *substantive* decision entered against him on his historical, factual and legal claims by either of the Courts below. No one has so much as attempted to argue that Petitioner' factual history is incorrect. This is because there is no getting around the fact that Petitioner's factual claims are historically accurate. What these facts mean, or more directly *who determines* what these facts mean, is really what is at issue.

Rather than acknowledge and determine the meaning of what Petitioner had discovered and rather than consider the substantive merits of Petitioner's claims, the District Court *sua sponte* dismissed the entirety of the case under *F.R.Civ.P.* 12(b)(6) which was affirmed on appeal by the Third Circuit without oral argument. The reason why? Not that Petitioner is wrong in his history. In short, the position taken by the Third Circuit in this case is that even though Petitioner may be correct, *Coleman* v. *Miller* holds that there is simply nothing any Article III Court can do about it.

The Third Circuit specifically stated below as follows:

> … "[t]he issue of whether a constitutional amendment has been properly ratified is a political question." *United States* v. *McDonald,*

> 919 F.2d 146, 1990 WL 186103 (table), at *3 (9th Cir. 1990) (per curium) (citing *Coleman v. Miller,* 307 U.S. 433, 450 (1939)). In *Coleman,* the Supreme Court held that "the question of the efficacy of ratifications by state legislatures … should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." 307 U.S. at 450.
>
> [September 20, 2012 Opinion at page 56 (A-6-7)].

For this panel of the Third Circuit to reach the conclusion that all of Petitioner's Article V claims are in fact nonjusticiable under *Coleman*, the *Per Curium* "Not for Publication" Decision first cited to one of the many possible readings of *Coleman* itself, and supported that reading with citation to a 22 year old unreported and not precedential decision from the Ninth Circuit (*United States* v. *McDonald*) in a tax protester case. The Third Circuit below interpreted *Coleman* as an absolute bar to judicial review of any and all Article V claims at all times and under all circumstances. In so doing, the Third Circuit simply disregarded directly conflicting views clearly stated in a reported and precedential decision from the Third Circuit itself on the identical issues, where the Court found that *Coleman* should not be read so as to bar all Article V claims. *See Government of the*

Virgin Islands v. *Eleventh Legislature of Virgin Islands,* 536 F.2d 34 (3d Cir. 1976).

The unreported and not precedential Ninth Circuit Opinion in *United States* v. *McDonald* and the directly conflicting reported and precedential Third Circuit Opinion in *Government of the Virgin Islands* v. *Eleventh Legislature of Virgin Islands* can not *both* be right in their reading on *Coleman* and the judiciability of Article V claims.

Stated bluntly and plainly, what is the answer: Does an Article III Court ever have the authority to determine whether or when a proposed Constitutional Amendment has been ratified by "three fourths" of the "legislatures" of the "several States" in accordance with the Constitution's Article V and has become law?

Existing Precedent on this Court's Authority to Judicially Review Article V Claims Prior to *Coleman* v. *Miller*

Ordinarily the answer to the question just posed would be clear beyond reasonable dispute. In *Hollingsworth* v. *Virginia,* 3 U.S. (3 Dall.) 378 (1798) this Court considered and ruled on the merits of a case were it was argued that the "Suability of the States" amendment was not valid and had not lawfully become a permanent part of the Constitution pursuant to the special Article V federal Constitutional law making process. This Court found those questions subject to judicial review and decided the case on its substantive merits. Five years later in *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137 (1803) Chief Justice John Marshall, writing for a unanimous Court, held that "…[i]t is emphatically the province of the judicial

department to say what the law is ...", *Id.* at 177, and in so doing established the general principle of judicial review, now unquestionably a bedrock of our Constitutional form of government. The point being is that the *specific* principle that Article V claims are judicially reviewable is itself actually five years older than the *general* principle of judicial review itself. Indeed, this Court through the years, on a variety of occasions and in a variety of contexts, routinely decided Article V amendment claims, finding in each case the Article V issue to be subject to judicial review without issue or serious question as to the jurisdiction or authority of this Court to do so. *See e.g. National Prohibition Cases,* 253 U.S. 350 (1920); *Hawke* v. *Smith (No. 1),* 253 U.S. 221 (1920) (eighteenth amendment); *Hawke* v. *Smith (No. 2),* 253 U.S. 231 (1920) (nineteenth amendment); *Dillon* v. *Gloss,* 256 U.S. 368 (1921); *Lesser* v. *Garnett,* 258 U.S. 130 (1922); *United States* v. *Sprague,* 282 U.S. 716 (1931).

The *Coleman* v. *Miller and Chandler* v. *Wise* Cases

However, in 1939 the then sitting nine Justices[8] on the Court issued their various opinions

[8] A full nine member Supreme Court participated in the vote to grant the Petitions for a writ of *certiorari* in the *Coleman* and *Chandler* cases. The members of the Court at the time the Petitions were granted were Chief Justice Charles Evans Hughes and Associate Justices Hugo Black, Owen Roberts, Lewis Brandeis, Benjamin Cordoza, Pierce Butler, James McReynolds, Harlan Fiske Stone and Stanley Reed. The matter was briefed and argument was scheduled for the following fall in October 1938. However, on July 9, 1938, after the Court had agreed to hear both cases but before oral argument was held, Justice Benjamin Cordoza suddenly and unexpectedly died, leaving the Court temporarily now at 8

in *Coleman* v. *Miller* 307 U.S. 433 (1939) and the companion case of *Chandler* v. *Wise* 307 U.S. 474 (1939) and in so doing cast serious doubt, uncertainty and disagreement and outright confusion as to whether any Article V claims were still or ever subject to judicial review, a confusion which lasts to this day.

The Court was deeply divided in both cases. In *Coleman,* treated as the main case of the two, there were four separate opinions among the nine Justices on the various issues in the case, with the Justices only able to actually reach a majority

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members. When oral argument was heard in the *Coleman* and *Chandler* cases on October 10, 1938 the following fall, no replacement for Justice Cordoza had yet been nominated and confirmed. Therefore, the eight Justices sitting heard oral argument. As history developed, it is clear that after the October 10, 1938 oral argument in each case that the Court was evenly divided and as such could not reach a decision on the issues presented as the matter was held over without decision and scheduled for re-argument the following Spring. On January 4, 1939 Felix Frankfurter was nominated to replace Justice Cordoza, and was sworn in and officially joined the Supreme Court on January 30, 1939, bringing the Court back to the full size of 9 members. However, two weeks later, on February 13, 1939, Justice Louis Brandies retired, now again bringing the size of the Court back down to eight members. On March 20, 1939 William O. Douglas was nominated to replace Justice Brandeis and was confirmed by the full Senate on April 4, 1939. Justice Douglas was sworn in on Monday April 17, 1939, and literally immediately thereafter that same day Justices Douglas and the other eight members of the now full nine member Supreme Court heard the first of two days of re-argument in the *Coleman* and *Chandler* cases. These were the first cases ever heard by Justice Douglas.

agreement on one issue, that being the threshold issue of standing. No other issue could manage to commanded a majority opinion of the Court. Included in the four opinions was the written concurrence of Justice Black, which was joined in by Justices Roberts and new Justices Frankfurter and Douglas. These four Justices, not a majority of the Court, appeared to disclaim *any* judicial review of the Article V amendment process whatsoever under any circumstances. *Coleman* v. *Miller* 307 U.S. at 459 (Black, J., concurring). "Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority." *Id.* at 459-460.

REASONS TO GRANT THE PETITION

This Petition For *Certiorari* Should Be Granted So That This Court Can Settle Once And For All These Extremely Important Yet Unresolved Constitutional Issues And So That This Court Can Resolve The Splits Among The Various Circuit Courts of Appeals On The Meaning And Applicability Of This Court's *Coleman* v. *Miller* Plurality Decision

Since 1939 and this Court's plurality decisions in *Coleman* v. *Miller* 307 U.S. 433 (1939) and the companion case of *Chandler* v. *Wise* 307 U.S. 474 (1939), the reality is that the Article III Courts (including members of this Court), the members of the Article I and Article II Political

Branches, and academic commentators can not agree in any way on exactly what *Coleman* means, to what extent if any *Coleman* applies, and whether indeed today *Coleman* has *any* application or affect whatsoever on the justiciability of claims regarding the Constitution's Article V amendment process.

The Views on *Coleman* v. *Miller* and Justiciability of Article V Issues During the Equal Rights Amendment Process

The most prominent and detailed opinions on the issue of whether *Coleman v. Miller* operates to prohibit judicial review of all Article V issues at all times as "political questions" came as the result of the various legal challenges to the Article V process during the Equal Rights Amendment debates of the 1970s and early 1980s.

The First E.R.A. Case: *Trombetta* v. *Florida*

First in sequence was *Trombetta* v. *Florida,* 353 F.Supp. 575 (M.D.Fla. 1973), where the District Court found the question of whether a Florida legal requirement that an election must occur prior to a vote being taken by the Legislature on ratification of an amendment violates the Constitution's Article V was a question properly subject to judicial review notwithstanding *Coleman* v. *Miller* and the related "political question doctrine".

The Views of "Circuit Judge" John Paul Stevens on *Coleman* v. *Miller* and Justiciability of Article V Claims

Next were two lawsuits that were filed in the United States District Court in Illinois – one in the Northern District and one in the Eastern District – each by different members of the Illinois Legislature, and each seeking the same relief in the form of a declaration that an Illinois State Constitutional provision and Rules of the Illinois Legislature which required a supermajority of a three-fifths affirmative vote for a proposed Federal Constitutional Amendment to be ratified violated the United States Constitution's Article V. It was claimed by the plaintiff members of the legislature that the Constitution's Article V required nothing more than a simple majority vote (*ie.* 50%+). The two cases were consolidated and a three judge court was convened to hear the consolidated cases, consisting of two District Court Judges and John Paul Stevens, then a Circuit Judge on the Eighth Circuit Court of Appeals. On February 20, 1975, the three Judge Court issued their decisions in the two cases (*Dyer* v. *Blair* and *Netsch* v. *Harris*) in a unanimous opinion written by then Circuit Justice Stevens. *See Dyer* v. *Blair,* 390 F.Supp. 1291 (N.D. Ill. 1975) (three-judge court) . The defendants raised the issue of nonjusticiability of the claims due to *Coleman* as a bar to the Court considering the cases. On this issue then Circuit Judge Stevens stated as follows:

> Defendants contend that these cases present a "political question," that is to say, a question which can be

> answered by only either the executive or the legislative branch of the Federal Government. The contention is supported by alternative arguments: first, that Congress has sole and complete control over the entire amending process, subject to no judicial review: and second, that even if every aspect of the amending process is not controlled by Congress, the specific issue raised by in these cases is.
>
> There is force to the first argument since it was expressly accepted by four Justices of the Supreme Court in *Coleman* v. *Miller,* 307 U.S. 433. But since a majority of the Court refused to accept that position in that case, and since the Court has on several occasions decided questions arising under article V, even in the face of "political question" contentions, that argument is not one which a District Court is free to accept.
>
> [*Dyer* v. *Blair,* 390 F.Supp. 1291, 1299-1230 (N.D. Ill. 1975) (three-judge court)].

The Views of Then "Circuit Justice" Rhenquist on *Coleman* v. *Miller* and Justiciability of Article V Claims

In *Kimble* v. *Swackhamer,* 439 U.S. 1385 (1977) (Rhenquist, Circuit Justice, in Chambers on

Application for Stay) then Associate Justice (later Chief Justice) William Rhenquist, sitting as a Circuit Justice on application for a stay, considered the substance of certain Article V claims, specifically whether Nevada's holding a non-binding referendum on the issue of whether the State Legislature should approve and ratify the Equal Rights Amendment was a violation of the Constitution's Article V. Justice Rhenquist determined that the application did not involve a substantial federal question as the referendum process did nothing more than serve as a gage of public support or opposition merely to be taken into consideration by each member of the State Legislature when making a decision to vote in favor or oppose the ratification, and did not operate to require anyone to do anything other than to be advised of public opinion. However, *in deciding* the application (notwithstanding his actually denying the application) Justice Rhenquist indeed considered the substance of the actual Article V claims.

The Views of "Professor" Ruth Bader Ginsburg on *Coleman* v. *Miller* and Justiciability of Article V Claims

In August 1979 then Columbia Law School Professor (now United States Supreme Court Associate Justice) Ruth Bader Ginsburg published a paper styled as an "Observation". *See* "Ratification of the Equal Rights Amendment – A Question of Time", by Ruth Bader Ginsburg, 57 Tex. L. Rev. 919 (August 1979). In that paper then Professor Ginsburg observed on the issue of Judicial Review and whether in the Article V

context Congress functions as the exclusive forum of first, last, and only resort on all issues relating in any way to the Article V process, that "… [t]he Supreme Court's 1939 judgment in *Coleman* v. *Miller*, read alone, points to Congress as the sole arbiter, but the High Court decisions both before and after *Coleman* tend against a conclusion that the issues are nonjusticiable 'political questions'". *Id.* at 942. Professor Ginsburg then noted that "… *Coleman* did not retract a line of decisions in which the Court entertained and resolved on the merits a variety of questions relating to the process of ratifying constitutional amendments …", including *Dillon* v. *Gloss,* 256 U.S. 368 (1921); *The National Prohibition Cases,* 253 U.S. 350 (1920); *Hawk* v. *Smith I,* 253 U.S. 221 (1920) (eighteenth amendment case); *Hawk* v. *Smith II,* 253 U.S. 231 (1920) (nineteenth amendment case); and *Hollingsworth* v. *Virginia,* 3 U.S. (3 Dall.) 378 (1798). Professor Ginsburg then further noted that in *Powell* v. *McCormack*, 395 U.S. 186 (1962) the Supreme Court had ruled that the question of whether Adam Clayton Powell was entitled to a seat in the House of Representatives was indeed a justiciable question, and then proceeded to rule affirmatively and in Powell's favor, ordering that he be seated. *Id.* Considering this historical background and the fact that *Coleman* by its terms did not claim to expressly overrule the earlier cases, Professor Ginsburg concluded with the following specifically articulated view on the likelihood of certain Article V questions being found to be justiciable by the Supreme Court:

> I suspect, although my tea leaves reveal no more than yours, that the

> Court might well hold the validity of the ERA time extension justiciable.
>
> [*Id.* at 943].

Idaho v. Freeman: The Supreme Court's Mooted and Missed Opportunity to Revisit _Coleman_ v. _Miller_ and Address the Article V Justiciability Questions

In *Idaho* v. *Freeman,* 529 F.Supp. 1107 (D. Idaho 1981) the District Court concluded that the questions of (1) whether Congress' extension of an initial 7 year time frame for ratification contained in the proposing resolution of an amendment (there, specifically the ERA Amendment) violates the Constitution's Article V, and (2) whether a State may rescind the affirmative ratification vote of an earlier sitting Legislature without violating the Constitution's Article V, were both questions properly susceptible to judicial review notwithstanding *Coleman* v. *Miller* and the related "political question doctrine". In fact, in the *Idaho* case the District Court specifically ruled that (1) the extension of the initial 7 year time frame by Congress violated the Constitution's Article V and (2) that the Idaho Legislature had the right under Article V to rescind a ratification of the Equal Rights Amendment by an earlier State Legislature.

To say that this ruling was somewhat controversial would be polite, not so much for the fact *that the Court ruled*, but more for *what* the Court ruled. The rulings were immediately appealed to the Ninth Circuit and, from there, application was made directly to this Court for *certiorari* which was granted while appeal was still

pending and before Circuit Court Judgment was entered by the Ninth Circuit. This Court noted probable jurisdiction, stayed the trial court order, and temporarily stayed and delayed consideration of the case *sub nom National Organization for Women* v. *Idaho* and *Carmen, Administrator of General Services* v. *Idaho,* 455 U.S. 918 (1982). However, the June 1982 "deadline" for ratification of the ERA passed without three fourths of the several states Legislatures having ratified the proposed Amendment. Therefore, on application of the Solicitor General (brought on behalf of the General Services Administrator, who then was charged with promulgation of amendments, which task is today vested with the Archivist) the appeal was dismissed as moot. *See National Organization for Women* v. *Idaho* and *Carmen, Administrator of General Services* v. *Idaho* (both cases) at 459 U.S. 809 (1982).

Therefore, though this Court had determined 30 years ago that the identical questions at issue in this case presented important public issues and involved differing views throughout the Circuits that needed to be addressed so that there would be uniformity, circumstances developed that mooted the case. As such, these important questions were never addressed by this Court yet. To this end, Petitioner submits that these issue are just as compelling today as they were 30 years ago, if not more so, and the uncertainty as to the scope and meaning of *Coleman* v. *Miller,* not clarified then, has only gotten exponentially worse.

The Academics Sound In: Duke University's Walter Dellinger vs. Harvard University's Laurence Tribe

After this Court dismissed the ERA cases as moot, the meaning and application of *Coleman* v. *Miller* and the justiciability of Article V Constitutional claims was not settled. In a lengthy scholarly article, Duke University Law Professor Walter Dellinger argued that Article V Constitutional claims were indeed justiciable and that *Coleman* was simply wrongly decided. *See The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* by Walter Dellinger, 97 Harv. L. Rev. 386 (1983). Harvard University Law Professor Laurence Tribe responded and disagreed with many – but not all - of Dellinger's views on *Coleman* v. *Miller,* and argued that while some Article V claims could be justiciable, others should not be entertained. *See Comment: A Constitution We Are Amending: In Defense of a Restrained Judicial Role,* by Laurence Tribe, 97 Harv. L. Rev. 433 (1938). The point being is that "nobody" can agree what *Coleman* v. *Miller* actually means today with regard to the justiciability of Article V Constitutional claims.

The "Tax Protester" Cases and the Application of *Coleman* v. *Miller* to the Article V Constitutional Claims in Those Cases

In *United States* v. *Thomas,* 788 F.2d 1250 (7th Cir. 1986), *cert.* denied 479 U.S. 853 (1986), the 7th Circuit rejected a tax protester challenge regarding the validity of the Sixteenth Amendment noting in part that *Coleman* v. *Miller* holds that

"…questions about ratification of amendments *may be* nonjusticiable." (emphasis added) 788 F.2d at 1253. However, another panel of the Seventh Circuit in *United States* v. *Foster,* 789 F.2d 457 (7th Cir. 1986), *cert.* denied 479 U.S. 883 (1986), in an identical type of tax protester challenge regarding the validity of the Sixteenth Amendment, stated that:

> In *Coleman* v. *Miller,* 307 U.S. 433, the Court refused to address the effect of a previous ratification or rejection of the Child Labor Amendment upon a subsequent ratification, finding this "a political question pertaining to the political departments."
>
> [*United States* v. *Foster,* 789 F.2d at 462, footnote 6].

However, *Coleman* was not the basis for the Court's decision in *United States* v. *Foster, supra.*

Somewhat simultaneous to these cases, in *United States* v. *Sitka,* 666 F.Supp. 19 (D.Conn. 1987), *affd.* 845 F.2d 43 (2d Cir. 1988), *cert.* denied 488 U.S. 827 (1988) yet another identical Sixteenth Amendment challenge tax protester case was brought. In rejecting the challenge there, the Second Circuit noted that:

> Among the issues that the Supreme Court has held nonjusticiable under the political question doctrine are those relating to the precedent employed in the ratification of amendments. *See Coleman* v. *Miller,*

> 307 U.S. 433, 450-456 (1939); *id.* at 456-460, Black, J., concurring).
>
> [*United States* v. *Sitka,* 845 F.2d at 46].

In yet another identical type of tax protester case, *United States* v. *Stahl,* 792 F.2d 1438 (9th Cir. 1986), *cert.* denied 479 U.S. 1036 (1987), the Ninth Circuit rejected the challenge there to the validity of the 16th Amendment, and in so doing never mentioned *Coleman* but nonetheless referred to the challenge as a "political question". Lastly, there is the unpublished and not precedential Ninth Circuit Opinion in what was yet another Sixteenth Amendment tax protester case relied upon below by the Third Circuit in this case, *United States* v. *McDonald,* 919 F.2d 146, 1990 WL 186103 (table), at *3 (9th Cir. 1990) (per curium), where *Coleman* v. *Miller* was interpreted so as to render all possible Article V claims nonjusticiable under any circumstances.

"Article the Second" is Certified by the Archivist as an Amendment on May 18, 1992 Over the "Objections" of the Article I Legislative Branch, and the Article II Attorney General's Office of Legal Counsel Publishes Their Interpretation of *Coleman* v. *Miller*

In May 1992 there were arguably enough State Legislatures that had ratified "Article the Second" for that amendment to become law. The Article I Archivist sought the advice of the Office of Legal Counsel in the Office of the Attorney General as to what to do or how to proceed. The Article II Office of Legal Counsel ultimately issues two

formal published legal opinions on the issue, and interpreted *Coleman* (because of the delegation of promulgation in 1 U.S.C. § 106b from the Article I Congress to the Article II Executive Branch Archivist) to, in context, mean that now it was the Article II Executive Branch – and not the Article I Congress as indicated in *Coleman* – that was actually now ultimately "in charge" of promulgation. *See* "Congressional Pay Amendment", Memorandum Opinion for the Council to the President, by Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, 16 O.L.C.Op. 85 (1992) (May 13, 1992), later amplification of the opinion at "Congressional Pay Amendment", Memorandum Opinion for the Council to the President, by Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, 16 O.L.C.Op. 87 (1992) (November 2, 1992). This position was taken over the specific objections of the Article I Legislative Branch based upon the understanding of this Court's *Coleman* decision. Senator Robert Byrd specifically argued that the decision of whether or when to promulgate the amendment was a matter *exclusively* within the province of Congress as per this Court's decision in *Coleman.*[9] However, on the advice of the

[9] The interpretation of *Coleman v. Miller* that the Article I Congress has exclusive control over the amendment process and that Article V claims are nonjusticiable political questions was also the specific argument advanced by those in control of the Article I Branch 10 years earlier in 1982 when this specific argument was advanced before this Court in the ERA Cases through an *Amicus Curiae* Brief filed by Speaker of the House of Representatives Thomas P. O'Neil and Chairman of the House Judiciary Committee Peter Rodino on January 11, 1982. In this case now there is no such need for such indirect arguments as to the rights of the Article I

Office of Legal Counsel, on May 18, 1992 the Archivist "Certified" the amendment without approval or participation from Congress. *See Federal Register,* Volume 57, No. 97, Tuesday, May 19, 1992. Senator Byrd objected to what he viewed as essentially the Article II Branch's usurpation of the Article I powers and complete disregard for this Court's decision in *Coleman* v. *Miller. See generally* "The Pay Amendment" – May 19, 1992 speech on the floor of the United States Senate by Senate President *Pro Tempore* Robert Byrd, found at Congressional Record – Senate, page S-6828. Without conceding the point, Congress also "promulgated" the amendment by resolution. *See* Concurrent Resolution No. 120 dated May 19, 1992 at Congressional Record - Senate, S6908 and Senate Resolution No. 298 dated May 19, 1992, Congressional Record – Senate, page S6909 (both purporting to declare "Article the Second" as ratified).

The 1992 process of promulgating Article the Second only serves to highlight the sustaining problems with this Court's decision in *Coleman* v. *Miller*: That there simply is no common agreement among the Article I Branch, the Article II Branch, the Article III Branch, and scholars (those who bother to pay attention to such obscure Constitutional issues) on the meaning and applicability of *Coleman.* Petitioner submits that the time has come to address this mass confusion,

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Congress as both present Speaker of the House of Representatives John Boehner and present Speaker *Pro Tempore* Daniel Inouye are actual parties to this case. As such, the views of the Article I and Article II Branches can be heard as parties to this action rather than merely as *Amicus Curiae.*

and humbly submits that this is the case to use as the vehicle to address these very important Constitutional issues.

Petitioner's Article III Standing to Bring the Claims at Issue Here has Clearly Been Established

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

> … expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because '[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Baker v. Carr*, 369 *U.S.* 186, 208 (1962) (quoting *Coleman v. Miller*, 307 *U.S.* 422, 438 (1939)).

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

The Petitioner in *Department of Commerce v. United States House of Representatives* was identically situated to Petitioner here. As such, it is submitted that there really is no question but that Petitioner indeed has Article III standing to bring the within claims. *Department of Commerce v. United States House of Representatives*, *supra.; see also Bond v. United States,* 564 *U.S.* ___ (2011) (No. 09-1227, slip opinion at 10-11).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition a *writ of certiorari* be GRANTED.

Respectfully submitted,

Eugene Martin LaVergne
Petitioner
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West Long Branch, N.J. 07764
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APPENDIX

Appendix A

(A-1)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-1171

EUGENE MARTIN LAVERGNE,

Appellant

v.

JOHN BRYSON, in his official capacity as the Secretary of the United States Department of Commerce;
JOHN GROVER, in his official capacity as the Director of the United States Census Bureau;
KAREN L. HAAS, in her official capacity as the Clerk of the United States House of Representatives;
JOHN BOEHNER, in his official capacity as the Speaker of the United States House of Representatives;
DANIEL INOUYE, in his official capacity as the President Pro Tempore of the United States Senate;

(A-2)

JOSEPH BIDEN, in his official capacity as
the President of the Senate;
DAVID FERRIERO, in his official capacity as the
Archivist of the United States of America

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

(No. 3-11-cv-07117)

District Judge: The Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 14, 2012

Before: SMITH and CHAGARES, CIRCUIT
JUDGES, and
ROSENTHAL, District Judge*

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*The Honorable Lee H. Rosenthal, U.S. District Judge for the Southern District of Texas, sitting by designation.

[Court Opinion Start of Page 2]

(Filed: September 20, 2012)

OPINION

PER CURIAM

Eugene Martin LaVergne, proceeding pro se,[1] appeals from an order of the United States District Court for the District of New Jersey denying his request to convene a three-judge panel under 28 U.S.C. § 2284 and dismissing his complaint. We summarily affirm. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

I.

LaVergne, a New Jersey citizen and registered voter, alleges in this suit that the method of congressional apportionment under 2 U.S.C. § 2a is unconstitutional. LaVergne asserts that the method violates (1) the separation of powers, (2) the nondelegation doctrine, (3) the principles of the "one person, vote," and (4) "Article the First," an amendment to the United States Constitution proposed in 1789 that LaVergne asserts was ratified and is part of the Constitution. LaVergne sought a declaratory judgment and an injunction ordering the leaders of Congress to enact an apportionment plan consistent with Article the Firsts ratio of one member of Congress per 50,000 citizens and ordering the Vice-President of the

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[1] Although LaVergne is pro se, he received his license to practice law in New Jersey in 1990. His license was temporarily suspended in January 2011 and indefinitely suspended by the New Jersey Supreme Court in July 2011. *In re LaVergne,* 21 a.3d 1181 (N.J. 2011).

[Court Opinion Start of Page 3] United States to count 15 electoral votes for New Jersey in the 2012 presidential election. The relief LaVergne sought would expand the House of Representatives from the 435 member size that has been statutorily set since the 1910s to over 6,160 members.

On December 16, 2011, the District Court on its own denied LaVergne's application for a show-cause order and his request for a three-judge panel, and dismissed the case. LaVergne timely appealed. In this court, LaVergne moved for a preliminary injunction, an expedited appeal, and initial en banc review or panel review. The court denied the motions.

II.

We have jurisdiction under 28 U.S.C. § 1291. Our review of the District Court's order dismissing the complaint is plenary. *Ill. Nat'l Ins. Co.* v. *Wyndham Worldwide Operations, Inc.,* 653 F.3d. 225, 230 (3d Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). We may summarily affirm if an appeal presents no substantial question. 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

III.

[Court Opinion Start of Page 4]

This appeal presents two threshold issues: standing and justiciability. The District Court concluded that LaVergne lacked standing because, among other reasons, he did not suffer the injury he complained about. The District Court concluded that, if there was an injury, it was only to certain government officials, such as the governor of New Jersey, who is responsible for implementing redistricting under § 2a; New Jersey members of the House of Representatives who could lose their congressional seats as a result of redistricting; or certain presidential candidates, who would want New Jersey to have a larger number of electoral votes. (See A5). LaVergne disagrees with that conclusion, relying upon *Department of Commerce* v. *U.S. House of Representatives,* 525 U.S. 316 (1999). In that case, the Supreme Court held that state voters' "expected loss of a Representative in the United States Congress" based on redistricting ordered under § 2a "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Id.* at 331. But in that case, statistical evidence showed that the plaintiffs' votes would be diluted through the loss of a congressional seat to another state. *See id.* at 331-34; *see also Schaffer* v. *Clinton,* 240 F.3d 878, 885 (10th Cir. 2001) (interpreting *House of Representatives*). Here, by contrast, the relief LaVergne seeks would result in every state, based on its population, gaining congressional seats under Article the First. The result would be an increase for each state in the same proportion as the present method produces. If there will be "dilution" to **[Court Opinion Start**

of Page 5] LaVergne's vote when New Jersey is redistricted using the § 2a apportionment method, LaVergne's proposed solution would neither affect it nor change the size of New Jersey's congressional delegation relative to the size of other states' delegations.

In addition to this problem, LaVergne at most alleges "a type of institutional injury" – an allegedly unconstitutionally low number of representatives – "which necessarily damages" all United States voters "equally." *Raines* v. *Byrd,* 521 U.S. 811, 821 (1997); *see also Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 573-74 (1992) (explaining that the Supreme Court has "consistently held that a plaintiff … seeking relief that no more directly and tangibly benefits him that it does the public at large – does not state an Article III case or controversy"). He "has not alleged a sufficiently personal injury to establish standing[.]" *Schaffer,* 240 F.3d at 885 (citing *Raines,* 521 U.S. at 821). *Cf. also Clemons* v. *U.S. Dep't of Commerce,* 131 S.Ct. 821 (2010) (summarily ordering voter's constitutional challenge to § 2a dismissed for lack of jurisdiction).

LaVergne's claims also fail on other grounds, including lack of justiciability. LaVergne's constitutional challenge to § 2a is primarily based on his argument that the apportionment method violates Article the First. He alleges that this proposed constitutional amendment was ratified by the States in November 1791 or June 1792. Putting aside the considerable factual and historical problems with his **[Court Opinion Start**

of Page 6] argument, "[t]he issue of whether a constitutional amendment has been properly ratified is a political question." *United States* v. *McDonale,* 919 F.2d 146, 1990 WL 186103 (table), at *3 (9th Cir. 1990) (per curiam) (citing *Coleman* v. *Miller,* 307 U.S. 433, 450 (1939)). In *Coleman,* the Supreme Court held that "the question of the efficacy of ratifications by state legislatures … should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." 307 U.S. at 450. *See also* Luther v. Borden, 48 U.S. (7 How.) 1, 39 (1849) (holding that "the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision"); United States v. Foster, 789 F.2d 457, 463 n. 6 (7th Cir. 1986) (holding that the issue of "the validity of an amendment's ratification [is] a non-justiciable political question" citing, among other cases, *Lesser* v. *Garnett,* 258 U.S. 130, 137 (1922); and *Coleman,* 307 U.S. at 450).

LaVergne also argues that the § 2a apportionment method violates the nondelegaton doctrine and separation of powers. To the extent that these arguments present justiciable questions,[2] they fail on the merits. As to the first

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[2] *See U.S. Dep't of Commerce v. Montana,* 503 U.S. 442, 456-59 (1992) (rejecting the governments contention that a constitutional challenge to § 2a presented a nonjusticiable question because the challenge was to whether "specific congressional action" – the enactment of § 2a – violated the

[Court Opinion Start of Page 7] argument, the Supreme Court has recognized that "in our increasingly complex society, replete with ever challenging and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. *United States v. Amirnazmi,* 645 F.3d 564, 575 (3d Cir. 2011) (quoting *Mistretta v. United States,* 488 U.S. 361, 372 (1989)). Congress may "endow a coordinate branch of government with a measure of discretion" if the delegation includes " 'an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* (quoting *J.W. Hamption Jr. & Co.* v. *United States,* 276 U.S. 394, 409 (1928)). Section 2a clearly contains an intelligible principle to guide the exercise of delegated authority: "the method of equal proportions," which is automatic in character and which provides "procedural and substantive rules that are consistently applied year after year[.]" *Montana,* 503 U.S. at 465. LaVergne's nondelegation argument is meritless.

LaVergne's separation-of-powers argument similarly fails. The Supreme Court's "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at

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constitutional principles); *but cf. Clemons,* 131 *S.Ct.* 821 (summarily ordering that voters' constitutional challenge to § 2a – which the three-judge district court had determined was justiciable – be dismissed for lack of jurisdiction.

the expense of another branch." *Freytag* v. *Comm'r,* 501 U.S. 868, 878 (1991). 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. *Cf. also* [Court Opinion Start of Page 8] *Montana,* 503 U.S. at 465 (holding, with regard to § 2a, that there is "no constitutional obstacle preventing Congress from adopting such a sensible procedure").

Finally, LaVergne's appeal of the District Court's order denying his request to convene a three-judge panel is limited to passing references to that issue. (*See* Opening Br. at 5, 6, n.1, 9, 29-30). Such cursory presentation waives the issue on appeal. *See Skretvedt* v. *E.I. DuPont De Nemours,* 372 F.3d 193, 202-03 (3d Cir. 2004) ("We have held on numerous occasions that an issue is waived unless a party raised it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court." (internal quotation marks and alterations omitted)); *John Wyeth & Bro. Ltd.* v. *CIGNA Int'l Corp.,* 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (Alito, J.) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived."). Moreover, LaVergne does not seek reversal on this basis, or remand, but rather states that this three-judge panel's review of his claims suffices. (Opening Br. at 30).

IV.

This appeal does not raise a substantial question. We summarily affirm the judgment of the District Court.

Appendix B

(A-11)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

———————

No. 12-1171

———————

EUGENE MARTIN LAVERGNE,

Appellant

v.

JOHN BRYSON, in his official capacity as the Secretary of the United States Department of Commerce;
JOHN GROVER, in his official capacity as the Director of the United States Census Bureau;
KAREN L. HAAS, in her official capacity as the Clerk of the United States House of Representatives;
JOHN BOEHNER, in his official capacity as the Speaker of the United States House of Representatives;
DANIEL INOUYE, in his official capacity as the President Pro Tempore of the United States Senate;
JOSEPH BIDEN, in his official capacity as the President of the Senate;

DAVID FERRIERO, in his official capacity as the Archivist of the United States of America

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

(No. 3-11-cv-07117)

District Judge: The Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 14, 2012

Before: SMITH and CHAGARES, CIRCUIT JUDGES, and ROSENTHAL, District Judge*

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*The Honorable Lee H. Rosenthal, U.S. District Judge for the Southern District of Texas, sitting by designation.

[Judgment Start of Page 2]

JUDGMENT

This cause came to be considered from the United States District Court for the District of New

Jersey and submitted pursuant to Third Circuit L.A.R. 34.1(a) on September 14, 2012. On consideration whereof, it is hereby

ADJUDGED and ORDERED by this Court that the order of the District Court dated December 16, 2011 is hereby AFFIRMED in all respects. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant.

ATTEST:

/s/ Marcia M. Waldron,
Clerk

Dated: September 20, 2012

Appendix C

(A-14)

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

May 17, 2012
ECO-045

No. 12-1171

EUGENE MARTIN LAVERGNE,
Appellant

v.

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

(A-15)

(D.N.J. No. 3-11-cv-07117)

Present: MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY and VANASKIE, Circuit Judges

1. Motion by Appellant for Expedited Initial En Banc review or Alternatively Expedited Initial Panel Review.

2. Response by Appellees Speaker of the House of Representatives and Clerk of the United States House of Representatives;

3. Reply by Appellant to Appellees response.

Respectfully,
Clerk/mb/tmm

_____ORDER_____

The foregoing motion by Appellant for Expedited Initial En banc Review or Alternatively Expedited Initial Panel review is hereby denied.

[Order Start of Page 2]

By the Court,

/s/ Theodore A. McKee
Circuit Judge

Dated: May 25, 2012
Tmm/cc: Eugene M. LaVergne, Esq.
Todd B. Tatelman, Esq.
Michael S. Raab, Esq.
Henry C. Whitaker, Esq.
Kerry W. Kirscher, Esq.

Appendix D

(A-17)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 7, 2012
ECO-045

No. 12-1171

EUGENE MARTIN LAVERGNE,

Appellant

v.

JOHN BRYSON, in his official capacity as the Secretary of the United States Department of Commerce;
JOHN GROVER, in his official capacity as the Director of the United States Census Bureau;
KAREN L. HAAS, in her official capacity as the Clerk of the United States House of Representatives;
JOHN BOEHNER, in his official capacity as the Speaker of the United States House of Representatives;
DANIEL INOUYE, in his official capacity as the President Pro Tempore of the United States Senate;
JOSEPH BIDEN, in his official capacity as the President of the Senate;

(A-18)

DAVID FERRIERO, in his official capacity as the Archivist of the United States of America

(D.N.J. No. 3-11-cv-07117)

AMBROI, JORDAN and VANASKIE, Circuit Judges

1. Motion by Appellant for an Order entering a Preliminary Injunction and Mandamus or alternatively for an Order directing pending appeal in this matter be heard and decided on an Expedited basis with proposed Briefing Schedule:

   Appellees' Brief due within 10 days of Appellants Brief;

   Appellant's reply Brief due within 4 days thereafter;

   Oral Argument to be held immediately thereafter.

2. Corrected Addendum to Motion by Appellant containing Portion of Exhibit B to Declaration inadvertently omitted when originally filed.

[Start of Page 2]

Respectfully,
Clerk/tmm

_____ORDER_____

The foregoing motion by Appellant for an Order entering a Preliminary Injunction and Mandamus or alternatively for an Order directing pending appeal in this matter be heard and decided on an Expedited basis and the Corrected Addendum thereto, are hereby DENIED.

By the Court,

/s/Kent Jordan
Circuit Judge

Dated: March 8, 2012
tmm/cc: Eugene M. LaVergne, Esq.
Michael S. Raab, Esq.
Henry C. Whitaker, Esq.

Appendix E

(A-20)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EUGENE MARTIN LaVERGNE,	:	
	:	
Plaintiff,	:	Civil Action No.: 11-7117(PGS)
	:	
v.	:	
	:	MEMORANDUM
JOHN BRYSON et al.,	:	& ORDER
	:	
Defendants.	:	

This matter comes before the Court on the application of plaintiff Eugene Martin LaVergne, pro se ("Plaintiff")[3] for an order to show cause and for the underlying matter to be heard and determined by a three-judge panel. Plaintiff's underlying Complaint states a claim for vote dilution, alleging that (1) the current system of apportioning Representatives for the United States House of Representatives is unconstitutional, and (2) the current system of appointing Electors to the Electoral College is unconstitutional. Plaintiff

[3] At the present time, Plaintiff is an attorney whose admission has been suspended.

applies for an order to show cause pursuant to Local Civil Rule 65.1, seeking preliminary injunctions, writs of mandamus, and declaratory judgments. Additionally, Plaintiff requests a three-judge panel pursuant to 28 U.S.C. § 2284(a), which requires the convention of a three-judge panel to hear certain actions challenging the apportionment of congressional districts.

Local Civil Rule 65.1 states in pertinent part that "[n]o order to show cause to bring on a matter for hearing will be granted except on a clear specific showing by affidavit or verified **[Memorandum & Order Start of Page 2]** pleading of good and sufficient reasons why a procedure other than by notice of motion is necessary." Plaintiff has made no such showing. Neither Plaintiff's verified complaint nor Plaintiff's application for an order to show cause addresses the issue of why this matter needs to be resolved on an expedited basis. Rather, the facts as stated in the Complaint suggest entirely the opposite: Plaintiff's core contentions involve the constitutionality of an eighty-two year old federal statute and the potential enactment of an amendment to the U.S. Constitution two hundred and nineteen years ago. As these issues have waited a combined thirty decades to reach their ultimate resolution, there seems to be no reason now why they can not wait until the end of the standard motion cycle.

Separately, the Court denies Plaintiff's request for the convention of a three-judge panel. Section 2284 of Title 28 of the U.S. Code states "[a] district court of three judges shall be convened … when an action is filed challenging the

constitutionality of the apportionment of congressional districts . …" 28 U.S.C. § 2284(a). However, the application of this provision is not mechanical. The procedure for the convening a three-judge court requires the judge to whom the request is presented to notify the chief judge of the circuit upon the filing of a request for three judges, "unless he determines that three judges are not required." 28 U.S.C. § 2284(b)(1). Essentially, the statute requires that the judge to whom the request is presented to screen the complaint to determine whether a three-judge panel is required. *See Idelwild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962), *superseded by statute on other grounds,* Act of Aug. 12, 1976, Pub.L.No. 94-381, 90 Stat. 1119, *as recognized by Morril* v. *Weaver,* 224 F.Supp.2d 882, 887 (E.D.Pa. 2002); *N.J. Sand Hill Band of Lenape & Cherokee Indians* v. *Corzine,* No. 09-683 (KSH), 2009 WL 799210, at *2 (D.N.J. Mar. 24, 2009). As the Fifth Circuit explained, "[a] **[Memorandum & Order Start of Page 3]** three judge court is not required if the claim is wholly insubstantial or completely without merit." *United States* v. *Saint Landry Parish Sch. Bd.,* 601 F.2d 859, 863 (5th Cir. 1979).

Here, the convention of a three-judge panel is nor required for several reasons. First, recent case law suggests otherwise. *See Clemons* v. *U.S. Dep't of Commerce,* 710 F.Supp.2d 570, *vacated and remanded by* 131 S.Ct. 821 (2010). Second, Plaintiff's standing is questionable when his interest is considered in relation to individuals such as New Jersey Governor Chris Christie, who implemented the redistricting; Congresspersons

whose seats were abolished; and presidential candidates who may fear an election result like that of Vice President Gore, who had won the popular vote but lost in the electoral college vote to George Bush. Third, the ability of a pro se Plaintiff who is suspended from the practice of law to professionally and adequately present such a case which effects every state is tenuous.[4] Finally, the long standing principles establishing representation in our republican form of government have been thoroughly evaluated since the Constitutional Convention.

ORDER

The Court has considered the papers submitted in support of Plaintiff's application and request. Pursuant to Federal Rule of Civil Procedure 78, no oral argument was heard. For the reasons stated below,

IT IS on this 16th day of December, 2011, hereby

ORDERED that Plaintiff's application for an order to show cause is DENIED; and

[Memorandum & Order Start of Page 4]

ORDERED that Plaintiff's request that the Court convene a three-judge panel pursuant to 28 U.S.C. § 2284 is DENIED; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED and the case is CLOSED.

/s/ Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J. December 16th, 2011

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[4] I recall that when I was practicing, Mr. LaVergne was always a very competent and professional adversary; however, this case is of a different ilk.

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Appendix F

(A-25)

STATE OF CONNECTICUT
CONNECTICUT STATE LIBRARY
231 Capitol Avenue Hartford Connecticut 06106

COUNTY OF HARTFORD)
(ss.
STATE OF CONNECTICUT)

I hereby certify that the document

Connecticut Archival Record Group #001
Early General Records
Connecticut Archives Series
Revolutionary War Series I, Volume 37, Document 302A & 302B

Differing votes on ratification of amendments to the Constitution proposed by U.S. Congress Mar. 1789. Constitution referred to May Session

To which this is attached is a true copy of a record turned over to me and on deposit in the State Library in accordance with the provisions of Section 11-4c of the General Statutes, revision 1958, Revised to January 1, 2012.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the State of the Library at Hartford, this March 27, 2012.

(A-26)

Kendall Wiggin
State Librarian

per

[Seal of the Conn. State Library]

/s/ Mel E. Smith
Mel E. Smith, Librarian II
History & Genealogy Unit

[Resolution confirming the affirmative ratification vote of the Connecticut State House of Representatives of Article the First at the October 1789 Legislative Session, with the Upper House Council deferring their vote on the Amendments until the following May 1790 Session of the General Assembly]

The Congress of the United States of America begun & holden at the City of New York on the fourth day of March AD. 1789 having proposed to the legislatures of the Several States certain articles of amendments to the Constitution of ^ the United States;

This Assembly do ratify as part of said constitution the first, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh & twelfth articles proposed as aforesaid -----

Passed in the house of representatives

/s/ James Davenport, Clerk

In the upper House

The further Consideration of this Bill is referred to the General Assembly of this State to be holden at Hartford on the 2d Thursday of May next.

Test /s/ George Willys, Secretary

[References to subsequent action of different House of Representatives from May 1790 General Assembly meeting at Hartford not re-printed, photo real copies of Certification and Resolution on next pages].

[Docketing Information]

Bill ratifying Amendments to the Constitution.

Oct. 1789.

To CH

Confirm UH

[illegible]

[End of Docketing Information]

Appendix G

(A-29)

STATE OF CONNECTICUT
CONNECTICUT STATE LIBRARY
231 Capitol Avenue Hartford Connecticut 06106

COUNTY OF HARTFORD)
(ss.
STATE OF CONNECTICUT)

I hereby certify that the document

Connecticut Archival Record Group #001
Early General Records
Connecticut Archives Series
Civil Officers Series II, Volume 22, Document 4A, 4B, 4C, & 4D

Assent & ratification of articles one to twelve of the U.S. Constitution. Differing votes. Referred to Committee, May 1790 Session.

To which this is attached is a true copy of a record turned over to me and on deposit in the State Library in accordance with the provisions of Section 11-4c of the General Statutes, revision 1958, Revised to January 1, 2012.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the State of the Library at Hartford, this March 27, 2012.

Kendall Wiggin
State Librarian

per

[Seal of the Conn. State Library]

/s/ Mel E. Smith
Mel E. Smith, Librarian II
History & Genealogy Unit

Appendix H

(A-31)

CONNECTICUT STATE LIBRARY
Connecticut Archives Manuscript Index
Civil Officers Etc. 1790-1820
SERIES 2d VOL XXII DOC. 4 PAGES abcd
(*Photostat copy)*

4a

Whereas the Senate & House of Representatives of the United States of America in Congress Assembled on Wednesday the fourth of March One thousand seven hundred & eighty nine two thirds of both houses concurring proposed to the Legislatures of the Several States as amendments to the Constitution of the United States the following Articles all or any of which Articles when ratified by ("the legislatures of" crossed out) three fourths of the said Legislatures to be valid to all intents and purposes as part of the said Constitution viz-

ARTICLE THE FIRST

After the first enumeration, required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress that there shall be not less than one hundred representatives, nor less [**Petitioner's Editorial note: The preceding word "less" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's*

Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at this exact part of the text of the second clause (or second "line") of the three clauses (or three "lines") that make up Article the First, but the Clerk after the vote incorrectly made the change in the text at Line 3.] than one representative for every forty thousand persons, until the umber 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 [**Petitioner's Editorial note: The preceding word "more" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at Line 2 at the point referenced above. However, the Clerk after the vote incorrectly made the change in the text at Line 3. The word here should still read "less".*] than one representative for [Start of Page 2 of the Upper House Council's May 1790 Resolution] every fifty thousand persons.

ARTICLE THE SECOND

No law, varying the compensation for the services of senators and representatives, shall take effect, until an election of representatives shall have intervened.

ARTICLE THE THIRD

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably assembly, and to petition the government for a redress of grievances.

ARTICLE THE FOURTH

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE THE FIFTH

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law.

ARTICLE THE SIXTH

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the person or things to be seized.

Article

[Start of Page 2 of the Upper House Council's May 1790 Resolution]

ARTICLE THE SEVENTH

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE THE EIGHTH

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defence. [(*sic., proper spelling is "defense"*)]

ARTICLE THE NINTH

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of [Start of Page 78] trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE THE TENTH

Art. X. Excessive bail shall not be required, nor excessive fines imposed, nor cruel & unusual punishments [**Petitioner's Editorial note: The preceding word "punishments" is correct and is the word in the text actually approved by Congress in the final form in the final two thirds vote in each house. The 14 original hand engrossed "copies" of the approved text made some time between September 25 and September 29, 1789, correctly reflected the word "punishments" in each Copy, as did the little known 15th hand engrossed "Vermont Copy". However, the first 600+ Official Government Authorized Printed Copies, prepared by Printer Thomas Greenleaf of New York, contained a printer's error as the word was incorrectly printed as "imprisonments" in the first 600 Official Printed Copies.*] inflicted.

Article

[Start of Page 3 of the Upper House Council's May 1790 Resolution]

ARTICLE THE ELEVENTH

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE THE TWELFTH

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively, or the people.

This Assembly do assent to & ratify as part of the said Constitution all the Articles proposed as aforesaid.

Passed in the upper House
George Willys, Secretary

Dissented In the House of Representatives
Test [illegible], Clerk

[References to subsequent action of the House of Representatives from May 1790 General Assembly meeting at Hartford not re-printed, a photo real copies the Certification and Resolution is found in the next pages].

Appendix H

(A-37)

[Certification of Authentic Documents]

I certify that this is an exact photocopy of the original unaltered document which is on deposit at the Kentucky Department for Libraries and Archives, Public Records Division.

Source: Gov. Shelby's Enrolled Bills book 17

Staff Person: /s/ Jennifer Patterson

Date: 1/24/12

[End of Certification of Authentic Documents]

[Start of Docketing Information]

Act of June 1792

An Act to ratify certain Articles in Addition to and amendment of the Constitution of the United States of America proposed by the Congress to the Legislatures of the Several States.

[End of Docketing Information]

[Start of Engrossed Copy of Kentucky General Assembly's June 27, 1792 Resolution ratifying all Twelve Proposed Amendments]

An Act to ratify certain Articles in addition to and Amendment of the Constitution of the United States of America proposed by Congress to the Legislatures of the Several States.

Whereas it is provided by the fifth Article of the Constitution of the United States of America that Congress whenever two thirds of both Houses shall deem it necessary shall proposed Amendments to the said Constitution, which shall be valid to all Intents and purposes as part of said Constitution when ratified by the Legislatures of three fourths of the several States.

And whereas at a Session of the Congress of the United States begun and held at the City of New York on the Fourth Day of March, in the year one thousand seven hundred and eighty nine, it was resolved by the Senate and House of Representatives in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the Several States, all or any of which Articles when ratified as aforesaid to be valid to all Intents and purposes as part of said Constitution, to wit:

Article the first

After the first enumeration, required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress that there shall be not less than one hundred representatives, nor less [**Petitioner's Editorial note: The preceding word "less" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at this exact part of the text of the second clause (or second "line") of the three clauses (or three "lines") that make up Article the First, but the Clerk after the vote incorrectly made the change in the text at Line 3.*] than one representative for every forty thousand persons, until the umber 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 [**Petitioner's Editorial note: The preceding word "more" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the*

final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at Line 2 at the point referenced above. However, the Clerk after the vote incorrectly made the change in the text at Line 3. The word here should still read "less".] than one representative for every fifty thousand persons.

Article the second

No law, varying the compensation for the services of senators and representatives, shall take effect, until an election of representatives shall have intervened.

Article the third

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably assembly, and to petition the government for a redress of grievances.

Article the fourth

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article the fifth

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law.

Article the sixth

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article the seventh

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article the eighth

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defence. [(*sic., proper spelling is "defense"*)]

Article the ninth

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article the tenth

Art. X. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments [**Petitioner's Editorial note: The preceding word "punishments" is correct and is the word in the text actually approved by Congress in the final form in the final two thirds vote in each house. The 14 original hand engrossed "copies" of the approved text made some time between September 25 and September 29, 1789, correctly reflected the word "punishments" in each Copy, as did the little known 15th hand engrossed "Vermont Copy". However, the first 600+ Official Government Authorized Printed Copies, prepared by Printer Thomas Greenleaf of New York, contained a printer's error as the word was incorrectly printed as "imprisonments" in the first 600 Official Printed Copies.*] inflicted.

Article the eleventh

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively, or the people.

Be it therefore enacted by the General Assembly, that the aforesaid Articles and each of them be, and they are hereby confirmed and ratified.

/s/ R Breckinridge
Speaker of the House of Representatives

/s/ Alex J. Bullitt
Speaker of the Senate

Approved June 27, 1792
/s/ Isaac Shelby
Governor of Kentucky

Appendix I

(A-44)

[Certification of Authentic Documents]

I certify that this is an exact photocopy of the original unaltered document which is on deposit at the Kentucky Department for Libraries and Archives, Public Records Division.

Source: Littell's The Statute Law of I

Staff Person: /s/ Jennifer Patterson

Date: 1/24/12

[End of Certification of Authentic Documents]

[Copy of Excerpt from the Official Printed Laws of the State of Kentucky Confirming the Kentucky General Assembly's June 27, 1792 Resolution ratifying all Twelve Proposed Amendments]

[Title Page]

The
STATUTE LAW
of
KENTUCKY;

WITH NOTES, PRAELECTIONS, AND
OBSERVATIONS ON THE PUBLIC ACTS,

COMPREHENDING ALSO,

THE LAWS OF VIRGINIA AND ACTS OF PARLIAMENT IN FORCE IN THIS COMMONWEALTH;

THE CHARTER OF VIRGINIA, THE FEDERAL
AND STATE CONSTITUTIONS,

AND SO MUCH OF

THE KING OF ENGLAND'S PROCLAMATION IN
1763, AS RELATES TO THE TITLES TO THE
LAND IN KENTUCKY.

(A-46)

TOGETHER WITH

A TABLE OF REFERENCE TO THE CASES
ADJUDICATED IN THE COURT OF APPEALS.

IN THREE VOLUMES

BY WILLIAM LITTLE, ESQ.

SIC VOS NON VOBIS, Etc. – Virgil

FRANKFORT, (KEN.)

PRINTED BY AND FOR WILLIAM HUNTER

1809

[End of Title Page]

[Official Printed Copy of Kentucky General Assembly's June 27, 1792 Resolution ratifying all Twelve Proposed Amendments]

[Page 76]

JUNE SESSION, 1792

CHAPTER XII

An ACT to ratify certain articles in addition to and amendment of the constitution of the United States of America, proposed by Congress to the Legislatures of the several states.

Approved, June 27th, 1792

Another amendment was ratified in 1803, (Vol. III. Chap. 118.)

Preamble.

Section 1. WHEREAS it is provided by the fifth article of the constitution of the United States of America, that congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to the said constitution, which shall be valid to all intents and purposes as part of the said constitution, when ratified by the legislatures of three-fourths of the several states.

And whereas at a session of the congress of the United States, begun and held at the city of New-York, on the fourth day of March, in the year one

thousand seven hundred and eighty-nine, it was resolved by the senate and house of representatives in congress assembled, to thirds of both houses concurring, that the following articles be proposed to the legislatures of the several states, all or any of which articles, when ratified as aforesaid to be valid to all intents and purposes as part of the said constitution, to wit:

ARTICLE I. After the first enumeration, required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress that there shall be not less than one hundred representatives, nor less [**Petitioner's Editorial note: The preceding word "less" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at this exact part of the text of the second clause (or second "line") of the three clauses (or three "lines") that make up Article the First, but the Clerk after the vote incorrectly made the change in the text at Line 3.*] than one representative for every forty thousand persons, until the umber 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 [*Petitioner's Editorial note: The preceding word "more" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at Line 2 at the point referenced above. However, the Clerk after the vote incorrectly made the change in the text at Line 3. The word here should still read "less".*] than one representative for every fifty thousand persons.

Art. II. No law, varying the compensation for the services of senators and representatives, shall take ef[Start of page 77]fect, until an election of representatives shall have intervened.

Art. III. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably assembly, and to petition the government for a redress of grievances.

Art. IV. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Art. V. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law.

Art. VI. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Art VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VIII. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. [(*sic., proper spelling is "defense"*)]

Art. IX. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of [Start of Page 78] trial by jury shall

be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Art. X. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments [**Petitioner's Editorial note: The preceding word "punishments" is correct and is the word in the text actually approved by Congress in the final form in the final two thirds vote in each house. The 14 original hand engrossed "copies" of the approved text made some time between September 25 and September 29, 1789, correctly reflected the word "punishments" in each Copy, as did the little known 15th hand engrossed "Vermont Copy". However, the first 600+ Official Government Authorized Printed Copies, prepared by Printer Thomas Greenleaf of New York, contained a printer's error as the word was incorrectly printed as "imprisonments" in the first 600 Official Printed Copies.*] inflicted.

Art. XI. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Art. XII. The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively, or the people.

Ratification.

Sec. 3. [(*sic.,* no is no preceding Sec. 2)] *Be it therefore enacted by the general assembly,* That the

aforesaid articles and each of them be, and they are hereby confirmed and ratified.

[End of Official Printed Copy of Kentucky General Assembly's June 27, 1792 Resolution ratifying all Twelve Proposed Amendments]

Appendix J

(A-53)

[Library of Congress Document Indentifying Information]

22201
U.S. 1st Congress, 1789-1791;
…. In the House …. 24th August, 1789. Resolved …. Amendments …. In Senate, August 25, 1789.
New York, Greenleaf, [1789]/ 2pp.
LOC copy.

[Start of Page 1 of Original Printed Copy of Document]

CONGRESS OF THE UNITED STATES.
In the House of Representatives,

Monday, 24th August, 1789.

RESOLVED, by the Senate and House of Representatives of the United States of America in Congress Assembled, two thirds of both Houses deeming it necessary. That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes as part of the said Constitution – Viz.

ARTICLE the FIRST.

After the first enumeration, required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forth thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than two hundred representatives, nor less than one Representative for every fifty thousand persons.

ARTICLE the SECOND.

No law varying the compensation to the members of Congress, shall take effect, until an election of Representatives shall have intervened.

ARTICLE the THIRD.

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

ARTICLE the FOURTH.

The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to

the Government for a redress of grievances, shall not be infringed.

[Start of Page 2 of Original Printed Copy]

[2]

ARTICLE the FIFTH.

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

ARTICLE the SIXTH.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE the SEVENTH.

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searches, and the persons or things to be seized.

ARTICLE the EIGHTH.

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE the NINTH.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause fo the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

ARTICLE THE TENTH.

The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger) shall be by an Impartial Jury of the Vicinage, which the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime is

committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State.

[Start of Page 3 of Original Printed Copy]

[3]

ARTICLE the ELEVENTH.

No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a Jury according to the course of the common law, be otherwise re-examined, than according to the rules of common law.

ARTICLE the TWELFTH.

In suits at common law, the right of trial by Jury shall be preserved.

ARTICLE the THIRTEENTH.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE the FOURTEENTH.

No State shall infringe the right of trial by Jury in criminal cases, nor the right of conscience, nor the freedom of speech, of the press.

ARTICLE the FIFTEENTH.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE the SIXTEENTH.

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the executive powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

ARTICLE the SEVENTEENTH.

The powers not delegated by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively.

Teste,

JOHN BECKLEY, Clerk

In Senate, *August* 25, 1789.
Read and ordered to be printed for the consideration of the Senate.

Attest,

SAMUEL A. OTIS, Secretary

New-York, Printed by T. GREENLEAF, near the Coffee-House

[End of Original Printed Copy of Document]

Appendix K

(A-60)

[Original Hand Written Joint Committee Report]
[*PETITIONER'S EDITORIAL NOTE: the one original Joint Committee Report, of which there were no other copies made, was written out in long hand in pen and ink on parchment by committee member Senator Oliver Ellsworth of Connecticut. This original Joint Committee Report was presented to the Senate on September 24, 1789, where it was formally acknowledged. However, the Senate was busy with the pending Judiciary Act on this day. Therefore, before the Senate took action, and while continuing debate and revisions of Judiciary Act (primarily drafted by Senator Oliver Ellsworth of Connecticut also, so he himself was too busy on other "more important matters" this day to present his own Report on the "less important" Amendment issues), Ellsworth's one original hand written Joint Committee Report was immediately carried from the Senate to the House of Representatives Chambers where later that same day, September 24, 1789, the House of Representatives adopted, without change, the recommendations in the original Joint Committee Report. After the House vote, the one original hand written Joint Committee Report was carried back to the Senate Chambers where the next day, September 25, 1789, the Senate adopted,

without change, the recommendations in the original Joint Committee Report.

Contrary to historical myth taught to children in grammar school, the fact is that there was never any one single "original and final" text copy of the 12 proposed Amendments in one final document that was presented and voted on. Rather, there were two separate printed (the House version with 17 Amendments, the Senate version with 12 Amendments) Broadsides and the Joint Committee Report Committee that taken together is what was voted on and must be referred to so as to confirm the final approved text of the 12 Amendments. For the final text of Preamble and the final text of Articles 3 through 12 one must review the printed Senate Broadside and substitute the text of "Article the Third" and "Article the Eighth" for the new verbatim text as contained in the Joint Committee Report. For the final text of Article the First, one must review the printed House Broadside and substitute the word "less" for "more" in Line 2 of the three Lines that make up Article the First. However, the Clerk, after the vote, made the exchange of the word "more" for "less" in Line 3, not Line 2 where Congress and the Report had directed.]

[Page 1 (un-paginated)]

The Committees of the two Houses appointed to confer on their different votes on the Amendments proposed by the Senate to the resolution proposing Amendment to the Constitution, and disagreed to by the House of Representatives, have had a conference, and have agreed that it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and **(PETITIONER'S EDITORIAL NOTE: the word the word "to" is included and then is crossed out)** petition the Government for a redress of grievances;" – And with an amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the **[Start of Page 2 unpaginated]** "the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses

(PETITIONER'S EDITORIAL NOTE: the words "against him" are included and then are crossed out) in his favor, & ^ to have the assistance of counsel for his defense.

The Committee were also of opinion it would be proper for both Houses to agree to amend the first Article, by striking out the word "less" in the last line but one, and inserting in its place the word "more", and accordingly recommend that the said Article be reconsidered for that purpose.

[End of Original Hand Written Joint Committee Report].

[Docketing Information]

1st Sess: L v 1st Con.

Report of the Committee of Conference on the subject of Amendments to the Amendments proposed to the Constitution.

Sept 26th
1789

Fol.
273

[End of Docketing Information]

Appendix L

(A-64)

[Verbatim Official Printed Text Version of the First 600+ Official Government Authorized and Approved Printed Copies of the 12 Amendments proposed by Congress as Printed by Printer Thomas Greenleaf. Example is identical to Copy on file with Rutgers University, New Brunswick, New Jersey; also identical to George Washington's personal Copy, presently in custody of the Mount Vernon Ladies Association, Mount Vernon, Virginia; also identical to Thomas Jefferson's personal Copy, presently in custody of the Lilly Library at the University of Indiana, Bloomington, Indiana.]

[Page 1, indicated at page 92 in the series of the Laws Greenleaf printed for the First Session of the First Congress].

CONGRESS OF THE UNITED STATES, begun and held at the city of New-York, on Wednesday the fourth of March, one thousand seven hundred eighty-nine.

The Conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further

declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution –

RESOLVED, by the Senate and House of Representatives of the United States of America in Congress assembled, two thirds of both Houses concurring, that the following articles be proposed to the legislatures of the several states, as amendments to the constitution of the United States, all or any of which articles, when ratified by three fourths of the said legislatures, to be valid for all intents and purposes, as part of the said constitution, viz.

ARTICLES in Addition to, and Amendment of, the CONSTITUTION OF THE UNITED STATES OF AMERICA, proposed by Congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

Article the First

After the first enumeration, required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress that there shall be not less than one hundred representatives, nor less [***Petitioner's Editorial note: The preceding word "less" is incorrect and is the product of a Clerk's mistake***

converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at this exact part of the text of the second clause (or second "line") of the three clauses (or three "lines") that make up Article the First, but the Clerk after the vote incorrectly made the change in the text at Line 3.] than one representative for every forty thousand persons, until the umber 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 [**Petitioner's Editorial note: The preceding word "more" is incorrect and is the product of a Clerk's mistake converted into a Scrivener's and Printer's Error, thereafter inadvertently perpetuated in history. The actual text approved by Congress in the final form in the final two thirds vote in each house specifically directed that the word "more" be substituted for the word "less" at Line 2 at the point referenced above. However, the Clerk after the vote incorrectly made the change in the text at Line 3. The word here should still read "less".*] than one representative for every fifty thousand persons.

Article the Second

No law, varying the compensation for the services of senators and representatives, shall take effect, until an election of representatives shall have intervened.

Article the Third

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably assembly, and to petition the government for a redress of grievances.

Article the Fourth

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article the Fifth

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law.

Article the Sixth

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the person or things to be seized.

[Start of Second Page, Page 93]

Article the Seventh

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article the Eighth

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defence. [(*sic., proper spelling is "defense"*)]

Article the Ninth

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of [Start of Page 78] trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article the Tenth

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments [**Petitioner's Editorial note: The preceding word "punishments" is correct and is the word in the text actually approved by Congress in the final form in the final two thirds vote in each house. The 14 original hand engrossed "copies" of the approved text made some time between September 25 and September 29, 1789, correctly reflected the word "punishments" in each Copy, as did the little known 15th hand engrossed "Vermont Copy". However, the first 600+ Official Government Authorized Printed Copies, prepared by Printer Thomas Greenleaf of New York, contained a printer's error as the word was incorrectly printed as "imprisonments" in the first 600 Official Printed Copies.*] inflicted.

Article the Eleventh

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the Twelfth

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively, or the people.

FREDERICK AUGUSTUS MUHLENBERG, *Speaker of the House of Representatives.*

JOHN ADAMS, *Vice-President of the United States and President of the Senate.*

JOHN BECKELY, *Clerk of the House of Representatives*

Attest.

SAMUEL A. OTIS, Secretary of the Senate.