Nos. 15-55478 and 15-55502

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER LEE, MIRI PARK, HO SAM PARK, GENEY KIM, and YONAH HONG, individuals,

Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES,

Defendant and Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
HON. CONSUELO B. MARSHALL, JUDGE
CASE NO. 2:12-CV-06618-CBM-JCG

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The District Court's order was entered on February 24, 2015, and its judgment for Appellee was entered on March 3, 2015. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1291. The notice of appeal was filed on March 27, 2015, and thus was timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the District Court erred in granting summary judgment in favor of Defendant-Appellee City of Los Angeles ("the City"), where there was substantial direct and circumstantial evidence showing that race was the City's predominant motivation in drawing the boundaries for City Council District 10 ("CD 10").

2. Whether the District Court erred in allowing the City to invoke the qualified legislative privilege to block Plaintiffs from taking discovery about the City's intent. And if that privilege applies, whether Plaintiffs should have been allowed to conduct discovery because intent was an essential element of their *Shaw* claim and the publically available evidence showed that City representatives stated that they drew CD 10's boundaries for an unconstitutional racial purpose.

APPELLANTS' OPENING BRIEF

STATEMENT OF THE CASE

A. Introduction

Plaintiffs-Appellants Peter Lee, Miri Park, Ho Sam Park, Geney Kim, and Yonah Hong (the "Lee Plaintiffs" or "Plaintiffs") are residents of Los Angeles City Council District 10 ("CD 10"). During the 2011 redistricting process, Defendant-Appellee City of Los Angeles ("the City") dramatically altered the boundaries of CD 10 against the overwhelming public input that Koreatown should be in a single district. The Lee Plaintiffs raised a *Shaw* claim that turned on one central question: did the City redraw the lines of CD 10 with a predominantly racial intent?

The evidence recited below establishes that there is at least a triable issue of fact as to whether the City re-drew the CD 10 boundaries with the explicit and overriding goal of keeping an African-American Council member on the Los Angeles City Council for decades. Plaintiffs showed that the Ad Hoc Committee charged with re-drawing the boundaries of CD 10 gathered behind closed doors, insulated from public oversight, where Christopher Ellison (the Commissioner for CD 10 handpicked by Herb Wesson, the City Council President and incumbent of CD 10) systematically and intentionally removed majority Caucasian neighborhoods from CD 10 and replaced them with majority African-American neighborhoods from the surrounding districts. There is no mystery as to why. As

Ellison said, **"[w]e attempted to protect the historical African American incumbents in [CD 10] by increasing the black voter registration"** and these changes **"would allow CD 10 to divest itself of . . . [a] diverse populated area, and increase the [African-American] population."** An alternative map that kept Koreatown intact was suppressed, and the racially-motivated map was then presented to the City's Redistricting Commission. The Commission adopted it after three dissenting commissioners were replaced at the eleventh hour by new commissioners who supported that map.

Plaintiffs demonstrated that once Ellison and the Commission had significantly boosted the number of African-American voters in CD 10, the City Council, under the leadership of City Council President and CD 10 representative Herb Wesson, passed the racially-motivated map with only a few cosmetic changes. Wesson later bragged in a videotaped speech that as a result "**a minimum of two of the council peoples will be black for the next thirty years**."

A comparison of the demographic data from CD 10 before and after the redistricting process also shows that as a result of Wesson's and Ellison's changes, **the proportion of the African-American voting age population to the Caucasian voting age population rose from approximately 2-1 to approximately 3-1**. This dramatically increased the voting power of the

African-American population, who were on the edge of a +50% majority before the redistricting process.

Plaintiffs' redistricting expert, Dr. Kareem U. Crayton, also confirmed that race was the predominant motivation in drawing the CD 10 boundaries. He used a boundary segment analysis—the U.S. Supreme Court's gold standard method for identifying racially motivated redistricting. Dr. Crayton showed that the City had been primarily motivated by race when making the alterations to the CD 10 map by showing that a majority of the boundary segments of CD 10 were drawn to concentrate African-American voters inside the district and concentrate non-African-American voters outside the district.

The District Court (Hon. Consuelo B. Marshall) erred by granting summary judgment in favor of the City on Plaintiffs' *Shaw* claim. It failed to construe facts and inferences in favor of Plaintiffs and resolved disputed factual issues without a trial. The District Court overlooked key evidence provided by Plaintiffs of predominantly racial intent and only examined portions of Plaintiffs' evidence piecemeal. In granting summary judgment for the City, the District Court also radically departed from the *Shaw* standard by adding additional requirements to the racial predominance test.

The District Court separately erred by preventing Plaintiffs from obtaining any meaningful discovery about key City officials' intent in changing the CD 10

boundaries. It blocked Plaintiffs from deposing key witnesses on issues of intent, holding that questions of motivation were protected by the qualified legislative privilege. No such privilege applies here, but even if it did, racial intent is the central question raised in any *Shaw* claim. An inquiry into legislative motive requires examining the motivations of individual legislators. The legislative privilege, which is a qualified privilege, is overridden in such circumstances.

This case should be remanded for a trial of Plaintiffs' *Shaw* claim. The Protective Order should be vacated, so Plaintiffs can conduct discovery unhampered by it.

B. Factual Background

1. Council District 10.

CD 10 is west of downtown Los Angeles and split in half by the Santa Monica Freeway. ER255. It was one of the City's most underpopulated districts with 240,540 residents, about 4.9% below the required population size. ER957, 1843. 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%. ER957. CD 10's registered voters were 49.1% African-American. ER2093.

The northern portion of CD 10 includes part of Koreatown, a longstanding neighborhood in the "Mid-Wilshire" area of Los Angeles. On August 5, 2003, the

City certified the Wilshire Center-Koreatown Neighborhood Council ("WCKNC") and its boundaries. ER883-1840.[1] Koreatown is 52.4% Latino and 35.4% Asian. ER906.

2. Initiation of the 2011-2012 Redistricting Process.

In August 2011, the City Council, the Mayor, the Controller, and the City Attorney appointed Commissioners to the 21-member Redistricting Commission responsible for recommending district boundary lines to the City Council. City Council President Herb Wesson, the African-American representative of CD 10, appointed Christopher Ellison, an African-American sports agent with no prior experience with redistricting issues. ER225-29.

The Commission divided its members into "Ad Hoc Regional Line Drawing Committees" covering three "regions": (1) San Fernando Valley; (2) West and Southwest Los Angeles; and (3) East and Southeast Los Angeles. ER172, 323, 652-54. The *explicit* purpose of the Ad Hoc Committees was to "avoid any Brown Act issues," i.e., evading the requirement for governmental meetings to be held in public. ER653.

[1] In 1999, a commission charged with revising the City Charter recommended the creation of neighborhood councils to "promote more citizen participation in government and make government more responsive to local needs." Los Angeles City Charter, § 901.

3. The Public Testified Overwhelmingly that Koreatown Should be in a Single Council District.

Between December 5, 2011, and January 10, 2012, the Commission held 15 public hearings, one in each of the 15 City Council districts, ostensibly to ensure maximum public participation in the redistricting process. ER321, 1893-1914. Over 95% of the public interest-holders who spoke at the public hearings in CD 10, CD 4, and CD 13 requested that Koreatown, as defined by the WCKNC, be kept in a single district. ER184, 321-22, 339-650. In the closed-door deliberations of the Ad Hoc Committees, the Commissioners were not provided with any analyses or summaries of the public hearings. ER171-72, 241.

4. The Ad Hoc Committee Adopted Commissioner Christopher Ellison's Map with the Sole Purpose of Increasing the African-American Registered Voters in CD 10.

The Ad Hoc Committees were the most important part of the redistricting process. ER172. Their decisions—particularly with respect to CD 10—effectively controlled the entire map-drawing process.

The West/Southwest Committee handled CD 10 and four other districts. ER324, 654. The committee was composed of a Commissioner representing each district, plus Helen Kim (the City Controller's appointee) and Julie Downey (the City Attorney's appointee). *Id*.

Commissioner Ellison had enormous control over the West/Southwest Committee because the other Commissioners deferred to him about the boundaries of CD 10. ER261. At that Committee's first meeting on January 19, 2012, Ellison initiated the re-mapping of CD 10 by giving Nicole Boyle, the "Technical Director," a series of coordinates and instructing her to draw new boundaries for CD 10 and then overlay on this map the African-American demographics for each of its census tracts. ER174-75, 184, 325. The City never explained where these coordinates came from. 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%. ER185.

Ellison directed Boyle to adjust the boundaries of CD 10 until the percentage of African-American registered voters reached the desired level. ER174-75, 185, 325. Ellison told Boyle to place into CD 10 certain African-American neighborhoods, including Leimert Park, the "Dons" portion of Baldwin Hills, and other heavily African-American neighborhoods and communities. *Id*. Ellison also told Boyle to remove from CD 10 a substantial portion of the "Palms" neighborhood, a densely populated neighborhood with a minority of African-Americans. ER326, 1322-23.

From that point, Ellison repeatedly rejected any other proposed map if it did not increase the African-American registered voting population in CD 10. ER176, 1319-20.

5. Only Commissioner Christopher Ellison's Map of CD 10 Was Presented to the Dispute Resolution Committee.

On January 20, 2012, the West/Southwest Committee voted on both Ellison's CD 10 map (the "Ellison Map") and an alternative map presented by Commissioner Helen Kim, which placed all of Koreatown in CD 10. Both maps received the same number of votes and therefore should have been submitted to a "Dispute Resolution" subcommittee. ER185, 326. But that did not happen: only the Ellison Map was presented to the subcommittee. ER185, 327. The City has never explained why.

The map later presented to the full Commission thus reflected only Ellison's changes to CD 10. ER177, 185, 327. That map did not include any changes to CD 10 from any alternative proposed map, including Commissioner Kim's proposal. ER327.

On January 25, 2012, the Commission voted to present the maps created in the Ad Hoc Committees, including the Ellison Map, to the public. ER185, 327. The Commission also rejected a proposed map that would have placed the entirety of Koreatown in CD 13. ER330, 853-67, 1916-56. The boundaries of CD 10 in

that were presented to the public were essentially identical to those in the Ellison Map. ER185, 327.

6. Commissioner Christopher Ellison Expressly Stated That the New Boundaries for CD 10 were Designed to Increase African-American Voters and Ensure that CD 10 Continued to Elect African-Americans.

On January 20, 2012, after the West/Southwest Committee met, Ellison sent an email to the other Committee members describing the motivation and purpose behind the Ellison Map:

> 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.**

ER325, 327, 664 (emphasis added). 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.**

ER325, 327, 665 (emphasis added).

7. Subsequent Public Hearings Confirmed the Virtually Unanimous Desire of Interest-Holders to Place Koreatown in a Single City Council District.

On February 1, 2012, the Commission held a public hearing on the Commission Map for the "Central Region," which included Koreatown. ER1345. Over 90% of the persons who spoke at this hearing asked for Koreatown to be put in one district. ER186, 329, 669-774. Various groups presented alternative maps to the Commission that kept Koreatown intact in one district. ER329, 775-851.

8. Dissenting Commissioners Were Removed to Guarantee Passage of Commissioner Ellison's Map.

The City took steps during the redistricting process to remove any viable opposition to the Ellison Map. Three commissioners who vocally opposed the proposed lines for CD 10 were removed and quickly replaced late in the Commission's deliberations. ER170-71, 173-74, 202. Each replacement Commissioner voted for the Ellison Map. *Id.*

As a result, the Commission disregarded alternatives in favor of the racially-motivated Ellison map. At its February 15, 2012 meeting, the Commission confirmed the relocation of the Leimert Park and Baldwin Hills neighborhoods into CD 10. ER330, 853-67, 1943-53. The Commission also removed a large population segment from CD 10, despite CD 10's need to *gain* population. ER1843. Almost a quarter of CD 10's constituency was exchanged for people from other neighborhoods. ER2124. Caucasian voters were moved out

of CD 10 and placed in other districts. ER265. In their place, the Commission substantially increased the number of African-American voters in CD 10. *Id*.

On February 22, 2012, the Commission approved its map (the Commission's Map) and sent it to the City Council for approval. ER330, 1954-56, 1970-92. The Commission's Map had boundaries for CD 10 that were essentially identical to those in the Ellison Map. ER956-58, 2270-88. Under the Commission's Map, African-Americans increased to 43.1% CVAP in CD 10; Caucasian CVAP decreased to 11.1%; and Asian-American CVAP and Latino CVAP remained essentially unchanged at 16.3% and 27.6%, respectively. ER957. The Commission submitted the Commission's Map along with its Final Report and Recommendations—including Christopher Ellison's racially-charged email to the City Council. ER883-1840.

9. The City Council Approved the Commission's Map with Few Material Changes and with Substantially More African-American Registered Voters in CD 10 than the Original CD 10.

The City Council used a short, truncated hearing process to approve the Commission's Map. After holding just three public hearings over less than two weeks (ER2109), on March 14, 2012, Gerry F. Miller, the City's Chief Legislative Analyst, issued a report recommending certain revisions to the Commission's Map. The changes to the Commission's Map for CD 10 were largely inconsequential. ER2110-22, 2225-30, 1328.

On March 16, 2012, the City Council adopted the Commission's Map, as amended, by a vote of 13-2, and instructed the City Engineer to prepare a "metes and bounds" version of the map, which was part of the final Redistricting Ordinance. ER2232-39. The City Council passed the final Redistricting Ordinance on June 20, 2012. ER2266. The Redistricting Ordinance was signed and published on June 22, 2012. ER2267.

As desired by City Council President Wesson and his hand-picked Commissioner Ellison, the end result was a CD 10 in which the African-American CVAP for CD 10 is 40.5% and the proportion of the African-American voting population to the Caucasian voting age population rose from approximately 2-1 to approximately 3-1. ER2356.

10. The City Council President and Representative of CD 10 Herb Wesson Stated That Redistricting Would Ensure African-American Council Members for 30 Years.

After the City passed the racially motivated redistricting plan, City Council President Herb Wesson confirmed in public that he had used the redistricting process to ensure that "**a minimum of two of the council peoples will be black for the next thirty years**." ER180. Wesson also stated that **"[his] priority" was making sure "we have a black vote or two on that council."** ER181. During the same meeting, Wesson made clear, albeit in comments about another city council district, the importance of making CD 10 a near-majority

African-American district: "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." *Id*.

C. Procedural History.

Plaintiffs brought a federal civil rights case against the City, claiming that the City violated the Equal Protection Clause of the Fourteenth Amendment (the "*Shaw* Claim") by drawing CD 10's boundaries predominately to include or exclude voters based upon their race. This *Shaw* Claim required Plaintiffs to prove legislative intent, namely, that the City ignored traditional redistricting criteria in favor of a specific racial purpose.

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"). The Haveriland Action 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.

1. Haveriland Protective Order and Consolidation of Cases.

To obtain evidence concerning the central issue in the case—the motivation of the legislative officials who created and approved the new City Council District boundaries—the Haveriland Plaintiffs sought to depose several City officials,

including City Council President Herb Wesson. *See* Haveriland Action, Dkt. No. 27 at ¶ 8. At that time, the Haveriland Action and the Lee Action had not been consolidated. *See* ER2480-81. In response to the Haveriland Plaintiffs' deposition requests, the City filed a Motion for Protective Order in the Haveriland Action on August 22, 2013. *See* Haveriland Action, Dkt. No. 24. The City's motion did not just seek to limit lines of questioning, it sought to prohibit certain depositions, including the deposition of City Council President Herb Wesson. *Id*.

On August 23, 2013, after the Motion for Protective Order had been filed, the District Court consolidated the Lee Action with the Haveriland Action (together, the "Actions"). ER2480-81. The Lee Plaintiffs then joined in the opposition to the motion and participated at oral argument. ER2475-79. Despite recognizing that the legislative privilege is qualified, Magistrate Judge Gandhi granted the City's motion for a protective order. ER2473-74.

The Haveriland Plaintiffs, supported by the Lee Plaintiffs requested that the District Court reject Magistrate Judge Gandhi's decision. ER2396-2438, 2380-95. The District Court held that Magistrate Judge Gandhi's ruling was "not clearly erroneous." ER2379. Both sets of Plaintiffs moved for certification for interlocutory appeal. ER2367-78. The District Court refused certification. ER2358-66. 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 map drawing for CD 10.

2. Discovery and Subsequent Summary Judgment Motion.

Throughout the discovery process, Plaintiffs were repeatedly stymied by the City's invocation of the legislative privilege and the District Court's Protective Order. For Christopher Ellison and the few other depositions that were allowed to proceed, the City repeatedly blocked any questioning that could conceivably relate to the intent of the deponent or any other City official or representative. ER223, 229-30, 232, 239. The City also withheld any and all documents concerning the motivation behind the creation and passage of the new City Council District boundaries. ER2511-35.

On February 24, 2015, for reasons we discuss below, the District Court entered summary judgment in favor of the City. ER2-27. The Lee Plaintiffs filed their notice of appeal on March 27, 2015. ER28-31.

SUMMARY OF ARGUMENT

Based on the following evidence, there was at least a triable issue of fact as to whether race was the predominant factor in drawing the boundaries of CD 10:

- Statements made during the redistricting process by Christopher Ellison, the commissioner representing CD 10 on the Redistricting Commission, that increasing the African-American population in CD 10 was the goal of the committee that drew the lines for CD 10. ER325, 664-65.

- Declarations by 4 of the 7 Commissioners on the Committee that drew the initial map of CD 10 that Commissioner Ellison pursued a race-based goal. ER121-30, 169-78, 182-87, 198-204, 319-31.

- Evidence that the City removed Caucasian neighborhoods from the western portion of CD 10 even though CD 10 was severely under-populated. ER272, 1843.

- Evidence that the City moved African-American neighborhoods from CD 8 to CD 10, when other adjacent districts were more overpopulated than CD 8. ER272-73.

- Evidence of departures from procedural norms that allowed the race-based map for CD 10 to pass through the process without significant changes. ER127-28, 185, 326-27.

- Evidence that alternative maps for CD 10 were rejected because they did not achieve the desired race-based goals. ER127-28, 176, 185, 326-27, 853-67, 1319-20, 1916-56.

- Evidence that the Redistricting Commission kept the crucial stages of the line-drawing process from public view. ER172, 652-54.

- Evidence that Commissioner Ellison, with no previous redistricting experience, was put in charge of drawing the CD 10 lines by City Council President and CD 10 representative Herb Wesson. ER225-29.

- Evidence that commissioners were appointed late in the process just to approve the race-based plan for CD 10. ER170-74, 202.

- Evidence that commissioners who opposed the race-based plan for CD 10 were removed from the Redistricting Commission. ER170-74, 202.

- Evidence that the final map for CD 10 went against the overwhelming public opinion to place Koreatown in one district. ER126, 184, 321-22, 332-650.

- Evidence that it was possible for Koreatown to be placed in one district if the City had not pursued its race-based goals. ER129, 187, 272-73, 329-31.

- A Boundary Segment Analysis showing that the changes to the CD 10 map were made because of race. ER269-72.
- 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. ER2356.
- City Council President Herb Wesson, the representative from CD 10's, statement that the goal had been to make sure that there would be a African-American City Council representative from CD 10 for the next 30 years. ER180-81.

The Protective Order should be vacated because no qualified legislative privilege applies to state and local officials, and no privilege should apply when government misconduct is at issue. Even if it does, it was overcome because all eight factors for the qualified privilege balancing test weigh in favor of vacating the Protective Order.

STANDARD OF REVIEW

The Court applies de novo review when examining a summary judgment ruling. *Smith v. Hardy*, 308 F. App'x 216, 217 (9th Cir. 2009) (applying de novo review); *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 326 (9th Cir. 1995) (same); *Prejean v. Foster*, 227 F.3d 504, 508 (5th Cir. 2000) ("This court reviews the granting of summary judgment de novo and applies the same criteria as the district court.").

De novo review is also the correct standard for reviewing the District Court's Protective Order based on the legislative privilege. Although discovery orders are generally reviewed for abuse of discretion (*e.g., Wharton v. Calderon*,

127 F.3d 1201, 1205 (9th Cir. 1997)), determinations of privilege are reviewed de novo. *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995) ("We review de novo the district court's rulings on the scope of the attorney-client privilege as they involve mixed questions of law and fact."); *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (same); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) (the correct standard of review for a claim of the state secrets privilege is "[d]e novo review as to the legal application of the privilege" because "the determination of privilege is essentially a legal matter based on the underlying facts").

De novo review is also required here because the issues raised require constitutional interpretation. *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 n.6 (9th Cir. 1993) ("Although the size and complexity of the record support applying a deferential standard to the district court's factual findings, precedent establishes that the de novo standard of review is appropriate for mixed questions involving constitutional issues."); *United States v. Scampini*, 911 F.2d 350, 351 (9th Cir. 1990) ("Both of [appellant's] arguments require us to address questions of constitutional law and thus our standard of review is de novo.").

LEGAL ARGUMENT

I. SUMMARY JUDGMENT STANDARD FOR *SHAW* CLAIMS

The legal standard for a *Shaw* claim is well-established. 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 v. Hunt* (*Shaw II*), 517 U.S. 899, 907 (1996).[2] 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 they require an intensely factual inquiry. *Prejean*, 227 F.3d at 509 ("Legislative motivation or intent is a paradigmatic fact question.") (citing *Hunt v. Cromartie*

[2] The City made no attempt whatsoever to prove that its redistricting of CD 10 would survive strict scrutiny. Nor can it. The City has presented no evidence that it had any compelling interest whatsoever in engaging in race-based redistricting. For example, the City has openly acknowledged that CD 10 is not a district in which Voting Rights Act preclearance is required. ER2340 n.8 ("The City of Los Angeles has never been covered by section 5 [of the Voting Rights Act]."). Nor has the City made any effort to demonstrate that its redistricting process or result was narrowly tailored to achieve any compelling interest. The City has not presented any evidence demonstrating that it considered any alternative to the race-based redistricting in which it engaged. Because the City has not provided any justification for a race-based goal, that inquiry is over. *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1276 (11th Cir. 2002) ("Race-based districting cannot survive strict scrutiny absent a compelling state interest[.]"). The City has waived its opportunity to attempt to justify using race as a predominant motivating factor. *United States v. Patzer*, 284 F.3d 1043, 1046 (9th Cir. 2002) (holding that the government could not raise "a completely new theory" justifying an alleged constitutional violation where "there was no reason that it could not have been argued" in the government's original briefing).

(*Cromartie I*), 526 U.S. 541, 549 (1999)); *accord Woullard v. Mississippi*, No. 3:05 CV 97, 2006 WL 1806457, at *7-8 (S.D. Miss. June 29, 2006); *Polish Am. Cong. v. City of Chicago*, 226 F. Supp. 2d 930, 937 (N.D. Ill. 2002).

Conflicting evidence regarding the predominance of racial intent precludes summary judgment in a *Shaw* case. It presents a factual issue that only the factfinder can resolve at trial. *Cromartie I*, 526 U.S. at 552 ("[I]t was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage."); *Prejean*, 227 F.3d at 514 ("appellants' evidence raises a factual issue as to whether race was the predominant motivation").

The District Court was not empowered to grant summary judgment in the City's favor unless there was no genuine question of material fact about the racial motivation behind CD 10's boundaries. *Prejean*, 227 F.3d at 509. The District Court was required to construe all facts and inferences in favor of Plaintiffs as the non-moving parties. *Cromartie I*, 526 U.S. at 552; *Prejean*, 227 F.3d at 510 (district court "should have drawn all inferences in favor of the appellants and included in its consideration the evidence they adduced"); *Robertson v. Bartels*, 148 F. Supp. 2d 443, 447 (D.N.J. 2001) (discussing defendant's summary judgment burden in a *Shaw* claim); *see also Johnson v. Mortham*, 915 F. Supp. 1529, 1540–41 (N.D. Fla. 1995) (denying defendant's motion for summary judgment in racial gerrymandering case because defendant had "failed to present

supporting evidence showing that no material question of fact remained on Plaintiffs' claims").

It is reversible error to credit the asserted inferences of the City over those advanced by Plaintiffs. *Cromartie I*, 526 U.S. at 552 ("Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding. . . . [I]t was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.").

II. PLAINTIFFS' EVIDENCE CREATED A TRIABLE ISSUE OF FACT AS TO WHETHER CD 10'S BOUNDARIES WERE DRAWN TO FAVOR AFRICAN-AMERICAN CANDIDATES.

The District Court concluded that Plaintiffs "fail[ed]" to "provide evidence of the City's racial motivation." ER21. That is incorrect.[3]

The direct evidence shows that race predominated in the drawing of the lines for CD 10 or, at a minimum, that issues of fact exist about racial predominance.[4] City Council President Herb Wesson and his hand-picked commissioner,

[3] Although the District Court discussed at some length the redistricting process as it relates to other districts, that information is irrelevant. The correct inquiry for a *Shaw* claim is to examine individual districts, not the plan as a whole. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*.") (original emphasis).

[4] In fact, if direct evidence is presented tending to show that race was the predominant motivating factor, as it was here, the court "need not even consider—much less rest [its] holding on—circumstantial evidence." *Hays v. Louisiana (Hays III)*, 936 F. Supp. 360, 368 (W.D. La. 1996).

Christopher Ellison, had inordinate influence over the boundaries of CD 10. ER257 ("Correspondence from the commissioners, suggests, not surprisingly, that each appointed commissioner led in fashioning the boundaries for his or her corresponding council district."). Wesson had huge sway because he was the Council member from CD 10 and City Council President. ER297-98 ("Aside from the agenda setting authority that comes with his office as Council President, Wesson had a key role in appointing members of the Commission including Commissioner Ellison . . . . [t]he Council President's influence extended to the Council's review of the mapping recommendations provided by the Commission. Aside from his position as Council President, Wesson chaired the Rules Committee that considered the Commission's recommendations to the Council. Any of the subsequent alterations to the maps . . . occurred under his control, and they were summarily accepted by the full City Council."). Behind closed doors, Commissioner Ellison had control, because other Commissioners deferred to him on the boundaries of CD 10. ER261.

The Ad Hoc Committees were the most important part of the redistricting process. ER172. Their decisions—particularly with respect to CD 10—set the course for the entire map-drawing process. ER295 ("[The Ad Hoc Line drawing committees] were not informal gatherings for the early discussions of concepts and

ideas; instead they were critical sites where the crucial choices about redistricting were considered, debated and settled.").

The Ad Hoc Committee charged with re-drawing the boundaries of CD 10 gathered behind closed doors, insulated from public oversight, and watched as Ellison systematically, repeatedly, and intentionally removed majority Caucasian neighborhoods from CD 10 and replaced them with majority African-American neighborhoods from the surrounding districts. ER172, 323, 652-54. Ellison rejected any other proposed map if it did not increase the African-American registered voting population in CD 10. ER176, 1320.

Ellison sent an email to the other Committee members confirming the motivation of the Ad Hoc Committee in making these changes:

> 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.**

ER325, 664 (emphasis added).

Ellison also confirmed that race was the sole motivation for removing a portion of the Palms area 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.**

ER325, 665 (emphasis added).

The Ad Hoc Committee and then the full Redistricting Commission adopted Ellison's racially-motivated map for CD 10. ER177, 185, 327, 330, 853-67, 1954-56. The Redistricting Commission then sent its Final Report and Recommendations—including Ellison's race-based email—to the City Council. ER883-1840.

The City Council made minor cosmetic changes to the map, but, under the leadership of City Council President Wesson, did not materially change the voting demographics that Commissioner Ellison created in CD 10. ER185, 266, 327, 2302.

In the process, the City ignored the near unanimous public testimony of the public that called for Koreatown to be placed in a single district. ER321-22, 339-650. Commissioners and experts alike agreed that there is no reason why Koreatown could not have been placed in one district. ER187, 272-73, 329-31.

When the map was all done and approved, City Council President Wesson crowed about it in public. He had used the redistricting process to make sure that

"**a minimum of two of the council peoples will be black for the next thirty years.**" ER180-81. Wesson also stated that "[his] priority" was making sure "we have a black vote or two on that Council." *Id*. During the same meeting, Wesson noted that, with respect to another City Council district, "**You have to realize that 40% of the voting—the voters in the 9th district are black. You will be very powerful, 'cuz they will never be able to get reelected without us. Ever.**" *Id*. (emphasis added).[5] These racially-charged statements by the City Council President are powerful evidence of legislative intent because he appointed the key commissioner, Ellison, who drove the racially-motivated redistricting of CD 10. *Busbee v. Smith*, 549 F. Supp. 494, 510 (D. D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) (holding that a statement made by the Speaker of the House of Representatives to a private audience was relevant to the racial gerrymandering claim "because [the Speaker] appointed the House conferees—the ultimate decision-makers in the congressional reapportionment process.").

The demographics confirm what Wesson and Ellison set out to achieve. Altering CD 10's boundaries both maximized the percentage of African-American

[5] Racially-charged statements by individual legislators demonstrate that the legislative body acted with unconstitutional intent. *See, e.g.*, *Diaz v. Silver*, 978 F. Supp. 96, 119 (E.D.N.Y. 1997) (holding that statements by legislators "evidence[d] awareness of the centrality of race to the redistricting process."); *Backus v. S. Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C. 2012) (finding that trial testimony from a state legislator who recalled private discussions between legislators regarding the use of race in redistricting "strongly suggested that race was a factor in drawing many district lines").

voters in that district and minimized the non-African-American voters there. The African-American CVAP of CD 10 increased from 36.8% to 40.5%, while the Caucasian CVAP declined from 15.9% to 12.3%. ER2356. The ratio of African-American CVAP to Caucasian CVAP increased from 2.3 to 1 to 3.2 to 1. *Id.* It is also telling that Wesson, the Council member from CD 10, considered a 40% plurality of African-Americans in a neighboring district sufficient to ensure that no other group could "get reelected without us. Ever." ER180-81. Further, many of the non-African-American residents added to CD 10 have had lower voter participation than the residents they replaced, magnifying the influence of the African-American CVAP in CD 10.[6]

According to census data from 2010 submitted by the City, there was a 49.1% African-American Voter Registration for CD 10 in 2011. ER2093. This means that before the adoption of the new CD 10 map, African-Americans were close to achieving a majority of registered voters in CD 10; even a marginal increase in the African-American population in CD 10 was likely to give these voters a controlling majority. This was Ellison's stated goal. ER1319 ("As Chris

[6] ER301 ("[T]he Council replaced African Americans with Latino residents living in places that had never been part of CD 10. Given the express goal to create a functional majority of registered voters, the Council's tradeoff of African Americans for Latinos (as opposed to white voters who had been excised from CD 10) is quite calculated. Latino voter participation is not as robust as other racial groups.").

candidly acknowledges in his summary, his goal was to raise Black registered votes to over 50%.").

Dr. Kareem U. Crayton's boundary segment analysis[7] on CD 10, the same analysis done by the expert in *Cromartie*, further supports Plaintiffs' claim that race was the predominant factor in CD 10's redistricting. ER269-71. A majority of boundary segments immediately inside the CD 10 boundary (54%) had a higher percentage of black voting age population ("BVAP") than the boundary segment immediately outside CD 10. ER270. This indicates that race was the predominant factor in the redistricting of CD 10. David W. Peterson, *On Forensic Decision Analysis*, 18 J. OF FORENSIC ECONOMICS (2005) at 42 (discussing a boundary segment analysis and noting that a "percentage, being greater than 50%" lends credence to the claim that race was the dominant factor in the decision-making).

[7] Boundary segment analysis is a well-accepted method for demonstrating legislative intent. The Supreme Court endorsed it in *Cromartie I* and *Cromartie II* to determine the role race played in redistricting. *Cromartie I*, 526 U.S. at 548 (discussing an expert's boundary segment analysis); *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 251 (2001) (relying on boundary segment analysis as part of basis for Court's holding). Boundary segment analysis is mathematically based. For each piece of a district's perimeter ("boundary segment"), the "relevant comparison is between the inside precinct that touches the segment and the corresponding outside precinct." *Cromartie I*, 526 U.S. at 548 n.5. The percentage of a racial group in the "inside" precinct is compared with the percentage for the same racial group in the "outside" precinct. If a majority of the boundary segments yields a higher percentage of a racial group inside versus outside, this indicates that race was a predominant factor in the redistricting.

By contrast, in an alternative map proposal submitted to the City, only 44% of the boundary segments had a higher rate of BVAP inside the boundary than outside. ER271. This further demonstrates that the City was motivated predominantly by race. *Id.*

Dr. Crayton also compared CD 10 to other districts in the same area as CD 10. ER270. One such district, CD 8, was a traditionally "majority-minority" district because over 50% of its population was traditionally African-American. *Id.* Yet CD 10, traditionally a "coalition" district, had a higher percentage of BVAP inside than outside its boundaries than did CD 8 (54% vs. 50%). *Id.* CD 10's comparison to CD 8 further shows that race was the predominant factor in the City's redistricting of CD 10. ER272.[8]

At a minimum, Plaintiffs demonstrated that there were disputed issues of fact whether race was the predominant motivation in the drawing of CD 10 boundaries. This Court should reverse the District Court's summary judgment ruling.

[8] Dr. Bruce Cain, the City's expert offered a different interpretation of Dr. Crayton's boundary segment analysis and a modified boundary segment analysis that arrives at a different conclusion. *Cromartie* has already addressed this issue: where there is a conflict between two boundary segment analyses, it is error to resolve the disputed issue of racial motivation at the summary judgment stage. *Cromartie I,* 526 U.S. at 552.

III. THE DISTRICT COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD.

Although Plaintiffs presented significant evidence of racial intent, the District Court committed several errors in applying the summary judgment standard to this evidence.

A. The District Court Erred in Considering Plaintiffs' Evidence in Isolation, Rather than in Its Entirety.

The District Court was required to examine the totality of the evidence supporting Plaintiffs' *Shaw* claim—just as in any constitutional challenge involving improper discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the **totality of the relevant facts**. . . .") (emphasis added); *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (" The court must evaluate the record and consider each explanation within the context of the trial as a whole."); *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"); *Prejean*, 227 F.3d at 512 (same). 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. It did so here.

Rather than considering the *cumulative* effect of all of Plaintiffs' evidence, the District Court improperly dealt with it piecemeal.

The District Court first reviewed Plaintiffs' direct evidence of racial intent in isolation, and concluded that "some individuals involved in the redistricting process . . . may have been motivated by racial considerations. . . . [but the direct] evidence does not permit a fact finder to draw an inference that 'racial considerations predominated the City's drawing of [d]istrict boundaries.'" ER19-21 (quoting *Cromartie II*, 532 U.S. at 257).

The District Court then considered the circumstantial evidence that race was the predominant motivation in the drawing of CD 10's boundaries. Again, the District Court found that while the evidence showed a demographic shift to increase African-Americans in CD 10, this evidence alone could not prove that race predominated. ER22-23.

The District Court erred by failing to consider these two types of evidence together. The only contemporaneous statements in the record from decision makers regarding CD 10 indicate that race was the primary motivation. These statements are then *confirmed* by the circumstantial evidence. It is highly likely that race was the predominant motivation when the CD 10 decision-makers

expressed their intention to raise the African-American CVAP to a specific number and when the demographic changes closely tracked their stated goal. Considered together, the evidence shows that race was the predominant motivating factor in the drawing of CD 10's boundaries or at least that it is a triable issue.

B. The District Court Erred by Failing to Make All Inferences in Favor of Plaintiffs When It Characterized the Racial Changes to CD 10 as "Slight."

The District Court erred by characterizing the demographic changes in CD 10 as "slight." ER18. The Court ignored Plaintiffs' expert's analysis that examined the impact of each demographic change made to CD 10 throughout the process. ER254-74. Dr. Crayton concluded that these changes indicated that race was the predominant factor in the drawing of CD 10's boundaries. ER254 ("My general opinion is that race was the predominant, if not the sole, factor in the drawing of CD 10's boundaries."). Ignoring these expert conclusions was error.

C. The District Court Erred by Failing to Make All Inferences in Favor of Plaintiffs' Evidence that the Shape of CD 10 Was Irregular.

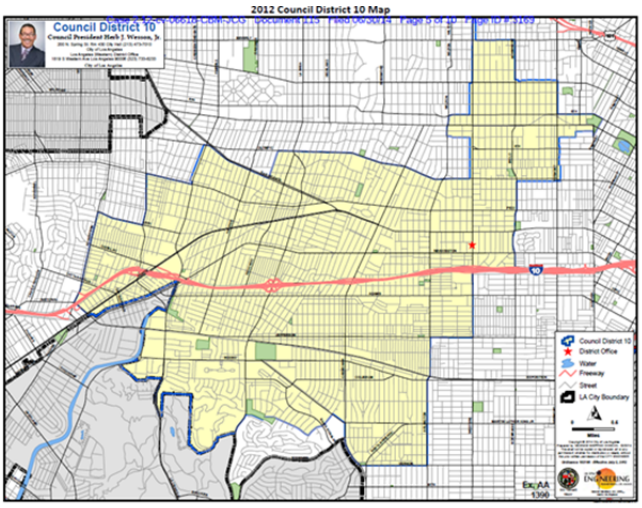
When a map is equally consistent with two competing explanations, one in which race predominates, the fact-finder must determine the correct explanation. *Prejean*, 227 F.3d at 510 (denying summary judgment where evidence supported race-neutral explanation of redistricting decision but it was "equally plausible"—based on racial statistics and evidence of a legislative "objective of creating a black

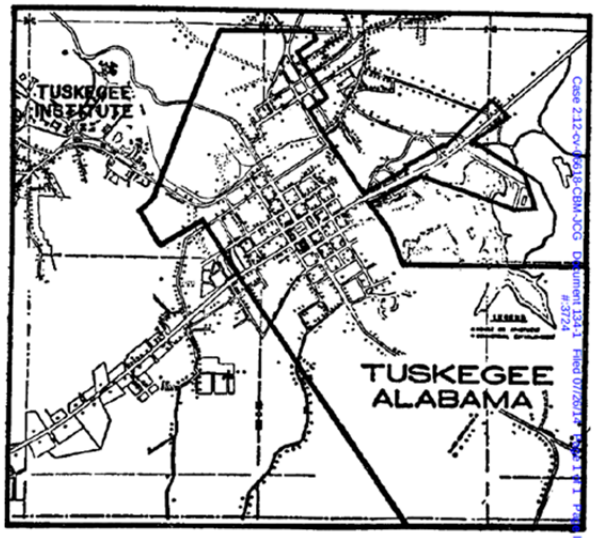
subdistrict"—that race predominated); *Woullard*, 2006 WL 1806457, at *7–8 (because evidence—including boundary segment analysis—was consistent with both racial and non-racial explanations and court was "undecided" on which predominated, summary judgment must be denied, particularly given evidence of statement by Senator that he did not want "those people" in his district); *Hays v. Louisiana*, 936 F. Supp. 360, 369 (W.D. La. 1996) (defendant's race-neutral explanation—although consistent with the final map—was "post-hoc rationalization" given evidence that the "Legislature knowingly allowed race to become the predominant factor driving the enactment of [the district]").

In *Kelley v. Bennett*, the parties presented two competing explanations of the final state map. 96 F. Supp. 2d 1301, 1320–21 (M.D. Ala.), *vacated on procedural grounds, Sinkfield v. Kelley*, 531 U.S. 28 (2000). Plaintiffs, using direct and statistical evidence, argued that the final map was created for racial reasons, while the state proffered race-neutral explanations of preserving communities of interest and "compactness." *Id.* at 1320–22. These competing explanations meant plaintiffs were entitled to a trial on the merits, where they prevailed. *Id.* at 1324. The court at trial found that the interest in maintaining communities of interest "was not an important objective in crafting the Plan's lines." *Id.* at 1321. The court further noted that the State—much like the City here—failed to provide an objective measure of "compactness" and did not make any "comparison[s] to other

districts that would be drawable in the relevant region." *Id*.; *see also Miller*, 515 U.S. at 917 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, 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"); *Prejean*, 227 F.3d at 512 ("At first glance, the shape of the majority-black subdistrict in the 23rd JDC is not as ungainly as the districts in *Shaw* or *Gomillion.* But upon closer inspection, the construction of the judicial subdistricts appears problematic. In this respect, the 23rd JDC resembles the Eleventh District at issue in *Miller:* 'Although by comparison with other districts the geometric shape of the [district] may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering . . . becomes much clearer.'") (quoting *Miller*, 515 U.S. at 917).

The shape of CD 10 is plainly more bizarre than the district in *Gomillion*, which was identified in the *Shaw I* opinion as "so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] voters.'" *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 631 (1993) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 364 (1960)). See the maps below comparing ER2302 (showing in yellow the current shape of CD 10) and ER168 (showing the disputed district in *Gomillion v. Lightfoot*):





(The entire area of the square comprised the City prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city.)

The District Court ignored this evidence when finding that CD 10 did not have an irregular shape. At the very least, because this is a factual issue as to which reasonable minds can differ, this Court should construe the facts in favor of the Plaintiffs and find that CD 10 has a bizarre shape or at least that the evidence raises a triable issue.

D. The District Court Erred by Minimizing the Evidence of Control That City Council President Herb Wesson and Commissioner Christopher Ellison Had Over the Drawing the Boundaries of CD 10—Herb Wesson's District.

The District Court conceded that Commissioner Ellison and Council President Wesson "may have been motivated by racial considerations." ER21. However, the District Court entirely failed to recognize the relative importance of these actors in the line-drawing of CD 10. Instead, the District Court treated these

individuals as just two of many legislators, rather than recognizing their outsized influence on the shaping of the CD 10 map. *Id.*; ER257-59.

The racially-charged statements of a particularly influential legislator are a strong indicator of racially-discriminatory intent. *Busbee*, 549 F. Supp. at 516 ("Overt racial statements, . . . provide . . . one basis for finding discriminatory intent."); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (affirming district court's finding of liability under the Fourteenth Amendment on the basis of "statements by citizens, including the defendants, which in a different context might not illustrate racial bigotry" but given the context were "interpreted by the trial court as 'camouflaged' racial expressions"). That the Commissioner, who directed the drawing of CD 10's boundaries admittedly for race-based reasons, was appointed by a powerful member of the City Council (Wesson), who then voted to approve that map with the stated purpose of ensuring predominance of a particular race, at least creates a triable issue as to whether race predominated in the redistricting of CD 10. *Busbee*, 549 F. Supp. at 502 ("[Chairman] utilized the full power of his position and personality to insure passage of his desired Congressional plan.").

The District Court ignored the evidence of Ellison and Wesson's influence by concluding that even though "one Commissioner expressed racial concerns and one Councilmember praised the Redistrict [sic] Ordinance after it was passed," this

"cannot be imputed to prove the City's motivation." ER21. There is no clearer-cut evidence of the City's motivation than the statements of the City Council President and his chosen Commissioner. Having done what they said they were going to do, their intent shows that the redistricting of CD 10 was race-based, or at least that this is a triable issue of fact.

E. The District Court Erred by Failing to Recognize the Importance of the Ad Hoc Line-Drawing Process, and the Procedural Irregularities Throughout the Line-Drawing Process.

The Ad Hoc Committees were the most important part of the redistricting process. ER172. Their decisions—particularly with respect to CD 10—set the course for the entire map-drawing process. ER295 ("[The Ad Hoc Line drawing committees] were not informal gatherings for the early discussions of concepts and ideas; instead they were critical sites where the crucial choices about redistricting were considered, debated and settled."). However, there was no mention of this in the District Court's opinion. Instead, the Court devoted much time to discussing other parts of the process that were much less consequential to Plaintiffs' *Shaw* claim. ER4-12. The Court also ignored the procedural irregularities with respect to CD 10.

First, inexperienced or unqualified commissioners, most particularly Commissioner Ellison, were appointed to the Commission. ER173-74, 225-29. In *United States v. Yonkers Bd. Of Educ.*, the Court held that the defendant intended

to preserve racially segregated neighborhoods, based on (among other things) the defendant's appointment of advisory committee members who "had no planning or zoning experience" and whose "major qualification appear[ed] to have been that they were white residents of the School 4 area." 837 F.2d 1181, 1221-22 (2d Cir. 1987). The same is true here. Ellison, an African-American and the handpicked selection of Council President Wesson to represent CD 10, had no prior redistricting or city planning experience. ER226-229. Yet Ellison became the prime architect of the new CD 10 map, which increased the African-American CVAP in CD 10. Throughout the process he was adamant that the African-American voting registration numbers in CD 10 had to increase. He brooked no dissent or compromise. ER176, 1320.

Ellison was not the only commissioner appointed solely to support the racially-motivated map. Three of the commissioners were replaced almost immediately before the Commission's final vote because they voiced opposition to CD 10's boundaries. ER173, 202. The replacements were not privy to the Ad Hoc Committee discussions, the public hearings, or any of the redistricting process. Their only significant contribution was to do the bidding of their bosses and vote for the Commission's plan. ER173.

Second, in *Sunrise Development, Inc. v. Town of Huntington*, the court held that discriminatory intent could be shown because the defendants did not allow for

consideration of public input. 62 F. Supp. 2d 762, 775 (E.D.N.Y. 1999). Although the public presented their views at a public hearing, the law went into effect before the public input could be taken into account. *Id*. at 768-69. From that record, the court determined that there was a "substantial likelihood that discrimination played a central role in the Town's decision[.]" *Id.* at 776.

Here, the Commission did not allow for meaningful consideration of public input. By dividing into Ad Hoc Committees, the City avoided the Brown Act requirement to have public meetings. The Commission staff then failed to provide any analysis of the public opinion to the Ad Hoc Committees, and did not make the public testimony available to individual Commissioners. ER172, 241. As in *Sunrise Development*, the public's testimony at public hearings was meaningless because such testimony was of no consequence to the decision-making of the legislative body.

Third, there were internal inconsistencies in the decision-making process as it related to CD 10. In *Dailey v. City of Lawton*, the Tenth Circuit affirmed the determination of racial motivation where the defendant city refused to rezone a portion of the city for low-income housing even though the surrounding area had been rezoned and Planning Commission members testified that there was no reason the land in question could not also be re-zoned. 425 F.2d 1037, 1038-1040 (10th Cir. 1970). Commissioners and experts alike agreed that there is no reason why

Koreatown could not have been placed in one district. ER187, 272-73, 329-31. This deviation from the redistricting norm of keeping neighborhood councils in a single district is evidence of a racial intent that, along with the other evidence of racial motivation, made it reversible error for the District Court to have granted summary judgment.

Fourth, the Commission removed voters from CD 10 despite the need to add population to this district. In *Woullard v. Mississippi*, the Court examined a Mississippi senate district that needed to add population. 2006 WL 1806457, at *7. There, the Mississippi legislature removed African-American residents and added in new residents. The court found that this was "compelling documentary evidence" of racial intent, and allowed the case to proceed to trial "clearly impressed with the strength of the plaintiff's case." *Id*. at *7-8. The same is true here. CD 10 was severely underpopulated, and yet the City *removed* Caucasian neighborhoods from the western portion of CD 10. ER272, 1843. The City also added African-Americans residents from CD 8 when other adjacent districts were more overpopulated than CD 8. ER272-73.

For these reasons, the Plaintiffs should have been permitted to proceed to trial.

F. The District Court Erred by Holding that A *Shaw* Violation Could Only Be Found if the Minority Population Achieved a "Controlling Electoral Majority."

The District Court rejected plaintiffs' *Shaw* claim, because it did not believe that there was a "controlling electoral majority"[9] in CD 10. It reasoned that "[t]he Supreme Court has never applied *Shaw* principles to invalidate a district in which the alleged favored minority population does not represent a controlling electoral majority." ER17. This is not the law.[10]

First, a "controlling electoral majority" has never been a requirement for a *Shaw* claim. The Supreme Court has ruled on the constitutionality of four different redistricting processes challenged under *Shaw*, finding for the plaintiff in three of the four.[11] In *Cromartie I*, the Court was faced with a district in which the African-

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[9] This factual finding itself is wrong. (Section II above).

[10] The District Court appears to have concluded that regardless of the evidence of racial intent, the map was constitutionally acceptable because the City did not deviate from traditional redistricting criteria. ER24 ("The evidence presented to this Court, therefore, demonstrates that the City's changes to CD 10 were consistent with traditional redistricting principles."). The District Court's reasoning conflates the search for a legislator's motive (what *Shaw* is about) with a decision about the particular changes to the district. For example, if the City unified every neighborhood council in perfectly compact districts, but it did so predominantly to achieve a certain racial result, that would violate *Shaw* but not the District Court's test. This is clearly wrong.

[11] The Supreme Court's *Shaw* jurisprudence consists of six cases. Two pairs of those cases (*Shaw I* and *Shaw II*, and *Cromartie I* and *Cromartie II*) dealt with the constitutionality of the same apportionment plan. In three cases, the Supreme Court held in favor of Plaintiffs. *Miller v. Johnson*, 515 U.S. at 900 (1995); *Shaw II*, 517 U.S. 899 (1996); and *Bush v. Vera*, 517 U.S. 952 (1996).

American voting age population was 43%. Even without-African-American voters having an "effective majority," the Court stated that, "[v]iewed *in toto*, appellee's evidence tends to support an inference that the State drew its district lines with an impermissible racial motive." *Cromartie I*, 526 U.S. at 548–49.

Second, the term "controlling electoral majority" has no clear definition for purposes of a *Shaw* claim. Is it based on population? Is it based on voting age population? Is it based on registered voters? How big does the majority have to be to be controlling? The vagueness of this so-called requirement makes it unworkable and constitutionally impermissible.

Third, any "effective majority" requirement would be an illogical limitation for a *Shaw* claim. So long as the politician in question is confident of getting *some* votes from other races, a +50% majority would not be necessary for a racially-motivated plan to succeed. For example, City Council President and CD 10 representative Herb Wesson stated that a 40% plurality of African-Americans in a district was sufficient to ensure that African-Americans could control future elections in that district. ER180-81. Merely increasing the percentage of a particular group gives that group an advantage, whether it is absolute control over the outcome of an election or increased bargaining power in a coalition district. Changing the number of a certain set of voters in a district changes the power balance in that district.

G. The District Court Erred by Treating the Irregular Shape of CD 10 as a Required Factor Rather than Just One of Many Potential Indicators of a *Shaw* Violation.

The District Court erred by making the inquiry into the shape of the district a necessary part of the *Shaw* standard.[12] The shape of a district may be a strong indicator of racial motivation in the redistricting process (*Miller*, 515 U.S. at 913), but it is neither the only indicator of racial motivation, nor a requirement for a *Shaw* claim. The Supreme Court has stated that bizarrely-shaped districts are "rare" and therefore "not a necessary predicate to a violation of the Equal Protection Clause." *Miller*, 515 U.S. at 913-14. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale . . . ." *Id*. at 913. Similarly, notwithstanding the City's claim to the contrary, "compactness [is] merely one among many factors whose presence b[ears] on the ultimate question whether race was the predominant factor . . . ." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406 (5th Cir. 1996).

The District Court stated that the lack of an unusual shape indicates that there was no viable *Shaw* claim here. ER17 ("The shape of the challenged districts is 'highly probative' in showing that CDS 9 and 10 were *not* drawn primarily on

[12] The District Court also erred by failing to treat CD 10 as "bizarrely shaped." (Section III.C.)

the basis of race).[13] This is a logical, and legal, error. The presence of such evidence may give rise to an inference of racial motivation, but is absence does not establish the opposite inference.

IV. THE DISTRICT COURT ERRED BY MISINTERPRETING THE LEGISLATIVE PRIVILEGE, PREVENTING PLAINTIFF FROM DEPOSING KEY WITNESSES.

The District Court committed clear legal error by upholding the Protective Order preventing Plaintiffs from obtaining any important discovery concerning the central issue in this case—the City's motivation for creating and approving CD 10's boundaries. ER2379. Plaintiffs' ability to prosecute their claims against the City depended in great part on their ability to access evidence of such intent. Under these circumstances, courts have consistently overridden claims of privilege

[13] The District Court cites the district court opinion in *Cano v. Davis* for this proposition. This is an impermissible extension of *Cano* that mischaracterizes the *Shaw* standard. *Cano* affirms that "bizarre shape is not a necessary condition for a successful *Shaw* claim. . . . Nevertheless, shape remains a highly probative method of **proving** that a district **is** primarily race-based . . . ." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1222 n.15 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003) (emphasis added). The court in *Cano* did not reason, as the District Court did here, that the **absence** of irregular shape is probative in showing that a challenged district was **not** drawn primarily on the basis of race. The absence of an irregular shape of the challenged districts in *Cano* was not fatal to the petitioners there. Rather it was the plaintiffs' failure to provide evidence of racial goals subordinating traditional redistricting goals. *Id*. at 1221. That is not the case here. Plaintiffs have put forward considerable evidence that race predominated over other redistricting concerns, and the decision-makers made a race-based goal the number one priority for CD 10, which they achieved.

and ordered production of relevant information concerning government officials' individual intent.

A. The Legislative Privilege Does Not Apply Here.

1. The Legislative Privilege Does Not Apply to State and Local Officials.

The qualified legislative privilege is an outgrowth of the "legislative immunity" afforded by the Speech and Debate Clause of the U.S. Constitution to shield federal legislators from liability for legislative acts. *United States v. Gillock*, 445 U.S. 360, 369 (1980); *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922 MMM RZ, 2003 WL 25294710, at *9 (C.D. Cal. Oct. 10, 2003) ("From [the legislative immunity] springs a limited legislative privilege."); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002) (three-judge court) (recognizing a qualified legislative privilege under federal common law).[14] This privilege should not apply to state and local officials. *In re Grand Jury*, 821 F.2d 946, 958 (3d Cir.

[14] There are two other privileges that are related to the legislative privilege. First, the deliberative process privilege applies only to predecisional, deliberative documents, communications, and testimony concerning a legislative or administrative policy or decision. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Second, the mental process privilege applies to questions directed to individual legislative or administrative decisionmakers' "uncommunicated motivations for a policy or decision[,]" *North Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003), particularly to questions probing their "subjective uncommunicated thoughts[,]" *Surf & Sand, LLC v. City of Capitola*, No. C09-05542, 2010 WL 4393886, at *3-4 (N.D. Cal. Oct. 29, 2010). These privileges are also qualified. *See, e.g.*, *North Pacifica*, 274 F. Supp. 2d at 1122-1125 (mental process and deliberative process privileges are qualified); *Kay*, 2003 WL 25294710, at *18 (legislative privilege is qualified).

1987) ("[W]e do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause."); *contra Kay*, 2003 WL 25294710, at *10 ("State and local legislators also enjoy this sort of immunity, although the Speech and Debate Clause of the Constitution itself does not extend to them.").

2. The Legislative Privilege Does Not Apply Because the Government's Intent Is Central to this Case.

Where a plaintiff's constitutional claim is directed at the government's intent, the plaintiff's need for discovery concerning governmental conduct is so clear 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) (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"). California federal district courts have described the District of Columbia Circuit's "highly persuasive" recognition of a governmental misconduct exception and have looked to that reasoning for guidance. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1022 (E.D. Cal. 2010); *see also Marilley v. McCamman*, No. C11-02418, 2012 WL 4120633, at *6 (N.D. Cal. Sept. 19, 2012) ("'[t]he privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit . . . [i]f the plaintiff's

cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield.'. . . . Here, there is no question that the Legislature's decisionmaking process with respect to the differential fees 'is' the case.") (quoting *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)).

The rejection of a privilege claim in *United States v. Irvin*, 127 F.R.D. 169 (C.D. Cal. 1989), which is factually apposite, is instructive. The plaintiffs in *Irvin* alleged that a redistricting plan adopted by the Los Angeles County Board of Supervisors violated section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., by abridging citizens' voting rights on account of race. 127 F.R.D. at 170. "Plaintiff [sought] to discover evidence concerning the intent with which the Board adopted the plan and rejected certain alternatives. More specifically, Plaintiff [sought] to discover communications occurring between the Supervisors and their staff members during non-public meetings immediately preceding the plan's adoption." *Id*.

The County objected to the discovery, and in particular to the questioning of several deponents, arguing that the communications were irrelevant and were protected by the deliberative process privilege. *Irvin*, 127 F.R.D. at 170. The court overruled the government's privilege objections, because it reasoned that the plaintiff's Voting Rights Act violations "may implicate intentional or negligent

governmental misconduct." *Id*. at 174. Not only was governmental misconduct at issue, the "[p]laintiff's allegations place[d] in issue the Supervisors' deliberations themselves." *Id*. The Court explained that this changed the nature of the privilege analysis substantially:

> "Clearly, then, this is not the usual 'deliberative process' case in which a private party challenges governmental action or seeks documents via the Freedom of Information Act, and the government tries to prevent its decisionmaking process from being swept up unnecessarily into public. Here the decisionmaking process is not 'swept up into' the case, it is the case."

Id. (quoting *United States v. Bd. of Educ.*, 610 F. Supp. 695, 700 (N.D. Ill. 1985)).

These cases should also apply to legislative privilege. Assuming it applies here (it does not: Section IV.A), the legislative privilege was originally conceived as a protection for federal legislators, and affords weaker protection for state and local officials. *Gillock*, 445 U.S. at 370 ("[U]nder our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators."). Therefore, the legislative privilege is no stronger than the deliberative process privilege and should be treated in the same way. *Contra*, *Kay*, 2003 WL 25294710, at *18 ("[T]he Court views the common-law deliberative process privilege as weaker than, and thus more readily outweighed than, the constitutionally-rooted legislative process privilege.").

B. If There Is a Legislative Privilege Here, It Is Qualified and Readily Overcome.

As Magistrate Judge Gandhi noted multiple times during oral argument on the City's Motion for Protective Order, "the [legislative] privilege is not absolute." ER2409, 2431. If the legislative privilege applies, courts conduct a balancing test to determine whether it is overcome. *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("*Gillock* instructs us that any such privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides."); *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) ("the discovery and trial needs of plaintiff in enforcing her rights under federal law clearly outweigh the State Defendants' need for confidentiality"). This balancing test involves an examination of several factors that are derived from the identical balancing test used for the deliberative process privilege. *Kay*, 2003 WL 25294710, at *17 ("The balancing tests that courts have suggested for challenges to both the legislative privilege and the deliberative process privilege are quite similar and functionally interchangeable."). These factors include: (1) the relevance of the evidence sought to be protected; (2) the seriousness of the litigation and the issues involved; (3) the role of the government in the litigation itself; (4) the interest of the litigants, and ultimately of society, in accurate judicial fact finding; (5) the federal interest in the enforcement of federal law; (6) the presence of issues concerning alleged governmental misconduct; (7) the availability or unavailability

of comparable evidence from other sources; and (8) the possibility of future timidity by government employees. *Id.* at *18 (quoting *Irvin*, 127 F.R.D. at 173); *see also North Pacifica*, 274 F. Supp. 2d at 1122-25 (applying same test to qualified mental process and deliberative process privileges).

Each of these factors weighs in favor of overriding the qualified legislative privilege here.

1. The Evidence Sought By Plaintiffs Is Unquestionably Highly Relevant.

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. *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking body" are highly relevant to the question of whether the body proposed invidious discrimination); *Favors v. Cuomo*, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) (holding that the "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); *accord Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 102 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

2. Plaintiffs' *Shaw* Claim Involves Serious Allegations of Racial Discrimination and Unconstitutional Actions by the City.

"[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 v. Pataki*, 280 F. Supp. 2d at 102); *accord Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011).

3. As The Sole Defendant, the City Has a Central Role in This Litigation.

As the defendant, the City's role in this litigation is central. This strongly favors overriding the legislative privilege. *Favors*, 285 F.R.D. at 220 ("[T]he legislature's direct role in the litigation supports overcoming the privilege."); *accord Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8; *Baldus*, 2011 WL 6122542, at *2; *see also Academy of Our Lady of Peace v. City of San Diego*, No. 09CV0962 WQH MDD, 2011 WL 6826636, at *8 (S.D. Cal. Dec. 28, 2011) (same for deliberative process privilege); *Stott Outdoor Adver. v. County of Monterey*, No. C06-00891, 2007 WL 460647, at *3 (N.D. Cal. Feb. 7, 2007) ("The government plays a central role in this litigation, and thus this factor cuts strongly in favor of disclosure.").

4. The Interest of the Litigants, and Ultimately of Society, in Accurate Judicial Fact Finding Heavily Favors Disclosure.

"The interest of the litigant and society in accurate fact-finding cuts in favor of disclosure, as it always must." *Stott Outdoor Adver*., 2007 WL 460647, at *3. And "where, as here, federal constitutional rights are at stake, the interest [in accurate judicial fact-finding] is heightened." *Marilley*, 2012 WL 4120633, at *7; *cf. Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) (in "action alleging violations of federal constitutional magnitude," the "tendency is . . . to allow discovery"). The litigants here and the voters in the City are entitled to judicial fact finding based on a full record of the City's intent.

5. The Federal Government Has a Strong Interest in the Enforcement of the Fourteenth Amendment of the U.S. Constitution.

This factor also compels disclosure. The *Irvin* court recognized the "compelling" federal interest in "vigorous and searching enforcement" of the Voting Rights Act, which "forbids local practices that abridge the fundamental right to vote." *Irvin*, 127 F.R.D. 169, 174. That same federal interest applies to the constitutional voting rights issues at stake here. *Academy of Our Lady of Peace*, 2011 WL 6826636, at *8 ("strong federal interest in the enforcement of federal civil right laws" weighs in favor of disclosure); *Marilley*, 2012 WL 4120633, at *7; *North Pacifica*, 274 F. Supp. 2d at 1123-24 ("[T]he federal interest in the enforcement of federal constitutional rights weighs in favor of disclosure."); *Irvin*,

127 F.R.D. at 174 ("[D]istrict courts have overridden local officials' privileges found to be in conflict with the enforcement of federal civil rights laws."); *Stott Outdoor Adver.*, 2007 WL 460647 at *3 ("[T]here are federal constitutional claims at stake in this case, and it is in the federal interest to see constitutional norms enforced.").

6. Plaintiffs Allege Serious Governmental Misconduct.

This case squarely alleges governmental misconduct on a constitutional scale. At the heart of this case is the question of government intent—and racial motivation in particular. Thus, this factor heavily favors overcoming the qualified legislative privilege. The cases are in accord. "The City's deliberative process is not collateral in this case; this case is directed at the City's intent. Consequently, it makes no sense to allow the City to use the privilege as a shield." *Academy of Our Lady of Peace*, 2011 WL 6826636, at *8; *accord Irons v. Sisto*, No. S-05-0912, 2007 WL 4531560, at *3 (E.D. Cal. Dec. 18, 2007) ("The privilege does not apply when the decision-making itself is attacked by a claim."); *Irvin*, 127 F.R.D. at 174 ("Plaintiff's allegations may implicate intentional or negligent governmental misconduct. . . . Plaintiff's allegations place in issue the Supervisors' deliberations themselves . . . . 'Here the decisionmaking process is not "swept up into" the case, it is the case[.]'") (quoting *United States v. Bd. of Educ.*, 610 F. Supp. at 700).

7. Comparable Evidence of Discriminatory Legislative Intent and Racially-Motivated Redistricting Is Unavailable from Other Sources.

Discovery is necessary here because "[m]unicipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record." *Smith v. Town of Clarkton*, 682 F.2d at 1064. The public record is no substitute for the evidence Plaintiffs need to prove their *Shaw* claim. *Favors*, 285 F.R.D. at 219 ("[E]vidence [including maps, analyses, data, and memoranda] may provide only part of the story. To the extent that the information sought . . . relates to non-public, confidential deliberations that occurred . . . between legislators, their staffs, and retained experts, such information likely cannot be obtained by other means.").

Here, all significant decisions and deliberations of the Redistricting Commission happened behind closed doors in the Ad Hoc Committees. ER172, 295. It is likely that additional statements and communications revealing racially-motivated discriminatory intent would have occurred during the City's closed-door deliberations.

In granting the Protective Order early in the litigation, Magistrate Judge Gandhi suggested that Plaintiffs did not need additional evidence of discriminatory intent because of the publically available racially-charged statements of Wesson and Ellison. ER2473 ("The Court does note that, from their argument, the Haveriland Plaintiffs' [sic] appear to contend that they have, in their opinion, sufficient evidence to demonstrate discriminatory intent already, which also counsels against unnecessary inquiries into the motives of legislators under the circumstances presented here.").

Almost a year and a half later at the summary judgment stage, the District Court disagreed, holding that Plaintiffs lacked sufficient evidence of predominant racial intent. ER20-23.[15]

Although Plaintiff contends that the District Court was incorrect in its summary judgment determination (Section II, III), there is no doubt that the Protective Order hampered Plaintiffs' ability to gather highly relevant evidence. Plaintiff was unable to take depositions of representatives and employees of the City who collectively possessed information directly relevant to Plaintiffs' *Shaw* claim. And the depositions that were taken were drastically limited in scope because of the City's privilege objections. ER2473. Although the evidence that

[15] The District Court cited Plaintiffs' failure to produce the very type of evidence that the Court had prevented Plaintiffs from obtaining. ER20-21 ("The evidence offered by Plaintiff demonstrates only that some individuals involved in the redistricting process . . . may have been motivated by racial considerations.").

Plaintiff was able to obtain demonstrates a predominant, racially-motivated intent, this evidence only made up a tiny fraction of the shielded communications. A full examination of Ellison and Wesson along with all of the decision-makers involved in the West and Southwest Ad Hoc Committee is needed here.

8. There Is a Low Likelihood of Future Timidity by Government Employees, and Deterring Unconstitutional Behavior is Desirable.

First, this factor should not weigh in the City's favor because of the infrequent nature of redistricting means "[t]here [is] no reasonable concern that allowing discovery . . . would open the proverbial floodgates to more and more requests for discovery prying into how the legislature made its decisions." *Kay*, 2003 WL 25294710, at *20.

Second, since the bulk of the decision-making was performed by a redistricting commission made up of non-legislators, there is even less fear of future timidity. In *Rodriguez v. Pataki*, the court held that such a 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." 280 F. Supp. 2d at 101.

Third, any impact that disclosure of this evidence would have on future discussions regarding the City's redistricting policies is minimal because the officials making these redistricting decisions are not subject to monetary liability

individually. *Irvin*, 127 F.R.D. at 174 (citing *Kuzinich v. Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982)) (concluding that disclosure did not pose that threat to communications between Supervisors because individual Supervisors enjoyed legislative immunity from monetary liability).

Fourth, Plaintiffs' request for other similar evidence is not a fishing expedition designed to harass legislators or pry into their deliberations for no good reason. Unlike the vast majority of cases dealing with legislative privilege, Plaintiffs actually possess evidence of the City's race-based motivations. (Section II, III). The presence of that evidence shows that further inquiry should have been allowed. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 305 (D. Md. 1992) (holding that if "plaintiffs are able factually to draw into serious question the legality under federal law" the question of legislative privilege should be revisited).

Fifth, this is a federal civil rights suit alleging unconstitutional legislative intent. Any chilling effect on unlawful behavior is desirable. *E.g.*, *Marilley*, 2012 WL 4120633, at *6 ("[A] useful purpose will have been served [if. . . members of government agencies . . . are reminded that they are subject to scrutiny].") (citation and internal quotation marks omitted); *Newport Pacific*, 200 F.R.D. at 640 ("[C]ourts have consistently found the government cannot hide evidence of wrongdoing behind governmental privileges and that the only possible effect of

these depositions would be more caution by government employees who are participating in discrimination and other wrongful conduct[.]") (citation omitted); *accord North Pacifica*, 274 F. Supp. 2d at 1125.

For each of the above reasons, the Court should find that any qualified legislative privilege is overcome here.

C. The City's Reliance on *Cano* Is Unfounded.

In supporting its contrary view, the City relied almost entirely on the district court decision in *Cano v. Davis*, 193 F. Supp. 2d 1177 (C.D. Cal. 2002). But *Cano* is not dispositive here because, among other reasons, it did not address the key "privilege" question presented by the Protective Order. *Cano* addressed only two narrow questions about the waiver of the qualified legislative privilege: (1) whether a third party non-legislator could testify "to conversations with [California state] legislators and their staffs" (the majority answered yes); and (2) whether a member of the California Assembly could waive the legislative privilege and testify as to the motivations of other members who did assert the privilege (the majority answered no; the assembly member could waive the privilege only as to himself). *Id*. at 1179.

Cano did not address whether the qualified privilege should be overridden as to local legislators who had asserted the privilege and refused to testify concerning legislative intent—particularly where there already was evidence of racial intent.

The majority was clear in holding that this was a separate issue: "Whether an absolute or a qualified privilege should be recognized for state legislators' acts is a separate question from who should be permitted to waive the privilege once it attaches to an individual legislator's legislative acts." *Cano*, 193 F. Supp. 2d at 1180. See also the dissent of the Hon. Stephen Reinhardt—the only Ninth Circuit Judge on this three-judge panel. *Cano*, 193 F. Supp. 2d at 1181-82.

For these reasons, this Court should reject *Cano*.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's summary judgment ruling, and remand Plaintiffs' *Shaw* claim for trial. Further, this Court should reverse the District Court's Protective Order and allow Plaintiffs to conduct depositions and other discovery of persons involved in the 2011-2012 redistricting process.

Respectfully submitted,

Dated: November 9, 2015

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CERTIFICATE OF COMPLIANCE

I certify that:

☒ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,649 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

Dated: November 9, 2015

AKIN GUMP STRAUSS HAUER & FELD LLP

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STATEMENT OF RELATED CASES

This appeal has been consolidated with *Stanley Haveriland, et al. v. City of Los Angeles*, Ninth Circuit Case No. 15-55502. These cases were consolidated in the district court as well. *Haveriland v. City of Los Angeles*, Case No. 13-cv-01410-CBM (JCGx). Both cases arise out of challenges to a 2012 ordinance adopted by the City of Los Angeles to redraw district lines for election to the Los Angeles City Council. On February 24, 2015, the Hon. Consuelo B. Marshall entered summary judgment in favor of Defendant City of Los Angeles in both matters.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 9, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Rex S. Heinke