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WHY LEGISLATIVE FINDINGS CAN PAD-LOCK REDISTRICTING PLANS IN RACIAL-GERRYMANDERING CASES

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I. INTRODUCTION**

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest, to racial considerations.[1]

This excerpt from the United States Supreme Court's 1995 decision in *Miller v. Johnson* sets forth the "predominant factor" test that courts use to determine whether plaintiffs in a racial gerrymander challenge[2] to an electoral district has satisfied their burden of proving that the district's design violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[3] by discriminating against the plaintiff based on his or her (or their) membership within a particular racial or

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** This article only expresses the view of the author and does not express the view of any other individual, attorney, entity, or object.

1. Miller v. Johnson, 515 U.S. 900, 902-03 (1995).

2. For purposes of this article, the phrase "racial gerrymander" means the intentional reliance on race or ethnicity in the design of an electoral district.

3. U.S. CONST. amend. XIV, § 1.

ethnic group, i.e., unconstitutional racial or ethnic discrimination.[4] In *Miller*, a majority of the Court declared for the first time[5] the standard for courts to use in adjudicating equal-protection racial-gerrymander challenges.[6] *Miller* is the second of six cases,

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4. *See Miller*, 515 U.S. at 902-03 (setting forth the plaintiff's burden of proof in "equal-protection racial-gerrymander claims" or "equal protection racial gerrymander challenges"). *Miller* and the other equal protection racial gerrymander cases decided by the Court have addressed equal protection claims based only on a theory of racial or ethnic discrimination, *e.g.*, racial gerrymandering. *Id.* at 914-20. *Accord* Easley v. Cromartie, 532 U.S. 234, 241-57 (2001); Hunt v. Cromartie, 526 U.S. 541, 545-54 (1999); Bush v. Vera, 517 U.S. 952, 957-89 (1996) (plurality opinion); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 904-18 (1996); Shaw v. Reno (*Shaw I*), 509 U.S. 630, 639-58 (1993); United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 148-49 (1977) (plurality opinion). In *United Jewish Org.*, Justice White challenged the state senate and assembly districts of the New York State legislature because they divided members of Hasidic Jewish community—the majority population in the previous design—into two, new electoral districts. In addition to the development of an equal protection jurisprudence for racial gerrymander claims, the Court has developed a jurisprudence for so-called "political gerrymander" claims. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586-97 (2005) (discussing differences between Oklahoma's semiclosed primary voting system and previous voting systems that the Supreme Court has found constitutional). Political gerrymandering and racial gerrymandering are jurisdictionally distinct and this article does not discuss the law relative to political gerrymandering. For a discussion of the Court's "political gerrymander" jurisprudence, *see generally* Michael Weaver, *Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in Vieth v. Jubeliner*, 36 LOY. U. CHI. L.J. 1273 (2005); Amy M. Pugh, *Unresolved: Whether a Claim for Political Gerrymandering May Be Brought Under the First Amendment*, 32 N. KY. L. REV. 373 (2005); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (Dec. 2002).

5. *Compare Miller*, 515 U.S. at 902-03 (declaring the equal protection standard for racial gerrymander challenges), *with United Jewish Org.*, 430 U.S. at 148-49 (plurality opinion) (marking the first time the Court addressed an equal protection racial gerrymander claim). *Id.* The plurality in *United Jewish Org.* held that the appropriate equal protection standard for racial or ethnic gerrymander claims against the design of electoral districts is a proportionate representation standard. *Id.* *Shaw I* and its progeny have eviscerated the "proportionality representation" standard for the adjudication of racial gerrymandering cases set forth in *United Jewish Org.* *See* David M. Guinn, Christopher W. Chapman & Kathryn S. Knechtel, *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 227-28 (1999) (discussing the effect of the *Shaw I* line of cases on the Court's plurality decision in *United Jewish Org. of Williamsburgh*).

6. A redistricting plan, once approved, is embodied in legislation adopted by the redistricting entity; usually a statute or ordinance. *See, e.g., Miller*, 515 U.S. at 902-03 (highlighting Georgia's Congressional redistricting plan contained in redistricting legislation); *see also* the Illinois Congressional Reapportionment Act of 2001, codified at 10 ILL. COMP. STAT. 76/5 (2002) (giving Illinois' current congressional districts); Chen v. City of Houston (*Chen II*), 206 F.3d 509, 512 (5th Cir. 2000) (noting the codification of the City of Houston's 1997 redistricting plan in an ordinance).

beginning with the Court's 1993 landmark decision in *Shaw v. Reno ("Shaw I")*, that attempt to set forth an analytical framework for courts to use in assessing the merits of a claimant's equal-protection racial-gerrymander claim as well as the governmental redistricting entity's defense in such cases.[7]

Under the equal protection standard set forth in *Miller*, if a claimant establishes that race was the "predominant factor" in the placement of electoral district boundaries, i.e., in the legislative decision making relative to the design of one or more electoral districts within a redistricting plan, then the redistricting plan is presumed invalid and the burden of proof shifts to the redistricting entity[8] to demonstrate that the challenged plan satisfies the Court's strict scrutiny test.[9] Once strict scrutiny is triggered, a redistricting plan will only be upheld if the redistricting entity, in its own defense, can demonstrate that the use of race by decision makers in the placement of district boundaries was "narrowly tailored to achieve a compelling [government] interest."[10] In other

7. *See Easley*, 532 U.S. at 241-57; *Hunt*, 526 U.S. at 545-54; *Bush*, 517 U.S. at 957-89 (O'Connor, J., plurality opinion); *Shaw II*, 517 U.S. at 904-18; *Shaw I*, 509 U.S. at 639-58.

8. Every government entity that elects public officials is a redistricting entity, and every district within a redistricting entity is redesigned, i.e. at the time dictated by either the United States Constitution or state statute. Article I, Section 2 of the United States Constitution requires State legislatures to redraw the district boundaries of congressmen and congresswomen within Congressional redistricting plans as well as their own (state legislative and senate districts) political districts after the release of every national decennial census. U.S. CONST. art. I, § 2. State and municipal ordinances determine the time of reappointment for some state legislatures as well as for county and local redistricting plans. *See* Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, at 2208 n. 8 (May 2003) [hereinafter *The Future of Majority-Minority Districts*]; *see also Chen II*, 206 F.3d at 512 (crediting the municipal ordinance for determining the frequency of the City of Houston's redistricting).

9. *Miller*, 515 U.S. at 904. In point of fact, the Court's 1995 decision in *Miller* setting forth the "predominant factor" test developed and clarified the holding in *Shaw I*. *Id.* In *Shaw I* the Court recognized, for the first time – as a matter of pleading – a cause of action for equal protection racial gerrymandering based solely on the "bizarre" design of a majority-minority district. *Id.*; *Shaw I*, 509 U.S. at 639-58; *see also infra* discussion at pp. 1375-87. Hence, the starting point and inception of the Court's current standard for equal-protection racial-gerrymander claims is *Shaw I*. *Miller*, 515 U.S. at 904.

10. *Miller*, 505 U.S. at 904. In other words, the redistricting entity must demonstrate that it has used the least restrictive means available its governmental objective that the Court has recognized and accepted as sufficiently "compelling." *Id.* at 904. But, if a redistricting plaintiff does not successfully demonstrate that the redistricting plan was predominately motivated by race, then the plan will likely be upheld with the "rational basis" test, under which a court affirms legislation if it is reasonably related to any legitimate government objective. *See Easley*, 532 U.S. at 254-58. It almost goes without saying that the Court's strict scrutiny test, which originated over sixty years ago in Korematsu v. United States, 323 U.S. 214, 216 (1944), is

words, the redistricting entity must demonstrate that it has used the least restrictive means available to achieve a governmental objective that has been accepted and approved by the Court as sufficiently "compelling."[11]

A redistricting entity's attempt to avoid successful application of the predominant factor test, however, may give rise to a material conflict between the redistricting entity's attempt to rely on race or ethnicity in order to comply with the prohibition of vote dilution in Section 2,[12] as well as the non-retrogression principle in Section 5[13] of the Voting Rights Act of 1965 ("VRA"). Such a scenario is likely when a redistricting entity designs electoral districts wherein members of a racial or ethnic minority group (usually either African-American or Latino/Hispanic)[14] constitute a majority within the electoral district, i.e., a "majority-minority" district.[15] Indeed, in its attempts to enforce the VRA, the United States Department of Justice has regularly required redistricting entities to intentionally rely on race or ethnicity to design majority-minority districts.[16] At least one of the Court's decisions after *Shaw I* recognized that the "intentional creation of a majority-minority district is not, in and of itself, uncon-

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regarded as a near impossible affirmative defense to prove in equal protection cases. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (describing strict scrutiny as "scrutiny that is strict in theory but fatal in fact."); Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CONST. L.Q. 445, 446-47 (2003). Since 1944 the Court has found the government satisfied strict scrutiny in only three cases involving equal protection racial discrimination. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding University of Michigan Law School's race based admission policy under strict scrutiny); United States v. Paradise, 480 U.S. 149 (1987) (upholding a district court order requiring a one-for-one hiring as a remedy for past racial discrimination); *Korematsu*, 323 U.S. 214 (upholding an Executive Order based on a Federal Act that set a curfew for American citizens of Japanese ancestry in certain geographic areas during World War II).

11. *Miller*, 515 U.S. at 904.

12. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2000).

13. *Id.* at § 1973(c).

14. The racial and/or minority group that constitutes the "majority" in the majority-minority districts are usually African American or Latino/Hispanic. *See The Future of Majority-Minority Districts*, *supra* note 8, at 2208 (defining "majority-minority" districts to mean districts "in which a majority of the residents (and often the voters as well) are African-American or Latino"); *United Jewish Org.*, 430 U.S. at 148-49 (plurality opinion).

15. *The Future of Majority-Minority Districts*, *supra* note 8, at 2208; *see also*, *Miller*, 515 U.S. at 911 (discussing majority-minority districts in relation to race-based districting that violates Section 5 of the VRA).

16. *See* Guinn, Chapman & Knechtel, *supra* note 6, at 227-28 (touching on the Justice Department's mandate that state legislatures purposefully create majority-minority districts to withstand constitutional guidelines); *see also* 42 U.S.C. § 1972(c) (2000) (laying out the guidelines of sections 2 and 5).

stitutional."[17] However, a redistricting entity is nevertheless exposed to an equal-protection racial-gerrymander claim under the *Shaw I* line of cases and application of the "predominant factor test under *Miller* if, in the design of one or more of its majority-minority districts, a redistricting entity subordinates so called "traditional districting principles"[18] to racial considerations.[19]

The redistricting regime under the *Shaw I* line of cases has proven to be extremely burdensome to voters, legislators, attorneys, and courts that have adjudicated equal-protection racial-gerrymander claims directed at majority-minority districts.[20] Numerous attempts by redistricting entities to comply with *Miller's* predominant factor test, while simultaneously attempting to adhere to Sections 2 and/or 5 of the VRA, have resulted in an ongoing and burdensome process of designing one or more majority-minority districts, defending them in subsequent litigation based on an equal-protection racial-gerrymander claim,[21]

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17. Guinn, Chapman & Knechtel, *supra* note 5, at 228; *see Bush*, 517 U.S. at 962.

18. So-called "traditional" redistricting criteria are numerous and may include: population equality; compactness and contiguity; identifiable natural geographic boundaries such as rivers, mountain ranges, and other unique geographic configurations; state constitutional and statutory requirements; use of county voting precincts as benchmarks when drawing districts; recognition of incumbent-constituent relationships by keeping incumbents in their districts; and partisan political considerations. Guinn, Chapman & Knechtel, *supra* note 5, at 227, 265-66.

19. *See Miller*, 515 U.S. at 916 (providing a sample of race-neutral districting principles that a legislature may use); *see also* Guinn, Chapman & Knechtel, *supra* note 5, at 265-67 (listing a more comprehensive sample of race-neutral considerations).

20. *See id.* at 227-28 (describing the evolving efforts of practitioners to rectify the *Shaw* line of cases with the VRA requirements).

21. *Id.* Since the Court's landmark decision in Baker v. Carr, 369 U.S. 186 (1962), holding that equal protection challenges to reapportionment plans are "justiciable," there have been several theories, constitutional and statutory, used by claimants to challenge redistricting plans. *See* Pope v. Blue, 809 F. Supp. 392, 395 (W.D.N.C. 1992). Among the theories relied on by plaintiffs to challenge redistricting plans are claims that:

(i) a redistricting plan violates voters' First Amendment right to free speech by creating a "chilling effect" on voters right to free speech, *id.* at 398-99;

(ii) a redistricting plan violates voters' First Amendment right to free association, *see id.*; Chen *I*, 9 F. Supp. 2d at 751;

(iii) a redistricting plan violates the Petition Clause of the First Amendment, *see Pope,* 890 F. Supp. at 398-99;

(iv) a redistricting plan violates the Due Process Clause of the Fourteenth Amendment because voters have been deprived of their fundamental right to vote, *Pope*, 809 F. Supp. at 395 n.1; *see also* Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 284 F. Supp. 2d 1240, 1247 (D. Ariz. 2003) (affirming that states may freely conduct redistricting provided it does not compromise constitutional guarantees);

and then either redesigning the entire plan when the challenged majority-minority district(s) are invalidated by a court, or subjecting the redistricting to a court ordered plan. In essence, this may require adjustments to district boundaries within an existing plan, causing a ripple effect and the redesigning of other districts within the existing plan.[22] This often leads to years of political compromise, cut-throat litigation, and a focus on the minutia and nuances of redistricting law and litigation procedure, with the concomitant government expenditure of what can amount to millions of dollars in legal fees for the defense of a redistricting plan already approved by the legislative process.[23]

(v) a redistricting plan violates the Privileges and Immunities Clause of the Fourteenth Amendment by depriving voters their right to fair representation or to an effective vote, *Pope*, 809 F. Supp. at 399. *Cf.* O-Lear v. Miller, 222 F. Supp. 2d 850, 860 (E.D. Mich. 2002) (denying plaintiffs' claim that the reapportionment plan violates the Privileges and Immunities Clause because the XIV Amendment does not guarantee an *effective* right to vote);

(vi) a redistricting plan violates the one-person, one–vote guarantee of the Fourteenth Amendment and Article I, § 2, *see* Vieth v. Jubelirer, 541 U.S. 267, 272-73 (2004); *see also* Cecere v. County of Nassau, 274 F. Supp. 2d 308, 312 (E.D. N.Y. 2003) (describing plaintiff's burden as "formidable" when a pure one-person, one-vote claim is asserted without a claim including a racial cause of action); Reynolds v. Sims, 377 U.S. 533, 557-58 (1964) (reaffirming the constitutional principle that a person is allowed only one vote);

(vii) a redistricting plan violates the Fifteenth Amendment by diluting the voting strength of members of an ethnic or racial minority group, *see Reynolds*, 377 U.S. at 557;

(viii) a redistricting plan violates a state constitutional requirement defining the number of legislative districts in a municipality, *see* McNeil v. Legislative Apportionment Comm'n, 828 A.2d 840, 854-55 (N.J. 2003);

(ix) a redistricting plan violates state constitutional equal protection standards, *see Ariz. Minority Coal. for Fair Redistricting*, 284 F. Supp. 2d at 1247-48;

(x) a redistricting plan violates a provision of a State's Election Code, *see In re* Petition of the Bd. of Dir. of the Hazleton Area Sch. Dist. to Change an Approved Plan Which Established Nine Regions for Election of Dir. Within the Dist. Valley Educ. Ass'n., 527 A.2d 1091, 1092 (Pa. Commw. Ct. 1987) (challenging a district plan that violated a Pennsylvania state election code).

This article, however, does not attempt to set forth an exhaustive discussion of all of the constitutional and statutory theories which may be used to challenge redistricting plans and/or electoral districts contained therein. Rather, this article focuses on the standard that the Court has developed for courts to use in adjudicating equal protection racial gerrymandering cases in *Shaw I* and its progeny.

22. *Compare Shaw II*, 517 U.S. at 914-20 (invalidating the district plan), *with* Barnett v. City of Chicago (*Barnett III*), 17 F. Supp. 2d 753 (1998) (approving court ordered plan). Indeed, four of the six Supreme Court decisions in the *Shaw I* line of cases involved repeat attempts by the North Carolina legislature to successfully defend the design of an intentionally created majority-minority congressional district. *See Easley*, 532 U.S. 241-57; *Hunt*, 526 U.S. at 545-54; *Shaw II*, 517 U.S. at 914-20; *Shaw I*, 509 U.S. 657-58.

23. *See generally Easley*, 532 U.S. at 241-57 (giving several examples

Often, nobody truly wins in redistricting litigation except for the partners in the law firms that charge exorbitant hourly rates to defend redistricting plans that have to be redrawn every few years.[24] Indeed, sometimes the civil rights claimants and their respective attorneys—successful in their representation—obtain a windfall in court ordered attorney's fees.[25] Without a doubt, the political campaigns of public officials, represented by attorneys specializing in redistricting law, are likely to receive contributions at any given time. From the beginning of the redistricting process to the end of any litigation that ensues, and, of course, in preparation of any future redistricting, the budgeting of public expenditures with respect to any redistricting project may be volatile.

Predictability in connection with the redistricting process — in particular with the design of majority-minority districts — may be more certain with meticulous planning and cooperation between the politicians and attorneys involved, i.e., the "players," and can ensure more integrity and public confidence associated with any redistricting project. In anticipating an equal-protection racial-gerrymander challenge, perhaps the most valuable weapon

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litigation details involving both parties that prolonged litigation); *Hunt*, 526 U.S. at 544-54 (giving the tedious and extended history surrounding North Carolina's 12th Congressional District); *Bush*, 517 U.S. at 962 (citing direct evidence of a district creating a majority-minority as "one of several ingredients" to the Court's decision); *Shaw I*, 509 U.S. at 657-58 (remanding the issue for further litigation); *Shaw II*, 517 U.S. at 901-914 (trying to get it right the second time around in the Supreme Court); Barnett v. City of Chicago (*Barnett I*), 969 F. Supp. 1359, 1368 (N.D. Ill. 1997) (expounding upon the lengthy and tedious history of the trial); Barnett v. City of Chicago (*Barnett II*), 141 F.3d 699 (7th Cir. 1998) (continuing the litigation saga and holding that citizen voting-age population was proper basis for determining whether distribution of effective majority status was proportional to population and remanding for district court to apply this standard in reconsidering ruling); *Barnett III*, 17 F. Supp. 2d at 753 (after remand from *Barnett II*, holding that alternative maps proposed by African-American voters created wards that met the appropriate proportional population standards - determined by *Barnett II*, and this better balanced the relevant factors than did the existing map). Indeed, redistricting litigation can prove to be a very lucrative industry for law firms that are chosen to defend a redistricting plan. *See* Steven R. Strahler, *Random Walk: An Opportunity Missed by Jenner & Block*, CRAIN'S CHICAGO BUSINESS, March 24, 1997, at 2 (noting that by 1997, the Chicago-based national law firm Jenner & Block earned in excess of $7.5 million dollars in connection with legal work performed in defending the City of Chicago in the *Barnett* litigation that commenced in 1992).

24. *See* Strahler, *supra* note 23 (giving details of Jenner & Block's exorbitant fee award for defending the City of Chicago's redistricting plan).

25. *See, e.g.*, Barnett v. City of Chicago (*Barnett IV*), 122 F. Supp. 2d 921 (N.D. Ill. 2000), *aff'd*, 3 Fed. Appx. 546 (7th Cir. 2001) (awarding over 5 million dollars in plaintiff's attorney's fees for legal work performed in connection with successful challenge to the City of Chicago's 1992 redistricting plan).

of the players who seek to design an unassailable majority-minority district is an understanding of the standard used for equal-protection racial-gerrymander challenges, as well as the burden-shifting scheme extracted from the *Shaw I* line of cases *and* the Promethean value of the transcript containing testimony of the legislative decision-makers adduced during the legislative hearings for the proposed redistricting plan, i.e., the legislative findings.[26] Indeed, in the context of equal-protection racial-gerrymander challenges to majority-minority districts, legislative findings, including the testimony of the public officials who seek to testify in support of the design of the boundaries of majority-minority districts and the acknowledgment of participation by attorneys and experts in the design of a redistricting plan that support a majority-minority district, can act as both a sword and a shield in the hands of the architects of majority-minority districts when called upon to defend against an equal-protection racial-gerrymander challenge.[27]

The notion of deferring to legislative findings that support the proffered reasons for the design of one or more majority-minority districts, as the primary evidence to justify the deliberate use of race or ethnicity as a factor in the design of such a district has been acknowledged, even if only implicitly, by the Supreme Court in two of its six *Shaw I* cases.[28] Moreover, in *Chen v. City of Houston ("Chen II")*, the United States Court of Appeals for the Fifth Circuit relied almost exclusively on the testimony of the proponents of the challenged districts adduced from the Houston City Council hearings held prior to the adoption of Houston's 1997 redistricting plan to affirm the district court's grant of summary judgment in favor of Houston's redistricting plan.[29] In *Chen II*, the fifth circuit concluded that there was no need to apply strict scrutiny to the challenged plan because, viewed inter alia, the transcripts from three days of public hearings reflected that the

26. *See also infra* Part IV.

27. *See Chen II*, 206 F.3d at 51.

28. *See Chen II*, 206 F.3d at 517 (showing plan supporters having been "heavily coached" which negated a presumption of legislative good faith). *Cf. Hunt*, 526 U.S. at 547-552 (refusing to find that race was the district's motivating factor even though the Court acknowledged the strong correlation between African Americans and the Democratic party with the contested district); *Miller*, 515 U.S. at 916-20 (stating that districts are always aware of racial demographics but that does not support the notion that race is a predominant factor in the redistricting process). To qualify as a predominant factor a district's racial motivation must be "obvious" and clear as an "overriding desire" to assign district boundaries with racial distinctions. *Miller*, 515 U.S. at 917.

29. *See id.* (citing the voluminous legislative testimony that the plaintiffs argued created a material issue of fact regarding the legislature's racial motivation in its districting structure).

legislative decision makers did not predominately rely on race in the design of Houston's 1997 redistricting plan.

This article proposes an iron-clad redistricting strategy that redistricting entities can use to successfully defend against equal-protection racial-gerrymander claims directed at majority-minority districts. This strategy is largely based on the City of Houston's 1997 successful redistricting efforts, which were affirmed by the fifth circuit in *Chen II*. The City of Houston's strategy may be viewed as a prototype, which, if followed, may obviate the need to justify a majority-minority district under strict scrutiny because it is unlikely the plaintiff will ever be able to satisfy its burden under the predominant factor test.

Part II.A provides an overview of Sections 2 and 5 of the VRA, and the requirements they impose on redistricting entities, i.e., the basis for Section 2 and Section 5 affirmative defenses. Part II.B provides a summary of the Court's equal protection standard that state and local entities must meet to justify race and/or ethnic-based affirmative-action remedial programs under strict scrutiny, i.e., the basis for remedial affirmative defenses. Part II.C traces the Court's development of an analytic framework for adjudicating equal-protection racial-gerrymander challenges to majority-minority districts: from the Court's inception of its standard in *Shaw I* to a more complete analytical framework resulting in the Court's most recent decision in 2001 in *Easley v. Cromartie*. Part II.D summarizes the analytical framework that, as a result of the *Shaw I* line of cases, lower courts must use when adjudicating equal-protection racial-gerrymander challenges to majority-minority districts. Part IV discusses the redistricting strategy employed by the City of Houston in 1997, which was affirmed in *Chen II*. Finally, Part V proposes a strategy for anticipating equal-protection racial-gerrymander claims — based on the strategy employed by the City of Houston in designing its 1997 Councilmanic plan — for redistricting entities to follow when designing majority-minority districts that will, as in the *Chen* litigation, be successfully defended in court — every time.

II. THE SUPREME COURT'S ATTEMPT TO RESOLVE THE DILEMMA RAISED BY *SHAW I* AND ITS PROGENY

The *Shaw I* line of cases reflects the Court's attempt to create a standard for adjudicating equal-protection racial-gerrymander cases. Rectifying these cases exemplifies the reality that redistricting entities may intentionally rely on racial and/or ethnic considerations when designing majority-minority districts that comply with Section 2 and/or 5 of the VRA, and/or to remedy the disabling effects of prior or present intentional discrimination

against racial or ethnic minority group's voting strength.[30]

Shaw I and its progeny have attempted to resolve the apparent dilemma in redistricting entities being required by the predominant factor test to prohibit consideration of race and/or ethnicity in the design of electoral districts, while at the same time having to rely on race and/or ethnicity as a factor in their design to comply with Section 2 and 5 of the VRA. To remedy this, the Court has suggested three affirmative defenses to the predominant factor test which, in theory, may be used by a redistricting entity to satisfy strict scrutiny.[31] Two of the affirmative defenses are based on designing majority-minority districts that comply with the VRA, but all three affirmative defenses may satisfy a redistricting entity's burden of proof under strict scrutiny.

One affirmative defense created by the Court in the *Shaw I* line of cases is based on designing a majority-minority district that complies with Section 2 of the VRA.[32] Under this Section 2 affirmative defense, if a redistricting entity can prove that a challenged majority-minority district is narrowly tailored to achieve compliance with Section 2, then, even assuming arguendo that race or ethnicity is the predominant factor relied on in the challenged district's design, the district is nevertheless valid and constitutional.[33] A second affirmative defense is based on designing electoral districts that comply with Section 5 of the VRA.[34] Similar to the Section 2 affirmative defense, if a redistricting entity can prove that an electoral district is narrowly tailored to achieve compliance with Section 5, then, even assuming arguendo that race or ethnicity was the predominant factor relied on in the design of the challenged district, the district is nevertheless valid and constitutional.[35] In addition to the Section

30. *See Bush*, 517 U.S. at 967-70 (affirming political gerrymandering as contrasted with racial gerrymandering regardless of whether or not political motivations correlate to racial classifications); *see also* Guinn, Chapman & Knechtel, *supra* note 5, at 232-50 (laying out the evolution of the *Shaw* line of cases and how race considerations play a role with judicial analysis).

31. *See Bush*, 517 U.S. at 959 (defending reapportionment with the goal of creating a majority-minority district that satisfies Section 2 and incumbency protection); *Shaw II*, 517 U.S. at 911 (defending redistricting by complying with Section 2 and 5 requirements); *Miller*, 515 U.S. at 910-11 (misconstruing an affirmative defense option because voter classification based solely on race will call for strict scrutiny judicial review).

32. *Bush*, 517 U.S. at 978-79.

33. *Id.* at 979.

34. *Shaw II*, 517 U.S. at 911-13.

35. *Bush*, 517 U.S. at 982-83, 979. In the event that Section 5 is not renewed before its current expiration date of June 29, 2007, redistricting entities will have one less affirmative defense available if a court determines that race or ethnicity is the predominant factor in the design of a majority-minority district. On June 29, 1982, Section 5 was Amended. Pub. L. No. 97-

2 and Section 5 affirmative defenses, a third affirmative defense exists, which is the same defense the Court created for government entities to justify race-based affirmative-action, remedial set-aside programs under strict scrutiny, or "the remedial affirmative defense".[36] Under this defense, if a majority-minority district is narrowly tailored to eradicate the disabling effects of past or present race or ethnic discrimination by the redistricting entity, then, even assuming arguendo that race or ethnicity is the predominant factor relied on in the majority-minority district's design, the district is nevertheless valid and constitutional.[37]

Significantly, none of the challenged districts in the Court's *Shaw I* line of cases satisfied strict scrutiny under the Section 2 affirmative defense, the Section 5 affirmative defense, or the remedial affirmative defense.[38] As such, the Court has not set forth concrete precedent for redistricting entities or lower courts to follow as a model for what to do to ensure that a majority-minority district satisfies strict scrutiny. In other words, the Court has indicated what *not* to do. Moreover, the Court has merely indicated that, in theory, there is a way to satisfy strict scrutiny.

A summary of the standards imposed by Sections 2 and 5 of the VRA provides a necessary foundation for understanding *both* how a redistricting entity's use of race and/or ethnicity might be required to satisfy those sections of the VRA *and* the constitutional/statutory conflict the Court was confronted with when it decided the *Shaw I* line of cases. Similarly, a summary of the equal protection standard that the Court has developed for state and local entities to justify race and/or ethnic based affirmative-action governmental remedial programs in education

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205, 96 Stat. 134 (1982) (codified as amended at 42 U.S.C. § 1973 (a)-(b) (2000)). Even though no substantive changes were made to the substantive language supporting the "non-retrogressive" principle upon which the Section 5 affirmative defense is predicated, the clear and unambiguous language of the amendment to Section 5 clearly indicates that, unless renewed, Section 5 is scheduled to expire twenty-five years following the date of the 1982 Amendment. *Id.* The amendment to Section 5 unequivocally states that "[t]he provisions of this Section shall expire after twenty-five years following the effective date of the Amendments to the Voting Rights Act of 1982." *Id.* If this occurs, then as of June 29, 2007, there will be one less weapon in the already limited arsenal of architects of majority-minority districts and litigators called upon to defend such districts against equal protection racial gerrymander challenges. *Compare id.*, *with Bush*, 517 U.S. at 979-85, *Shaw II*, 517 U.S. at 909-16, *Miller*, 515 U.S. at 914-20, *and Shaw I*, 509 U.S. at 657-59.

36. *Id.* at 982; *Shaw II*, 517 U.S. at 909-10.

37. *See Bush*, 517 U.S. at 982-83 (defining remedial action as equivalent to an affirmative action program); *Miller*, 515 U.S. at 922-23 (requiring a strong basis of evidence that remedial action is required as a race-based remedy).

38. *See Bush*, 517 U.S. at 985-986; *Shaw II*, 517 U.S. at 918; *Miller*, 515 U.S. at 917-918.

and contracting under strict scrutiny provides a necessary foundation for understanding the basis for the remedial affirmative defense. These summaries will provide a foundation for an examination of the Supreme Court's development of an analytical framework for applying strict scrutiny in the *Shaw I* line of cases.

A. Sections 2 and 5

The VRA was enacted to eradicate inequalities in the voting strength of certain racial and ethnic minority groups that exist as a result of the effects of past discrimination against those groups.[39] The two primary enforcement provisions of the VRA — often resulting in litigation — are Sections 2 and 5.[40] Sections 2 and 5 each impose separate independent VRA standards.[41] The following is a summary of the standards imposed by Sections 2 and 5 as well as a discussion of how those sections are generally used in litigation as redistricting enforcement mechanisms.[42]

1. Section 2

Section 2 prohibits the vote dilution of protected minority groups.[43] In particular, Section 2 proscribes states and their political subdivisions from imposing any "voting qualifications or prerequisites to voting or [any] standard, practice, or procedure which results in a denial or abridgement of the right of any citizen of the United States to vote" who is a member of a protected class of racial or language minorities under the Act.[44] Section 2 provides

39. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000). The VRA does not protect all racial or ethnic minority groups. *Id.* Covered groups under the VRA include African Americans, Latinos, American Indians, Asian-Americans and Alaskan Natives. *See* Polish Am. Cong. v. City of Chicago, 211 F. Supp. 2d 1098, 1107 (N.D. Ill. 2002) (holding that citizens of Polish ancestry are not within the class of "language minority" groups protected under VRA).

40. *See* Guinn, Chapman & Knechtel, *supra*, note 5, at 699.

41. 42 U.S.C. § 1973.

42. Although the Court has developed a body of case law for its interpretation of Sections 2 and 5, the thrust of this article is the way in which the Court has developed an analytic framework within its equal protection jurisprudence for adjudicating racial gerrymandering claims that incorporate the VRA standard for compliance with Sections 2 and 5, and how redistricting entities can design majority-minority districts that are successfully defended in litigation based on equal-protection racial-gerrymander claims. For a complete discussion of the Court's equal protection and VRA jurisprudence relative to redistricting, *see generally The Future of Majority-Minority Districts*, *supra* note 8, at 2208; Guinn, Chapman & Knechtel, *supra* note 5, at 699.

43. 42 U.S.C. § 1973(a). Vote dilution includes voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups." Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 479 (1997) (quoting S. REP. NO. 97-417, at 28 (1983)).

44. 42 U.S.C. § 1973(a).

an independent cause of action for members of protected groups who have been the victims of racial or ethnic discrimination in the form of a dilution in the power of their group's collective vote.[45]

Unlike an equal-protection racial-gerrymander challenge to an electoral district, a Section 2 challenge to an electoral district does not require proof, or inference of discriminatory intent by the redistricting entity that designed the challenged electoral districts.[46] Since the Court's 1986 decision in *Thornburg v. Gingles*, the most common use of Section 2 has been to challenge multimember, "at large" redistricting plans on a theory of minority "vote dilution."[47] Under the "*Gingles* factors" test, a plaintiff attempting to establish a Section 2 vote dilution claim has the burden of proving, as its prima facie case, that: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that the minority group is "politically cohesive;" and (3) that the "white majority votes sufficiently as a block to enable it to — in the absence of special circumstances, such as the minority candidate running unopposed . . . defeat the minority's preferred candidate."[48] If a plaintiff establishes a prima facie case under the *Gingles* factors test, then the burden of proof shifts to the redistricting entity which can avoid liability under Section 2 by showing that the "totality of the circumstances" reveal that the "political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[49]

2. Section 5

Section 5, unlike Section 2, does not have nationwide reach.[50] Section 5 does not apply to all redistricting entities; Section 5 applies only to certain enumerated, or "covered" jurisdictions.[51] It

45. *Id.*

46. *See* Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986) (requiring only the question of whether plaintiffs have an equal opportunity to vote).

47. *Id.* at 47-48; *see, e.g., Barnett II*, 141 F.3d 699.

48. *Thornburg*, 478 U.S. at 50-51.

49. *Id.* at 43 (internal quotation marks omitted) (alteration in original); 42 U.S.C. § 1973(b)(F).

50. *See* Guinn, Chapman & Knechtel, *supra* note 5, at 243 (limiting Section 5 to "certain voting jurisdictions" that require preclearence by the Justice Department before making any changes to the voting process).

51. 42 U.S.C. § 1973(c). "Covered jurisdiction is used to refer to a State, where the determination referred to in § 51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis." Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.2 (2006); *See also id.* at § 51.4

requires covered jurisdictions that "enact or seek to administer any voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting" to "preclear" the proposed change with the Justice Department in order for the change to result in a valid and enforceable statute.[52] This extraordinary practice of "preclearance" requires all laws relating to voting procedures in "covered" jurisdictions to be federally reviewed by either the Civil Rights Division of the Justice Department, or the United States District Court for the District of Columbia.[53] As a result, covered jurisdictions under Section 5 have the option of either submitting redistricting plans to the Justice Department or filing a complaint for declaratory judgment with the District of Columbia for approval, i.e. preclearance.[54]

Since the Supreme Court's 1976 decision in *Beer v. United States*,[55] the standard by which voting changes are reviewed and precleared under Section 5 is whether retrogression would result from the proposed voting change.[56] To obtain preclearance, a change in voting related practices must at least maintain the minority voting position as of the benchmark date.[57] Thus, under Section 5, any change in voting related practices in a covered jurisdiction that results in retrogression is not an effective, enforceable law.[58]

B. An Overview of the Equal Protection Standard State and Local Governmental Entities Must Meet to Justify Race-and/or Ethnic-Based Remedial Affirmative-Action Programs

Beginning in 1978 with the Court's seminal decision in *Regents of the University of California v. Bakke*,[59] and continuing through the Court's 2003 decisions in *Grutter v. Bollinger*[60] and *Gratz v. Bollinger*,[61] the Court has developed a jurisprudence for race- and/or ethnic-based government-sponsored remedial

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appendix (providing details for determining what jurisdictions are covered).

52. 42 U.S.C. § 1973(c).

53. *Id.*

54. *Id.*

55. 425 U.S. 130 (1976).

56. *Id.* at 141.

57. *See id.* at 151-53, 153 n.11 (declaring that the VRA is meant to prevent retrogression and that the purpose of a proposed redistricting plan might be gleaned from considering "a minority's relative position under the existing and proposed plans").

58. *Id.* at 133.

59. 438 U.S. 265 (1978) (reviewing an affirmative action program at a public university).

60. *See* 539 U.S. 306 (2003) (reviewing race based admission standards at the University of Michigan's Law School).

61. *See* 539 U.S. 244 (2003) (reviewing race based admission standards at the University of Michigan's undergraduate school).

programs.[62] The Court's race- and ethnic-based affirmative-action jurisprudence has developed a formula for determining whether a government entity seeking to justify its intentional use of race and/or ethnicity in its attempts to remedy the disabling effects of past or present discrimination can satisfy its burden of proof under both prongs of strict scrutiny: the compelling interest prong and the narrowly tailored prong.[63] To determine whether a government entity sponsoring a remedial program can establish a compelling interest, the Court has indicated that the government entity must come forward with a factual predicate demonstrating a "strong basis in evidence for its conclusion that remedial action was necessary."[64] Generally, this means that the government entity sponsoring the remedial program has to demonstrate – either by evidentiary proof or via judicial, administrative, or legislative findings – that it has engaged in past or present ethnic and/or racial discrimination, and that there are identifiable

62. *See generally* John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South*, 78 TUL. L. REV. 2117, 2127-62 (June 2004). In all, the Court has decided eight cases involving appeals in challenges to government-sponsored ethnic and/or race-based affirmative-action programs. *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Metro Broad., Inc. v. Fed. Commc'n Comm'n, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); Wygant v. Jackson, 476 U.S. 276 (1986) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448 (1980); *Bakke*, 438 U.S. 265; *see also* United States v. Paradise, 480 U.S. 149, 167 (1987) (reviewing court ordered race-based affirmative-action program as a remedy for racial discrimination by a government employer). From those decisions, there are *at least* two compelling interests that, according to the Court, justify a government-sponsored ethnic and/or race-based affirmative-action program under strict scrutiny. *Compare Grutter*, 539 U.S. at 330 (finding a diverse student body to be a compelling state interest), *with J.A. Croson*, 488 U.S. at 536-38 (Marshall, J., dissenting) (noting that the elimination of private discrimination is a compelling interest, but attempting to remedy past discrimination is not).

The remedial affirmative-action defense recognized in the *Shaw I* line of cases is based on the Court's recognition of a compelling interest in remedying the disabling effects of prior and/or present ethnic and/or racial discrimination by the government entity sponsoring the remedial program. *Compare Shaw II*, 517 U.S. at 909-10 (asserting that past discrimination is not an adequate defense because the scope is too broad to give the court any direction for analyzing the proposed remedy for the injury), *with J.A. Croson*, 488 U.S. at 509 (suggesting that direct evidence of discriminatory incidents may qualify as a defense necessary to justify present conduct). None of the Court's decisions in either its *Shaw I* line of cases, or within its affirmative-action jurisprudence have held that a remedial program satisfies strict scrutiny. *See Shaw II*, 517 U.S. at 909-10 (alleviating "the effects of societal discrimination is not a compelling interest"). *Cf. Grutter*, 539 U.S. at 330; *J.A. Croson*, 488 U.S. at 508-10.

63. *Adarand*, 515 U.S. at 236.

64. *J.A. Croson*, 488 U.S. at 539 (quoting *Wygant*, 476 U.S. at 277) (internal quotation marks omitted).

"disabling effects" with a nexus to the prior or present discrimination itself.[65]

Assuming arguendo that a court determines that the factual predicate is sufficient to support a compelling interest in a remedial program, the government entity must then demonstrate that the remedial program is narrowly tailored to eradicate the disabling effects of past and/or present ethnic and/or racial discrimination by the government entity.[66] To satisfy the narrowly tailored prong of strict scrutiny, the government entity must establish that the remedial program is neither impermissibly overinclusive, nor impermissibly underinclusive, i.e., the remedial program can neither offer benefits to members of ethnic and/or racial minority groups that the factual predicate does not reflect discrimination against (overinclusive), nor can the benefits offered by the remedial program be tailored to benefit only members of the group that the factual predicate reflects have suffered actual discrimination by the government entity sponsoring the program (underinclusive).[67]

In addition, for the government approved remedial program to be narrowly tailored under the Court's decisions in *Bakke* and its progeny, the government entity sponsoring the remedial program must first show that, prior to its adoption of the remedial program, it attempted race- and/or ethnic-neutral means of remedying the disabling effects identified by the factual predicate.[68] Second, the impact of the remedial program must not be unduly burdensome on third parties.[69] Third, the duration of the relief must be directly tied to eradicating the disabling effects identified by the factual predicate.[70] The remedial program must also be flexible so as to achieve all of the elements of the narrowly tailored prong of strict scrutiny.[71]

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65. *See Adarand*, 515 U.S. at 237 (noting that race based action taken to remedy "pervasive, systematic, and obstinate discriminatory conduct" is justified when the program is narrowly tailored to address the discriminatory conduct); *Croson*, 488 U.S. at 509 (suggesting that evidence of a pattern of discrimination, supported by statistics, can aid in a remedial defense); *Wygant*, 476 U.S. at 277 (proposing that an employer must have convincing evidence that remedial action is necessary before embarking on an affirmative action program).

66. *Adarand*, 515 U.S. at 227.

67. *See id.* at 236-37 (discussing the importance to society of ensuring that a close nexus exists between a remedial program and the discrimination allegedly addressed by the program); *Croson*, 488 U.S. at 506 (noting that overinclusive programs serve to indicate that the underlying purpose of an alleged remedial program "is not in fact to remedy past discrimination").

68. *See Adarand*, 515 U.S. at 237.

69. *Grutter*, 539 U.S. at 341.

70. *Adarand*, 515 U.S. at 238.

71. See *Croson*, 488 U.S. at 488 (emphasizing the flexibility of the program in *Fullilove*). For an example of a court ordered remedial program in an

C. The Development of an Analytic Framework for Racial Gerrymandering Claims: Shaw I *and its Progeny*

Beginning with its 1993 decision in *Shaw I*, the Supreme Court has decided six cases recognizing an equal protection standard "analytically distinct"[72] from the standard utilized by the Court in its review of equal protection challenges to redistricting plans in prior cases.[73] An examination of the Court's decisions in *Shaw I*, *Miller*, *Shaw II*, *Bush*, *Hunt*, and *Easley* reveals the evolution of the equal-protection racial-gerrymandering claim from the Court's initial recognition of such a claim in *Shaw I*, to the Court's most recent declaration on the subject in *Easley*.[74] These cases, when viewed together, also reveal the Court's incorporation within its analytical framework for equal-protection racial-gerrymander claims of affirmative defenses which may be raised by redistricting entities relying on race or ethnicity in the creation of an electoral district in order to comply with Sections 2 and/or 5.

1. Shaw I*: The Court's Recognition of an Equal Protection Racial Gerrymandering Claim*

In *Shaw I*, a group of North Carolina voters challenged the state legislature's use of race in the creation of two congressional districts: District 1 and District 12.[75] Like the equal protection claims in the five cases that followed, the plaintiffs in *Shaw I* were white voters who claimed that the legislature's decision to split

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employment context that satisfies both prongs of strict scrutiny, *see Paradise*, 480 U.S. at 169-74.

72. *Miller*, 515 U.S. at 911.

73. *Id.* In point of fact, prior to *Shaw I*, the Court only considered and decided one case involving an equal protection racial gerrymander challenge to an electoral district. *See United Jewish Org.* 430 U.S. at 148-49. The analytical framework and the standard for adjudicating equal protection racial gerrymander cases set forth by the *Shaw I* line of cases effectively overruled the standard set forth by the Court's plurality decision in *United Jewish Org. Compare Shaw II*, 517 U.S. at 909-14, *and Miller*, 515 U.S. at 911-12, *with United Jewish Org.*, 430 U.S. at 148-49; *see also* Guinn, Chapman & Knechtel, *supra* note 5, at 227-28 (discussing the Court's recent attempts to rectify the conflicting standards).

74. In addition to the Court's six decisions in the *Shaw I* line of cases tracing the development of the Court's framework for examining racial gerrymandering claims, the Court in 1995 summarily affirmed a case, without a written opinion, wherein a district court panel approved a redistricting plan. DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd and dismissed in part*, 515 U.S. 1170 (1995). There is, however, no reasoning from the Court in *Dewitt's* from which redistricting entities may find guidance. *See Bush*, 517 U.S. at 996 (Kennedy, J. concurring) ("[O]ur summary affirmance in *DeWitt* stands for no proposition other than the districts reviewed were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of judgment."); *see also id.* at 1001-02 (Thomas, J. concurring) (agreeing with Justice Kennedy).

75. 509 U.S. at 633.

their community into two districts was based solely on racial considerations — the intent to create a majority-minority district.[76] However, unlike prior cases before the Court, the allegations in the complaint supporting the plaintiffs' equal protection claim in *Shaw I* focused on the "bizarre" shape of the challenged districts.[77] The complaint alleged that the extremely irregular shape of the districts alone was indicative of "an effort to segregate the races for the purpose of voting, without regard for traditional districting principles and without sufficiently compelling justification."[78] According to the allegations in the complaint, district I was "hook-shaped" with "finger-like extensions," which the North Carolina district court compared to a "Rorschach ink-blot test."[79] District 12 was even more bizarrely shaped.[80] The complaint also alleged that District 12 was approximately 160 miles long and ran on both sides of an interstate highway, "[i]t [wound] in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough enclaves of black neighborhoods."[81]

Although a three-judge district court panel granted the State's motion to dismiss the plaintiffs' complaint for failure to allege a claim upon which relief could be granted, the Court reversed the district court's decision.[82] The majority opinion was authored by Justice O'Connor and joined by the late Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas (collectively "the *Shaw I* majority").[83] The *Shaw I* majority focused on the allegation of the bizarre shape of the challenged districts as an apparent decisive factor, holding that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregate . . . voters' on the basis of race."[84] In remanding the case to the North Carolina district court, the Court in *Shaw I* directed the district court to determine, assuming the allegations

76. Prior to *Shaw I*, an equal protection plaintiff alleging racial or ethnic discrimination in redistricting had to show both a racially discriminatory purpose and a discriminatory effect on the claimants' group. *DeWitt*, 856 F. Supp. at 1413.

77. *Shaw I*, 509 U.S. at 642.

78. *Id.*

79. *Id.* at 635.

80. *Id.*

81. *Id.* at 635-36 (internal quotation marks omitted).

82. *Id.* at 656-57. Prior to its decision in *Shaw I*, the only appeal to the Court from the adjudication by a lower court of an equal protection racial gerrymander claim was in *United Jewish Org.*, 430 U.S. at 148-49.

83. *Shaw I*, 509 U.S. at 658. In reversing, the Court recognized that the issue presented was "analytically distinct" from issues presented in the Court's prior decisions involving alleged equal protection violations to alleged unconstitutional race-based gerrymandering. *Id.* at 652.

84. *Id.* at 646-647.

of racial gerrymandering were uncontradicted by the State, whether the congressional reapportionment plan containing Districts 1 and 12 satisfied strict scrutiny.[85]

The Court in *Shaw I* also went on to conclude that even assuming that the plaintiffs were able to satisfy their burden of proving race was the predominant factor in the design of Districts 1 and 12, there were at least two compelling government interests that would, under strict scrutiny, justify predominant reliance on race in the design of a majority-minority district: (1) eradicating the effects of present or past discrimination; and (2) compliance with Section 5.[86] In so doing, the *Shaw I* majority stated that if a reapportionment plan is narrowly tailored to achieve either of these objectives, the plan would survive strict scrutiny.[87] Significant to subsequent decisions, the Court in *Shaw I* did not comment on the significance, if any, of the procedural posture of the order appealed from, i.e. the ruling on a motion to dismiss the complaint.[88]

2. The Pronouncement of the "Predominant Factor" Test: Miller v. Johnson

In the Court's 1995 decision in *Miller*, the Court's pronouncement of the "predominant factor" test emphasized that legislative purpose is more important than shape in proving an equal-protection racial-gerrymander claim, and that purpose ultimately determines whether strict scrutiny is triggered.[89] In *Miller*, five Georgia voters challenged Georgia's Congressional District 11, a majority-minority district intentionally created in order for Georgia's congressional reapportionment plan to obtain preclearance by the Justice Department under Section 5.[90] Even though the shape of District 11 was not altogether bizarre in comparison with other districts, Georgia conceded that racial considerations were its primary motivation for the creation of District 11.[91]

A three-judge district court panel invalidated District 11.[92] The district court concluded that the State failed to carry its burden of justifying the plan containing District 11 under strict scrutiny.[93] In so doing, the district court "read *Shaw [I]* to require

85. *Id.* at 658.
86. *Id.* at 657.
87. *Id.*
88. *See id.* at 637.
89. *Miller*, 515 U.S. at 916.
90. *Id.* at 909.
91. *Id.*
92. *Id.* at 909-910.
93. *Id.*

strict scrutiny whenever race is the overriding, predominant force in the redistricting process."[94]

The Court in *Miller*, in an opinion via the *Shaw I* majority authored by Justice Kennedy, affirmed the Georgia district court decision.[95] After noting that there is a "presumption of good faith that must be accorded legislative enactments, [which] requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race," the Court in *Miller* interpreted its holding in *Shaw I* to mean that a district's bizarre shape is merely circumstantial evidence that race was the primary consideration in redistricting.[96] In so doing, the Court stated that a claimant in a racial gerrymandering case is "neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness."[97]

Significantly, the Court in *Miller* for the first time pronounced the predominant factor test as the test to be applied in equal-protection racial-gerrymander cases to determine whether a claimant has satisfied its burden of proof which, to reiterate, is as follows:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interest, to racial considerations.[98]

Since the evidence before the district court in *Miller* established that race was the predominant factor in the creation of District 11, the Court concluded that the district court correctly determined that an application of strict scrutiny was warranted.[99]

In reviewing whether District 11 satisfied strict scrutiny, the Court did not squarely address whether compliance with Section 2 or 5 could be a compelling interest.[100] The Court did, however, reject the State's contention that there is a compelling interest in complying with the Justice Department's interpretation of the

94. *Id.* at 909 (internal quotation marks omitted).
95. *Id.* at 903, 928.
96. *Id.* at 916.
97. *Id.* at 915.
98. *Id.* at 916.
99. *Id.* at 928.
100. *See id.* at 921.

VRA.[101] In so doing, the Court stated that "blind judicial deference" to the Justice Department's interpretation of the VRA "has no place in equal protection analysis."[102]

The Court in *Miller* also concluded that the drawing of District 11 was not required to comply with Section 5's non-retrogression principle.[103] In so doing, the Court reasoned that in satisfying the Justice Department's objections to previous plans, the Georgia legislature's clear purpose for creating District 11 was to maximize the number of majority-minority congressional districts, not to avoid retrogression.[104] Since Georgia's earlier congressional redistricting plans had already increased the number of majority-minority districts, the Court in *Miller* concluded that adding an additional majority-minority district was not required in order to comply with Section 5.[105]

3. Shaw II *and* Bush*: A More Complete Analytic Framework Set Forth in Two Cases Decided the Same Day*

On June 13, 1996, the Court issued its two opinions in *Shaw II* and *Bush*.[106] In each of these cases, the Court applied the predominant factor test *and* strict scrutiny analysis to invalidate the redistricting plans challenged therein. *Shaw II* and *Bush* are the only two cases wherein the Court has applied *both* the predominant factor test *and* strict scrutiny analysis in assessing the constitutional validity of a redistricting plan.[107]

a. *Shaw II*

After the remand in *Shaw I*, the North Carolina district court determined that even though race was the predominant factor in the creation of North Carolina's Districts 1 and 12, the districts were constitutionally valid because the plan that created them satisfied strict scrutiny, i.e., was narrowly tailored to achieve compliance with Sections 2 and 5.[108] In an opinion, again via the *Shaw I* majority, this time authored by the late Chief Justice Rehnquist, the Court reversed the district court decision.[109] The

101. *Id.* at 922.
102. *Id.* at 922 (quoting *Croson*, 488 U.S. at 501).
103. *Id.* at 923.
104. *Id.* at 923-24.
105. *Id.* at 924 (declaring that Georgia's policy of "adhering to other districting principles instead of creating as many majority-minority districts as possible" is not evidence of discriminatory purpose).
106. *Shaw II*, 517 U.S. at 899; *Bush*, 517 U.S. at 952. Although *Shaw II* was decided on the same day as *Bush*, the majority opinion in *Shaw II* appears in both the United States Reporter and the Supreme Court Reporter before the Court's plurality opinion in *Bush*.
107. *Shaw II*, 517 U.S. at 906-07; *Bush*, 517 U.S. at 959-60.
108. Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D. N.C. 1994).
109. *Shaw II*, 517 U.S. at 901, 918.

Court in *Shaw II* dismissed the challenge directed at District 1 because none of the claimants resided in District 1 and therefore did not have standing.[110] The Court's focus, in terms of its application of *Shaw I* and *Miller* to further develop an analytic framework relating to the substantive law of equal protection racial gerrymander cases, was directed at the propriety of the district court's decision relative to District 12.[111] In so doing, the Court in *Shaw II* applied the predominant factor test and concluded that strict scrutiny was warranted because the evidence demonstrated that race was the predominant factor in drawing District 12.[112]

Applying strict scrutiny, the Court in *Shaw II* identified *three* compelling interests that could sustain a redistricting plan.[113] The Court agreed with the State that eradicating the effects of past or present discrimination is a compelling interest.[114] The Court also assumed, without deciding, that achieving compliance with Sections 2 and 5 are compelling interests which could — independently — justify a majority-minority district designed with race as the predominant factor.[115] With respect to whether the creation of District 12 was justified by a compelling interest in eradicating the effects of present or prior discrimination, the Court in *Shaw II* concluded that there was insufficient proof of present or prior discrimination to support a finding that such a compelling interest existed.[116]

As in *Miller*, the Court in *Shaw II* also held that the design of District 12 was not required by its independent reading of Section 5, which, in the Court's view, did not require a redistricting plan that maximized the number of majority-minority districts.[117] Since North Carolina's earlier redistricting plans had already increased the number of majority-minority districts in comparison to previous plans, adding District 12 was not required to achieve compliance with Section 5's non-retrogression principle.[118] Hence, in the Court's view, the plan containing District 12 was not required to comply with Section 5.[119]

The Court then rejected the State's contention that District 12 was created in order to comply with Section 2.[120] In so doing, the

110. *Id.* at 904.
111. *Id.* at 905-09.
112. *Id.* at 906.
113. *Id.* at 908.
114. *Id.* at 909.
115. *Id.*
116. *Id.* at 913.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

Court applied the *Gingles* factors,[121] which set forth the three essential preconditions for a cause of action under Section 2.[122] These elements require a minority group challenging a multi-member redistricting plan under Section 2 to demonstrate that: (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "it is politically cohesive;" and (3) "the white majority votes sufficiently as a bloc to enable it to — in the absence of special circumstances, such as the minority candidate running unopposed . . . defeat the minority's preferred candidate."[123] The Court concluded that the first *Gingles* factor was not satisfied, reasoning that, given the "snake-like" appearance of District 12, "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race."[124] As such, the Court concluded that the District 12 plan did not achieve compliance with Section 2.[125]

b. *Bush*

In *Bush*, a panel of three district judges concluded that Texas Congressional Districts 18, 29, and 30 were unconstitutional racial gerrymanders.[126] The primary tool used in drawing congressional district boundaries was a computer program that permitted the Texas legislature to manipulate district lines on computer maps on which racial and other socio-economic data was superimposed at block-by-block level, whereas other data, such as party registration and past voting statistics, was available only at the level of voter registration districts. Before 1990, that data had not been broken down beyond the census tract level.[127] The Texas district court determined that strict scrutiny was appropriate because the districts "were all designed with highly irregular boundaries that take no heed of traditional districting criteria."[128] Applying strict scrutiny, the district court concluded that none of the districts were "narrowly tailored to fulfill the State's compelling interest in avoiding liability under § 2 or § 5 of the Federal Voting Rights Act."[129]

The Supreme Court, in a plurality opinion authored by Justice O'Connor and joined by the late Chief Justice Rehnquist and Justice Kennedy, affirmed the district court's decision that

121. 478 U.S. 30 (1986).
122. *Shaw II*, 517 U.S. at 914.
123. *Thornburg*, 478 U.S. at 50-51.
124. *Shaw II*, 517 U.S. at 916.
125. *Id.* at 917.
126. *Bush*, 517 U.S. at 957.
127. *Id.* at 961-62.
128. Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994).
129. *Id.*

race was the predominant factor in the design of the challenged districts and that the challenged districts did not satisfy strict scrutiny.[130] Even though the Court's plurality in *Bush* characterized the case as a "mixed motive" case,[131] it held that the record demonstrated that race was the predominant factor in the creation of the challenged districts.[132] The Texas legislators in *Bush* also conceded that racial considerations, i.e., the creation of a majority-minority congressional district, were a significant driving force behind the challenged districts.[133] Indeed, the Court in *Bush* observed that even though there was also extensive evidence that the legislature was concerned with ensuring the re-election of incumbent Congressmen, any "political gerrymandering was accomplished in large part by the use of race as a proxy."[134] Hence, the Court held that race was a predominant factor in the design of the challenged electoral districts.

Significantly, the Court's plurality opinion in *Bush* identified the same three compelling interests as the majority in *Shaw II* that could sustain a redistricting plan under strict scrutiny.[135] With respect to eradicating the effects of present and past discrimination and achieving compliance with Section 2, the State argued that the creation of Districts 18, 19, and 20 was necessary to prevent minority vote dilution as a consequence of racial bloc voting.[136] Referencing the three *Gingles* factors, and the additional caveat that "[a] district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability," the Court rejected the State's contention.[137] In the plurality's view, none of the challenged districts were sufficiently geographically compact to reflect that the State did not subordinate traditional districting principles to race more than reasonably necessary to avoid Section 2 liability.[138] Hence, the challenged majority-minority districts did not realize the compelling interest of achieving compliance with Section 2.

As for Section 5, the only contention relied on by the State was that creation of District 18 was justified in achieving compliance with Section 5.[139] The Court's plurality in *Bush* rejected this argument reasoning that District 18 was not created

130. *Bush*, 517 U.S. at 957.
131. *Id.* at 959.
132. *Id.*
133. *Id.*
134. *Id.* at 969.
135. *Id.* at 977-984.
136. *Id.* at 982.
137. *Id.* at 979
138. *Id.*
139. *Id.* at 976.

to maintain minority voting strength, but rather to augment it.[140] The plurality stated that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[141] Hence, the Court concluded that the plan containing District 18 did not achieve compliance with Section 5.[142] As a result, the challenged majority-minority districts were invalidated.[143]

4. Hunt *and* Easley*: Scaling Back on the Predominant Factor Test*

The Supreme Court's 1999 decision in *Hunt* and its 2001 decision in *Easley* are the Court's latest decisions assessing the propriety of an equal-protection racial-gerrymandering claim.[144] In both cases, the Court again reviewed the proof supporting a racial-gerrymandering challenge to North Carolina's District 12, which was redrawn following the Court's decision in *Shaw II*.[145] The Court's theme in these two cases appears to be that the focus of the predominant factor test is to determine legislative intent, and that the district court's ability to examine a well-developed record is essential to this determination.

a. Hunt: North Carolina's District 12 — Round 3

In response to the Court's 1996 decision in *Shaw II*, North Carolina enacted a new reapportionment plan altering District 12 in several respects.[146] Among other things, the new District 12 reduced the total minority population to approximately 47% of the district. District 12 was also geographically different from the previous District 12, splitting fewer counties and retaining only 41.6% of its former area.[147] Although the new District 12 was wider and shorter than the previous District 12, it retained its "snake-like" shape and continued to track both sides of the interstate.[148]

The North Carolina district court granted summary judgment in favor of the claimants before either the claimants or the State

140. *Id.* at 983.
141. *Id.* (emphasis in original).
142. *Id.*
143. *Id.*
144. *Hunt*, 526 U.S. at 541; *Easley*, 532 U.S. at 234.
145. *See Hunt*, 526 U.S. at 543 (reviewing the constitutionality of North Carolina's 12th congressional district for the third time in six years); *Easley*, 532 U.S. at 234 (reviewing North Carolina's racial districting for the fourth time).
146. *Hunt*, 526 U.S. at 544.
147. *Id.*
148. *Id.*

had conducted discovery, and without an evidentiary hearing.[149] Although the State relied on an affidavit containing expert opinion testimony stating that District 12 was created to produce a Democratic seat in Congress, as well as "after the fact" affidavits of two members of the North Carolina General Assembly stating that the General Assembly attempted to adhere to traditional districting principles, the district court panel concluded that "the uncontroverted material facts" showed that District 12 was designed "to collect precincts with high racial identification rather than political identification."[150] From the so-called "uncontroverted facts," including statistical and demographic evidence submitted by the claimants, the district court panel concluded that the North Carolina General Assembly relied on race as the predominant factor in drawing of District 12 because, in the district court's view, race, rather than politics explained the drawing of District 12.[151] Hence, the district court applied strict scrutiny and invalidated North Carolina District 12.

In a majority opinion, via the *Shaw I* majority and authored by Justice Thomas, the Supreme Court in *Hunt* reversed and remanded the North Carolina district court's decision.[152] Noting that there is a "presumption of good faith that must be accorded legislative enactments" and that "[t]he task of assessing a [redistricting entity's] motivation is not a simple matter," rather "it is an inherently complex endeavor, one requiring the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," the Court held that there were triable issues that precluded summary judgment.[153] In so doing, the Court observed that, even though "[v]iewed *in toto*, appellees' evidence tends to support an inference that the State drew its district lines with an impermissible racial motive," and that the affidavit submitted by the State's expert opined that race corresponded closely with political affiliation, thus, precluding summary judgment.[154] Since the evidence on the issue of intent was in dispute, the Court concluded that the North Carolina district court erred in determining that summary judgment in favor of the claimants was proper.[155]

149. *Id.* at 543.
150. *Id.* at 545.
151. *Id.*
152. *Id.*
153. *Id.* at 546 (internal quotation marks omitted).
154. *Id.* at 548.
155. *Id.*

b. Easley: The Constitutionality of North Carolina's District 12

On remand from *Hunt*, the parties undertook additional discovery, after which a three day trial was held.[156] Based on the evidence presented at trial, the North Carolina district court in *Easley* concluded that the North Carolina legislature had relied on race as the predominant factor in drawing the new District 12.[157] The district court based its conclusion on, inter alia, one critical factual determination — that race rather than politics (a Democratic seat in Congress) predominantly explained the new boundaries of District 12.[158] As a result, the court invalidated the district.[159]

The Supreme Court in *Easley*, in a majority opinion authored by Justice Breyer and joined by Justices Stevens, O'Connor, Souter, and Ginsberg, reversed the North Carolina district court and upheld North Carolina's District 12.[160] Interestingly, the Court's independent examination of the district court record reflected that the North Carolina legislature had drawn the boundaries of District 12 to collect precincts with high racial identification.[161] However, the Court also observed that, in the case of District 12, "the voting population is one in which race and political affiliation are highly correlated."[162] As such, the Court concluded that "[g]iven the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina, these facts in and of themselves cannot, as a matter of law, support the District Court's judgment."[163] Because the evidence before the district court reflected that, as far as District 12 was concerned, race correlated with Democratic voting behavior, the Court in *Easley* concluded that "political, not racial, reasons" explained District 12.[164] Thus, the Court held that the plaintiff had not carried its burden of demonstrating that race was the predominant factor in the district's design.

D. The Impact of Shaw I *and its Progeny on the Equal-Protection Standard for Adjudicating Racial-Gerrymandering Claims.*

At least three conclusions can be drawn from the Supreme Court's decisions in the *Shaw I* line of cases. First, not all racial considerations are proscribed when designing electoral districts under a redistricting plan; as long as race is not the predominant

156. *Easley*, 532 U.S. at 239.
157. *Id.* at 239-40.
158. *Id.*
159. *Id.* at 241.
160. *Id.* at 237.
161. *Id.* at 238, 240.
162. *Id.* at 242.
163. *Id.* at 243.
164. *Id.* at 248.

factor in the drawing of district boundaries, then strict scrutiny is not triggered.[165] If, however, traditional districting principles are subordinated to race, then the redistricting entity must justify its plan under strict scrutiny.[166] *Hunt* and *Easley*, however, demonstrate that a practical problem arises when a redistricting entity relies predominantly on an apparently race-neutral factor that corresponds closely with race.[167] Since *Easley* is the only post-*Shaw I* decision that has addressed this situation, it is unclear whether political preference is the only legitimate race neutral factor, despite its close correlation with race, that may be relied on by redistricting entities to avoid triggering strict scrutiny.

A second conclusion that can be drawn from *Shaw I* and its progeny is that there are at least three compelling interests that can justify a redistricting plan once strict scrutiny is triggered: (1) eradicating the effects of present or past discrimination; (2) achieving compliance with Section 2; and (3) achieving compliance with Section 5.[168] However, since the Court has only assumed, without deciding, that these are sufficiently compelling interests to support a plan, and because the Court has never held that a redistricting plan has satisfied strict scrutiny, there is no model Supreme Court decision for lower courts to follow as to exactly how a redistricting plan can satisfy both the compelling interest prong and the narrowly tailored prong of strict scrutiny. Future Supreme Court decisions should provide more guidance to lower courts and to redistricting entities in this respect.

The Court's decision in *Easley* presents a *third* and independent conclusion that can be drawn from the *Shaw I* line of cases. Unlike the decisions in *Shaw I*, *Miller*, *Shaw II*, *Bush*, and *Hunt*, the Court in *Easley* performed an independent, unilateral examination of the trial court record to determine whether the legislative design of the challenged district predominantly relied on race.[169] Indeed, the Court essentially functioned as a trial court in its assessment of the constitutional validity of North Carolina's District 12.[170] The Court's function in this regard was unique insofar as it was a departure from its usual function of determining whether a lower court applied the correct legal standard.[171] In this regard, the Court in *Easley* may have set a

165. *See* Guinn, Chapman & Knechtel, *supra* note 5, at 250 (highlighting the practical problem created by the Court's pronouncement in *Bush* that race is not always the predominant factor when creating majority-minority districts).

166. *Miller*, 515 U.S. at 916.

167. *Easley*, 532 U.S. at 244; *Hunt*, 526 U.S. at 544.

168. *Bush*, 517 U.S. at 976.

169. *Easley*, 532 U.S. at 246-49.

170. *Id.*

171. *Compare id.* (reviewing the facts in the record on file), *with Shaw I*, 509 U.S. 630 (reviewing whether plaintiff's had stated a cognizable claim), *Miller*, 515 U.S. 900 (questioning whether there was a valid equal protection claim

precedent for its role in equal protection redistricting litigation.

III. THE PROTOTYPE REDISTRICTING STRATEGY USED BY THE CITY OF HOUSTON IN DESIGNING ITS 1997 COUNCILMANIC DISTRICTING PLAN MAY BE USED BY OTHER REDISTRICTING ENTITIES TO DESIGN AND PADLOCK MAJORITY-MINORITY DISTRICTS

As a result of the Court's attempt in the *Shaw I* line of cases to resolve the potential conflict between its equal protection standard for racial-gerrymandering challenges and Sections 2 and 5, redistricting entities are now forced to carefully design redistricting plans so as to reduce exposure to possible liability from a racial gerrymandering claim.[172] This is especially so when a plan resulting in one or more majority-minority district(s) is bizarrely shaped and/or divides a racial or ethnic group into two or more districts.[173] However, an application of strict scrutiny[174] may be avoided if, as in *Easley*, a court determines that the plaintiff has failed to carry its burden of demonstrating that race was predominantly relied on in constructing the challenged district(s) more so than traditional districting criteria.[175] Thus, to a large degree the focus of discovery and proof in racial-gerrymandering cases is an attempt to discover the evidence reflecting the extent to which race was intentionally relied on and/or subordinated to traditional districting principles in the design of the challenged district(s).[176]

With foreknowledge of the equal-protection racial-gerrymander standards from the *Shaw I* line of cases and an examination of the relative exposure of any majority-minority districts within the redistricting plan to an equal-protection racial-gerrymandering lawsuit based on an application of those standards, there is no excuse for designing electoral districts that will subject the redistricting entity to a test of strict scrutiny regarding a majority-minority district challenged in subsequent

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and whether it would survive strict scrutiny), *Shaw II*, 517 U.S. 901 (deciding whether North Carolina's plan survives strict scrutiny), *Bush*, 517 U.S. 969 (addressing only the constitutional issue and standard of review), *and Hunt*, 526 U.S. 543 (reviewing whether the lower court's grant of summary judgment was appropriate).

172. *See* Guinn, Chapman and Knechtel, *supra* note 5, at 227-28.

173. *See id.* at 230.

174. An application of strict scrutiny is not necessarily fatal to redistricting plan. *See, e.g.*, King v. State Bd. of Elections, 979 F. Supp 619 (N.D. Ill. 1997) (upholding intentionally designed Latino-majority district under strict scrutiny as being narrowly tailored to achieve compliance with Section 2).

175. *Easley*, 532 U.S. at 241; *see also Miller*, 515 U.S. at 919 (finding statements by a government official to be powerful evidence of subordinating traditional principles for racial considerations).

176. *Hunt*, 526 U.S. at 547.

litigation.[177] Attorneys for redistricting entities may advise the politicians whose electoral districts are contained therein to support the constitutional design of their respective districts with their own testimony as to the non-racial factors relied on in the design of their respective electoral districts.[178] The transcript containing that testimony and any additional testimony of computer experts, demographers, or anyone that participated in the process then becomes a pre-litigation, and post-litigation weapon designed to increase the likelihood that any prospective challenge will be easily and efficiently disposed of — procedurally and substantively.[179] The result in *Chen II* becomes a bargaining tool in the hands of the politicians defending their district, and the need for discovery in any litigation that ensues becomes minimal.

The fifth circuit's 2000 decision in *Chen II* affirmed a district court decision concluding, based largely upon testimony adduced at legislative hearings, that the City of Houston did not primarily rely on race in connection with its 1997 redistricting plan. The nature of the findings adduced in the legislative hearings — in particular, the legislative testimony therein — relied on by the City of Houston in anticipation of the lawsuit in *Chen*, as well as the litigation strategy employed by the City of Houston to defend the challenged districts in its 1997 redistricting plan, may prove to be a prototype model for redistricting entities who seek an iron-clad approach to designing a redistricting plan and defending it in a subsequent equal-protection racial-gerrymandering challenge based on the *Shaw I* line of cases.[180]

A. *The Strategy Employed by the City of Houston in the Design of its 1997 Municipal Redistricting Plan*

The *Chen* litigation involved an equal-protection racial-gerrymandering claim to Houston's 1997 redistricting plan ("1997 Houston Plan"), and was set against the backdrop of Houston's annexation in 1996 of a predominantly white suburban community known as Kingwood with a population of over 40,000, along with the annexation of three other areas with a combined population of almost 5,000.[181] As part of Houston's 1997 redistricting process,

177. *Id.* at 547-48.

178. *Id.*

179. *Chen II*, 206 F.3d at 517.

180. *See* Steve Bickerstaff, *Effects of Voting Rights Act on Reapportionment and Hispanic Voting Strength in Texas*, 6 TEX. HISP. J.L. & POL'Y 99, 110 (2001) ("The process followed by the City of Houston is a model for use in successfully negotiating the narrow path between drawing districts with a consciousness of race and ethnicity necessary to assure compliance with the Voting Rights Act and drawing districts unconstitutionally based on the race or ethnicity of the inhabitants.").

181. Chen v. City of Houston (*Chen I*), 9 F. Supp. 2d 745, 747 (S.D. Tex. 1998).

members of the Houston City Council[182] had to decide in which of Houston's nine districts (Districts A through I) the Kingwood community should be placed, while at the same time complying with the Supreme Court's equal protection and VRA standards.[183] In so doing, Houston's City Council compiled an evidentiary record of legislative hearings. The evidence contained in the transcript from those legislative hearings was the primary evidence relied on to support the City of Houston's court victory in the subsequent racial gerrymandering challenge to the map.[184] An examination of the factors at issue in the annexation of Kingwood and the three less populated neighboring communities, and the concepts discussed via lamb chop testimony during the 1997 City Council hearings, may provide guidance as to the way in which redistricting entities approach redistricting in the future.

1. The Annexation of Kingwood, and the Concomitant Effect on the Racial Balance in Houston's Councilmanic Districts

After the annexation of Kingwood, the City of Houston had to determine in which district to place Kingwood while allocating the spillover effect in other districts so as to avoid disrupting population balances in those districts.[185] Kingwood was adjacent to two Houston City Council districts — each composed of a different racial majority; (1) District B, a predominately African-American community, and (2) District E, a predominantly white community.[186] The population adjustments to District E, as well as the other Houston City Council districts were accomplished by using a computer software program that contained racial and ethnic data at the level of the voting precincts.[187] The resulting approved map, as measured by total population figures, contained

182. The City of Houston's districting scheme, as it relates to electing City Council members in single-member districts, is somewhat similar to many state and local districting schemes. The City of Houston is governed by a fifteen member City Council consisting of: (i) the mayor and five council members, who, like Houston's mayor, are elected at-large; and (ii) nine council members elected through single member districts (Districts A through I). *Chen II*, 206 F.3d at 504.

183. *Id.* at 510-14.

184. *Id.* at 515.

185. *Id.* at 514-15.

186. *Id.* at 508-09.

187. *Id.* at 508. Advances in technology and, in particular, the availability of computer software program containing census data and district boundaries, along with the concurrent ability to place and replace electoral district boundaries has made the ability to design redistricting plans and the individual electoral districts therein into an efficient and convenient way to facilitate the redistricting process and any subsequent litigation stemming there from. *Bush*, 517 U.S. at 962.

two districts with a Hispanic majority and two districts with an African-American majority.[188]

2. The Houston City Council Hearings and the Section 5 Filings

Prior to the City of Houston's adoption of the 1997 Houston Plan, the Houston City Council held three days of legislative hearings wherein members of the City Council supporting and opposing the annexation of Kingwood into District E gave testimony as to the reasons for their respective positions.[189] In addition, the City of Houston, a covered jurisdiction within the meaning of Section 5, filed documents with the Justice Department to obtain preclearance.[190] Both the hearings and the Section 5 filings were relied on by the City of Houston in the *Chen* litigation as evidence of the factors relied on by the City Council in adopting its 1997 plan.[191] The Houston City Council hearings relating to the 1997 Houston Plan, focused primarily on: (1) a comparison between Kingwood's community of interest, and District E's and District B's communities of interest; and (2) the spillover concerns, in terms of population balance, in an attempt to minimize one-person, one-vote concerns and the mass redrawing of other district borders.[192]

a. Testimony by Proponents of the 1997 Houston Plan

Proponents of the 1997 Houston Plan testified that Kingwood's communities of interest were consistent with District E, but were at variance with District B.[193] In so doing, Houston City Council members supporting the 1997 Houston Plan did not limit their testimony to general discussions of socio-economic indicators.[194] In particular, City Council members supporting the annexation of Kingwood to District E referred to both anecdotal

188. *Chen II*, 206 F.3d at 504-05.

189. *Id.* at 517.

190. *Id.* at 504.

191. *Id.* at 515-16. In July 1997, the 1997 Houston Plan received Department of Justice preclearance pursuant to Section 5. *Chen I*, 9 F. Supp. 2d at 747.

192. *Chen I*, 9 F. Supp. 2d at 757-758 ; *see also* Transcript of Houston City Council Hearing at 7-10, (Feb. 26, 1997). In addition to focusing on the extent to which the placement of Kingwood in District E preserved existing communities of interest and are-perforce-vote concerns, there was also extensive testimony at the Houston City Council's hearings demonstrating that the City of Houston's decision to place Kingwood in District E was partially driven by the fear of retrogression liability in derogation of Section 5. *Chen II*, 206 F.3d at 614-15; *see also* Transcript of Houston City Council Hearing at 51-54, (Feb. 26, 1997); Transcript of Houston City Council Hearing at 7-10 (Apr. 2, 1997).

193. *Chen II*, 206 F.3d at 515-16. *See also* Transcript of Houston City Council Hearing at 21-30, 48-49, (Feb. 26, 1997).

194. *See supra* notes 205-208 and accompanying text.

and statistical evidence demonstrating that the average income and quality of housing in Kingwood were much higher than those of District B, while the percentage of individuals on public relief and the occurrence of illiteracy were much lower.[195] Proponents of the 1997 Houston Plan also testified as to infrastructure differences in District B, and referred to it as the "worst in the city." The infrastructure and average income of District E was closer to that of Kingwood.[196] Like Kingwood, District E also contained planned communities that shared Kingwood's concerns relative to services and taxation.[197]

Proponents of the 1997 Houston Plan also emphasized that given Kingwood's large population, placing Kingwood in District B would have a population spillover effect which would negatively effect the majority-minority population balance in other districts — more so than placing Kingwood in District E.[198] At that time, District B was close to the one-person, one-vote limit and placing Kingwood in District B would cause a ripple effect, moving predominantly African-American areas on the borders of District B into surrounding districts creating an additional spillover effect of requiring several districts to be redrawn to eliminate the then existing majority-minority population in these Districts.[199] Placing the African-American populations on the borders of District B into adjacent districts would have eliminated the Hispanic majority in the adjacent districts.[200] Placing Kingwood into District E, instead of into District B, minimized population spillover concerns and prevented mass redrawing of other districts borders that would have ensued.[201]

b. Testimony Relating to the Avoidance/Prevention of Retrogression

Testimony in support of the 1997 Houston Plan also showed that the Houston City Council carefully considered the proposed plan and the feasibility of various modifications, and that the decision to place Kingwood in District E was partially driven by the fear of retrogression liability in derogation of Section 5.[202]

195. *Chen II*, 206 F.3d at 515-16.
196. *Id.* at 515.
197. *Id.* at 516.
198. *Id.* at 515-16.
199. *Id.*
200. *See id.* at 514 (noting that the 1997 Plan largely maintained the borders of previous plans, set with the goal of creating two black and two Hispanic single member districts).
201. *Id.* at 514-15.
202. *Id.* at 514.

c. Testimony by Opponents of the 1997 Houston Plan

Even though the majority of Houston City Council members supported the 1997 Houston Plan, there were opponents who provided opening statements and comments during the City Council debates and before the final council vote.[203] However, at no point did the opponents of the 1997 Houston Plan challenge the other Council members' statements characterizing Kingwood's socio-economic status, infrastructure, or "available public services."[204] Indeed, the opponents of the 1997 Houston Plan never attempted to show — either by their own testimony at the hearings or through expert testimony — that the lack of similarity between Kingwood and District B was overcome by the presence of commonalities of communities of interest.[205] The closest the opponents came to challenging testimony relating to reliance on the similarities between Kingwood's communities of interest and that of District E, was a disclosure by a member of the Houston City Council who opposed the plan. That member stated, in general terms, that communities of interest were inherently linked in geography, i.e., that the "community of interest" districting criteria was inextricably intertwined with the geographic "importance" districting criteria.[206] However, at no point did this councilmember or any individual or expert discuss or present evidence indicating the existence of particular communities of interest, such as occupations or educational level, creating a significant point of commonality between Kingwood and District B. Such evidence would have mitigated the differences between District B and Kingwood discussed by proponents of the 1997 Houston Plan.[207]

d. Testimony of Attorneys with Respect to Compliance with *Shaw I* and VRA Standards

Testimony by the lead redistricting attorney and Council members at the Houston City Council hearings referenced the City of Houston's obligation to comply with existing equal protection and VRA standards and clearly reflected awareness of the possibility that the redistricting would be subject to a lawsuit.[208]

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203. *See id.* at 516; *see also* Transcript of Houston City Council Hearing at 50-54 (Feb. 26, 1997); Transcript of Houston City Council Hearing at 68-71 (Apr. 2, 1997).

204. *Chen II*, 206 F.3d at 516.

205. *Id.* at 516-17.

206. *See id.* at 516.

207. *Id.* at 516-17.

208. *Id.* at 517. The lead attorney in the City of Houston's 1997 redistricting process conceded at the City Council hearings that, in advising Council members during the map drawing process, he was seeking to, *inter alia*, avoid Section 2 and equal protection liability. Transcript of Houston City Council

For instance, lead counsel for the 1997 Houston Plan read into the record a discussion of the applicable law relating to redistricting, including the City's requirement to comply with Section 2 and 5 of the VRA, and the Equal Protection Clause, as well as the potential exposure of the City's final map to litigation alleging violations thereof.[209] In so doing, he stated that race can be "a factor" in the drawing of districts in a political map, but not the "predominant factor."[210]

Counsel for the City also recognized that, under the VRA, race must be taken into account in the drawing of districts such that minority-voting rights as a group are not diluted (Section 2) and so that there is no retrogression of minority-voting strength (Section 5).[211] He also stated that districts can be designed to carry majority-minority population, so long as race and ethnicity are not the predominant factor in the design, and that there are permissible districting criteria other than race which may drive redistricting decision making, including preservation of communities of interest and drawing districts to be as compact[212] and contiguous as is practicable.[213]

Counsel for the City further discussed the potential retrogression that would occur if Kingwood were placed in a predominantly African-American district, and that the 1997 Houston Plan had to be narrowly tailored to achieve compliance with Section 5, i.e., in order to prevent retrogression. He concluded by noting that the Houston City Council passed a resolution establishing a system designed to follow traditional redistricting principles, which, if followed, would direct the Houston City Council to satisfy its legal requirements.[214]

Hearing at 36-37, (Feb. 26, 1997).

209. Transcript of Houston City Council Hearing at 36-37, (Feb. 26, 1997).

210. *Id.*

211. *Id.*

212. *See Chen II*, 206 F.3d at 507 (discussing the concept of "compactness"). Both the testimony before the Houston City Council and the fifth circuit's analysis in *Chen II* discussed the difference between "geographic" compactness and "functional" compactness. *Id.* at 507 & n.2. "Functional" compactness considers communities of interest along with the geography of districts, so that mathematical and geographic compactness are sacrificed to preserve communities of interest. *Id.*; Transcript of Houston City Council Hearing at 11-12, 28-29, 48-49 (Apr. 2, 1997).

213. Transcript of Houston City Council Hearing at 36-37 (Feb. 26, 1997).

214. *Id.* at 12-31; Transcript of Houston City Council Hearing at 7, 59-60, 67-69 (Apr. 2, 1997). The Lead Counsel for the redistricting project opined that, in his view, the 1997 Houston Plan annexing Kingwood to District E was "most defensible" in any litigation challenges to the Plan. Transcript of Houston City Council Hearing at 7, 59-60, 67-69 (Apr. 2, 1997).

B. Chen*: The Equal Protection Challenge to the 1997 Houston Plan*

The day that the 1997 Houston Plan was adopted, April 9, 1997, the plaintiffs in *Chen*, five residents of the City of Houston, filed an equal-protection racial-gerrymandering claim challenging the plan in the United States District Court for the Southern District of Texas.[215] The lawsuit sought injunctive relief to prevent the implementation of the 1997 Houston Plan and, in so doing, alleged that placement of Kingwood in District E was an unconstitutional racial gerrymander.[216]

Both the district court's decision in *Chen I* and the fifth circuit's decision in *Chen II* applied *Miller's* predominant factor test[217] and concluded that the plaintiffs failed to demonstrate that traditional districting principles were subordinated to race in the annexation of Kingwood.[218] An examination of the district court's decision in *Chen I* and fifth circuit's decision in *Chen II*, and the evidence relied on by those decisions, may assist in the planning of future redistricting plans.

1. The District Court Decision in Chen I

After the plaintiffs and the City of Houston presented the evidence and arguments to the district court in support of their respective positions, the district court affirmed the 1997 Houston Plan, granting summary judgment in favor of the City and against the plaintiffs in the racial-gerrymandering claims.[219] In its analysis, the district court relied primarily[220] on evidence from two

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215. *Chen II*, 206 F.3d at 505.

216. *Chen I*, 9 F. Supp. 2d at 759. In addition to alleging that the 1997 Houston Plan constituted unconstitutional racial gerrymandering, the *Chen* plaintiffs raised several alternative constitutional claims, including: that the City's decision to assign Kingwood to District E violated the requirements of ballot secrecy; violated the plaintiffs' rights under the First Amendment to petition for redress of grievances, to assemble for political purposes, and to advocate for the candidate of their choice; and violated the Equal Protection Clause's "one-person, one-vote" principle. *Id.* at 747.

217. At the time of the fifth circuit's decision in *Chen II*, five of the six cases in the *Shaw I* line: *Shaw I*, *Miller*, *Shaw II*, *Bush*, and *Hunt*. The Court's 2001 decision in *Easley* had not yet been decided.

218. *Chen II*, 206 F.3d at 514; *Chen I*, 9 F. Supp. 2d at 754.

219. *Chen I*, 9 F. Supp. 2d at 763.

220. *Id.* at 754-57. The plaintiffs and the City of Houston each presented several sources of evidence in support of their respective positions aside from expert reports and the City Council hearings. *Id.* For instance, the City of Houston relied on, *inter alia*: memoranda from the City's outside attorneys regarding the legal requirements for redistricting plans; the City of Houston's "redistricting resolution" setting forth the criteria upon which the 1997 Houston Plan was purportedly based; the report submitted to the city council by Mr. Jerry Ward, the individual primarily responsible for developing the 1997 Houston Plan, describing the considerations which were involved in the

sources: (1) expert reports relating to the extent to which the challenged districts deviated from compactness;[221] and (2) the transcript from the City Council's hearing relating to the 1997 Houston Plan.[222]

Despite both parties' reliance on the evidence, the district court's focus on these two sources of evidence submitted might suggest that, in the absence of contradictory legislative testimony,[223] or contrary expert reports relative to whether traditional districting criteria were subordinated to race, a court may primarily — if not exclusively — look to these sources to determine whether a redistricting entity has predominately relied on race in the creation of one or more electoral districts in the adjudication of an equal-protection racial-gerrymandering claim. Ultimately, the district court in *Chen I* concluded that plaintiffs failed to carry their burden of proving that race was the predominant factor in the placement of Kingwood into District E, and granted summary judgment in favor of the City of Houston.[224]

2. *The Fifth Circuit's Decision in Chen II*

The plaintiffs in *Chen I* appealed the district court's decision to the Court of Appeals for the Fifth Circuit, claiming that the district court erred in granting the City's motion for summary judgment.[225] In support of their appeal, the plaintiffs argued that they produced enough direct and circumstantial evidence of the predominance of race in connection with the decision making relative to the 1997 Houston Plan and that the district court therefore erred in granting the City's motion for summary judgment.[226]

In affirming the district court, the fifth circuit in *Chen II*, like the district court in *Chen I*, primarily relied on the expert reports and transcripts from the Houston City Council hearings to conclude that race was not the predominant factor in the

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development of the 1997 Houston Plan. *Id.* The plaintiffs, however, relied on the deposition testimony of two Houston City Council members who each testified that, in their opinion, race was the deciding factor in the placement of the Kingwood community. *Id.* at 761.

221. *Id.* at 761. The expert reports of both parties focused upon the extent to which the District deviated from, or conformed with, acceptable criteria for compactness, i.e., the extent to which District E was bizarrely shaped. *Id.* at 761-62.

222. *Id.* at 758-59.

223. Significantly, the district court found that the subjective opinions of the two council members proffered by the plaintiffs were not material. *See Chen I*, 9 F. Supp. 2d at 761 ("The opinions of individual council members are not material; the relevant inquiry concerns the intent of the City through its City Council as a legislative body.").

224. *Id.* at 763.

225. *Chen II*, 206 F.3d at 504.

226. *Id.* at 505.

placement of Kingwood in District E, and therefore that the 1997 Houston Plan was not subject to strict scrutiny.[227] In rendering its decision, the fifth circuit addressed procedural aspects of a Federal Appellate Court's review of a district court's ruling on a motion for summary judgment in an equal-protection racial-gerrymander case, which, if followed by other courts, give redistricting entities the upper hand when defending against such claims.[228] After making these procedural points, the court rejected the plaintiffs' argument that the district court erred in determining that the plaintiffs' evidence was insufficient to satisfy the burden of demonstrating that race was the predominant factor in the design of the 1997 Houston Plan.[229]

Since both the procedural and substantive holdings made by the fifth circuit in *Chen II* may provide support for a successful defense of intentionally designed majority-minority districts, the following subsections will summarize the procedural and substantive holdings of the fifth circuit in *Chen II* before discussing the fifth circuit's disposition of the plaintiff's specific contentions.

a. Procedural themes from the fifth circuit's decision in *Chen II* — redistricting cases are ripe for summary judgment in favor of the redistricting entity when the plaintiff's burden on the predominant factor test has not been satisfied

In *Chen II* the fifth circuit made three very significant points with respect to the standard of review that a federal appellate court should apply to a district court's grant of summary judgment in favor of a redistricting entity in an equal-protection racial-gerrymandering claim. An examination of these three points suggests that such claims are ripe for summary judgment and that a federal court may be reluctant in such cases to disturb a legislature's decision making in the area of redistricting.

i. Federal courts are reluctant to disturb redistricting plans

First, the fifth circuit in *Chen II* distinguished its review of lawsuits challenging redistricting plans from other categories of decisions. In setting forth the applicable standard by which it reviews district court rulings on motions for summary judgments, the court cited *Hunt*, among others, for the proposition that its review of such rulings "must be understood in the context of the courts' traditional reluctance to interfere with the delicate and

227. *Id.* at 515.

228. *See id.* at 505-06 (noting the high burden of proof plaintiffs must bear to overcome summary judgment compared to the redistricting entity who enjoys the benefit of receiving a presumption of good faith).

229. *See id.* at 521-22.

politically charged area of legislative redistricting."[230] Thus, the fifth circuit relied on *Hunt* for the proposition that the "legislature has the benefit of a presumption of good faith when it conducts districting."[231]

ii. Summary judgment in favor of a redistricting entity is *not* disfavored in equal-protection racial-gerrymander cases

The fifth circuit in *Chen II* also rejected the plaintiffs' contention that summary judgment is disfavored in equal-protection racial-gerrymander lawsuits. In so doing, the fifth circuit distinguished the Supreme Court's decision in *Hunt* by pointing out that, in *Hunt*, the Supreme Court stressed that summary judgment in favor of the plaintiff was inappropriate because of the fact-sensitive nature of the intent requirement and because the non-movant did not have the burden of persuasion on the predominant factor issue.[232] In addition, the fifth circuit again emphasized that "[t]he Court [in Hunt] also relied on the traditional presumption that the legislature acted in good faith while districting"[233] The fifth circuit went on stating that "[t]he plaintiffs here bear the burden of persuasion, and the presumption of legislative integrity adds to, rather than lessens, their burden facing summary judgment."[234]

iii. When a redistricting entity can demonstrate alternative race-neutral motives for design of its redistricting plan, a racial gerrymander claim is ripe for summary judgment

The third point made by the fifth circuit was that a case containing "mixed motives" advances, rather than hinders summary judgment in favor of the redistricting entity.[235] The court thus rejected, prior to addressing the plaintiffs' contentions as to the propriety of the district court's grant of the City's motion for summary judgment, the plaintiffs' contention that summary judgment was inappropriate because the case contained mixed motives in that the City "proffered justifications for its actions grounded in traditional districting principles, [even though] it . . . also conceded that race was a factor in its decisions."[236] In disposing of that argument, the court stated that:

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230. *Id.* at 505; *see also Hunt*, 526 U.S. at 541 (granting the legislature a presumption of good faith for redistricting); Reynolds v. Sims, 377 U.S. 533 (1964) (explaining that "legislative reapportionment is primarily a matter for legislative consideration and determination").

231. *Id.* (citing *Hunt*, 526 U.S. at 549).

232. *See Chen II*, 206 F.3d at 506.

233. *See id.* (citing *Hunt*, 526 U.S. at 544).

234. *Id.*

235. *Id.* at 507.

236. *Id.*

> The City of Houston's presentation of valid evidence of nonracial intent, which transforms the case into one of mixed motives, advances rather than hinders its case for summary judgment. We will review the district court's grant of summary judgment using the traditional criteria, and take into account both the presumption in favor of a legislature's good faith and a plaintiff's burden of proof.[237]

Hence, as with its indication that federal courts should be reluctant to interfere with a legislature's redistricting plan, the fifth circuit in *Chen II* relied on the Supreme Court's recognition in *Hunt* that a federal court's consideration of an equal-protection racial-gerrymander challenge to a redistricting plan should presume that a legislature acted in good faith when determining whether the claimants satisfied their burden of proof on the predominant factor test.[238]

b. The fifth circuit' rejection in *Chen II* of the plaintiff's appellate argument that there was sufficient direct evidence that race was the predominant factor in Houston's 1997 Plan

In support of their position that they produced sufficient direct evidence that the 1997 Houston Plan was predominantly motivated by racial considerations, the plaintiffs relied on three arguments.[239] First, the plaintiffs argued that racial intent could be inferred from the City's access to racial data on the precinct level through use of a computer program that contained racial and ethnic data at the level of voting precincts.[240] Second, the plaintiffs maintained that the decision to place Kingwood in District E rather than District B was predominantly influenced by race.[241] Third, the plaintiffs claimed that the 1997 Houston Plan substantially maintained the borders of previous plans, and that these borders were set by a process in which race — specifically, the desire to create two African-American and two Hispanic single member districts — predominated.[242]

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237. *Id.*
238. *Id.* at 506-507.
239. *See id.* at 513-15. Although the fifth circuit first addresses the plaintiffs' procedural arguments and whether they produced enough circumstantial or direct evidence that race predominated the decision to place Kingwood in District E, the Court's disposition of plaintiffs' arguments regarding the sufficiency of its direct evidence is relevant here because, in equal protection racial discrimination cases, if the plaintiff satisfies its burden of proof via direct evidence (an acknowledgment of illegal racial discrimination by the relevant government decision maker) then the plaintiff has satisfied their initial burden of proof and does not have to come forward with circumstantial evidence. *Hunt*, 526 U.S. at 546.
240. *Chen II*, 206 F.3d at 514.
241. *Id.* at 514.
242. *Id.*

i. The use of precincts with racial data as an administrative boundary is not evidence of racial discrimination

Although the plaintiffs in *Chen II* argued that the administrative boundaries used by the City were based on precincts with racial data, the fifth circuit held that conformity with such administrative boundaries was neither direct nor indirect evidence of racial discrimination because there was no larger, more race-neutral, administrative unit that could have been practically used in designing district boundaries.[243] Moreover, the City itself was not the government unit that set precinct size.[244] Because the 1997 Houston Plan conformed to the administrative boundary of the precinct, which was the largest and only administrative unit available, and was not set by the City, this argument was rejected.[245]

ii. The fifth circuit relied almost exclusively on the legislative testimony from council debates when determining whether the decision to annex Kingwood was predominantly motivated by race

The fifth circuit concluded that the City's decision to place Kingwood in District E had three alternative justifications. One alternative justification was to prevent retrogression.[246] The City's Section 5 filing and the testimony presented at the Council hearings established the justification, and the City did not contest the issue.[247] According to the fifth circuit, however, "[t]he most powerful alternative justification for the City's actions is the nature of Kingwood and its greater community of interest overlap with portions of District E."[248] To support this conclusion, the fifth circuit reasoned that the "transcripts of the series of council debates that led to the final vote on the districting plan demonstrate that members of the Council discussed and evaluated data that indicated that Kingwood's communities of interest overlapped with District E, but were wildly at variance with District B."[249] In so concluding, the fifth circuit distinguished the Supreme Court's rejection of this alternative justification in *Shaw II* and *Bush* because in those cases the relevant material was not available at the time of the council deliberations and the

243. *Id.* at 514.
244. *Id.*
245. *See id.* (rejecting plaintiffs' contention because they could not correlate any city action with changes in precinct size).
246. *Id.* at 515.
247. *Id.*
248. *Id.*
249. *Id.*

alternative justification was raised "after the fact and only hypothetically motivated the districting body." [250]

In relying on the testimony from the Council debates, the fifth circuit emphasized that the proponents of the 1997 Houston Plan did not limit their testimony to general discussions of socio-economic indicators, but rather referred to both anecdotal and statistical evidence comparing the average income and quality of housing in Kingwood with that in Districts B and E. The Council members' testimony also discussed the differences in infrastructure between the two districts.[251] Moreover, the plaintiffs' expert witness generally confirmed the City's assessment.[252]

For the third alternative justification, the concern with minimizing the spillover effect on one-person, one-vote concerns, the fifth circuit also relied on testimony from the Council debates for its conclusion.[253] The court relied on council member testimony and a report prepared by an expert reflecting that, if Kingwood was placed in another district, major alterations would have to be made to the entire districting scheme versus minor alterations with the placement of Kingwoord in District E.[254] "By placing Kingwood in District E, the City minimized the spillover effect maintained by one-person, one-vote concerns, and the corresponding mass redrawing of districts that would ensue."[255]

Significantly, in setting forth its conclusions as to the propriety of the district court's conclusions regarding the alternative race-neutral explanations for placing Kingwood in District E, the fifth circuit rejected the plaintiffs' contention that the City could not rely on what the plaintiff argued was "scripted" testimony from the Council hearings.[256] Once again, the court relied on the presumption of legislative good faith in redistricting as set forth in *Hunt*.[257] In the plaintiff's view in *Chen II*, the Houston City Council debates "were mere smoke and mirrors concocted in anticipation of precisely this lawsuit."[258] The fifth circuit explained that given the "voluminous testimony" at the Council debates and the Supreme Court's declaration in Hunt to

250. *Id.*
251. *Id.* at 516-17.
252. *See id.* at 516 (noting the testimony of a local university professor in support of the City's position).
253. *Id.* at 517.
254. *Id.*
255. *Id.*
256. *Id.* at 517.
257. *See id.* (agreeing that the Council may have been aware of the possibility of litigation but denying that such awareness creates a fact issue regarding whether the testimony was a pretext for concealed racial motivation).
258. *Id.*

lower courts that there is a "presumption of good faith in this area," there was no merit to the plaintiffs' contention.[259] Hence, for the fourth time in its analysis, the fifth circuit in *Chen II* relied on *Hunt's* emphasis that courts should afford legislative decision making a presumption of good faith in redistricting litigation.

iii. Continuation of a racially motivated districting scheme

The fifth circuit also rejected the plaintiffs' argument that the City's continuation of a racially-motivated districting structure was direct evidence that race predominated in the design of the 1997 Houston Plan.[260] Even though the Justice Department had intervened in past redistricting schemes, and the City conceded that race was "a factor" in the design of past redistricting schemes, the plaintiffs in *Chen* failed to demonstrate any specific areas where the communities of interest were subordinated to race.[261] However, the fifth circuit, in disposing of this argument, again relied on the presumption in favor of legislative good faith set forth by the Supreme Court in *Hunt*: given the fact that the plaintiffs bore the burden of proof on this issue and the presumption of the Council's good faith, the plaintiffs needed to undercut the hypothesis that the City's plans were independently and substantially justified by traditional districting factors.[262] They failed to do so.[263]

c. The fifth circuit's rejection in *Chen II* of the plaintiffs' argument that there was sufficient circumstantial evidence that race was the predominant factor in Houston's 1997 Plan

The plaintiffs in *Chen II* relied on only one contention to support their position that they presented sufficient circumstantial evidence that race was the predominant factor in the 1997 Houston Plan. They argued, as did the North Carolina plaintiffs in *Shaw I* and *Bush*, that the shape of the districts contained in the Plan were sufficiently "bizarre" in relation to the racial demographics and population densities so that the shape itself was circumstantial evidence that race predominated in the design of the districts contained in the 1997 Houston Plan.[264] In addressing this argument, the fifth circuit in *Chen II* performed a

259. *Id.*

260. *See id.* at 518 (discussing the plaintiff's claim that the "sins of past Councils" were haunting the current council's asserted justifications).

261. *See id.* at 518-20.

262. *See id.* at 520-21.

263. *Id.* at 520. The court also reasoned that the passage of time lent an additional element to the determination of the Council's intent because maintaining established district lines is a traditional districting principle and the City included it in its guidance for the 1997 Houston Plan. *See id.* at 521.

264. *See id.* at 507.

comparative analysis between the shapes of the districts contained in the 1997 Houston Plan to the respective shapes of the districts held by the Supreme Court in *Shaw I* and *Bush* to be sufficiently "bizarre" to raise an inference of predominance of racial considerations in the majority-minority districts challenged therein.[265] After performing the comparison, the fifth circuit in *Chen II* concluded that even though the Houston districts were not "compact," the shape was not so bizarre as to give rise to the inference that race predominated in the legislature's decision relative to its design of each district.[266]

3. Chen I *and* Chen II *Appear to be Consistent with the Supreme Court's Decisions in the* Shaw I *Line of Cases*

The district court's decision in *Chen I* and the fifth circuit's affirmation in *Chen II* appear to be consistent with the Supreme Court's decisions in the *Shaw I* line of cases relative to a plaintiff's burden of proof in equal-protection racial-gerrymander cases. In 1998, at the time of the district court's decision in *Chen I*, the Supreme Court had decided *Shaw I* (1993), *Miller* (1995), *Shaw II* (1996), and *Bush* (1996), but not *Hunt* (1999) or *Easley* (2001). As such, the predominant factor test had already been set forth. However, there had been no exhaustive list of race-neutral districting principles that could be relied on as factors so as to avoid an application of strict scrutiny.

Consistent with *Shaw I*, *Miller*, *Shaw II*, and *Bush*, the district court applied *Miller*'s predominant factor test and considered all of the evidence presented on the issue of legislative intent in an attempt to determine the extent to which racial considerations — in comparison with traditional districting principles — were relied on in connection with the design of the 1997 Houston Plan and, in particular, the annexation of Kingwood into District E.[267] In so doing, the district court in *Chen I* focused on all of the evidence presented by both parties relevant to the factors relied on by the City Council, including the subjective opinions of the two Council members who opposed the plan.[268] The district court's decision, although not specifying which districting principles — if any — it considered the City to have relied on more than racial considerations, granted the City's motion for summary judgment on the basis that the plaintiffs had not provided sufficient evidence to satisfy their burden of proof, or to raise a genuine issue of material fact that the City had predominately

265. *See id.*

266. *Id.* at 508. The plaintiff's in *Chen II* presented no demographic data reflecting the racial nature of the districts nor any showing that the designs of the districts were in derogation of traditional districting principles. *See id.*

267. *Chen I*, 9 F. Supp. 2d at 754-63.

268. *Id.* at 761.

relied on race in designing the 1997 Houston Plan.[269] Thus, the district court's decision in *Chen I* appears to have followed the Supreme Court's mandate in *Shaw I*, *Miller*, *Shaw II*, and *Bush*, that the plaintiffs in an equal-protection racial-gerrymandering case have the initial burden of presenting sufficient evidence that racial considerations, more than traditional districting principles, predominated in the legislature's design of the plan, the failure of which is fatal to the plaintiffs case.[270]

The fifth circuit's 2000 affirmance of *Chen I* in *Chen II*, although consistent with the *Shaw I* line of cases, added two significant nuances to the regime of equal-protection racial-gerrymander litigation under the *Shaw I* line of cases, which may have been implied in the Supreme Court's decisions. In so doing, the fifth circuit primarily relied on two sources of evidence in making and rendering its decisions with respect to the issues on appeal. Significantly, the fifth circuit relied on: (1) statements made during legislative hearings by the drafters of the 1997 Houston Plan, and (2) the Section 5 filings to determine the extent to which race was relied on in the design of the 1997 Houston Plan.[271]

The first nuance apparently set forth by the *Chen II* decision was the fifth circuit's reliance on a well-developed record, including three days of legislative hearings wherein the factors relied on in the annexation of Kingwood were discussed by legislators. This is consistent with the Supreme Court's 1999 decision in *Hunt*, wherein the Supreme Court emphasized that a well-developed record on the issue of legislative intent is essential to determining whether an equal-protection racial-gerrymander claimant has satisfied its initial burden of proving that the redistricting entity has predominantly relied on race in designing its district plan.[272] Indeed, the Court in *Hunt* noted that the only evidence available on the issue of intent were the affidavits of two legislators that were executed after the plan had been adopted.[273] Unlike the Supreme Court in *Hunt*, the district court in *Chen I* and the fifth circuit in *Chen II* had a litigation record available that included transcripts from legislative hearings containing extensive testimony by council members supporting the 1997 Houston Plan at legislative hearings made prior to the adoption of the 1997 Houston Plan.[274] As a result, the problem of insufficient evidence on the issue of legislative intent present in *Hunt* — as

269. *Id.* at 763.
270. *See supra* Part II.C.
271. *Chen II*, 206 F.3d at 515-16.
272. 526 U.S. at 549.
273. *Id.* at 544
274. *Compare id.*, *with Chen II*, 206 F.3d at 515-16, *and Chen I*, 9 F. Supp. 2d at 755-59.

well as timing problems regarding legislative statements supporting such evidence — was not present in *Chen*.

Second, the fifth circuit in *Chen II*, like the Supreme Court's 2001 decision in *Easley*, performed an independent examination of the record and identified race-neutral districting principles which were relied on by the redistricting entity more so than race. The fifth circuit in *Chen II* held that preserving communities of interest as well as one-person, one-vote concerns were the primary race-neutral reasons for incorporating Kingwood into District E, and[275] the Supreme Court in *Easley* identified "politics" as being the primary explanation for the drawing of North Carolina District 12.[276] In other words, the fifth circuit in *Chen II*, and the Supreme Court in *Easley* not only determined that the plaintiffs failed to carry their initial burden of proving that race was predominantly relied upon by the redistricting entity in designing the challenged plan, but also identified districting principles relied on more than, or as much as with, racial considerations.

After *Easley* all equal-protection racial-gerrymandering claims brought under the current regime of the *Shaw I* line of cases are subject to an independent examination of the record to determine whether a claimant has successfully carried the initial burden under the predominant factor test of showing that race, more than other districting principles, predominated in the creation of one or more districts within a districting plan. Future Supreme Court decisions might provide guidance as to whether, as in *Chen II* and *Easley*, courts, in their application of the predominant factor test, must identify the districting principles that the legislature predominantly relied on. Perhaps, however, as in *Chen I*, it is sufficient for a court to simply determine whether a racial gerrymandering claimant has carried its initial burden of proving that race was the predominant factor in the design of the challenged districts, without identifying the race- and/or ethnic-neutral districting principles it relied on.

IV. DESIGNING UNASSAILABLE MAJORITY-MINORITY DISTRICTS BY COMBINING THE APPROACH USED IN THE 1997 HOUSTON PLAN WITH MODERN TECHNOLOGY AND PROCEDURAL EXPERTISE

The City of Houston's successful redistricting efforts in connection with the annexation of Kingwood and the concomitant adjustments made to the 1997 Houston Plan is a model for success which may be followed by redistricting entities in both the "design" phase and the "litigation" phase of any redistricting project.[277] After all of the backroom deals are made by the players, after all

275. *Chen II*, 206 F.3d at 515-16.
276. *Easley*, 532 U.S. at 242-44.
277. Bickerstaff, *supra* note 180, at 110.

the compromises and informal turf wars are over and the elected officials are comfortable with the final design of their respective districts, and before any legislative hearings are held, the redistricting players may — as in the *Chen* litigation — place an unbreakable padlock on the majority-minority districts exposed to an equal-protection racial-gerrymandering claim. In so doing, they can identify all race-neutral justifications for the design of any majority-minority districts contained in the final plan that may potentially be exposed to an equal-protection racial-gerrymander claim under the *Shaw I* line of cases and then write a screenplay for certain elected officials to follow, performing monologues and colloquies at the subsequent legislative hearings.

As with the strategic design of the 1997 Houston Plan, assuming that the elected officials are on board, the officials that are involved in the redistricting process can strategically protect the majority-minority districts by preparing testimony for the legislative hearings, and, of course, following through with their testimony at the hearing.[278] Afterwards, the redistricting entity, as in the *Chen* litigation, may rely on the legislative hearings to successfully defend the plan in any litigation based on an equal-protection gerrymander claim.

When carefully thought through, a redistricting entity may be even better prepared than the City of Houston in the design and defense of its 1997 Houston Plan. By combining the City of Houston's strategy, which resulted in the successful defense of its 1997 Houston Plan in the *Chen* litigation, with strategic decisions about, inter alia, which majority-minority districts may be justified by specific testimony about race-neutral redistricting principles, which elected officials will provide the testimony at the legislative hearings, and the substance of their testimony, an iron-clad record can support any subsequent challenge to the majority-minority districts.

Given that the legislative hearing appears to be the final component of the "design phase of a redistricting plan, and the filing of an equal- protection racial-gerrymander claim appears to be the commencement of the litigation phase, the following subsections will discuss both, and itemize the strategies which may be used during each phase to ensure successful litigation of majority-minority districts every time.

A. The "Design" Phase

1. Identify "Problem" Majority-Minority Districts that are Exposed to Equal-protection racial-gerrymander claims

Since the nature of equal-protection racial-gerrymander

278. *See supra* discussion Part IV.A.

claims is to challenge the motivation of the legislative decision makers relative to the design of specific districts within a redistricting plan,[279] then an initial assessment of which majority-minority districts are exposed to such claims will likely reveal which districts are potential targets of such claims. If the *Shaw I* line of cases are of any guidance on this issue, there appear to be at least four indicators that determine which majority-minority districts are exposed to equal-protection racial-gerrymander claims. Clearly, as gleaned from *Shaw I* and *Bush*, one indicator is the shape of the district.[280] As with North Carolina's Congressional District 12 challenged in *Shaw I*, *Shaw II*, *Hunt*, and *Easley*, and Texas Congressional District 18 challenged in *Bush*, a "bizarrely" shaped majority-minority district might be a target of an equal-protection racial-gerrymander claim.[281] As in *Chen II*, comparing bizarrely shaped majority-minority districts with the districts challenged in *Shaw I* and *Bush* might reveal which districts are potential targets for an equal-protection racial-gerrymander challenge.

A second indicator of exposure arises when a redistricting entity derives a district by dividing a district, or neighboring district where an ethnic or racial group was previously the majority, into two districts.[282] A third indicator that a majority-minority district might be exposed to an equal-protection racial-gerrymander claim is the inclusion within a districting plan of a majority-minority district for the first time.[283]

Finally, a fourth indicator is the involvement of the Justice Department; in particular, a Justice Department direction to a redistricting entity to deliberately use race in the design of a majority-minority district in order to avoid retrogression and/or to

279. *See* Polish Am. Cong. v. City of Chicago, 211 F. Supp. 2d 1098, 1107-1108 (examining equal protection claim alleging that the City of Chicago's entire redistricting project discriminated against citizens of Polish ancestry and in favor of members of all of the other European and non-European ethnic groups).

280. *Shaw I*, 509 U.S. at 639-49; *Bush*, 517 U.S. at 957.

281. *See Easley*, 532 U.S at 241-57; *Hunt*, 326 U.S. at 545-54; *Bush*, 517 U.S. at 957-89); *Shaw II*, 517 U.S. at 904-08; *Shaw I*, 509 U.S. at 639-58.

282. *See, e.g., United Jewish Org.*, 430 U.S. at 147-48 (challenging state senate and assembly districts of the New York State legislature because they divided members of the Hasidic Jewish community who were previously the majority population in the design of the electoral districts — into two districts).

283. *See, e.g., Miller*, 515 U.S. at 902-03 (first majority African-American congressional district in Georgia); King v. Illinois State Board of Elections, 979 F. Supp. 619 (N.D. Ill. 1997) (first majority-Latino Illinois Congressional district challenged in an equal protection racial gerrymander claim and upheld under strict scrutiny as being narrowly tailored to comply Section 2 of the VRA).

comply with Section 2.[284] Given that the Court in *Miller* indicated that there is no compelling interest in complying with the Justice Department's interpretation of the VRA, the Justice Department's involvement in the design of a majority-minority district appears to increase the redistricting entity's exposure to an equal-protection racial-gerrymander claim.[285]

2. Determine Which Race-Neutral Districting Principles Justify the Design of the Majority-Minority District(s) Exposed to Equal-Protection Racial-Gerrymander Claims

The architects of the exposed majority-minority district(s) (the elected officials in that district and the districts that border the district) should also make a determination as to the extent to which, if any, race-neutral traditional principles provide alternative justifications for the district's design. Assuming there are such alternative justifications, and one or more districting principles correspond with racial considerations, then, as in *Chen*, such justifications will likely be the basis for the redistricting entity's litigation defense. As long as the redistricting entity can prove that those districting principles are not subordinated to racial considerations in the exposed district's design, then there is a basis for planning the legislative hearing, and winning any subsequent litigation.[286]

3. All of the Public Officials Involved in the Decision Making Relative to the Exposed Majority-Minority District(s) Must be On Board

After the exposed majority-minority districts are identified, and after the race-neutral justifications for those districts have been selected, the elected officials whose district(s) comprise the majority-minority district that has been selected for protection must be on board for preparing for the legislative hearing and any subsequent litigation. Since the motivation for the placement of the district boundaries is at the heart of equal-protection racial-gerrymandering cases, the elected official of the majority-minority district at issue, as well as the elected officials in each and every adjacent district, will likely be the key witnesses at any subsequent legislative hearings or other proceedings at which evidence is provided concerning the motivation and considerations

284. *See Bush*, 517 U.S. at 957, 960-61, 970 (noting the influence of the Department of Justice in the State's use of race in a redistricting plan); *Miller*, 515 U.S. at 907-08 (noting the objections of the Department of Justice to districts that are not majority-minority).

285. *See Miller*, 515 U.S. at 922-26 (acknowledging that a Department of Justice interpretation of the VRA to compel race-based districting "by definition raises a seriously constitutional question").

286. *Id.*

pertaining to the placement of a challenged district's boundaries. If those elected officials are on board, then evidence as to the motivation for the placement of the borders comprising the boundaries of the exposed majority-minority district can be carefully protected until the time for presentment, i.e., the legislative hearing.

4. Hold a Hearing During Which the Public Officials From Exposed Majority-Minority District Provide Testimony Supporting the Race-Neutral Alternative Justifications for the District's Design

Legislative entities can learn an important lesson from the City of Houston's 1997 redistricting strategy in connection with the decision to hold legislative hearings during which proponents of the design plans, including the specific designers of any particular district, can articulate the race-neutral justifications for the placement of district boundaries. If a legislative hearing is held at the conclusion of the planning, and there is a script or equivalent outline for the elected officials whose districts are exposed, then proponents of a redistricting plan, including the proponents of the design of particular majority-minority districts, can, as in the case of the 1997 Houston Plan, provide specific testimony pertaining to alternative justifications for design of the exposed majority-minority districts.

Optimally, the source of the testimony as to the alternative race-neutral justifications will be the elected official of the exposed majority-minority district itself, along with the testimony of the elected officials in each of the adjacent districts about the motivations relative to the placement of the borders comprising the exposed district's boundaries. Thus, as with the City of Houston's 1997 redistricting project, the proponents of a redistricting plan should be prepared to testify at the hearing as to the districting principles relied on, and to testify that those redistricting principles were not subordinated to racial considerations. To the extent that opponents of an alternative design testify, the opponents' level of involvement in the decision making will likely be a factor to consider in subsequent litigation.

B. The "Litigation" Phase

1. Throughout Litigation, Litigators Should Practice Artful Drafting of Pleadings and Motion Practice to Secure a Position of Leverage so that Summary Judgment May be Entered in Favor of the Redistricting Entity

Assuming that individual majority-minority district(s) are challenged in an equal-protection racial-gerrymander claim based on the standard articulated in the *Shaw I* line of cases, skilled

litigators understand that the key to success is often found in artful, but honest and concise, drafting of pleadings, brief writing and motion practice.[287] Whether in opposition to a complaint containing an equal-protection gerrymandering claim, in opposition to a motion by the complainant for a preliminary injunction, in opposition to a motion for summary judgment, or in support of the redistricting entity's motion for summary judgment, and/or in the drafting of briefs to emphasize the evidence of intent contained in the transcript of the testimony of the elected officials articulating race-neutral reasons for the design of the challenged majority-minority districts, skillful drafting and motion practice might give the redistricting entity an edge — as it obviously did for the City of Houston in the *Chen* litigation[288] — in terms of achieving the objective of avoiding equal protection liability and the possibility of a court ordered redrawing of the challenged district(s). Indeed, a counterclaim by the redistricting entity seeking a declaratory judgment that the challenged majority-minority district(s) do not violate the equal-protection standard set forth by the *Shaw I* line of cases might be a useful leveraging tool for the redistricting entity,[289] because then both sides must pursue, and defend against the issue of whether race and/or ethnicity was the predominant factor in the design of the challenged majority-minority district.

2. *The Legislature's Final Redistricting Plan, and the Legislative Findings on the Issue of Legislative Intent are Entitled to a Presumption of Good Faith*

If, when the time comes for the district court to consider a motion for summary judgment or a trial, plaintiffs attempt to attack the credibility of the testimony or other evidence adduced during the legislative hearings, the redistricting entity can, as did the City of Houston in *Chen II*, argue that testimony presented at the legislative hearings is entitled to a presumption of good faith.[290] Relying on *Hunt* for this proposition can, as it did in *Chen*

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287. Michael Deasy, Trial Practice: How to Win Cases and Influence Judges, 12th Annual Northeast Bankruptcy Conference (July 14-17, 2005), *available at* 071405 ABI-CLE 99 (Westlaw).

288. *Chen II*, 206 F.3d at 504-06.

289. *See In re* Constitutionality of House Joint Resolution 25E, 863 So. 2d 1176 (Fla. 2003) (providing an example of the use of declaratory relief to render a resolution plan valid). Florida Attorney General filed a petition for Declaratory Judgment to determine the validity of a State House of Representatives Resolution that adopted three State House Representative Districts. *Id.* at 1177. The court determined the plan satisfied equal protection one-person, one-vote requirements and Florida state constitution requirements. *Id.* at 1178.

290. *See generally* Theriot v. Parish of Jefferson, 185 F.3d 477, 483-86 (5th Cir. 1999) (exemplifying an alternative strategy for redistricting entities that

II, operate as a procedural shield to any attacks on the merits of the redistricting entity's reliance on the testimony adduced at the legislative hearings.[291] Until overruled, *Hunt's* presumption of legislative good faith appears immutable.

3. A Redistricting Entity May Rely on the Doctrine of Judicial Deference to Legislative Findings to Support Its Position as to the Merits of its Litigation Defense Against an Equal-Protection Racial-Gerrymander Claim

In any given litigation, a redistricting entity may invoke precedent indicating that the adjudicating court must defer to legislative "findings,"[292] such as testimony presented on the issue of legislative intent from legislative hearings, when making the determination of whether race was the predominant factor in the placement of the boundaries of a challenged district.[293] Since the transcript from any legislative hearing likely contains ample testimony as to the factors relied on in the design of the challenged majority-minority district and reflects race-neutral alternative justifications for the district's design, the redistricting entity may rely on it every time to achieve victory. There is no reason why this strategy should not prevail, as it did in the *Chen* litigation.

V. CONCLUSION

With the benefit of the City of Houston's successful redistricting strategy in 1997, resulting in the *Chen II* decision, redistricting entities can now avoid the unnecessary cost and expense often associated with litigation derived from political turf wars. Careful planning, political compromise, attention to detail, and artful lawyering can result in a redistricting victory and the maintenance of the political status quo in any given system. *Shaw I* and its progeny have created a standard for courts to apply in the

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do not hold legislative hearings). If the legislative decision makers are on board for any subsequent litigation then it is possible to achieve the same result without previously recorded testimony. *Id.* Even though there was no legislative hearing in *Theriot*, the public official in the challenged Louisiana Parish as well as the public officials in the immediately adjacent Parishes testified at trial that the primary motivation for the placement of the borders of the challenged districts were one-person, one-vote concerns, preserving incumbency, and compliance with Section 2 of the VRA. *Id.* Significantly, all of the public officials who were involved in the design of the challenged majority-minority district testified at a bench trial in *Theriot*. *Id.* Hence, attorneys can use the same strategy and call the involved public officials to give testimony as to race-neutral alternative justifications. *Id.*

291. *Chen II*, 206 F.3d at 518-20.

292. *See* Seastrunk v. Burns, 772 F.2d 143, 151 (5th Cir. 1985) (noting that federal courts must defer to legislative decision making relative to redistricting plans).

293. *Id.*

adjudication of equal-protection racial-gerrymander cases. Living with this standard is easy: just follow the rules.