No. 18-

In The Supreme Court of the United States

PETER LEE, MIRI PARK, HO SAM PARK, GENEY KIM, AND YONAH HONG,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a case under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw* claim"), and its progeny, alleging that a City Council racially gerrymandered new district boundaries, the central question is whether legislators drew boundaries with a predominant racial intent.

1. In such cases: (a) what is the test that governs the assertion of legislative privilege by state and local officials – especially in light of the tension between this Court's decisions in *United States v. Gillock*, 445 U.S. 360 (1980) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977); and (b) if the privilege is qualified, is it overcome by direct and circumstantial evidence that race was likely the predominant factor in drawing boundary lines, including statements by key decision-makers that a district was created to include a specific racial makeup, expert opinion that the boundaries were based on race, and procedural irregularities in the redistricting process?

2. Even if a legislative privilege prevents discovery, does *Hunt v. Cromartie*, 526 U.S. 541 (1999), preclude summary judgment on a *Shaw* claim in the face of such direct and circumstantial evidence of racial intent because legislative motivation is a factual question for a jury to resolve?

PARTIES TO THE PROCEEDINGS

Petitioners Peter Lee, Miri Park, Ho Sam Park, Geney Kim, and Yonah Hong were the plaintiffs in the district court and the appellants in the court of appeals.

The City of Los Angeles was the defendant in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Other Authorities

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Peter Lee, Miri Park, Ho Sam Park, Geney Kim, and Yonah Hong respectfully petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-28a) is reported at 908 F.3d 1175 (2018). The order of the district court (App. C, *infra*, 31a-61a) is reported at 88 F. Supp. 3d 1140.

JURISDICTION

The court of appeals entered its judgment on Nov. 18, 2018. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on Dec. 28, 2018. App. B, *infra*, 29a-30a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

> the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

INTRODUCTION

The Ninth Circuit affirmed summary judgment for Respondent-Defendant City of Los Angeles ("City") on a claim under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw* claim"), alleging that the City relied on race as the predominant factor in redistricting Los Angeles City Council District 10 ("CD 10"). Petitioners-Plaintiffs Peter Lee, Miri Park, Ho Sam Park, Geney Kim, and Yonah Hong are residents of CD 10 and contended that the City racially gerrymandered CD 10 by removing Caucasian voters and dividing the heavily Asian and Latino neighborhood of Koreatown between City Council districts to ensure that CD 10 retained a sufficient percentage of African-American voters that, in the words of the City Council President and incumbent in CD 10, would ensure that the district "will be black for the next thirty years."

The Ninth Circuit affirmed the grant of summary judgment for the City. App. A, *infra*, 5a. That decision raises two important issues that warrant review by this Court.

First, in holding that the City can assert a legislative privilege to prevent written and oral discovery into whether it was motivated by race when it redrew the boundaries of CD 10, the Ninth Circuit disregarded this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), as well as a Third Circuit opinion, *In re Grand Jury*, 821 F.2d 946, 948 (3d Cir. 1987). Both cases held any legislative privilege that

might apply to state and local officials must give way when important federal interests are at stake.

Ignoring these cases, the Ninth Circuit relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which indicated that calling legislators to testify at trial is "extraordinary." The tension between *Gillock* and *Arlington Heights* can be resolved only by this Court, so review here is essential to define what will overcome a claim of legislative privilege.

Although some cases, including a decision from the Fourth Circuit, suggest that a legislative privilege for state and local officials is absolute, *e.g.*, *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir. 1988), *overruled on other grounds by Berkley v. Common Council of the City of Charleston*, 63 F.3d 295 (4th Cir. 1995), the Ninth Circuit recognized that any legislative privilege is qualified. It nonetheless held that Plaintiffs failed to provide sufficient evidence to overcome any qualified legislative privilege despite considerable direct and circumstantial evidence that the City relied on race when drawing CD 10. That evidence included: (1) statements by the City Council President who represented CD 10 and his handpicked representative to the City's Redistricting Committee that increasing the percentage of African-American voters in CD 10 was essential and then had been achieved; (2) the representative's orders that the map drawers consider African-American voters when drawing the boundaries and his rejection of proposed maps that did not increase the African-American registered voting population in CD 10; (3) expert opinion that the boundaries of CD 10 were likely the product of racial gerrymandering; and (4) procedural

irregularities that departed from the normal redistricting process, including the removal of Redistricting Commission members who objected to the map of CD 10. Despite that evidence, the Ninth Circuit concluded without analysis that Plaintiffs had failed to establish "extraordinary circumstances" to warrant discovery.

This holding departed from the test for qualified legislative privilege used by most courts in redistricting cases. Recognizing that the legislature's motivation is central to redistricting claims, most courts apply a five-factor balancing test for when legislative privilege can preclude discovery in redistricting claims. Other courts in redistricting and deliberative process privilege cases consider additional factors in their balancing test. The Ninth Circuit, however, failed to address any tests used by other courts and performed no test at all. By holding that Plaintiffs failed to overcome the privilege in this case – despite the ample direct and circumstantial evidence of racial intent – the Ninth Circuit has effectively made the legislative privilege absolute.

Second, the Ninth Circuit opinion conflicts with *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*Cromartie I*), which held that, on summary judgment, courts may not weigh conflicting evidence of racial intent in racial gerrymandering cases. As in all summary judgment proceedings, a court must view the evidence and inferences in favor of the non-moving party. Yet the Ninth Circuit rejected both direct and circumstantial evidence that race was the predominant factor in drawing CD 10's boundaries.

Instead of determining if the totality of the evidence supported an inference of racial intent, the

Ninth Circuit weighed and rejected the evidence piecemeal. For example, it held that, even if direct evidence showed that the City Council President who represented CD 10 and his appointee to the Redistricting Commission were solely motivated by race, their motivation was irrelevant because other people participated in drawing and approving the final map. Not only does this violate established summary judgment standards, but it would allow officials to immunize themselves from racial gerrymandering claims merely by having others approve the final maps.

Similarly, the Ninth Circuit accepted the City's explanation for the boundaries of CD 10 despite contrary evidence that supported the inference that the City's predominant motivation was race. Because the Ninth Circuit could not weigh the evidence as it did, summary judgment was improper. Plaintiffs raised a triable issue of fact that could be decided only by a jury.

Accordingly, certiorari should be granted.

STATEMENT OF THE CASE

A. Legal Framework

In *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), this Court held that the Equal Protection Clause of the United States Constitution prohibits racial gerrymandering of legislative districts. In post-*Shaw I* decisions, this Court has held that strict scrutiny applies to redistricting decisions if race was the predominant factor in the drawing of a legislative district. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*). Race is the "predominant factor" in redistricting if

other goals in the redistricting process were subordinated to racial concerns. *Id.* This Court also has held that determining a jurisdiction's motivation requires courts to "perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Cromartie I*, 526 U.S. at 546 (quoting *Arlington Heights*, 429 U. S. at 266).

B. Factual and Procedural History

1. In 2011-2012, the City redrew its City Council districts. CD 10 includes part of Koreatown, a longstanding neighborhood in the "Mid-Wilshire" area of Los Angeles that is 52.4% Latino and 35.4% Asian.[1]

When redistricting began, CD 10 was underpopulated by about 4.9%. CD 10's Citizen Voting Age Population ("CVAP") percentages were African-Americans 36.87%, Latinos 28.2%, Caucasians 15.9%, and Asian-Americans 17.1%. CD 10's registered voters were 49.1% African-American.

CD 10 is represented by City Council President Herb Wesson, who is African-American. Wesson appointed Christopher Ellison, an African-American sports agent with no prior redistricting experience, to represent CD 10 on the Redistricting Commission responsible for redrawing district boundaries.

In the final map approved by the City Council, the heavily African-American neighborhoods of Leimert Park and Baldwin Hills were moved into CD 10. Although CD 10 needed to gain population, Caucasian voters were moved out to other districts. In

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[1] The following facts are drawn from the summary judgment record.

the final map, African-Americans increased to 43.1% CVAP in CD 10; Caucasian CVAP decreased to 11.1%; and Asian-American and Latino CVAP remained largely unchanged at 16.3% and 27.6%, respectively.

Ellison exercised strong control over CD 10's boundaries, and made strenuous efforts to ensure that the African-American CVAP of CD 10 was above 40%. At the first meeting of the West/Southwest Subcommittee responsible for drawing CD 10, Ellison gave Nicole Boyle, the "Technical Director," a series of coordinates and instructed her to draw new boundaries for CD 10 and then overlay on this map the African-American demographics for each of its census tracts. The City never explained where Ellison got these coordinates. Ellison then announced his intention to increase the level of African-American registered voters in CD 10 to 50.12% and the CVAP to 42.8%.

Ellison directed Boyle to adjust the boundaries of CD 10 until the percentage of African-American registered voters reached his desired level. Ellison told Boyle to move into CD 10 certain African-American neighborhoods, including Leimert Park, the "Dons" portion of Baldwin Hills, and other heavily African-American neighborhoods and communities. Ellison also told Boyle to remove from CD 10 a substantial portion of Palms, a densely populated neighborhood with a minority of African-Americans. Ellison repeatedly rejected proposed maps that did not increase the African-American registered voting population in CD 10.

Ellison subsequently confirmed in an email to other West/Southwest Subcommittee members that

the map resulting from his directions (the "Ellison Map") was drawn to increase African-American voters:

> Being a historical African American opportunity district, we found it necessary to increase the [African-American] population. We attempted to protect the historical African American incumbents in this district by increasing the black voter registration percentage and CVAP #s accordingly. As you can discern on the attachment, we were able to increase the numbers to 50.12% and 42.8%, respectively. This was a significant increase in the black voters in CD 10 which would protect and assist in keeping CD 10 a predominantly African-American opportunity district.

Ellison also confirmed that race was the sole motivation for removing a portion of Palms from CD 10:

> We agreed to move the western portion of CD 10 (Palms) into CD 5 and 11. This area is approximately 50% white voter registration or CVAP, 20% Latino CVAP and approximately 11% [African-American] voter registration. This move would allow CD 10 to divest itself of this diverse populated area, and increase the [African-American] population to the South [*i.e.*, the African-American neighborhoods mentioned above].

This email was included in materials submitted to the City Council.

Further confirmation of racial intent came from Council President Wesson. In public statements, he explained that the final map ensured that "a minimum of two of the council peoples will be black for the next thirty years." Wesson also stated that "[his] priority" was making sure "we have a black vote or two on that council." During the same meeting, Wesson emphasized the importance of making districts near-majority African-American. Citing another district, he stated: "You have to realize 40% of the voting—the voters in the 9th district are black. You will be very powerful, because they will never be able to get reelected without us. Ever."

2. Plaintiffs are residents of CD 10. Plaintiffs sued the City, claiming that CD 10's current boundaries violate the Equal Protection Clause of the Fourteenth Amendment (the "*Shaw* claim") because they were drawn predominately to include or exclude voters based upon their race. This *Shaw* claim required Plaintiffs to prove that the City was racially motivated in drawing CD 10's boundaries.

Shortly thereafter, other plaintiffs filed a related but separate action, *Haveriland v. City of Los Angeles*, Case No. CV 13-01410-CBM (JCGx) (the "Haveriland Action"). It overlapped substantially with Plaintiffs' action, by alleging a racially-motivated plan to increase the number of African-American voters in CD 10. However, it also alleged a racially motivated plan to increase the Latino population in CD 9. The District Court consolidated the Lee Action with the Haveriland Action.

Before consolidation, the City sought a protective order to prohibit certain depositions,

including the deposition of City Council President Herb Wesson and other City officials on the grounds of legislative privilege. The Magistrate Judge recognized that the legislative privilege is qualified, but granted the City's motion for a protective order. When Plaintiffs and the Haveriland Plaintiffs objected to the Magistrate Judge's decision, the District Court held that it was "not clearly erroneous." The District Court denied both sets of Plaintiffs' requests that it certify an interlocutory appeal from the discovery order. As a result, Plaintiffs were precluded from taking the deposition of Herb Wesson, and other people key to the redistricting process who had knowledge of the motivations underlying the City's boundary drawing for CD 10.

The City's invocation of legislative privilege did not stop with the protective order. For Christopher Ellison and the few depositions that were allowed to proceed, the City blocked any questioning that could conceivably relate to the intent of the deponent or any other City official or representative. The City also withheld documents concerning the motivation behind the creation and passage of the new City Council District boundaries.

Despite being denied that discovery, Plaintiffs offered substantial evidence at summary judgment. They offered direct evidence of racial intent, namely Ellison's demands and instructions to the people drawing the new districts; his refusal to consider any maps that did not increase the percentage of African-American voters in CD 10; his email statements confirming that CD 10 was drawn to increase African-American constituents; and Wesson's public statements that CD 10 was designed to ensure and did

ensure that African-American officials were elected from the district.

In addition to that direct evidence of racial intent, Plaintiffs offered significant circumstantial evidence that CD 10's boundaries were motivated by race:

- Evidence that CD 10's shape was irregular, just like a map this Court found "strangely irregular" in *Gomillion v. Lightfoot*, 364 U.S. 339, 364 (1960).

- Evidence of the racial demographics of CD 10, showing a shift in the ratio of African-American voters to Caucasian voters from 2:1 to 3:1.

- The use of Ad Hoc Committees to "avoid any Brown Act issues," *i.e.*, the requirement for governmental meetings to be held in public.

- Declarations by four of the seven Commissioners on the Committee who drew the initial map of CD 10 that Commissioner Ellison pursued a race-based goal.

- Evidence that Caucasian neighborhoods were removed from CD 10 despite it being severely underpopulated while African-American neighborhoods were moved into CD 10.

- Evidence that alternative maps for CD 10 were rejected because they did not achieve the desired race-based goals.

- Evidence of departures from procedural norms including: allowing the race-based map for CD 10 to pass through the process without significant changes; circumventing open meeting requirements that hid crucial stages of the line-drawing process from public view; and not submitting an alternative CD 10 map to a "Dispute Resolution" subcommittee, even though it received the same number of subcommittee votes as the Ellison Map.

- Evidence that commissioners who opposed the race-based plan for CD 10 were removed from the Redistricting Commission and replaced with commissioners who supported the race-based map.

- Evidence that the final map for CD 10 went against the overwhelming public opinion to place Koreatown in one district.

- Evidence that it was possible for Koreatown to be placed in one district and meet traditional redistricting requirements if the City had not pursued its race-based goals.

- An expert-produced Boundary Segment Analysis showing that changes to the CD 10 map were likely based on race.

Despite Plaintiff's evidence, the District Court granted summary judgment on the *Shaw* claim. App. C, *infra*, 31a-61a.

3. The Ninth Circuit affirmed, holding that Plaintiffs failed to raise a triable issue of fact as to whether the City was predominately motivated by race in drawing CD 10's boundaries. The court acknowledged that the evidence showed that race was a motivation in drawing CD 10 and may have been Ellison's and Wesson's "only motivation." App. A, *infra*, 16a. But it held that this evidence did not raise a triable issue that race was the predominant factor because Ellison and Wesson were only two participants in the process by which CD 10's boundaries were adopted. *Id.* at 22a. Citing the fact that other people voted on the maps and various amendments, the Ninth Circuit entirely discounted the direct evidence of racial intent by two key decision-makers. *Id.*

The Ninth Circuit also rejected the circumstantial evidence of racial intent, including the expert evidence regarding the shape of the district and demographic changes, as well as the procedural irregularities. App. A, *infra*, 20a-22a. Instead, it accepted the City's explanations to discount the issues raised by Plaintiffs and their experts. *Id.*

In addition, the Ninth Circuit found that the district court did not err in applying the legislative privilege to preclude discovery. App. A, *infra*, 22a-26a. Relying on *Arlington Heights*, the Ninth Circuit held that the City could assert legislative privilege. The Ninth Circuit engaged in no analysis of factors that courts should consider when analyzing legislative privilege or the evidence required to overcome that privilege. *Id.* It merely held that "the factual record in this case falls short of justifying the 'substantial

intrusion' into the legislative process." *Id.* at 25a-26a (quoting *Arlington Heights*, 429 U.S. at 268 n.18).

The Ninth Circuit denied rehearing and rehearing en banc. App. B, *infra*, 29a-30a.

REASONS FOR GRANTING THE WRIT

This case presents important questions regarding the standards applicable to discovery and summary judgment on *Shaw* claims. The Ninth Circuit's decision below conflicts with decisions of this Court and courts in other circuits in its application of the legislative privilege in redistricting cases and departs from this Court's precedent establishing the standards that govern summary judgment in redistricting litigation.

Certiorari should be granted to establish a single test for legislative privilege claims in redistricting disputes.

Certiorari also should be granted to reaffirm this Court's holding in *Cromartie I* that a legislature's motivation in redistricting is a factual question that cannot be decided on summary judgment when direct and circumstantial evidence is capable of raising an inference that race was the predominant factor in redistricting decisions.

I. THE CASES ARE DIVIDED ON THE STANDARDS GOVERNING LEGISLATIVE PRIVILEGE CLAIMS.

A. The Tension In This Court's Decisions About Legislative Privilege Claims Can Be Resolved Only By This Court.

In *Gillock*, this Court refused to find that a state legislator facing federal criminal charges had an evidentiary privilege akin to the Speech or Debate Clause of the United States Constitution. 445 U.S. at 366-74. Because the Speech or Debate Clause applies only to members of Congress, *id.* at 371-72, the state legislator argued that a legislative privilege for state officials exists at common law through Federal Rule of Evidence 501 or due to principles of federalism. *Id*. at 366-67.

This Court held no such privilege exists. The twin rationales for the Speech or Debate Clause are, first, to protect the separation of powers between co-equal branches of the federal government, and, second, to protect legislative independence. *Gillock*, 445 U.S. at 369. The former is irrelevant to state (and local) officials. *Id*. at 371-73. The latter may support state officials' immunity from civil suit, but does not create an evidentiary privilege in criminal proceedings. "[A]lthough principles of comity command careful consideration, our cases disclose that *where important federal interests are at stake*, as in the enforcement of federal criminal statutes, comity yields[,]" even though "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function." *Id.* at 373 (emphasis added).

Echoing *Gillock*, the Third Circuit categorically rejected a legislative privilege claim by state legislators. *In re Grand Jury*, 821 F.2d at 948. "Neither the threat of harassment by the federal executive or judiciary, nor the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of [state] legislative activities normally protected by the Speech or Debate Clause." *Id.* at 958.

Like criminal prosecutions, redistricting cases present important federal interests. "[F]ew issues could be more serious to preserving our system of representative democracy" than ensuring voters' constitutional rights in elections. *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574-75 (D. Md. 2017); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *23 (N.D. Ill. Oct. 12, 2011) (actions challenging redistricting "seek to vindicate public rights" and are "akin to criminal prosecutions" in *Gillock*).

Ignoring *Gillock* and *In re Grand Jury*, the Ninth Circuit looked instead to *Arlington Heights*. App., *infra*, 25a-26a. There, in a claim that a Village's Board violated the Equal Protection Clause by denying a permit to build low-income housing, this Court held that "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. It added that, "[i]n some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by

privilege." *Id.* However, "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" so "[p]lacing a decisionmaker on the stand is . . . 'usually to be avoided.'" *Id.* at 268 n.18 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)). Based on that language, the Ninth Circuit concluded that "extraordinary circumstances" are not present here. App., *infra*, 25a-26a.

Gillock did not discuss *Arlington Heights*, which had only been decided three years earlier, nor did *Gillock* address when "important federal interests" will override legislative privilege claims in civil suits. As discussed below (section C), there are multiple reasons why the Ninth Circuit was wrong in reading *Arlington Heights* to preclude discovery. Nonetheless, there is a tension between *Gillock* and *Arlington Heights* that necessitates review because only this Court can resolve that tension about legislative privilege.

B. Most Courts In Redistricting Cases Apply A Qualified Legislative Privilege That Requires The Weighing Of Multiple Factors.

Consistent with *Gillock* and *In re Grand Jury*, some circuits applying a legislative privilege for state or local legislators, recognize that the privilege is qualified. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (in non-redistricting case, holding "the legislative privilege for state lawmakers is, at best,

one which is qualified" and such "privilege must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth") (internal quotation marks omitted); *Ala. Educ. Ass'n v. Bentley (In re Hubbard)*, 803 F.3d 1298, 1311 (11th Cir. 2015) ("To be sure, a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests."). But other courts suggest that the privilege is an absolute evidentiary and testimonial privilege. *Schlitz*, 854 F.2d at 46 ("The purpose of the [legislative immunity] doctrine is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves"); *Cunningham v. Chapel Hill, ISD*, 438 F. Supp. 2d 718, 723 (E.D. Tex. 2006) (legislative privilege protected members of the Board of Trustees from having to testify about their votes to dissolve their maintenance department); *Miles-UN-Ltd. v. Town of New Shoreham*, 917 F. Supp. 91, 98 (D.N.H. 1996) ("'legislative immunity not only protects state [and local] legislators from civil liability, it also functions as an evidentiary and testimonial privilege'") (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D.Md. 1992)); *see also Sizeler Hammond Square Ltd. Pshp. v. City of Hammond*, No. 99-1816, 1999 WL 615173 (E.D. La. Aug. 12, 1999) (discussing legislative immunity providing an absolute evidentiary and testimonial privilege for legislative acts, but finding it inapplicable because acts in dispute were not legislative acts).

In redistricting cases brought before three-judge panels under 28 U.S.C. § 2284, district courts generally apply a qualified legislative privilege. [2] *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574-75 (D. Md. 2017) ("privilege does not absolutely protect state legislative officials from discovery into communications made in their legislative capacity"); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 336-37 (E.D. Va. 2015) (legislative privilege is "qualified when it stands as a barrier to the vindication of important federal interests and insulates against effective redress of public rights"); *Perez v. Perry*, No. SA-11-CV-360-OLG-JES-XR, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) ("'Indeed, the proposition that a legislative privilege is not absolute, particularly where another compelling, competing interest is at stake, is not a novel one.'") (quoting *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013)); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7 ("Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need."); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003) (legislative privilege "is not absolute" and "legislators may, at times, be called upon to produce documents or testify at depositions"), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); *see also Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015) (holding in

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[2] Three-judge panels hear all actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284. This case does not fall within that section because it challenges local redistricting.

challenge to voter ID law that "[i]n cases involving constitutional challenges related to voting rights, the vast majority of federal courts have found that the federal common law also affords state legislators only a qualified (i.e., not absolute) legislative privilege against having to provide records or testimony concerning their legislative activity"); *Florida v. United States*, 886 F. Supp. 2d 1301, 1303-04 (N.D. Fla. 2012) (applying qualified privilege in Voting Rights Act preclearance litigation). "Redistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." *Bethune-Hill*, 114 F. Supp. 3d at 337.

However, even in redistricting cases, the test for the legislative privilege is not always consistent. To determine if the qualified privilege precludes discovery in redistricting cases, the majority of courts consider five factors: (1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the state, as opposed to individual legislators, in the litigation, and (5) the extent to which the discovery would impede legislative action. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 575; *Bethune-Hill*, 114 F. Supp. 3d at 337-38; *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7; *Rodriguez*, 280 F. Supp. 2d at 100-01. "The first three factors aim to capture the federal interests at stake – courts are more likely to require disclosure of communications that are highly relevant, difficult to obtain elsewhere, and will assist in the enforcement of public rights – while the final two factors reflect our

comity interest in minimizing intrusion into the State's legislative process." *Benisek*, 241 F. Supp. 3d at 575. Yet other courts apply additional factors. *See, e.g.*, *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (considering eight factors).[3]

C. The Ninth Circuit's Decision Conflicts With Numerous Decisions Because It Applied No Balancing Test And Effectively Established An Absolute Privilege.

The decision below conflicts with cases holding that the legislative privilege is absolute and with courts holding that a balancing test is required for legislative privilege claims in redistricting cases.

The Ninth Circuit acknowledged that the legislative privilege is qualified, App. A, *infra*, 24a, but eschewed the test employed in other redistricting cases. It instead cited *Arlington Heights* for the proposition that members of a Village's Board could be called to testify at trial only "[i]n some extraordinary instances" and that "'judicial inquiries into legislative or executive motivation represent a substantial intrusion' such that calling a decision maker as a witness 'is therefore "usually to be avoided."'" App., *infra*, 24a-25a (quoting *Arlington Heights*, 429 U.S. at

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[3] *Irvin* relied on cases deciding analogous deliberative process claims, which also considered factors such as "[t]he interest of the litigants, and ultimately of society, in accurate judicial fact finding[,]"*In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), "[t]he presence of issues concerning alleged governmental misconduct[,]" *Dowd v. Calabrese*, 101 F.R.D. 427, 431-32 (D.D.C.1984); *Wood v. Breier*, 54 F.R.D. 7, 12 (E.D. Wis. 1972), and the federal interest in the enforcement of federal law, *Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y.1989).

268 n.18). It then concluded without analysis that "the factual record in this case falls short of justifying the 'substantial intrusion' into the legislative process" and that Plaintiffs had not shown the "extraordinary circumstances" required by *Arlington Heights*. App. A, *infra*, 25a-26a.

The Ninth Circuit's reliance on *Arlington Heights* was misplaced. *Arlington Heights* involved no claim of privilege, so that statement was dicta. Although the district court had excluded testimony about Board members' motivation for their votes, this Court found that decision was appropriate because the plaintiffs had argued that its equal protection claim was based on the "effect" of the Village Board's vote, not its motivation. 429 U.S. at 270 n.20. Thus, the motivation behind the vote was irrelevant.

By contrast, the motivation here is central to Plaintiffs' claims. "Unlike other cases, where the deliberative process privilege or the legislative privilege may be employed to 'prevent [the government's] decision-making process from being swept up unnecessarily into the public domain,' this is a case where the decisionmaking process 'is the case.'" *Bethune-Hill*, 114 F. Supp. 3d at 339 (quoting *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8).

In any event, unlike here, the plaintiffs in *Arlington Heights* were able in discovery "to question Board members fully about materials and information available to them at the time of decision." *Id.*

The Ninth Circuit also held that Plaintiffs failed to distinguish this case from *Arlington Heights*. But its analysis was no more than stating that, because *Arlington Heights* involved an equal protection claim

in which intent was directly at issue, such claims must present "extraordinary circumstances" to overcome legislative privilege. This conflicts with redistricting cases where courts have held that they present precisely the type of constitutional issues that satisfy the "extraordinary circumstances" test. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 574 n.8; *Bethune-Hill*, 114 F. Supp. 3d at 337. "In redistricting cases, where the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of 'legislative self-entrenchment,' [citation], the courts are presented with just such an 'extraordinary instance.'" *Bethune-Hill*, 114 F. Supp. 3d at 337 (quoting Christopher Asta, Note, *Developing A Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. Rev. 238, 264 (2014)).

Finally, unlike this case, the evidence offered in *Arlington Heights* also contained no direct evidence of discriminatory purpose. The zoning policy at issue existed before the project was proposed, the statements of the Board focused "almost exclusively on the zoning aspects" of the application, and the Board member that testified at trial said nothing that "supports an inference of invidious purpose." *Arlington Heights*, 429 U.S. at 270. Here, by contrast, both direct and circumstantial evidence that race was the predominant factor in the drawing of CD 10's boundaries.

By performing no balancing test despite direct and circumstantial evidence of racial intent behind the drawing of CD 10's boundaries, the Ninth Circuit created a wholly new standard for legislative privilege claims. It applied a purportedly qualified privilege, but

effectively made it an absolute privilege. That result is inconsistent with *Arlington Heights* and conflicts with many of the decisions above. If the direct and circumstantial evidence proffered by Plaintiffs is insufficient to overcome the legislative privilege, it is difficult to fathom a case that could satisfy the "extraordinary circumstances" bar set by the Ninth Circuit. This Court needs to grant review to resolve the scope of the legislative privilege.

D. A Proper Legislative Privilege Analysis Would Have Resulted In A Different Decision.

Had the legislative privilege factors above been applied, the privilege would have given way to the constitutional considerations.

First, evidence of discriminatory intent and non-public deliberations between legislators in redistricting cases is indisputably highly relevant and thus heavily weighs in favor of overriding the qualified legislative privilege. *Arlington Heights*, 429 U.S. at 268 ("contemporary statements by members of the decisionmaking body" are highly relevant to the question of whether the body proposed invidious discrimination); *League of Women Voters v. Johnson*, No. 17-14148, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) ("The question of whether state legislators sought to dilute the votes of Democrats by pursuing specific voting population percentages is critical to this case."); *Favors v. Cuomo*, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) ("the relevance factor weighs in favor of disclosure" in a redistricting case involving claims of racial and ethnic discrimination in violation of the Equal Protection Clause); *Page v. Virginia State*

Bd. of Elections, 58 F. Supp. 3d 533 (E.D. Va. 2014) (*Page II*) ("The Supreme Court has cited several specific factors as evidence of racial line drawing[, including] statements by legislators indicating that race was a predominant factor in redistricting [and] evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised[.]"), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

As the D.C. Circuit has held, if a claim turns on the government's intent, the plaintiff's need for discovery concerning governmental conduct is so clear that no privilege should apply. *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (*Subpoena II*) (recognizing a government misconduct exception to the deliberative process privilege whereby the privilege does not apply, and no balancing test is required, "when a cause of action is directed at the government's intent"); *accord In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 27681, at *11 n.2 (2d Cir. Dec. 27, 2017) (although government could assert Administrative Procedure Act claims in action challenging rescission of Deferred Action for Childhood Arrivals, it "could not rely on such privilege to avoid all discovery with respect to plaintiffs' constitutional claims") (citing *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (*Subpoena I*)).

Second, although Plaintiffs offered substantial evidence to prove its claim, the Ninth Circuit found it incapable of proving that race was the predominant factor. Notably, the Ninth Circuit dismissed the direct evidence of racial intent by key decisionmakers Ellison

and Wesson, because other people participated in the redistricting process and voted on the final map. Plaintiffs were denied discovery into those other people's motivations and the extent to which their votes were influenced by Ellison and Wesson. There was no alternative source for such information.

In any event, "the availability of alternate evidence does not render the evidence sought here irrelevant by any measure." *Bethune-Hill*, 114 F. Supp. 3d at 341; *see also Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 665 (E.D. Va. 2014) (*Page I*) (availability of some evidence of statements and circumstance evidence "does not mean that the Plaintiffs must confine their proof to those statements or to the circumstantial evidence"). In particular, circumstantial evidence in redistricting cases "is not a substitute for the ability to depose a witness and obtain direct evidence of motive and intent, thus avoiding the potential ambiguity of circumstantial evidence." *Benisek*, 241 F. Supp. 3d at 576.

Third, that the seriousness of the litigation and the issues involved favor discovery needs little discussion. "[I]t is indisputable that racial . . . claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government' and thus counsel in favor of allowing discovery." *Favors*, 285 F.R.D. at 219 (quoting *Rodriguez,* 280 F. Supp. 2d at 102); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 ("There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process[.]"). "The right to vote and the rights conferred by the Equal Protection Clause are of cardinal

importance." *Page I*, 15 F. Supp. 3d at 667. The third factor is "intended to give due consideration to some of the most invidious forms of government malfeasance." *Favors*, 285 F.R.D. at 219.

Fourth, consideration of the role of the state as compared to that of individual legislators also weighs in favor of discovery. *Benisek*, 241 F. Supp. 3d at 576. Because the claim is directed at the City, not individual members of the City Council or Redistricting Commission, "the witnesses have no personal stake in the litigation and face no direct adverse consequence if the plaintiffs prevail." *Id.*; *see also League of Women Voters*, 2018 WL 2335805, at *4 (where government was direct defendant and individual was sued only in her official capacity, factor weighed in favor of discovery). Particularly where the witnesses from whom discovery is sought were "primarily responsible for drafting, revising and approving" the disputed districts, the fourth factor supports discovery. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8.

Fifth, the final factor may present the "closest question," but still favors discovery. *Benisek*, 241 F. Supp. 3d at 576-77; *see also Bethune-Hill*, 114 F. Supp. 3d at 342-43 (ordering discovery despite fifth factor weighing against disclosure); *League of Women Voters*, 2018 WL 2335805, at *4 (same). The threat to legislative independence and future timidity by legislators "is substantially lowered when individual legislators are not subject to liability." *Bethune-Hill*, 114 F. Supp. 3d at 342. These concerns also are lessened because much of the decision-making was performed by a redistricting commission made up of the non-legislators. *Rodriguez*, 280 F. Supp. 2d at 101

(redistricting commission, "tends to weaken any claim that the disclosure of . . . deliberations and documents would cause future members of the Legislature not to engage in frank discussions of proposed legislation"). Further, to the extent particular discovery would chill future conduct by the City Council, the district court can address those concerns by crafting narrow limits on that discovery or permitting witnesses to seek post-testimony protection for the statements rather than foreclose discovery entirely. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 577 (providing for post-testimony protection); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 (limiting disclosures to particular communications).

II. THE NINTH CIRCUIT'S SUMMARY JUDGMENT RULING CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING *SHAW* CLAIMS.

To trigger strict scrutiny of alleged unconstitutional conduct, Plaintiffs need only prove that race was the predominant factor in the drawing of the lines of CD 10. *Shaw II*, 517 U.S. at 907. The test for whether race predominated is whether other goals in the redistricting process were subordinated to racial concerns. *Id*. Summary judgment is disfavored for resolving *Shaw* claims because "[l]egislative motivation or intent is a paradigmatic fact question." *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000); *see also Cromartie I*, 526 U.S. at 549 ("The legislature's motivation is itself a factual question.").

In *Cromartie I*, this Court reversed summary judgment in the plaintiffs' favor on a *Shaw* claim. The

district court had held that race was the predominant factor based on the plaintiffs' circumstantial evidence – expert testimony, analysis of the shape of the district, statistical evidence, and demographic evidence. 526 U.S. at 547-48. This evidence "tends to support an inference that the State drew its district lines with an impermissible racial motive – *even though [plaintiffs] presented no direct evidence of intent*." *Id.* at 548-49 (emphasis added). However, the state countered with evidence from legislators involved in drawing the maps, who offered race-neutral reasons for the district boundaries, and an expert affidavit that claimed the boundaries resulted from partisan, not race-based, gerrymandering. *Id.* at 549-51.

This Court held summary judgment was improper. The evidentiary inferences supported both a racial motivation and a political motivation. *Id.* at 552. In granting summary judgment, the district court "either credited [plaintiffs'] asserted inferences over those advanced and supported by [the state] or did not give [the state] the inference they were due." *Id.* It was error for the court "to resolve the disputed fact of motivation at the summary judgment stage." *Id.*

In affirming summary judgment here, the Ninth Circuit committed the same error as in *Cromartie I*. Plaintiffs offered direct and circumstantial evidence of racial motivation, including: the statements of Ellison and Wesson; the highly irregular shape of CD 10; an expert analysis of boundary segments that reflected racial disparities between areas immediately inside CD 10 and immediately outside, a strong indicator of racial intent; unusual decisions such as removing Caucasian voters from CD 10 and substituting

African-American voters when it was already underpopulated; and procedural irregularities in the redistricting process, including using ad hoc committees that worked behind closed doors and did not participate in or receive summaries of public hearings; failing to submit an alternative CD 10 map that would have kept Koreatown in one district to a "Dispute Resolution" subcommittee, and removing commissioners who opposed the Ellison Map.

Despite conceding that Ellison's and Wesson's statements established that race was the predominant – and possibly sole – factor in their actions, the Ninth Circuit held the participation of other officials somehow countered that evidence. App. A, *infra*, 16a-18a. But this Court has routinely relied upon statements of one or more individual legislators to find an impermissible purpose. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (striking down a provision of the Alabama constitution and relying on a statement made by the president of the constitutional convention regarding its racial purpose); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541-42 (1993) (striking down a city ordinance based on statements from three City Councilmembers and various other officials).

Dismissing Ellison's and Wesson's statements was particularly improper here, because Ellison, who directed how CD 10's boundaries should be drawn, and Wesson, CD 10's Councilman and the City Council President, had greater interests in and exercised disproportionate control over CD 10's final boundaries. *E.g.*, *Busbee v. Smith*, 549 F. Supp. 494, 510 (D.D.C. 1982) (giving particular weight to statement made by the Speaker of the House of Representatives in racial

gerrymandering claim, "because [the Speaker] appointed the House conferees—the ultimate decision-makers in the congressional reapportionment process"), *aff'd*, 459 U.S. 1166 (1983).

Similarly, rejecting circumstantial evidence, the Ninth Circuit dismissed evidence that commissioners opposed to CD 10 were replaced, because there was other turnover and the "record does not clearly show that the two aforementioned Commissioners had concerns specifically about racial line drawing, as opposed to the overall proposal put forth by Ellison." App. A, *infra*, 21a-22a. It also ignored the expert testimony and concluded that "CD 10 is not any more bizarrely shaped than it was with its previous boundaries." *Id.* at 20a. But under *Cromartie I*, this evidence raises competing inferences for a jury to decide. 526 U.S. at 552; *see also Prejean*, 227 F.3d at 510 (denying summary judgment where evidence supported race-neutral explanation of redistricting decision but it was "equally plausible" – based on racial statistics and evidence of a legislative "objective of creating a black subdistrict" – that race predominated).

By failing to give inferences in favor of Plaintiffs and disregarding the evidence of racial intent, the Ninth Circuit's Opinion conflicts with *Cromartie I* and imposes a nearly impossible standard for plaintiffs to meet in *Shaw* claims. In most redistricting cases, while multiple stages will be involved and numerous legislators will approve final maps, that cannot immunize governments from *Shaw* claims. Certiorari should be granted to bring this case in line with this Court's precedent and provide guidance for future courts handling redistricting claims.

In addition, the Ninth Circuit's approach conflicted with this Court's admonition that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976). The Ninth Circuit disregarded the evidence piecemeal, rather than looking at the totality of the evidence. *Id.*; *see also Miller v. Johnson*, 515 U.S. 900, 917 (1995) (holding that while the shape of the district alone may not show racial predominance, "when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer"). Whether or not individual pieces (or even categories) of evidence in a vacuum can prove racial predominance is not the right inquiry. On summary judgment, the relevant question is whether all evidence considered together raises a triable issue of fact as to racial predominance.

Thus, by weighing individual pieces of evidence without giving inferences in Plaintiff's favor, the Ninth Circuit departed from the established standards governing summary judgment for *Shaw* claims.

III. THE STANDARDS FOR LEGISLATIVE PRIVILEGE AND DECIDING *SHAW* CLAIMS PRESENT IMPORTANT AND RECURRING QUESTIONS.

As this Court's docket reflects, racial gerrymandering is an important and recurring subject of litigation. Since 2015, this Court has decided *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct.

788, 791 (2017), and recently heard argument in *Virginia House of Delegates v. Bethune-Hill*, No. 18-281. The Brennan Center for Justice lists fourteen significant recent or still-pending cases asserting racial gerrymandering.[4] Following the 2020 census, an entirely new round of redistricting will take place at the state and local level, likely leading to a wave of new redistricting challenges.

Questions about legislative privilege in redistricting cases raise recurring and important issues. Many of the legislative privilege cases cited above have been decided since 2014. *E.g.*, *Benisek*, 241 F. Supp. 3d 566; *Bethune-Hill*, 114 F. Supp. 3d 323; *Perez*, 2014 WL 106927; *Nashville Student Org. Comm.*, 123 F. Supp. 3d 967, *Page II*, 58 F. Supp. 3d 533.

Moreover, because appellate review in most redistricting cases is by direct appeal to this Court under 28 U.S.C. § 1253, the scope and standards for legislative privilege will seldom be addressed by the Courts of Appeal. As for review in this Court from a three-judge panel, this Court has jurisdiction to review only "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. Discovery orders do not fall within the scope of § 1253, and Plaintiffs are aware of no decision of this Court in which jurisdiction was predicated on § 1253 that has involved reviewing a discovery order. Plaintiffs are

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[4] *See* http://www.brennancenter.org/blog/state-redistricting-litigation.

aware of only one appeal from an order overruling a legislative privilege claim, but this Court dismissed the appeal for lack of jurisdiction. *Republican Caucus of Pa. House of Representatives v. Vieth*, 537 U.S. 801 (2002) (Mem.); *see also Vieth v. Pennsylvania*, 67 F. App'x 95, 98 & n.1 (3d Cir. 2003) (holding appeal to the Court of Appeal was moot). Thus, although the scope and test for legislative privilege in redistricting cases keeps arising in the district courts, absent certiorari in this case, the issue continues to evade meaningful review by this Court.

How courts should decide *Shaw* claims on summary judgment thus presents an important and recurring issue. "In a republican government, there is no more foundational right than meaningful representation." *Bethune-Hill*, 114 F. Supp. 3d at 341. The Ninth Circuit's holding that district courts can grant summary judgment on *Shaw* claims despite direct evidence that key decisionmakers were motived by race because other officials approved the final maps and that circumstantial evidence can be viewed and rejected piecemeal would effectively immunize racial gerrymandering. If this case could not survive summary judgment, it is difficult to fathom that any racial gerrymandering could raise a triable issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 28, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 11/19/2018]

No. 15-55478
D.C. No. 2:12-cv-06618-CBM-JCG

PETER LEE, individual; MIRI PARK, individual; HO SAM PARK, individual; GENEY KIM, individual; YONAH HONG, individual,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

No. 15-55502
D.C. No. 2:12-cv-06618-CBM-JCG

STANLEY HAVERILAND, individual; THEODORE THOMAS, individual; HORACE PENNMAN, individual; JULIA SIMMONS, individual; HEATHER PRESHA, individual; SALLY STEIN, individual,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California Consuelo B. Marshall, Senior District Judge, Presiding

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Argued and Submitted January 9, 2017
Pasadena, California

Filed November 19, 2018

Before: Jacqueline H. Nguyen[*] and Paul J. Watford, Circuit Judges, and Mark W. Bennett,[**] District Judge.

Opinion by Judge Nguyen

OPINION

SUMMARY[***]

Civil Rights

The panel affirmed the district court's protective order and its order granting summary judgment in favor of the City of Los Angeles in an action alleging that the City was motivated predominantly by racial considerations in drawing the boundaries of its current Council Districts for its 2012 redistricting ordinance.

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[*] Judge Nguyen was drawn to replace Judge Reinhardt on the panel following his death. Judge Nguyen has read the briefs, reviewed the record, and listened to the oral argument.

[**] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that, although the evidence showed that race was a motivation in drawing Council District 10, plaintiffs failed to raise a genuine issue of material fact as to whether race was the predominant factor motivating the legislature's decision as to the Council Districts' final boundaries. The panel held that even viewed in the light most favorable to plaintiffs, the record failed to show that the successive boundary amendments were driven predominantly by racial considerations. Instead, the panel held that the City Council Redistricting Commission's final report and recommendations showed that, overall, the Commission sought to rebalance the populations in each Council District, while preserving communities and unifying as many Neighborhood Councils as possible in a single Council District. The panel further held that the circumstantial evidence, demographic data and expert analyses failed to create a genuine dispute on racial predominance in Council District 10.

The panel agreed with the district court that legislative privilege protected local officials from being deposed and questioned regarding any legislative acts, motivations, or deliberations pertaining to the 2012 redistricting ordinance. The panel held that the factual record in this case fell short of justifying such a "substantial intrusion" into the legislative process.

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OPINION

NGUYEN, Circuit Judge:

At least once every ten years, the City of Los Angeles (the "City") must redraw the boundaries of its Council Districts in accordance with the requirements of its City Charter. Unsurprisingly, this decennial exercise can ignite intense debate and political maneuvering. These debates often center around "communities of interest," which are frequently but not exclusively defined along racial or ethnic lines, and which the City must take into account in its redistricting. In Los Angeles, certain communities have been divided across two or more Council Districts for decades even when they have been historically concentrated in certain areas of the City. Here, for example, Koreatown in Los Angeles is the largest Korean community in the United States, but, because it has been split into multiple City Council districts, the community has encountered "difficulty getting elected officials to address [its] needs."

Even as the redistricting process endeavors to respect the integrity of these communities of interest,

the City has recognized that it is "inevitable . . . that some interests will be advanced more than others by the choice of a particular district configuration." The City Council (and the Commission charged with advising it) must make these tough calls, recognizing that not all communities will be satisfied with the outcome. While the City Council may consider the passionate advocacy of these local communities, they must ultimately adhere to the strictures of the United States and California Constitutions and the City Charter. Thus, the City Council generally may not act with race as a predominant motivating factor. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Doing so would be presumptively unlawful under the Equal Protection Clause of the Fourteenth Amendment, unless the City can meet the demanding burden of showing that such action was narrowly tailored to serve a compelling interest. *Id.* at 1464.

In this appeal, we must decide whether Plaintiffs have presented sufficient evidence to survive summary judgment on the claim that the City was motivated predominantly by racial considerations in drawing its current Council Districts. That is, we consider whether the City primarily sought to maximize the voting power of certain racial groups over others when drawing Council Districts and subordinated all other considerations to that priority. On this record, we conclude that Plaintiffs have failed to raise a genuine issue of material fact on whether racial considerations predominated the City's redistricting process. We further agree with the district court that legislative privilege protects local officials from being deposed. We therefore affirm the district court's protective order and its order granting summary judgment in favor of the City.

I. Background

A. Factual Background

The Los Angeles City Council Redistricting Commission was created after Los Angeles voters adopted the current Los Angeles City Charter in 1999. The purpose of the Commission is to advise the Los Angeles City Council on the drawing of new Council District (alternatively, "CD") boundaries. These boundaries are drawn every ten years after each federal census with the goal of ensuring that each Council District contain "as nearly as practicable, equal portions of the total population of the City" as shown in the most recent census data. To the extent feasible, the boundaries are to be drawn to "keep neighborhoods and communities intact, utilize natural boundaries or street lines, and be geographically compact." In accordance with the City Charter, a Commission was appointed to propose new boundaries after the 2010 census. Since the previous redistricting in 2002, changes in population had caused imbalances across Council Districts that required rebalancing.

1. *The Commission's Initial Steps*

The Commission began the redistricting process by holding several preliminary meetings between September 27, 2011 and December 5, 2011. At these initial meetings, the Commission was presented with the existing Council District boundaries along with population and demographic data from the 2010 Census. The Commission then held a series of public hearings throughout the City between December 5, 2011, and January 10, 2012. One of the issues raised at these hearings was whether the Wilshire Center-Koreatown Neighborhood Council ("Koreatown") should

continue to be split across multiple Council Districts or united into a single Council District. At the time, Koreatown fell within at least three Council Districts: CDs 4, 10, and 13. The majority of public participants at the hearings spoke in favor of joining Koreatown into a single Council District.

On January 11, 2012, the Commission held a meeting at which the Chair of the Commission proposed dividing the Commission into three ad hoc committees corresponding to three regions: (1) the San Fernando Valley; (2) West and Southwest Los Angeles; and (3) East and Southeast Los Angeles. Each committee would meet on its own and be responsible for drawing an initial map of the Council Districts within its assigned region. The Commission voted to approve this proposal.

2. *The Ad Hoc Committees Draw the Initial Council District Boundaries*

The committee assigned to West and Southwest Los Angeles (the "West/Southwest Committee") was responsible for drawing five Council Districts, including CD 10. CD 10 is west of downtown Los Angeles and split in half by the I-10 (Santa Monica Freeway). At the time of the 2012 redistricting, the 2010 Census data indicated that CD 10 was about 4.9% below its required population size. Its registered voters were 49.1% African American, and its Citizen Voting Age Population ("CVAP") percentages were 36.8% African American, 28.2% Latino, 17.1% Asian, and 15.9% White.

At the West/Southwest Committee's first meeting, Commissioner Chris Ellison, who had been appointed to the Commission by City Council President Herb Wesson (CD 10's councilmember), prepared his pro-

posed boundaries for CD 10. These boundaries encompassed majority African American neighborhoods that had previously been in CD 8, such as Leimert Park and the "Dons" portion of Baldwin Hills. They also excluded from CD 10 a substantial portion of the "Palms" neighborhood (which had a minority of African American residents) and split Koreatown's population between CD 10 and CD 13. In presenting his proposed boundaries, Ellison stated that he sought to increase the percentage of registered African American voters in CD 10 to over 50%. He later reiterated this intention in an email:

> Being a historical African American opportunity district, we found it necessary to increase the AA population. We attempted to protect the historical African American incumbents in this district by increasing the black voter registration percentage and CVAP #s accordingly. As you can discern on the attachment, we were able to increase the numbers to 50.12% and 42.8%, respectively. This was a significant increase in black voters in CD 10 which would protect and assist in keeping CD 10 a predominantly African-American opportunity district.

He continued:

> We agreed to move the western portion of CD 10 (Palms) into CD 5 and 11. This area is approximately 50% white voter registration or CVAP, 20% Latino CVAP and approximately 11% AA voter registration. This move would allow CD 10 to divest itself of this diverse populated area, and increase the AA population to the South.

After Ellison's presentation, other Commissioners proposed alternative boundaries. Ellison's proposed boundaries and the boundaries proposed by Commissioner Helen B. Kim received the most votes from the West/Southwest Committee with three votes each, but neither received a majority. Because both Ellison's and Kim's proposals received the same number of votes, the West/Southwest Committee should have submitted both proposals to a larger "Dispute Resolution" subcommittee to "stitch[] together" a compromise from the various proposals. However, this did not occur, and instead only Ellison's proposal was presented to the Dispute Resolution subcommittee.[1] As a result, the West/Southwest Committee ultimately presented only Ellison's proposal to the full Commission for approval.

3. *The Commission Considers the Proposed Boundaries*

Although the West/Southwest Committee formally presented Ellison's proposal to the Commission, Commissioner Kim presented an alternative set of boundaries to the Commission that would have placed Koreatown entirely within CD 13. The Commission rejected Kim's proposal. Because it was the largest neighborhood in Los Angeles, the Commission

[1] The record does not provide a clear explanation as to why Ellison's map, but not Kim's map, moved forward: whether it was a result of "suppression," or, alternatively, a misunderstanding by the initial Valley/West Dispute Resolution Committee that the Kim map had "not gone through the proper process." In any case, the record indicates that once the first Dispute Resolution Committee had met to resolve boundaries for the Valley/West region, those boundaries were effectively "locked in" for the subsequent East/West Dispute Resolution Committee.

did not find it practical or feasible to maintain Koreatown within a single Council District without creating "major disruptions to other communities and Council Districts throughout the City." Instead, the Commission incorporated Ellison's proposal into a complete draft Council District map, which it released for public comment and review.

After considering the public feedback, the Commission debated and approved 42 out of 80 proposed adjustments. The Commission then placed these amended boundaries before the public for another round of comment and review.[2] This led to yet another round of amendments wherein the Commission approved 5 of 14 proposed adjustments. The Commission then approved this "final" set of boundaries on a 16–5 vote, which was forwarded to the City Council with additional adjustments for the City Council to consider.

The Commission's final proposal increased the African American CVAP in CD 10 from 36.8% to 43.1%, and it increased the percentage of African American registered voters in CD 10 from 43.2% to 50.6%. The White CVAP in CD 10 decreased from 15.6% to 11.1%, and the Asian CVAP decreased from 17.1% to 16.3%.

4. *The City Council Deliberates and Promulgates the Final Council District Boundaries*

After the City Council received the Commission's final proposal, it held three public hearings through-

[2] Over the course of this entire process, the Commission held a total of 22 public testimony hearings and 10 business meetings, which over 5,000 people attended and which produced over 6,500 pieces of written and verbal testimony.

out the City to further review and revise it. Based on these hearings, City Council members ended up proposing 25 additional adjustments to the Commission's proposed boundaries. The City's Chief Legislative Analyst reviewed these proposed changes along with the Commission's original proposal and recommended adopting the Commission's proposed boundaries with 18 of the 25 proposed adjustments. According to the Legislative Analyst, adoption of these 18 adjustments would resolve concerns raised during the public hearings.

On March 16, 2012, the City Council adopted the Commission's proposal with the 18 additional adjustments. On June 20, 2012, the City Council passed the final redistricting ordinance, which was signed and published two days later. CD 10's final boundaries increased African American CVAP from 36.8% to 40.5%, and decreased White CVAP from 15.9% to 12.3% and Asian CVAP from 17.1% to 16.3%.

Afterwards, Council President Wesson made the following statements to the Baptist Ministers' Conference in July 2012:

> One, it has been since November, so brothers and sisters, it was me against twelve other members on the Council. I had no backup. I had no faction. And I did the very best I could with what I had. And I was able to protect the most important asset that we as black people have. And that's to make sure that a minimum of two of the council peoples will be black for the next thirty years.
>
> We as African Americans make up only 9% of the population. 9%. If we didn't all live

> clustered together, we would not have one council district. Not one. The Asians have 16% of the population. They don't have one district. Why? Because they live all over. So it's important for us to harness our resources because the most important asset again that we have as people is to make sure we have a black vote or two on that council. And that was my priority.

B. Procedural History

On July 31, 2012, Peter Lee, Miri Park, Ho Sam Park, Geney Kim, and Yonah Hong filed a complaint in federal district court alleging that the City violated the U.S. and California Constitutions and the City Charter in drawing CD 10. On February 26, 2013, Stanley Haveriland, Theodore Thomas, Horace Pennman, Julia Simons, Heather Presha, and Sally Stein filed a similar complaint in federal district court bringing the same claims against the City for CD 10, but also challenging the boundaries for CDs 8 and 9. The district court consolidated these cases on August 21, 2013.

In the course of litigation, the City moved for a protective order prohibiting Plaintiffs from questioning City officials regarding any legislative acts, motivations, or deliberations pertaining to the 2012 redistricting ordinance. The City also sought to specifically prohibit Plaintiffs from deposing Mayor Eric Garcetti, Council President Wesson, City Councilmember Jose Huizar, and former City Councilmember Jan Perry. The district court granted the City's motion and issued a protective order.

On February 24, 2015, the district court granted summary judgment in favor of the City as to

Plaintiffs' federal constitutional claim and declined to exercise supplemental jurisdiction over their remaining claims, which it dismissed without prejudice. Plaintiffs appeal both the summary judgment order and the issuance of the protective order.[3]

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's order granting summary judgment. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). "Summary judgment . . . is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (*Cromartie I*).

We generally review protective orders entered under a district court's inherent authority for abuse of discretion. *Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997). However, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Because the application of a legal privilege is "essentially a legal matter" that is reviewed de novo, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007), we apply that standard here to the district court's application of the legislative privilege.

III. Discussion

A. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny

[3] Because we do not rely on it in this opinion, we DENY the City's motion requesting judicial notice as moot.

to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. "Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). This includes "separating . . . citizens into different voting districts on the basis of race" without "sufficient justification." *Cooper*, 137 S. Ct. at 1463 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)). Claims that voting districts have been drawn on race-based lines are evaluated under a two-step analysis: (1) the plaintiffs must first prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"; and (2) if the plaintiffs do so, the burden shifts to the defendant "to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* at 1463–64 (quoting *Bethune-Hill*, 137 S. Ct. at 797). The district court granted summary judgment after finding that the plaintiffs failed to raise a genuine dispute at the first step of the analysis.

Proving that race was the predominant factor in drawing district boundaries "entails demonstrating that the legislature 'subordinated' other factors . . . to 'racial considerations.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). What matters is "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the [legislative body] in theory could have used but in reality did not." *Bethune-Hill*, 137 S. Ct. at 799. Plaintiffs may make this showing with direct or circumstantial evidence. *Cooper*, 137 S. Ct. at 1464.

In proving that race was the predominant factor, it is unnecessary to show an actual conflict between the enacted plan and "traditional redistricting principles." *Bethune-Hill*, 137 S. Ct. at 799. "Race may predominate even when a reapportionment plan respects traditional principles," *id.* at 798—for example, when a legislative body uses race as the predominant criterion to advance those principles, *see Cooper*, 137 S. Ct. at 1464 n.1. Given that traditional redistricting principles are "numerous and malleable," a legislative body "could construct a plethora of potential maps that look consistent with traditional, race-neutral principles." *Bethune-Hill*, 137 S. Ct. at 799. "But if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Id.* Still, the Supreme Court has recently reiterated that the "good faith of [the legislative body] must be presumed," and the burden of proof rests with the challenger to demonstrate that race predominated the districting process. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller*, 515 U.S. at 915).

Plaintiffs argue that race was in fact the overriding motivation behind CD 10's boundaries. They contend that Council President Wesson used his powerful and prominent position to ensure that CD 10 would become a majority African American Council District. Wesson claimed credit for acting to preserve African American seats on the City Council after the redistricting process concluded. He explicitly stated that it had been his "priority" to "make sure we have a black vote or two on that council."

In light of Wesson's statements, Plaintiffs draw particular significance from two facts: (1) Wesson's appointment of Christopher Ellison, a man with no prior redistricting experience, to the Redistricting

Commission, and (2) the division of the Commission into ad hoc committees for the initial drawing of Council District boundaries. According to Plaintiffs, the explicit purpose of the ad hoc committees was to avoid public scrutiny, and Ellison was appointed specifically to pursue Wesson's race-based agenda. Outside public view, and with fewer Commissioners against whom he needed to contend, Ellison could exercise greater control over the proceedings and more effectively pursue his (and Wesson's) goals. Indeed, Plaintiffs assert that "[t]he Ad Hoc Committees were the most important part of the redistricting process." By getting the first crack at drawing the Council Districts, these committees enjoyed the advantage of setting the terms of future debate. Although the Commission and the City Council might later amend a committee's proposal on the margins, it would be difficult if not impossible to completely scrap a proposal and redraw the boundaries anew.

At the West/Southwest Committee's first meeting, Ellison had the Commission's Technical Director display a map of CD 10 with racial demographic data superimposed over it. He then had the Technical Director redraw CD 10 to maximize the percentage of African American registered voters. Ellison explained the changes in his proposed map in terms of how it would increase the African American voting population in CD 10. He explicitly stated that "[w]e attempted to protect the historical African American incumbents in this district by increasing the black voter registration percentage and CVAP #s accordingly."

This evidence certainly shows that race was *a* motivation in drawing CD 10. For Ellison and Wesson, it may have even been the only motivation.

Ellison never offered any justification other than race for his proposed boundaries. But the relevant inquiry is whether "race was the *predominant* factor motivating the *legislature's* decision" as to the final boundaries. *Cooper*, 137 S. Ct. at 1463 (emphases added). And here, Plaintiffs have not made the requisite showing to raise a genuine dispute of fact. Had Ellison been the final decision maker, then on this record Plaintiffs may have been able to make a compelling showing of predominance. However, Ellison and Wesson were only two people in a process that incorporated multiple layers of decisions and alterations from the entire Commission, as well as the City Council.

Nor was Ellison's proposal adopted "as is." After his proposal was forwarded to the Commission, the boundaries underwent additional review and changes. First, the Commission released its proposed Council Districts (including Ellison's proposed boundaries for CD 10) for public comment and review. After considering the public feedback, the Commission amended the proposed boundaries. For CD 10, the Commission voted to place additional neighborhoods into the District, putting all of Little Bangladesh and around 70% of Koreatown[4] into CD 10. The Commission then placed these amended boundaries before the public again for additional comment and review. Afterwards, the Commission further amended its boundaries[5] and approved a "final" ver-

[4] The actual percentage of Koreatown that the Commission voted to place into CD 10 depends on the definition used, e.g., 70% if defined as the Wilshire Center-Koreatown Neighborhood Council, but 100% if defined by the City of Los Angeles' community renaming policy.

[5] Although not for CD 10.

sion. The Commission forwarded this "final" version to the City Council with additional recommendations that would further alter CD 10's boundaries from what Ellison originally proposed.[6]

Next, the City Council held its own public hearings regarding the proposed Council Districts and the Commission's recommendations. Members of the City Council then proposed their own adjustments to the Commission's proposal; three of these proposals would affect CD 10. The City's Chief Legislative Analyst reviewed these proposed changes along with the Commission's original proposal. Ultimately, the Legislative Analyst recommended adopting the Commission's proposal with 18 of the proposed adjustments, including the proposed changes to CD 10. Finally, on March 16, 2012, the City Council adopted the Legislative Analyst's recommended Council District boundaries.

Even viewed in the light most favorable to Plaintiffs, the record fails to show that these successive amendments were driven predominantly by racial considerations. Instead, the Commission's final report and recommendations show that, overall, the Commission sought to rebalance the populations in each Council District, while preserving communities and unifying as many Neighborhood Councils as possible in a single Council District. According to the Commission's report, 53 of 95 Neighborhood Councils had been divided across more than one Council District, and 13 of the 53 were divided across more than two Council Districts. Under the Commission's final

[6] These recommendations would have kept businesses in the communities of Little Bangladesh, Little Ethiopia, and Koreatown within CD 10.

proposed boundaries, the number of divided Neighborhood Councils was reduced from 53 to 29, and the number of Neighborhood Councils divided across more than two Council Districts was reduced from 13 to 3.

A memorandum to the Commission from its staff reflects these priorities. According to the memorandum, the amendments pertaining to Koreatown and its adjacent areas were adopted in response to public testimony expressing a desire to keep neighborhoods such as Little Ethiopia, Koreatown, and Little Bangladesh whole. In choosing to place Leimert Park and Baldwin Hills in CD 10, the Commission was responding to public testimony requesting that the entire Empowerment Congress West Area Neighborhood Development Council (of which Leimert Park and Baldwin Hills are a part) be placed in one Council District. Some of these neighborhoods had been divided across more than one Council District for at least forty years. Although Koreatown, as defined as the Wilshire Center-Koreatown Neighborhood Council, ultimately could not be brought into a single Council District, the Commission did succeed in reducing the split from three Council Districts to two.[7]

As for the amendments proposed by City Council members, the record lacks substantive evidence to show that they were proposed predominantly because of race, rather than in response to concerns raised during the public hearings. Plaintiffs allude to Council President Wesson's "huge sway" over the drawing

[7] Under a narrower definition of Koreatown as discussed above, *see supra* note 4, the Commission succeeded in uniting Koreatown into a single Council District.

of CD 10's boundaries, but aside from appointing Ellison to the Commission, they fail to point to any evidence showing how Wesson used his power and influence to pursue a race-based redistricting agenda. Wesson stated that his "priority" was to "make sure [they] have a black vote or two on that council," but he indicated in those same remarks that he was alone in prioritizing race in drawing the Council Districts. Wesson said that it was "[him] against twelve other members on the Council. [He] had no backup. [He] had no faction." These remarks tend to show that Wesson did not exert as much influence over the proceedings as he would have liked. Absent any additional evidence, Ellison's and Wesson's own subjective motivations are insufficient to make plaintiff's case that race predominated over the City Council's deliberations.

The circumstantial evidence also fails to create a genuine dispute on racial predominance. CD 10 is one of the most compact districts in Los Angeles, and its boundaries generally follow the boundaries of the Los Angeles Neighborhood Councils or other geographic markers. Moreover, CD 10 is not any more bizarrely shaped than it was with its previous boundaries.[8] *See* Appendix. This is a far cry from the cases in which the Supreme Court found the shape of voting districts to be indicative of racial considerations on their face. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 965–66 (1996) (describing a "compact, albeit irregularly shaped, core" with "narrow and bizarrely shaped tentacles . . . extending primarily to the north and west"); *Miller*, 515 U.S. at 908–09 (describing a "sparsely populated

[8] Expert analysis shows that 88.53% of CD 10's current boundaries either follow the Neighborhood Council boundaries or CD 10's original boundaries before redistricting.

rural core" connected by "narrow corridors" to "four discrete, widely spaced urban centers"); *Shaw I*, 509 U.S. at 635–36 (describing two districts, one with a "hook shape[]" with "finger-like extensions" and another that winds "in snakelike fashion" to encompass African American neighborhoods).

The demographic data and expert analyses fail to raise a genuine dispute on racial predominance as well. Not only is the increase in CD 10's African American CVAP from 36.8% to 40.5% relatively small, but looking at only the initial and final numbers also obscures what occurred in between. The Commission's proposal to the City Council originally increased African American CVAP to 43.1%. The City Council's final, approved version therefore reflects a *decrease* in CD 10's African American CVAP in comparison to the Commission's proposal. By placing most of Koreatown, which is predominantly Latino and Asian in population, in CD 10, the City Council diluted rather than concentrated African American voting power in that district. Moreover, the boundary segment analysis conducted by Plaintiffs' expert indicates that the current CD 10 does not appreciably concentrate African Americans inside CD 10 any more than the former CD 10 did.

Finally, the remaining procedural irregularities noted by Plaintiffs fail to suggest that race predominated over the drawing of Council Districts. Plaintiffs identify two Commissioners who were replaced after allegedly expressing reservations about the Commission's proposal. However, turnover on the Commission was not uncommon—six Commissioners were replaced between September 2011 and February 2012. The record does not clearly show that the two aforementioned Commissioners had concerns specifi-

cally about racial line drawing, as opposed to the overall proposal put forth by Ellison.

Plaintiffs also take issue with the Commission's use of ad hoc committees, but the Commission followed a similar procedure to draw boundaries in 2002. Admittedly, the record does not provide a clear explanation on exactly why the West/Southwest Committee chose to forward Ellison's proposed boundaries to the Commission rather than Kim's, but Kim was able to present her proposal before the full Commission anyway. The Commission rejected Kim's proposal based on concerns that placing Koreatown in a single Council District would create major disruptions to other neighborhoods and Council Districts throughout the City. And, contrary to Plaintiffs' assertions, the use of ad hoc committees did not exclude the public from the redistricting process. The record indicates that the public was consulted continually throughout the redistricting process.

In sum, we conclude that Plaintiffs failed to raise a triable issue of fact as to whether the City was motivated predominantly by race in drawing CD 10, and the district court properly granted summary judgment in favor of the City.[9]

B. Legislative Privilege Claim

Plaintiffs contend that the district court erred in barring the depositions of Ellison, Wesson, and other officials involved in the redistricting process. First, according to Plaintiffs, the legislative privilege does

[9] The plaintiffs in the *Haveriland* action appeal the district court's summary judgment order as to CDs 8 and 9. Because the *Haveriland* plaintiffs merely joined in "the same arguments and analyses that were made in the Lee Appellants' Opening Brief," their appeal fails for the same reason.

not apply at all to state and local officials. We disagree.

The legislative privilege has deep historical roots that the Supreme Court has traced back to "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). In *Tenney*, the Court reviewed a civil rights suit against members of a California state senate committee and a local city mayor, ultimately finding that such a suit could not proceed. *Id.* at 369. As the Court explained:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

Id. at 373 (citation omitted). The Court's analysis drew on "political principles already firmly established in the States," as reflected in numerous state constitutions that had historically embraced just such a privilege for their own legislators. *Id.* at 373–75. Because the defendants had not "exceeded the bounds of legislative power" and "were acting in a field where legislators traditionally have power to act," the Court held that they were immune from suit.[10] *Id.* at 378–79.

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[10] While the privilege, as applied to federal officials, is embedded directly in the Constitution, its extension to state and local officials is a matter of federal common law. *See United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980).

While *Tenney*'s holding rested upon a finding of immunity, its logic supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well. Like their federal counterparts, state and local officials undoubtedly share an interest in minimizing the "distraction" of "divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation." *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The rationale for the privilege—to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box—applies equally to federal, state, and local officials.[11] "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference . . . ." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). We therefore hold that state and local legislators may invoke legislative privilege.[12]

Plaintiffs next argue that, even assuming the privilege applies to state and local officials, it is only a qualified right that should be overcome in this case. Plaintiffs have failed to persuade us that the privilege was improperly applied here.

Although the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony, it has repeatedly stressed that "judicial inquiries into legis-

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[11] We recognize, however, that certain other concerns addressed by the legislative privilege are specific to federal legislators, such as the separation of powers principles that undergird the Speech and Debate Clause of the Constitution. *See Gillock*, 445 U.S. at 370, 372 n.10.

[12] The privilege also extends to legislative aides and assistants. *See Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011).

lative or executive motivation represent a substantial intrusion" such that calling a decision maker as a witness "is therefore 'usually to be avoided.'" *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)).

In *Village of Arlington Heights*, the plaintiff brought an Equal Protection challenge against local officials, alleging that their refusal to rezone a parcel of land for redevelopment was motivated by racial discrimination. *Id.* at 254. While the Court acknowledged that "[t]he legislative or administrative history may be highly relevant," it nonetheless found that even "[i]n extraordinary instances . . . such testimony frequently will be barred by privilege." *Id.* at 268 (citing *Tenney*, 341 U.S. 367). Applying this precedent, we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in "extraordinary circumstances." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984) (citing *Vill. of Arlington Heights*, 429 U.S. at 268).

We recognize that claims of racial gerrymandering involve serious allegations: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial . . . class."'" *Miller*, 515 U.S. at 911 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (O'Connor, J., dissenting)). Here, Defendants have been accused of violating that important constitutional right.

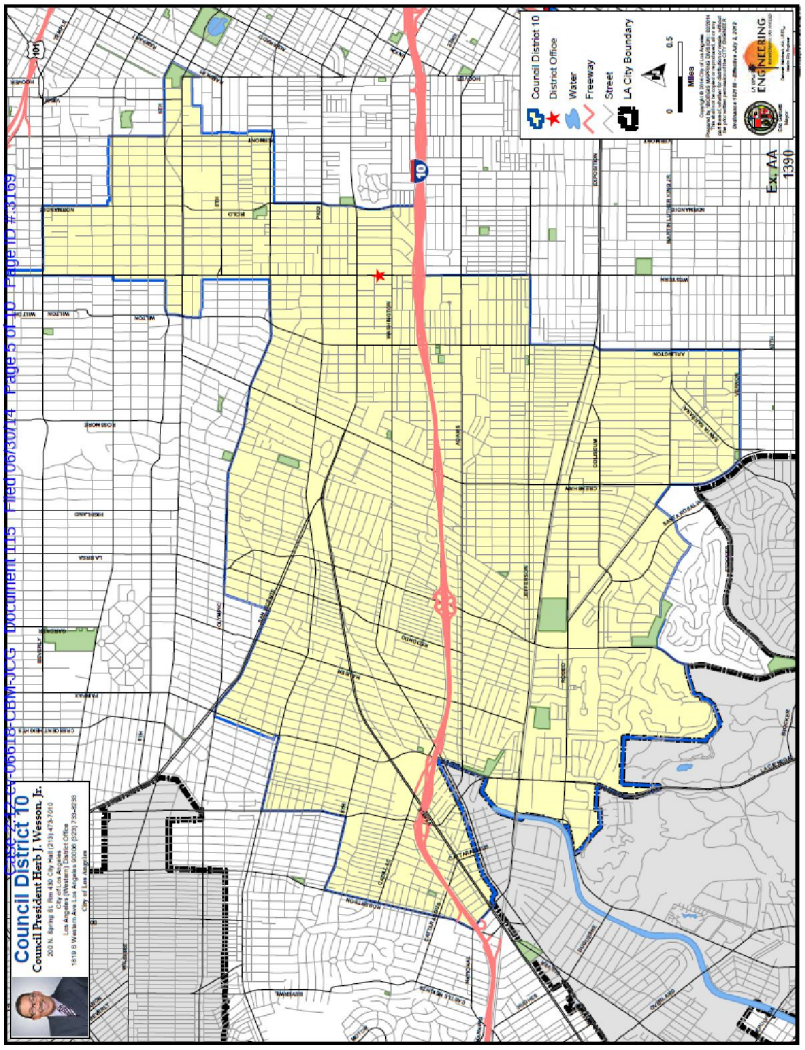
But the factual record in this case falls short of justifying the "substantial intrusion" into the legislative process. *See Vill. of Arlington Heights*, 429 U.S.

at 268 n.18. Although Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render the privilege "of little value." *See Tenney*, 341 U.S. at 377. *Village of Arlington Heights* itself also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of "extraordinary instances" that might justify an exception to the privilege. 429 U.S. at 268. Without sufficient grounds to distinguish those circumstances from the case at hand, we conclude that the district court properly denied discovery on the ground of legislative privilege.

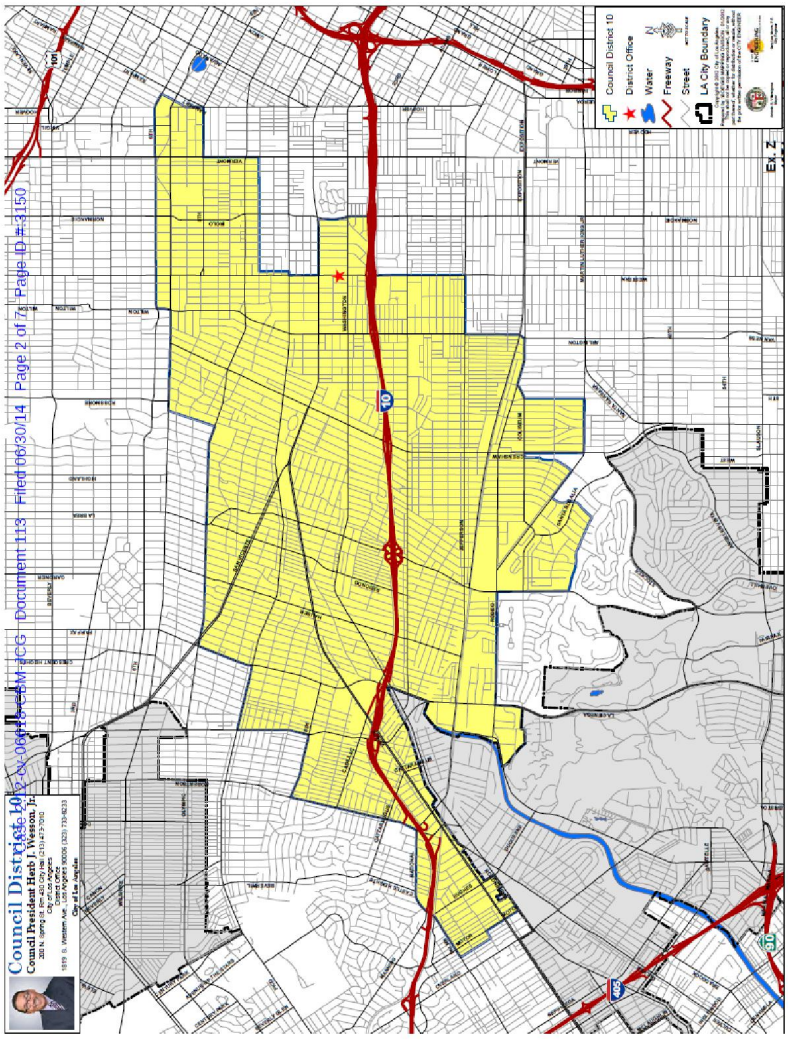
AFFIRMED.

APPENDIX

Current CD 10 Boundaries



Previous CD 10 Boundaries



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 12/28/2018]

No. 15-55478
D.C. No. 2:12-cv-06618-CBM-JCG
Central District of California, Los Angeles

PETER LEE, individual; et al.,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

No. 15-55502
D.C. No. 2:12-cv-06618-CBM-JCG
Central District of California, Los Angeles

STANLEY HAVERILAND, individual; et al.,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES, The,

Defendant-Appellee.

ORDER

Before: NGUYEN and WATFORD, Circuit Judges, and BENNETT,* District Judge.

The panel has voted to deny Appellants' petition for panel rehearing. Judges Nguyen and Watford have voted to deny the petition for rehearing en banc, and Judge Bennett has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing and petition for rehearing en banc are DENIED.

* The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed 02/24/2015]

Case No. CV 12-06618 CBM (RZx))
Related Case No. CV 13-01410

PETER LEE, *et al*.,

and

STANLEY HAVERILAND, *et al*.,

Plaintiffs,

vs.

CITY OF LOS ANGELES,

Defendant.

ORDER GRANTING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

Plaintiffs Peter Lee, Miri Park, Ho Sam Park, Yonah Hong, and Geney Kim (the "Lee Plaintiffs") are registered voters and residents of "Koreatown," in the city of Los Angeles, California. The Lee Plaintiffs reside within the boundaries of Los Angeles City Council District ("CD") 10. Plaintiffs Stanley Haveriland, Theordore Thomas, Horace Pennman, Julia Simmons, Heather Presha, and Sally Stein (the "Haveriland Plaintiffs") are registered voters in the

city of Los Angeles residing in Los Angeles City Council Districts ("CDs") 9, 8, and 10. Following the 2012 Los Angeles redistricting process, the Lee Plaintiffs and Haveriland Plaintiffs (collectively "Plaintiffs") filed separate lawsuits against the City of Los Angeles (the "City" or "Defendant"). The Lee Plaintiffs' complaint focused on the City's failure to put "Koreatown" in one City Council District, while the Haveriland Plaintiffs' complaint focused on the City's move of two predominantly African-American neighborhoods from CD 8 into CD 10 and the creation of a majority Latino district in CD 9. Both sets of Plaintiffs brought claims alleging that the City violated: (1) the Equal Protection Clause of the Fourteenth Amendment, (2) Section 204 of the City Charter, and (3) the Article II, Section 11(a) of the California Constitution. The Lee and Haveriland Plaintiffs' lawsuits were consolidated for all purposes on the parties' stipulation. (Docket No. 33.)

Following two years of litigation, the City now moves for summary judgment on all of Plaintiffs' claims. (Docket Nos. 84, 87.) The Plaintiffs move for summary adjudication as to their third cause of action (the California Constitutional law claim). (Docket No. 106.) The Court finds that there is no triable issue of material fact that the City violated the Fourteenth Amendment in the 2012 redistricting process. Having so found, the Court grants judgment in favor of the City as to Plaintiffs' first cause of action, Plaintiffs' only federal claim, and dismisses Plaintiffs' supplemental state law causes of action (claims two and three) without prejudice. The City of Los Angeles' Motions for Summary Judgment are GRANTED as to Plaintiffs' first cause of action. (Docket Nos. 84, 87.) Plaintiffs' Motion for Summary

Adjudication as to Plaintiffs' Third Cause of Action is DENIED. (Docket No. 106.)

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

II. FACTUAL OVERVIEW

Los Angeles redraws its political boundaries after each decennial census to account for population and demographic shifts over the previous ten years. Pursuant to a City Charter provision that was approved by the voters of Los Angeles in 1999, Los Angeles redistricting begins with the selection of a twenty-one-member volunteer Redistricting Commission. Los Angeles Charter & Admin. Code ("Charter") § 204. This Redistricting Commission is responsible for "seek[ing] public input throughout the redistricting process" and advising the City Council (the "Council") on the drawing of Council District lines. *Id*. The Commission is required to present a non-binding proposal for redistricting to the Council in March of redistricting years. Charter § 204(c). The City Council must adopt a redistricting ordinance by July 1 of redistricting years. *Id.*

Following the 2010 census, the second Los Angeles Redistricting Commission was appointed (the first was appointed after the 2000 census). The mayor appointed three members, the City Controller and the City Attorney each appointed one member, the City Council President appointed three members, and each City Councilperson appointed a member to the Redistricting Commission (the "Commission").

1. The Redistricting Commission

The Commission first met in September 2011 and began reviewing copies of the existing 2002 Council District map (the "Benchmark Map"). Due to growth and shifts in the City's population, the CDs in the Benchmark Map had developed a population deviation of over 19%, indicating that changes were necessary to comply with the electoral principle of equal legislative representation.[1] Also, several Neighborhood Councils were certified after 2002, and the 2012 Commission considered the boundaries of ninety-five Neighborhood Councils.[2] (*See* Defense RJN, Ex. A at 30-31.) The Benchmark Map divided fifty-three of these ninety-five Neighborhood Councils across more than one council district, and divided thirteen Neighborhood Councils (including the Wilshire-Center Koreatown Neighborhood Counsel or "WCKNC") among three CDs. (*See* Defense RJN, Ex. A at 30-31, 36-37.) The Benchmark Map also split several

[1] Under the principle of "one person, one vote," established by *Baker v. Carr*, 369 U.S. 186 (1962), total population deviation is the difference between the most under-populated district and the most over-populated district. The *Baker* Court held that each individual must be weighted equally (or as equally as possible) in legislative apportionment. *Id*. Under the City's guidelines, population deviation should not be greater than 10%, and the Commission adopted a resolution that the population deviation should not be greater than 5%. (Defense RJN, Ex. A at 30 and Exs. M, N.)

[2] Los Angeles Neighborhood Councils are groups of people who have certified a boundary within Los Angeles pursuant to Los Angeles Ordinance 176704, thereby establishing a unique recognized community within the City. Neighborhood Councils are smaller than Council Districts, but are recognized political subdivisions with defined geographic boundaries that share political interests. (*See* Los Angeles Charter and Admin. Code, Art. IX; *see also* Defense RJN Exs. C, D.)

communities defined by the City's official community renaming policy process, including Koreatown.[3] (*See id.* at 36.)

The Commission adopted a "Summary of Legal Criteria that Governs the Redistricting Process" and this document was posted and available at Commission meetings and provided an outline of the legal criteria the Commission was responsible for complying with. (*See* Defense RJN, Ex. K (Docket No. 102).) This Summary of Legal Criteria was often referred to by Commission members and staff, and provided guidance applicable to complying with the equal protection clause and the City Charter. (Decl. of Andrew J. Westall in Supp. of Def. City of Los Angeles' Mot. for Summ. J. ("Westall Decl.") ¶ 18.)

a. Public Input and Fact Gathering Hearings

From December 5, 2011 through January 10, 2012, the Commission held a series of public hearings throughout Los Angeles, with at least one hearing held in each of the fifteen City Council districts. (Decl. of Bobbi Jean Anderson in Opp'n to Def.'s Mot.

[3] Evidence demonstrates that several different boundaries defining Koreatown were reviewed by the Commission, including the Olympic Division LAPD boundaries and the Koreatown boundaries as identified by the L.A. Times L.A. Communities project. (Defense RJN, Ex. A, p. 36.) For this lawsuit, Plaintiffs use the term "Koreatown" to describe the Wilshire-Center Koreatown Neighborhood Council, the largest Neighborhood Council in the City of Los Angeles by more than 10,000 people with a population of 95,324 residents (52.4% Latino; 35.4% Asian). *Id*. Koreatown, as defined by the Los Angeles community renaming policy in 2010, has a population of 53,155 residents (46.9% Latino; 40.0% Asian). (*Id*.; *see also* City Council's January 31, 2006 Motion Approving City's Official Community Renaming Policy, Defense RJN, Ex. E.)

for Summ. J. ("Anderson Decl.") ¶ 7 (Docket No. 132-17); Decl. of Helen Kim in Opp'n to Def.'s Mot. for Summ. J. ("Helen Kim Decl.") ¶ 9 (Docket No. 136).) The Commission created a website and posted public notices about how to get involved with the redistricting process and information about the ongoing process. These notices were posted in several languages throughout the city. The Commission's website made meeting agendas, podcasts of all public hearings, and maps proposed by the public and interest groups publicly available. At each of the public hearings, the public was provided an opportunity to comment and express their concerns and desires for Los Angeles redistricting. In addition, the City broadcasted Commission meetings live on local television, streamed them online, and later posted the recorded video of meetings on the Commission's website. More than 1,800 individuals attended the public hearings and the Commission received more than 500 public or written comments. (Westall Decl. ¶ 24.)

b. Drafting the Initial Redistricting Map

On January 11, 2012, the Commission began drafting an initial district map. As was done in the 2002 round of redistricting, the Commission divided into three "ad hoc" groups for the initial line-drawing process. The ad hoc groups were responsible for drawing the boundary lines for: (1) the San Fernando Valley (Council Districts 2, 3, 6, 7, and 12); (2) the West and Southwest ("West Group") (Council Districts 4, 5, 8, 10, and 11) and (3) the South and East ("East Group") (Council Districts 1, 9, 13, 14, and 15). Each ad hoc group consisted of seven Commissioners. The Technical Director (the individual in charge of using the line-drawing software) was the only non-Commission member present in the ad hoc group

meetings. To comply with the California Brown Act, the Commissioners were instructed not to discuss ad hoc group discussions with Commissioners in other ad hoc groups.[4]

Prior to the ad hoc groups meeting on their own, on January 18, 2012, the full Commission convened in its regular session and considered twenty-one proposed Map Presentations by individuals and groups. (Westall Decl. ¶¶ 26-27; Defense RJN, Ex. A at 37-44.) Maps proposed by the Korean American

Coalition, the Asian Pacific American Legal Center, the Historic South Central NAACP, and other groups and individuals were all considered by the Commission. (*See* Westall Decl. ¶ 26, Defense RJN, Ex. A at 37; Defense RJN Ex. H at 1055.) These plans were posted on the Commission's website and kept in the Commission's office in City Hall. (*Id*.)

The West Group (the ad hoc group that was responsible for providing the initial proposal for the districts challenged in this lawsuit) held its first line-drawing meeting on January 19, 2012. (Helen Kim Decl. ¶ 30.) Members of the West group included Christopher Ellison, Helen Kim, Bobbie Jean Anderson, Julie Downey, Rob Kadota, Grover McKean, and David Roberti.[5] The West/South Ad Hoc

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[4] The Brown Act is contained in section 54950 et seq. of the California Government Code and prohibits any non-public gathering of a quorum of a legislative body to discuss or transact business under the body's jurisdiction. The ad hoc groups, because they represented less than a quorum and could not make final decisions, were permitted to meet without a public meeting under the Brown Act.

[5] Commissioners Kim, Anderson, and Roberti offered declarations in support of Plaintiffs' Opposition to Defendants' summary judgment motions. (*See* Docket Nos. 132-17, 136, 142-1.)

Committee was responsible for drawing the boundary lines of five City Council districts: CDs 4, 5, 8, 10, and 11.

The West Group was tasked with incorporating additional population into CD 10, because it had become underpopulated (the district was about 4.9% below the ideal district population size). (Expert Report of Kareem U. Crayton ("Crayton Rept.") at 6 (Docket No. 132-6).) In this initial West Group meeting, Commissioner Ellison, who was appointed by the Councilmember for CD 10 (Council President Wesson), suggested changing the Benchmark Map by incorporating Leimert Park and the "Dons" portion of Baldwin Hills into CD 10. (Helen Kim Decl. ¶ 39.) Commissioner Ellison also suggested excluding the Palms neighborhood from CD 10, and adding a portion of the WCKNC into CD 10. (Helen Kim Decl. ¶ 40.) Some members of the West Group (including key declarants in this lawsuit) disagreed with the proposed boundaries of CD 10 because the change resulted in a shift of the African-American population from CD 8 (Los Angeles' only majority African-American district) to CD 10 (a district with a sizeable African-Americans population), and because these changes incorporated half, but not all, of the WCKNC in CD 10. (*See, e.g.*, Helen Kim Decl.) Some of the West Group Commissioners believed that Commissioner Ellison intended to increase the level of African-American registered voters in CD 10 to over 50% and did not support Commissioner Ellison's suggested changes to CD 10. (*Id.*; *see also* Roberti Decl. ¶ 16.) Over the objection of a minority of the West Group members, changes suggested by Commissioner Ellison were included in the West Group map forwarded to the full Commission to be considered at the first public hearing.

c. Public Hearings and First Draft of Redistricting Map

On January 25, 2012, the Chair of the Commission, Andrew Westall, presented the "Initial Commission Map," which combined the maps generated by each of the ad hoc committees, at a public hearing. Many of the Commissioners were present, including Commissioners Kim, Ellison, Anderson, Kodota, and Roberti of the West Group. During this hearing, Commissioner Kim (who had opposed Commissioner Ellison's changes to CD 10) presented a proposed map that would have placed the entirety of the WCKNC in CD 13. (Helen Kim Decl. ¶ 60.) Commissioner Kim's proposed map (similar to the West Group's map) incorporated Liemert Park and Baldwin Hills into CD 10 and increased the African-American citizen voting age population ("CVAP") in that district to 41.2% from the Benchmark Map's 36.8%.[6] (*See* Helen Kim Decl., Ex. J at 10.) Commissioner Kim moved that her proposed alternative map be adopted by the Commission. (*Id*.) The Commission rejected Commissioner Kim's map by a vote of 12-3. (*See id.*; *see also* Defense RJN Ex. H, at 1057.)

The Commission took public comments, debated the Initial Commission Map for over three hours, and eventually approved the release of the first draft for additional public comment and review ("First Draft Map"). (Defense RJN, Ex. H at 1057-58; Westall Decl. ¶ 32.)

In the following weeks, the Commission proceeded to hold public hearings throughout the City to receive further public input on the First Draft Map. (*See*

[6] Commissioner Kim's proposed map would have increased the African-American population in CD 10 to a CVAP of 40.5%.

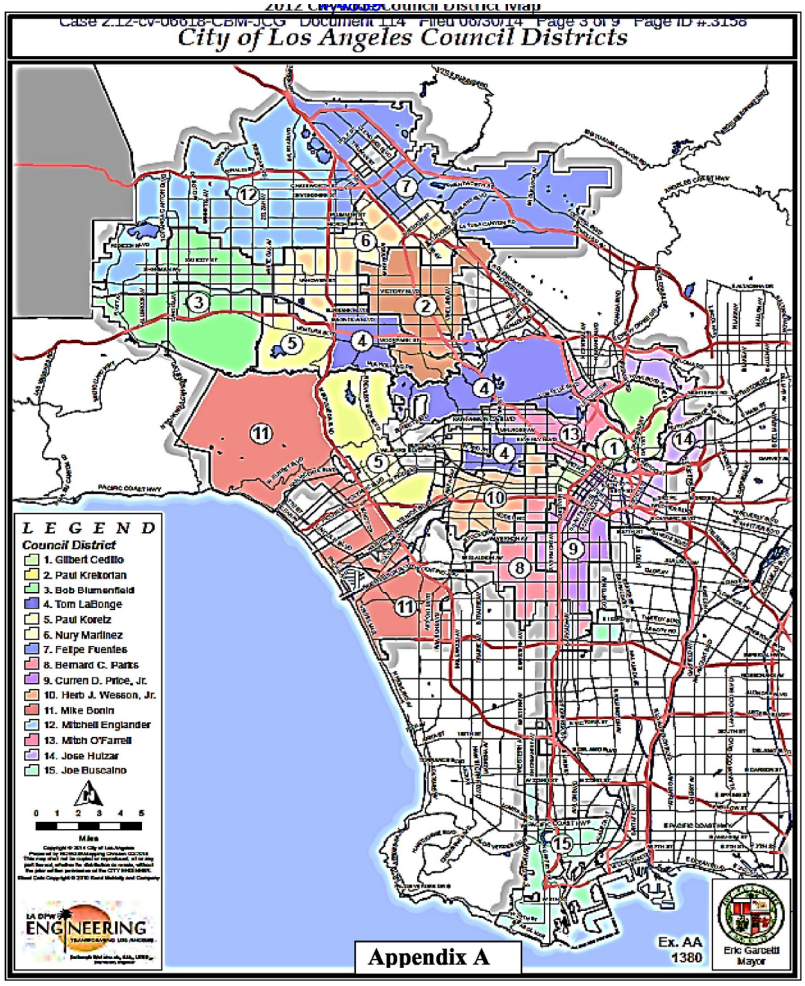
Westall Decl. ¶ 33.) Commissioners and an average of 400 members of the public attended each meeting. (*Id*.)

d. Second Draft of Redistricting Map

After the second round of public hearings, the Commission revised the First Draft Map at an open public meeting on February 15, 2012. (Defense RJN, Ex. S at 1204 (Docket No. 103.) The Commission discussed and voted on more than eighty adjustments to the First Draft Map that were proposed by the public, and approved forty-two of the proposed adjustments. (Defense RJN, Ex. H at 1060-70, Ex. M at 1112 (Docket No. 103.)) Many of the proposed amendments revolved around keeping Neighborhood Councils and other communities undivided within one Council District. One of the approved adjustments was to keep the "Empowerment Congress West Area Neighborhood Development Council, which includes all of Leimert Park and Baldwin Hills, whole in CD 10." (Defense RJN, Ex. H. at 1062, Ex. M (Docket No. 102 at 1113.)) The Commission also approved a motion that the Council would "keep at least two-thirds (64) of the Neighborhood Councils whole in a Council District . . ." (Defense RJN, Ex. H at 1061.) The Commission denied a motion to "move the southern portion of Wilshire Center Koreatown Neighborhood Council into CD 13 in order to unify the Wilshire Center Koreatown Neighborhood Council whole in one Council District" by a vote of 17-4. (*Id.* at 1066.) This public hearing lasted eight hours. (Westall Decl. ¶ 35.) Following the hearing, the Commission completed and released the "Second Draft Map" for the public to review and propose additional changes. (*Id.* ¶ 36.)

e. Final Commission Map

A final public Redistricting Commission hearing was held on February 22, 2012. At this hearing, the Commission considered fourteen additional amendments proposed by the public and approved five of these amendments. (Defense RJN at 24 & Ex. T. (Docket No. 104 at 1218); Ex. H, p. 1071 (Docket No. 102).) Thereafter, the Commission approved a final recommended plan (the "Final Commission Map") by a vote of 16-5. (RJN at 24 & Ex. T; SUF, ¶ 21; Westall Decl., ¶ 36; Defense RJN Ex. H, p. 1073 (Docket No. 102).) (attached hereto as Appendix A).



The City Attorney's Office reviewed the Final Commission Map and concluded that it satisfied all relevant legal criteria. (Defense RJN, Ex. A, App. C; Westall Decl. ¶ 44.) The Commission then drafted a comprehensive report that set forth the Commission's activities, considerations, and the public's input in creating Final Commission Map. (*See* Defense RJN at 36-44.) The report was 951 pages, with appendices. (Defense RJN at 15-965.) The report documented the

"Major Issues" the Commission considered, such as redistricting the boundaries of Koreatown/ WCKNC, South Los Angeles, Downtown Los Angeles, Westchester, and the Foothill communities. (*Id*. at 32-33 (Docket No. 96); Defense RJN Ex. A, p. 36-44.)

2. Los Angeles City Council & Finalizing the 2012 CD Map

The Chair and Co-Chairs of the Commission presented the Final Commission Map and report to the City Council's Rules, Elections and Intergovernmental Relations Committee (the "Rules Committee") at a public meeting on March 2, 2012. (Wickham Decl. ¶ 7; Defense RJN, Ex. U.) The Rules Committee subsequently held public hearings on March 5, 6, and 7, at three separate locations throughout the City. (*Id*.) The Rules Committee permitted any City Councilmember to propose amendments to the Final Commission Map. (Wickham Decl. ¶ 8.) Councilmembers submitted twenty-five proposed amendments. (*Id.*) The Chief Legislative Analyst's Office ("CLA") reviewed those proposals and issued a lengthy public report discussing each of the proposed amendments and recommending that eighteen of those amendments be adopted to modify the Final Commission Map. These changes to the Final Commission Map were approved by the Council, and the changes were incorporated into a Final Map. (*Id.*; Defense RJN, Exs. V & W.)

On March 16, 2012, at a public meeting, the City Council approved, by a vote of 13-2, the Final Map, the 2012 Redistricting Ordinance. (Wickham Decl. ¶ 12; *see also* Defense RJN, Ex. X.) The Mayor signed the 2012 Redistricting Ordinance and it became effective upon publication.

3. The Present Controversy

On July 31, 2012, the Lee Plaintiffs filed a lawsuit against the City challenging the City's 2012 redistricting results and process. The Plaintiffs alleged that the City violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by racially gerrymandering CD 9 and CD 10 (referred to herein as Plaintiffs' "*Shaw* claim"). The Plaintiffs also alleged that the City violated Section 204 of the Los Angeles City Charter by failing to keep communities and neighborhoods (specifically the WCKNC) "intact" to "the extent feasible." Finally, Plaintiffs' third cause of action alleged that the City violated Article II, Section 11(a) of the California Constitution by denying Plaintiffs the right to a referendum on the 2012 Redistricting Ordinance.

III. STATEMENT OF LAW

On a motion for summary judgment, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Simo v. Union of Needletrades, Indus. & Textile Empls.*, 322 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56. Summary judgment against a party is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of establishing the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate an absence of a genuine issue of material fact. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986).

IV. ANALYSIS

1. Plaintiffs' First Cause of Action: Equal Protection *Shaw* Claim

Equal Protection jurisprudence instructs that the government may not classify citizens by race unless such a classification can meet the strict scrutiny of the court. *Fisher v. U. of Texas at Austin*, 758 F.3d 633, 642 (5th Cir. 2014). The Supreme Court has found that, in "exceptional" circumstances, facially race-neutral redistricting schemes may be viewed as racial classifications (or unlawful racial gerrymanders) subject to strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) ("*Shaw*" or "*Shaw I*"). To succeed on an Equal Protection claim and prove a racial classification under *Shaw*, plaintiffs must meet "the demanding burden of proof to show that a facially neutral law is unexplainable on grounds other than race." *Easley v. Cromartie*, 532 U.S. 234, 235 (2001) ("*Cromartie II*"). A *Shaw* violation may exist when "race is the predominant consideration in drawing the district lines such that the legislature subordinates traditional race-neutral principles to racial considerations." *Shaw v. Hunt*, 517 U.S. 899, 907 *("Shaw II*") (internal quotations omitted). Courts use restraint in finding that facially-neutral redistricting ordinances objectionable "[b]ecause the underlying districting decision falls within a legislature's sphere of competence." *Cromartie II*, 532 U.S. at 235. "[C]ourts must exercise extraordinary caution

in adjudicating [*Shaw*] claims," *Miller v. Johnson,* 515 U.S. 900, 916 (1995), and a "presumption of good faith . . . must be accorded [to] legislative enactments." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) ("*Cromartie I*").

As an initial matter, only individuals who live in a district challenged on equal protection grounds have standing to bring a *Shaw* claim. *See United States v. Hays*, 515 U.S. 737, 739 (1995) (holding that plaintiffs lack standing where they "do not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification.") Accordingly, the Lee Plaintiffs and two of the Haveriland Plaintiffs (Presha and Stein) have standing to challenge CD 10. Only Plantiff Pennman has standing to challenge CD 9. Three of the Haveriland Plaintiffs, Haveriland, Simmons, and Thomas, residents of CD 8, do not have standing to bring a *Shaw* claim challenging CD 9 or CD 10. *Id*.

Plaintiffs assert that both CD 10 and CD 9 (as adopted by the 2012 Redistricting Ordinance) violate the Equal Protection Clause as unconstitutional racial gerrymanders.[7] Defendants move for summary

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[7] The Haveriland Plaintiffs also argue, "race is being used as a primary factor in redrawing district lines which is a violation of the Voting Rights Act." (Haveriland Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment at 10:17-18.) The use of race as a "primary factor" in drawing district lines is not a violation of the Voting Rights Act. Further, Plaintiffs do not bring a Voting Rights claim in this lawsuit. Conversely, Section 2 of the Voting Rights Act is a civil rights statute that requires consideration of race (or other communities of interest) in redistricting, and may require, in some instances, that race be a primary factor in redistricting. *See, e.g.*

judgment and argue that the 2012 Redistricting Ordinance is a race-neutral statute and that Plaintiffs cannot provide evidence that CD 9 or CD 10 were drawn based on race. To defeat summary judgment on their *Shaw* claim, Plaintiffs must "raise a genuine issue of material fact regarding whether the legislature abandoned or subordinated traditional redistricting principals to racial considerations." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1219, 1458 (C.D. Cal. 2002) (Reinhardt, J., Snyder, J., and Morrow, J.) *aff'd,* 537 U.S. 1100 (2003) ("*Cano II*"); *see also Shaw II,* 517 U.S. at 907. Plaintiffs must provide evidence that the "facially neutral law is unexplainable on grounds other than race." *Shaw I*, 509 U. S. at 644. Considering all of Plaintiffs' evidence in the light most favorable to their case, the Court finds that there is no evidence that CD 9 or CD 10 racially classify the Plaintiffs. Accordingly, there is no evidence that CD 9 and CD 10 violate the Equal Protection clause. *See Shaw I*, 509 U.S. 630, 643 (holding that strict scrutiny only applies "to those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'") (internal citation omitted)).

a. The Shape of the Challenged City Council Districts

Although bizarre shape is not required to establish a *Shaw* claim, the irregular shape of a district significantly influences the outcome of *Shaw* cases. *Shaw I*, 509 U.S. at 647 ("[R]eapportionment is one

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League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 402 (2006) ("Under [Voting Rights Act] § 2, by contrast [to the Equal Protection Clause], the injury is vote dilution, so the compactness inquiry considers 'the compactness of the minority population, not . . . the compactness of the contested district.'")

area in which appearances do matter"). Indeed, the "bizarre" shape of North Carolina's twelfth congressional district, which was drawn with the intent of creating a majority African-American district to meet the preclearance requirements of Section 5 of the Voting Rights Act,[8] first established that an equal protection claim could be made in the redistricting context. *Id.* Furthermore, extremely unusually-shaped districts-likened to spider webs and tentacles by the Supreme Court—were central to the analysis in the only three Supreme Court cases in which *Shaw* claims were successful. *See Shaw I,* 517 U.S. 899, *Miler v. Johnson*, 515 U.S. 900 (1995), and *Bush v. Vera*, 517 U.S. 952 (1996). North Carolina's twelfth congressional district, was a "snakelike" district 160 miles long but often no wider than the I-85 corridor, which "gobble[d] in . . . enclaves of black neighborhoods." *Shaw I*, 509 U.S. at 635. Similarly, Georgia's eleventh congressional district, the district at issue in *Miller v. Johnson*, was a "monstrosity" containing "narrow land bridges" that traveled hundreds of miles through rural areas to connect urban "appendages containing nearly 80% of the district's total black population." *Miller*, 515 U.S. at 909, 917 (citations omitted). Further, the three Texas congressional districts at issue in *Bush v. Vera* contained "bizarrely shaped tentacles" that reached for and connected pockets of minority populations to create minority-majority districts. *Bush*, 517 U.S. at 965, 973. There is no precedent in which a court has found a *Shaw* violation in the absence of the court finding that the challenged district was irregular in shape.

[8] Section 5 of the Voting Rights Act is not at issue in this case.

Conversely, the map established by the 2012 Redistricting Ordinance demonstrates that CD 10 is one of the most compact districts in Los Angeles. (*See* Appendix A.) CD 10 is contiguous and its contours generally follow the boundaries of Los Angeles Neighborhood Councils and geographic markers. Plaintiffs argue that CD 10 is unusual in shape based on a media commentator's reference to the district's appearance as that of a "fat turkey." (Defense RJN, Exs. AA at 1390; Plaintiffs' RJN at Exs. D-G.) A media commentator did so comment; however a commentator's rhetorical flourish is not evidence. Furthermore, a "fat turkey" is a relatively compact and contiguous shape.

The 2012 Redistricting Ordinance similarly demonstrates that CD 9 is compact and contiguous. (*See* Appendix A.) The shape of the challenged districts is "highly probative" in showing that CDs 9 and 10 were *not* drawn primarily on the basis of race. *Cano*, 211 F. Supp. 2d at 1222, n.15.

b. The Demographics of the Challenged City Council Districts

Shaw claims seek to avoid political districts that would "balkanize us into competing racial factions" or generate "political apartheid" by creating districts that represented specific racial groups or racial coalitions to the detriment of others. *Shaw I*, 509 U.S. at 657, 647. The Supreme Court has never applied *Shaw* principles to invalidate a district in which the allegedly favored minority population does not represent a controlling electoral majority. The Plaintiffs in this case, therefore, ask this Court to do something that has never been done by the Supreme Court. *Shaw* jurisprudence prohibits municipalities from intentionally and artificially creating districts

defined by a race (such as "Black districts" or "White districts") because the Supreme Court finds such districts to be unfair racial classifications of the citizens within those districts. Here, Plaintiffs challenge two racially diverse districts. In CD 10, which Plaintiffs claim favors African-Americans, no one racial group has a controlling majority population. In CD 9, which the Haveriland Plaintiffs challenge as favoring Latinos, the Latino population is only slightly higher than 50%. The demographics of CD 9 and CD 10 do not support Plaintiffs' claim that the City caused Plaintiffs any representational harm or engaged in the "unlawful segregation of races of citizens into different voting districts," which are the harms *Shaw* claims aim to address. *Id*. at 645 (internal quotation omitted).

The slight demographic changes from the Benchmark Map to the 2012 Redistricting Ordinance are evidence weighing against finding that CD 9 or CD 10 are unlawful racial gerrymanders. African-Americans comprise only 25.9% of the population in CD 10. (Wickham Decl., Ex. G at 27.) The City's 2012 Redistricting Ordinance increased CD 10's African-American population by only 1.7% from the demographics under the 2002 Council District map. (*Id.*) CD 10's voting population ("Citizen Voting-Age Population" or "CVAP") was 36.8% African-American in 2002, and under the 2012 Redistricting Ordinance this percentage increased to 40.5%. (*Id.*) The CVAP change in African-American population in CD 10 was only 3.7%. (*Id*.) Unlike every other district challenged in binding *Shaw* precedent, CD 10 is a multiracial district where no one racial group constitutes a majority.

Similarly, the demographics of CD 9 do not provide evidence of improper racial gerrymandering under *Shaw*. Under the 2012 Redistricting Ordinance, CD 9's CVAP is 52.2%, Latino, 8.5% White, 33.0% African-American, and 4.8% Asian. (Defense Ex. C (Docket No. 85-3).) None of these populations changed more than 4% from the 2002 Benchmark Map. Plaintiffs argue that the City purposefully created a majority-Latino district. However, even if the City did purposefully create a majority-Latino district, this would not constitute an equal protection violation. Law encourages purposeful creation of majority-minority districts where minority populations are geographically compact. In some instances, cities are required to deliberately draw majority-minority districts by Section 2 of the Voting Rights Act of 1965.[9] *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 403 (2006); *Old Pers. v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000).

"There is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district." *Cano*, 211 F. Supp. 2d at 1218. The uncontested evidence tends to support that neither CD 9 nor CD 10 served to unlawfully classify the Plaintiffs by a particular race.

c. Evidence of Race Consciousness

(i) Plaintiffs' Purported "Direct Evidence" of Intent

Plaintiffs' core argument as to why the City's motion for summary judgment should be denied is

[9] The Plaintiffs brought no Voting Rights claims against the City in this case.

that there is "direct evidence" of racial intent. This evidence is twofold. First, the evidence demonstrates that Commissioner Christopher Ellison (one of the twenty-one Commissioners, none of whom had voting power to pass the 2012 Redistricting Ordinance) voiced the goal of increasing the African-American population in CD 10. (Declaration of Leo James Terrell ("Terrell Decl.") Ex. 5 (Docket No. 126-2); Helen Kim Decl., Ex. F.). Second, the evidence demonstrates that the City Council President, Herb Wesson, Jr. (one of thirteen Councilmembers who voted to approve the 2012 Redistricting Ordinance), praised the increased African-American population in CD 10 after the redistricting ordinance was passed. (Terrell Decl., Ex. 4.) Plaintiffs' also argue there is there is "direct evidence" that a Commissioner opposed an amendment to the western boundary of CD 9 because it would dilute the Latino population. Plaintiffs' evidence regarding individual legislators' motivations is insufficient to create a factual dispute sufficient to overcome summary judgment on a *Shaw* claim. *See Cano*, 211 F. Supp. 2d at 1228 ("[T]he mere use of race as *a* reason for a redistricting decision cannot lead to a *Shaw* violation [on summary judgment] . . ."); s*ee also Cromartie II*, 532 U.S. at 253.

The Supreme Court's analysis in *Cromartie II* is instructive as to why Plaintiffs' argument that evidence of racial motivation alone is sufficient to prove a *Shaw* violation fails. In *Cromartie II*, the plaintiffs produced, and the district court relied on, two pieces of "direct" evidence of discriminatory intent to prove that North Carolina's redistricting process was predominantly motivated by race and thus a *Shaw* violation. 532 U.S. at 253. First, plaintiffs relied on evidence of a statement by a state senator and leader of the redistricting effort, testifying publicly before a

legislative committee, in which he stated that the redistricting plan "satisfies a need for racial and partisan balance." *Id.* The district court pointed to the state senator's reference of "racial balance" as an admission that the legislature had drawn the districts using race as a controlling factor. *Id.* The Supreme Court, however, found that "even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a predominant role comparatively speaking." *Id.* at 253-54 (citing *Bush v. Vera*, 517 U.S. at 952, 958 (O'Connor, J., principal opinion)). The plaintiffs in *Cromartie II* also offered evidence of an email sent from a legislative staff member to two state senators discussing moving portions of the African-American community into and out of certain districts. *Id.* at 254. The district court found that this evidence proved racial intent and a *Shaw* violation. *Id*. The Supreme Court, however, reversed the district court and entered judgment in favor of the legislature, concluding that, as a *matter of law,* the plaintiffs' "evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries." *Id.* at 257.

The evidence offered by Plaintiff demonstrates only that some individuals involved in the redistricting process (namely Commissioner Ellison and Council President Wesson) may have been motivated by racial considerations. The evidence also supports that some of the changes to CD 10 for which Commissioner Ellison advocated became a part of the 2012 Redistricting Ordinance. This evidence does not permit a fact finder to draw an inference "that racial considerations predominated in the City's drawing of

[d]istrict . . . boundaries." *Id.* at 257. Plaintiffs provide no evidence that the advisory Commission was motivated to create a "Black district" in CD 10 or a "Latino district" in CD 9. The evidence conversely demonstrates that Commissioners did not agree on the drawing of the district lines. Furthermore, there is no evidence that the City Council, the legislative body that passed the 2012 Redistricting Ordinance, was motivated by race in drawing the boundaries of CD 9 and CD 10. Plaintiffs' evidence that one Commissioner expressed racial concerns and one Councilmember praised the Redistrict Ordinance after it was passed cannot be imputed to prove the City's motivation.

Furthermore, evidence that race was "*a* motivation for the drawing of a majority-minority district" is not evidence that supports a *Shaw* claim. *Bush v. Vera,* 517 U.S. at 959. Even if Plaintiffs were able to provide evidence of the City's racial motivation, which the Court finds they fail to do, such evidence would be insufficient to prove an equal protection violation. A *Shaw* claim has not been proven as a matter of law even where a legislative body uses "facially race-driven" criteria in creating an electoral district; there must be evidence that race is the *predominant* or *only* motivating factor. *See Cromartie I*, 526 U.S. at 545, 552. Considering all of Plaintiffs' "direct evidence" in the light most favorable to Plaintiffs does not create a material dispute that the City was predominately motivated by race in redistricting CD 9 or CD 10.

(ii) Plaintiffs' Purported "Circumstantial Evidence" of Intent

Plaintiffs argue that they provide "circumstantial evidence" which may prove that race was the pre-

dominant motivating factor in the City's changes to CD 10.[10] This evidence includes (1) A boundary segment analysis generated by Professor Kareem Crayton; (2) a statistical analysis comparing the African-American and white population changes made to CD 10; and (3) "procedural irregularities." Considering Plaintiffs' "circumstantial evidence," and viewing it in the light most favorable to the Plaintiffs, does not create a material issue of fact that the City was predominantly motivated by race in establishing CD 10. Plaintiffs' evidence demonstrates that there were demographic changes to CD 10 resulting in greater African-American population and a reduced white population in CD 10. Plaintiffs' evidence also demonstrates that some Commissioners felt that the Redistricting Commission procedures were unfair. This evidence does not support Plaintiffs' *Shaw* claim.

The City does not dispute that race was a factor considered in its drawing of CD 9 and CD 10. In fact, the law requires that the City consider communities of interest (racial or otherwise) in redistricting. *See League of United Latin Am. Citizens*, 548 U.S. at 402. Race consciousness "does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries." *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1995); *see also Cano*, 211 F. Supp. 2d at 1220; *see also Alabama Legislative Black Caucus v. Alabama*, (*ALBC*) 989 F. Supp. 2d 1277, 1294 (M.D. Ala. 2013), *cert. granted* (finding that "[a]lthough race was a factor in the creation of the districts, we find that the

[10] Plaintiffs do not offer any additional evidence pertaining to CD 9.

Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations"). The Court finds that there is no evidence that the City was predominantly motivated by race. Furthermore, the consideration of the City's motivation is only half of the relevant *Shaw* inquiry.

d. No Subordination of Traditional Redistricting Criteria

Neglecting or subordinating traditional districting criteria is a necessary element of a *Shaw* claim. *Bush*, 517 U.S. at 962. With its motions for summary judgment, the City provides undisputed evidence that every change to CD 10 and CD 9 worked in favor of fulfilling a traditional non-racial redistricting purpose. Plaintiffs fail to provide any evidence that the City subordinated traditional redistricting criteria to racial considerations in drawing the district lines for CD 9 or CD 10.

The City provides evidence that every change to the Benchmark Map of CD 10 satisfied a traditional, non-racial, redistricting purpose. Comparing the Benchmark Map boundaries with the 2012 Redistricting Ordinance, the evidence demonstrates that there were twelve changes made to CD 10 after the 2010 census. (Westall Decl., Ex. B at 55.) Defendants' Exhibits C and D to their Motion for Summary Judgment as to the Lee Plaintiffs provide undisputed evidence that each change made to CD 10 furthered some traditional non-racial redistricting criteria (most commonly, keeping neighborhood councils intact). (Docket No. 88-3, 88-4.) The evidence provided by Defendants is uncontested and tends to prove that the changes made to CD 10 promoted traditional redistricting criteria by unifying neighborhoods councils. The City's removal of the Palms neighborhood

from CD 10 resulted in a reduction in the white population of CD 10; however, this change also unified the Palms Neighborhood Council into one district, ameliorating the Palms Neighborhood Council's three-district split under the 2002 Benchmark Map. Similarly, the incorporation of Leimert Park and Baldwin Hills into CD 10 helped to unify a neighborhood council (the Empowerment Congress West Area Neighborhood Council). The Final Commission Map, which Plaintiffs argue was motivated by race based on Commissioner Ellison's comments, unified the neighborhood of Baldwin Hills in CD 10. The evidence shows that the City Council, however, removed the heavily African-American "Dons" section of the Baldwin Hills neighborhood from CD 10 and placed it into CD 8 because the incumbent Councilmember for CD 8 resided in the "Dons" neighborhood.

The biggest change made to CD 10 from the Benchmark Map, and the change that appears of most concern to the Plaintiffs, was the City's addition of a large portion of the WCKNC into CD 10. The Plaintiffs argue that the WCKNC should not have been divided amongst Council Districts. Evidence demonstrates that, despite the public's strong advocacy asking the City to keep WCKNC whole in one Los Angeles city council district (CD 13), the City did not do so. While the City failed to meet this Neighborhood Council's demands, the changes made to CD 10 advanced the goal of unifying the WCKNC and other Neighborhood Councils. Incorporating a large portion of WCKNC into CD 10 resulted in the WCKNC being divided only between two council districts, whereas under the Benchmark Map this Neighborhood Council was divided amongst three

council districts.[11] Furthermore, the 2012 Redistricting Ordinance consolidated two-thirds of the WCKNC into one district (CD 10) and placed the City's officially named "Koreatown," undivided, in one council district. The evidence presented to this Court, therefore, demonstrates that the City's changes to CD 10 were consistent with traditional redistricting principles.

Defendants also provide evidence proving that the four changes made to CD 9 served non-racial traditional redistricting purposes. (*See* Defendants' Motion for Summary Judgment as to Haveriland Plaintiffs' Claims, Ex. A.) Plaintiffs do not dispute Defendants' evidence. While the Plaintiffs argue that the City moved Downtown Los Angeles from CD 9 into CD 14 artificially, there is no evidence to support the argument that the move was artificial. The evidence demonstrates that the City's changes from the Benchmark Map to the 2012 Redistricting Ordinance consolidated Downtown Los Angeles into CD 14 and unified the Downtown Neighborhood

[11] It is notable that this change to CD 10 reduced the percentage of the African-American population in CD 10, because the WCKNC incorporated a population with a relatively low percentage of African-Americans. (Cain Decl. ¶ 43; *see also* Wickham Decl., Ex. C.) The WCKNC population consisted of 5.5% African-American population, and 10.4% African-American CVAP. (*Id.*) The evidence, therefore, creates an inference that tends to disprove Plaintiffs' argument that the City was predominantly motivated by increasing the African-American population in CD 10. Furthermore, the district map proposed by Commissioner Kim at the Commission's January 15, 2015 meeting, which sought to place the WCKNC entirely in CD 13, would have resulted in a higher African-American population in CD 10 (41.2%) than resulted from the 2012 Redistricting Ordinance (40.5%). (*See* Cain Decl. ¶ 43; *Compare* Helen Kim Decl., Ex. J at 464-65 *with* Defense Ex. F.)

Council. (Westall Decl. ¶¶ 50-51 & Ex. B; Cain Decl., ¶ 36 & Ex. G.) Plaintiffs do not present any evidence challenging that the City's changes to CD 9 promoted traditional redistricting principles.

Regardless of the motivation behind the City's creation of CD 9 and CD 10, the evidence that the City did not subordinate or neglect traditional redistricting criteria in passing the 2012 Redistricting Ordinance is undisputed. Summary judgment must, therefore, be granted in favor of the City. *See Cromartie I*, 526 U.S. at 541 ("To carry their burden, [plaintiffs] were obliged to show—using direct or circumstantial evidence, or a combination of both . . . that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.").

2. Plaintiffs' State Law Causes of Action

The Plaintiffs assert two additional state law causes of action, one under the City Charter and one under the State Constitution. As the Court grants summary judgment in favor of the City on Plaintiffs' *Shaw* claims, the Court has discretion to dismiss these supplemental state law claims. 28 U.S.C. § 1367(c)(3); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed as well."). The City moves for this Court to exercise its discretion and dismiss the Plaintiffs' state law claims.

It is unclear whether this Court has jurisdiction over Plaintiffs' state law claims, as supplemental jurisdiction exists only "over all other claims that are

so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367. Neither party raised or addressed the issue of whether the Court has supplemental jurisdiction. If the Plaintiffs' state law claims do not stem from the same "case or controversy" as Plaintiffs' *Shaw* claim, this Court does not have jurisdiction. Plaintiffs' only federal cause of action claims that the City drew the lines of CD 9 and CD 10 predominantly motivated by the goal of increasing the African-American population in CD 10 and the Latino population in CD 9, thereby engaging in racial gerrymandering and classifying the Plaintiffs by race in violation of equal protection principles. Plaintiffs' federal claim, therefore, has attenuated, if any, ties to Plaintiffs' second claim, which argues that the City failed to keep the boundaries of the WCKNC whole within a single district in violation of the Los Angeles City Charter.[12] It is even more unclear whether Plaintiffs' federal claim has any relation to Plaintiffs' third cause of action, which alleges that the Los Angeles City Charter infringes Plaintiffs' rights to a referendum under the California Constitution.

Assuming that this Court has supplemental jurisdiction, however, the Court finds that it should exercise its discretion to dismiss Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(c). The discovery in this matter targeted only Plaintiffs' federal law claim, and "economy, convenience and fairness to the parties, and comity" are all served by dismissing

[12] It is also unclear to this Court whether Plaintiffs' second cause of action states a claim upon which any legal relief may be granted.

Plaintiffs' state-law claims to be considered by a state court. *See Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003). Plaintiffs' state law claims present novel and unique state-law issues, with wholly dissimilar factual considerations than the federal cause of action, which served as the heart of this case. Maintaining federal jurisdiction of Plaintiffs second and third causes of action presents an entirely different lawsuit before this Court, with separate facts, laws, and issues unrelated to the claim that provided this Court with original jurisdiction. *See Gibbs*, 383 U.S. 727 ("Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."). Plaintiffs' second and third causes of action are dismissed without prejudice. Plaintiffs may seek relief in state court.

V. CONCLUSION

The Court GRANTS Defendant's Motions for Summary Judgment, and enters judgment in favor of the City as to Plaintiffs' first cause of action. (Docket Nos. 84, 87.) The Court dismisses Plaintiffs second and third causes of action. The Court DENIES Plaintiffs' Motion for Summary Adjudication. (Docket. No. 106.)

IT IS SO ORDERED.

DATED: 24 February 2015

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE