UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EUGENE MARTIN LAVERGNE, *et al.*,

Plaintiffs,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Defendants,

Case 1:17-cv-00793-CKK-CP-RDM

THE FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF SCOTT NEUMAN'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

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INTRODUCTION

In an attempt to assist a group of would-be intervenors in their effort to dramatically expand the scope of this case, Plaintiff Scott Neuman seeks to add several new counts challenging the constitutionality of the statute governing the apportionment of membership in the House of Representatives. Mr. Neuman's claims are nearly word-for-word identical to claims that Plaintiff Eugene LaVergne brought in 2011 in the United States District Court for the District of New Jersey, where they were promptly dismissed as meritless and for want of standing. They remain meritless, and Mr. Neuman lacks standing just as Mr. LaVergne did. Mr. Neuman's motion to amend should therefore be denied as futile.

BACKGROUND

A. Plaintiffs' Underlying Claims and Procedural History

Mr. LaVergne and four co-plaintiffs—including Mr. Neuman—brought this case on April 28, 2017. ECF No. 1. They claim that there is a provision in the United States Constitution—known only to them—requiring the House of Representatives to be apportioned such that there be at least one representative for every 50,000 persons in the United States, which, by their math, requires that the House contain at least 6,230 members as of the last census. *See* Am. Compl. at 19 ¶ 1, ECF No. 4. For a House that size to achieve the quorum necessary to conduct business, 3,116 members would have to be present. *Id.* at 20 ¶ 1. Because the House of the current 115th Congress contains only 435 members, Plaintiffs say, each and every action taken by that House—and presumably that of every other Congress in recent history—lacked a quorum and must be declared illegal and void *ab initio*. *Id.* at 67 ¶ J. This would seemingly invalidate many hundreds of laws and other legislative actions, but Plaintiffs target three specific examples: the election of Paul Ryan to be Speaker of the House on January 3, 2017, *id.*at 67 ¶ I, the enactment of a joint

resolution disapproving a broadband-privacy regulation on March 28, 2017, *id.* at 71 ¶ 10, and the passage by the House of the American Health Care Act of 2017 on May 4, 2017, *id.* at 75 ¶¶ 6–7.

Plaintiffs' novel apportionment theory arises from a constitutional amendment that was proposed in 1789 but never ratified by the required number of states. That proposed amendment read:

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

Id., Ex. J. If ratified, this amendment would have modified the language in Article I stating that "the number of Representatives shall not exceed one for every thirty Thousand." Art. I, § 2, cl. 3.[1]

Contrary to any accepted account of history, Plaintiffs claim that Article the First was fully ratified by the requisite number of states and that it is part of the United States Constitution, a fact that they say was "lost in history for over 220 years" but "will be documented and presented in detail at time of trial." *Id.* at 30–31 ¶ 7. Specifically, Plaintiffs claim that they have proof that Connecticut ratified Article the First in 1789 or 1790. *Id.* at 28 ¶ 6. In reality, as is known, the

[1] On its face, that language of Article the First does not support Plaintiffs' position that the House is under-populated. The proposed amendment would have set a high ceiling (which the current House membership would not exceed), whereas Plaintiffs advocate a high floor. Plaintiffs contend, however, that there was a scrivener's error in the engrossed version of Article the First and that the last instance of the word "more" in the proposed amendment should have read "less": ". . . nor *less* than one representative for every fifty thousand persons." *Id.* at 37–40 ¶¶ 1–8. Plaintiffs therefore urge the Court to retroactively rewrite the engrossed version of the amendment and the ratification resolutions of all those states that approved it so that they all fit what they contend to have been the "correct" language. *Id.* at 40 ¶ 8.

lower house of the Connecticut legislature voted to ratify Article the First with the other eleven proposed amendments in October 1789, but the upper house did not complete the process. *See* Thomas H. LeDuc, *Connecticut and the First Ten Amendments of the Federal Constitution*, S. Doc. No. 75-96 at 2 (1937). A new legislature then took the matter back up in 1790. This time, the lower house voted to ratify only the latter ten amendments (those that are now known as the Bill of Rights) but not Articles the First and Second. *Id.* at 3. The upper house, however, voted to ratify all twelve amendments. *Id.* The matter was therefore again deferred for the next legislature. In that legislature, the lower house voted to reject all of the amendments, and the matter appears never to have been taken up again. *Id.*

Notably, Plaintiffs' argument on Article the First relies not on any newly discovered documentary evidence, as they imply, but on their novel legal contention that the known actions of the Connecticut legislature as described above resulted in its ratification of Article the First. Specifically, Plaintiffs assert, without much exposition, that Article V (which governs constitutional amendments) somehow silently exempts bicameral state legislatures from acting bicamerally. Am. Compl. at 25–26 ¶¶ 1–2. Consequently, Plaintiffs say, Connecticut should be deemed to have ratified Article the First when its lower house alone voted to do so in 1789. *See id.* at 28 ¶ 6 (contending that the Connecticut legislature ratified Article the First "by . . . Article V standards" in October 1789). If not, then Article the First should be deemed ratified when only the upper house of a later-constituted legislature voted to do so in 1790. *Id.* (contending, "alternatively," that Article the First should be deemed ratified in "May 1790 if the 'Upper House Council' is part of the 'Legislature' for Article V purposes"). In other words, Plaintiffs insist that "for Article V purposes" Connecticut's bicameral legislature may act unicamerally when it comes

to the ratification of constitutional amendments. Plaintiffs offer no legal support for this unorthodox notion.

Plaintiffs are not shy about the remedies they seek. They ask this Court to, among other things: (1) declare 2 U.S.C. § 2[2] unconstitutional, *id.* at 59 ¶ A; (2) order state officials in Connecticut, Kentucky, and Virginia to notify the Archivist of the United States that they have ratified Article the First (using Plaintiffs' "corrected" language), *id.* at 36 ¶ A; (3) order the Secretary of Commerce to report to the President of the United States that the House of Representatives must contain 6,230 members according to the 2010 census, *id.* at 59–60 ¶ C; (4) order the President to report to the Clerk of the House that the House must contain 6,230 members, *id.* at 61–62 ¶ D; (5) order the Clerk of the House to report the new number of representatives to every state governor, *id.* at 63–65 ¶ E; (5) order state officials in each of the 50 states to hold new elections for representation in the House, *id.* at 65–66 ¶ F; and (6) declare each and every action by the House of Representatives of the 115th Congress illegal and void, *id.* at 67 ¶ J. To effectuate this wide-ranging remedy, Plaintiffs have sued several hundreds of defendants, including numerous federal officials as well as officials in each of the fifty states.

On July 17, 2017, the Court noted that the docket did not reflect that Plaintiffs had served any of these defendants and ordered them to file proofs of service by July 27, 2017, or risk dismissal. ECF No. 11. On August 17, 2017, acting on motions by Mr. LaVergne and some state defendants, the Court extended Plaintiffs' time to serve the defendants and to file proofs thereof to October 6, 2017, and it set a telephone conference for October 20, 2017, to set a schedule for proceedings. ECF No. 38. In filings submitted in anticipation of that conference, defendants noted

[2] This appears to be a miscite. There is no 2 U.S.C. § 2. Presumably, Plaintiffs mean to refer to 2 U.S.C. § 2a, which governs the apportionment of the House.

that one of the bases under which they would move for dismissal was that Mr. LaVergne is collaterally estopped from pursuing his claims, having unsuccessfully litigated the same issue in 2011. ECF No. 45. During the conference, the Court requested that the federal and state defendants brief collateral estoppel as a threshold issue, before addressing other bases for dismissal. That issue has been fully briefed and is awaiting the Court's decision.

On December 7, 2017, a nonprofit organization and several individuals, all represented by the same counsel—Scott Stafne of Stafne Law Advocacy and Consulting—sought to intervene. ECF No. 73. The nonprofit, Citizens for Fair Representation ("CFR"), advocates for increasing the size of the California state legislature and has filed a lawsuit in the United States District Court for the Eastern District of California seeking to compel such an increase. Proposed Compl. in Intervention ¶ 2.5, ECF No. 73. The other proposed intervenors are mostly persons who advocate for a new "State of Jefferson" to be constituted from several counties in northern California and southern Oregon. *Id.* ¶¶ 2.6–2.2.10. The proposed intervenors seek to add several more claims and issues to this case beyond Plaintiffs' Article the First claim. Specifically, they want to incorporate into this case new claims that the current apportionment of the House of Representatives (1) violates the separation of powers because it "reconstitute[s] [the House] as an oligarchy or aristocracy," *id.* ¶ 6.22, (2) violates principles of federalism because it "create[s] an [sic] de facto and de jure oligarcy/aristocracy" that "undermined the people's role as sovereign at both the State and Federal level," *id.* ¶ 6.42, and (3) violates the nondelegation doctrine, *id.* ¶ 6.47. The Federal Defendants opposed the motion to intervene for several reasons, including that the proposed intervenors inappropriately seek to expand the scope of the case, which intervention does not permit. ECF No. 86 at 7–8 (citing *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944)). In their reply filed on January 12, 2018, the proposed intervenors addressed this argument in part by

noting that "it is their understanding that one or more of the original plaintiffs will be amending their complaint to incorporate all of Applicant's causes of action as a part of that original party's complaint." ECF No. 91 at 18.

B. Mr. Neuman's Motion to File a Second Amended Complaint

Days after filing the reply in support of the motion to intervene, on January 16, 2018, Mr. Stafne, counsel for the proposed intervenors, filed (without leave) a second amended complaint on behalf of Plaintiff Mr. Neuman. ECF No. 92. Both undersigned counsel and the chambers of Judge Kollar-Kotelly separately inquired of Mr. Stafne whether he represented Mr. Neuman. Mr. Stafne responded that he did not, but wanted to file the amended pleading because he "believed it was in [his] clients [*sic*] best interests." Exhibits 1, 2. The Court struck the amended complaint because more than twenty-one days had passed since Defendants had filed a motion to dismiss[3] and because Mr. Neuman "cannot have attorneys who do not represent him file documents through ECF on his behalf." Order, ECF No. 93. On February 5, 2018, the clerk docketed Mr. Neuman's newly submitted motion for leave to file a second amended complaint. Mot. for Leave to File 2d Am. Compl., ECF No. 98.

Mr. Neuman's proposed amended complaint seeks to add three new claims—counts six through eight—to this case. Remarkably, those claims are nearly word-for-word identical to claims that Mr. LaVergne litigated and lost in the same New Jersey case that forms the basis for the Federal Defendants' motion to dismiss on grounds of collateral estoppel. *Compare* Proposed 2d Am. Compl. at 2–8, *with* Compl. ¶¶ 50–58, *LaVergne v. Bryson*, No. 11-7117 (D.N.J.), ECF No. 1 (attached as Exhibit 3). Each of these new claims challenges the constitutionality of the current

[3] In addition, Plaintiffs, including Mr. Neuman, had already amended their complaint once as a matter of right. *See* Am. Compl., ECF No. 4.

statutory method of apportioning the members of the House to the states established by 2 U.S.C. § 2a. Specifically, Count Six claims that § 2a violates the separation of powers. *See* Proposed 2d Am. Compl. at 2–4. In a similar vein, Count Seven claims that § 2a is an unconstitutional delegation of legislative power to the Executive Branch. *Id.* at 5–6. And Count Eight argues that the constitution and the "one person, one vote" principle foreclose the "method of equal proportions" approach that § 2a embodies. *Id.* at 6–9.

When Mr. LaVergne brought these claims in New Jersey, the district court promptly dismissed them, and the Court of Appeals for the Third Circuit affirmed, holding that Mr. LaVergne lacked standing and that his claims lacked merit. *See LaVergne v. Bryson*, 497 Fed. App'x 219 (3d Cir. 2012). The Federal Defendants urge this Court to reach the same conclusion with respect to the identical claims Mr. Neuman seeks to add here, and accordingly deny his motion to file a second amended complaint as futile.

C. The Apportionment Statute

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

Beginning in 1850, Congress set the overall size of the House in advance, and then distributed that fixed number of seats among the States proportionally. Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1025 (1929). Because Congress ensured that no State would lose a Representative even as population increased, the size of the House increased steadily until Congress in 1911 fixed its size at 435 members. *See Montana*, 503 U.S. at 451 & n.24. After the 1920 census, Congress failed to enact a new apportionment, in part because of concerns that increasing the size of the House beyond 435 members would make the House "too large and unwieldy." H.R. Rep. No. 70-2010, at 3 (1929). To avoid another political deadlock after the 1930 census, *id.* at 4, Congress in 1929 enacted a statute providing for a self-executing means of apportioning the 435 House seats among the States based on the census. *See* Pub. L. No. 71-13, 46 Stat. 21, 26 (1929).

That statute, as amended in 1941, and now codified at 2 U.S.C. § 2a, has governed every apportionment conducted since. *See Montana*, 503 U.S. at 452–53. Section 2a provides that, following each decennial census, "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. § 2a. The method of equal proportions is a mathematical formula used to allocate the 435 seats to the various States given their relative populations. *See Montana*, 503 U.S. at 455–56. Since the number of House seats was fixed at 435 when Congress enacted this statute, the number of Representatives—with the exception of a brief period after Alaska and Hawaii were admitted as new States, *id.* at 451 n.24—has remained at 435 ever since.

STANDARD

"Under Fed. R. Civ. P. 15(a)(2), when unable to do so as-of-right, 'a party may amend its pleading only with the opposing party's written consent or the court's leave.'" *Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016) (quoting Fed. R. Civ. P. 15(a)(2)). The grant or denial of leave lies in the sound discretion of the district court, *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996), and leave should be "freely given when justice so requires," *id.* (quoting Fed. R. Civ. P. 15(a)). Leave to amend may be denied, however, based on "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Id.* A finding of futility is warranted if a proposed claim would not survive a motion to dismiss. *Williams*, 819 F.3d at 471 (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1487 (3d ed. 2004) (an amendment should be denied when it "clearly is frivolous, advanc[es] a claim or defense that is legally insufficient on its face, or . . . fails to include allegations to cure defects in the original pleading") (footnote omitted).

ARGUMENT

If allowed, Mr. Neuman's proposed second amended complaint would not survive a motion to dismiss for the same reason that the identical claims brought by Mr. LaVergne in New Jersey were dismissed. Mr. Neuman lacks the requisite standing and the claims lack legal merit. The Court should therefore deny Mr. Neuman's motion to amend as futile.

I. Mr. Neuman Lacks Standing to Assert His Proposed New Claims.

In order to have standing to claim the type of prospective injunctive relief that Mr. Neuman seeks here, he would have to demonstrate that his requested relief would redress some concrete and particularized injury that he is currently suffering as the result of the alleged constitutional

defects in the apportionment statute. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). He has not and cannot do so. As the Third Circuit held when affirming the dismissal of Mr. LaVergne's identical claims in 2012, the injury alleged by Mr. Neuman—that the Executive Branch is improperly involved in the apportionment of representatives and that the current representatives are not appropriately distributed—"at most alleges 'a type of institutional injury . . . which necessarily damages' all United States voters equally." *LaVergne*, 497 Fed. App'x at 221 (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).

The Third Circuit's conclusion is well-founded and should be replicated here. Mr. Neuman (like Mr. LaVergne before him) alleges that he is a resident of New Jersey, Am. Compl. ¶ 1, and that, following the 2010 decennial census, the "method of equal proportions" prescribed by § 2a resulted in "Texas [being] unconstitutionally apportioned 1 extra Representative that should have been apportioned to either New Jersey or Louisiana." Proposed 2d Am. Compl. ¶ 5 at 8. Mr. Neuman has not shown, however, that the proper remedy for his constitutional claims would be to revert to the apportionment that prevailed following the 2000 census. Indeed, it is unlikely that would be the case, given that the pre-2000-census apportionment was also configured under the "method of equal proportions" that Mr. Neuman claims to be unconstitutional. Consequently, Mr. Neuman has failed to articulate a redressable injury.

This is not a case like *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). In that case, the Supreme Court held that voters had standing to challenge a method of apportioning the fixed number of 435 House seats among the States because the voters had presented evidence that, under the method of apportionment they contended was constitutionally required, their States would obtain additional House seats. *Id.* at 331–32. Here, however, Mr. Neuman has not demonstrated that prevailing on his claims would result in New Jersey gaining a

House seat that would have otherwise been awarded to another State (and thus that New Jersey would gain political power relative to other States). Unlike the plaintiff in *Department of Commerce*, then, Mr. Neuman has not shown statnding.

II. Mr. Neuman's Proposed New Claims Are Without Legal Merit.

Even if Mr. Neuman could establish the requisite elements of standing, his claims would nevertheless be subject to dismissal for clear lack of merit.

A. Section 2a Does Not Unconstitutionally Delegate Power to the Executive.

Mr. Neuman's proposed Count Six and Count Seven allege that § 2a improperly delegates legislative power to the Executive Branch and therefore violated the separation-of-powers principle known as the nondelegation doctrine. Proposed Am. Compl. at 2–6. Following the 1920 census, a political stalemate prevented Congress, for the first time in the nation's history, from enacting a new apportionment based on changes in the population reflected in the decennial census. In 1929, Congress broke the logjam by enacting a self-executing process for apportioning seats in the House of Representatives, which is today codified in 2 U.S.C. § 2a. Section 2a provides that, following each decennial census, "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. 2a. It was well within Congress's authority to establish a selfexecuting procedure for apportioning seats to avoid the politically divisive and disruptive process of enacting a new apportionment after each census. *See Montana*, 503 U.S. at 465.

Mr. Neuman nonetheless contends that this statute unconstitutionally delegates legislative power to the Executive Branch and that it violates the separation of powers. Proposed 2d Am. Compl. pages 2–6. These contentions fail. A statute unconstitutionally delegates legislative power

to the Executive only if it lacks an "intelligible principle" to guide the Executive's exercise of discretion under the statute. *See, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001). Far from conveying undue discretion on the Executive, § 2a requires the President to apportion representatives according to a precise and well-defined mathematical formula that is entirely nondiscretionary—the method of equal proportions. *See Montana*, 503 U.S. at 455; *LaVergne*, 497 Fed. App'x at 222 ("Section 2a clearly contains an intelligible principle to guide the exercise of delegated authority."). Although Mr. Neuman complains that "Career Federal Civil Servant Employees" are carrying out this process, *see* Proposed 2d Am. Compl. at 3, there is no cogent separation-of-powers objection to those employees' following a nondiscretionary process for conducting the apportionment set forth in a duly enacted federal statute.

The Supreme Court has rejected challenges to statutes conveying authority on the Executive Branch that was far more discretionary than that created by 2 U.S.C. § 2a. *See Whitman*, 531 U.S. at 472 (rejecting nondelegation challenge to statute authorizing the Environmental Protection Agency to set air quality standards that "allow[] an adequate margin of safety" and "are requisite to protect the public health"); *Touby v. United States*, 500 U.S. 160, 165-66 (1991) (rejecting nondelegation challenge to statute permitting the Attorney General to add substance to the banned list if doing so is "necessary to avoid an imminent hazard to public safety" (internal quotation marks omitted)); *United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011) (rejecting nondelegation challenge to statute permitting the President to declare an emergency if there is an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States" (internal quotation marks omitted)). And to the extent that Mr. Neuman's objection is to the self-executing character of § 2a, the Supreme Court in *Montana* found "no merit" to the suggestion that "the automatic character of the application of the method of equal

proportions" was unconstitutional, noting that "the use of a procedure that is administered efficiently and that avoids partisan controversy supports the legitimacy of congressional action, rather than undermining it." 503 U.S. at 465. Mr. Neuman provides no basis for revisiting *Montana* or any of the cases consistently upholding far more expansive delegations of authority to the Executive.

B. Section 2a Does Not Violate Article I, Section 2 of the Constitution.

Mr. Neuman also seeks to add a claim that § 2a violates Article I, Section 2 of the Constitution and the "one person, one vote" principle derived therefrom in *Wesberry v. Sanders*, 376 U.S. 1 (1964). That claim is flatly foreclosed by the Supreme Court's decision in *Montana*. In that case, the state of Montana challenged the constitutionality of § 2a after it lost half of its two-person House delegation following the 1990 decennial census. A majority of a three-judge panel on the United States District Court for the District of Montana granted Montana's motion for summary judgment, concluding that § 2a's "method of equal proportions" approach violated the "one person, one vote" principle announced in *Wesberry*. *Id.* at 446. The Supreme Court reversed. It noted that its *Wesberry* jurisprudence exclusively involved disparities in voting districts within an individual state, not among the several states. *Id.* at 460. At the national level, the Court observed, different methods of apportionment result in different measures of inequality, and "none of these alternative measures of inequality" present "a substantive principle commanding constitutional significance." *Id.* at 463. Further, the Court noted that the constitutional requirement of at least one representative per state "inexorably compels a significant departure from the ideal" and renders precise mathematical equality "illusory," demonstrating the inapplicability of the *Wesberry* standard. *Id.* Accordingly, Mr. Nueman's claim that § 2a is unconstitutional under *Wesberry* is directly at odds with established Supreme Court precedent and is futile for that reason.

CONCLUSION

Mr. Neuman's motion to amend should be denied.

Dated: March 5, 2018

Respectfully Submitted,

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