

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   GARY BARTLETT, EXECUTIVE                                 :

4   DIRECTOR OF THE NORTH                                     :

5   CAROLINA STATE BOARD OF                                   :

6   ELECTIONS, ET AL.,   :

7                                 Petitioners                                 :

8                 v.   :   No. 07-689

9   DWIGHT STRICKLAND, ET AL.                                 :

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11   Washington, D.C.

12   Tuesday, October 14, 2008

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14                                 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:04 a.m.

17 APPEARANCES:

18 CHRISTOPHER G. BROWNING, JR., ESQ., Solicitor General,  
19         Raleigh, N.C.; on behalf of the Petitioners.

20 CARL W. THURMAN, III, ESQ., Wilmington, N.C.; on behalf  
21         of the Respondents.

22 DARYL JOSEFFER, ESQ., Assistant to the Solicitor  
23         General, Department of Justice, Washington,  
24         D.C.; on behalf of the United States, as amicus  
25         curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear argument  
4 first this morning in Case 07-689, Bartlett v.  
5 Strickland.

6 Mr. Browning.

7 ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. BROWNING: Mr. Chief Justice and may it  
10 please the Court:

11 The Voting Rights Act should be interpreted in  
12 such a way as to encourage a transition to a society  
13 where race no longer matters. In North Carolina,  
14 coalition districts have been crucial in moving towards  
15 Congress's ultimate goal. Coalition districts bring  
16 races together by fostering political alliances across  
17 racial lines. As a result they serve to diminish racial  
18 polarization over time. Coalition districts help us in  
19 reaching the point where race will no longer matter in  
20 drawing district lines. These districts bring us one  
21 step closer to fulfilling our Nation's moral and ethical  
22 obligation to create an integrated society.

23 CHIEF JUSTICE ROBERTS: How can you say that  
24 this brings us closer to a situation where race will not  
25 matter when it expands the number of situations in which

1     redistricting authorities have to consider race?

2                   MR. BROWNING:   Well, Your Honor,  
3     Mr. Chief Justice, it will require somewhat an increase  
4     in the number of districts that would be drawn, there is  
5     no question about that, but that increase is not  
6     substantial.   But it does cause race to be much less of  
7     a factor in the redistricting process.   Currently, if a  
8     General Assembly has a choice between drawing a  
9     coalition district or a majority-minority district, the  
10    50 percent rule that the North Carolina Supreme Court  
11    adopted encourages States to draw a majority-minority  
12    district, and when you do that it causes race to re-  
13    dominate in the process.

14                  CHIEF JUSTICE ROBERTS:   It seems to me to be  
15    a criticism of the majority-minority district approach  
16    in the first place.

17                  MR. BROWNING:   Well, Your Honor, it is a  
18    recognition of the fact that coalition districts allow  
19    us to move away from majority-minority districts and  
20    create districts where races are working together.

21                  CHIEF JUSTICE ROBERTS:   What about influence  
22    districts?

23                  MR. BROWNING:   Your Honor --

24                  CHIEF JUSTICE ROBERTS:   Do you move --  
25    you've moved from majority-minority to crossover

1 districts. Should you continue to move to so-called  
2 influence districts?

3 MR. BROWNING: Your Honor, the decision in  
4 LULAC makes clear that influence districts are not  
5 protected under section 2 of the Voting Rights Act.

6 JUSTICE KENNEDY: But under your definition  
7 of coalition district, race is the key factor.

8 MR. BROWNING: Your Honor -

9 JUSTICE KENNEDY: And you are telling us if  
10 we have a rule that makes race the key factor then race  
11 doesn't matter.

12 MR. BROWNING: Your Honor, it is a matter of  
13 -- under the Voting Rights Act, Congress has made clear  
14 that districts should be drawn to protect minority  
15 voting rights. When there are areas of the country  
16 where there is racial polarization, districts -- race  
17 has to be considered in drawing districts that will give  
18 minorities equal opportunity, just as majority --

19 JUSTICE KENNEDY: I thought you were  
20 proposing a brave new world of coalition districts.

21 MR. BROWNING: Your Honor, and race --

22 JUSTICE KENNEDY: Based on race.

23 MR. BROWNING: Justice Kennedy, you have to  
24 consider race in drawing these districts. There's no  
25 question about that. That's the very thing that section

1 2 of the Voting Rights Act requires us to do. And you  
2 do that because there is racial polarization.

3 JUSTICE KENNEDY: What's the authority that  
4 says you must consider race in drawing the districts,  
5 assuming that you don't have an existing majority --  
6 minority-majority district? What's the -- what  
7 authority do you cite for the fact that you must  
8 consider race in drawing districts? What do I read to  
9 find that?

10 MR. BROWNING: Well, Your Honor, that's  
11 certainly the decision in Thornburg v. Gingles. Under  
12 --

13 JUSTICE KENNEDY: No, that's -- that's a  
14 majority -- majority district.

15 MR. BROWNING: Yes, Your Honor. That was a  
16 majority district. This Court --

17 JUSTICE KENNEDY: Okay. So then what other  
18 case do you have?

19 MR. BROWNING: Your Honor, this Court, of  
20 course, has left open the issue of whether the Voting  
21 Rights Act would protect minority --

22 JUSTICE KENNEDY: Well, then your statement  
23 that you must always consider race in drawing districts  
24 is not -- is not supported, or at least it's a new  
25 proposition that you are arguing for us here.

1                   MR. BROWNING: Your Honor, my point is when  
2   you are drawing districts under section 2, of course  
3   race has to be considered, but it's considered because  
4   the process is not equally open to minorities.  
5   Unfortunately, North Carolina has a long history of  
6   discrimination, and that discrimination has resulted in  
7   current effects in the voting place. There is racially  
8   polarized voting, as has been stipulated to in this  
9   case. There has been --

10                  CHIEF JUSTICE ROBERTS: Well, I would have  
11   thought the possibility of coalition districts would be  
12   evidence that the Voting Rights Act has succeeded,  
13   rather than evidence that you need to apply it more  
14   broadly.

15                  MR. BROWNING: Mr. Chief Justice, the  
16   coalition districts are certainly evidence that we have  
17   made progress towards Congress's ultimate goal under the  
18   Voting Rights Act, but we are not there yet. In this  
19   district, the expert testimony is that only 15 to 30  
20   percent of whites will vote for a black candidate, and  
21   that is still very racially polarized. But coalition  
22   districts help us to move away. It -- they help to  
23   diminish the amount of racial polarization over time, so  
24   that eventually we won't need to be looking at race at  
25   all in drawing district lines, but where --

1 CHIEF JUSTICE ROBERTS: Well, I mean, the  
2 obvious question when you say 15 to 30 percent is what  
3 number of crossover voters would you say demonstrates  
4 that you no longer need to consider race in shifting a  
5 coalition district?

6 MR. BROWNING: Your Honor, in the Gingles  
7 case, this Court stated that it was a district-by-  
8 district determination. There's no bright-line rule as  
9 to where crossover voting is so great that it doesn't  
10 satisfy the third Gingles prong. Here, however, the  
11 district was --

12 CHIEF JUSTICE ROBERTS: Of course, it could  
13 be 70 percent that don't vote for a particular  
14 candidate. At some point you have to conclude that it's  
15 based on the candidate rather than on race.

16 MR. BROWNING: Your Honor, at some point  
17 that's true, that it would be issues beyond race, but  
18 here, the expert report and as stipulated to by  
19 Respondents, this voting is racially polarized. There  
20 is some crossover voting, but not enough to say that the  
21 effects of past discrimination have been eliminated.  
22 That crossover voting is sufficient for this district to  
23 work.

24 JUSTICE ALITO: You can't say where -- how  
25 much crossover voting would be so large as to make a



1 difference? You can't say where the line is  
2 statistically?

3 MR. BROWNING: Your Honor, this Court's,  
4 again, decision in Gingles makes clear that that is a  
5 district-by-district determination.

6 JUSTICE GINSBURG: And that -- that has been  
7 stipulated here, right, that you meet the third Gingles  
8 factor? So it's not at issue in this case, but the  
9 point was made that, in one of the cases that you rely  
10 on, in Metts, that reliance on crossovers to prove the  
11 ability to elect the candidate of a racial minority's  
12 choosing undercuts the argument that the majority votes  
13 as a bloc against the minority preferred candidates. So  
14 there's tension between the crossovers on the one hand  
15 and showing that the dominant race votes as a bloc.

16 MR. BROWNING: Justice Ginsburg, I  
17 completely agree that, at some point, the crossover  
18 voting becomes so great that you no longer have to take  
19 into account district lines. Unfortunately --

20 JUSTICE ALITO: If that's the case, then --

21 MR. BROWNING: -- we're not there yet.

22 JUSTICE ALITO: If that's the case, then  
23 your test imposes a statistical standard just as your  
24 opponent's test does, doesn't it? It's just a different  
25 one.

1                   MR. BROWNING: Yes, Your Honor. What we're  
2 proposing and what we think is required by the text of  
3 section 2 is you simply take the existing Gingles  
4 factors and you look at the amount of racially polarized  
5 voting, and from that you are able to readily calculate  
6 the size of the minority group that would be  
7 sufficiently large to elect a minority -- a minority  
8 candidate.

9                   JUSTICE ALITO: Suppose there is 40 percent  
10 crossover voting, and that's a little bit -- that's not  
11 quite enough for the minority candidate to win.

12                  MR. BROWNING: Your Honor, again, whether  
13 the third Gingles prong is satisfied obviously is a  
14 district-by-district determination. Here, however --

15                  JUSTICE ALITO: We can't even say that 40  
16 percent would be sufficient in every instance, that that  
17 might be -- you know, that might not be enough?

18                  MR. BROWNING: I'm hesitant since this Court  
19 has not set a specific limit, and that's, again, an  
20 issue that has been stipulated to in this case. The --

21                  JUSTICE SOUTER: Well, you don't suggest  
22 that if there were 40 percent white crossover voting, we  
23 would find white bloc voting within the Gingles  
24 condition, do you? Do you think that is a serious  
25 possibility?

1 MR. BROWNING: No, I think it would be very,  
2 very unrealistic that you'd have 40 percent --

3 JUSTICE SOUTER: No, but I mean you really  
4 do have an answer to Justice Alito's question.

5 MR. BROWNING: Yes, Your Honor.

6 CHIEF JUSTICE ROBERTS: What is the answer?  
7 What percentage of crossover voting would make this not  
8 actionable under section 2?

9 MR. BROWNING: Again, the third prong is not  
10 an aspect of this case.

11 CHIEF JUSTICE ROBERTS: So you don't have an  
12 answer to Justice Alito's question?

13 (Laughter.)

14 MR. BROWNING: If you are saying that 40  
15 percent is a very high amount of crossover voting, that,  
16 of course, is not our case, where the crossover voting  
17 that is necessary to make this coalition district work  
18 is 18 percent crossover voting.

19 JUSTICE SCALIA: Do you have racially  
20 polarized voting when you have as high a crossover vote  
21 as 40 percent? I mean, you say, we apply the normal  
22 Gingles factors, but it seems to me 40 percent crossover  
23 is fairly high.

24 MR. BROWNING: 40 percent is a high number,  
25 and particularly --

1 JUSTICE SCALIA: But you still think that we  
2 can confidently say this is racially polarized?

3 MR. BROWNING: Your Honor, here, however,  
4 under this case, there's not 40 percent crossover --

5 JUSTICE GINSBURG: But you're opening  
6 yourself to this line of questioning about the third  
7 factor, which is conceded by both sides, so it's not in  
8 issue. But you are opening it by having a test that  
9 looks to the second and third factor and leaves the  
10 first factor out of it. I mean, whether you agree with  
11 it or not, the 50 percent line is bright if you know  
12 what's in and what's out. You don't have any test for  
13 the first factor that's comparable, that would give  
14 district courts and attorneys some degree of security  
15 about how you determine the first factor.

16 MR. BROWNING: Well, Your Honor, as the  
17 language the Court used in the De Grandy decision is  
18 whether the minority group is sufficiently large to  
19 elect a minority-preferred candidate. There are, of  
20 course, limiting factors on the side of the coalition  
21 district which could be drawn. There are practical  
22 limiting factors and there are legal limitations.

23 The practical limitation, of course, is in  
24 North Carolina, given what has happened in past  
25 elections, the North Carolina General Assembly

1 appropriately concluded that a minority group of less  
2 than 40 percent would simply not work, that it would not  
3 be effective to give rise to a minority -- a district in  
4 which minorities elect a minority-preferred candidate.

5           There's also a legal limitation. In the  
6 Court's decision in LULAC, the Court made clear that  
7 influence districts are not protected by section 2. So  
8 as a result, the minority group will by necessity have  
9 to control its coalition partner; otherwise it would  
10 simply be an influence district. And here at a minority  
11 group of 40 percent, the minority group in the area is  
12 substantially larger than the crossover voting that is  
13 needed to have an ability to elect.

14           CHIEF JUSTICE ROBERTS: Under your theory,  
15 it would be possible to challenge a majority-minority  
16 district on the ground that you could draw a different  
17 coalition district, maybe more than one coalition  
18 district. Let's put it that way.

19           If you could draw a majority-minority  
20 district and you could draw two crossover districts,  
21 does the Voting Rights Act impose a limit on the choice?

22           MR. BROWNING: Your Honor, our position is  
23 that the -- assuming all of the factors under Gingles to  
24 be met, that if you have a minority group that was  
25 packed in to a -- one district, and in its place two

1 coalition districts could be effectively drawn, and  
2 those districts would actually work and you could meet  
3 all of the other standards under Gingles -- the district  
4 was geographically compact, there is --

5 CHIEF JUSTICE ROBERTS: That's an easy -- I  
6 suspect that's a common hypothetical. You could draw a  
7 district with 80 percent minority voters or you could  
8 have, as you have here, two 40 percent districts. And  
9 the Voting Rights Act requires what?

10 MR. BROWNING: In that situation, assuming  
11 you could meet all of the Gingles factors, that, yes,  
12 that 80 percent district should be drawn as two 40  
13 percent districts.

14 JUSTICE SOUTER: Aren't you adopting the  
15 principle of maximization?

16 MR. BROWNING: No, Your Honor.

17 JUSTICE SOUTER: Let me ask you this, and  
18 correct me if I am wrong, because it has been a long  
19 time since Gingles came along and I may be forgetting  
20 things. But I -- I thought when you are given the  
21 alternatives you were just giving, one 80 percent and  
22 two 40 percents, that because there is not a principle  
23 of maximization there simply is not an abstract or  
24 bright-line answer to the question; and that in order to  
25 get an answer to the question, you look at all of the

1 other things that districting authorities look to, and  
2 you see how they add up, whether we are talking about  
3 compactness, congruency with -- with -- with other  
4 political lines, and so on. And unless you look to all  
5 the other things that reasonably can and should be take  
6 into consideration when districting is done, you simply  
7 cannot answer the question, should there be two 40's or  
8 one 80.

9 Am I wrong?

10 MR. BROWNING: Well, Justice Souter,  
11 certainly the -- the criteria that you have referred to  
12 have to be part of the districting process.

13 JUSTICE SOUTER: But they weren't part of  
14 your answer to the Chief Justice.

15 MR. BROWNING: Well, my point is that when  
16 minorities are basically put in an enclave, in a  
17 separate district but yet it is possible to draw two  
18 districts, two coalition districts, and the other prongs  
19 of Gingles have not been met, so that there is not rough  
20 proportionality throughout the State, yes, the  
21 districting body needs to consider drawing two  
22 districts --

23 JUSTICE SOUTER: It needs to consider it,  
24 but I thought your answer was it needs to do it. Is  
25 that your answer?

1           MR. BROWNING: Yes, Your Honor, it would  
2 be -- it is our answer that if a district -- if there is  
3 not rough proportionality in a State, there is a  
4 district that is a super-majority and there is no reason  
5 for that super-majority to be in place.

6           JUSTICE SOUTER: Okay if there is no reason  
7 for the super-majority. My point is that you cannot  
8 answer the question in the abstract. And when you start  
9 to answer it, as you are doing now, you are going beyond  
10 the abstract and you are getting into facts outside the  
11 mere choice between two 40's and one 80. And that seems  
12 to me to be correct. At least, if it's not correct, you  
13 and I are making the same mistake.

14          MR. BROWNING: No, Justice Souter, your  
15 point is well taken and I agree that with a hypothetical  
16 like that it's very difficult, unless you are actually  
17 considering the specific situation of the district.

18          JUSTICE SCALIA: Well, we -- what you  
19 propose is going to inject courts into the drawing of  
20 districts much more frequently than they -- than they  
21 already are injected. The reality is that one of the  
22 factors -- you mentioned contiguousness and county lines  
23 and so forth, but one of the factors that legislators  
24 always take into account is incumbent protection and the  
25 incumbent is always going to rather be in an 80 percent



1 district than in a so-called 40 percent coalition  
2 district.

3 I think you are unrealistic to expect State  
4 legislatures to draw districts that way, where everybody  
5 will have a chance. The whole object of it is that  
6 nobody will have a chance, just the incumbents. That's  
7 what is going on.

8 MR. BROWNING: Your Honor, I think what  
9 Congress has required courts to do is to look at the  
10 overall picture of the district. The Congress, in  
11 connection with the section 2 of the Voting Rights Act,  
12 used very broad language, phrases like "totality of  
13 circumstances" and "opportunity to participate and  
14 elect." So clearly, Congress intended for a broad  
15 approach to be taken and a functional one.

16 JUSTICE SCALIA: Well, that's fine, but you  
17 just can't wave a magic wand. It -- Congress also  
18 intended primarily to leave it up to the legislatures  
19 under guidelines, to be sure. And when you have a  
20 choice of one 80 percent or two or even three 40  
21 percent, it's clear to me what the legislature is going  
22 to -- going to choose.

23 MR. BROWNING: Well, Your Honor, and that's  
24 the very point of the section 2 of the Voting Rights  
25 Act, is when minorities do not have equal opportunity to

1 elect their candidate of choice, where they are packed  
2 in to districts --

3 JUSTICE SCALIA: We will be injected into  
4 this very political game much more frequently than we  
5 now are. I have always regarded the 50 percent Gingles  
6 thing as simply a self-protection prescription for the  
7 courts, where you can look, you can be clear and say,  
8 you know, close enough for government work.

9 But if you want us to figure out whether  
10 there could be three districts, two districts instead of  
11 just one district, you are just, it seems to me, tossing  
12 the whole -- the whole project of drawing districts into  
13 the courts. And that is -- that is not something that  
14 I, for one, favor.

15 JUSTICE STEVENS: In this case which way  
16 does the presumption favoring what the legislature did  
17 cut? Here the court set aside what the legislature did;  
18 is that not right?

19 MR. BROWNING: Yes, Your Honor, the North  
20 Carolina Supreme Court determined that this district  
21 should not cut county lines. Ironically, that county  
22 line was a county line that was originally created to  
23 segregate blacks in Wilmington, in the southern portion  
24 of the county, from whites in the northern portion of  
25 the county.

1           So that original discriminatory act is now  
2   being used to keep a district from -- from being a place  
3   that is a district that has a proven ability to elect a  
4   minority --

5           JUSTICE KENNEDY: That's something new. I  
6   thought we took the case -- at least I have been  
7   thinking about the case -- on the assumption that there  
8   is a valid State law that is being superseded. Now, if  
9   you are questioning the validity of the State law,  
10   that's something -- that hasn't been raised here, has  
11   it?

12          MR. BROWNING: Your Honor, the government  
13   has asserted that there should be a near-50 percent test  
14   which includes as part of it a -- either the district is  
15   close to 50 percent or there is an element of  
16   discrimination.

17          JUSTICE KENNEDY: I'm talking about, you're  
18   indicating to us that the county line standard that the  
19   State court invoked as a matter of State law is itself  
20   questionable because it was based on a prohibited racial  
21   animus. And I -- I indicated that that's very new to  
22   me. I thought we were taking the case on the  
23   proposition that the county line rule is a neutral,  
24   valid State law principle.

25          Now, it may or may not be superseded by

1 the -- by the requirement of section 2. That's what we  
2 are arguing about. But this is the first time I have  
3 heard that we have to somehow question the underlying  
4 State rule under the Fourteenth Amendment.

5 I thought we took the case on the assumption  
6 that the State rule is valid.

7 MR. BROWNING: Justice Kennedy, the decision  
8 of the North Carolina Supreme Court is to adopt an  
9 inflexible 50 percent rule. That -- that was the issue  
10 that was resolved on summary judgment by the --

11 JUSTICE KENNEDY: I'm talking about the  
12 county line rule.

13 MR. BROWNING: Yes, Your Honor, that the  
14 county line rule -- the North Carolina Supreme Court  
15 concluded that this district could not cut county lines  
16 because this should not be treated as a section  
17 2 district.

18 CHIEF JUSTICE ROBERTS: We are fighting  
19 over -- the district that you want to draw, the  
20 crossover district, would have 39 percent  
21 African-American voters. The district that complied  
22 with State law of the county line would have 35 percent.

23 Where the assumption is that you have a  
24 significant degree of crossover voting, is that really a  
25 difference worth changing the Voting Rights Act

1 jurisprudence for?

2 MR. BROWNING: Your Honor, the plaintiffs  
3 have and the Respondent and the government have referred  
4 to an alternative district that would not cut those  
5 county lines and would have a black voting age  
6 population of 35 percent. The problem with that is  
7 there is absolutely no testimony that that -- their  
8 alternative district would be in any way workable. As a  
9 matter of fact, the undisputed testimony of the joint  
10 appendix at page 73-74 is to the contrary.

11 CHIEF JUSTICE ROBERTS: What do you mean by  
12 "workable"?

13 MR. BROWNING: That this -- that the  
14 district they propose was simply prepared by their  
15 attorney, looking at a map. There is absolutely no  
16 testimony that this would be an effective minority  
17 district, that there would be an equal opportunity for  
18 minorities --

19 CHIEF JUSTICE ROBERTS: Because it's 4  
20 percent less than the district you propose?

21 MR. BROWNING: Well, it is a matter of the  
22 percentage of voting age population, but more  
23 importantly, the district they drew would have put a  
24 black incumbent, a black Democrat incumbent, in the same  
25 district with a white Republican incumbent. If they

1     were serious about --

2                   CHIEF JUSTICE ROBERTS:   So it gets back to  
3     the Justice Scalia's point --

4                   MR. BROWNING:   Yes.

5                   CHIEF JUSTICE ROBERTS:   -- that this is  
6     designed to protect incumbents.

7                   MR. BROWNING:   Well, Your Honor, incumbency  
8     certainly has to be considered in the context of what  
9     the Voting Rights Act requires us to do, which is to  
10    look at the total picture.  Is it a functional approach?  
11    It is a matter of looking -- undertaking a searching  
12    evaluation of the past and present political realities.

13                   JUSTICE GINSBURG:   Mr. Browning, I thought  
14    there was something in the record that said never in  
15    North Carolina's history have you had African Americans  
16    able to choose the -- able to elect the candidate of  
17    their choice where the minority population was less than  
18    38.37 percent.

19                   MR. BROWNING:   Justice Ginsburg, there are  
20    districts such as Wake County, the seat of government,  
21    where a minority has been elected with less than 38  
22    percent.  But in areas of the State where there is  
23    highly racially polarized voting, 38 percent roughly is  
24    the effective floor that the General Assembly recognized  
25    as being workable for creating a district such as this.

1 I will also note that this issue was not presented to  
2 the North Carolina Supreme Court, the issue of whether  
3 there is an alternative district that would somehow be  
4 feasible and workable.

5 JUSTICE GINSBURG: Well, does that mean a  
6 proposal if you succeed, we should remand on that  
7 question?

8 MR. BROWNING: Your Honor, that would  
9 certainly be one possibility, but the North Carolina  
10 Supreme Court resolved this straight legal question as  
11 to whether the 50 percent rule is in place and is an --  
12 is an inflexible rule, and not only did they -- they  
13 imposed this rule with respect to this district, they  
14 essentially had a mandatory injunction on the North  
15 Carolina General Assembly to never draw a district at  
16 less than 50 percent if it cuts too many county lines;  
17 and that is even inconsistent with the United States'  
18 view of section 2. For that reason, alone the decision  
19 should be reversed.

20 If there are no other questions I would like  
21 to reserve the remainder of my time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23 Browning.

24 Mr. Thurman.

25 ORAL ARGUMENT OF CARL W. THURMAN, III,

1                   ON BEHALF OF THE RESPONDENTS

2                   MR. THURMAN: Thank you, Mr. Chief Justice,  
3 and may it please the Court.

4                   The rule proposed by Petitioners in this  
5 case would effectively require maximization resulting  
6 in, as the Court has recognized, judicial involvement in  
7 many, many more situations.

8                   JUSTICE SOUTER: I don't know why it would  
9 require maximization. It would -- it would certainly  
10 open the door to -- to more districts required by  
11 section 2 than if we have a 50 percent rule. But I -- I  
12 think your brother conceded that when -- when you draw a  
13 district, you are bound by our case law as well as  
14 tradition to look to something more than maximization,  
15 and maximization is in fact not the law. So I don't see  
16 why it would be required.

17                  MR. THURMAN: Your Honor, in this situation,  
18 we take the position that the people of North Carolina  
19 and their ultimate authority, their State Constitution,  
20 have spoken and said that county lines should be kept  
21 whole to the extent practical. And the State's position  
22 is the legislators disregarded that and, based on the  
23 cases, based on LULAC, at 25 percent --

24                  JUSTICE SOUTER: What's that got to do with  
25 maximization?



1                   MR. THURMAN: Well, Your Honor, that would  
2 be the position they would take of every district that  
3 could be drawn regardless of the --

4                   JUSTICE SOUTER: There is no question that  
5 if they are -- if they win this case, I think there is  
6 no question there will be more claims requiring -- or  
7 potentially more claims requiring adjustment of lines  
8 based on avoiding section 2 violation. I would almost  
9 think that was common ground. But that is a different  
10 thing from saying that the result of those claims is  
11 going to be a required maximization. And that's --  
12 that's the only point that I -- that I meant to pick --  
13 pick up on.

14                  MR. THURMAN: Your Honor, it seems that if  
15 there are going to be more potential claims, and as  
16 every legislative body, school board, city council,  
17 whatever it is, has to follow section 2, they will have  
18 to take this into account. They will be facing  
19 potential claims and they will have to run the risk of  
20 do we look to try to maximize a district that might not  
21 otherwise be required, that might violate a neutral  
22 criteria --

23                  JUSTICE SOUTER: You are saying they will  
24 tend to maximization in order to avoid litigation.

25                  MR. THURMAN: Your Honor, I think that is

1 absolutely true.

2 JUSTICE SOUTER: Okay.

3 CHIEF JUSTICE ROBERTS: Why in the -- why in  
4 the world would you stipulate to bloc voting in a  
5 situation where you have nearly 20 percent crossover  
6 voting?

7 MR. THURMAN: Your Honor, the answer to that  
8 question is we were 20 months into the litigation, we  
9 had just received a partial ruling on cross motions for  
10 summary judgment, we were already at the midpoint of the  
11 decade. If this Court should affirm the North Carolina  
12 Supreme Court, my client will have one election in which  
13 they have a district that complies with the North  
14 Carolina Constitution. We quite simply wanted to move  
15 the case along.

16 CHIEF JUSTICE ROBERTS: Well, but it seems  
17 to me you have complicated situations on a rather  
18 critical point, what seems to me a basic conundrum, how  
19 can you have bloc voting and at the same time have  
20 significant crossover voting? You take one of those off  
21 the table, it's kind of hard to address the basic issue  
22 in the case.

23 MR. THURMAN: I agree, Your Honor. The  
24 other point that I would point out is, it is not a  
25 stipulation that there was sufficient bloc voting within

1 either of the districts that were drawn. The  
2 stipulation was with reference to bloc voting within the  
3 two counties. The district that could be drawn -- there  
4 is no stipulation that the alternative district does not  
5 comply and would -- and therefore would require the  
6 creation of the 39 percent district.

7 JUSTICE SOUTER: Well, since the district is  
8 drawn from the counties and there's a stipulation with  
9 respect to the counties, doesn't it follow in the  
10 absence of some surprising fact that there would be bloc  
11 voting or the stipulation would cover bloc voting in the  
12 district?

13 MR. THURMAN: Your Honor, there are very  
14 different populations in these two counties, and that is  
15 referenced in the record with regards to the growth in  
16 population; and there is very different minority  
17 populations in the two counties because of the influx --

18 JUSTICE SOUTER: But regardless, regardless  
19 of the -- the variations in mix, if you are stipulating  
20 that there's bloc voting in county A, bloc voting in  
21 county B, and you have got a district made up part of A,  
22 part of B, doesn't it follow in -- in the absence of  
23 some pretty specific evidence to the contrary, that in  
24 the district there is probably going to be bloc voting?

25 MR. THURMAN: Your Honor, I would

1 respectfully submit that it does not follow within a  
2 particular section of a district. I think we all --

3 JUSTICE SOUTER: Do you have evidence in the  
4 record -- did you put evidence in the record that this  
5 particular district is carved from some peculiar section  
6 of county A and county B, so that the general bloc  
7 voting pattern does not apply in the district?

8 MR. THURMAN: Your Honor, there is evidence  
9 in the record, and it is cited in the brief, that  
10 minority candidates, black candidates for judicial  
11 office and for State auditor received between 59 percent  
12 and 62 percent of the vote in the proposed district. We  
13 would respectfully submit that that comprises evidence  
14 that there is not sufficient bloc voting.

15 JUSTICE SOUTER: Well --

16 JUSTICE GINSBURG: But you stipulated. You  
17 didn't want to argue the third factor. You wanted --  
18 you just started out by saying you were tired of this  
19 litigation, we wanted to concentrate on one issue and  
20 one issue only, and that was the 50 percent rule. And  
21 now you are suggesting that, well, no, the stipulation  
22 really didn't stipulate away the third factor. I  
23 thought you were giving in on that issue so that you  
24 could get the first issue decided.

25 MR. THURMAN: Your Honor, we did make a

1 stipulation that there was evidence sufficient to  
2 support a finding and that we would stand by. There was  
3 evidence they had an expert who was willing to so  
4 testify. I was responding to Justice Souter's question  
5 of was there was evidence in the record to support the  
6 contention that there might not be bloc voting within  
7 the alternative district, and that was -- that meant  
8 that black candidates can receive in excess of 60  
9 percent of the vote in the 35 percent district.

10 JUSTICE SOUTER: But just help me on the  
11 facts, because I may have misunderstood the facts.  
12 You're saying you did not stipulate that there was bloc  
13 voting; you stipulated that there was sufficient  
14 evidence for a factfinder to find that there was bloc  
15 voting. Is that your position?

16 MR. THURMAN: Your Honor, on page 130a of  
17 the -- I believe this is their submission, the --

18 JUSTICE SCALIA: I'm sorry, what -- what's  
19 the color of the brief -- of the cover on this? Is it  
20 the brown one or the white one?

21 MR. THURMAN: I believe this is the white  
22 one, Your Honor.

23 JUSTICE SOUTER: Okay, and you're at 130?

24 JUSTICE SCALIA: 130a?

25 MR. THURMAN: Yes, Your Honor.

1 JUSTICE SOUTER: Yes.

2 MR. THURMAN: And it starts out that, in  
3 terms of the bloc voting, between the -- and the  
4 evidence presented by the defendant is sufficient to  
5 support a finding of fact that the racial difference in  
6 the presence of those results in the white majority  
7 voting is sufficient as a bloc to defeat the minority's  
8 preferred candidate. And, again, that comes down to --  
9 the court that it was Pender and New Hanover County that  
10 started the action on 29a, and that was the stipulation.  
11 And --

12 JUSTICE SOUTER: But what do you make of the  
13 -- the beginning of the next paragraph? "Plaintiffs  
14 hereby advise the court that they do not wish to be  
15 heard further or to present evidence regarding the  
16 remaining issues." Doesn't -- I'm not sure what that's  
17 getting at, but when I looked at it, I thought it meant  
18 that the stipulation can control, i.e., it may be found  
19 without objection that there is bloc voting or assumed  
20 without objection that there is bloc voting.

21 MR. THURMAN: Your Honor --

22 JUSTICE SOUTER: If you don't wish to  
23 present evidence.

24 MR. THURMAN: Your Honor, first of all, we  
25 were not stipulating that it did exist. We stipulated

1 that it was in evidence, that the court defined --

2 JUSTICE SOUTER: Yes, I realize, but when  
3 you then say "And we don't wish to present any evidence  
4 on it," it sounds to me as though you are conceding the  
5 issue.

6 MR. THURMAN: Your Honor, we do -- we let it  
7 stand on its own, we not wish to be heard further, we do  
8 not wish to take additional time on that, given the  
9 circumstances of the case.

10 The other factor that I think is perhaps  
11 most important in considering this is touched on briefly  
12 earlier. Section 2 clearly applies to all  
13 jurisdictions. And without the guidance of the 50  
14 percent rule, the bodies that are drafting are left with  
15 an uncertain standard and a standard -- in this case, so  
16 far as we know, the State had retroactive -- this Court  
17 -- had been used previously, are every local government  
18 body requires paying such an expert to proceed simply to  
19 redistrict? That, if you don't have a clear rule to  
20 follow, presents a problem for the many government  
21 bodies that have to redistrict on a regular basis.

22 JUSTICE GINSBURG: What was wrong with the  
23 clear rule that Justice Souter suggested in the LULAC  
24 case?

25 MR. THURMAN: I'm sorry, ma'am.

1 JUSTICE GINSBURG: Justice Souter, in his  
2 opinion in the LULAC case --

3 MR. THURMAN: Yes, Your Honor.

4 JUSTICE GINSBURG: -- he suggested what he  
5 called a hard-edged -- a clear, hard-edged rule which is  
6 not going to be an exclusive rule, but, anyway, if you  
7 met that standard, you're okay.

8 MR. THURMAN: Your Honor, I certainly am not  
9 criticizing the rule proposed by Justice Souter, but --

10 JUSTICE SOUTER: It's okay.

11 (Laughter.)

12 MR. THURMAN: Your Honor, I think -- the  
13 perspective -- and I can't help -- that it is not as  
14 clear-edged as it seemed to the Court, at least to  
15 Justice Souter, that the 50 percent rule does provide a  
16 very clear, very limited sort of a rule that can be  
17 followed without getting involved in -- I do believe  
18 that -- race becomes very likely the predominant factor  
19 in the redistricting decision, because based on the  
20 cases that have come before you already, there have been  
21 claims that 26 percent, 25 percent --

22 JUSTICE BREYER: I don't see how those  
23 claims could possibly succeed, but I thought -- let's go  
24 back to sort of step 1. My mind turns a little confused  
25 when I start thinking of these cases. Are we talking



1 about a case of -- where the claim is normally vote  
2 dilution? Is that yes or no?

3 MR. THURMAN: Yes, Your Honor.

4 JUSTICE BREYER: Section 2 -- does vote  
5 dilution mean we who are a minority group, let's say a  
6 black group, could have elected a candidate of our  
7 choice more likely than the white group, but because you  
8 are engaged in vote dilution, that isn't going to happen  
9 anymore? Is that the form of the claim?

10 MR. THURMAN: Yes, Your Honor, that is --

11 JUSTICE BREYER: That's the form of the  
12 claim.

13 Then, it's our problem here that to see  
14 whether that's so, you have to see whether the black  
15 group did really vote as a group. Did they used to have  
16 a good chance to elect the person they want, and does  
17 the white group tend to also vote as a group and swamp  
18 them? Is that what we are trying to find out?

19 MR. THURMAN: Your Honor, I'm not sure that  
20 is entirely what we are trying to find out, because  
21 certainly districts are created where there was no  
22 minority incumbent, and that can happen because of  
23 changes in demographics or a variety --

24 JUSTICE BREYER: There are a lot of reasons  
25 that can happen. But is the evil we are trying to get

1 at, the evil of a black group, when they stick together  
2 in polarized voting, having less of a chance of getting  
3 their candidate elected than when the white group does  
4 the same?

5 MR. THURMAN: Your Honor, I believe the  
6 answer is, yes, we are trying to prevent that from  
7 happening.

8 JUSTICE BREYER: That's what we are trying  
9 to prevent? Okay. If that's what we are trying to  
10 prevent, then haven't we learned that putting a  
11 threshold, because you can't even get in the door -- you  
12 can't even get in the door -- unless the black group  
13 accounted for 50 percent of something, the voters or the  
14 people who turn out, that that doesn't make much sense  
15 for the reason that Justice Scalia started with. It  
16 doesn't make much sense because sometimes they account  
17 for 51 percent, but they can't elect anybody, because  
18 they all divide on four different people, or maybe they  
19 didn't turn out. On the other hand, sometimes if they  
20 account for 43 percent, they could elect the candidate  
21 of their choice. So it looks as if that 50 percent is  
22 pretty arbitrary and we're looking for a better  
23 criterion. Is there anything wrong with what I've said  
24 so far?

25 MR. THURMAN: Respectfully, Your Honor, I

1 believe there is, because you said you look to see if  
2 there is vote dilution. Well, there needs to be  
3 something to measure that by. Section 5 is about  
4 retrogression.

5 JUSTICE BREYER: Here what we've -- could we  
6 look to see whether the three Gingles factors, whatever  
7 they are -- one was, is the black group numerous enough  
8 to elect the candidates of their choice? Reasonably  
9 compact, politically cohesive? And then you look to  
10 see, does the white group tend to vote as a bloc to stop  
11 them?

12 MR. THURMAN: Yes, Your Honor.

13 JUSTICE BREYER: That's what we should do?

14 MR. THURMAN: Your Honor --

15 JUSTICE BREYER: Then I'm back to my  
16 problem, that sometimes the 50 percent criteria just  
17 doesn't measure that first part. And so you say, well,  
18 any other matter would be worse, but I bet we could  
19 invent some that were actually better. Suppose you  
20 wouldn't have to go to 20 percent; suppose, for example,  
21 you started looking in the 40 percents, and you said,  
22 you know, if the black group is going to elect their  
23 candidate with 40 percent, or 45 percent even, they're  
24 going to need a lot of crossovers, because they may only  
25 vote -- you know, only 80 percent may turn out. They

1 are going to need a lot of crossovers. And the more  
2 crossovers you have to have, the harder it is to say  
3 that that white group is out there trying to beat them.

4           So there's a kind of natural stopping place.  
5 When I worked out the numbers, it seemed that natural  
6 stopping place fell around 42-43 percent. It sort of  
7 fell -- as you said, that the black group -- you insist  
8 that the black group had to be twice as many as the  
9 white group that crossed over. A little arbitrary, but  
10 at least we were getting to the same -- to the right  
11 thing. I mean -- respond as you wish.

12           MR. THURMAN: Thank you, Your Honor. It may  
13 take me a second to take it all in. It seems to me that  
14 the reason the 50 percent rule does work is, at 50  
15 percent, there is a claim that there is the opportunity  
16 and there is voter registration, voter turnout, a lot of  
17 factors that can influence at that point, but that  
18 doesn't prevent there from being opportunity. That's  
19 the choice of whatever group is involved. You start  
20 dropping below 50 percent, and then they're not being  
21 denied an equal opportunity. They have the same  
22 opportunity any other group does. This would require  
23 trying to -- because what -- basically the Petitioner's  
24 position is -- the State in its -- position is, it takes  
25 a minority group, and then you find presumably another

1 majority group that shares political and partisan goals  
2 with them, and you combine those two together. So you  
3 look not only to the race of one group -- that  
4 predominates first. Then you go find like-minded  
5 members of the majority group to join with them. And so  
6 that is what is being required. At that point you are  
7 not talking about them being treated less equal than  
8 anyone else.

9 JUSTICE STEVENS: Mr. Thurman, can I ask you  
10 this question? It seems to me that a rigid 51 percent  
11 rule assumes that the minority communities throughout  
12 the country are all alike, and that there is enough  
13 variety in every district and every part of the country  
14 where we have this problem. There are variations.  
15 Maybe 51 percent would not be enough. The minority  
16 group might, itself, be divided as is often the case.

17 I -- I think the underlying premise -- the  
18 underlying -- the premise underlying your argument is  
19 that all minorities are exactly alike. That's why we  
20 can have this mathematical figure, and that answers the  
21 question.

22 MR. THURMAN: Your Honor, I categorically  
23 reject that as a human-rights basis for our argument.  
24 That is handled by the third Gingles prong and the  
25 second Gingles prong. And when you look at what the

1 coalition is, what it is, and you look at how  
2 politically cohesive it is. So it could be that 50  
3 percent is arguably not enough under the second Gingles  
4 provision.

5 But that until you get to 50 percent, you  
6 are -- again, it is the way it has been described as a  
7 gate-keeping function for us to keep the Court out of  
8 it. And it is going to -- if this happens, you start  
9 looking at combining a combination of race or other  
10 minority status and partisan politics and combining them  
11 together for the purpose of electing particular  
12 candidates. And I do not believe it's ever been  
13 something that this Court has endorsed for the purpose  
14 of the Voting Rights Act. And if that is the position  
15 it takes, it starts to run into the issue: Is such  
16 supportable under the Solomon case, under equal  
17 protection?

18 JUSTICE GINSBURG: What -- what  
19 Justice Breyer proposed a rule at the end of his  
20 question. He said: Suppose you make it, the threshold,  
21 instead of 50 percent, it would be twice as many in the  
22 African-American population as in the crossover group.  
23 That would be the threshold.

24 MR. THURMAN: But, Your Honor, first, I  
25 believe as he said, as Justice Breyer said, that's an

1 arbitrary number that he picked up on, the 50 percent.  
2 The reason we would submit that is not simply an  
3 arbitrary number is that it does deal with them. At  
4 that point there is an opportunity, regardless of  
5 whether there is the -- what it certainly does not  
6 exist --

7 JUSTICE SOUTER: But -- but you are saying  
8 it's an opportunity, and what you mean is it is  
9 sufficient to provide an opportunity. And  
10 Justice Breyer's question is: Isn't the two-to-one  
11 ratio something that we should consider as also being  
12 sufficient to provide an opportunity?

13 MR. THURMAN: Your Honor, I would say that  
14 that would not be appropriate, because at that point you  
15 are looking on -- at the basis of race to give one group  
16 a greater opportunity than another, and the Voting  
17 Rights Act is the one group being given less opportunity  
18 than another. And so if you are hinting to draw a  
19 district that bases itself on race, that attempts to  
20 give one group --

21 JUSTICE SOUTER: Well, it's -- it's a  
22 greater opportunity than -- than would be given to them  
23 in -- in the district or a pair of districts that splits  
24 the minority population in half. But how is it in some  
25 abstract sense a greater opportunity?

1 MR. THURMAN: Your Honor --

2 JUSTICE SOUTER: The opportunities are --  
3 are measured on the ground, not in the abstract.

4 MR. THURMAN: Your Honor, my answer to that  
5 would be that the -- what would be proposed is it is  
6 required. It is no longer left up to the legislature to  
7 decide whether that is appropriate. And that since it  
8 is a requirement, that is not part of the political  
9 process; and it goes to whether that is -- they are no  
10 longer looking to what they have left, but whether they  
11 are, in fact, given more.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Joseffer?

14 ORAL ARGUMENT OF DARYL JOSEFFER

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURAE,

17 SUPPORTING THE RESPONDENTS

18 MR. JOSEFFER: Mr. Chief Justice, and may it  
19 please the Court:

20 Petitioner has proposed expansion of section  
21 2's traditional coverage because of three serious  
22 problems. The first is to provide State and local  
23 legislatures, as well as the courts, with a baseline  
24 against which to when a section 2 District must be drawn  
25 in the first place, when to engage in this race-



1 conscious exercise in the first place.

2 Second, it raises the serious Constitutional  
3 concerns identified in LULAC, especially because it  
4 combines not only racial gerrymandering but with  
5 political-party gerrymandering all at the same time.

6 And third, it requires difficult predictive  
7 judgments about how people would react, how people would  
8 vote in a future proposed district, something that is  
9 not required under the traditional Gingles analysis.

10 And these problems would exist nationwide  
11 because section 2 applies to every districting done in  
12 every jurisdiction and every -- nationwide, be it a  
13 county, city, or locality or down to the school-board or  
14 city-council level.

15 Now, under the first of those points, under  
16 the traditional Gingles test, the scope of consideration  
17 of race and other things, as well as the majority limit  
18 of the districts -- and that provides an -- an easy  
19 focal point that anyone drawing a district knows.

20 JUSTICE GINSBURG: I thought you were  
21 conceding that it isn't a rigid rule, and that the North  
22 Carolina Supreme Court should have to be -- I mean they  
23 could be 48 percent, I think you said.

24 MR. JOSEFFER: We have identified two  
25 narrow exceptions, neither of which the Court really

1 needs to reach in this case. The first is an inference  
2 of intentional discrimination. And the important thing  
3 there is, first, that's academic. Because if you can  
4 prove intentional discrimination, you can proceed with a  
5 constitutional claim under section 2 and not add  
6 anything anyway.

7 JUSTICE KENNEDY: Intentional by those who  
8 draw the district?

9 MR. JOSEFFER: Yes, exactly. And there --  
10 the point here is because it's not an actualization  
11 statute, one needs a baseline to determine if there is  
12 the denial of an equal opportunity to elect. And if, in  
13 fact, what the people drawing the district were trying  
14 to do was to deprive the minority group of that  
15 opportunity, that is a perfectly good alternative  
16 baseline.

17 Our other proposed narrow exception, which  
18 also is not even close to being implicated here, is  
19 basically an evidentiary one: That there are those  
20 cases where, when you are trying to figure out whether  
21 the majority population is above 50 percent, you may not  
22 be sure because these are estimates. They are very  
23 reliable, but we would impose about a two percent  
24 cushion there to adjust -- to account for the  
25 possibility that if there is that much evidentiary

1     uncertainty, it makes sense to have a -- for purposes of  
2     that test.  However --

3                 JUSTICE SOUTER:  I don't know if you  
4     litigate whether you are -- whether you are really  
5     talking about a -- a possible two percent variation.  So  
6     that I mean, I -- I think you have to concede under your  
7     -- under your test that there's going to be more  
8     litigation.  There is going to be more claims than there  
9     are under a 50 percent rule.

10                MR. JOSEFFER:  Well, because -- I say  
11     actually the opposite because -- well, I think that  
12     trying to determine 48percent raises no more difficulty  
13     than trying to determine 50 percent.

14                JUSTICE SOUTER:  Except that you have a  
15     better chance so you are more likely to do it.

16                MR. JOSEFFER:  There is -- there is a slight  
17     narrowing of the -- of the --

18                JUSTICE SOUTER:  Two percent is pretty big  
19     in an election.

20                MR. JOSEFFER:  Well, in -- in practice -- I  
21     mean, remember, the majority-minority rule has been  
22     followed in almost every jurisdiction nationwide for  
23     more than two decades, and so far I have seen one 48  
24     percent case.  There may have been others, but there --  
25     there don't seem to have been very many.

1 JUSTICE BREYER: If you want an absolute,  
2 arbitrary rule, which is what you were heading toward  
3 which will just -- the question is whether they get in  
4 the door. If they are in the door, they have to prove  
5 the three factors. And you want to keep certain people  
6 out.

7 Okay. Suppose you say, well, 42 percent.  
8 That gives you down to 40, with your two back, instead  
9 of 50. But you are out anyway if the crossover vote  
10 from the white majority is more than half of what the  
11 whole vote is with the black and white together on that  
12 side. So you have a two-to-one ratio.

13 Now, the only virtue of that is that there  
14 was an effort to try to get an arbitrary rule, which you  
15 have with your 50 percent, even -- only a little bit  
16 more difficult than that to -- to administer, and is  
17 likely to get in more cases that are justified. But  
18 they still have to prove their three factors.

19 MR. JOSEFFER: Well, there -- there are a  
20 couple of things. The first is that, textually  
21 speaking, what the statute refers to is an equal  
22 opportunity to elect the -- the representative of their  
23 choice. And at least the most principal blind is the  
24 majority-minority rule. Because if you have by  
25 yourselves the majority of the electorate, you have at

1 least in theory the opportunity to elect the  
2 representative of your choice. When you go beyond that,  
3 there really is at that point --

4 JUSTICE BREYER: It takes into account the  
5 realistic fact that in every group, including lots of  
6 African-American groups, there is -- it is not  
7 100 percent African American at all. There are -- there  
8 are a few others who will come along, and -- and that's  
9 still the candidate of that community's choice.

10 MR. JOSEFFER: Right. But that's --

11 JUSTICE BREYER: So we want -- a little  
12 flexibility here is all that I'm suggesting.

13 MR. JOSEFFER: Yes. The problem is once you  
14 go below what is at least in principle a 50 percent  
15 line, it's not clear where -- where one would ever stop.  
16 And under your approach, I think two exceptions: One,  
17 you definitely open the door down to potentially below  
18 42, especially -- in this case, especially --

19 JUSTICE BREYER: You can't get below 42.  
20 I'm not going to get below 40 no matter what, even with  
21 your thumb on the scale.

22 MR. JOSEFFER: I mean --

23 JUSTICE BREYER: They are -- they are  
24 finished at 40, and they are not even in at 40, if they  
25 have to depend more than two-to-one on the crossovers.

1                   MR. JOSEFFER: One problem with what you are  
2 looking for is a principle rule that can be justified.  
3 I understand 50, and I understand the slight evidentiary  
4 cushion. Forty-two really does -- from what you're  
5 trying to determine is now the equal opportunity to be  
6 coming out of nowhere.

7                   The other advantage the 50 percent rule has  
8 is the advantages of incumbency. In effect, it has been  
9 a case that has been litigated for more than two  
10 decades. And that has shown that, first, that it's  
11 workable; and second, that it does not appear to have  
12 left some gaping hole of section 2's coverage. If it  
13 had, Congress likely would have -- statute over the past  
14 two decades.

15                  And the other thing -- I'm sorry.

16                  JUSTICE KENNEDY: I won -- I'd hoped that  
17 you could have a brief time to discuss your third  
18 rationale because it's going to require determination of  
19 how people would vote.

20                  MR. JOSEFFER: Under Gingles one typically  
21 looks at what actually happened in the past. The third  
22 Gingles factor looks, for example, looks to whether  
23 white bloc voting in actual elections has generally been  
24 sufficient to prevent the election of minority group's  
25 candidate of choice in the past. So, it's a

1 straightforward historic-based inquiry.

2 Here, however, the state or local  
3 legislature at the outset looking to trade a new  
4 district based on the prediction that it will elect the  
5 minority group's candidate of choice.

6 So, as a practical matter, you start with  
7 the racial makeup of some people and the political  
8 partisanship of others. But you can't stop there,  
9 because you have to predict turnout by each group,  
10 crossover voting by each group.

11 As a practical matter, those things will  
12 vary based on who the candidates are, whether there is  
13 an incumbent, whether the incumbent is the minority  
14 group's candidate of choice. And especially in local  
15 elections, the -- may not even be available, which was a  
16 point that was made in the topside amicus brief filed by  
17 the Lawyers' Committee for Civil Rights, the NAACP Legal  
18 Defense Fund and others.

19 If I could turn to the Constitutional --  
20 point. In that perspective, this proposal is really the  
21 worst of all worlds, because the way you construct a  
22 district is to take some people based on race, others  
23 based on political party affiliation, and the race can't  
24 dominate and the majority of courts have also held  
25 purely partisan gerrymandering, at least -- aside is

1 also unconstitutional.

2 But this is both. What you have is  
3 nationwide in every jurisdiction, every districting a  
4 mandate that requires consideration for both race and  
5 partisanship that goes far beyond what has traditionally  
6 been required under section 2 and I suspected far beyond  
7 what normally happens at the local level.

8 CHIEF JUSTICE ROBERTS: Do you have a view  
9 on how we should approach the stipulation adopted below?

10 MR. JOSEFFER: I think the easy way to cut  
11 through is that a state Supreme Court respond and remand  
12 all arguments other than the first Gingles factor. So,  
13 the first Gingles factor, based on what happened in the  
14 state Supreme Court is the only thing that is before the  
15 Court.

16 What would remain potentially unremand is if  
17 this Court were to would ban the traditional  
18 understanding of the first Gingles factor and impose a  
19 new understanding. Then the adjudication of that might  
20 be open on remand. But Respondents have remanded  
21 everything else in the state Supreme Court.

22 Finally, I also can't help but mention that  
23 there is a great irony here in that Petitioners'  
24 essential position is that back when race relations were  
25 worse and back when there's much more racial bloc



1 voting, minority-majority districts worked okay.

2 But now that race relations have improved  
3 and there is much more crossover voting, we should now  
4 require greater consideration of race as well as  
5 partisanship than had ever been done before under the  
6 same unamended statute.

7 And if I could turn -- Justice's -- at the  
8 outset, a state or local legislature as well as the  
9 court really doesn't know where to start. State and  
10 local legislatures are the ones who are supposed to be  
11 drawing these lines. That means they need to be clear  
12 administrable rules to follow. And the simpler they  
13 are, the better the chance we will have to do it, and if  
14 they can figure it out at the outset, the less  
15 consideration of race and partisanship becomes  
16 necessary.

17 And the 50 percent rule, as a practical  
18 matter, has worked for a couple of decades in this  
19 respect. And if one goes beyond that, there is also no  
20 principle stopping point. Here's 39 percent, which  
21 doesn't seem close to me or under Justice Breyer's  
22 rationale --

23 JUSTICE STEVENS: You mention how well it  
24 worked. Did you see the graphs -- one of Amicus briefs  
25 have the graph showing what the 50 percent rule did for

1 one gerrymander and how the lesser percentage worked  
2 out -- remember which were much more -- not using the 50  
3 percent rule produced much more compact districts?

4 MR. JOSEFFER: There are two things about  
5 the graphs. The first is that less compact maps --  
6 those were the districts that would determine the  
7 unconstitutional.

8 JUSTICE STEVENS: But they were designed to  
9 produce 50 percent, and that's why they got so -- so --  
10 so grotesque.

11 MR. JOSEFFER: Right. Another thing there  
12 seems to be a common misconception that our view of  
13 section 2 prohibits the drafting of crossover districts,  
14 which is not case of all.

15 The question here is what if it is required.  
16 If a district -- if a jurisdiction wants to draw a  
17 crossover district, then at least in principle nothing  
18 is stopping it from doing so. However, if what you were  
19 to do was require the drawing these crossover districts,  
20 that could create some funny maps of its own, because if  
21 you have to reach out to grab jurisdiction wide, look at  
22 every significant pocket of minority voters, look at  
23 whatever you could put together that would vote alike,  
24 which as a practical matter is the same political party,  
25 then you are going to be requiring the same dynamics

1     that led to those very strange maps in the -- in the  
2     first place.

3                   CHIEF JUSTICE ROBERTS:   Thank you Mr.  
4     Joseffer.

5                   Mr. Browning, you have four minutes  
6     remaining.

7                   REBUTTAL ARGUMENT OF CHRISTOPHER G. BROWNING

8                   ON BEHALF OF THE PETITIONERS

9                   MR. BROWNING:   Thank you, Mr. Chief Justice.

10                   Let me start first of all with  
11     Justice Breyer's question about the arbitrary nature of  
12     the 50 percent rule.   The 50 percent rule, let there be  
13     no doubt, is extremely arbitrary, even under the  
14     government's 2 percent cushion.

15                   What would happen is you have a district  
16     that is 40 percent -- 46 percent African American, that  
17     district could be freely carved off into two districts  
18     of 23 percent each, neither of which would provide an  
19     equal opportunity to elect.   Even when you are in a  
20     situation like this case, where the district is actually  
21     functioning and has a proven ability to elect a minority  
22     preferred candidate.   Moreover --

23                   JUSTICE ALITO:   Wouldn't Justice Breyer's 40  
24     percent rule be just as arbitrary?

25                   MR. BROWNING:   Justice Alito, it is

1 important to recognize that there are significant  
2 districts that are out there that would not be protected  
3 under the 50 percent rule. And I understand the Court's  
4 desire to have some sort of limitation on the size of  
5 the district. We believe it is already in there, in  
6 place as a result of the LULAC decision.

7 It's in place because in North Carolina, as  
8 a practical matter, you can't go much below 40 percent  
9 and have a district that will actually work.

10 JUSTICE GINSBURG: But this -- but yours is  
11 below? Just slightly below.

12 MR. BROWNING: The voting age population is  
13 39.36 percent based upon the census data. The  
14 government wants to use a 2 percent cushion as their  
15 threshold. But there is some significant problems with  
16 that, because when you look at the overcount of white  
17 voters, the Census Bureau recognizes the lower count is  
18 basically 2 percent there in and of itself, then there  
19 are some undercounted black voters is a 1 percent  
20 undercount. So even a 48 percent doesn't even get  
21 anywhere close.

22 Moreover, you have districts where there are  
23 a number of eligible -- number of people that are  
24 counted in the census that are not truly eligible to  
25 vote. That is reflected in the brief by the States at

1 page 28 in footnote 2. The States make the point that  
2 there are many districts where we have military bases,  
3 we have colleges that cause this to be an extremely  
4 arbitrary rule.

5 And in North Carolina there are districts  
6 where once you remove the military base where most of  
7 the population will not be voting in that district,  
8 there is a shift of even 12 percent in the minority  
9 voting age population increasing by 12 percent once you  
10 just remove the military bases from the equation.

11 JUSTICE BREYER: The rule I suggested,  
12 though there are arbitrary aspects is a better targeted,  
13 more administrable -- or equally administrable or not  
14 much worse administrable arbitrary rule.

15 MR. BROWNING: Justice Breyer, in our view  
16 the rule that should be applied is consistent with the  
17 rule of LULAC, that the minority group is substantially  
18 larger than its coalition partner.

19 Here the minority group is 39.36 percent  
20 African American. It only requires an additional  
21 roughly 11 percent white crossover voting. So the white  
22 crossover voting that is needed is only a third of the  
23 size of the minority group.

24 JUSTICE BREYER: There must be somebody  
25 there to get you over 50 percent.

1 MR. BROWNING: I'm sorry?

2 JUSTICE BREYER: Thirty-three plus 11 is 44.  
3 So where does the rest come from?

4 MR. BROWNING: Your Honor, this district is  
5 39.36 percent African American.

6 JUSTICE BREYER: That's 40, and then -- oh,  
7 I see, 39 plus 11.

8 MR. BROWNING: And you need 11 percent  
9 crossover voting, 11 percent of the electorate --

10 JUSTICE BREYER: If they vote cohesively.

11 MR. BROWNING: Yes, Your Honor. Here the  
12 minority group, the expert's testimony is that they do  
13 vote cohesively.

14 CHIEF JUSTICE ROBERTS: But it's a necessary  
15 predicate to his very question that the majority group,  
16 the white group does not vote cohesively. Under your  
17 hypothetical at least 11 percent have to swing over.

18 MR. BROWNING: The -- the white vote does  
19 not vote 100 percent cohesively. But it is still at  
20 such high levels, there is only a limited amount of  
21 crossover voting. It is still very racially polarized.  
22 And if district lines are not taken into account, the --  
23 the votes of black voters in the district will be  
24 drowned out by the white voters that are voting against  
25 that minority candidate simply because that candidate is

1 a minority.

2 There is some crossover voting, but not  
3 enough to make the -- for us to lose on the third  
4 Gingles prong.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 The case is submitted.

7 (Whereupon, at 11:07 a.m., the case in the  
8 above-entitled matter was submitted.)

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