

Fourteenth Amendment — Election Law —
Alexander v. South Carolina State Conference of the NAACP

With the rise of right-wing populism in recent years,¹ there has been a trend of voters of color shifting to the right.² But the trend has yet to become consequential enough to uproot longstanding racial polarization in American politics.³ As of 2023, 83% of Black voters, 63% of Asian voters, and 61% of Hispanic voters are affiliated with or lean to the Democratic Party.⁴ States, however, cannot use race to draw electoral district boundaries without facing constitutional challenges.⁵ The Supreme Court has held that the use of race as a predominant factor in redistricting “must withstand strict scrutiny” under the Equal Protection Clause.⁶ Yet despite the correlation between race and partisan preference, the Court has chosen to handle partisan gerrymandering cases differently — deeming them nonjusticiable in *Rucho v. Common Cause*.⁷

Last Term, in *Alexander v. South Carolina State Conference of the NAACP*,⁸ the Court reversed a district court’s finding that South Carolina engaged in unconstitutional racial gerrymandering.⁹ By failing to give due deference to the lower court’s factual findings, the *Alexander* Court made it increasingly difficult for plaintiffs to succeed on racial gerrymandering claims. In a post-*Rucho* context, where states may pursue partisan goals while redistricting without judicial interference, the burdens imposed on plaintiffs are magnified. The Court requires plaintiffs to “disentangle race and politics” and prove that race was a state legislature’s motivating factor in redistricting.¹⁰ But when race and

¹ See CLIFFORD YOUNG, IPSOS, POPULISM IN 2024: POPULISM, ANTI-ELITISM AND NATIVISM 3 (2024), <https://www.ipsos.com/sites/default/files/ct/news/documents/2024-02/Ipsos%20Populism%20Final%20February%202024.pdf> [<https://perma.cc/U6FF-P42K>]; David Brooks, Opinion, *We Haven’t Hit Peak Populism Yet*, N.Y. TIMES (May 23, 2024), <https://www.nytimes.com/2024/05/23/opinion/populism-trump-elections.html> [<https://perma.cc/H3G5-ZCC4>].

² Nicholas O. Stephanopoulos, Election Law for the New Electorate 23–27 (June 21, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529 [<https://perma.cc/S846-42Q6>]; see also David Leonhardt, *Race and Politics*, N.Y. TIMES (Mar. 21, 2024), <https://www.nytimes.com/2024/03/21/briefing/race-and-politics.html> [<https://perma.cc/WEp9-WKTG>] (“Asian, Black and Hispanic voters have all become less likely to support Democratic candidates and more likely to support Republicans, including Trump.”).

³ See PEW RSCH. CTR., CHANGING PARTISAN COALITIONS IN A POLITICALLY DIVIDED NATION: PARTY IDENTIFICATION AMONG REGISTERED VOTERS, 1994–2023, at 13–14 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/04/PP_2024.4.9_partisan-coalitions_REPORT.pdf [<https://perma.cc/B3VJ-QC2X>].

⁴ *Id.*

⁵ *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citing *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)).

⁶ *Id.* at 1463–64 (citing *Bethune-Hill*, 137 S. Ct. at 800).

⁷ 139 S. Ct. 2484, 2506–07 (2019).

⁸ 144 S. Ct. 1221 (2024).

⁹ *Id.* at 1233.

¹⁰ *Id.*

politics are strongly correlated, state defendants are incentivized to shield racial motives behind partisan defenses.

Due to population shifts captured in the 2020 census, South Carolina redrew its congressional districts to comply with the one-person, one-vote rule.¹¹ Two of South Carolina's seven congressional districts — District 1 and District 6 — were at issue in *Alexander*.¹² Between 1980 and 2016, District 1 had reliably elected a Republican.¹³ The 2018 and 2020 elections were much closer for the district, with the 2018 election yielding a Democratic victory and the 2020 election returning a Republican victory.¹⁴ Conversely, a Democrat has represented District 6, a majority-Black district,¹⁵ since 1993.¹⁶ Following the 2020 census, the Republican-controlled legislature removed predominantly Black precincts in Charleston from District 1 and sorted them into District 6 during its redistricting process.¹⁷ Specifically, the reapportionment plan moved 30,243 of the 48,706 Black residents in District 1 into District 6.¹⁸ As a result, unbalanced racial division permeated Charleston County — 79% of its Black population was placed in District 6 compared to 21% in District 1.¹⁹

A resident in District 1 and the South Carolina State Conference of the NAACP challenged South Carolina's reapportionment plan.²⁰ The plaintiffs claimed District 1 was “the product of racial gerrymandering in violation of their rights under the Fourteenth Amendment.”²¹ A three-judge district court panel agreed.²² The district court found that the plaintiffs met their burden by providing circumstantial evidence to prove “that race was the predominant motivating factor” in South Carolina's design of District 1.²³ The plaintiffs did not produce as evidence an alternative map that avoids a racial gerrymander in District 1 and achieves South Carolina's nonracial goals, but the district court noted

¹¹ *Id.* at 1237. The one-person, one-vote rule is a principle that ensures equal weight of votes. *See Reynolds v. Sims*, 377 U.S. 533, 557–58 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963)). To comply with the rule, states must draw congressional districts that have nearly equal population so elected officials represent equal numbers of people. *See id.* at 568. In *Alexander*, the Court noted that about 88,000 voters needed to be moved out of District 1 to comply with the rule — South Carolina instead moved approximately 140,000 voters. 144 S. Ct. at 1242.

¹² 144 S. Ct. at 1236.

¹³ S.C. State Conf. of NAACP v. *Alexander*, 649 F. Supp. 3d 177, 187 (D.S.C. 2023).

¹⁴ *Id.*

¹⁵ *Id.* at 185.

¹⁶ *Alexander*, 144 S. Ct. at 1238.

¹⁷ *Id.* at 1237, 1242.

¹⁸ *Alexander*, 649 F. Supp. 3d at 189.

¹⁹ *Id.* at 190.

²⁰ *Id.* at 187.

²¹ *Id.* at 197.

²² *Id.* Federal law requires “[a] district court of three judges” to be convened when a plaintiff “challeng[es] the constitutionality of the apportionment of congressional districts.” 28 U.S.C. § 2284(a).

²³ *See Alexander*, 649 F. Supp. 3d at 193, 197.

that it was “not necessary” for the plaintiffs “to present an acceptable alternative map to prevail on their claims.”²⁴ The court also held that the reapportionment plan failed strict scrutiny as South Carolina “made no showing” of “a compelling state interest” to justify using race to redraw District 1.²⁵ To remedy the “stark racial gerrymander of Charleston,”²⁶ the court permanently enjoined South Carolina from holding an election in District 1 until the court approved a remedial plan.²⁷ South Carolina appealed.²⁸

The Supreme Court reversed. Writing for a 6–3 majority, Justice Alito held that the district court’s factual findings that evidenced a racial gerrymander in District 1 were “clearly erroneous.”²⁹ The Court began with the governing legal precedent.³⁰ The Equal Protection Clause prohibits states from using “race as a basis for separating voters into districts.”³¹ States are presumed to have reapportioned in good faith until a plaintiff shows that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”³² To prove that race was the motivating factor, plaintiffs often demonstrate that a state legislature “subordinated” principles like “compactness, contiguity, and [partisanship] . . . to racial considerations.”³³ Plaintiffs may fulfill their burden through “direct evidence” of legislative intent or “circumstantial evidence of a district’s shape and demographics.”³⁴ Once the plaintiffs provide sufficient evidence, “the burden . . . shifts to the State” to demonstrate that “its race-based sorting of voters serves a ‘compelling interest’ and is ‘narrowly tailored’ to that end.”³⁵

Next, the Court defined the appropriate standard of review: “[A] district court’s factual findings in racial-gerrymandering cases” are reviewed for “clear error.”³⁶ The Court, however, noted that it “must exercise special care” while reviewing because “there is a special danger

²⁴ *Id.* at 198–99.

²⁵ *Id.* at 197 (citing *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017)).

²⁶ *Id.* at 193.

²⁷ *Id.* at 199.

²⁸ *Alexander*, 144 S. Ct. at 1238. When a party appeals a three-judge district court permanent injunction, it is appealed directly to the Supreme Court. 28 U.S.C. § 1253.

²⁹ *Alexander*, 144 S. Ct. at 1233. Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett. Justice Thomas did not join Part III-C of the opinion. *Id.* at 1252 (Thomas, J., concurring in part).

³⁰ *Id.* at 1233–36 (majority opinion).

³¹ *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

³² *Id.* at 916.

³³ *Id.*

³⁴ *Id.*

³⁵ *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017)).

³⁶ *Alexander*, 144 S. Ct. at 1240. The Court sets aside factual findings under clear error review only if it is “left with the definite and firm conviction that a mistake has been committed.” *Id.* (quoting *Cooper*, 137 S. Ct. at 1474).

that a misunderstanding of what the law requires may infect what is labeled a finding of fact” in redistricting cases.³⁷ The Court then explained why the district court’s reliance on circumstantial evidence to find race as the state legislature’s predominant motivating factor was “clearly flawed.”³⁸

Because the plaintiffs did not present direct evidence of legislative intent, the district court inferred a racial motive from four key pieces of circumstantial evidence: (1) District 1’s Black voting age population (BVAP) remained near 17% despite South Carolina’s changes during its redistricting;³⁹ (2) South Carolina split Charleston between Districts 1 and 6 despite traditional redistricting principles counseling against such splits and “moved more voters out of District 1” than necessary to satisfy the one-person, one-vote rule;⁴⁰ (3) many of the voters who were moved came from predominantly Black precincts;⁴¹ and (4) state legislative staffers “viewed racial data at some point during the redistricting process.”⁴² The Court, however, used the state legislature’s “avowed partisan objective” of strengthening the Republican tilt in District 1, which was first asserted at trial, to explain away most of the factual findings.⁴³ First, District 1’s steady BVAP may have been “simply a side effect of the legislature’s partisan goal”⁴⁴ since a 17% BVAP creates a “Republican tilt” in the district.⁴⁵ Second, South Carolina may have moved more voters out of District 1 to ensure the district “had a reliable Republican majority.”⁴⁶ Third, “because of the tight correlation between race and partisan preferences” in South Carolina, politics — not race — may have motivated the state’s redistribution of Black precincts.⁴⁷ Fourth, mapmakers may lawfully view racial data after drawing a new map that fulfilled South Carolina’s partisan purpose.⁴⁸ Ultimately, the Court found that the circumstantial evidence was insufficient to establish race as South Carolina’s predominant motivating factor in redrawing District 1.⁴⁹

After deeming the district court’s reliance on the circumstantial evidence “seriously misguided,” the Court turned to the plaintiffs’ expert

³⁷ *Id.* at 1240–41.

³⁸ *Id.* at 1240.

³⁹ *Id.* at 1241 (citing *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177, 191 (D.S.C. 2023)).

⁴⁰ *Id.* at 1242.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1241–43.

⁴⁴ *Id.* at 1241.

⁴⁵ *Id.* (quoting *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177, 188 (D.S.C. 2023)).

⁴⁶ *Id.* at 1242.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1242–43. The mapmaker in this case testified that he subsequently viewed racial data to ensure that the map complied with the Voting Rights Act. *Id.* at 1242.

⁴⁹ *Id.* at 1243 (“[A] court in a case such as this must rule out the possibility that politics drove the districting process.”).

reports.⁵⁰ The Court found that the expert reports were “flawed because they ‘ignored certain traditional districting criteria.’”⁵¹ One expert “failed to consider partisanship” when creating an algorithm that generated constitutionally compliant maps of District 1.⁵² Two others ignored the “mapmaking factors” of “contiguity and compactness” and did not use the most suitable method or data to “measur[e] a precinct’s partisan leanings” in the eyes of the majority.⁵³ The final expert fatally engaged in a “state-wide analysis” rather than zooming in on District 1.⁵⁴ Accordingly, the Court held that the expert reports — like the circumstantial evidence — “[could not] sustain a finding that race played a predominant role in the drawing of District 1’s lines.”⁵⁵

Finally, the Court found that the district court “critically erred by failing to draw an adverse inference” when the plaintiffs did not provide an alternative map showing how South Carolina could have redrawn District 1 to meet partisan objectives with greater racial balance.⁵⁶ Alternative maps are favored, the Court argued, because they help courts “distinguish[] between racial and political motivations when race and partisanship are closely entwined.”⁵⁷ Moreover, the Court believed such maps “can be designed with ease.”⁵⁸ The absence of an alternative map, therefore, was an “implicit concession” that South Carolina could not have designed a map that secured a Republican tilt in District 1 without moving a disproportionate amount of Black voters out of the district.⁵⁹

Justice Thomas concurred in part. He wrote separately to argue that racial gerrymandering claims are nonjusticiable.⁶⁰ In his view, politicians may draw electoral districts without judicial interference because “the Constitution commits those issues exclusively to the political branches.”⁶¹ He also argued that “[t]he Court’s searching review of the expert reports exceeds the proper scope of clear-error review.”⁶²

Justice Kagan dissented.⁶³ First, she argued that the majority did not correctly apply the clear error standard.⁶⁴ Rather, the majority

⁵⁰ *Id.*

⁵¹ *Id.* (quoting *Allen v. Milligan*, 143 S. Ct. 1487, 1512 (2023)).

⁵² *Id.* at 1244.

⁵³ *Id.* at 1245, 1248.

⁵⁴ *Id.* at 1249 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 790 (2017); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262–63 (2015)).

⁵⁵ *Id.* at 1243 (citing *Allen*, 143 S. Ct. at 1512–13).

⁵⁶ *Id.* at 1249 (citing *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1250.

⁵⁹ *See id.*

⁶⁰ *Id.* at 1253 (Thomas, J., concurring in part).

⁶¹ *Id.* “The Elections Clause makes a ‘textually demonstrable constitutional commitment’ of the power to oversee congressional districting to ‘a coordinate political department,’ Congress.” *Id.* at 1258 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion)).

⁶² *Id.* at 1252.

⁶³ Justices Sotomayor and Jackson joined Justice Kagan.

⁶⁴ *Id.* at 1271.

flipped the standard of review in a “novel credit-the-losing-State approach.”⁶⁵ The majority not only “refuse[d] to defer to the District Court’s [factual] findings,” but instead deferred to the state because its story about not considering race was plausible.⁶⁶ Justice Kagan also accused the majority of “invent[ing] a new rule of evidence to burden plaintiffs in racial-gerrymandering cases”: Plaintiffs who do not produce an alternative map are subject to an adverse inference against them.⁶⁷ She pointed out that *Cooper v. Harris*⁶⁸ “expressly rejected” what the majority in effect accomplished — an alternative map requirement.⁶⁹

The *Alexander* Court imposed too stringent a burden on plaintiffs that bring racial gerrymandering claims. Having “stack[ed] the deck” against plaintiffs,⁷⁰ the Court’s decision, coupled with the enticing post-*Rucho* defense strategy of arguing that a reapportionment plan was designed primarily to gain partisan advantage, all but ensures victory for state defendants. This is a shift in the Court’s racial gerrymandering jurisprudence.

The Roberts Court previously preserved a fair burden on plaintiffs in racial gerrymandering cases. In *Alabama Legislative Black Caucus v. Alabama*,⁷¹ for example, the Court held that a plaintiff need not prove that a state subordinated the one-person, one-vote rule, or “equal population objectives,” to racial considerations to succeed on a racial gerrymandering claim.⁷² The Court confirmed that a plaintiff need only “prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations” to meet the burden of showing a racial motive predominated a state’s redistricting.⁷³

Additionally, in *Cooper*, the Court affirmed a district court’s finding of a racial gerrymander.⁷⁴ Under the deferential clear error standard of review, the Court noted that “[a] finding that is ‘plausible’ in light of the full record — even if another is equally or more so — must govern” regardless of whether the Court would have found differently on first review.⁷⁵ If plaintiffs succeed at the district level, they should not be

⁶⁵ *Id.* at 1272 (citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993)).

⁶⁶ *Id.* at 1271.

⁶⁷ *Id.* at 1269.

⁶⁸ 137 S. Ct. 1455 (2017).

⁶⁹ *Alexander*, 144 S. Ct. at 1273 (Kagan, J., dissenting).

⁷⁰ *Id.* at 1285.

⁷¹ 575 U.S. 254 (2015).

⁷² *Id.* at 272.

⁷³ *Id.* (alteration in original) (emphasis omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). To be certain, an equal population objective is not a traditional race-neutral districting principle in the context of a racial gerrymandering predominance test. *Id.* at 273 (“[I]f the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the ‘predominance’ question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, ‘traditional’ factors when doing so.”).

⁷⁴ *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017).

⁷⁵ *Id.* at 1465 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

burdened with defending a trial court’s factual findings without due deference.⁷⁶ Moreover, the Court dismissed an alternative map requirement for racial gerrymandering claims: “[I]n no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. Nor would it make sense to do so here.”⁷⁷ Ultimately, the Roberts Court in *Alabama Legislative Black Caucus* and *Cooper* safeguarded the plaintiff’s burden of proving a racial gerrymandering claim at a challenging but reasonable level.

Then the Court decided *Rucho* — a major blow to plaintiffs seeking justice for racial gerrymandering in the context of racial polarization. The *Rucho* Court strengthened a winning defense strategy of claiming partisan gerrymandering. Although the defense was readily used before *Rucho* due to the Court’s failure to adopt a standard for adjudicating partisan gerrymandering claims,⁷⁸ it was argued in a world where “all possibility of judicial relief” had not yet been “foreclose[d].”⁷⁹ *Rucho* shut down that possibility.⁸⁰ By holding partisan gerrymandering non-justiciable, *Rucho* eliminated any risk of liability when a state redistricted with a predominantly partisan purpose⁸¹ and therefore further incentivized state legislatures to assert that they redistricted based on partisanship — not race — when defending against racial gerrymandering claims.⁸² And states have had great success doing so.⁸³

But why would a state redistrict based on race rather than partisanship when states can now openly engage in partisan gerrymandering? Now more than ever, states may be tempted to use race as a “proxy for achieving [their] partisan aims.”⁸⁴ If partisan data are not available or

⁷⁶ See FED. R. CIV. P. 52(a)(6) (“[T]he reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); see also *Alexander*, 144 S. Ct. at 1273 (Kagan, J., dissenting) (“[O]nce plaintiffs have met [their burden] to a three-judge district court’s satisfaction, their hardest job should be done.”).

⁷⁷ *Cooper*, 137 S. Ct. at 1479–80 (citation omitted) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)).

⁷⁸ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

⁷⁹ *Id.* at 306 (Kennedy, J., concurring in the judgment).

⁸⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

⁸¹ Joey Fishkin, *Rucho: A Sinkhole Dangerously Close to the House* (*Rucho Symposium*), ELECTION L. BLOG (July 1, 2019, 7:38 AM), <https://electionlawblog.org/?p=105928> [<https://perma.cc/PYD3-2FUJ>] (“Before *Rucho*, partisan gerrymandering was a theoretically possible source of liability, even if an unlikely one, so the prudent redistricter tried to keep it subtle.”).

⁸² See, e.g., Kristen Clarke & Jon Greenbaum, *Gerrymandering Symposium: The Racial Implications of Yesterday’s Partisan Gerrymandering Decision*, SCOTUSBLOG (June 28, 2019, 2:01 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-the-racial-implications-of-todays-partisan-gerrymandering-decision> [<https://perma.cc/3X9H-2AF9>].

⁸³ See Sara Tofighbakhsh, Note, *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885, 1903 (2020) (“The [partisanship] defense succeeded in 74.2% of districts where a [racial gerrymandering] claim required analyzing predominant racial motive [since 2010] . . .”).

⁸⁴ Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1865 (2018).

reliable, a state may feel compelled to turn to racial data when the two are intertwined.⁸⁵ In South Carolina, for example, the 2020 election data were not as accurate as racial data to produce a partisan tilt because “a Black voter is more likely to vote for a Democrat in the next election than is someone who voted for a Democrat in the last election.”⁸⁶ Despite the unconstitutional nature of redistricting based on race, states are incentivized to racially gerrymander to achieve partisan goals when racial data are more reliable. And the risk of doing so is lessened when a state can easily raise a partisan gerrymandering defense to shield its violation of the Fourteenth Amendment.

To be sure, the ramifications of the defendant-friendly ruling in *Rucho* are evident in *Alexander*. At trial, South Carolina adopted a partisan defense despite key state witnesses’ “den[ial of] partisan motives” during pretrial proceedings.⁸⁷ Although the district court saw through South Carolina’s convenient post-hoc rationalization, the Court accepted the state’s explanation and refused to probe its defense.

Furthermore, the *Alexander* Court served up another blow to plaintiffs by reversing its positions in *Cooper*. Rather than defer to a district court’s factual findings, the Court overrode clear error review under the guise of a presumption of good faith for states because the evidence could plausibly support the South Carolina’s story.⁸⁸ Then comes an evidentiary requirement dressed up as an adverse inference. Flying in the face of *Cooper*’s command, *Alexander* directs courts in cases where states assert a partisan defense to draw an adverse inference if a plaintiff does not produce an alternative map that “shows how [a] State ‘could have achieved its legitimate political objectives’” without disproportionately moving voters of color out of or into a district.⁸⁹ Although mandating that a court draw an adverse inference is not technically the same as requiring a plaintiff to present a specific piece of evidence, “there is precious little difference between the two” as “few litigants will feel free to proceed without commissioning alternative maps.”⁹⁰ Unfortunately, *Rucho* and *Alexander* together impose formidable hurdles on plaintiffs in states where race and politics are closely correlated — effectively foreclosing a lower court’s ability to hold a state accountable for redistricting based on race.

The Court itself recognized the high bar plaintiffs face when bringing racial gerrymandering claims. Justice Alito labeled the task as “difficult” or “stringent” six times in one section of the *Alexander* opinion.⁹¹

⁸⁵ *See id.*

⁸⁶ *Alexander*, 144 S. Ct. at 1279 (Kagan, J., dissenting).

⁸⁷ *Id.* at 1275 (“A strong case made by plaintiffs can powerfully concentrate a defendant’s mind.”).

⁸⁸ *See id.* at 1271 (“If the District Court wants deference, it had better just rule for the State.”).

⁸⁹ *Id.* at 1249 (majority opinion) (quoting *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)).

⁹⁰ *Id.* at 1274 (Kagan, J., dissenting).

⁹¹ *Id.* at 1234–36 (majority opinion).

He clarified that it is “especially difficult” when a plaintiff provides only circumstantial evidence and a state puts forth a partisan-gerrymandering defense.⁹² Although the path of relatively less resistance is offering direct evidence of racial motive during a state’s redistricting efforts, plaintiffs do not always have the luxury of choice in what evidence is available to them. States may “admit to considering race” when statutorily mandated,⁹³ but “[o]utright admissions of *impermissible* racial motivation are infrequent and plaintiffs often must rely upon other evidence.”⁹⁴ Therefore, the Court has put plaintiffs in an “especially difficult” position to prove that race predominantly motivated a state legislature’s redistricting efforts.

When a smoking gun loaded with direct evidence of a state’s racial motive is not discoverable, how can a plaintiff satisfy the Court’s stringent standard for circumstantial evidence? The Court suggested that plaintiffs should simply produce an alternative map to show that a state legislature could have met its partisan goals without racial disparity.⁹⁵ But alternative maps are not the only form of circumstantial evidence, and the Court should not require plaintiffs to “jump through ‘evidentiary hoops’” when they can meet their already-difficult-enough burden through other means.⁹⁶ Ultimately, the *Alexander* Court puts an unnecessary roadblock in front of plaintiffs who attempt to fulfill their difficult obligation of disentangling race from politics — making it easier for states to sort voters based on race as a means to achieve partisan ends.

The use of the word “difficult” implies that a plaintiff’s burden in a racial gerrymandering case is challenging but not impossible. However, in districts where racial polarization or the “alignment of race, party, and ideology” controls⁹⁷ — like in South Carolina where 90% of Black voters in the 2020 presidential election voted for the Democratic candidate⁹⁸ — it is “unrealistic to act as if” race and party “can be disentangled and one assigned predominance.”⁹⁹ Because state legislatures are aware of such polarization, “[n]early every decision to discriminate against racial minorities in voting has an electoral purpose.”¹⁰⁰ When race and politics are strongly correlated in a district, then the question of whether race or party predominated during redistricting becomes

⁹² *Id.* at 1235.

⁹³ *Id.* at 1234 (citing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 259–60 (2015)).

⁹⁴ *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (emphasis added).

⁹⁵ *Alexander*, 144 S. Ct. at 1235.

⁹⁶ *Id.* at 1274 (Kagan, J., dissenting) (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1480 n.15 (2017)).

⁹⁷ Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*,

77 OHIO ST. L.J. 867, 869 (2016).

⁹⁸ *Alexander*, 144 S. Ct. at 1235.

⁹⁹ Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2545 (1997).

¹⁰⁰ Cain & Zhang, *supra* note 97, at 886.

nearly unanswerable without direct evidence.¹⁰¹ Did moving voters based on race predominantly motivate a state legislature's goals? Or was moving voters based on partisan preference to secure a partisan advantage the predominant motivation? Because circumstantial evidence can plausibly point a factfinder in either direction, a plaintiff's burden to prove that race, not party, predominated meets — and possibly even exceeds — the label of “especially difficult” when a state's claim of partisan motivation receives further deference.

Deciphering whether race or politics predominated a state legislature's motivations while redistricting may be a futile task against the backdrop of racial polarization. Yet regardless of a plaintiff's theoretical ability to do so, the Court's command is clear: “[A] legislature [cannot] elevate[] race to the predominant criterion in order to advance other goals, including political ones.”¹⁰² Such elevation would run afoul of the Equal Protection Clause because partisan objectives do not qualify as a compelling state interest for purposes of strict scrutiny.¹⁰³ Thus, a Republican-controlled state legislature cannot predominantly use race to create a reapportionment plan that yields a Republican tilt in certain districts. And the same rule applies for Democratic-controlled state legislatures. *Rucho* and *Alexander*, however, muddy the waters. On paper, the law remains — despite Justice Thomas's attempt to sway the Court toward holding racial gerrymandering as nonjusticiable in his *Alexander* concurrence — that a state legislature's redistricting decisions may be held unconstitutional if predominantly motivated by race. But in practice, the additional burdens plaintiffs face to prove racial predominance coupled with a strong defense for state defendants yield an unreasonable challenge to the enforcement of the law.

It is apparent that the Court has increased an already-demanding burden on plaintiffs that bring racial gerrymandering claims and face partisan defenses. The Court may have done so out of belief that the judicial branch should “exercise extraordinary caution” when adjudicating such claims.¹⁰⁴ Increasing that caution — directly through *Alexander*'s dilution of clear error review and evidentiary preference for an alternative map and indirectly through *Rucho*'s ban on reviewing partisan gerrymandering claims — may show respect for state legislatures and their “traditional domain” of redistricting.¹⁰⁵ Regardless of the reasoning, the result is unavoidable: Plaintiffs will have to clear higher barriers to secure justice for a state's unconstitutional racial gerrymandering.

¹⁰¹ See Tofighbakhsh, *supra* note 83, at 1900 (“[T]he correlation between race and party, particularly in the South, makes evaluating circumstantial evidence unpredictable.”).

¹⁰² *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n.1 (2017) (citing *Bush v. Vera*, 517 U.S. 952, 968–70 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 914 (1995)).

¹⁰³ See *id.* at 1463–64.

¹⁰⁴ *Alexander*, 144 S. Ct. at 1234 (quoting *Miller*, 515 U.S. at 916).

¹⁰⁵ *Id.* at 1233 (citing *Moore v. Harper*, 143 S. Ct. 2065 (2023); U.S. CONST. art. I, § 4, cl. 1).