No. 18-1257

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**

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

In 2012, the City of Los Angeles engaged in a lengthy, public process to redraw the boundaries for its fifteen City Council districts. Plaintiffs allege that the City Council drew the lines to maintain Council District 10 ("CD 10") as an African-American district in violation of *Shaw v. Reno*, 509 U.S. 630 (1993). Despite having access to thousands of pages of documents and video testimony, plaintiffs' primary evidence is limited to statements by one member of an advisory commission during the process and a post-decisional statement by one City Council member. The questions presented are:

1. Whether the Ninth Circuit correctly held that "the factual record in this case falls short of justifying the 'substantial intrusion' into the legislative process" that would be caused by allowing discovery into the motives of individual legislators.

2. Whether the Ninth Circuit properly held that plaintiffs' evidence regarding the motives of one Commission member and one Council member failed to raise a triable issue of fact as to whether race was the predominant factor motivating the *City Council's* decision, particularly in light of the objectively-verifiable evidence that the final plan reduced CD 10's African-American population from the Commission's recommended plan, CD 10 is one of the most compact and diverse districts in the City, and its boundaries unify communities better than before and comply with all traditional districting criteria.

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## INTRODUCTION

Based primarily on statements made by one member of an advisory redistricting commission and one post-redistricting speech by a single City Councilmember, petitioners claim that twenty-one members of that commission, and then fifteen members of the Los Angeles City Council and the Mayor – thirty-seven City officials in all – engaged in intentional race discrimination when they publicly debated and approved the boundaries of City Council District 10 in 2012. Specifically, plaintiffs, who reside in an area known as Koreatown that is part of CD 10, allege that the district was drawn to ensure that it would remain an African-American district, in violation of *Shaw v. Reno*, 509 U.S. 630 (1993). This is despite the facts that CD 10's African-American population is only 25.9%, its citizen voting age population (CVAP) is only 40.5%, and the City Council's final plan actually *lowered* the African-American percentages in the district from the percentages in the Commission's recommended plan.

After two-and-a-half years of litigation and extensive discovery, the District Court held that plaintiffs had failed to raise a genuine issue of material fact as to whether race was the predominant factor motivating the City Council's action, and the Ninth Circuit affirmed. Those rulings were fully supported by the following facts:

- CD 10 is one of the most diverse districts in one of the most diverse cities in the country. It continues to be a multi-racial, coalition district with large populations of Latino, Asian, White, and African-American residents. If CD 10 is a *Shaw* district, no district in the country is safe from such a claim;

- CD 10's African-American population increased *only 1.7%* from the 2002 plan (from 24.2% to 25.9%) and African-American CVAP increased *only 3.7%* (from 36.8% to 40.5%);

- Far from ignoring Koreatown residents and "maximizing" African-American population in CD 10, the biggest change to CD 10 consolidated all of Koreatown and 70% of the Wilshire Center Koreatown Neighborhood Council ("WCKNC"), which have very low African-American populations, *into CD 10*;

- The two changes to CD 10 that form the plaintiffs' *Shaw* claim (a change in the Palms and Empowerment Congress neighborhood councils) better unified those neighborhoods as their residents requested;

- Both changes – either separately or together – are insignificant changes on the perimeter of the district that would not provide a viable *Shaw* claim even if they did not adhere to traditional districting criteria, which they did;

- The commissioner at issue did not get what he allegedly wanted because the City Council revised the Commission's plan by moving a largely African-American neighborhood out of CD 10 in part to keep the CD 8 incumbent's residence in his district, thereby *reducing* the African-American CVAP of CD 10 by approximately 3%; and

- CD 10 is not remotely unusual in shape. Rather, it is one of the more compact districts in the City

and its shape has stayed remarkably unchanged since the 1970s.

Despite all this, plaintiffs ask this Court to reverse the lower court rulings and send the case back for a trial that could not possibly be completed in time to impose new districts for the one remaining citywide election before the City must redraw its district lines in 2021. They do so based on two arguments: (1) that the lower courts erred in recognizing a legislative privilege that prohibits inquiry into the motives of individual legislators in this case, and (2) that the lower courts erred in granting summary judgment in favor of the City.

Plaintiffs do not even pretend to argue that there is a conflict in the circuit courts on either of the issues they urge upon the Court. Instead, plaintiffs argue that there is a conflict between this Court's opinions on legislative privilege in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and in *United States v. Gillock*, 445 U.S. 360 (1980). There is no conflict. As *Gillock* makes clear, "in protecting the independence of state legislators, [the Court's cases] on official immunity have drawn the line at civil actions." 445 U.S. at 373. Thus, in civil actions, the Court applies the rule that "[o]nly in "extraordinary instances" should a legislator "be called to the stand to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Arlington Heights*, 429 U.S. at 268. In criminal cases involving state and local legislators, it does not.

Similarly, plaintiffs do not argue that there is any conflict in the circuits regarding the proper standard

for summary judgment on *Shaw* claims. Instead, they argue that the Ninth Circuit's ruling conflicts with this Court's own decisions, ignoring the admonition in Rule 10 of the Supreme Court Rules that a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Even if there were a conflict in the circuits, however, the Ninth Circuit's decision was entirely consistent with this Court's rulings. As demonstrated below, the Ninth Circuit carefully reviewed plaintiffs' evidence in light of this Court's most recent *Shaw* cases and found it wanting. That was entirely appropriate in light of the Court's earlier holdings that a legislative body "must have discretion to exercise the political judgment necessary to balance competing interests," and that courts must "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("*Cromartie II*") (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis added in *Cromartie II*).

As Justice O'Connor said in *Miller*, plaintiffs' burden of proof is a "demanding one" meant to make only the most "extreme instances of gerrymandering subject to meaningful judicial review" without casting doubt on or subjecting to challenge the "vast majority" of districts throughout the country. *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring). A ruling that plaintiffs were entitled to go to trial on this evidence would result in precisely what Justice O'Connor sought to avoid.

## STATEMENT OF FACTS AND OF THE CASE

### A. Correction of Factual Misstatement in Petition for Writ of Certiorari

Pursuant to Supreme Court Rule 15, defendant City of Los Angeles brings to the Court's attention a material misstatement in plaintiffs' brief. The petition misstates the Citizen Voting Age Population (CVAP) percentage for African-Americans in CD 10 as "43.1%." Pet. 7-8. That was the CVAP percentage for CD 10 in the Commission's final advisory map; the CVAP percentage for African-Americans in the final ordinance approved by the City Council was reduced to 40.5%. Pet. App. 11a. The other CVAP percentages for CD 10 were: 28.9% Latino, 16.3% Asian, and 12.3% White. *See id.*

### B. The Redistricting Commission Proceedings

Under the Los Angeles City Charter, a twenty-one member, volunteer Redistricting Commission (the "Commission") begins the task of redistricting the fifteen City Council districts. The Commission submits a recommended plan to the City Council, which can accept or modify the proposal, or draw a new map. Pet. App. 33a.

The 2012 Redistricting Commission held 39 public meetings and hearings, at which it not only took testimony from the public, but also publicly deliberated the merits of each proposal before it.[1] More than 1,800 individuals

1. Most facts in this brief can be found in the opinions of the District Court or Court of Appeal, included in the Petition Appendix ("Pet. App."). Any other facts are found in the Excerpts of Record and Supplemental Excerpts of Record filed with the Ninth Circuit.

attended these hearings, and the Commission received more than 500 oral or written comments, together with more than 40 draft plans from the public. *See id.*, 36a.

Like its predecessor in 2002, the Commission decided to draft the preliminary plan for public comment in small groups with the assistance of a Technical Director to facilitate the use of redistricting software. The groups were instructed not to talk to each other in order to ensure compliance with California's open meeting law. The West/Southwest ad hoc group that drafted the initial proposal for CD 4, 5, 8, 10, and 11 had seven members, including Commissioner Christopher Ellison, and met only twice. A resolution group met on January 24 to unite the plans from the ad hoc groups into a citywide plan. *Id.*, 36a-37a.

After the initial ad hoc committee meetings, the Commission met and deliberated entirely in public. It issued three draft plans, holding seven public hearings on the first plan, then debating and voting at an eight-hour public meeting on more than 80 proposed amendments to the plan, of which it approved 42. The public then reviewed and proposed additional changes. At yet another public meeting, the Commission considered fourteen additional amendments and approved five. The Commission then approved a final recommended plan by a supermajority vote of 16-5. The Commission also drafted a 951-page report describing its work, including how it addressed particularly difficult areas of the City such as Koreatown. *See* Pet. App. 39a-41a.

The issue of how to handle Koreatown was a recurring theme throughout the Commission process. Commissioner Helen Kim strongly advocated unifying the Wilshire

Center Koreatown Neighborhood Council ("WCKNC") in CD 13. Commissioner Kim, joined by Commissioners Ahn, Anderson, and Roberts, voted against the Commission's recommended plan and drafted a minority report that, among other things, attached an email from Commissioner Ellison, a focus of this case, and accused Commissioner Ellison of race-based line-drawing.

Finally, before the Commission submitted its recommended plan to the City Council, the City Attorney's Office reviewed the plan, as well as the minority report, and concluded that the Commission's recommended plan met all relevant legal criteria. *Id.*, 42a.

### C. The City Council Proceedings

The City Council held three public hearings on the plan at separate locations throughout the City. City Councilmembers proposed twenty-five amendments. In two lengthy public reports, the Chief Legislative Analyst's Office ("CLA") discussed each proposed amendment, recommending that eighteen be adopted, including significant changes to CD 10 that reduced the African-American population in the district.

On March 16, 2012, after extensive public discussion, the City Council adopted eighteen amendments and voted 13-2 to approve the Redistricting Ordinance, which the Mayor then signed. Pet. App. 43a.

### D. Treatment of Koreatown in the Final Plan

Koreatown can be defined in several ways, but no matter how it is defined, Koreatown is made more whole

under the new plan. One definition uses Koreatown boundaries as defined through the City's renaming policy, and under that definition, Koreatown is made whole in CD 10.

Plaintiffs prefer to define Koreatown by the boundaries of the WCKNC. WCKNC is the largest neighborhood council with more than 95,000 residents (which would constitute almost 40% of a single council district) and lies at the center of the City. As a result, it is very difficult to unify WCKNC in one district without splitting other communities of interest, and that area has not been whole in previous plans. Under the old plan, the City renaming policy neighborhood was split in two, and WCKNC was split into three City Council districts. Under the new plan, the renaming policy neighborhood is made whole in CD 10, the WCKNC splits have been reduced to two, and 70% of the neighborhood council is consolidated into CD 10. *See* Pet. App. 57a-58a.

### E. Procedural History

The *Lee* plaintiffs, who are voters residing in CD 10, filed suit on July 31, 2012, principally alleging that the City redrew the boundaries in CD 10 with the predominant intent of increasing the percentage of African-American voters in that district, in violation of *Shaw v. Reno*.[2]

2. Another group of plaintiffs, known as the *Haveriland* plaintiffs, filed a separate complaint that challenged CD 9 on the same grounds. Although the District Court consolidated the two cases, the *Haveriland* plaintiffs did not file briefs addressing CD 9 in the Ninth Circuit, and they have not filed a petition for writ of certiorari in this Court.

The parties engaged in extensive discovery. The redistricting efforts of both the Commission and City Council produced a voluminous public legislative record that was provided to plaintiffs in November 2012. These records consist of: (1) full transcripts and/or video or audio recordings of redistricting meetings and public hearings; (2) all draft maps released by the Commission along with related demographic data; (3) written public comments and draft maps submitted by the public and interest groups, including impact statements from several Neighborhood Councils; (4) all Commission and City Council meeting agendas, minutes, and reports provided for the meetings, including the City's Chief Legislative Analyst's Report and addendum; (5) all presentations to either body; and (6) the Commission's full Report.

In addition to providing all of these documents, the City also agreed to and produced to plaintiffs non-privileged information contained in the files of the City Council and Commission members, Mayor, and City staffers who worked on redistricting. Finally, the City agreed to – and plaintiffs took – the depositions of staff and Commission members, subject to objection on the basis of privilege.

The City objected to providing pre-decisional, non-public documents containing communications about the thought processes of commissioners and City Council members or their staff, citing legislative privilege. The *Lee* plaintiffs initially claimed that they were entitled to documents protected by the legislative privilege, and they filed a motion to compel production of them. After full briefing and argument, Magistrate Judge Jay Gandhi suggested a compromise that would limit

plaintiffs' discovery requests to any race-based factual statements or race-based reports, but that would allow the City to redact those portions that "include opinions, recommendations or advice about legislative decisions."

The *Lee* plaintiffs agreed to the compromise and withdrew their motion to compel "without prejudice." The *Lee* plaintiffs did not reverse their position until three months later, when the *Haveriland* plaintiffs sought to depose staff and members of the Commission and the City Council, including the Council President and the Mayor, without limiting questioning to non-privileged material. The *Haveriland* plaintiffs rejected the Magistrate Judge's suggestion of a compromise similar to the one that the *Lee* plaintiffs had accepted. When the Magistrate Judge issued a protective order, the *Lee* plaintiffs supported the *Haveriland* plaintiffs' motion for reconsideration, which the District Court denied and which it declined to certify for an interlocutory appeal to the Ninth Circuit.

The District Court granted the City's motion for summary judgment with respect to both the *Lee* and *Haveriland* plaintiffs on February 24, 2015, and the Ninth Circuit issued its ruling upholding the District Court's judgment on November 19, 2018.

## REASONS FOR DENYING THE PETITION

### I.

### PLAINTIFFS' CASE WILL BE MOOT LONG BEFORE IT COULD EVER BE RESOLVED

The Court should deny plaintiffs' petition because the case will be moot long before it could ever be completed.

The merits of plaintiffs' *Shaw* claim are not before the Court, only the lower court's discovery and summary judgment rulings. Even if petitioners were to prevail before this Court, the case must still be remanded for additional discovery and a trial.

The current CD 10 boundaries will be used for the last time in the City's 2020 elections; thereafter the City will redraw all of its district boundaries based on the 2020 Census, as required by the City Charter. Thus, the window during which any effective relief could be ordered and implemented closes once the pre-election deadlines for the City's March 3, 2020 primary election begin to occur. Those deadlines are fast approaching. Under the City's election laws, all candidates for the March 2020 primary election must be residents of their respective districts no later than 150 days before the election, which is October 15, 2019, and must file their declarations of candidacy no later than 115 days before the election, which is November 9, 2019. *See* L.A. City Charter, §§ 204, 401, 407 & 421.

As a practical matter, therefore, the case is already essentially moot because it would be impossible for the Court to take, hear, decide and remand the case, and then have the District Court order discovery, hold a trial, and order a remedial map, all within the next six months.

Article III's "case-or-controversy requirement subsists through all stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 305 (2012) (citations and quotations omitted); *see*, *e.g.*,

*Camreta v. Greene*, 563 U.S. 692, 711 (2011) (challenge to Oregon officials' interview of a minor about sexual abuse allegations became moot when minor was only months away from adulthood and had moved to Florida); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (challenge to law school admissions policy became moot when plaintiff neared graduation); *Atherton Mills v. Johnston*, 259 U.S. 13, 15-16 (1922) (challenge to validity of a child labor statute became moot when child became adult).

Nor can plaintiffs demonstrate that their case qualifies for the exception for disputes capable of repetition, yet evading review. The exception only applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citations and quotations omitted).

Neither requirement is met here. First, the challenged action – the use of CD 10 boundaries – will have lasted eight years, more than enough time for plaintiffs to have fully litigated the case had they prosecuted it with any sense of urgency or even average pace. Instead, they usually did the bare minimum to advance the case pursuant to court-mandated deadlines. They never sought temporary or preliminary relief before elections in CD 10, and only rarely and inconsistently requested expedited briefing or review on matters.

Second, this case is unlikely to recur. The "capable of repetition" prong requires a "'reasonable expectation'" or a "'demonstrated probability'" that "the same

controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (citation omitted). Here, there is little chance the same controversy will recur involving the same complaining parties. The next City redistricting ordinance will be drafted by a newly appointed redistricting commission and a completely different City Council than the one that approved the current lines in 2012, using new census data. It is entirely unknowable at this point how those legislative bodies will go about drafting CD 10 and what CD 10 will look like given the passage of ten years in a diverse, centrally located urban district.[3]

## II.

## PLAINTIFFS' LEGISLATIVE PRIVILEGE CLAIM DOES NOT WARRANT REVIEW BY THIS COURT

Plaintiffs argue that the Court should grant their writ because (1) there is a division in this Court's cases on legislative privilege, and (2) the Ninth Circuit's opinion "effectively established an absolute privilege." Pet. 22,

3. This is not like the situation in *North Carolina v. Covington*, 138 S. Ct. 2548 (2018), where the Court held that plaintiffs alleging a *Shaw* claim had standing to challenge a remedial plan the Legislature drew in response to plaintiffs' original action. In that case, plaintiffs contended that the new, remedial districts were mere continuations of the old, gerrymandered districts. The Court held that "[b]ecause the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction." 138 S. Ct. at 2553. Here, the new districts are not yet drawn and it is impossible to know how a new redistricting commission and City Council will draw CD 10.

25. Plaintiffs then catalog the reasons why they should have been allowed to probe the motives of commissioners and City Councilmembers without ever mentioning the compromise that they had accepted that limited their discovery or that they had access to thousands of documents and hours of video from the redistricting process, as well as the opportunity to depose legislators and staff about how that process unfolded. In short, as demonstrated below, there is no need to clarify the common law of legislative privilege, but even if there were, this case is not the proper vehicle for doing it, because plaintiffs had access to a wealth of material with which to make their case.

### A. There Is No Conflict in This Court's Case Law

Plaintiffs strain to find a conflict in this Court's case law where there is none. Specifically, they insist that the Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980) conflicts with its decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) on the applicability of a common law legislative privilege for state and local legislators. That argument misses the fact that the Court has drawn a sharp line between the kind of civil action discussed in *Arlington Heights* and federal criminal actions against state or local legislators like the one at issue in *Gillock*.

### 1. The Court applies *Village of Arlington Heights v. Metropolitan Housing Development Corporation* in civil cases alleging race discrimination

Like this case, *Arlington Heights* was a civil case involving charges that a municipality had acted with a racially discriminatory intent. There, this Court made clear that proof of racially discriminatory legislation must be made through objective evidence, not by placing individual legislators on the stand, where their testimony "frequently will be barred by privilege." 429 U.S. at 268. In *Reno v. Bossier Parish School Board*, the Court held that the framework established in *Arlington Heights* applies to claims of racial gerrymandering as well:

> As our discussion illustrates, assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available." In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance.
>
> 520 U.S. 471, 488 (1997) (quoting *Arlington Heights*, 429 U.S. at 266).

The *Reno* Court went on to say that the framework set in *Arlington Heights* for analyzing whether discriminatory purpose motivated a governmental body's decisionmaking had served "as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades," citing no fewer than six of

its other voting rights cases. *Id.*[4] The first case listed was *Shaw*, 509 U.S. 630, on which plaintiffs' entire claim of racial discrimination is based.

The framework that this Court has explicitly stated should be used to decide cases like this one includes the recognition that only in "extraordinary instances" legislators "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." *Arlington Heights*, 429 U.S. at 268. It also includes the admonishment that "[t]his Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Id.* at 268 n.8. "Placing a decisionmaker on the stand," the Court said, "is therefore usually to be avoided.'" *Id.* (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)).

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4. The cases, with the Court's parenthetical descriptions, were *Shaw*, 509 U.S. at 644 (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *City of Mobile v. Bolden*, 446 U.S. 55, 70-74 (1980) (same); *Pleasant Grove v. United States*, 479 U.S. 462, 469-70 (1987) (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *see also Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *summarily aff'd*, 459 U.S. 1166 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982) (same). *Accord Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985) (court of appeals properly used *Arlington Heights* approach in case challenging disenfranchisement of felons as racially motivated).

Plaintiffs argue that the statements about legislative privilege in *Arlington Heights* are dicta, because the plaintiffs in that case based their argument on the effect of the Village board's vote, as opposed to the motivation behind the vote. Pet. 23. The Court's statements about privilege and the proper way to prove discriminatory intent were not carelessly tossed about, however, as plaintiffs suggest. Although the *Arlington Heights* plaintiffs originally tried their case on a theory of discriminatory effect, they did so because the Court had not yet ruled in *Washington v. Davis*, 426 U.S. 229 (1976) that proof of discriminatory intent is necessary to show a violation of the Equal Protection Clause. *Arlington Heights*, 429 U.S. at 268. Writing post-*Washington,* the Court laid out the framework for proving discriminatory intent and then held that the plaintiffs had failed to meet their burden to prove such intent. *Id.* at 266-70.

Three members of the Court dissented, saying that the case should have been remanded in order to give plaintiffs an opportunity to meet the different standard. The *Arlington Heights* majority clearly disagreed with the dissent and retained its discussion of the appropriate test for discriminatory intent. Most importantly, as described above, the Court has reaffirmed that courts should use the framework in *Arlington Heights* to decide *Shaw* claims, as it had done "for over two decades." *Reno*, 520 U.S. at 488 (collecting cases).

Finally, it is simply not true, as plaintiffs claim, that the *Arlington Heights* plaintiffs were able to question Board members about materials and information available to them at the time of decision while the plaintiffs in this case were not. Pet. 23. As described earlier, plaintiffs *agreed* to a compromise that limited discovery to

objective, race-based reports that may have been before the legislators, which plaintiffs received. Although the City objected when the *Haveriland* plaintiffs sought to depose the Mayor and the City Council President, it did not object to the *Lee* plaintiffs' notices of deposition for the Executive Director and two members of the Commission. At these depositions, plaintiffs were allowed to question the Commissioners and the Executive Director about the factors that this Court has said are relevant to a racial discrimination claim like theirs: the legislative or administrative history, the historical background of the decision, the sequence of events leading to the decision, and departures from procedural and substantive norms. *Arlington Heights*, 429 U.S. at 267-68. Finally, plaintiffs had full access to three of the four dissenting Commission members, who provided declarations on which plaintiffs relied. Plaintiffs' choice not to take more depositions or do additional discovery does not mean that they were prevented from doing so.

### 2. The Court applies *United States v. Gillock* only in criminal cases

*United States v. Gillock* was a criminal case in which federal authorities charged a state senator with accepting bribes to perform legislative acts. 445 U.S. 360, 362 (1980). In holding that the defendant legislator could not use the legislative privilege to exclude evidence regarding his legislative acts, this Court distinguished between civil and criminal cases with respect to recognizing a legislative privilege for state and local officials, saying that "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions." *Id.* at 373.

*Gillock* came three years after the Court's decision in *Arlington Heights*, and the Court's statement that it has "drawn the line at civil actions" had to have been written with that case in mind. Moreover, an examination of "*Tenney* and subsequent cases on official immunity," to which the Court referred, reveals that the interests at stake in the civil cases where the Court upheld the legislative privilege were every bit as important as the interests that plaintiffs seek to assert here. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), a private individual alleged that the California Legislature's Fact-Finding Committee on Un-American Activities subpoenaed him and held him in contempt for refusing to testify in violation of his First Amendment rights. Nevertheless, this Court held that his lawsuit was prohibited by legislative privilege, saying that "[t]he claim of an unworthy purpose does not destroy the privilege," which exists "not for [legislators'] private indulgence but for the public good." *Id.* at 377.

*Tenney* is not an isolated case. In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), this Court reaffirmed that local legislators are absolutely immune from a lawsuit alleging that they had eliminated a city employee's position in violation of her First Amendment rights. The lawsuit in *Bogan* also included claims of race discrimination, because the plaintiff employee alleged that the city council retaliated against her for disciplinary action she had taken against a subordinate who reportedly "had made repeated racial and ethnic slurs about her colleagues." *Id.* at 46. Nevertheless, this Court unanimously held that the city councilmembers and mayor were entitled to absolute legislative immunity.[5]

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5. *Accord Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-06 (1979) (absolute legislative

Plaintiffs may argue that there is a difference between immunity from suit and evidentiary or testimonial immunity in a lawsuit against the governmental entity of which a legislator is a part. As an initial matter, of course, absolute immunity from suit is a far more extreme jurisprudential bar than evidentiary immunity.

Second, as is clear from the preceding discussion of *Arlington Heights* and its progeny, the Court has addressed the evidentiary privilege issue as well. Only in "extraordinary instances" should a legislator "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." *Arlington Heights*, 429 U.S. at 268.

### B. The Ninth Circuit Did Not Establish An Absolute Legislative Privilege

Plaintiffs next argue that the Ninth Circuit's opinion effectively establishes an absolute legislative privilege, because the Court of Appeals did not apply a formal balancing analysis to the legislative privilege claim. Pet. 22-25. Plaintiffs argue that "[t]he Ninth Circuit acknowledged that the legislative privilege is qualified, but eschewed the test employed in other redistricting cases." *Id.* at 22 (citation omitted).

Far from eschewing the test used in other redistricting cases, the Ninth Circuit and the District Court did precisely what this Court has long held a court *should* do in a redistricting case. In *Miller v. Johnson*, this Court made

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immunity for individual members of regional agency performing legislative functions).

clear that courts should "exercise extraordinary caution" in adjudicating *Shaw* claims and in "*determining whether to permit discovery or trial to proceed*." 515 U.S. 900, 916-17 (1995) (emphasis added).

The Ninth Circuit's opinion must be read with these principles in mind. The entire first part of the Ninth Circuit's opinion carefully reviews the massive amounts of evidence that the plaintiffs had available to them, including evidence about what went on in the nonpublic ad hoc committee meeting for CD 10.[6] Each of these things informed the Ninth Circuit's conclusion that "the factual record in this case falls short of justifying the 'substantial intrusion' in the legislative process." *Id.*, 25a. Because the Ninth Circuit lacked sufficient grounds to distinguish this case from *Arlington Heights*, it said, "we conclude that the district court properly denied discovery on the ground of legislative privilege." *Id.*, 26a.

The Ninth Circuit's conclusion was entirely appropriate. Even plaintiffs concede that the Ninth Circuit acknowledged that the legislative privilege is not absolute. Pet. 22. The fact that it did not engage in a formal balancing exercise in no way suggests that it intended to hold that the privilege is in fact absolute after all.

6. The emails from Mr. Ellison that are so central to plaintiffs' argument were attached to the minority report that was part of the redistricting commission's final Report.

### C. Plaintiffs' Application of a Balancing Test Is Not Supported By the Case Law on Which They Rely

Plaintiffs next ask this Court to act as a court of first review by applying a balancing test that not surprisingly comes out in their favor. On closer examination, however, it becomes clear that the balancing cases on which plaintiffs rely will not bear the weight of their argument.

For example, plaintiffs cite this Court's statement in *Arlington Heights* that "contemporary statements by members of the decisionmaking body" are highly relevant to the issue of discriminatory intent. Pet. 25. However, the rest of the text reveals that the Court was *not* talking about private conversations. If it had been referring to private conversations, the Court would never have said that "such testimony frequently will be barred by privilege." *Arlington Heights*, 429 U.S. at 268.

Plaintiffs also repeatedly cite *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012) without mentioning that the magistrate judge in that case *upheld* the privilege for legislators and only allowed questioning of the outside consultants used to develop the redistricting plan. Pet. 25, 27. The same was true in *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, a redistricting case in which the three-judge court held that "the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation."[7] *Page v. Virginia*

7. No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656, at *33 (N.D. Ill. Oct. 12, 2011).

*State Bd. of Elections* did not even discuss legislative privilege. Indeed, there was no need to do so; as with so many *Shaw* cases, legislators openly acknowledged that racial considerations predominated because they were trying to comply with Section 5 of the Voting Rights Act.[8]

Moreover, the D.C. Circuit cases that plaintiffs cite for the proposition that no privilege should apply if a plaintiff's claim turns on government intent (Pet. 26) all involved the deliberative process privilege applicable to the executive branch, not the legislative privilege. Courts have generally held that the legislative privilege is "weightier" or more "robust" than the deliberative process privilege. *Favors*, 285 F.R.D. at 210 n.22; *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922, 2003 U.S. Dist. LEXIS 27311, at *54 (C.D. Cal. Oct. 9, 2003).

Of all of plaintiffs' cases, only two redistricting cases held that plaintiffs' need for documents outweighed the legislative privilege: *Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017) and *Bethune-Hill v. Virginia State Board of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015).

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8. 58 F. Supp. 3d 533, 533-34 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015). *See Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (state admits in preclearance submission that its "*overriding* purpose" was creation of majority-minority district) (emphasis in original); *Bush v. Vera*, 517 U.S. 952, 969 (1996) (state's DOJ submission explains the drawing of the district at issue "in exclusively racial terms."); *Miller*, 515 U.S. at 918 (state admits, in brief to the Court, that district "is the product of a desire by the General Assembly to create a majority black district" to comply with DOJ's repeated instructions to do so.).

*Benisek* involved a partisan gerrymandering claim currently before this Court. Two things make *Benisek* inapplicable here. First, the *Benisek* court relied on *United States v. Gillock* in weighing the extent to which discovery would impede legislative action,[9] which even plaintiffs concede "may present the closest question" in the balancing process. Pet. 28. As discussed above, *Gillock* is a criminal case not applicable here.

The other distinguishing characteristic of *Benisek* was the lack of transparency and the way in which redistricting unfolded in that case. Although the Maryland Legislature used a redistricting advisory committee that held public hearings to take public comment, the committee was exempt by law from the state's open meetings act and may not have deliberated in public, as the Commission and the City Council did in this case. *Benisek*, 241 F. Supp. 3d at 568. Most importantly, in contrast to the City Council's lengthy deliberations at issue here, the Maryland Legislature held only one joint committee hearing the same day the plan was introduced and, after making only technical amendments, passed the plan in three days. *Id*. at 569.

*Bethune-Hill* involved a racial gerrymandering claim that ultimately reached this Court on the merits. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017). Before the case reached this Court, however, the District Court resolved a discovery dispute limited to production of documents – not testimony – on legislative privilege. After a lengthy discussion of whether or not the legislative privilege for state legislators was absolute,

9. 241 F. Supp. 3d at 576-77.

the District Court used a balancing process and held that most documents were protected, but that a document that "pertains to, or 'reveals an awareness'" of racial considerations must be produced. *Bethune-Hill*, 114 F. Supp. 3d at 344-45.

The District Court in *Bethune-Hill* discussed both *Arlington Heights* and *Gillock*, but it did so almost entirely in the context of absolute immunity. Although the court quoted this Court's statement in *Arlington Heights* that placing a decisionmaker on the stand is usually to be avoided, it omitted the second part of that sentence in which the Court said that such testimony "frequently will be barred by privilege." *Compare id.* at 337 *with Arlington Heights*, 429 U.S. at 268. That failure appears to have led the District Court to conclude that once it held that only a qualified privilege applies, the balancing test used by other courts skews heavily in favor of disclosure. As demonstrated above, that is not the case.

### D. There Will Be Far Better Cases In Which the Court Can Decide the Proper Scope of the Legislative Privilege

Plaintiffs' final argument in favor of review is that the scope of the legislative privilege in redistricting cases is an important and recurring issue, but that it will seldom be addressed by the courts of appeals or this Court, because of restrictions on appeals under 28 U.S.C. section 1253. Pet. 34.

Section 1253 only applies to appeals from three-judge courts, and in the redistricting context, a three-judge court is only convened in a challenge to a statewide

or Congressional redistricting. 28 U.S.C. § 2284(a). Plaintiffs' argument ignores the many other redistricting cases that did not require a three-judge court and that could just as easily have reached this Court by writ of certiorari. That is because redistricting occurs at least every ten years for thousands of cities, counties, school districts, and special districts across the nation. Those redistricting efforts often result in the same conflicts and disagreements that produced this lawsuit, with groups of citizens claiming that the linedrawers were motivated by discriminatory intent. *See*, *e.g.*, *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 487-89 (1997) (school district redistricting case alleging discriminatory intent); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (city council redistricting case alleging discriminatory intent); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (county redistricting case alleging discriminatory intent). The issue of legislative privilege could come up in any of these cases and reach the Court.

Moreover, there is no reason that this Court could not address legislative privilege in other cases involving allegations of race discrimination against governmental bodies. *Arlington Heights* itself was a case about race discrimination in zoning. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) held that the Alabama Legislature changed the boundaries of the City of Tuskegee in order to deprive African-American voters of their right to vote in city elections.

Most importantly, this case is clearly not an appropriate vehicle for reaching the privilege issue. As noted above, the redistricting process at issue in this case was a very public one that contrasted sharply with the kind

of redistricting that usually occurs behind closed doors, where prospective plaintiffs have no access to the deliberations. Here, plaintiffs had access to a wealth of data, including detailed information from a redistricting commissioner about what happened in the only nonpublic meeting at which CD 10 was discussed.

## III.

## THERE IS NO REASON FOR THE COURT TO REVIEW THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S RULING ON SUMMARY JUDGMENT

The Court should reject plaintiffs' request that it review the lower court's ruling on summary judgment for several reasons.

First, plaintiffs do not point to any conflict in the circuits regarding the standard for summary judgment on *Shaw* claims, nor do they contend that the question has not been, but should be, settled by the Court. Instead, they argue that the Ninth Circuit's ruling conflicts with this Court's own decisions, ignoring Rule 10 of the Court's Rules that a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Second, the Ninth Circuit's opinion demonstrates that it closely followed and applied this Court's standards for adjudicating *Shaw* claims, including the Court's latest opinions in *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2017), *Cooper v. Harris*, 136 S. Ct. 1455 (2017), and *Abbott v. Perez*, 138 S. Ct.

2305 (2018). Specifically, the Ninth Circuit held that in order to prove that race predominated in drawing a district, plaintiffs must show that the legislative body subordinated other factors, and that "[w]hat 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.'" Pet. App. 14a (quoting *Bethune-Hill*, 137 S. Ct. at 799). The Ninth Circuit also made clear that plaintiffs were not required to "show an actual conflict between the enacted plan and 'traditional redistricting principles.'" *Id.* at 15a (quoting *Bethune-Hill*, 137 S. Ct. at 799). Finally, the court held that, nonetheless, the "'good faith of [the legislative body] must be presumed' and the burden of proof rests with the challenger to demonstrate that race predominated [in] the districting process." *Id.* at 15a (quoting *Abbott*, 138 S. Ct. at 2324).

Applying these standards, the Ninth Circuit carefully reviewed the entire record, all of the District Court's findings, and the facts plaintiffs point to as direct or circumstantial evidence of "racial motivation." Based on that review, the Court of Appeals determined that the District Court properly granted summary judgment in favor of the City. The reason was simple: throughout this case, plaintiffs have ignored the fact that they have the burden of showing that the City subordinated other districting criteria for racial considerations. That burden is a "demanding one"[10] meant to make only the most "extreme instances of gerrymandering subject to meaningful judicial review" without casting doubt on or

10. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*").

subjecting to challenge the "vast majority" of districts throughout the country. *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring).

Instead, plaintiffs argue here, as they have unsuccessfully at every stage of this litigation, that summary judgment in *Shaw* cases is disfavored and that they only needed to provide *some* evidence of racial motivation in order to overcome summary judgment. For that argument, they rely on *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"), which denied summary judgment to *plaintiffs* on a *Shaw* claim, but they never even cite, much less address, the Court's subsequent holding in *Cromartie II*, 532 U.S. 234, which *granted* judgment to defendants on plaintiffs' *Shaw* claim as a matter of law.

The issue in *Cromartie I* was whether a three-judge court correctly granted summary judgment in favor of plaintiffs before discovery had occurred. This Court held that "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Cromartie I*, 526 U.S. at 553. The Court also noted that "[j]ust as summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation . . . the same holds true for racial gerrymandering claims of the sort brought here." *Id.* at 553 n.9. Thus, *Cromartie I* does not stand for the proposition that summary judgment is disfavored for resolving *Shaw* claims, as plaintiffs contend. It is only disfavored for resolving *Shaw* claims in favor of the party with the burden of proof.

*Cromartie II* provides the applicable standard here, not *Cromartie I*. In *Cromartie II*, the Court reviewed plaintiffs' direct and circumstantial evidence and held that plaintiffs had failed to demonstrate that traditional redistricting criteria had been subordinated to racial considerations. Finding that the evidence "was consistent with a constitutional political objective, namely, the creation of a safe Democratic seat," the Court held that the plaintiffs' evidence of race discrimination was insufficient to support a *Shaw* claim *as a matter of law*. *Cromartie II*, 532 U.S. at 239, 257. *Accord Miller*, 515 U.S. at 916-17 (courts should consider the intrusive nature of *Shaw* claims when assessing the strength of plaintiffs' case and "determining whether to permit discovery or trial to proceed.").

Moreover, the Ninth Circuit's holding is entirely consistent with the Court's most recent summary of the burden of proof necessary to establish a *Shaw* claim:

> As a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria. In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so. And, in the absence of a conflict with traditional principles, it may be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside. *In fact, this Court to date has not affirmed a*

> *predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles.*
>
> *Bethune-Hill*, 137 S. Ct. at 799 (collecting cases) (emphasis added).

The plaintiffs in this case have never presented any evidence that CD 10's lines deviated from traditional districting principles, nor could they. The evidence was overwhelming and uncontested that the district's boundaries were very similar to the district's previous boundaries dating back to the 1970's (which plaintiffs never criticized as racially gerrymandered), were compact, and followed Neighborhood Council boundary lines, thereby healing many more Neighborhood Council splits than existed in the previous plan. In reviewing plaintiffs' evidence, the Ninth Circuit correctly took into account these undisputed facts, as well as the fact that the City Council actually made changes that *reduced* the African-American population in CD 10 from that in the Commission plan.

Finally, it is important to keep in mind the context in which this redistricting took place. As noted earlier, unlike the linedrawing exercises in most other jurisdictions, the City conducted its redistricting in public, which in turn produced a public record available to plaintiffs and everyone else. The Ninth Circuit was aware of this fact, and based on the entire record, it correctly held that evidence that race may have motivated one commissioner and even one member of the City Council is not enough to

raise a triable issue of fact as to whether it motivated the other 35 city officials who deliberated and voted upon the 2012 redistricting plan.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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