THE LEGISLATURE AS THE GOOD GUY: RECOVERING THE PRESUMPTION OF LEGISLATIVE GOOD FAITH

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In August 2021, the release of new census data kicked off redistricting across the country.[1] By the end of the year, plaintiffs had filed redistricting lawsuits in close to one-third of the States.[2] A second wave came in early 2022, with more than 100 lawsuits now in 35 States.[3] Litigation targeted swing States including Georgia, Ohio, Michigan, North Carolina, Pennsylvania, and Wisconsin,[4] plus oth-

1. Districts are redrawn every ten years in response to population changes. *See, e.g.*, UTAH CONST. art. IX, §1 (requiring redistricting after the census); WIS. CONST. art. IV, §3 (same). Some States gain or lose a congressional seat based on national population movement, requiring the creation or elimination of a congressional district. *See* 2 U.S.C. § 2a. And within States, existing congressional and legislative districts must be redrawn to ensure an equal number of people are placed in each district based on the latest census data. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

2. This decennial, Marc Elias's "Democracy Docket" tracked litigation in real time celebrated "victory" for plaintiffs. *See* DEMOCRACY DOCKET, https://www.democracydocket.com/analysis/topic/litigation/ [https://perma.cc/YAT4-D2C5].

3. *See 2020 Redistricting Cycle Report*, DEMOCRACY DOCKET (Jan. 30, 2023), https://www.democracydocket.com/analysis/2020-redistricting-cycle-report-how-maps-were-challenged-in-court/ [https://perma.cc/B9JZ-GXTJ].

4. *See* Alpha Phi Alpha Fraternity, Inc. v. Raffensperger, 700 F. Supp.3d 1136 (N.D. Ga. 2023); League of Women Voters of Ohio v. Ohio Redist'ing Comm'n, 192 N.E.3d 379 (Ohio 2022); Agee v. Benson, 2023 WL 10947213 (W.D. Mich. Aug. 29, 2023); Banerian v. Benson, 589 F. Supp. 3d 735 (W.D. Mich. 2022); Moore v. Harper, 143 S. Ct. 2065 (2023); Carter v. Chapman, 270 A.3d 444 (Pa. 2022); Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245 (2022).

ers where the major parties stood to gain congressional seats, including in Alabama, Louisiana, South Carolina, New York, and Utah.[5] All the while, other litigation continued over state election laws in Arizona, Wisconsin, Texas, Florida and elsewhere.[6]

Early cases moved at breakneck speed, with plaintiffs hoping for preliminary injunctions before districts or other election laws could be used in forthcoming elections. In North Carolina congressional redistricting litigation, plaintiffs moved for a preliminary injunction in November 2021.[7] By December 2021, the case was appealed.[8] The state supreme court granted preliminary relief and directed the trial court to hold a trial and issue a decision in five weeks' time.[9] After the New Year, the state supreme court imposed its own map for the 2022 elections, and the U.S. Supreme Court declined to intervene.[10] Likewise in Alabama, plaintiffs moved for immediate relief in November and December 2021.[11] By Christmas, forty-one lawyers had appeared in three cases.[12] By the New Year, the parties had finished discovery, deposing lawmakers and obtaining their documents over legislative privilege objections.[13] By mid-January,

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5. *See* Allen v. Milligan, 143 S. Ct. 1487 (2023); Robinson v. Ardoin, 37 F.4th 208 (5th Cir. 2022); Callais v. Landry, 2024 WL 1903930 (W.D. La. Apr. 30, 2024), *stayed sub nom.* Robinson v. Callais, 144 S. Ct. 1171 (2024); Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221 (2024); Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022); League of Women Voters of Utah v. Utah State Legislature, 554 P.3d 372 (Utah 2024).

6. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021); Mi Familia Vota v. Hobbs, 977 F.3d 948 (9th Cir. 2020); Mi Familia Vota v. Fontes, 2024 WL 2244338 (D. Ariz. May 2, 2024), *stayed*, 145 S. Ct. 108 (2024); Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519 (Wis. 2022), *overruled by* Priorities USA v. Wis. Elections Comm'n, 8 N.W.3d 429 (Wis. 2024); La Union Del Pueblo Entero v. Abbott, 68 F.4th 228 (5th Cir. 2023); League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 66 F.4th 905 (11th Cir. 2023).

7. *See* Harper v. Hall, 868 S.E.2d 499, 514 (N.C. 2022) (*Harper I*).

8. *See id.*

9. *See id.*

10. *See* Moore v. Harper, 142 S. Ct. 1089 (2022); *id.* at 1090 (Alito, J., dissenting).

11. *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 943 (N.D. Ala. 2022).

12. *See id.* at 943.

13. *See id.; compare, e.g.*, La Union Del Pueblo Entero v. Abbott, 68 F.4th 228, 238 (5th Cir. 2023) ("courts are not to facilitate an expedition seeking to uncover a legislator's subjective intent in drafting, supporting, or opposing proposed or enacted legislation") *with* Pernell v. Fla. Bd. of Governors of State Univ., 84 F.4th 1339, 1343–45 (11th Cir.

a week-long preliminary injunction hearing was in the books.[14] Four days before the deadline for candidates to qualify for the 2022 elections, the district court preliminarily enjoined the State from using its congressional districts.[15] The Supreme Court stayed that order, only to reverse course later and allow the 2024 elections to proceed on a court-drawn map.[16] Seemingly irreconcilable theories prevailed in the lower courts. Louisiana plaintiffs argued the State violated the federal Voting Rights Act; then another set of plaintiffs argued the State's VRA fix was a racial gerrymander.[17] Alabama plaintiffs argued the VRA required the Legislature to split Mobile County into two racially segregated districts; meanwhile, South Carolina plaintiffs argued splitting Charleston into two districts was a racial gerrymander.[18] And in state supreme courts, Ohio plaintiffs argued districts were too politically homogenous (unfairly "packing" Democratic voters), while Utah plaintiffs argued districts were too politically heterogenous (unfairly "cracking" Democratic voters).[19] These conflicting arguments are what guar-

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2023) ("state legislators can protect the integrity of the legislative process by invoking [legislative] privilege to quash" subpoenas (quotation marks omitted)).

14. *See Singleton*, 582 F. Supp. 3d at 943.

15. *See id.*

16. *See* Merrill v. Milligan, 142 S. Ct. 879 (2022); Allen v. Milligan, 143 S. Ct. 1487 (2023); Allen v. Caster, 144 S. Ct. 476 (2023).

17. Robinson v. Ardoin, 37 F.4th 208 (5th Cir. 2022); Callais v. Landry, 2024 WL 1903930 (W.D. La. Apr. 30, 2024), *consolidated sub nom.* Louisiana v. Callais, 145 S. Ct. 434 (2024) (consolidating Louisiana v. Callais, No. 24-109 (U.S. Aug. 1, 2024) with Robinson v. Callais, No. 24-110 (U.S. Aug. 1, 2024)).

18. *Compare Allen*, 143 S. Ct. at 1525–26, 1546 (Thomas, J., dissenting), *with* Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1238 (2024).

19. *Compare* League of Women Voters of Ohio v. Ohio Redist'ing Comm'n, 192 N.E.3d 379, 411 (Ohio 2022), *with* League of Women Voters of Utah v. Utah State Legislature, 554 P.3d 872, 884–86 (Utah 2024). After *Rucho v. Common Cause*, 588 U.S. 684 (2019), partisan gerrymandering litigation moved to the state courts—a major area of activity in this decennial's redistricting litigation—where States have taken a variety of approaches given their variety of state constitutions. *Compare, e.g.*, Grisham v. Van Soelen, 539 P.3d 272 (N.M. 2023) *and* Carter v. Chapman, 270 A.3d 44 (Pa. 2022) (considering claims of partisan unfairness), *with* Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022), *and* Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 473 (Wis. 2021) (holding claims of partisan unfairness were not justiciable).

antee redistricting litigation decade after decade. So long as legislatures face these "competing hazards of liability," the judiciary's place as a super-redistricting commission remains.[20]

Along the way, parties demand to bring the legislature to court. Plaintiffs subpoenaed legislators to testify and to turn over emails or text messages not only in Alabama but also in Texas, North Dakota, Florida, South Carolina, and others.[21] Whether legislators may be the subject of discovery remains a common flashpoint in redistricting cases. *In theory*, legislators cannot be hauled into court to testify about their legislative acts—an immunity and privilege that existed well before the Founding.[22] That common-law privilege allows legislators to remain focused on their job representing constituents and to allow for "the uninhibited discharge of their legislative duty," without fear of later becoming a witness in litigation.[23] But *in practice*, legislative privilege is honored in the breach in redistricting cases.[24] There is often no time to appeal orders from a fast-mov-

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20. Abbott v. Perez, 585 U.S. 579, 587 (2018); *see also* Holder v. Hall, 512 U.S. 874, 891–93 (1994) (Thomas, J., concurring in judgment).

21. *See, e.g.*, Singleton v. Merrill, 582 F. Supp. 3d 924, 943 (N.D. Ala. 2023); League of United Latin Amer. Citizens v. Abbott, 601 F. Supp. 3d 147 (W.D. Tex. 2022); *In re* N.D. Legis. Ass'y, 70 F.4th 460 (8th Cir. 2023), *vacated sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Ass'y, 144 S. Ct. 2709 (2024); Florida v. Byrd, 674 F. Supp. 3d 1097, 1103–05 (N.D. Fla. 2023) (refusing to allow legislators' depositions); S.C. State Conf. of NAACP v. McMaster, 584 F. Supp. 3d 152 (D.S.C. 2022); S.C. State Conf. of NAACP v. Alexander, 2022 WL 2452319 (D.S.C. July 5, 2022); Ga. State Conf. of NAACP v. Georgia, 2022 WL 18780944 (N.D. Ga. Nov. 1, 2022); *see also* Mi Familia Vota v. Hobbs, 682 F. Supp. 3d 769 (D. Ariz. 2023); Andy Chow, *Lawyers release hours of depositions in redistricting lawsuit*, STATEHOUSE NEWS BUREAU (Oct. 25, 2021), https://www.statenews.org/government-politics/2021-10-25/lawyers-release-hours-of-depositions-in-redistricting-lawsuit [https://perma.cc/Z5UD-CD3L].

22. Tenney v. Brandhove, 341 U.S. 367, 372–77 (1951); United States v. Johnson, 383 U.S. 169, 178 (1966).

23. *Tenney*, 341 U.S. at 377; Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (legislators have been "protected not only from the consequences of litigation's results, but also from the burden of defending themselves").

24. Redistricting courts have invoked a "five-factor balancing test" that bears little resemblance to the way legislative privilege is handled in other contexts. *Compare McMaster*, 584 F. Supp. 3d at 159, *with* Pernell v. Fla. Bd. of Governors of State Univ., 84 F.4th 1339, 1344–45 (11th Cir. 2023) (stating "we are reluctant to adopt a manipulable

ing trial court and no desire among elected officials to find themselves in contempt of such orders. In Texas redistricting litigation, for example, the three-judge court allowed depositions of two dozen legislators and staff and required them to answer all questions, over their privilege objections.[25] The Supreme Court did not intervene before the depositions occurred.[26] Only after a summer spent in those legislative depositions, the Texas court decided that the legislators' testimony was mostly privileged.[27] By that point, the proverbial "cat was out of the bag."[28]

Years into this redistricting cycle, the Supreme Court's decision in *Alexander v. South Carolina State Conference of the NAACP*[29] was a harbinger of something different. *Alexander* was a challenge to South Carolina's congressional districts. Plaintiffs alleged the Legislature racially gerrymandered the Charleston area, a three-judge district court convened, discovery from legislators ensued, a trial was held, and the lower court ultimately enjoined use of South Carolina's first congressional district.[30] Procedurally, *Alexander* is interesting because, while the litigation moved quickly, it was not rushed to judgment before the 2022 elections.[31] Unlike other States

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balancing test," which links the derogation of the legislative privilege to a subjective judgment of the case's importance" and simply mirrors general discovery standards for non-privileged material); *see also, e.g.,* Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015); Favors v. Cuomo, 285 F.R.D. 187 (E.D.N.Y. 2012); *see also* Rodriguez v. Pataki, 280 F. Supp. 2d 89, 94 (S.D.N.Y. 2003).

25. *See Latin American Citizens*, 601 F. Supp. 3d 147. Ordinarily a witness can choose not to answer a question in whole or in part "when necessary to preserve a privilege," FED. R. CIV. P. 30(c)(2), consistent with the concern that once the witness answers, the proverbial "cat is out of the bag." *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

26. *See* Guillen v. LULAC, 142 S. Ct. 2773 (2022); *see also* Toma v. U.S. Dist. Ct. for the Dist. of Ariz., 144 S. Ct. 443 (2023) (refusing to stay depositions of Arizona speaker and senate president in litigation regarding voting laws).

27. *See* League of United Latin Amer. Citizens v. Abbott, 708 F. Supp. 3d 87 (W.D. Tex. 2023).

28. *In re Kellogg*, 756 F.3d at 761 (Kavanaugh, J.).

29. 144 S. Ct. 1221.

30. S.C. State Conf. of NAACP v. Alexander, 649 F. Supp. 3d 177 (D.S.C. 2023); S.C. State Conf. of NAACP v. Alexander, 2022 WL 2452319 (D.S.C. July 5, 2022).

31. *Compare Alexander*, 649 F Supp. 3d at 183, *with* Singleton v. Merrill, 582 F. Supp. 3d 924, 943 (N.D. Ala. 2022).

this redistricting cycle, South Carolina had time to make its defense, prepare experts, and prepare for trial. Perhaps that made all the difference substantively.

Once *Alexander* made it to the Supreme Court, the Court divided over a question as old as the country itself. Should we assume the Legislature is the good guy or the bad guy?[32] Justice Alito, writing for the majority, said the Court had to presume the Legislature was the good guy: "in assessing the legislature's work, we start with a presumption that the legislature acted in good faith."[33] When faced with two possible explanations for what motivated the Legislature, courts must "draw the inference that cuts in the legislature's favor."[34] That presumption of good faith is not new.[35] But its application to the facts in *Alexander* was, in the dissent's words, "supercharged."[36]

The particular dispute in *Alexander* was whether the Legislature's changes to the Charleston-area congressional districts were driven by politics or race.[37] The former is permissible as far as federal courts are concerned; "redistricting is an inescapably political enterprise," and legislatures "may pursue partisan ends."[38] The latter is undoubtedly not. Race *cannot* predominate in redistricting; whatever the reason, such racial classifications "are by their very nature odious."[39] But "when race and partisan preference are highly correlated," it becomes difficult to discern whether a legislature was

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32. *See, e.g.*, FEDERALIST NO. 10 (James Madison); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), https://founders.archives.gov/documents/Madison/01-10-02-0151 [https://perma.cc/7GZK-CCLC]; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130–131 (1810) (opinion of Marshall, C.J.).

33. *Alexander*, 144 S. Ct. at 1233.

34. *Id.* at 1236.

35. *See* Miller v. Johnson, 515 U.S. 900, 318–19 (1995) (collecting cases).

36. *Alexander*, 144 S. Ct. at 1271 (Kagan, J., dissenting).

37. *Id.* at 1233 (majority opinion).

38. *Id.*; *see also supra*, note 31.

39. Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1247 – 48 (2022); *see Alexander*, 144 S. Ct. at 1233.

redistricting for politics or for verboten racial reasons.[40] So in *Alexander*, after the district court concluded that the Legislature drew South Carolina's first congressional district with a racial "'target' in mind" based on the district's racial demographics,[41] the State appealed, arguing that politics, not race, was the target.[42] The Supreme Court agreed with the State. The racial makeup of the district "was simply a side effect of the legislature's partisan goal," not evidence of racial gerrymandering.[43]

What's notable about *Alexander* is *why* the Supreme Court agreed. The basis for the Court's ruling was the presumption of good faith owed to state legislatures.[44] The Court said that good-faith presumption required viewing the case through this lens: Is there some "possibility" that politics (or other nonracial criteria) explained district lines?[45] So long as that "possibility" remained, it was "dispositive"—for the State.[46] Plaintiffs and their experts were required to "*rule out* the possibility that politics" lawfully "drove the districting process."[47] To say otherwise would be to "infer[] *bad faith*" based only on *ex post* "racial effects" of otherwise permissible redistricting decisions.[48] Any lesser burden, the Court observed, would risk transforming "federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'"[49]

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40. *Alexander*, 144 S. Ct. at 1233; *id.* at 1255–56 (Thomas, J., concurring in part) ("race and politics are, at present, highly correlated in American society," imposing a "serious obstacle" to evaluating a map's constitutionality); Cooper v. Harris, 581 U.S. 285, 308 (2017) (describing the "formidable task" of "disentangl[ing] race from politics").

41. *Alexander*, 144 S. Ct. at 1238.

42. *Id.* at 1238–41.

43. *Id.* at 1241.

44. *Id.* at 1236.

45. *Id.* at 1241.

46. *Id.* at 1241; *compare id.* at 1272 (Kagan, J., dissenting) ("Nothing in our decisions suggests that a trial court must resolve every plausibly disputed factual issue for the State (as if we could hardly imagine officials violating the law).").

47. *Id.* at 1243 (majority opinion) (emphasis added).

48. *Id.* at 1242.

49. *Id.* at 1236.

After *Alexander*, Professor Nicholas Stephanopoulos made the honest observation that the Court's decision would probably slow the tide of redistricting litigation.[50] "Many (most?) racial gerrymandering cases have partisan as well as race-related objectives," he observed.[51] In *Alexander*, for example, a win for plaintiffs would likely have allowed Democrats to reclaim a second congressional seat in South Carolina, held briefly by Democrat Joe Cunningham before redistricting, and put them one step closer "to recapture control of the House."[52] After *Alexander*, it's now "much more difficult for racial gerrymandering plaintiffs to achieve any partisan goals they might have."[53] For a plaintiff to "rule out" politics as an explanation, a plaintiff must convince a court that a different map could have achieved *a legislature's* partisan goals,[54] meaning the plaintiff must step into the legislature's shoes and adopt their same political preferences.[55]

Stephanopoulos might be right about future litigation. But it's difficult to say. The Supreme Court's two major redistricting decisions from last decade did not stop the deluge of litigation this cycle. The Court's 2013 decision in *Shelby County v. Holder*[56] effectively ended VRA section 5 claims against "preclearance" jurisdictions across the country. In response, plaintiffs this redistricting cycle

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50. Nicholas Stephanopoulos, *The End of Racial Gerrymandering Claims as Covert Partisan Gerrymandering Claims*, ELECTION L. BLOG (May 23, 2024), https://electionlawblog.org/?p=143240 [https://perma.cc/9HB9-PK88].

51. *Id.*

52. Nina Totenberg, *South Carolina redistricting case could add Democratic House seats*, NPR MORNING EDITION (Oct. 11, 2023), npr.org/2023/10/11/1204343688/south-carolina-redistricting-case-could-add-democratic-house-seats [https://perma.cc/MQG4-FP6B] ("Democrats believe that similar redistricting wins are possible in Louisiana and Georgia and that, combined with a recent win in Alabama, could conceivably by enough for the Democrats to recapture control of the House of Representatives.").

53. Stephanopoulos, *supra* note 51.

54. *See Alexander*, 144 S. Ct. at 1243, 1250 (faulting plaintiffs for failing to produce an alternative map and deeming that failure "an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense that the district lines were based on a permissible, rather than a prohibited, ground" (quotation marks omitted)).

55. *See, e.g.*, *id.* at 1243–49 (faulting plaintiffs' experts for failing to consider the same criteria as lawmakers).

56. 570 U.S. 529 (2013).

pivoted to assert racial gerrymandering claims against old section 5 districts,[57] and others argued that federal law now requires legislators to intentionally *reduce* the concentration of minority voters in existing districts.[58] Similarly, the Court's 2019 decision in *Rucho v. Common Cause*[59] ended partisan gerrymandering claims in federal courts. In response, plaintiffs moved those claims to state courts.[60]

Whatever that future litigation might entail, litigation strategy and tactics ought to change after *Alexander*. The Court's decision restores an old way forward. It is a timely reminder that election cases ought not start with the presumption that a legislature did something wrong.[61] *Alexander*'s framework—asking whether it is

57. *See, e.g.*, Singleton v. Merrill, 582 F. Supp. 3d 924, 1034 (N.D. Ala. 2022).

58. *See, e.g.*, Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1247 n.1, 1249 (2022) (summarily reversing court-drawn plan proposed by the Wisconsin Governor, where "the black voting-age populations in the Governor's seven districts all cluster between 50.1% and 51.4%, compared to the current six districts' range of 51% to 62%"); *see also, e.g.*, Allen v. Milligan, 143 S. Ct. 1487, 1525–26, 1546 (2023) (Thomas, J., dissenting) (describing plaintiffs' plans as "careful" to allow "District 7 to maintain its black majority" while redrawing District 2 to hit 50% black voting age population).

59. 588 U.S. 684 (2019).

60. *See, e.g.*, League of Women Voters of Ohio v. Ohio Redist'ing Comm'n, 192 N.E.3d 379 (Ohio 2022); Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022); Grisham v. Van Soelen, 539 P.3d 272 (N.M. 2023); Harper v. Hall, 868 S.E.2d 499 (N.C. 2022); Carter v. Chapman, 270 A.3d 44 (Pa. 2022); Graham v. Adams, 684 S.W.3d 663 (Ky. 2023); Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 473 (Wis. 2021); Rivera v. Schwab, 512 P.3d 168 (Kan. 2022); League of Women Voters of Utah v. Utah State Legislature, 554 P.3d 372 (Utah 2024).

61. A Mississippi federal court rejected *Alexander*'s applicability, in particular its discussion about the difficulty of disaggregating whether the Legislature acted for politics versus race, to claims arising section 2 of the VRA and the court's "effects-based review" of that claim. Miss. State Conf. of NAACP v. Mississippi, 739 F. Supp. 3d 383, 449 n.8 (S.D. Miss. 2024). The Alabama three-judge court said it could apply either in constitutional cases or "vote dilution." Singleton v. Allen, 740 F. Supp. 3d 1138, 1149, 1153 (N.D. Ala. 2024) (stating "presumption of the legislature's good faith, detailed at length in *Alexander*, applies in all districting cases in which a plaintiff alleges discriminatory intent, including both racial gerrymandering and vote dilution cases" but declining to apply it at the motion-to-dismiss stage); *see also* Tenn. State Conf. of NAACP v. Lee, 746 F. Supp. 3d 473, 482 (M.D. Tenn. 2024) (applying *Alexander* to dismiss complaint without prejudice for plaintiffs' failure to "rule out" politics as the basis for congressional and state senate districts in their complaint).

"possible" that something lawful explains the Legislature's decision—requires more than a simple showing that districts could have been drawn differently. And both the timing of *Alexander* itself and its deference to States ought to slow down the race to undo the work of a legislature by preliminary injunction, too often with too little time for the State to prepare its defense.[62]

More broadly, *Alexander* also sends an important message to lawmakers. The Court didn't just acknowledge the presumption of good faith; it applied it to uphold the Legislature's work. In this way, *Alexander* is encouragement for lawmakers to sufficiently explain their decisions as part of the public legislative record. If districts make minimal changes because lawmakers wanted to make minimal changes, make a record of it. If a district includes a particular church or a university because lawmakers wanted it, make a record of it. If districts must split a particular city because lawmakers didn't have other good options to equalize population, make a record of it. Those actual explanations, often local political considerations, for district lines are far from the nefarious explanations alleged in litigation. And what *Alexander* promises is that these explanations will be credited over allegations that lawmakers discriminated, even if plaintiffs would have redistricted with different data or priorities.[63]

That robust legislative record, moreover, ought to deter legislative discovery over legislators' privilege objections.[64] All *Alexander*

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62. *See supra* notes 9–21 and accompanying text; *see also, e.g.*, Reynolds v. Sims, 377 U.S. 533, 585 – 86 (1964) (cautioning that "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case even though the existing apportionment scheme was found invalid"); *see, e.g.*, Pileggi v. Aichele, 843 F. Supp. 2d 584, 597 (E.D. Pa. 2012) (leaving 2001 legislative districts in place to leave sufficient time to resolve 2011 redistricting challenge).

63. *See, e.g.*, S.C. State Conf. of the NAACP v. Alexander, 144 S. Ct. 1221, 1243 (2024) (rejecting plaintiffs' arguments about Legislature's sub-standard election data and stating "[n]othing in our case law requires the State to adopt novel methodologies in analyzing election data.").

64. *Supra* notes 22–29 and accompanying text.

requires are plausible non-racial explanations for district lines.[65] Those explanations can come from the legislative record itself or perhaps litigation experts, but there is no need for it to come from legislators' subpoenaed confidential communications as they considered different redistricting proposals, *ex ante*, or from legislators' deposition testimony, *ex post*. While *Alexander* likely will not end the practice of subpoenaing legislators, the Court's forceful application of the good-faith presumption should extend to these discovery disputes too. When a legislature explains itself on the floor or otherwise in the public legislative record, what basis is there for presuming that those public explanations are pretextual, concealing some hidden motive? Nor would it be in keeping with the presumption of legislative good faith to impute one legislator's internal motivations—absent from the public record and gleaned for the first time in discovery—to the whole Legislature.[66]

To be sure, critics will say that *Alexander* reflects an all too naïve a view legislators. Justice Kagan's dissent faulted the majority's "pro-State presumption" and mocked its resolution of "disputed factual issue[s] for the State (as if we could hardly imagine officials violating the law)."[67] But that fundamental disagreement with *Alexander*'s presumption of good faith reflects a too-jaundiced view of legislators themselves. In the redistricting labyrinth we lawyers have created for legislators, legislators would say they're just doing their best to follow the law. Racial gerrymandering seen this redis-

65. *See, e.g.*, *Alexander*, 144 S. Ct. at 1245 (explaining that expert's failure to "rule out core retention as another plausible explanation for the difference between the Enacted Plan" and simulations).

66. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (rejecting "cat's paw" theory, where one is "a 'dupe . . . used by another to accomplish his purposes'" as having "no application to legislative bodies" because legislators "are not the agents of the bill's sponsor or proponents"); United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

67. *Alexander*, 144 S. Ct. at 1271–72 (Kagan, J., dissenting).

tricting cycle came mostly as a product of redistricting litigation itself.[68] In Wisconsin, for instance, such attempts were criticized by the affected legislators and summarily reversed by the Supreme Court.[69]

That's not to say there will never be "[m]en of factious tempers, of local prejudices, or of sinister designs" who get themselves elected.[70] All *Alexander* asks is that we lawyers not presume they're all that way.

68. *See* Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245 (2022); *see also* Allen v. Milligan, 143 S. Ct. 1487, 1525–26, 1546 (2023) (Thomas, J., dissenting).

69. *See Wisconsin Legislature*, 142 S. Ct. 1245; *see also* Br. of Sen. Lena C. Taylor, *Wis. Legislature v. Wis. Elections Comm'n*, U.S. No. 21A471 (filed Mar. 11, 2022); Reply Br. of Wis. Legislature at 8 n.3, 23–24, *Wis. Legislature v. Wis. Elections Comm'n*, U.S. No. 21A471 (filed Mar. 12, 2022).

70. FEDERALIST NO. 10 (James Madison).