No. 07-689

In the Supreme Court of the United States

GARY BARTLETT, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL., PETITIONERS

v.

DWIGHT STRICKLAND, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
KANNON K. SHANMUGAM
Assistant to the Solicitor General
DIANA K. FLYNN
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, obligated North Carolina to draw House District 18, in which African Americans constituted 39.36% of the voting-age population.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitutions, statutes, and regulations:

Miscellaneous:

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INTEREST OF THE UNITED STATES

Petitioners claim that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, required North Carolina to draw the legislative district at issue in this case, in which African Americans constituted 39.36% of the voting-age population. Because the United States has primary responsibility for enforcing Section 2, see 42 U.S.C. 1973j(d), the Court's decision in this case could impact federal enforcement efforts. The United States has participated in all of the Court's cases involving the interpretation of amended Section 2.

STATEMENT

1. Section 2(a) of the Voting Rights Act of 1965 (Voting Rights Act), as amended by Congress in 1982, pro-

hibits any "standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a). Section 2(b), which was added in 1982, provides that Section 2(a) is violated when, "based on the totality of circumstances, it is shown that * * * members of a class of citizens protected by subsection (a) of this section * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Section 2(b) also provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Ibid.*

Vote dilution occurs when a voting practice "operate[s] to minimize or cancel out the voting strength of * * * elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court held that, as "necessary preconditions" to proving a Section 2 vote-dilution claim, a plaintiff must show (1) that a 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 bloc to enable it * * * usually to defeat the minority's preferred candidate." *Id.* at 50-51. If a plaintiff satisfies the *Gingles* preconditions, a court must then consider the totality of circumstances, "based upon a searching practical evaluation of the past and present reality," to determine whether Section 2 has been violated. *Id.* at 79 (internal quotation marks and citation omitted).

2. Following the 2000 census, the North Carolina General Assembly adopted a series of redistricting plans for its two houses, the Senate and the House of Representatives. In 2003, after its initial plans were invalidated under state law, the General Assembly adopted the plan at issue in this case. The North Carolina Constitution provides that "[n]o county shall be divided" in the formation of legislative districts. See N.C. Const. Art. II, §§ 3(3), 5(3). The North Carolina Supreme Court has held, however, that the General Assembly may divide a county into multiple districts where it is necessary to do so in order to comply with federal law, including the Voting Rights Act. See *Stephenson* v. *Bartlett*, 562 S.E.2d 377, 396-397 (2002).

As part of the 2003 redistricting plan, the General Assembly divided Pender County, which is located in southeastern North Carolina, into two House districts. The district at issue in this case, House District 18, includes portions of Pender County and of a larger adjoining county to the south, New Hanover County. The evidence presented below indicates that African Americans constitute 39.36% of the voting-age population of House District 18. Pet. App. 69a. The evidence also indicates that it would be possible to draw a House district that keeps Pender County together with an African American voting-age population of 35.33%. J.A. 73.[1]

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[1] Forty North Carolina counties, but not Pender County or New Hanover County, are covered jurisdictions subject to the preclearance requirement in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51, App. North Carolina submitted the 2003 redistricting plan for preclearance, and the Attorney General declined to interpose an objection. Preclearance under Section 5 does not preclude a subsequent action under Section 2. See 28 C.F.R. 51.55(b); *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

3. Petitioners are the Governor of North Carolina and other state officials; respondents are three members of the Pender County Board of Commissioners. On May 14, 2004, respondents and others brought suit in Wake County Superior Court, contending that, by splitting Pender County into two House districts, the 2003 redistricting plan violated the whole-county provisions of the North Carolina Constitution. J.A. 5-14. Petitioners moved for summary judgment, asserting that it was necessary for the General Assembly to draw House District 18 as it did in order to avoid violating Section 2 of the Voting Rights Act. Respondents, in turn, moved for summary judgment, contending, *inter alia*, that House District 18 failed to satisfy the first *Gingles* precondition because it did not contain a majority African American voting-age population. Pet. App. 72a-74a.

The trial court granted partial summary judgment to petitioners. Pet. App. 51a-105a. The court concluded that, while "House District 18 is *not* a majority-minority district because of the number of African American voters located therein," *id.* at 90a, it was "a *de facto* black majority district * * * sufficient to meet the first prong of *Gingles*." *Id.* at 96a-97a. The court also concluded that the second *Gingles* precondition—that the minority group be politically cohesive—was satisfied. *Id.* at 99a. Respondents subsequently stipulated that the third *Gingles* precondition—that the majority group vote sufficiently as a bloc to defeat the minority group's preferred candidate—was met. *Id.* at 130a-131a. The trial court concluded that the ultimate totality-of-the-circumstances test was also satisfied, and accordingly entered judgment for petitioners. *Id.* at 106a-120a.

4. The North Carolina Supreme Court reversed. Pet. App. 1a-50a. The court held that "a minority group

must constitute a numerical majority of the voting-age population in the area under consideration before Section 2 of the [Voting Rights Act] requires the creation of a legislative district to prevent dilution of the votes of that minority group." *Id.* at 19a. Because "the African-American minority group in House District 18 does not constitute a numerical majority of citizens of voting age," the court determined that it was unnecessary for the General Assembly to draw House District 18 in the manner it did in order to comply with Section 2. *Id.* at 27a. The court therefore ordered the General Assembly to redraw the district. *Id.* at 34a.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act did not obligate North Carolina to draw House District 18, in which African Americans constitute approximately 39% of the voting-age population.

A. To establish a Section 2 claim, a plaintiff must generally show that members of a minority group can constitute a majority of the relevant population in a proposed district. That requirement follows from this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), as well as the text of Section 2. Where a politically cohesive minority group constitutes a numerical majority in a proposed district, the group will have the "opportunity to elect" a candidate of its own choice. And where a jurisdiction fails to adopt such a proposed district, it can fairly be presumed that the jurisdiction is not providing an *equal* opportunity to the minority group to elect the representative of its choice—at least where, in the absence of such a district, majority-bloc voting would defeat the minority group's preferred candidate. That general rule provides legislatures drawing

districts, and courts reviewing them, with a clear and administrable standard for applying Section 2.

B. While it correctly recognized the majority-minority requirement, the North Carolina Supreme Court went further than necessary in this case by stating that the requirement is absolute. The United States has previously explained that the general majority-minority requirement may be relaxed in two situations. The first is where a plaintiff shows that a challenged voting practice was adopted with discriminatory intent. Such a showing tends to suggest that a jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice. There is no allegation in this case of such an intent. The second is where the minority group is substantial in size yet just short of a majority. That adjustment accounts for the fact that census data may be imprecise and that population is a fluid, not static, concept. The minority group at issue here—at 39.36% of the voting-age population—constitutes far less than a majority in the proposed district. To decide this case, therefore, it was not necessary for the North Carolina Supreme Court to state that a numerical majority is *always* required.

C. Petitioners, who bear the burden of persuasion on the Section 2 issue in this case, have not shown that House District 18 is required by Section 2. In particular, petitioners' proposed "functional majority" approach is unsustainable. Such an approach is inconsistent not only with the *Gingles* framework, but with the text of Section 2, which grants minority groups the right to *equal* electoral opportunity, not the right to *maximize* electoral opportunity. In addition, such a "functional majority" test would make race a predominant factor in many redistricting decisions, thus raising constitutional

concerns identified by this Court. Likewise, it would require district lines to be drawn based on a complex, predictive inquiry into how voters in a proposed district would vote in future elections with unknown candidates. That inquiry not only would place legislatures in an untenable position in deciding whether a given district was required by Section 2, but also trigger perpetual cycles of Section 2 litigation. In the absence of any indication that Congress intended to adopt such a regime, the Court should decline to impose it.

D. If this Court nevertheless adopts petitioners' "functional majority" approach, it may wish to remand for further proceedings, including factfinding as to the likelihood that African Americans would be able to elect a candidate of choice in the proposed 39% African American district, as opposed to the 35% district that could have been drawn in compliance with state law.

ARGUMENT

SECTION 2 OF THE VOTING RIGHTS ACT DID NOT COMPEL NORTH CAROLINA TO DRAW HOUSE DISTRICT 18

Nothing in the Voting Rights Act of 1965 prevented North Carolina from drawing House District 18 with an approximately 39% African American voting-age population. And the United States certainly supports efforts to draw legislative districts in a manner that will provide equal electoral opportunities for all voters, regardless of race, including districts in which minority voters constitute less than a majority but nonetheless may carry significant political clout because of coalitions with voters from other minority groups or "crossover" voting by members of the majority group. This case arises, however, because North Carolina's own law against splitting counties in redistricting prevented the state legislature

from creating the district that it desired. Rather than complying with that law and drawing a district with a 35% African American voting-age population, North Carolina invoked Section 2 of the Voting Rights Act and argued that Section 2 *required* it to draw House District 18 with a 39% African American voting-age population. That position should be rejected.[2]

A. To Assert A Valid Claim, A Section 2 Plaintiff Ordinarily Must Show That Members Of A Minority Group Would Constitute A Majority In A Proposed District

1. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court held that, as "necessary preconditions" to proving that the use of multi-member districts constituted impermissible vote dilution under Section 2, a plaintiff must show (1) that a 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

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[2] Districts in which members of a minority group do not constitute a numerical majority have variously been described as "crossover," "coalition," and "influence" districts. Like the decision below, see Pet. App. 18a-19a, this brief uses "crossover" district to refer to a district in which the preferred candidate of voters from one minority group can be elected only with "crossover" votes from other voters. A "coalition" district, by contrast, is one in which voters from *two* minority groups could be said to form a "coalition" to elect the representative of their choice. There is no claim in this case that House District 18 was a "coalition" district. An "influence" district is one in which the preferred candidate of voters from a minority group cannot be elected, but voters from the minority group can nevertheless influence the outcome of the election. In *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) (*LULAC*), a majority of this Court agreed that Section 2 vote-dilution claims involving "influence" districts are not cognizable. See *id.* at 445 (opinion of Kennedy, J.); *id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Id.* at 50-51. The Court has held that the *Gingles* preconditions apply with at least as much force to a claim that a single-member districting plan gives rise to impermissible vote dilution. *Growe* v. *Emison*, 507 U.S. 25, 40 (1993).

Both in *Gingles* itself and in numerous later cases, this Court has reserved the question whether there are any circumstances in which a plaintiff may assert a Section 2 vote-dilution claim without showing that a district could be drawn in which members of a minority group would constitute a numerical majority. See *Gingles*, 478 U.S. at 46 n.12; *Growe*, 507 U.S. at 41 n.5; *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993); *Johnson* v. *De Grandy*, 512 U.S. 997, 1009 (1994); *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 443 (2006) (*LULAC*) (opinion of Kennedy, J.). The federal appellate courts that have considered the issue, however, have consistently held that a plaintiff must show that a majority-minority district could be drawn in order to satisfy the first *Gingles* precondition and assert a valid Section 2 vote-dilution claim. See, *e.g.*, *Hall* v. *Virginia*, 385 F.3d 421, 427-430 (4th Cir. 2004), cert. denied, 544 U.S. 961 (2005); *Valdespino* v. *Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-853 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000); *Cousin* v. *Sundquist,* 145 F.3d 818, 828-829 (6th Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1311-1312 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989).

In the decades since the Voting Rights Act was passed, no federal appellate court has held that Section 2 requires the creation of a district like the one at issue

here, in which the minority group constitutes substantially less than a majority of the voting-age population. In *Metts* v. *Murphy*, 363 F.3d 8 (2004) (en banc) (per curiam), the First Circuit refused, at the motion-to-dismiss stage, to "foreclose the *possibility* that a section 2 claim can ever be made out" where a majority-minority district could not be drawn. *Id.* at 11 (emphasis added). The court stopped short, however, of holding that Section 2 required the creation of such a district.

2. In prior cases before this Court, the United States has "agree[d] with those courts that have rejected" the assumption "that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." U.S. Br. at 16, *Voinovich*, *supra* (No. 91-1618); see U.S. Br. at 7, *Growe*, *supra* (No. 91-1420); U.S. Br. at 18-20, *LULAC*, *supra* (Nos. 05-204, 05-276 & 05-439). The general requirement that a plaintiff bringing a Section 2 vote-dilution claim must show that members of a minority group would constitute a numerical majority in a proposed district is supported by two principal considerations.

a. The majority-minority requirement squares with the text of Section 2. If a minority group constitutes a numerical majority in a proposed district (and is politically cohesive), the group will have an "opportunity * * * to elect" a representative of its own choice without support from other groups. See *Growe*, 507 U.S. at 40. If the preferred candidate of voters from a minority group can be elected only with "crossover" votes from the majority group, however, members of the minority group—*i.e.*, "members of a class of citizens protected by [Section 2]"—would not, in ordinary parlance, be deprived of the opportunity to "*elect* representatives of *their* choice." 42 U.S.C. 1973(b) (emphases added).

Rather, as Justice Brennan observed for the Court in *Gingles*, when the minority group "could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the [challenged voting practice]." 478 U.S. at 50 n.17.

When a minority group must rely on "crossover" votes, the prevailing candidate would be elected not by a majority composed of voters from that group, but by a coalition of voters from that group and other voters—and that *coalition* (as opposed to the minority group) would be the only group deprived of the opportunity to elect the representative of its choice if a proposed "crossover" district were not adopted. Such a coalition of minority and non-minority voters is not "a class of citizens protected by [Section 2]." 42 U.S.C. 1973(b). Thus, this Court has recognized that, where the majority-minority requirement is not satisfied, minority voters "cannot claim to have been injured by [the challenged] structure or practice," *Gingles*, 478 U.S. at 50 n.17, and "there neither has been a wrong nor can be a remedy," *Growe*, 507 U.S. at 41.

In addition, because it is highly likely that voters from a politically cohesive minority group would elect a representative of their choice from a proposed district in which they constitute a majority, it can fairly be presumed that the failure to adopt such a district would deprive those voters of an *equal* opportunity to elect the representative of their choice—at least where, in the absence of such a district, the majority has voted sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Together with the other *Gingles* preconditions, therefore, the threshold majority-minority requirement helps courts to winnow out those cases in

which there is no substantial likelihood that a jurisdiction is affording minority voters "less opportunity [than majority voters] * * * to elect representatives of their choice." 42 U.S.C. 1973(b).[3]

b. Like the other *Gingles* preconditions, the majority-minority requirement also provides a clear and administrable threshold standard for applying Section 2. As lower courts have noted, such a standard furthers "interests in clarity and uniformity" in the application of Section 2. *McNeil*, 851 F.2d at 944. That is true not only for the courts, but also for legislatures that must draw districts in compliance with Section 2 and thus must look to this Court's precedents for guidance. Even those members of the Court who have criticized the majority-minority requirement have acknowledged the need for a "clear-edged rule" at the threshold of the Section 2 inquiry. *LULAC*, 548 U.S. at 485 (Souter, J., concurring in part and dissenting in part).

Under the majority-minority requirement, one need only determine whether members of a minority group

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[3] Petitioners contend (Br. 32-34) that the majority-minority requirement is inconsistent with Section 2's directive that a court should consider "the totality of circumstances" in determining whether members of a minority group have been deprived of an equal opportunity to elect the representative of their choice. 42 U.S.C. 1973(b). This Court has made clear, however, that courts should assess the *Gingles* preconditions *before* analyzing the totality of circumstances. See, *e.g.*, *LULAC*, 548 U.S. at 425-427. Thus, Section 2's "totality of circumstances" language imposes an additional, not alternative, requirement. In addition, as discussed below, the United States has previously explained that the majority-minority requirement may be relaxed in particular situations. See pp. 13-17, *infra*. Those exceptions permit the consideration of additional factors, depending on the "nature of the claim," and thus prevent a "mechanical[]" application of the majority-minority rule. *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994) (citation omitted).

would constitute more than 50% of the relevant population in a proposed district. See *LULAC*, 548 U.S. at 429 (suggesting that the relevant population is the citizen voting-age population). In the vast majority of cases, that inquiry will be straightforward. Petitioners suggest (Br. 41-42) that such a requirement may be difficult to administer because, insofar as the relevant population is the citizen voting-age population, data concerning citizenship status may not be readily available. Where that is the case, however, a plaintiff may simply present evidence that members of a minority group could constitute a numerical majority of the *overall* voting-age population—as, indeed, petitioners did here. See Pet. App. 27a; *Barnett* v. *City of Chicago*, 141 F.3d 699, 705 (7th Cir.), cert. denied, 524 U.S. 954 (1998).

B. This Case Does Not Fit Into Either Of The Situations In Which The United States Has Stated That The General Majority-Minority Requirement May Be Relaxed

The United States has previously explained that the majority-minority requirement may be relaxed in two specific situations. See U.S. Br. at 19-20, *LULAC*, *supra* (Nos. 05-204, 05-276 & 05-439). Neither of those situations, however, is presented here. Accordingly, while the North Carolina Supreme Court properly concluded that the State was not obligated under Section 2 to draw the proposed 39% minority district at issue, it went further than necessary to decide this case by stating that a proposed district must always "satisfy the numerical majority requirement as defined herein." Pet. App. 33a.

1. The United States has explained that "the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial

discrimination has been shown." U.S. Br. at 12 n.6, *Growe*, *supra* (No. 91-1420); see *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); U.S. Br. in Opp. at 21-23, *Garza*, *supra* (No. 90-849). Where a plaintiff shows that the challenged redistricting plan was adopted with discriminatory intent, such evidence tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis. And where intentional racial discrimination is shown, relaxation of the majority-minority requirement ensures that a Section 2 claim will be available whenever such a claim is also cognizable under the Fourteenth or Fifteenth Amendment of the Constitution (each of which requires a showing of discriminatory intent). See *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997).

2. The United States has explained that the majority-minority requirement may also be relaxed where the minority group is "compact * * * and substantial in size *yet just short of a majority*." U.S. Br. at 19, *LULAC*, *supra* (Nos. 05-204, 05-276, and 05-439) (citation omitted). In *Valdespino* v. *Alamo Heights Independent School District* (No. 98-1987), for example, the minority group at issue represented 48% of the citizen voting-age population. The United States filed a brief as amicus curiae at the certiorari stage, repeatedly referring to the fact that the minority group was "just short of a majority." U.S. Br. at 11, *Valdespino*, *supra*; see *id.* at 10 (noting that the minority population was "slightly less than 50%"). In *Perez* v. *Pasadena Independent School District* (No. 98-1747), the United States filed an

amicus brief reiterating the position it took in *Valdespino*. See U.S. Br. at 7-8, *Perez*, *supra*.

This qualification accounts for the fact that there may be difficulties in determining the precise percentage of minority members in a proposed district's population, and statistical discrepancies could therefore make the difference in borderline cases. For example, as amici note, see, *e.g.*, Persily Br. 7-15; LWV Br. 19-28; Illinois Br. 27-29, the Census Bureau's data on citizen voting-age population rely to some extent on estimates. As a result, to the extent that the citizen voting-age population is the relevant population, there may be situations in which the figures for a proposed district are subject to sampling error (or other types of error, such as undercounting). See, *e.g.*, *Garza* v. *County of Los Angeles*, 756 F. Supp. 1298, 1322 (C.D. Cal.), aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). Where the plaintiff presents data indicating that the minority group at issue represents nearly 50% of the relevant population in a proposed district, it is thus possible that the true figure is in fact *above* 50%.

Moreover, any data on population merely represent a snapshot in time, and migration to and from a proposed district, as well as changes in citizenship rates (to the extent that citizenship status is relevant), may result in an actual minority population that is higher or lower than statistical estimates based on preexisting data suggest. In *Garza*, for example, the minority group at issue did not constitute more than 50% of the population in the first year after the 1980 census, but evidence suggested that it had grown to a majority in the following years. See U.S. Br. in Opp. at 12-13, *Garza*, *supra* (No. 90-849). For that reason as well, it is reasonable to conclude that the first *Gingles* precondition may be satisfied where

the data indicate that a minority group is just short of 50% of the relevant population in a proposed district.[4]

3. The proposed district at issue in this case does not fall into either category. Petitioners do not contend that House District 18 was adopted with discriminatory intent.[5] Likewise, African Americans constitute only 39.36% of the voting-age population of House District 18 (and no evidence suggests that African Americans constitute a different percentage of the *citizen* voting-age population). Pet. App. 69a. This case is therefore far removed from *Valdespino* (where the minority group represented 48% of the citizen voting-age population), or

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[4] In some of the near-50% borderline cases discussed in the text, the United States has justified relaxation of the majority-minority requirement in part on the ground that, in those cases, only a "small amount" of "crossover" voting would be necessary to ensure that the preferred candidate of voters from the minority group could be elected. U.S. Br. at 11, *Valdespino*, *supra* (No. 98-1987); see *id.* at 10-11 n.2 (observing that only "a minimal amount of crossover voting * * * would enable minority voters to elect representatives of their choice"); *id.* at 12 n.3 (referring to "a small but consistent amount of crossover voting" and stating that, "[a]t some point, of course, the amount of crossover voting" may be too substantial to support a Section 2 claim). The amount of "crossover" voting required to ensure that a candidate preferred by African Americans is elected in the proposed district at issue in this case, however, is significantly larger—almost 18% or more, see pp. 29-30 & n.10, *infra*—than in previous cases in which the United States recognized that a Section 2 claim may lie, where the minority group was "substantial in size yet *just short of a majority*." U.S. Br. at 19, *LULAC*, *supra* (Nos. 05-204, 05-276, and 05-439).

[5] Amici NAACP et al. suggest (Br. 13-15) that the whole-county provisions of the North Carolina Constitution, which prohibit the splitting of counties in legislative redistricting, themselves raise "serious concerns" under the Voting Rights Act. While a proper plaintiff would certainly be free to bring that claim, petitioners did not raise such a claim below and do not make it here.

a case where, based on a discrepancy in data or recent population changes, it is plausible to conclude that a minority group may in fact constitute more than 50% of the relevant population in the proposed district. As a result, in order to decide this case, it was not necessary for the North Carolina Supreme Court to state that a numerical majority is *always* required. See *id.* at 33a.

C. Petitioners Have Not Sustained Their Burden Of Establishing That Section 2 Required North Carolina To Draw The 39% Minority District At Issue

At a minimum, the further that a minority group in a proposed legislative district is from a numerical majority, the more difficult it is for the group to maintain a valid Section 2 claim. Petitioners, as the parties effectively raising the Section 2 claim in this case, bear the burden of persuasion on the Section 2 issue. See *Voinovich*, 507 U.S. at 155. To meet that burden in sustaining the 39% minority district here, petitioners urge this Court to adopt a "functional majority" test that goes far beyond the threshold precondition originally articulated in *Gingles*. That contention should be rejected.

1. To begin with, adopting petitioners' proposed interpretation of Section 2 would require retooling *Gingles*—if not, as petitioners' own amici suggest, relegating *Gingles* to the status of an alternative (and fallback) standard. See *LULAC*, 548 U.S. at 490 n.8 (Souter, J., concurring in part and dissenting in part) (recognizing that "[a]ll aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible ['crossover'] districts"); see also, *e.g.*, Lawyers' Committee Br. 22-28; MALDEF Br. 4. Although it is true that this Court has reserved the question presented by

petitioners, the Court should be reluctant to adopt a position that would require it to overhaul, if not effectively dismantle, the framework used by it and the federal appellate courts for more than two decades in evaluating Section 2 vote-dilution claims.[6]

2. Petitioners' "functional majority" test also is difficult to reconcile with the text of Section 2. As discussed above, see pp. 10-11, when a minority group constitutes substantially less than a majority in a proposed district, "minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the [challenged voting practice]." *Gingles*, 478 U.S. at 50 n.17. And such voters therefore cannot claim that they were denied an *equal opportunity* to elect the representative of their choice because the proposed district was not drawn. See 42 U.S.C. 1973(b).

Petitioners' interpretation of Section 2 also is at odds with the Court's admonition that the "[f]ailure to maximize [minority electoral opportunity] cannot be the measure of § 2." *De Grandy*, 512 U.S. at 1017; see *id.* at 1026 (Kennedy, J., concurring in part and concurring in the judgment). As this Court has stressed, "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates."

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[6] As several courts (and petitioners' own amici, see, *e.g.,* Lawyers' Committee Br. 13-14) have recognized, a "functional majority" test also could create tension between the first and third *Gingles* preconditions. See, *e.g.*, *Metts*, 363 F.3d at 12 ("To the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut."); *id.* at 14 (Selya, J., joined by Torruella, J., dissenting) (noting that "[a] showing of majoritarian bloc voting is structurally inconsistent with" a minority group's "reliance on a high level of crossover voting" to assert electoral control); see also U.S. Br. 12 n.3, *Valdespino*, *supra* (No. 98-1987).

Id. at 1014 n.11. In that regard, petitioners err in stating that "[t]he text of Section imposes an *opportunity-to-elect* precondition." Br. 17 (emphasis added); see, *e.g.*, Br. 28 (contending that Section 2 "asks whether a minority group, of whatever size, has been deprived of an opportunity to elect candidates of choice"). To be clear, Section 2 grants minority groups the right to an *equal* opportunity to elect, see 42 U.S.C. 1973(b), not the right simply to *maximize* electoral opportunity.

Petitioners' position is fundamentally inconsistent with that principle. Petitioners contend that Section 2 effectively requires the State to draw a district when a minority group can put together a winning coalition, even if the minority group itself is substantially less than a majority. Under petitioners' standard, a plaintiff presumably could pursue a Section 2 vote-dilution claim on behalf of a minority group whose members constituted only a fraction of the relevant population, where the plaintiff could show that the rest of the population was divided in such a way that the preferred candidate of the minority group would be unlikely to be elected (absent the proposed district). Such a standard would potentially give one group not merely an equal opportunity, but a *greater* opportunity than another group to elect the candidate of its choice.

Even petitioners appear to recognize that there must be some limit to the "functional majority" test. Thus, they suggest that a Section 2 vote-dilution claim could not proceed where the amount of "crossover" voting required to render it likely that the preferred candidate of voters from a minority group would be elected exceeds a certain numerical threshold. See Br. 16 (suggesting that a "functional majority" claim can proceed only where there is a "limited number" of "crossover" vot-

ers). Such a requirement is no more grounded in the text of Section 2 than an unqualified "functional majority" test. Moreover, it would in effect simply substitute a lower percentage for the majority-minority requirement of the first *Gingles* precondition. And ultimately —no doubt following significant litigation and uncertainty—the "crossover" line on which courts ultimately settle would be no less "unbending" (*ibid.*) than the 50% requirement of which petitioners complain.

Petitioners' amici alternatively suggest that a court could allow a Section 2 vote-dilution claim to proceed to the totality-of-the-circumstances inquiry based on satisfaction of the "functional majority" test, but reject such a claim under the totality of circumstances where the resulting number of "functional majority" districts would be disproportionate to the minority group's share of the population. See, *e.g.*, Lawyers' Committee Br. 14-15. This Court, however, has consistently held that proportionality is not a requirement of Section 2, but instead merely one of many factors to be considered in the totality-of-the circumstances inquiry. See *LULAC*, 548 U.S. at 436; *De Grandy*, 512 U.S. at 1017-1021. That approach, moreover, would likewise simply be a recipe for more, and more protracted, Section 2 litigation.

3. The constitutional concerns and potentially drastic practical consequences of petitioners' proposed interpretation of Section 2 also counsel against adopting that interpretation, particularly in the absence of any indication that Congress intended it. See, *e.g.*, *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004); *Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991).[7]

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[7] Far from establishing that Congress intended to permit vote-dilution claims under Section 2 on a "functional majority" theory, the

a. The Voting Rights Act was intended to "hasten the waning of racism in American politics," *De Grandy*, 512 U.S. at 1020, not to ensure that "race predominates in the redistricting process," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); see *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993) ("Racial classifications with respect to voting carry particular dangers."). Indeed, as this Court observed in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Id.* at 490-491; see *De Grandy*, 512 U.S. at 1029-1031 (Kennedy, J., concurring in part and concurring in the judgment). Petitioners' proposed standard runs counter to that goal.

Notwithstanding petitioners' assurances to the contrary, see, *e.g.*, Br. 37-39, their proposed "functional majority" test will inevitably magnify the consideration of race in redistricting decisions. Members of this Court have already recognized that extending Section 2 to "influence" districts would have that effect. See *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.) ("If § 2 were interpreted to protect ['influence' districts], it would

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legislative history of the 1982 amendments to the Voting Rights Act suggests that Congress was focused on voting practices that reduced the minority population in electoral districts below 50%. See, *e.g.*, S. Rep. No. 417, 97th Cong., 2d Sess. 120-121 (1982). Moreover, when it came to "interpreting the definitional parameters of districts which give blacks an opportunity to elect the candidates of their own choice," the legislative history indicates that Congress was working off a baseline rule that "a 65 percent level of minority population in a given district is * * * one which will 'give blacks an opportunity to elect a candidate of their choice.' " *Id.* at 121 n.40 (quoting testimony of Professor George C. Cochran).

unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions"). Extending Section 2 to "functional majority" districts would raise similar concerns. Indeed, under a "functional majority" standard, a redistricting record might frequently (if not typically) resemble the record in *Georgia*, where the State sought to maximize the number of districts in which minority groups, even if not a majority of the voting-age population, would control electoral races. See 539 U.S. at 470. As Justice Kennedy observed in his concurring opinion, while the issue was not before the Court, the facts of *Georgia* indicated that "race was a predominant factor in drawing the lines of Georgia's * * * redistricting map." *Id.* at 491.

This Court has interpreted the Voting Rights Act to avoid such constitutional concerns, see, *e.g.*, *Miller*, 515 U.S. at 926, and it should do so here as well. Indeed, as discussed next, the inevitable administrative difficulties and litigation that petitioners' approach invites would not only magnify the legislatures' use of race in redistricting, but enlist the courts in making predictive judgments about the role of race in the electoral process. That cannot help but reenforce "the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 928; see *Shaw*, 509 U.S. at 647-648.

b. A "functional majority" test would also generate considerable uncertainty and administrative difficulties for legislatures responsible for drawing district lines. As petitioners recognize (Br. 34), the *Gingles* preconditions focus on "the actual voting behavior of the electorate" (*e.g.*, whether the minority group is politically cohesive or whether the majority group votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate). By contrast, a "functional majority" test would

mandate a much more complicated, predictive inquiry into likely voting behavior. See *McNeil*, 851 F.2d at 944 (noting that "[m]ovement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations"). That inquiry would greatly complicate the task faced by legislatures in determining whether Section 2 requires the creation of a particular district following new census data, a new election cycle, or simply a new political trend.

For example, a legislature considering whether a proposed district is required, or a court engaging in a threshold "functional majority" inquiry, would have to determine, *inter alia*, (1) how many voters in the proposed district would be registered and turn out from each group; (2) how many voters would "cross over" to support the (hypothetical) preferred candidate of a minority group; (3) how many voters from the minority group would "cross over" in the opposite direction to support a (hypothetical) alternative candidate; (4) whether an incumbent would run for reelection in future cycles (and, if so, whether the presence of the incumbent would affect the likelihood that the preferred candidate of the minority group would be elected); and (5) whether there would be "coattail" effects in future cycles based on the results in other elections. See, *e.g.*, Pet. App. 25a; Persily Br. 15-16; Bishop Br. 13-17.[8]

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[8] In *LULAC*, Justice Souter, joined by Justice Ginsburg, suggested that the first *Gingles* precondition could be satisfied where "minority voters in a [proposed] district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election." 548 U.S. at 485-486 (opinion concurring in part and dissenting in part). But Section 2 was designed to protect minority groups, not the "dominant party" in place. See 42 U.S.C. 1973(b). In addition, leaving aside the question of how the other *Gingles* precondi-

As petitioners' own amici concede, therefore, a "functional majority" test would require "a more complicated analysis" involving "development of additional evidence that is not part of the existing § 2 calculus." Lawyers' Committee Br. 5, 7, 24-28; cf. *Georgia*, 539 U.S. at 480 ("The ability of minority voters to elect a candidate of their choice is * * * often complex in practice to determine."). Moreover, as petitioners' amici further acknowledge, "[a] functional approach is likely to be especially problematic in cases involving local elections for governing bodies"—which represent a "substantial amount of § 2 litigation"—given that relevant data for such districts will be even more difficult, if not impossible, to obtain. Lawyers' Committee Br. 24.[9]

The upshot is that, by presenting considerably greater difficulties in application, the threshold *Gingles* (or *Gingles*-like) inquiry would cease to perform any useful screening function, and legislatures would face

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tions would operate in that context, see 548 U.S. at 490, such a standard would potentially present difficulties in application similar to those of petitioners' "functional majority" standard. For example, it would require a legislature or court to predict how many voters would be registered and turn out from each group and which party voters would support in the general election—all with regard to a proposed district as to which precise actual data likely do not exist.

[9] In some cases, a legislature or court may determine that it is possible, but not certain, that the preferred candidate of minority voters would be elected on the basis of "crossover" voting. Under petitioners' apparent standard, it is unclear *how* probable the election of a preferred candidate would have to be (or how confident a legislature or court would have to be about the candidate's election) in order to satisfy the "functional majority" test. See Pet. Br. 40 (suggesting that the plaintiff must show that minority voters are "likely" to have the "opportunity" to elect candidates of their choice); Lawyers' Committee Br. 4 (suggesting that the plaintiff must show that "minority voters * * * have a realistic potential to elect candidates of their choice").

enormous uncertainty in drawing districts in compliance with Section 2. This Court has repeatedly stressed that "[e]lectoral districting is a most difficult subject for legislatures"; that "reapportionment is primarily the duty and responsibility of the State"; and that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915 (citation omitted); see *Voinovich*, 507 U.S. at 156-157; *Growe*, 507 U.S. at 34. Redistricting is already hard enough. Petitioners' proposed standard would greatly complicate the task faced by the States; eliminate a significant degree of discretion that States currently possess in deciding how to draw district lines; and, as discussed next, subject the States to protracted litigation over new plans. Given the absence of any indication that Congress intended to subject the States to such a regime, this Court should decline to interpret Section 2 in that fashion.

c. Adopting petitioners' "functional majority" test would not only transform the nature of Section 2 litigation, but increase its volume as well. As the North Carolina Supreme Court observed, under petitioners' proposed approach, "each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates," creating a "Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes." Pet. App. 24a (citation omitted). That concern is magnified by the fact that, unlike Section 5 of the Voting Rights Act, which applies only to certain covered jurisdictions, Section 2 applies nationwide.

Moreover, if a plaintiff could pursue a Section 2 claim by proposing a district with as little as a 39% minority population, then it would be difficult, if not impossible, to establish a reasoned endpoint or judicially manageable standards for evaluating vote-dilution claims by minority groups constituting less than a majority. Cf. *Holder* v. *Hall*, 512 U.S. 874, 885 (1994) (plurality opinion) (rejecting a Section 2 challenge to the size of a governing authority on the ground that such claims are "inherently standardless"); *id.* at 890 (O'Connor, J., concurring in part and concurring in the judgment) (same). The result would not only make Section 2 claims even more difficult to adjudicate, but—given the breadth and complexity of petitioner's proposed standard—trigger potentially never-ending cycles of Section 2 litigation.

4. A "functional majority" test is not, as petitioners suggest (Br. 34-36), necessary to align Section 2 with Section 5. As this Court has repeatedly emphasized, "the § 2 inquiry differs in significant respects from a § 5 inquiry." *Georgia*, 539 U.S. at 478. The basic premise of petitioners' argument is therefore fundamentally unsound. Moreover, in *Georgia*, the Court rejected the argument that Section 5 requires the States to maximize the number of majority-minority districts and, instead, held that "Section 5 leaves room for States to use * * * influence and coalitional districts" as well. *Id.* at 483. That decision is inconsistent with petitioners' position that Section 2 *required* North Carolina to draw a "crossover" district like House District 18, because such an interpretation of Section 2 would deprive the States of the "flexibility" that *Georgia* held the States retained under Section 5 "to choose one theory of effective representation over the other." *Id.* at 482.

As part of the most recent reenactment of the Voting Rights Act in 2006, Congress added new Section 5(b), which provides that, for purposes of Section 5, "[a]ny voting * * * practice * * * that * * * will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [language minority status], to elect their preferred candidates of choice denies or abridges the right to vote." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(b), 120 Stat. 580-581 (to be codified at 42 U.S.C. 1973c(b)). In adopting that provision, however, Congress did not amend Section 2 (or its equal-opportunity-to-elect standard). In addition, although it is clear that new Section 5(b) was intended to overrule *Georgia* at least in part, it is unclear whether Congress intended to preclude consideration of only "influence" districts in the Section 5 inquiry, see, *e.g.*, H.R. Rep. No. 478, 109th Cong., 2d Sess. 70-71 (2006), or "crossover" districts as well, see, *e.g.*, S. Rep. No. 295, 109th Cong., 2d Sess. 20-21 (2006).

In any event, even assuming that the amended Section 5 mandates consideration of "crossover" districts as part of the retrogression inquiry, that is not incompatible with the longstanding interpretation of Section 2 discussed above. The majority-minority requirement of the first *Gingles* precondition does not preclude consideration of "crossover" districts altogether, because it does not *require* a jurisdiction to draw a majority-minority district whenever such a district could be drawn. Instead, a jurisdiction remains free to draw a "crossover" district, provided that, under the totality of circumstances, the resulting district does not deny minority voters an equal opportunity to elect the representa-

tive of their choice. See, *e.g.*, *Uno* v. *City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995). So too, assuming that Section 5 mandates consideration of "crossover" districts as part of the retrogression inquiry, a jurisdiction would remain free to draw a "crossover" district, provided that there is no discriminatory purpose or retrogressive effect. Accordingly, there is no "disharmony" (Pet. Br. 34) between Section 2 and Section 5 that a "functional majority" test is needed to resolve.

5. As noted, this Court's refusal to adopt a "functional majority" test would not preclude state legislatures from drawing "crossover" districts, consistent with the other restraints imposed by the Voting Rights Act. Indeed, a number of legislatures did so in the wake of the 2000 census, notwithstanding the fact that no court of appeals had embraced the "functional majority" test. See, *e.g.*, Bishop Br. 4-5. Many have argued that such districts are desirable as a policy matter, because "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020; see generally *Georgia*, 539 U.S. at 480-483. Section 2, however, leaves States a measure of discretion to reach their own conclusion on such matters of political theory; it does not require States to create such districts whenever feasible.

Certainly, there have been significant gains since the Voting Rights Act was enacted in eliminating the invidious discrimination targeted by the Act. See Bishop Br. 4-5. Petitioners' amici argue that, "[o]ver time, as voters become increasingly willing to judge candidates on their merits, rather than on the color of their skin, the demands of the Voting Rights Act must evolve." LWV Br. 4. The proper forum for such evolution, however, is Congress, not the courts. As the recent amendments to

(and reauthorization of) Section 5 underscore, Congress has not hesitated to adapt the Voting Rights Act to new trends or concerns as it sees fit. The policy arguments raised by petitioners and their amici are therefore better addressed to Congress than to this Court.

D. If This Court Adopts A "Functional Majority" Standard For Section 2 Vote-Dilution Claims, It May Wish To Remand For Further Proceedings

If this Court adopts a "functional majority" test or otherwise alters the longstanding *Gingles* framework, it may wish to remand this case for further proceedings and, in particular, for consideration of two issues that the lower courts did not address.

First, it may be appropriate for the lower courts to determine whether the "crossover" required to ensure the election of the preferred candidate of minority voters in House District 18 is simply too large to permit a Section 2 vote-dilution claim challenging that district to proceed. In this case, with African Americans constituting 39.36% of the voting-age population of House District 18, almost 18% of the remaining voting-age population would have to "cross over" in a given election—and perhaps more, depending on the extent to which African American voters support other candidates.[10] "Cross-

[10] Petitioners suggest (Br. 31) that the necessary amount of "crossover" voting is 11%. That is misleading. Because African American voters constituted 39.36% of the voting-age population in House District 18, other voters constitute 60.64% of that population. Assuming that *every* African American voter supported the candidate of choice, it is true that another 10.64% of the *total* voting-age population would have to support that candidate for the candidate to be elected. The critical fact, however, is that 17.55% of the *remaining* voting-age population (*i.e.*, 10.64% divided by 60.64%) would have to "cross over" to support the minority group's candidate of choice.

over" voting of that magnitude may exceed the appropriate threshold, even under a "functional majority" test. Cf. *Abrams* v. *Johnson*, 521 U.S. 74, 92-93 (1997).[11]

Second, it may be appropriate for the lower courts to determine whether, under the totality of circumstances, it was necessary for the General Assembly to draw House District 18 in order to avoid violating Section 2 of the Voting Rights Act. While the evidence presented below indicates that African Americans constitute 39.36% of the voting-age population in House District 18, Pet. App. 69a, it also indicates that the General Assembly could have drawn an alternative district that kept Pender County together with an African American voting-age population of 35.33%, J.A. 73. It may be possible to argue that a 4% difference in the African American voting-age population would not materially affect the likelihood that the preferred candidate of African American voters would be elected—and that, without a showing that the 4% difference is likely to be dispositive for purposes of ensuring an equal opportunity to elect, Section 2 should not be read to require North Carolina to create the district at issue.[12] Of course, the difficul-

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[11] Although respondents stipulated, with regard to the third *Gingles* precondition, that "the racial difference in the preference of voters results in the white majority voting sufficiently as a block [*sic*] to usually enable it to defeat the minority's preferred candidate," Pet. App. 130a, they made no stipulation concerning the distinct question of the extent to which white voters in House District 18 would "cross over" to support the minority group's preferred candidate (or the extent to which members of the minority group would support other candidates).

[12] In making this determination, the lower courts would need to consider petitioners' evidence that, in the wake of the 1990 census, no House district *elsewhere* in North Carolina with an African American voting-age population of less than 38.37% had a history of electing African American representatives. J.A. 40, 45. The lower courts would

ties of the foregoing inquiries simply underscore the doctrinal and practical problems raised more generally by petitioners' proposed "functional majority" rule.

CONCLUSION

The judgment of the North Carolina Supreme Court should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
KANNON K. SHANMUGAM
Assistant to the Solicitor General
DIANA K. FLYNN
ANGELA M. MILLER
Attorneys

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also need to consider evidence concerning how the alternative district proposed by respondents would perform. See Resp. Br. 8-9, 49-50.