Court of Appeals Docket No. 15-55478
Consolidated with Court of Appeals Docket No. 15-55502

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER LEE, individual; et al.,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California,
Case No. 2:12-cv-06618-CBM-JCG,
The Honorable Consuelo B. Marshall, Presiding

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INTRODUCTION AND SUMMARY OF ARGUMENT

As they did in the District Court, plaintiffs all but ignore the relevant Supreme Court cases and standards that govern this case. Plaintiffs claim that the City of Los Angeles engaged in racial gerrymandering in violation of *Shaw v. Reno*, 509 U.S. 630 (1993), when drawing Council District 10.[1] However, plaintiffs barely mention, much less address or meet, the extraordinarily high standard the Supreme Court has set for such claims. In order to overcome summary judgment, plaintiffs were required to demonstrate that race was the predominant factor in drawing the boundaries for CD 10 and that those boundaries are "unexplainable on grounds other than race."[2] That heightened burden of proof, together with "the intrusive potential of judicial intervention into the legislative realm" must be considered "when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and *determining whether to permit discovery or trial to proceed*."[3]

Plaintiffs made no effort to demonstrate that CD 10's boundaries are unexplainable on grounds other than race, because it cannot be done. The City presented undisputed, overwhelming, and objectively-verifiable evidence that CD 10's boundaries adhere to race-neutral redistricting principles. CD 10 is compact, follows pre-existing boundaries, and complies with all traditional districting criteria. Every change made to CD 10 from

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[1] Plaintiffs have not and cannot make any claim under the Voting Rights Act.

[2] *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001) (citations omitted).

[3] *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (emphasis added).

the prior 2002 "benchmark" plan had the effect of healing a neighborhood split, which is not only an important, race-neutral redistricting criterion, but one that the City identified from the outset as one of its primary goals in drafting the 2012 plan.

Plaintiffs not only refuse to address the standard for a racial gerrymandering claim, they also ignore case law governing the evidence they must provide in order to prove it. Thus, plaintiffs never address the Supreme Court's holding in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 (1977), that proof of racially discriminatory legislation must be made through objective evidence, not by placing individual legislators on the stand, where their testimony "frequently will be barred by privilege." As this Court has said, "an otherwise constitutional statute will not be invalidated on the basis of an 'alleged illicit legislative motive,' and [the Supreme Court] has refused to inquire into legislative motives." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (citation omitted). Plaintiffs do not even cite the *Foley* case.

Rather than discuss these principles, plaintiffs tell their version of the facts in a legal vacuum. In that version, one member of the citizens' redistricting commission, Christopher Ellison, was somehow able to draw CD 10 solely based on race and then impose his plan not only on the other twenty members of the Commission but on the fifteen-member City Council itself, which must pass the redistricting ordinance, and the Mayor, who must sign it. Plaintiffs seek to bolster this narrative with an after-the-fact remark by the City Council President to a group of African-American clergy about the effect of the new district lines on African-American representation on the City Council. This is precisely the sort of evidence that the Supreme Court

has long rejected, warning that "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .'"[4] In the final analysis, plaintiffs' evidence falls woefully short as a matter of law, because it does not and cannot refute any of the following:

- Far from the City "dramatically altering" CD 10, as plaintiffs claim, the district has not changed in any material way; its shape, characteristics and demographic diversity have been retained from the 2002 plan;

- CD 10 is not a majority-minority African-American district under any standard: African-American population increased *only 1.7%* from the 2002 plan (from 24.2% to 25.9%) and African-American citizen voting age population (CVAP), a key measure of a racial group's strength, increased *only 3.7%* (from 36.8% to 40.5%);

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

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

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

[4] *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (citation omitted).

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

- CD 10 is not remotely unusual in shape. Rather, it is one of the more compact districts in the City and its shape has stayed remarkably unchanged since the 1970s;

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

Plaintiffs' case is extraordinarily weak when the *Shaw* doctrine requires that it be extraordinarily strong. No court has ever found a *Shaw* violation on such a comparable record, and in *Easley v. Cromartie*, 532 U.S. 234, the Supreme Court rejected such a claim as a *matter of law* based on far stronger evidence that race may have predominated than is present here. The same is true of a three-judge court in *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), which dismissed similar *Shaw* claims on summary judgment. The District Court carefully followed and applied the standards set forth by the Supreme Court in doing the same.

The 2012 redistricting plan was the product of a seven-month, open process with broad public input and debate. It necessarily required extensive compromise among virtually every political and neighborhood group in the City. Ultimately, the plan was approved by a supermajority of the Redistricting Commission and, after further revision, by a supermajority of the City Council, and then signed by the Mayor.

Redistricting almost always sets off a political tug of war, and the 2012 redistricting process was no different. Unhappy because the plan did not unify WCKNC as much as they wanted, plaintiffs tried to elevate the remarks of two individuals into enough to prove a *Shaw* claim, which the District Court rightly held was insufficient. Plaintiffs' failure to meet their high burden of proof had nothing to do with the evidentiary rulings of the District Court and everything to do with the fact that the City did not engage in racial gerrymandering. The District Court's holding should be affirmed.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court properly relied on *Easley v. Cromartie*, 532 U.S. 234 (2001), by requiring plaintiffs to demonstrate that race predominated in drawing CD 10 and that its boundaries are unexplainable on grounds other than race;

2. Whether the District Court properly granted summary judgment for the City when the City established that every change to CD 10 from the 2002 benchmark plan adheres to the race-neutral districting principle of healing neighborhood splits, plaintiffs did not rebut that evidence, and plaintiffs made no attempt to demonstrate that the City neglected traditional redistricting criteria when drawing CD 10;

3. Whether the District Court properly held that the legislative privilege protected from discovery the mental impressions of City officials when drafting and considering the redistricting ordinance.

ADDENDUM TO BRIEF

The City is attaching the City Charter provision that governs redistricting. The City is also attaching several maps and demographic data that include: a map of the City; a map of the 2012 Council Districts and

demographic data for each district; a map of CD 10; a map and chart showing all of the changes to CD 10; and maps of the relevant neighborhoods showing how they were treated in the 2002 and 2012 plans. These documents demonstrate, in ways words cannot, that CD 10 has not changed significantly since the 2002 plan, and the changes that were made adhere to race-neutral criteria (by healing neighborhoods and following neighborhood boundaries) and improve CD 10 and its neighboring districts. Finally, for comparison purposes, the City attaches maps of every district that the Supreme Court has held violate *Shaw*, which look nothing like CD 10.[5]

STATEMENT OF THE CASE

Under the City Charter, a twenty-one-member, volunteer Redistricting Commission (the "Commission") begins the task of redistricting the fifteen City Council districts.[6] Addendum at 1-2; Excerpts of Record ("ER") 915-16. The Commission submits a recommended plan to the City Council, which can accept or modify the proposal, or draw a new map. *See* Addendum at 1.

The City's 2012 redistricting spanned seven months and involved a level of public outreach and participation rivaled by only a few states in the country. *See* ER 891-95; SER 177-182, 270-87. The Commission held

[5] All of the maps and data attached were submitted to the District Court; plaintiffs did not contest their relevance or accuracy. *See* Supplemental Excerpts of Record ("SER") 138-61.

[6] The Mayor appoints three members, the Controller and City Attorney each appoint one member, the City Council President appoints two members, and the remaining fourteen City Councilmembers each appoint one member. Excerpts of Record ("ER") 915.

thirty-nine public meetings and hearings. ER 1822; SER 341. The Chair of the Commission was Arturo Vargas, a mayoral appointee, and the Co-Chairs were Jackie Dupont-Walker and Rob Kadota. SER 273; ER 918. The chair and co-chairs all voted for the Commission's final plan and report. SER 285. The Commission hired professional staff, including Executive Director Andrew Westall,[7] technical linedrawer Nicole Boyle (who had assisted the California Redistricting Commission), and an outreach team. SER 273-74. All Commission meetings were publicly noticed, held in public pursuant to the California Brown Act, broadcast on local TV, and posted on the Internet. SER 277.

I. THE REDISTRICTING COMMISSION'S WORK

A. Redistricting Criteria

The Commission discussed the redistricting criteria it would use at several public meetings[8] and based its recommended plan on the following:

Compliance with the City Charter. The City Charter requires that all districts (1) contain as equal population as nearly practicable, (2) comply "with [all] requirements of state and federal law," and (3) "to the extent feasible . . . keep neighborhoods and communities intact, utilize natural boundaries or street lines, and be geographically compact." ER 915. The City Attorney's Office advised the Commission throughout the process and authored several documents, including a Summary of Legal Criteria and a Standard Statement that was read before each meeting, which included the

[7] Andrew Westall was the technical linedrawer of the Commission in 2002 and for the California Assembly in 2002. SER 271.

[8] SER 277-280; ER 1894-1900.

clear instruction that "race cannot be used as the predominant factor in drawing district lines." ER 1994; *see also* ER 1970-95.

Reducing Equal Population Deviation. The 2010 census revealed that the total population deviation among then-current districts (the difference between the most under-populated district and most overpopulated district) was 19%. SER 274; ER 900, 966, 1843. Each district had to be redrawn closer to the ideal population of 252,841. ER 900. The Commission adopted a requirement that the maximum deviation among all districts should not exceed 5%, an improvement from the 2002 plan, which originally had a total deviation of 10%. ER 892, 900; SER 279-80, 344, 348.

Keeping Communities and Neighborhoods Whole. In 1999, the voters amended the Charter to establish a city-certified system of neighborhood councils with distinct boundaries and formal advisory roles within City government. SER 274-75; ER 1845-77. By 2012, there were ninety-five neighborhood councils, and their boundaries interlocked across the City. ER 900-01. In addition, in 2006, the City Council adopted a policy to name or rename communities (called the City's "Official Renaming Policy"). SER 275; ER 1879-91. Eight communities have been recognized under the policy.[9] ER 892, 1823. From the outset, one of the Commission's major priorities was to keep as many of these formally-recognized communities whole in one district as possible, and it received extensive input about the borders and characteristics of the neighborhood councils and renaming communities. ER 900-01; SER 82-83, 278-80. The Commission decided

[9] These are Historic Filipinotown, Koreatown, Little Armenia, Little Bangladesh, Little Ethiopia, Rose Hill, Sherman Oaks, and Thai Town. ER 1823.

that two-thirds of the City's neighborhood councils should be kept whole in one district. ER 900-01; SER 278-80.

Geographical challenges. The City has highly irregular borders, including long narrow corridors (for example to the Port) and several odd peninsulas and "holes" created by separately incorporated cities or unincorporated territory that are not part of the City (these include Culver City, West Hollywood, Beverly Hills, Universal City and Santa Monica). *See* Addendum at 3; SER 178. Natural boundaries like the Santa Monica Mountains, as well as major highways further complicate redistricting efforts. *Id.* The Commission adopted a requirement that no more than two districts should traverse the Santa Monica Mountains. SER 279-80.

B. The Redistricting Commission

Following a massive outreach campaign to encourage public participation,[10] the Commission held fifteen public hearings throughout the City, one in each district, to receive input about communities of interest and new boundary lines. SER 280-82. More than 1,800 individuals attended these hearings, and the Commission received more than 500 oral or written comments, together with more than forty draft plans from the public. *Id. see also* ER 891-95. The Commission also toured the City to see areas where the 2002 district lines divided neighborhoods. SER 280.

Like its predecessor in 2002, the Commission decided to draft the preliminary plan for public comment in small groups with the assistance of a Technical Director to facilitate the use of redistricting software. SER 282-83, 84-85. The groups were told not to talk to each other in order to ensure

[10] *See* SER 275-77; ER 894-95.

compliance with California's open meeting law. SER 282-83. The West/Southwest ad hoc group that drafted the initial proposal for CD 4, 5, 8, 10 and 11 had seven members, including Commissioner Ellison, and met only twice. *Id.* A resolution group met on January 24 to stitch together the plans from the ad hoc groups into a citywide plan. SER 283.

The First Draft Plan. At a public meeting on January 25, 2012, the Chair presented the draft plan, which the Commission debated for over three hours before approving its release for public comment. SER 283-85; ER 2076-94, 1940-41. The Commission then held seven public hearings throughout the City to receive public input on the first draft map. *See* SER 284; ER 894.

The Second Draft Plan. After the second round of public hearings, the Commission substantially revised the initial draft plan at an eight-hour, public meeting on February 15, 2012. SER 284. The Commission discussed and voted on more than eighty proposed amendments to the plan and approved forty-two of them. *Id.*; ER 1943-53, 2001-15 (list of amendments). The public then reviewed and proposed additional changes. SER 284.

The Third Draft Plan. At a public meeting on February 22, 2012, the Commission considered fourteen additional amendments and approved five. SER 284-85; ER 894, 2017-65, 2104-07. The Commission then approved a final recommended plan by a supermajority vote of 16-5. SER 284-85, ER 894.

The Commission also drafted a comprehensive report describing its work, including how it addressed particularly difficult areas of the City such as Koreatown, South Los Angeles, Downtown, and Westchester. *See* ER 885-914. On February 29, 2012, the Commission approved the Final

Report, which was 951 pages long with appendices. SER 285-87; *see also* ER 885-1840.

Throughout the process Commissioner Helen Kim strongly advocated unifying Wilshire Center Koreatown Neighborhood Council ("WCKNC") in CD 13. ER 330. Commissioner Kim, joined by Commissioners Ahn, Anderson, and Roberts, voted against the plan and drafted a minority report that, among other things, attached Commissioner Ellison's email, a focus of this case, and accused Commissioner Ellison of race-based linedrawing. ER 1302-15. Three of these Commissioners – Kim, Anderson, and Roberts – provided the declarations on which plaintiffs principally rely.

Finally, before the Commission submitted its recommended plan to the City Council, the City Attorney's Office reviewed the plan, as well as the minority report, and concluded that the Commission's recommended plan met all relevant legal criteria. ER 920-26; SER 286-87.

II. THE CITY COUNCIL

The City Council held three public hearings on the plan at separate locations throughout the City. SER 341. City Councilmembers proposed twenty-five amendments. *See* SER 342. In two lengthy public reports, the Chief Legislative Analyst's Office ("CLA") discussed each proposed amendment, recommending that eighteen be adopted including significant changes to CD 10 that reduced the African-American population in the district. SER 342-43; ER 2112-2230.

On March 16, 2012, at a public meeting, the City Council considered the Commission's proposal along with the twenty-five proposed amendments and the CLA's Reports. SER 343. After extensive discussion, the City Council adopted eighteen amendments and voted 13-2 to approve

the Redistricting Ordinance, which the Mayor then signed. *Id.*; *see also* ER 2232-39. At all times, the City Council's entire file of the proceedings has been posted on the City's website. SER 341.

III. SUMMARY OF THE REDISTRICTING ORDINANCE

The 2012 Redistricting Ordinance is a substantial improvement, in virtually every measurable category, over the City's 2002 redistricting plan. *See* SER 184-93, 344-45.

The new plan significantly reduces the total population deviation among districts from 10% to 5%. SER 344.

The plan keeps whole more neighborhoods. The previous plan kept whole only 42 (or 44%) of the City's 95 neighborhood councils. SER 344, 350-52. The 2012 plan keeps whole 64 (or 67%) of the neighborhood councils. SER 344. The plan also reduces from fourteen to four the neighborhood councils split into three districts. *Id.* In addition, the 2012 plan keeps whole each of the eight communities the City Council has recognized through its renaming policy. SER 186-87; ER 892.

The 2012 plan also makes substantial improvements to the neighborhoods surrounding CD 10. *See* SER 186-89, 287-91, 344-45. The Palms Neighborhood Council, which was split among three districts, is made whole, and the Empowerment Congress West Area Neighborhood Council is largely kept whole. Addendum at 6-9; *see* SER 287-91. Five other neighborhood councils that had been split on CD 10's old boundary line are made whole, as are the renaming policy neighborhoods of Little Ethiopia, Little Bangladesh, and Koreatown. Addendum at 6-7; SER 291.

Koreatown is also made more whole. ER 906-08; SER 192-289. Koreatown can be defined in several ways. One such way is using

Koreatown boundaries as defined through the City's renaming policy. *See* ER 906. Another – plaintiffs' preferred definition – is the WCKNC. WCKNC is the largest neighborhood council with more than 95,000 residents (which would constitute almost 40% of a single council district) and lies at the center of the City. *See id.* As a result, it is very difficult to unify WCKNC in one district without splitting other communities of interest, and that area has not been whole in previous plans. SER 192-93. Under the old plan, the City renaming policy neighborhood was split in two, and WCKNC was split into three City Council districts. ER 906; SER 192-93. Under the new plan, the renaming policy neighborhood is made whole in CD 10, the WCKNC splits have been reduced to two, and 70% of the neighborhood council is consolidated into CD 10. Addendum at 6-7 (*see* change "E") and 10; ER 906-07; SER 192-93, 289.

The improvements to the individual neighborhoods at issue in this case can be seen in maps at pages 8-10 of the Addendum.

IV. CITY ELECTIONS UNDER THE REDISTRICTING ORDINANCE

The City has now operated under the 2012 Redistricting Ordinance for two full City Council election cycles in 2013 and 2015, and two special elections. Request for Judicial Notice ("RJN"), Exs. 1-4. All of the fifteen current City Councilmembers have been elected from the new districts. *Id.*

It is also important to note that one concern voiced by opponents of the 2012 Redistricting Ordinance has not come to pass, namely that Korean-American candidates would have difficulty being elected to City Council if WCKNC were not made whole and placed in CD 13. In 2015, Councilmember David Ryu was elected from CD 4, which covers diverse

communities such as Hollywood, Miracle Mile, and Sherman Oaks. RJN, Ex 2.

ARGUMENT

I. STANDARD OF REVIEW

Although this Court applies *de novo* review to a ruling on summary judgment, it reviews the evidence "through the prism of the substantive evidentiary burden" that would apply at the trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *see also Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 816 (9th Cir. 1992). In this case, plaintiffs' burden of proof is a "demanding one"[11] meant to make only the most "extreme instances of gerrymandering subject to meaningful judicial review" without casting doubt on or subjecting to challenge the "vast majority" of districts throughout the country. *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring). The Supreme Court has made clear that a *Shaw* violation will only occur in "exceptional cases." *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) ("*Shaw I*").

Although plaintiffs concede that discovery rulings are generally reviewed for abuse of discretion, they argue for *de novo* review of the District Court's ruling on legislative privilege.[12] Appellants' Opening Brief ("AOB") at 19. For several reasons, however, that ruling should only be reviewed for abuse of discretion. First, both the Supreme Court and this Court applied that standard when reviewing legislative and deliberative

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

[12] Plaintiffs cite to cases involving the attorney-client privilege and the state secrets privilege, but no cases involving the legislative privilege. AOB at 20.

process privilege rulings. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.20 (1977) (no abuse of discretion in the lower court's decision to prohibit questions about legislators' motives); *Jeff D. v. Otter*, 643 F.3d 278, 289-90 (9th Cir. 2011) (the district court "did not abuse its discretion" by barring depositions based on the legislative and deliberative process privileges); and *Fed. Trade Comm'n v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (same with regard to deliberative process privilege). In addition, as plaintiffs concede, the legislative privilege ruling came in the context of discovery, over which district courts have broad discretion. AOB at 19, citing *Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997). Finally, the abuse of discretion standard is particularly applicable where, as here, the district court used a balancing test to determine whether and how to apply the legislative privilege. *See Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (using abuse of discretion standard to review application of legal standard to facts of the case).

Plaintiffs' argument that *de novo* review applies when the underlying case raises constitutional issues (AOB at 20) ignores the fact that the Supreme Court made no such distinction in *Village of Arlington Heights*, *supra*, where it held that the district court had not abused its discretion in prohibiting inquiry into city council members' motives. 429 U.S. at 268, 270 n.20.

II. APPELLANTS' *SHAW* CLAIM FAILS AS A MATTER OF LAW BECAUSE TRADITIONAL REDISTRICTING CRITERIA, NOT RACE, EXPLAIN THE BOUNDARIES OF CD 10

A. The District Court Applied The Correct Summary Judgment Standard

The Supreme Court has held that to establish a *Shaw* claim, plaintiffs must demonstrate that a district's boundaries are "unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 241-42 (citation omitted). "[N]eglect of traditional redistricting criteria is [a] . . . *necessary*" element of a *Shaw* claim. *Bush v. Vera*, 517 U.S. 952, 962 (1996) (emphasis added).

Plaintiffs concede that their *Shaw* claim requires them to prove "that the City ignored traditional redistricting criteria in favor of a specific racial purpose." AOB at 15; *see also* AOB at 21. Yet beyond mentioning the standard in passing, plaintiffs never address it or apply it to the facts of the case. Instead, they argue that in order to overcome summary judgment they need only present "[c]onflicting evidence regarding the predominance of racial intent." AOB at 22. That argument is squarely at odds with the Supreme Court's *Shaw* jurisprudence, most notably *Cromartie II*, 532 U.S. at 257-58. It is also directly at odds with the three-judge ruling in *Cano II*, which applied *Cromartie II* in the summary judgment context and dismissed a *Shaw* claim because the plaintiffs failed to demonstrate that the districts neglected traditional districting criteria. *Cano v. Davis*, 211 F. Supp. 2d 1208, 1224-25 (C.D. Cal. 2002) ("*Cano II*").

To understand why *Cromartie II* is so critical to this case, one must first understand the Supreme Court's earlier *Shaw* jurisprudence.[13] In the 1990s, the Department of Justice (DOJ) required that any state whose redistricting plans must be pre-cleared under section 5 of the Voting Rights Act[14] had to maximize the number of majority-minority districts as a condition of approval. *See Cano II*, 211 F. Supp. 2d at 1214-15 (discussing genesis of the *Shaw* doctrine). The DOJ's "maximization" policy forced states like North Carolina, Texas, and Georgia to draw district lines solely on the basis of race and in total disregard for traditional redistricting criteria. Those districts were bizarre on their face, often hundreds of miles long, splitting cities and communities with narrow land bridges designed to reach far-flung pockets of minority populations that had nothing in common. *See id.*

In *Shaw* and its progeny, the Supreme Court resolved two issues. First, the Court held that a racial gerrymandering claim could be stated under the Equal Protection Clause in "some exceptional cases" when race is not simply a motivation for drawing a majority-minority district, but rather is the

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[13] To date, the Supreme Court has decided seven *Shaw* cases. *Shaw I*, 509 U.S. 630 (1993); *Miller*, 515 U.S. 900 (1995); *Bush*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"); *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("*Cromartie I*"); *Cromartie II*, 532 U.S. 234 (2001); and *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). In addition, the Court addressed standing issues in *United States v. Hays*, 515 U.S. 737 (1995).

[14] Los Angeles has never been subject to section 5 preclearance. The Supreme Court recently overturned section 4 of the VRA, which freed covered jurisdictions from seeking preclearance under section 5. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

predominant factor motivating the legislature's decision. *Miller*, 515 U.S. at 914. Plaintiffs must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* at 916. Second, the Court rejected DOJ's policy, holding that section 5 did not require states to maximize majority-minority districts. *Shaw II*, 517 U.S. at 913.

Using these principles, the Court struck down districts in three cases (*Miller*, *Shaw II*, and *Bush*). In all three, there was overwhelming direct and circumstantial evidence that race was the predominant reason for drawing the districts: each district was a majority-minority district; each was bizarrely-shaped, completely ignoring geographic and political boundaries; and none of the districts could be explained by other districting criteria. *See Cano II*, 211 F. Supp. 2d at 1214-16, 1219 & n.12 (discussing *Shaw* cases). Most important, in each case, there was "overwhelming, and practically stipulated" direct evidence of racial gerrymandering. *Miller*, 515 U.S. at 910. In fact, the states essentially *admitted*, either in DOJ submissions or in the subsequent litigation, that race was the controlling factor in drawing the district, because they were complying with the DOJ policy.[15]

Once it ended the DOJ policy, the Court had to assess *Shaw* claims in the much more factually-muddled context where states did not admit race predominated because they were no longer relying on section 5 to justify the

[15] *See Shaw II*, 517 U.S. at 906 (preclearance submission says "overriding purpose" was creation of majority-minority district); *Bush*, 517 U.S. at 969 (preclearance submission explains drawing of district "in exclusively racial terms"); *Miller*, 515 U.S. at 918 (state's Supreme Court brief admits that General Assembly wanted to create majority black district to comply with DOJ's instructions).

districts. That occurred in *Cromartie II*. *Cromartie II* remains the only case in which the Supreme Court has decided the merits of a *Shaw* claim where the state is not claiming the districts were justified or required by the Voting Rights Act. That is what makes *Cromartie II* so important to this case, because CD 10 was not drawn to comply with any Voting Rights Act requirements.

In *Cromartie II*, the state argued that it drew the district for political reasons, in order to make a safe Democratic seat. 532 U.S. at 238-39. The trial court, however, held that race predominated, based on the following circumstantial evidence: (1) the district was functionally equivalent to a majority-minority district (47% African-American voting age population); (2) the district had a bizarre and meandering shape, cutting through towns and cities; and (3) plaintiffs' expert showed that more African-American precincts on the district's borders were placed in the district than were White precincts. *Id.* at 240. In addition, the direct evidence included (1) statements by the legislator who led the redistricting effort that the district provided "'racial and partisan' balance," and (2) an email from the State Senate's redistricting coordinator stating he had moved 60,000 African-Americans into the district and would need to take out an equivalent number of residents. *Id.* at 241.

Despite this evidence, the Supreme Court reversed the lower court and entered judgment for the state, thereby establishing a standard of disposing of *Shaw* claims as a matter of law. *Cromartie II*, 532 U.S. at 257-58. Reiterating that plaintiffs were required to demonstrate the district was unexplainable on grounds other than race, the Court found the evidence "was consistent with a constitutional political objective, namely, the creation of a safe Democratic seat" and therefore "the attacking party has not

successfully shown that race, rather than politics, predominantly accounts for the result." *Id.* at 239, 257. In other words, a *Shaw* claim fails as a matter of law if a district's lines are consistent with race-neutral criteria. *Id.* at 239; *see also Cano II*, 211 F. Supp. 2d at 1221-25. *Cromartie II* remains the Court's last word on the predominance standard.[16]

In *Cromartie II*, the Court deliberately created and applied a standard that is very difficult for a plaintiff to overcome. *Cromartie II*, 532 U.S. at 241. Because redistricting "ordinarily falls within a legislature's sphere of competence," federal court review of redistricting legislation "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915; *see also Cromartie II*, 532 U.S. at 242. "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16. Moreover, the nature of the inquiry is difficult because it requires distinguishing between when race is *a* factor (which is

[16] Since *Cromartie II*, the Court has decided one other *Shaw* case. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, resembles the *Shaw* cases before *Cromartie II*, because the state essentially conceded that it was deliberately drawing majority-minority districts, ostensibly to comply with section 5 of the VRA. The Court rejected Alabama's interpretation of section 5 and remanded the case to decide the *Shaw* claim. *Id*. at 1263-64, 1271. In addition, a challenge to one of Virginia's Congressional districts is set for argument in the Supreme Court on March 21, 2016, although the Court has indicated that standing is an issue in that case. *See Wittman v. Personhuballah*, 136 S. Ct. 499 (Mem.) (2015). In both cases, the states essentially conceded race was the predominant factor in order to comply with Section 5's non-retrogression requirement. *See, e.g., Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *9-10 (E.D. Va. June 5, 2015).

permissible) and when it becomes the dominant factor (which is not permissible). "This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to *exercise extraordinary caution* in adjudicating" a *Shaw* claim. *Miller*, 515 U.S. at 916 (emphasis added). These concerns are incorporated in and inform the high standard set forth in *Cromartie II*. *Cromartie II*, 532 U.S. at 257. This is the standard the unanimous three-judge court applied in *Cano II*, 211 F. Supp. 2d at 1224-25 in granting summary judgment for California and dismissing *Shaw* claims, and it is the standard the District Court carefully applied here. ER 14, 23-25.[17] *Cano II* is particularly relevant here because, like *Cromartie II*, it invokes *Shaw* in a case where the state did not claim the district was compelled by the Voting Rights Act.

As they did in the District Court, plaintiffs refuse to address *Cromartie II* and *Cano II*. Instead, they argue (wrongly) that summary judgment is disfavored for *Shaw* claims and that they only needed to establish there was a "material fact about the racial motivation behind CD 10's boundaries" in order to overcome summary judgment. AOB at 22.

[17] *See also Chen v. City of Houston*, 206 F.3d 502, 505 (5th Cir. 2000) (granting summary judgment for City against *Shaw* claims).

For both arguments, they rely primarily on *Cromartie I*, 526 U.S. 541 and *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000). AOB at 21-22.[18]

In *Cromartie I*, North Carolina's newly re-drawn 12th congressional district came back to the Court, after having been struck down in *Shaw II*. The issue in *Cromartie I* was whether the three-judge court correctly granted summary judgment *in favor of plaintiffs* before discovery had occurred. The Supreme Court held that "[s]ummary judgment *in favor of the party with the burden of persuasion* . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Cromartie I*, 526 U.S. at 553 (emphasis added). The Court also noted that "[j]ust as summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation . . . the same holds true for racial gerrymandering claims of the sort brought here." *Id.* at 553 n.9. Thus, *Cromartie I* does *not* stand for the proposition that summary judgment is disfavored for resolving *Shaw* claims, as plaintiffs contend. AOB at 21. It is only disfavored for resolving *Shaw* claims in favor of the party with the burden of proof. As explained above, *Cromartie II* provides the applicable standard here, not *Cromartie I*.

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[18] Plaintiffs' other cases do not help them, because no *Shaw* claim was ever established in any of them. In *Robertson v. Bartels*, 148 F. Supp. 2d 443, 453-58 (D.N.J. 2001) the court *granted* summary judgment in favor of defendant. In *Woullard v. Mississippi*, No. 3:05 CV 97, 2006 WL 1806457, at *9-10 (S.D. Miss. June 29, 2006), the three-judge court denied defendants' motion for summary judgment only to rule resoundingly in defendants' favor at trial. *Johnson v. Mortham*, 915 F. Supp. 1529, 1540-41 (N.D. Fla. 1995) and *Polish Am. Cong. v. City of Chicago*, 226 F. Supp. 2d 930, 937-38 (N.D. Ill. 2002) both involved summary judgment motions brought very early in the proceedings.

Plaintiffs make the same mistake by relying on *Prejean v. Foster*, 227 F.3d at 504. In that case, which preceded *Cromartie II*, the court initially reversed the District Court's order granting summary judgment for the state and remanded the case for further proceedings because the district had some of the characteristics of race-based line drawing seen in the *Shaw* cases. However, by the time remand occurred, *Cromartie II* had been decided, and the lower court dismissed the *Shaw* claim because the district was explainable in terms of incumbency protection; the Court of Appeal affirmed. *Prejean v. Foster*, 83 F. App'x 5 (5th Cir. 2003). Plaintiffs fail to mention this subsequent history.

Plaintiffs' argument that summary judgment is disfavored for resolving the City's motion is also directly at odds with *Miller*, *supra*, which holds that courts should consider the intrusive nature of *Shaw* claims when assessing the strength of plaintiffs' case and "determining whether to permit discovery or trial to proceed." *Miller*, 515 U.S. at 916-17.

Finally, plaintiffs' argument was squarely rejected in *Cano II*. There, the court held that plaintiffs could not defeat summary judgment by presenting some direct and circumstantial evidence that race predominated in the line-drawing. *Cano II*, 211 F. Supp. 2d at 1223-24. For purposes of the motion, the court not only accepted plaintiffs' evidence as true, but also accepted their allegation that race-based line-drawing drove the process. *Cano II*, 211 F. Supp. 2d at 1217. Nevertheless, the court entered summary judgment for defendants because, like here, plaintiffs were unable to demonstrate that the districts were unexplainable on grounds other than race. *Id.* at 1226.

B. The District Court Properly Found That Every Change To CD 10 Adhered To Traditional Districting Criteria, Not Race

In contrast to plaintiffs' failure to show that CD 10 is unexplainable on grounds other than race, the City demonstrated through objective, verifiable and undisputed evidence that CD 10 rigorously adheres to traditional redistricting criteria, including the specific changes about which plaintiffs complain.

The Commission's starting point for drafting the 2012 map was the 2002 plan. *See* SER 185-86, 279. This is an appropriate approach to redistricting. SER 185-86; *see also Chen v. City of Houston*, 206 F.3d at 521. The Commission also closely adhered to the goal of keeping at least two-thirds of the ninety-five neighborhood councils whole. ER 900-01; SER 186. CD 10 is clearly a result of these policies: It did not change much from the benchmark plan, but when it did it was to unify neighborhoods.

The City made a total of eleven changes to CD 10 from the 2002 benchmark plan. Almost all of the changes were minor changes on the perimeter of the district, and each of them had the effect of better unifying neighborhoods. Each change is shown on the map and described in the chart at pages 6-7 of the Addendum.

The eleven changes resulted in: (1) making five neighborhood councils whole (Palms, United Neighborhoods of the Historic Arlington, Pico Union, MacArthur Park, and Olympic Park); (2) making three official renaming policy neighborhoods whole (Koreatown, Little Ethiopia, and Little Bangladesh); (3) making the Leimert Park and Crenshaw Manor neighborhoods whole for the first time in forty years; and (4) better unifying four neighborhood councils (Mid-City, Greater Wilshire, WCKT, and

Empowerment Congress West Area). Addendum at 6-7; SER 186-7, 287-91. Put differently, each change either eliminated or improved a neighborhood split. SER 291. In addition, every movement of territory in or out of the district follows a pattern whereby the smaller piece of a neighborhood would move to the district in which the larger piece was already located, thereby minimizing disruption. *Id.*

Even the two changes that form the basis of plaintiffs' *Shaw* claim – moving part of Palms out of CD 10 and moving parts of the Empowerment Congress West Area into CD 10 – reduced or eliminated neighborhood splits, something that plaintiffs did not dispute.

Palms. In this change CD 10 ceded territory to CD 5 in order to make the Palms Neighborhood Council whole in CD 5. *See* Addendum at 6-7 (*see* change "A" in map and chart); SER 288. Palms was previously split among three City Council districts; now it is whole in one district. *See* Addendum at 8; SER 288. Moreover, this area is the farthest west CD 10 had been historically; moving territory to CD 5 made CD 10 more compact and restored CD 10 to more of its historical footprint. *Id.* This change was supported by public testimony. *Id.*

Empowerment Congress West Area NC. These changes moved territory from CD 8 into CD 10 to make the Leimert Park and Crenshaw Manor neighborhoods whole in CD 10. *See* Addendum at 6-7 (*see* changes "J" "K", "L" in map and chart); SER 290. The Commission's final recommendation placed the entire Empowerment Congress West Area NC whole in CD 10, but the City Council subsequently removed the Dons neighborhood from CD 10 to link the CD 8 incumbent's residence with his district. SER 290. The net effect was that all of Empowerment Congress NC except the Dons neighborhood is in CD 10, and the Leimert Park and

Baldwin Hills/Crenshaw (except the Dons) are unified for the first time in forty years. *See* Addendum at 9; SER 290. This change was supported by public testimony. SER 290.

Plaintiffs' claim also fails because a *Shaw* claim must show that "a significant number of voters" were moved in or out of a district based on their race. *Miller*, 515 U.S. at 916. In *Cromartie II*, the Supreme Court rejected as insufficient evidence that the chief linedrawer may have moved 60,000 African-Americans into another district (or about 11% of the district's population)[19] for racial considerations. *Cromartie II*, 532 U.S. at 254-55. Likewise, in *Cano II*, the court held that relatively small population border swaps were not actionable under *Shaw* as a matter of law. *Cano II*, 211 F. Supp. 2d at 1220. In *Cano II*, the court described a decrease in Latino voters comprising 6% of the district as insignificant. *Id.* at 1220 n.13. Here, the changes plaintiffs complain about are much smaller than those at issue in either *Cano* or *Cromartie II*: the Palms movement involved only 5.4% of the district's population; the Empowerment NC move involved only 4.8%. SER 219. But those percentages represent the entire number of people affected, regardless of race. SER 219. Plaintiffs contend the Palms move was made to reduce the White population, but that move included only 5,142 White residents, or 2% of the district's population. *See* SER 234 (population of CD 10 is 256,962), 219 (*see* change "A"), 242 (demographic data from movements). Likewise the African-American residents who were part of the Empowerment change represent only 3.6% of the district's population. SER 219 & 242 (*see* changes "J," "K," & "L").

[19] *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 n.3 (E.D.N.C. 2000).

Ironically, the biggest change to CD 10 was *adding* 31,417 people (or 12.2% of the district) to bring more of WCKNC *into* CD 10, making that neighborhood council far more whole. SER 219 (*see* change "E"). Because that area is mostly Latino (52.4%) and Asian (35.4%), with only a small African-American population (4.2%), that change clearly was not made to increase the African-American population. SER 289. In fact, the change would have the *opposite* effect, as the District Court found. ER 4 n.11.

Despite these facts, plaintiffs argue WCKNC should have been made whole. *See, e.g.*, AOB at 3.[20] Because WCKNC is by far the largest neighborhood council in the City, doing that without causing population deviations and neighborhood council splits across the City would have been extremely difficult. SER 192, 289. The 2012 Redistricting Ordinance, however, did dramatically improve the WCKNC area from 2002. It reduced the number of splits of WCKNC from three to two, and it placed all of the Koreatown renaming policy area in one district, CD 10. Addendum at 10; SER 289.

As the District Court held, CD 10 adheres to all of the traditional non-racial districting criteria: it is compact, balances population, unifies neighborhoods, preserves the overall shape and nature of the district and maintains representational continuity. *See* ER 16-19; *see also* SER 193. Plaintiffs never tried to prove otherwise.

[20] Notably, eleven of the sixteen draft maps filed by the public that covered this area split WCKNC between at least two districts. ER 906-08; SER 81-82.

C. Plaintiffs' Evidence Is Insufficient As A Matter Of Law To Overcome Summary Judgment

Plaintiffs' case also fails because even assuming their allegations of racial intent are true, CD 10 has none of the necessary characteristics of a *Shaw* district: it is compact and adheres to traditional criteria; it is not an African-American majority-minority district and does not reach for minority populations; it is not bizarrely shaped; and far from "balkanizing" voters by race, it is one of the most diverse districts in the City. *See Cano II*, 211 F. Supp. 2d at 1216-21. Nonetheless, plaintiffs attempted to rebut this with the evidence discussed below.

1. Plaintiffs' direct evidence

Plaintiffs' case that race predominated is based almost entirely on two pieces of direct evidence: (1) an email from Commissioner Ellison to other commissioners at the beginning of the process regarding his desire to increase the African-American population in CD 10 to keep it an "African-American opportunity district" (AOB at 11, 25); and (2) post-redistricting comments by City Council President Herb Wesson that plaintiffs construe as suggesting that he wanted to increase African-American population in CD 10. AOB at 14, 26-27.

Under the Supreme Court's ruling in *Cromartie II*, this evidence is insufficient as a matter of law. The district court in *Cromartie II* relied on two similar pieces of direct evidence: (1) a statement by the leader of the redistricting effort that the redistricting plan satisfies a "need for 'racial and partisan' balance"; and (2) an email from a legislative staff member to two state senators, stating: "I have moved Greensboro Black community into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this." *Cromartie II*, 532 U.S. at 253-54. Although the Supreme

Court found such evidence offered some support for a finding that race predominated, the Court held it was "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases" and concluded as a *matter of law* that the plaintiffs' "evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries." *Id.* at 254, 257.

The three-judge court in *Cano II* reached the same conclusion regarding similar evidence. The *Cano* plaintiffs relied on an alleged statement from the Senate Redistricting Committee Chair suggesting that certain districts may have been drawn for racial reasons. *Cano II*, 211 F. Supp. 2d at 1227-28. Nonetheless, the court found that "even coupled with plaintiffs' other evidence regarding intent, the statement is not sufficient to raise a triable issue as to whether traditional districting principles were subordinated to race." *Id.* at 1228. The weakness of plaintiffs' evidence is even more apparent when compared to the evidence in successful *Shaw* cases, where the state (as opposed to individual legislators) *expressly admitted* that its overriding purpose was to draw a majority-minority district to comply with the DOJ's maximization policy. *See* footnote 15, *supra*.

Equally important, even if Mr. Ellison or Mr. Wesson intended to use race as a predominant factor, their intent cannot be attributed to either the Commission as a whole or the City Council and Mayor, who had ultimate authority over redistricting. Mr. Ellison and Mr. Wesson were just two of the thirty-seven individuals (twenty-one Commissioners, fifteen City Councilmembers, and the Mayor) who voted on the various redistricting plans, and their individual motivations do not inform the legislative intent of either the Commission or City Council as a whole. *See Hispanic Coal. on*

Reapportionment v. Legislative Reapportionment Comm., 536 F. Supp. 578, 585 (E.D. Pa. 1982); *accord City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984) (subjective intent of individual legislators irrelevant to establishing motivation of entire Legislature).

The Commission's intent is found in its contemporaneous Final Report, drafted and approved one week after voting on its recommended plan. The report explains that race did not predominate and that the Commission followed neighborhood and natural boundaries where possible. SER 313.[21]

Mr. Ellison drafted his email on January 22, 2011, before the Commission released its first draft plan. ER 2352. The Commission substantially revised the map *twice* after that initial map, making significant changes to CD 10. SER 283-85. Then, the City Council made even more changes to CD 10 when it drafted its own plan, resulting in a significant reduction in the African-American population. SER 290.

Mr. Wesson's remarks came *after* the City Council voted and were made to a group of African-American clergy who were unhappy with the final plan. Courts are rightfully wary of relying on these kinds of *post hoc* explanations of legislative intent, and the Council President's remarks fall squarely within this Court's warning about focusing on what individuals say

[21] Plaintiffs rely primarily on the declarations of three commissioners (Kim, Roberts, and Anderson) who were opposed to the plan from the outset and signed the minority report (*see* ER 1304), but the Supreme Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).

"when they are making political statements to their constituencies . . . ." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1033 (9th Cir. 2010).

The District Court assessed the evidence and properly concluded that "[c]onsidering all of Plaintiffs' 'direct evidence' in light most favorable to Plaintiffs does not create a material dispute that the City was predominantly motivated by race in redistricting CD 9 or CD 10." ER 21.

2. Plaintiffs' circumstantial evidence

a. Demographics

Plaintiffs point to the fact that "[t]he ratio of African-American CVAP to Caucasian CVAP increased from 2.3 to 1 to 3.2 to 1" in CD 10 as evidence that race predominated in the linedrawing. AOB at 28. Plaintiffs do not explain why this ratio is relevant, nor could they. As the City's expert, Professor Bruce Cain explained, if the district were only biracial, the statistic could have meaning, but CD 10 has large Latino and Asian populations as well, and the white minority is well below any level where they could control electoral outcomes, making the focus on the black-white ratio irrelevant. SER 61.

Plaintiffs also claim – without any evidence at all – that CD 10's borders were changed to *maximize* African-American voters and minimize other voters. AOB at 28. The argument is absurd on its face: if that had really been its aim, the City would not have consolidated 70% of WCKNC into CD 10 since that area contains almost no African-American population. SER 60, 192. The great irony of plaintiffs' case is that what they want – WCKNC to be moved entirely out of CD 10 and into CD 13 – would *increase* the African-American population in CD 10. SER 192.

Rather, what the demographics show is that CD 10 was and continues to be one of the most diverse, multiracial coalition districts in the City. SER 188-89. It is not a *Shaw* district by any stretch of the imagination and does not perpetuate either the "representational" or "expressive" harms described in *Shaw*. *See Cano II*, 211 F. Supp. 2d at 1218. "Representational harm" occurs because the representative of a district created to favor one group may favor that group over the broader district. *Shaw I*, 509 U.S. at 648; *see also Cano II*, 211 F. Supp. 2d at 1216. Because no group constitutes a majority in CD 10, it would be "political folly, if not suicide" for a representative to focus on only one racial group. *Cano II*, 211 F. Supp. 2d at 1218. CD 10 is one of the most diverse districts in Los Angeles: it is one of only two districts that have double-digit citizen voting age populations in all four main racial and ethnic groups: Asian, Latino, African-American and White. *See* Addendum at 11-12; SER 188-89.

Moreover, CD 10 is not an African-American majority district by any measure, with an African-American population of only 25.9% and CVAP of only 40.5%. *See* Addendum at 12. Neither plaintiffs nor the City has found a case holding that a *Shaw* violation occurred in a district that was not a majority-minority district. Thus, although a majority-minority district is not legally required under *Shaw*, any district that is not equivalent to that will likely lack the representational harms about which *Shaw* is concerned. *Cano II*, 211 F. Supp. 2d at 1218.

Similarly, CD 10 does not create the "expressive harms" raised by *Shaw*, which result from the classification of voters on the basis of race. *Id.* Here shape is relevant again. In *Cano II*, the court observed that compact urban districts generally do not create expressive harms. "Where such

graphic indicia of racial districting are absent, the likelihood of 'expressive harm' is reduced, if not eliminated," because disproportionate representation in more compact districts "'can be seen as the result of residential housing patterns, not an intent to draw a line in order to reaffirm racial differences.'" *Id.* at 1219 (citation omitted).

The 2012 map demonstrates that CD 10 is both one of the most compact districts in the City and also completely consistent with the shape of the former district, with the only changes coming at the borders to make neighborhoods more whole. *See* Addendum 6-7; SER 185-86. Far from CD 10 being "dramatically altered" as plaintiffs claim (AOB at 3), the new district contains 85% of the old district and does not increase the African-American population in any material way. SER 185-86. The African-American population changed only 1.7% and the changes in African-American VAP (2%) and CVAP (3.7%) are also immaterial particularly given the overall levels. Addendum at 12; SER 188-89.

Plaintiffs argue, wrongly, that the District Court erred by "adding additional requirements to the predominance test" (AOB 5), claiming that the Court required plaintiffs to prove CD 10 had a "controlling electoral majority" of African-Americans to state a *Shaw* claim. AOB 42. What the District Court actually and accurately said was that in a district like CD 10, where no group is a majority, the representational harms about which *Shaw* is concerned do not exist. ER 17-18. The Court did not set a requirement that the district had to be majority-minority. Rather, looking at the demographics of CD 10, the Court accurately concluded that "[u]nlike every other district challenged in binding *Shaw* precedent, CD 10 is a multiracial district where no racial group constitutes a majority." ER 18.

b. Plaintiffs' boundary segment analysis

Plaintiffs' second piece of circumstantial evidence is their expert's "boundary segment analysis," which compares the racial voting age population on each side of a border segment created by the outside edge of a census bloc. AOB at 29-30. Professor Crayton concluded that because slightly more of the segments (54%) placed more African-Americans inside rather than outside CD 10, race must have been the predominant factor in drawing the boundaries. *Id*. Far from helping plaintiffs' case, the analysis completely undermines it.

First, 54% is only slightly above 50%, demonstrating that relatively few segments actually had more African-Americans inside rather than outside CD 10. SER 190. As Professor Cain explains, one would expect that number to be 80 to 90% if the line-drawer were really motivated to draw lines based on race. *Id.*

Second, Professor Crayton failed to perform the same analysis on the former CD 10 boundary, which he acknowledges was one of "the most diverse election districts in Los Angeles."[22] SER 191. Because Professor Crayton applauds the old CD 10 but claims the new boundaries were racially gerrymandered, a comparison between the two should be dramatic. Yet that comparison shows almost identical numbers: 53.61% of the segments of the former district placed more African-Americans inside the district than outside; the number is 54.84% for the new district. SER 192, 225.

Even more damaging, when the analysis examines what percentage of the 2012 boundary segments follow either the former CD 10 boundary or the boundary of a neighborhood council – two appropriate and laudable race-

[22] *See* ER 255.

neutral redistricting criteria – it becomes clear that 89% of the new district's boundaries follow those borders. SER 191, 225. Moreover, for the segments that do not follow those boundaries, the racial differential is significantly below the differential for the whole district. SER 191. In other words, where the blocks coincide with 2002 or neighborhood council lines, they adhere to traditional, race neutral criteria and where they do not, the race differential inside and outside the boundary *is lower*, a finding that is not consistent with the conclusion that race predominated in drawing the boundary. SER 191-92. Plaintiffs do not dispute any of this, arguing only that it creates a triable issue of fact. AOB 30. *Cromartie II* says otherwise. 532 U.S. at 252-53.

c. Shape of CD 10

Plaintiffs argue that CD 10's shape is "consistent with two competing explanations, one in which race predominates," because CD 10 is at least as bizarre as the boundaries overturned in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). AOB 33, 35. First, under *Cromartie II*, if there are two competing explanations for a district, one race-based and the other race-neutral, a *Shaw* claim fails as a matter of law. *See Cromartie II*, 532 U.S. at 257. Second, CD 10 is nothing like the boundary at issue in *Gomillion*, which was carefully drawn to exclude virtually all African-Americans from the city limits of Tuskegee, Alabama while excluding no white voters. *See Shaw I*, 509 U.S. at 644-45 (discussing *Gomillion*). In sharp contrast, CD 10's shape is dictated almost entirely by following other, pre-existing boundaries such as neighborhood council boundaries, the City's border with Culver City, and the old boundary lines from the 2002 plan. *See* Addendum at 7; SER 190-

93. Therefore, any irregularity in the shape of CD 10 is a result of following race-neutral criteria.

Moreover, the overall shape of CD 10 has remained remarkably stable since the 1970s, meaning that it has retained its historical shape and has not been contorted or dramatically redrawn to bring pockets of disparate racial communities into the district. SER 185-86, 211. Rather, it remains one of the most compact districts in the City.

Finally, CD 10 looks *nothing* like the districts the Supreme Court has found to violate *Shaw*. *Compare* Addendum at 5 (CD 10) with 14-18 (*Shaw* districts).

d. Alleged procedural irregularities

Plaintiffs also argue that certain Commission procedures show racial discrimination, starting with the fact that the first draft of CD 10 was done in a closed-door regional subcommittee meeting. AOB at 38-40. First, as noted earlier, this procedure originated with the 2002 redistricting commission; it was not new. SER 282-83. It is also common for commissions to work in small subsets. SER 182.

Second, it is simply not true, as plaintiffs allege, that "all significant decisions and deliberations of the Redistricting Commission happened behind closed doors in the Ad Hoc Committees." AOB at 55. The ad hoc committees met only twice in order to produce very preliminary regional plans that were then pulled together into a preliminary draft that was presented, discussed, and voted on in public. *See* SER 282-83. After that, the draft plan underwent two substantial revisions at two separate public meetings at which the Commission debated ninety-four different amendments, accepting forty-nine of them. *See* SER 283-85. Then, of

course, it was the City Council's turn to review, debate, and amend the proposed plan, which it did in the course of three public meetings. SER 341-46.

Plaintiffs also argue that alternate maps, including a plan by Commissioner Helen Kim, were improperly "suppressed." AOB 10. As the District Court correctly found, Commissioner Kim's map was reviewed, debated, and rejected at a meeting of the full Commission on January 25, 2012. ER 8-9; SER 86.

Plaintiffs also insinuate that certain Commission members were removed because they disagreed with the lines drawn for CD 10. AOB at 12-13, 39. However, plaintiffs produced no declarations from the commissioners who were replaced, and the two declarations from other commissioners on which plaintiffs rely say nothing about the reason for any replacement. *See* ER 173, 202. Although the declarations include hearsay that the removed commissioners "expressed reservations" about the ad hoc committee maps, there is absolutely no assertion, even by plaintiffs' declarants, that these alleged reservations had anything to do with race. *Id*. Moreover, two of the Commissioners whom plaintiffs claim voted against the plan did no such thing: One voted in favor of it, and the other was absent from the meeting. SER 86-87. In fact, six Commissioners voted against the January 25 plan yet *none* of those Commissioners was replaced. SER 87.

Finally, plaintiffs claim, wrongly, that the District Court erred by not considering the cumulative effect of their evidence and instead addressed it in piecemeal fashion. AOB at 32. The District Court reviewed plaintiffs' direct and circumstantial evidence precisely the same way as the Supreme Court did in *Cromartie II*: by examining each piece of evidence and

deciding whether it supports a finding that race predominated. *See* ER 21-26. After carefully reviewing the evidence in the light most favorable to plaintiffs, the Court concluded it did not create a material dispute about whether race predominated. *See* ER 119-23. Equally important, however, the Court, following *Cromartie II*, properly concluded that "[r]egardless of the motivation behind the City's creation of CD 9 and 10, the evidence that the City did not subordinate or neglect traditional redistricting criteria in passing the 2012 Redistricting Ordinance is undisputed. Summary judgment must, therefore be granted to the City." ER 25.

D. Plaintiffs Did Not Produce An Alternate Plan Consistent With Their Claim

Even if plaintiffs could establish that CD 10 was drawn on the basis of race, which they cannot, they were required to provide an alternative plan that accomplishes the City's race neutral goals regarding population deviations and neighborhood splits *and* also brings "about significantly greater racial balance."[23] *Cromartie II*, 532 U.S. at 258.

Plaintiffs never attempted to meet this requirement and offered no plan showing significantly greater racial balances. However, they did attach three alternative maps to their Complaint. Of the many contradictions in plaintiffs' case, perhaps the greatest is that the plans they offered do not achieve better "racial balance" in CD 10 or its neighboring districts, and they

[23] Plaintiffs' claim that the requirement only applies to "politics, not race" cases makes no sense. The Supreme Court has severely criticized political gerrymandering (*see Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)); the Court would not require an additional test to overcome a suspect rationale like politics, but not for one based on traditional redistricting principles.

grossly violate the most basic redistricting goals of the City. Plaintiffs attached three alternative maps to their Complaint to show that WCKNC could be kept whole. *See* SER 536-625. Two have almost identical African-American CVAP as CD 10 and therefore do nothing to improve racial balance. SER 292-94. The third has a slightly lower CVAP (37%), but the difference does not change the makeup of the district. *Id.* All three, however, grossly violate the City's other redistricting goals, by among other problems, dividing more than a third of the neighborhood councils, having total population deviations far in excess of the City's stated goal of 5%, and dividing official City renaming policy communities. SER 292-94.

II. THE *HAVERILAND* PLAINTIFFS WAIVED THEIR RIGHT TO APPEAL THE DISTRICT COURT'S HOLDING REGARDING CD 9

The District Court rejected the *Haveriland* plaintiffs' claim that the City violated *Shaw* in drawing CD 9 as well as CD 10. *See* ER 24-25. On appeal, the *Haveriland* plaintiffs simply joined the *Lee* plaintiffs' brief, which does not address CD 9. Because a party waives an issue on appeal if the issue is not distinctly and specifically raised in its opening brief, the *Haveriland* plaintiffs have waived review of the District Court's ruling on CD 9. *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) (citing *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994)).

III. THE DISTRICT COURT PROPERLY APPLIED THE LEGISLATIVE PRIVILEGE

Just as they did with the case law governing their *Shaw* claim, plaintiffs ignore the relevant case law on legislative privilege. They do not even cite this Court's principle opinion on the subject, *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), and they barely mention *Village of*

Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 267 (1977).

When plaintiffs do cite *Arlington Heights*, they quote only the Supreme Court's statement that as part of a statute's legislative history, contemporaneous statements by members of the decisionmaking body may be highly relevant to a racial discrimination claim. AOB at 51. Plaintiffs never mention the following sentence, which is critical to resolving a legislative privilege claim:

> In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

429 U.S. at 268.[24]

A. Plaintiffs Had Access To A Wealth Of Data About The City's 2012 Redistricting

Before turning to case law, it is important to understand the nature and amount of evidence that was available to plaintiffs. The Commission held thirty-nine public meetings (ER 1822), reviewing draft plans in ten public meetings held throughout the City. SER 283-85. All of this activity produced a massive public record which also includes lengthy reports by the Redistricting Commission and the City's Chief Legislative Analyst (CLA) discussing why the Commission drew the lines where it did and the nature of the Council members' proposed changes to those lines. SER 285-87, 342;

[24] These principles clearly apply to racial gerrymandering claims. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1977) (courts should look to *Arlington Heights* for guidance).

ER 883-1723 (Commission Report), 2112-2230 (CLA Reports). Plaintiffs had this complete record. *See* SER 443-46.

Plaintiffs also received hundreds of thousands of pages of documents through discovery and were allowed to depose both staff and Commission members about the factors that the Supreme Court has said are relevant to a racial discrimination claim like theirs: the legislative or administrative history, the historical background of the decision, the sequence of events leading to the decision, and departures from procedural and substantive norms. *Vill. of Arlington Heights*, 429 U.S. at 267-68. Plaintiffs deposed the Commission's Executive Director, and Commissioners Ellison and Downey. *See* ER 206 (referencing depositions).

The only depositions that plaintiffs were initially barred from taking were those of the Mayor and four City Council members, based on the well-established principle that high-ranking officials like the Mayor and Council President should not be deposed absent a showing that they have personal knowledge of relevant information and plaintiffs are unable to obtain that information in any other way. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). In seeking reconsideration, both sets of plaintiffs abandoned their attempts to depose the Mayor and other legislative officials, arguing that they wished to depose only Council President Wesson and one of his legislative aides, Deron Williams. *See* ER 2398. That plaintiffs chose not to take more depositions or do additional discovery does not mean that they were prevented from doing so.

The *Lee* plaintiffs also *agreed* to a compromise proposed by the Magistrate Judge that evidence regarding legislative acts, motivations, and deliberations is protected by the legislative privilege but that the City should

produce objective, race-based reports that may have been before the legislators. ER 2482-84. Although the stipulation was "without prejudice," the *Lee* plaintiffs never renewed their motion to compel discovery and only belatedly joined in the *Haveriland* plaintiffs' opposition to the City's motion for a protective order based on legislative privilege.[25]

Finally, it is important to note that counsel for the *Haveriland* plaintiffs told Magistrate Judge Jay C. Gandhi that he had sufficient evidence to demonstrate discriminatory intent already, which Judge Gandhi said "counsels against unnecessary inquiries into the motives of legislators under the circumstances presented here." *See* ER 2416-17.

B. The Legislative Privilege Applies To State And Local Officials

Plaintiffs argue that the legislative privilege "should not apply to state and local officials, " citing a single Third Circuit case, *In re Grand Jury*, 821 F.2d 946, 958 (3rd Cir. 1987). AOB at 46. Plaintiffs make no mention of the Supreme Court's statement in *Village of Arlington Heights*, *supra*, that the compelled testimony of local officials about the motivation behind an ordinance "frequently will be barred by privilege." 429 U.S. at 268. Nor

[25] Plaintiffs seriously mischaracterize the procedural record by suggesting the legislative privilege issue was only briefed once in *Haveriland* before the cases were consolidated. AOB at 15-16. *Before* the *Haveriland* dispute occurred, the *Lee* plaintiffs and the City litigated the legislative privilege issue in the context of the *Lee* plaintiffs' discovery requests, which resulted in the stipulation mentioned above. Therefore, taking into account the *Lee* motion to compel, the City's motion for protective order, and the plaintiffs' subsequent requests for reconsideration and certification of the City's motion, the legislative privilege issue was fully briefed and decided on four separate occasions in the District Court. *See* ER 2358-2366, 2379, 2473-74, 2487-2535; SER 426-69.

do they mention this Circuit's opinion in *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297-98 (9th Cir. 1984), prohibiting the depositions of local city council members about the motives behind a zoning decision. The *Foley* Court expressly stated that "[e]ven where a plaintiff must prove invidious purpose or intent, as in racial discrimination cases, the [Supreme] Court has indicated that only in extraordinary circumstances might members of the legislature be called to testify, and even in these circumstances the testimony may be barred by privilege." *Id*., citing *Vill. of Arlington Heights*, 429 U.S. at 268; *accord Jeff D. v. Otter*, 643 F.3d 278, 289-90 (9th Cir. 2011) (District Court properly shielded a state legislative budget analyst from deposition based on legislative privilege.). There can be no doubt that federal law, especially in this Circuit, recognizes a legislative privilege applicable to state and local officials.

C. The Fact That Government Intent Is At Issue In This Case Does Not Negate The Legislative Privilege

Plaintiffs next argue that no privilege should apply "[w]here a plaintiff's constitutional claim is directed at the government's intent . . . ." AOB at 47. For this proposition, plaintiffs rely on cases involving the separate – and weaker – deliberative process privilege. That privilege applies to executive and administrative acts, and although legislators and their staffs may claim both privileges, courts have generally held that the legislative privilege is "weightier" or more "robust" than the deliberative process privilege. *Favors v. Cuomo*, 285 F.R.D. 187, 210 n.22 (E.D.N.Y. 2012); *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922 MMM RZ, 2003 WL 25294710, at *18 (C.D. Cal. Oct. 10, 2003).

The government misconduct cases cited on pages 47-49 and 54 of plaintiffs' brief all involved the deliberative process privilege, not the

legislative privilege. The courts in those cases used a balancing test that included whether the issue involved allegations of government misconduct.

Courts addressing the government misconduct issue in the context of the *legislative privilege* come at the problem differently. If allegations of government misconduct could abrogate a legislator's privilege, then, as one court put it, "the legislative privilege could never be asserted in a redistricting case alleging a violation of the Voting Rights Act." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 99 (S.D.N.Y. 2003). Yet a three-judge court in the Central District of California carefully concluded that the legislative privilege applies to allegations of government misconduct in a redistricting case.

In *Cano v. Davis*, 193 F. Supp. 2d 1177 (C.D. Cal. 2002) ("*Cano I*"), plaintiffs claimed that the California Legislature engaged in racial gerrymandering in the 2001 statewide redistricting. When one member of the Legislature chose to waive his legislative privilege in deposition, the three-judge court held that he could do so, but that he could not testify about other legislators who had invoked the privilege or staffers or consultants who were also protected by the privilege. *Id.* at 1179.[26]

Plaintiffs argue that *Cano I* did not address whether the legislative privilege of other members should be overridden, "particularly where there

[26] Judge Reinhardt concluded that the legislator should be allowed to testify about statements made by fellow Assembly members, but he never suggested that legislators who had not waived the privilege could be compelled to testify. *Id.* at 1181-82. Most importantly, Judge Reinhardt later joined the other two judges in granting summary judgment in favor of the defendants, despite the fact that the court's ruling had barred plaintiffs from precisely the kind of discovery that plaintiffs seek here. *Cano II*, 211 F. Supp. 2d at 1251-52.

already was evidence of racial intent," presumably a reference to plaintiffs' evidence about statements made by Commissioner Ellison and Council President Wesson. AOB at 59. In *Cano*, however, the plaintiffs had presented evidence of legislators' statements suggesting that lines were drawn to reduce Latino population in order to favor white incumbents. *Cano II*, 211 F. Supp. 2d at 1227. Nevertheless, the three-judge court held that even a willing legislator could not testify in deposition about the motivation of legislators who had not waived their legislative privilege. *Cano I*, 193 F. Supp. 2d at 1179-80. Given this holding, if the court had allowed the case to go to trial, it almost certainly would not have permitted legislators to be called to the stand against their will.

Rather than acknowledging the holding in *Cano I*, plaintiffs focus on *United States v. Irvin*, 127 F.R.D. 169 (C.D. Cal. 1989). AOB at 48-49. *Irvin* involved the federal government's Voting Rights Act challenge to the redistricting plan adopted by the Los Angeles County Board of Supervisors in 1981. The County apparently raised only the deliberative process privilege, not the legislative privilege, as a defense to the government's motion to compel, and the magistrate judge rejected it. *United States v. Irvin*, 127 F.R.D. at 170. Given the fact that most courts have held that the deliberative process privilege applies to the executive branch, that conclusion is not surprising. It suggests that the County failed to cite the Supreme Court's decision in *Village of Arlington Heights* or this Court's decision in *Foley*, *supra*, both of which preceded *Irvin*. Because it addresses a different privilege than the one before the Court and because it makes no reference to controlling case law, *Irvin* is inapplicable here.

Finally, plaintiffs cite *United States v. Gillock*, 445 U.S. 360, 373 (1980) for the proposition that the legislative privilege is weaker for state

and local officials. AOB at 49. *Gillock* only holds that the privilege does not apply in *criminal* actions involving state or local officials. As the *Gillock* Court wrote, "cases on official immunity have drawn the line at civil actions." 445 U.S. at 373. This, of course, is a civil action, and both the Supreme Court in *Village of Arlington Heights* and this Court in *Foley* recognized that the legislative privilege applies in cases such as this.

D. The District Court's Legislative Privilege Ruling Satisfies Any Balancing Test

Plaintiffs insist that the City's legislative privilege is a qualified one subject to a balancing test. AOB at 50. Although this Court has never used a balancing test with regard to legislative privilege,[27] some courts have done so. For example, in *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, No. 11 C 5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), a three-judge district court balanced factors similar to those that this Court used for the deliberative process in *Federal Trade Commission, supra*, and *denied* plaintiffs access to materials regarding the motives and objectives of legislators conducting statewide redistricting. *Id.* at *9-10.[28] Because both the magistrate judge and the District Court judge relied on *Committee for a Fair and Balanced Map* in this case, if balancing

[27] *See Jeff D. v. Otter*, 643 F.3d 278, 290 (9th Cir. 2011); *Foley*, 747 F.2d at 1296-99. The Court did use a balancing test in *Fed. Trade Comm'n v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), which involved the deliberative process privilege.

[28] *See also Texas v. Holder*, No. 12-128, slip op. at 6 (D.D.C. June 5, 2012). RJN, Ex. 5. The City respectfully draws the Court's attention to footnote 1 of the three-judge court's opinion, which lists more than twenty cases involving legislative privilege, almost all of which upheld the privilege asserted in the particular case.

is to occur, it should be done using a test like the one used in *Committee for a Fair and Balanced Map*, which is based on the following factors: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation;[29] and (v) the possibility of future timidity by government employees. *Comm. for a Fair and Balanced Map*, 2011 WL 4837508, at *7.

1. Factor One: the relevance of the evidence plaintiffs seek

At first blush, it would seem that evidence of a legislator's motive is relevant to proving that race was the predominant factor in passage of a redistricting plan. One or two legislators' motives, however, are not enough to establish the motives of a twenty-one-member body like the Redistricting Commission or a fifteen-member body like the City Council to make the decisions that they did. Regardless of whether a legislative or deliberative process privilege applies, proving whether or not race was the predominant motive behind a redistricting plan cannot be done through individual inquiry; it must depend upon the intent of the body as a whole. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.") (citations omitted). That intent should be explored using *objective* evidence – such as the historical background of the ordinance, the sequence of events leading up to it, and whether the enacting body departed

[29] Respondents have addressed this factor separately in Part III C, *supra*.

from procedural or substantive norms. *Vill. of Arlington Heights*, 429 U.S. at 267-68; *Foley*, 747 F.2d at 1297.

2. Factor Two: the seriousness of the litigation and the issues involved

There can be no doubt that an allegation of intentional racial discrimination on the part of a governmental body is extremely serious. In this case, the question of the seriousness of the *litigation* – i.e., the strength of plaintiffs' case – is something else again. Where, as here, a city adopts a redistricting plan that complies in every respect with traditional redistricting criteria, using a process that is both public and thorough, the basis for plaintiffs' claims must be carefully examined. In doing so, a court should keep in mind that the *Shaw* doctrine is reserved for making only the "extreme instances of racial gerrymandering subject to meaningful review" and that it applies only in "exceptional cases." *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring); *Shaw I*, 509 U.S. at 646.

Here, plaintiffs base their claims on comments allegedly made by two individuals – Commissioner Christopher Ellison and City Council President Herb Wesson. Plaintiffs misrepresent and misconstrue those comments, but even if that were not the case, the objective evidence demonstrates that the City Council, including Mr. Wesson, actually changed the lines drawn by the Commission for Council District 10 in a way that *reduced* the district's African-American population.

3. Factor Three: the availability of other evidence

Because most deliberative process cases arise out of the executive branch, they involve decisionmaking from which the public was excluded. This is also true of most redistricting cases, where the process often occurs

almost entirely in secret. In this case, however, the public was very much involved, and there is a wealth of evidence available to these plaintiffs. Because those materials provide precisely the sort of evidence that the Supreme Court and the Ninth Circuit have held plaintiffs must rely on to prove discriminatory intent, the factor involving availability of other evidence weighs against disclosure.

4. Factor Four: the extent to which disclosure would hinder frank and independent discussion

The last factor to be weighed is the possibility of future timidity by government employees and decisionmakers. Courts recognize that the legislative process can be severely damaged if legislators or their aides lose confidence that they can speak candidly with one another. The Supreme Court has identified the severe intrusion that such inquiries entail, saying that "placing a decisionmaker on the stand is therefore usually to be avoided." *Vill. of Arlington Heights*, 429 U.S. at 268 n.18.

In *Committee for a Fair and Balanced Map*, 2011 WL 4837508, the three-judge district court described the need for confidentiality in redistricting decisions this way:

> In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law. This type of legislative horse trading is an important and undeniable part of the legislative process.

Id. at *9.

It is not enough for plaintiffs to say that "[a]ny chilling effect on unlawful behavior is desirable," (AOB at 58), because that approach ignores

the chilling effect on *lawful* behavior that is essential to the legislative process. As the California Supreme Court has said, "[t]he deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it." *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1345 (1991). Plaintiffs' argument that the lack of exposure to monetary liability (AOB at 57-58) lessens the impact of disclosure ignores the effect on candor that such disclosure will inevitably have.

Finally, there is also the difficulty of getting citizens to serve on public bodies at all if they can be questioned in court about the decisions they make. *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (the time and energy required to defend against a lawsuit are of particular concern at the local level). In this case, the twenty-one members of the Redistricting Commission were serving part-time, and citizens may not be willing to serve on the next Redistricting Commission if they will be subject to questioning about their motivation in subsequent litigation.

CONCLUSION

As the record makes abundantly clear, the City did not engage in racial gerrymandering. Plaintiffs are simply trying to leverage two statements from two legislators to overturn a map they do not like for a reason completely unrelated to their *Shaw* claim: that WCKNC was not made whole in their preferred district. In effect, plaintiffs are asking the Court to radically rewrite the *Shaw* doctrine to invalidate a redistricting ordinance any time there is evidence that some legislators considered race

during the process. If that were the standard, then every redistricting plan in the country could be overturned. That is not the law.

Dated: March 7, 2016

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: s/ Robin B. Johansen

s/ Thomas A. Willis

Attorneys for *Lee* and *Haveriland*
Defendant-Appellee City of Los Angeles

CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 15-55478

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 13,941 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: March 7, 2016

s/ Robin B. Johansen

ADDENDUM

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(00269713-5)

Appendix A: Charter Section 204 and Administrative Code Sec. 2.21

Sec. 204. Election of City Council Members; Redistricting.

(a) **Redistricting by Ordinance.** Commencing in 2002, the Council shall by ordinance redraw district lines to be used for all elections of Council members, including their recall, and for filling any vacancy in the office of member of the Council, after the effective date of the redistricting ordinance. Districts so formed shall each contain, as nearly as practicable, equal portions of the total population of the City as shown by the Federal Census immediately preceding the formation of districts.

(b) **Redistricting Commission.** There shall be a Redistricting Commission to advise the Council on drawing of Council district lines. The Commission members shall be appointed in the following manner: one by each Council member except that the Council President shall appoint two members, three by the Mayor, one by the City Attorney, and one by the Controller. No City officer or employee shall be eligible to serve on the Commission. The Redistricting Commission shall appoint a director and other personnel, consistent with budgetary approval, which positions shall be exempt from the civil service provisions of the Charter.

(c) **Redistricting Process.** The Redistricting Commission shall be appointed no later than the date by which the Census Bureau is to release decennial census data. A new Commission shall be appointed to advise the Council prior to each subsequent redistricting. The Commission shall begin the redistricting process at any time after the necessary data are obtained from the most recent Federal Census, but no later than January 1, 2002, and each subsequent tenth anniversary of that date. The Commission shall seek public input throughout the redistricting process. The Commission shall present its proposal for redistricting to the Council no later than a date prescribed by ordinance.

The Council shall adopt a redistricting ordinance no later than July 1, 2002, and each subsequent tenth anniversary of that date. Nothing in this section shall prohibit the Council from redistricting with greater frequency provided that districts so formed each contain, as nearly as practicable, equal portions of the total population of the City as shown by the Federal Census immediately preceding the formation of districts or based upon other population reports or estimates determined by the Council to be substantially reliable.

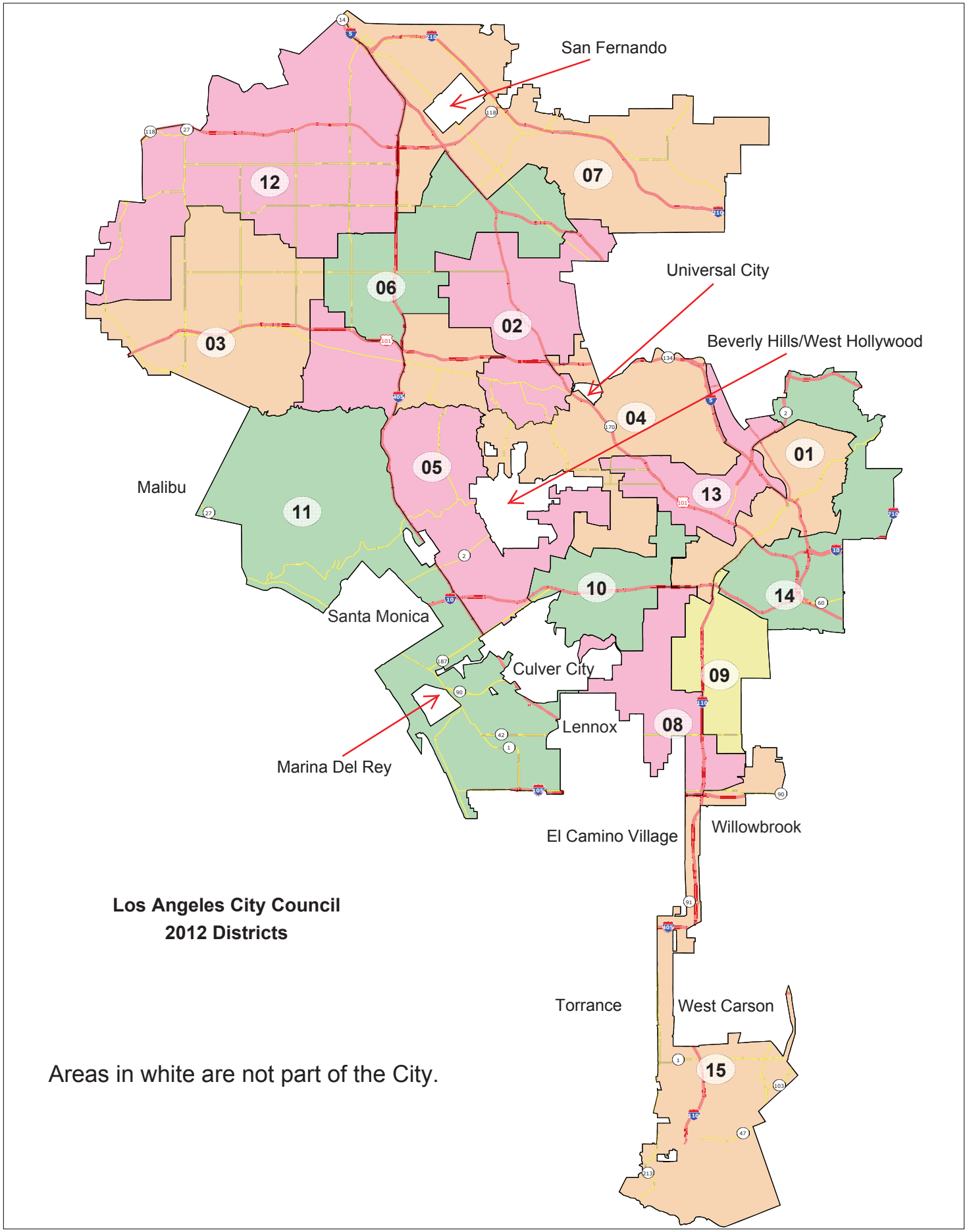
(d) **Criteria for Redistricting.** All districts shall be drawn in conformance with requirements of state and federal law and, to the extent feasible, shall keep neighborhoods and communities intact, utilize natural boundaries or street lines, and be geographically compact.

(e) **Effect of Redistricting on Incumbents.** No change in the boundary or location of any district by redistricting shall operate to abolish or terminate the term of office of any member of the Council prior to expiration of the term of office for which the member was elected.

(f) **Annexation or Consolidation.** Any territory annexed to or consolidated with the City shall, prior to or concurrently with completion of the proceedings therefor, be added to an adjacent district or districts by the Council by ordinance, which addition shall be effective upon completion of the annexation or consolidation proceedings notwithstanding any other provision of the Charter to the contrary.

(g) **Terms.** The terms of office for those members of the Council elected from odd-numbered districts shall commence during each fourth anniversary of the year 1997 and for the members elected from even-numbered districts shall commence during each fourth anniversary of the year 1999.

City of Los Angeles Municipal Boundary



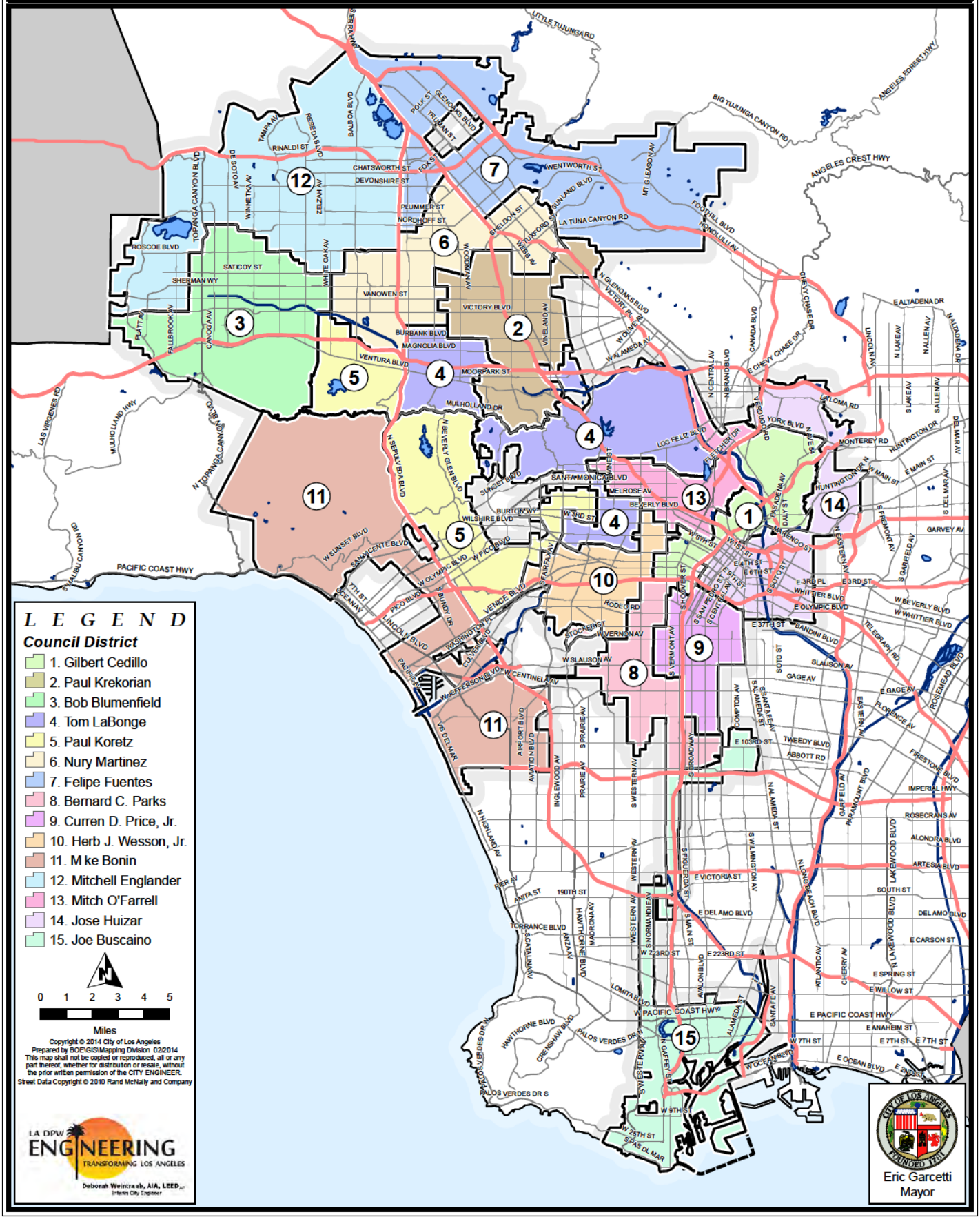
Los Angeles City Council
2012 Districts

Areas in white are not part of the City.

ADDENDUM 3

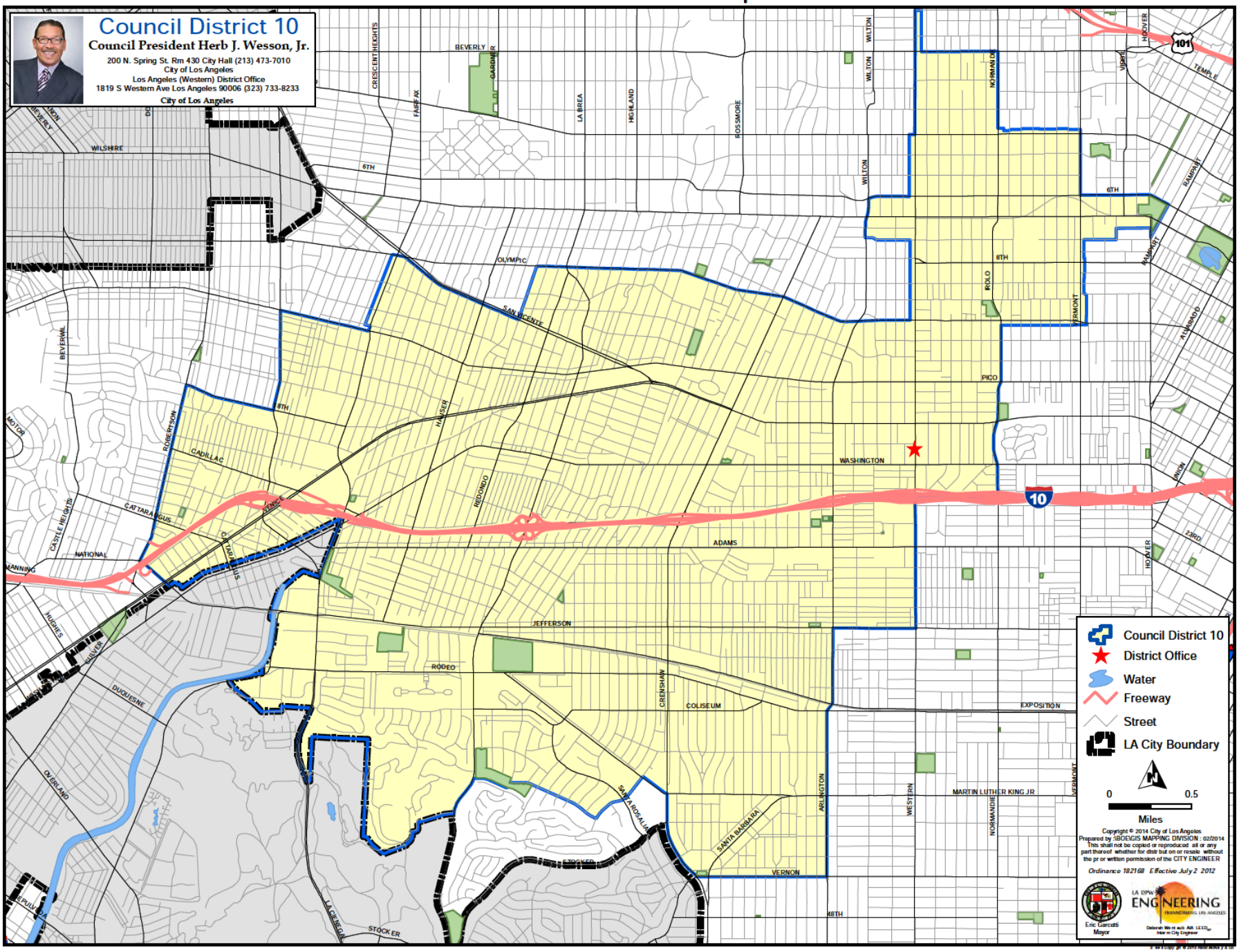
2012 Citywide Council District Map

City of Los Angeles Council Districts



ADDENDUM 4

2012 Council District 10 Map

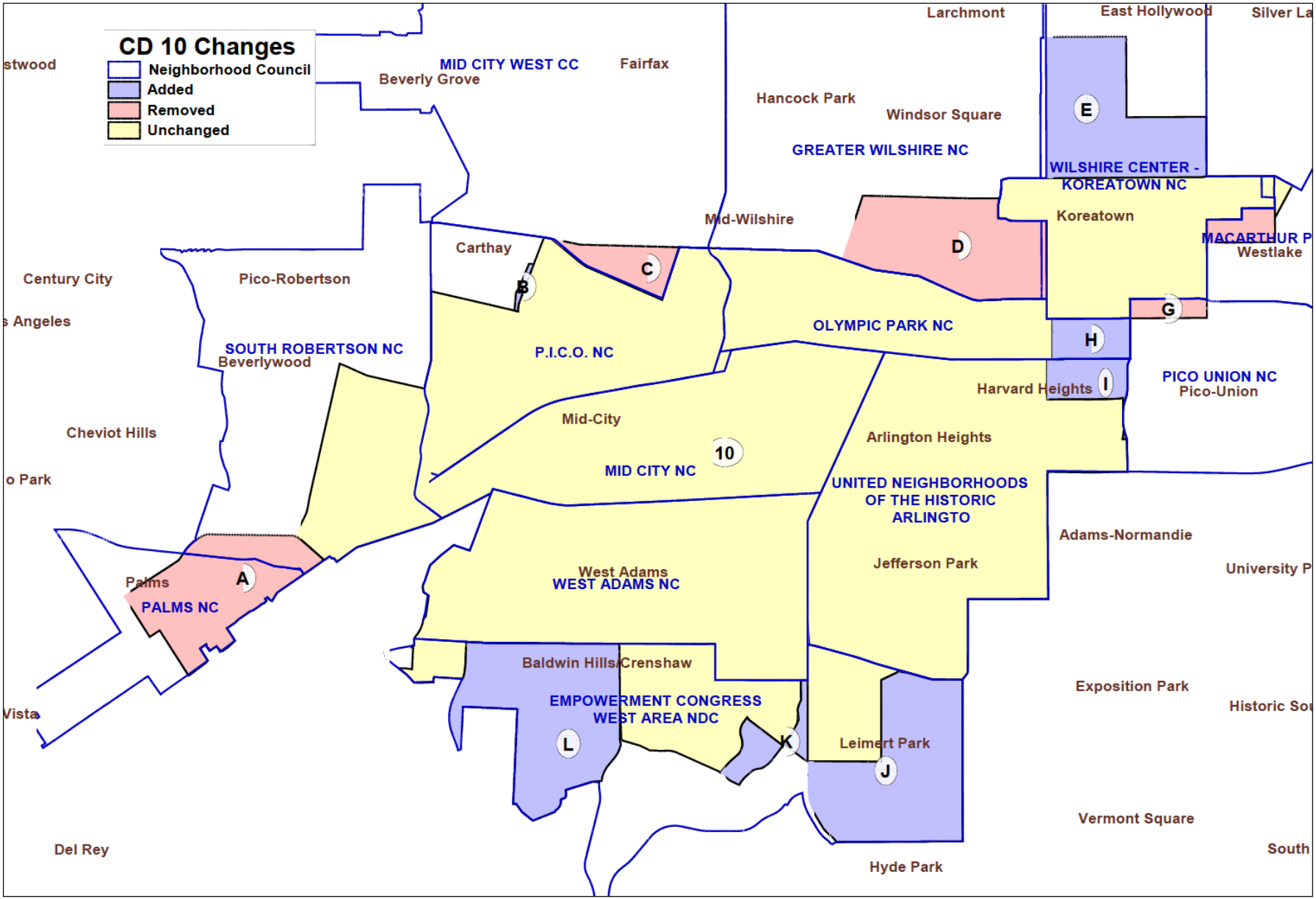


ADDENDUM 5

Summary of All Changes Made to
CD 10 in 2012 Final Redistricting Plan

Change	Affected Population	Percent of Adopted CD 10	Effect of Change
A	13,862	5.4%	Makes Palms Neighborhood Council (NC) whole (previously split in three districts)
B	464	0.2%	Makes official City renaming policy neighborhood of Little Ethiopia whole
C	2,125	0.8%	Reduces Mid-City West NC split from three to two
D	12,389	4.8%	Reduces Greater-Wilshire NC split from three to two
E	31,417	12.2%	Reduces Wilshire Center-Koreatown NC split from three to two (unifies 70% in one district); makes official City renaming policy neighborhoods of Koreatown and Little Bangladesh whole.
F	5,023	1.9%	Makes MacArthur Park NC whole
G	1,448	0.6%	Makes Pico Union NC whole
H	3,823	1.5%	Makes Olympic Park NC whole
I	3,147	1.2%	Makes United Neighborhoods of the Historic Arlington NC whole
J	8,305	3.2%	Unifies Leimert Park neighborhood
K & L	4,203	1.6%	Unifies Baldwin Hills/Crenshaw neighborhood (except Dons neighborhood)

All Changes to CD 10
(From 2002 Plan to 2012 Plan)



ADDENDUM 7

Treatment of Palms Neighborhood Council Across Council Districts from 2002 Plan to 2012 Plan

(NC Made Whole in One Council District After Being Split Among 3 Districts Under 2002 Plan)

2002

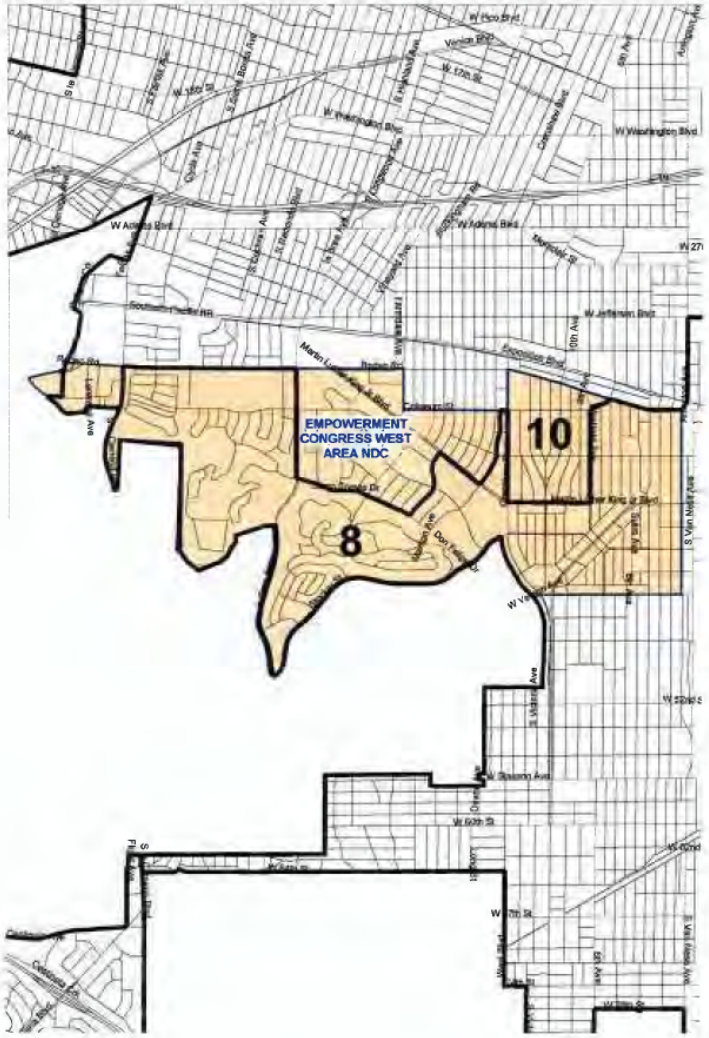
2012

ADDENDUM 8

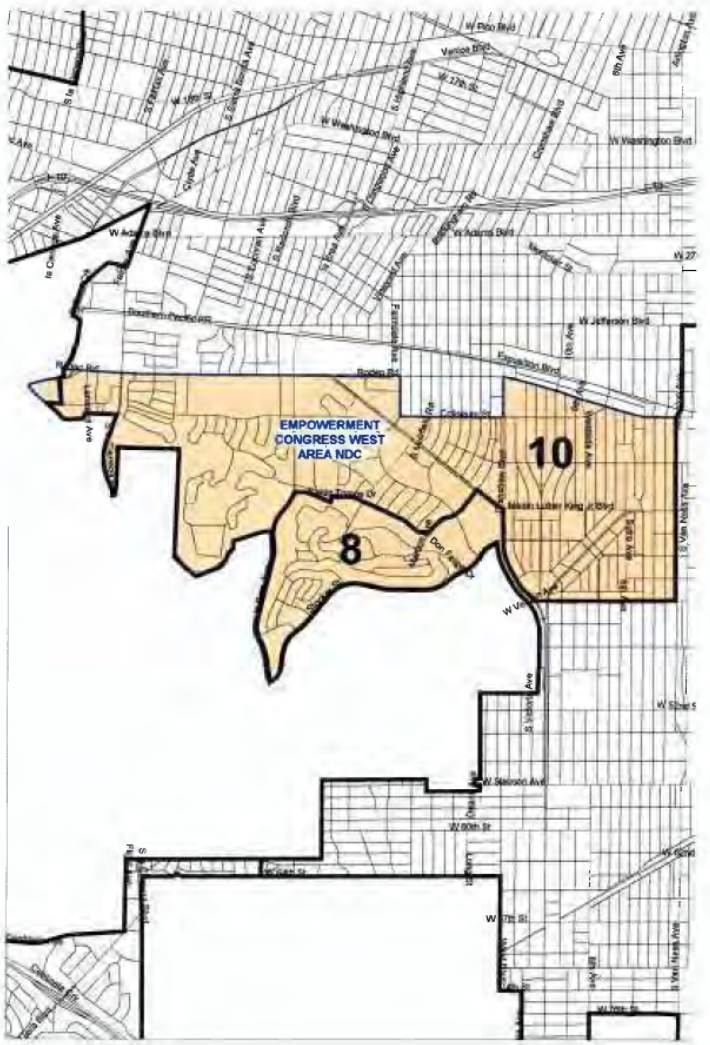
Treatment of Empowerment Congress West Area Neighborhood Council Across Council Districts from 2002 Plan to 2012 Plan

(NC More Unified in One Council District After Being More Split Under 2002 Plan)

2002



2012

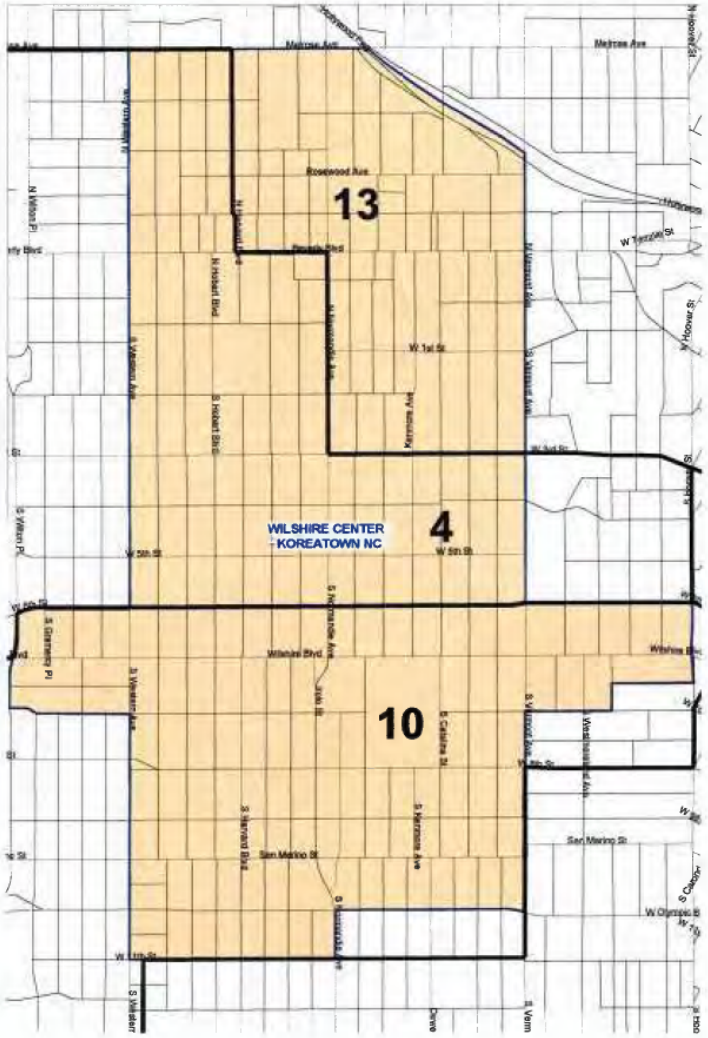


ADDENDUM 9

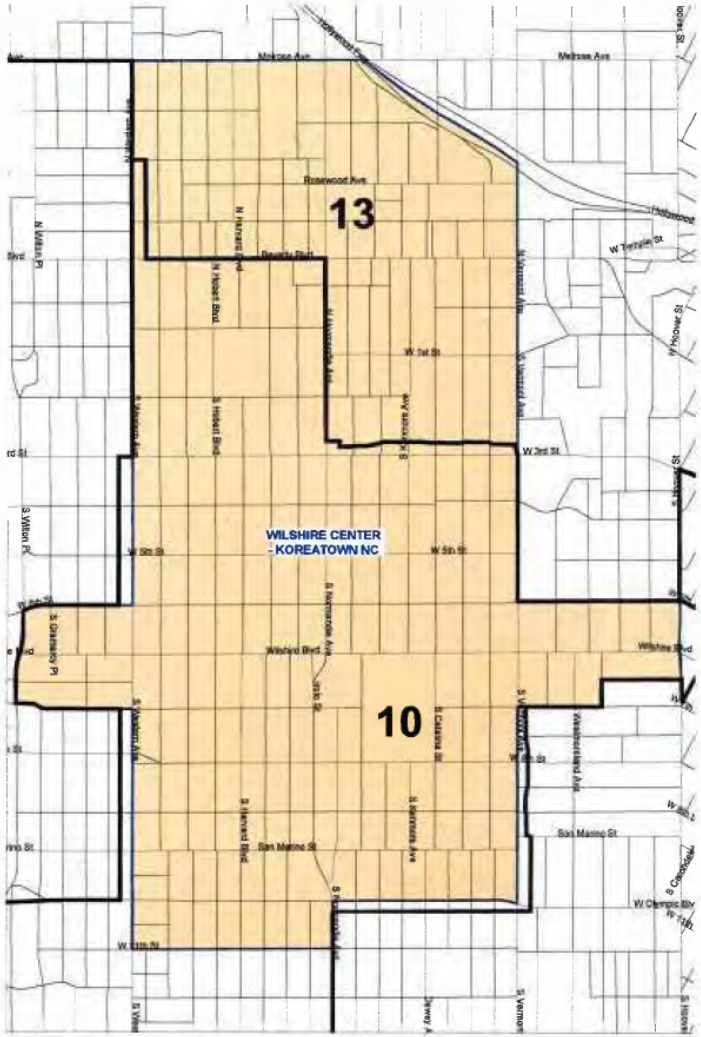
Treatment of Wilshire Center-Koreatown Neighborhood Council Across Council Districts from 2002 Plan to 2012 Plan

(70% of NC Unified in One Council District After Being Split Among 3 Districts Under 2002 Plan)

2002



2012



ADDENDUM 10

Demographic Data of 2002 Plan and 2012 Plan By District

CD 1	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	72.7%	70.5%	68.4%	66.1%	53.3%	50.7%
NH White	6.2%	7.9%	7.5%	9.4%	13.1%	15.9%
NH Black	3.0%	2.8%	3.3%	3.1%	6.1%	5.4%
NH Asian	17.2%	17.9%	19.9%	20.6%	26.5%	27.1%

CD 2	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	33.5%	45.0%	29.8%	40.3%	21.4%	28.3%
NH White	52.6%	41.5%	56.1%	45.5%	63.6%	55.2%
NH Black	4.0%	4.4%	4.0%	4.6%	4.9%	6.0%
NH Asian	8.4%	7.7%	8.7%	8.1%	8.7%	9.0%

CD 3	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	33.9%	37.4%	30.3%	33.3%	20.3%	22.4%
NH White	46.8%	43.2%	50.5%	47.2%	60.2%	57.4%
NH Black	4.3%	4.6%	4.0%	4.4%	5.0%	5.6%
NH Asian	13.5%	13.4%	13.8%	13.7%	13.2%	13.4%

CD 4	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	24.2%	15.2%	21.6%	14.0%	16.1%	11.5%
NH White	47.9%	61.2%	50.6%	63.0%	59.5%	68.1%
NH Black	5.6%	5.4%	5.7%	5.3%	7.0%	6.1%
NH Asian	20.7%	16.6%	20.5%	16.2%	15.9%	12.9%

CD 5	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	8.9%	10.8%	8.6%	10.3%	8.0%	9.2%
NH White	72.1%	66.9%	72.0%	66.9%	75.0%	71.1%
NH Black	3.5%	4.2%	3.5%	4.1%	3.7%	4.3%
NH Asian	14.1%	16.5%	14.6%	17.2%	12.1%	14.0%

CD 6	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	71.0%	70.5%	66.8%	66.2%	54.4%	52.3%
NH White	15.5%	15.1%	18.3%	17.8%	26.9%	27.2%
NH Black	3.4%	3.5%	3.6%	3.8%	5.4%	5.9%
NH Asian	8.9%	9.8%	10.2%	11.1%	12.0%	13.3%

Demographic Data of 2002 Plan and 2012 Plan By District

CD 7

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	79.5%	68.9%	75.9%	64.1%	65.7%	54.4%
NH White	8.6%	19.9%	10.7%	23.6%	16.4%	30.8%
NH Black	4.1%	3.7%	4.5%	3.9%	7.0%	5.4%
NH Asian	6.8%	6.5%	7.9%	7.3%	9.8%	8.1%

CD 8

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	49.1%	54.5%	44.9%	50.9%	27.2%	31.3%
NH White	4.2%	1.7%	5.3%	2.0%	6.7%	2.6%
NH Black	41.7%	40.7%	43.8%	43.5%	60.3%	62.4%
NH Asian	3.2%	1.4%	4.2%	1.8%	3.8%	1.7%

CD 9

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	75.5%	78.1%	71.0%	74.4%	48.4%	52.2%
NH White	3.6%	3.3%	4.8%	4.5%	8.4%	8.5%
NH Black	16.3%	15.2%	18.1%	16.6%	34.4%	33.0%
NH Asian	3.7%	2.5%	5.1%	3.6%	7.1%	4.8%

CD 10

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	48.4%	48.3%	43.7%	43.8%	28.2%	28.9%
NH White	10.1%	7.7%	11.7%	8.9%	15.9%	12.3%
NH Black	24.2%	25.9%	25.1%	27.1%	36.8%	40.5%
NH Asian	15.5%	16.3%	17.6%	18.6%	17.1%	16.3%

CD 11

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	19.3%	18.8%	17.3%	16.9%	13.6%	13.2%
NH White	58.7%	59.9%	60.7%	61.9%	66.0%	66.8%
NH Black	5.7%	5.7%	5.5%	5.5%	6.0%	6.0%
NH Asian	14.4%	13.8%	14.7%	14.0%	12.7%	12.4%

CD 12

	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	30.1%	26.9%	26.7%	24.0%	21.8%	19.9%
NH White	44.7%	47.7%	48.2%	50.9%	54.4%	56.7%
NH Black	4.8%	4.4%	4.6%	4.3%	5.3%	4.8%
NH Asian	18.9%	19.3%	19.0%	19.4%	17.1%	17.1%

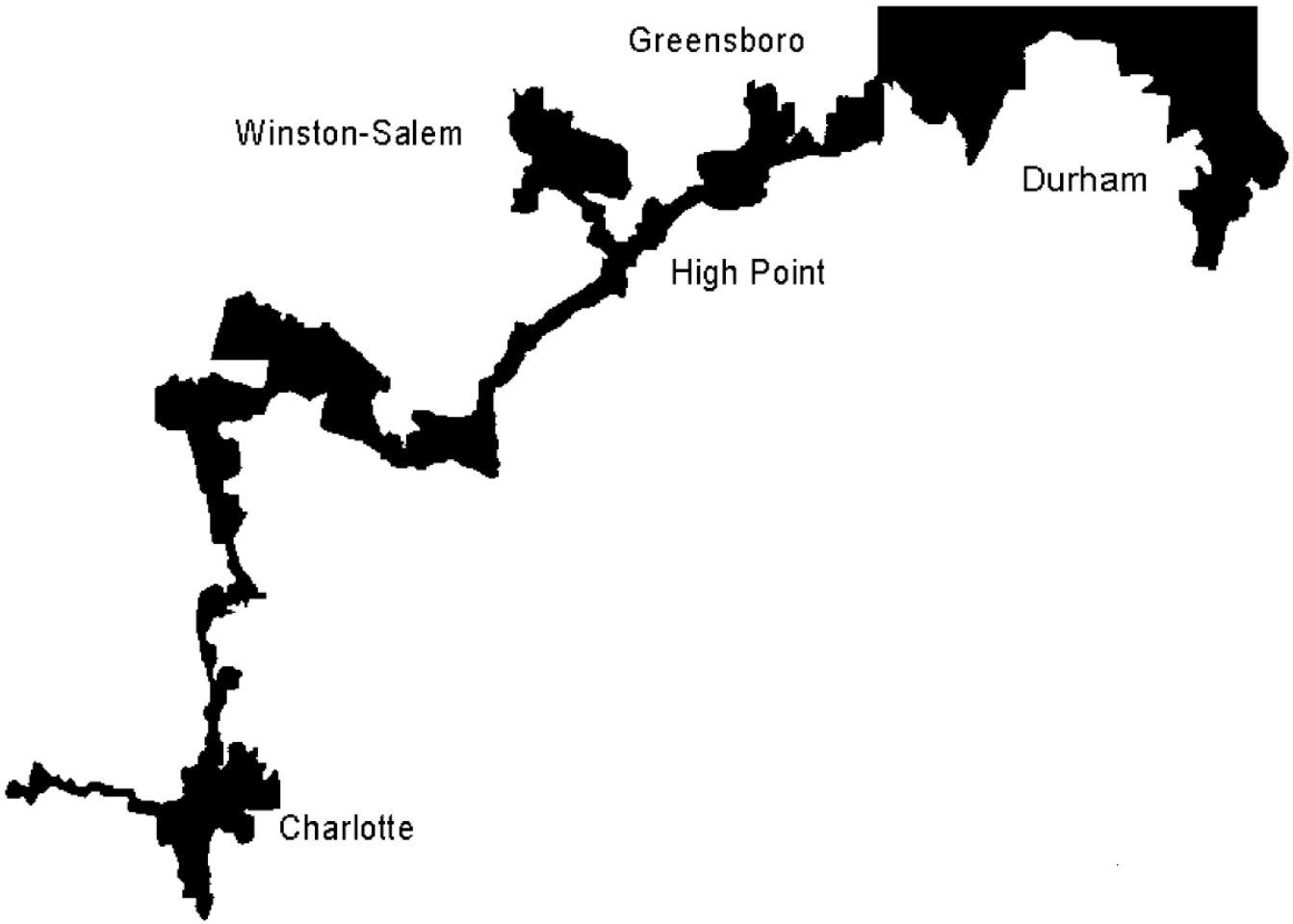
Demographic Data of 2002 Plan and 2012 Plan By District

CD 13	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	57.6%	54.2%	52.7%	49.3%	37.5%	34.5%
NH White	20.2%	22.9%	23.3%	26.2%	32.9%	36.4%
NH Black	3.3%	3.5%	3.6%	3.9%	5.8%	6.1%
NH Asian	17.6%	18.0%	19.1%	19.3%	22.5%	21.7%

CD 14	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	71.0%	67.2%	66.4%	61.8%	57.3%	52.3%
NH White	12.4%	12.6%	14.8%	15.0%	20.2%	20.2%
NH Black	3.9%	6.1%	4.6%	7.2%	6.5%	10.2%
NH Asian	11.8%	13.0%	13.2%	14.8%	14.8%	16.0%

CD 15	Population		VAP		CVAP	
	2002 Map	2012 Map	2002 Map	2012 Map	2002 Map	2012 Map
Latino	62.2%	62.1%	57.6%	57.4%	44.5%	44.8%
NH White	15.9%	16.6%	19.5%	20.3%	26.2%	27.2%
NH Black	13.7%	12.8%	13.5%	12.5%	18.7%	17.2%
NH Asian	6.4%	6.8%	7.7%	8.0%	8.4%	8.8%

Shaw v. Hunt, 517 U.S. 899 (1996)
Congressional District 12



ADDENDUM 14

Bush v. Vera, 517 U.S. 952 (1996)
Congressional District 18

ADDENDUM 15

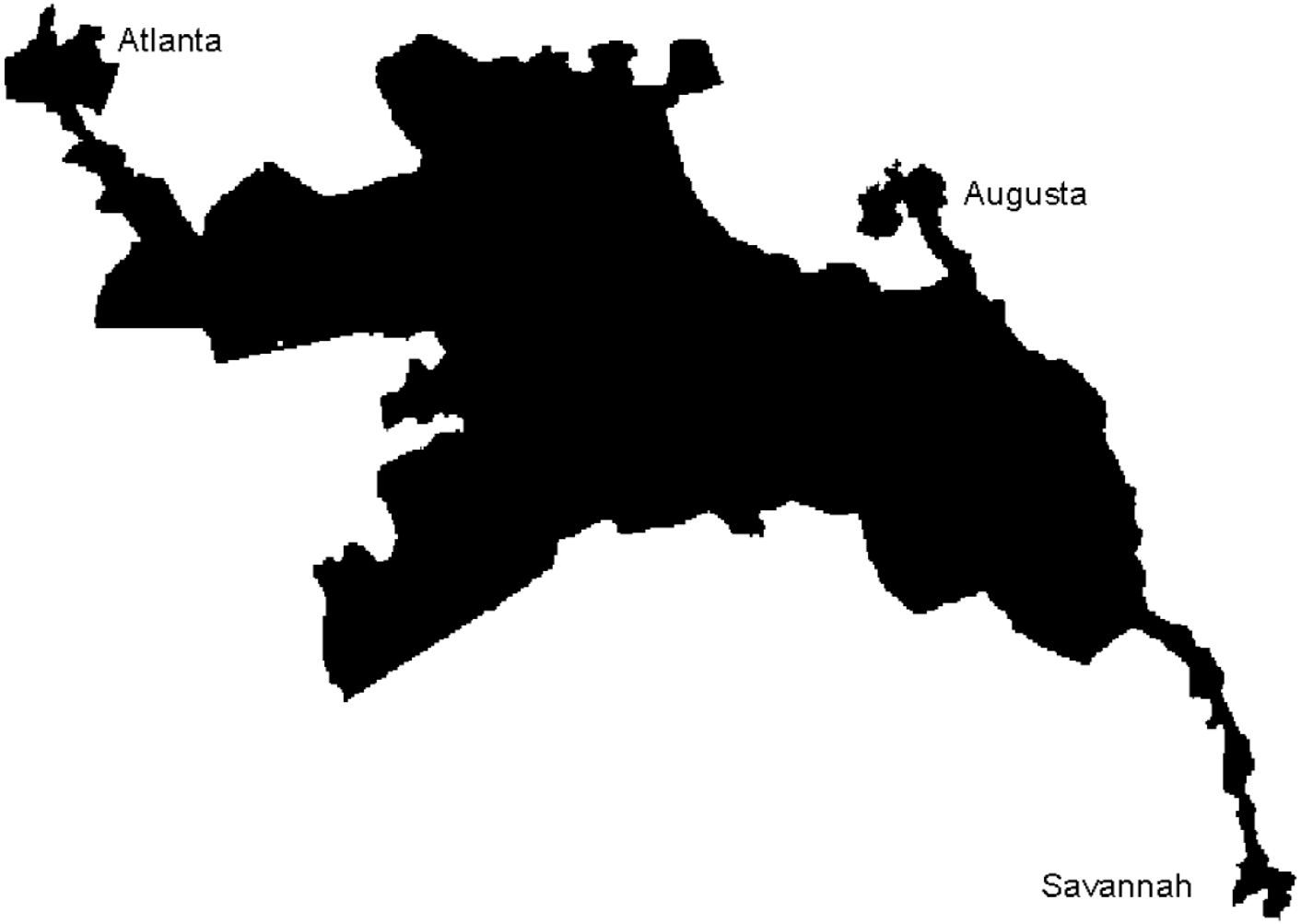
Bush v. Vera, 517 U.S. 952 (1996)
Congressional District 29

ADDENDUM 16

Bush v. Vera, 517 U.S. 952 (1996)
Congressional District 30

ADDENDUM 17

Miller v. Johnson, 515 U.S. 900 (1995)
Congressional District 11



ADDENDUM 18

Ninth Circuit Case No. 15-55478
Consolidated with Ninth Circuit Case No. 15-55502

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 March 7, 2016.

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/ Robin B. Johansen