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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The issue before this Court is not whether Plaintiffs will ultimately prevail in proving that Los Angeles City Council District 10 ("CD 10") was racially gerrymandered. The questions presented in Plaintiffs' Petition are whether review is needed to resolve conflicts in the standards for applying the legislative privilege and deciding summary judgment in redistricting cases. The answer is yes.

THE WRIT SHOULD BE GRANTED

I. THE LEGISLATIVE PRIVILEGE QUESTION WARRANTS REVIEW.

A. This Court Should Resolve The Tension Between *Gillock* And *Arlington Heights*.

The Ninth Circuit relied on *dicta* from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in holding that the legislative privilege prevented discovery from numerous city officials. App. 22a-26a. This conflicts with *United States v. Gillock*'s holding that legislative privilege must give way "*where important federal interests are at stake*. . . ." 445 U.S. 360, 373 (1980) (emphasis added).

1. The City argues there is no conflict because *Arlington Heights* was a civil case and *Gillock* was a criminal case. But *Gillock* did not announce a rule only for criminal cases, but for any "important federal interests[.]" *Id.* While enforcing federal criminal laws is an important federal interest, "many courts . . . have concluded that gerrymandering claims raise sufficiently important federal interests to overcome legislative privilege. . . ." *Whitford v. Gill*, 2019 WL 1978809, at *2 (W.D. Wis. May 3, 2019) (citing cases); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011). Thus, many case look to *Gillock* in civil legislative privilege claims. *Id.*; *Harding v. Cty. of Dallas*, 2016 WL 7426127, at *2 (N.D. Tex. Dec. 23, 2016); *Bethune-Hill v. Va. State Bd. of Elections* (*Bethune-Hill I*), 114 F. Supp. 3d 323, 333-34 (E.D. Va. 2015); *Kay v. City of*

Rancho Palos Verdes, 2003 WL 25294710, at *10-14 (C.D. Cal. Oct. 10, 2003). If *Gillock* applies only to criminal cases, this Court needs to tell the lower courts.

2. The City's argument that subsequent decisions have relied on *Arlington Heights* in discrimination cases is disingenuous, because they only rely on *Arlington Heights* for the appropriate standard for evaluating discrimination claims. The cases the City cites do not discuss legislative privilege. *E.g.*, *Reno v. Bossier Parish School Board* (*Bossier I*), 520 U.S. 471. 487-89 (1997); *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 644 (1993); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 70-74 (1980); *Pleasant Grove v. United States*, 479 U.S. 462, 469-70 (1987).

3. Equally misguided is the City's reliance on legislative immunity cases. The "justification for . . . immunity for the individual official" is that "the threat of personal monetary liability" will inhibit the decisionmaking process, "paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen v. City of Independence,* 445 U.S. 622, 655-66 (1980). "The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed." *Id.* at 656. Discovery in redistricting cases does not raise the same risks to legislative independence as does civil liability. *Benisek v. Lamone*, 241 F. Supp. 3d 566, 576 (D. Md. 2017); *Bethune-Hill I*, 114 F. Supp. 3d at 335.

B. The Ninth Circuit's *Arlington Heights* Standard For Legislative Privilege Conflicts With Redistricting Cases.

The Ninth Circuit held that legislative privilege is overcome only in "extraordinary instances," a wholly different standard than the balancing test employed by most courts considering legislative privilege in redistricting cases. Pet. 22-25. Recognizing the unique nature of redistricting cases, those cases look to multiple factors to determine if the legislative privilege must give way to the need for discovery. *Id.* The fundamental inconsistency between the Ninth Circuit and those other cases can be resolved only by this Court.

1. The City does not truly dispute this conflict. Nor can it. An "extraordinary instance" test that contains no discussion of what that means and how it is met is not the same as a multi-factor analysis of specific factors and a weighing of those factors. Indeed, a three-judge district court recently held that the Ninth Circuit's treatment of legislative privilege is mistaken because it "did not acknowledge *Gillock*'s statement that an important federal interest can overcome legislative immunity" or consider the unique nature of gerrymandering claims. *Whitford*, 2019 WL 1978809, at *2.

2. The City denies that the Ninth Circuit has effectively established an absolute privilege. Opp. 20-21. But its argument merely asserts that, because the Ninth Circuit decided Plaintiffs' evidence was insufficient to survive summary judgment, this case did not present an "extraordinary instance" that would overcome the privilege.

This cannot be the proper test. It ignores the reality that the very evidence being withheld based on legislative privilege could alter the summary judgment analysis.

Ultimately, if this case, with direct evidence that race played the predominant, if not sole, motivation of key decisionmakers and circumstantial evidence that CD 10's boundaries could only be explained by race, did not satisfy the Ninth Circuit's *Arlington Heights* test for legislative privilege, it is difficult to fathom any case that would.

C. This Is An Appropriate Case To Establish A Test For Legislative Privilege.

Finally, the City asserts that this is an inappropriate vehicle for the Court to use. The City is wrong.

1. The existence of direct evidence from Wesson and Ellison and circumstantial evidence of racial motivation makes this an appropriate case to evaluate the legislative privilege. If this case does not justify overcoming the legislative privilege, it is hard to imagine a case that would.

2. The City maintains that there is no reason to decide this case, because this Court has heard other redistricting cases. But despite the numerous redistricting cases it has heard, and the numerous redistricting cases that have raised legislative privilege, this Court has never considered legislative privilege in such a case. Deferring review of the important legislative privilege question in this case in favor of some hypothetical future appeal makes no sense.

II. THE NINTH CIRCUIT OPINION CONFLICTS WITH THIS COURT'S PRECEDENT GOVERNING SUMMARY JUDGMENTS IN REDISTRICTING CASES.

The Ninth Circuit departed from established precedent in affirming summary judgment for the City. Pet. 29-33. In opposition, the City misstates the summary judgment standard, tries to downplay the evidentiary record, and distorts Plaintiffs' argument. Nothing, however, refutes Plaintiffs' contention that the Ninth Circuit's opinion conflicts with *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541 (1999), by establishing a standard that permits lower courts to weigh evidence on summary judgment.

1. Contrary to the City's argument, this is not a case where the Ninth Circuit misapplied a properly stated rule of law. Opp. 27 (citing Sup. Ct. R. 10). The Ninth Circuit crafted its own rule: that race cannot be a predominant factor in redistricting when multiple people participate in the redistricting process and some changes to the map are made after the significant race-based decisions have been made. That standard cannot be squared with *Cromartie I*, which held that when the evidence can support both an inference of a racial motivation for redistricting and of a race-neutral motivation, a genuine issue of disputed fact precludes summary judgment.

2. The City inexplicably argues that *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234 (2001), establishes the proper standard for summary judgment in this case. *Cromartie II* is not mentioned in the Ninth Circuit opinion nor was it an appeal from a summary judgment ruling.

In *Cromartie II*, this Court reversed a trial court's factual finding that race, not political affiliation, was the predominant factor in redistricting. *Id.* at 258. Those erroneous conclusions included finding that the plaintiffs' expert's testimony supported the conclusion that districts had been based on race, when the expert's own testimony also supported the contrary conclusion. Likewise, the district court relied on a statement by a state senator who led the legislative redistricting effort that the districts achieved "'racial and partisan' balance," but omitted that the senator had also identified "geographic" considerations in the same sentence. *Id.* at 253. This equivocal evidence was incapable of establishing that race was the predominant motive.

Plaintiffs' evidence here was not equivocal. The statements by Ellison and Wesson demonstrate that CD 10's boundaries were racially motivated. Indeed, the Ninth Circuit acknowledges that "Ellison never offered any justification other than race for his proposed boundaries." *Id.*

3. The City also contends that the Ninth Circuit's opinion is consistent with *Bethune-Hill v. Virginia State Board of Elections* (*Bethune-Hill II*), 137 S. Ct. 788 (2017), because Plaintiffs purportedly did not offer evidence that the districts departed from traditional redistricting criteria. Opp. 30-31. But *Bethune-Hill II* holds that such a showing is unnecessary. Maps might "look consistent with traditional, race-neutral principles. But if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Bethune-Hill II*, 137 S. Ct. at 792. Thus, "a conflict or inconsistency between the enacted plan and traditional redistricting

criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." *Id*. at 799.

4. Finally, the City mischaracterizes Plaintiffs' argument and the evidence they offered. The City contends that Plaintiffs have argued that they need only offer "some" evidence of racial intent to overcome summary judgment." That has never been Plaintiffs' argument. Plaintiffs have argued that the combined direct and circumstantial evidence they offered is sufficient to establish that race was the predominant factor in drawing CD 10's boundaries.

Far from being only "some" evidence, which the City mischaracterizes as little more than two stray remarks by unimportant officials, Plaintiffs' evidence was substantial. Those two officials were: (1) Commissioner Ellison, who directed the drawing of CD 10's boundaries for admittedly race-based reasons; and (2) City Council President Wesson, who set the agenda, controlled the rules by which the maps would be approved, and then voted to approve that map with the stated purpose of ensuring predominance of a particular race in CD 10. In dismissing their relative power and particular interest in CD 10, simply because other City officials participated in the redistricting process, the Ninth Circuit failed to recognize that those two officials exercised disproportionate influence over CD 10. *Busbee v. Smith*, 549 F. Supp. 494, 510 (D. D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (statement made by the Speaker of the House to a private audience was relevant to a racial gerrymandering claim "because [the Speaker] appointed the House conferees—the ultimate decision-

makers in the congressional reapportionment process").

In any event, Ellison's and Wesson's statements were not the only direct evidence of racial intent. Four of the seven Commissioners on the Redistricting Committee that drew the initial map of CD 10 gave declarations that Ellison pursued a race-based goal. A concurrent report stated that Ellison had announced at an Ad Hoc Meeting that "his goal was to increase African-American registered voters in CD 10 to over 50% from its 2001 level of 43.2%." [1] That direct evidence was supported by significant circumstantial evidence, including expert analyses of CD 10, that indicated its boundaries were predominantly based on race. Pet 12-13

Although the City attempts to dispute this evidence and offers its own version of the redistricting process, that confirms that a factual dispute precludes summary judgment. The district court wrongly accepted the City's disputed explanations for the boundaries and made inferences in the City's favor.

For example, the City claims the number of public hearings disproves Plaintiffs' contentions. But over 95% of the public interest-holders who spoke at relevant public hearings requested that Koreatown be kept in a single district. Moreover, in the closed-door deliberations of the Ad Hoc Committees, the Commissioners were not provided with any analyses

[1] The report states that the proposed map raised the percentage of African-American registered voters in CD 10 to 50.6%, consistent with Ellison's stated goal.

or summaries of the public hearings and they did not receive much of the materials submitted by the public.

Similarly, the City attempts to downplay the work of the Ad Hoc Committees (Opp. 6), but they were where the maps were substantially approved and where Ellison insisted that race play a significant factor in CD 10's boundaries.

Likewise, the Ninth Circuit dismissed the increase in the CVAP because it was slightly reduced when the City Council approved the final map.[2] But the final CVAP increased 3.7% over the pre-redistricting CVAP, and was accomplished only by moving thousands of African-American voters into – and thousands of Caucasian voter out of – CD 10 by "divest[ing]" CD 10 of an area with a "diverse population" (50% Caucasian and 20% Latino) while increasing the African-American population in another area.[3] The final CVAP exceeded Wesson's 40% threshold for ensuring an African-American representative for CD 10. That supports an inference that the increased CVAP was significant – contrary to what the Ninth Circuit held.

5. Thus, the Ninth Circuit has established a standard for redistricting cases that permits lower

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[2] The City seizes on an error in Plaintiff's Petition that is largely irrelevant. CD 10's pre-redistricting African-American CVAP was 36.8%, well-below the 40% CVAP threshold that Wesson identified as necessary to ensure an African-American representative on the City Council. The map dictated by Ellison increased the African-American CVAP to 43.1%. The final map lowered the African-American CVAP to 40.5%.

[3] Ellison also stated that, in his proposed map, the percentage of African-American registered voters in CD 10 increased to 50.12%.

courts to weigh evidence contrary to with this Court's precedent.

III. THIS CASE IS NOT MOOT.

1. The City argues that this Court should decline to review this case because the case will soon be moot. This Court rejected a similar argument in *Reno v. Bossier Parish School Bd.* (*Bossier II*), 528 U.S. 320 (2000). Like here, that map would not have been used in future elections due to an upcoming census. But this Court rejected the argument because the existing map would be the baseline for future redistricting. *Id.* The same is true here. That alone defeats the City's argument.

2. Moreover, the issues raised in the Petition – particularly the legislative privilege question – are capable of repetition. That "exception 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.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Both criteria are met here.

The City claims that the life of a district map is effectively eight years. In a case challenging local redistricting, which must proceed through three levels of review, that is a short timeframe for an action to reach this Court.

3. The City suggests that the short duration factor is not met because Plaintiffs did not litigate this case expeditiously. Opp. 12. The City is mistaken. Plaintiffs filed this action within four months of the

final vote adopting the map. Summary judgment was heard on September 9, 2014 and granted five months later on February 24, 2015.[4] Judgment was entered on March 3, 2015.

Nor were Plaintiffs dilatory in the appeal. Within weeks of the judgment, on March 27, 2015, Plaintiffs appealed. The case was fully briefed on April 25, 2016. The Ninth Circuit, however, did not issue its opinion until November 19, 2018.

Moreover, Plaintiffs sought to expedite review. First, Plaintiffs sought certification under 28 U.S.C. § 1292(b) of the legislative privilege order, which the City opposed. The motion was denied on March 7, 2014.

Second, citing possible mootness, Plaintiffs moved in April 2015 to expedite oral argument. The City opposed that motion, arguing that the case was unlikely to become moot because the districts would not be redrawn until 2022. The Ninth Circuit denied the motion.

Having successfully blocked Plaintiffs' efforts to obtain earlier appellate review, the City should be judicially estopped from asserting mootness now. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

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[4] That time included five months for the City to prepare a legislative record and several discovery disputes.

The City also implies that Plaintiffs somehow acted improperly by agreeing to a judge-proposed compromise of a motion to compel. The stipulated compromise concerned Plaintiffs' motion to compel, not the later protective order which is the subject of this appeal. Agreeing to compromise an evidentiary dispute does not prevent that party from later challenging a ruling on a different order. Plaintiffs also expressly "reserve[d] their . . . rights and remedies" to challenge any discovery responses improperly withheld.

Plaintiffs likely will experience the same race-based redistricting of CD 10 in the next census. As Wesson stated following approval of the 2012 map, CD 10's boundaries were drawn to ensure an African-American representative "for the next thirty years." If this case evades review, the City, emboldened by the Ninth Circuit, will certainly assert the legislative privilege to foreclose discovery.

4. At the very least, if this Court believes this case is moot, it should vacate the Ninth Circuit's opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

Accordingly, this Court should reject the City's mootness argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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