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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Browning.

ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

ON BEHALF OF THE PETITIONERS

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

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

CHIEF JUSTICE ROBERTS: How can you say that this brings us closer to a situation where race will not 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 shaping 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 works --

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

1 much crossover voting would be so large as to make a
2 difference? You can't say where the line is
3 statistically?

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

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

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

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

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

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

1 one.

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

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

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

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

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

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

1 possibility?

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

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

6 MR. BROWNING: Yes, Your Honor.

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

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

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

14 (Laughter.)

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

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

25 MR. BROWNING: 40 percent is a high number,

1 and particularly --

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

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

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

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

24 The practical limitation, of course, is in
25 North Carolina, given what has happened in past

1 elections, the North Carolina General Assembly
2 appropriately concluded that a minority group of less
3 than 40 percent would simply not work, that it would not
4 be effective to give rise to a minority -- a district in
5 which minorities could elect a minority-preferred
6 candidate.

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

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

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

24 MR. BROWNING: Your Honor, our position is
25 that the -- assuming all of the factors under Gingles

1 could be met, that if you have a minority group that was
2 packed in to a -- one district, and in its place two
3 coalition districts could be effectively drawn, and
4 those districts would actually work and you could meet
5 all of the other standards under Gingles -- the district
6 was geographically compact, there is --

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

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

16 JUSTICE SOUTER: Aren't you adopting the
17 principle of maximization?

18 MR. BROWNING: No, Your Honor.

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

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

11 Am I wrong?

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

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

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

25 JUSTICE SOUTER: It needs to consider it,

1 but I thought your answer was it needs to do it. Is
2 that your answer?

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

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

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

20 JUSTICE SCALIA: Well, we -- what you
21 propose is going to inject courts into the drawing of
22 districts much more frequently than they -- than they
23 already are injected. The reality is that one of the
24 factors -- you mentioned contiguousness and county lines
25 and so forth, but one of the factors that legislators

1 always take into account is incumbent protection and the
2 incumbent is always going to rather be in an 80 percent
3 district than in a so-called 40 percent coalition
4 district.

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

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

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

25 MR. BROWNING: Well, Your Honor, and that's

1 the very point of the section 2 of the Voting Rights
2 Act, is when minorities do not have an equal opportunity
3 to elect their candidate of choice, where they are
4 packed in to districts --

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

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

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

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

1 of the county, from whites in the northern portion of
2 the county.

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

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

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

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

1 valid State law principle.

2 Now, it may or may not be superseded by
3 the -- by the requirement of section 2. That's what we
4 are arguing about. But this is the first time I have
5 heard that we have to somehow question the underlying
6 State rule under the Fourteenth Amendment.

7 I thought we took the case on the assumption
8 that the State rule is valid.

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

13 JUSTICE KENNEDY: I'm talking about the
14 county line rule.

15 MR. BROWNING: Yes, Your Honor, that the
16 county line rule -- the North Carolina Supreme Court
17 concluded that this district could not cut county lines
18 because this should not be treated as a section
19 2 district.

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

25 Where the assumption is that you have a

1 significant degree of crossover voting, is that really a
2 difference worth changing the Voting Rights Act
3 jurisprudence for?

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

13 CHIEF JUSTICE ROBERTS: What do you mean by
14 "workable"?

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

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

23 MR. BROWNING: Well, it is a matter of the
24 percentage of voting age population, but more
25 importantly, the district they drew would have put a

1 black incumbent, a black Democrat incumbent, in the same
2 district with a white Republican incumbent. And if they
3 were serious about --

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

6 MR. BROWNING: Yes.

7 CHIEF JUSTICE ROBERTS: -- that this is
8 designed to protect incumbents.

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

15 JUSTICE GINSBURG: Mr. Browning, I thought
16 there was something in the record that said never in
17 North Carolina's history have you had African Americans
18 able to choose the -- able to elect the candidate of
19 their choice where the minority population was less than
20 38.37 percent.

21 MR. BROWNING: Justice Ginsburg, there are
22 districts such as Wake County, the seat of government,
23 where a minority has been elected with less than 38
24 percent. But in areas of the State where there is
25 highly racially polarized voting, 38 percent roughly is

1 the effective floor that the General Assembly recognized
2 as being workable for creating a district such as this.
3 I will also note that this issue was not presented to
4 the North Carolina Supreme Court, the issue of whether
5 there is an alternative district that would somehow be
6 feasible and workable.

7 JUSTICE GINSBURG: Well, the government
8 proposed that if you succeed, we should remand on that
9 question.

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

20 And for that reason alone the decision should be reversed.

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

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

25 Mr. Thurman.

1 ORAL ARGUMENT OF CARL W. THURMAN, III,
2 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

1 maximization?

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

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

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

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

1 MR. THURMAN: Your Honor, I think that is
2 absolutely true.

3 JUSTICE SOUTER: Okay.

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

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

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

24 MR. THURMAN: I agree, Your Honor. The
25 other point that I would point out is, it was not a

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

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

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

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

1 MR. THURMAN: Your Honor, I would
2 respectfully submit that it does not follow within a
3 particular section of a district. I think we all --

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

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

16 JUSTICE SOUTER: Well --

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

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

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

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

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

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

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

25 JUSTICE SCALIA: 130a?

1 MR. THURMAN: Yes, Your Honor.

2 JUSTICE SOUTER: Yes.

3 MR. THURMAN: And it starts out that, in
4 terms of the bloc voting, between the -- and the
5 evidence presented by the defendants is sufficient to
6 support a finding of fact that the racial difference in
7 the preference of voters results in the white majority
8 voting sufficiently as a bloc to usually enable it to
9 defeat the minority's preferred candidate. And, again,
10 that comes down from the top of the paragraph -- not to
11 read the entire thing to the court -- that it was Pender
12 and New Hanover County that started the action on 29a, and
13 that was the stipulation. And --

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

23 MR. THURMAN: Your Honor --

24 JUSTICE SOUTER: If you don't wish to
25 present evidence.

1 MR. THURMAN: Your Honor, first of all, we
2 were not stipulating that it did exist. We stipulated
3 that they presented evidence, that the court defined --

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

8 MR. THURMAN: Your Honor, we didn't -- we
9 believe it stands on its own, we did not wish to be heard
10 further, we do not wish to take additional time on that,
11 given the circumstances of the case.

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

24 JUSTICE GINSBURG: What was wrong with the
25 clear rule that Justice Souter suggested in the LULAC

1 case?

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

3 JUSTICE GINSBURG: Justice Souter, in his
4 opinion in the LULAC case --

5 MR. THURMAN: Yes, Your Honor.

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

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

12 JUSTICE SOUTER: It's okay.

13 (Laughter.)

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

25 JUSTICE BREYER: I don't see how those

1 claims could possibly succeed, but I thought -- let's go
2 back to sort of step 1. My mind turns a little confused
3 when I start thinking of these cases. Are we talking
4 about a case of -- where the claim is normally vote
5 dilution? Is that yes or no?

6 MR. THURMAN: Yes, Your Honor.

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

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

14 JUSTICE BREYER: That's the form of the
15 claim.

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

22 MR. THURMAN: Your Honor, I'm not sure that
23 is entirely what we are trying to find out, because
24 certainly districts are created where there was no
25 minority incumbent, and that can happen because of

1 changes in demographics or a variety --

2 JUSTICE BREYER: There are a lot of reasons
3 it can happen. But is the evil we are trying to get
4 at, the evil of a black group, when they stick together
5 in polarized voting, having less of a chance of getting
6 their candidate elected than when the white group does
7 the same?

8 MR. THURMAN: Your Honor, I believe the
9 answer is, yes, we are trying to prevent that from
10 happening.

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

1 criterion. Is there anything wrong with what I've said
2 so far?

3 MR. THURMAN: Respectfully, Your Honor, I
4 believe there is, because you said you look to see if
5 there is vote dilution. Well, there needs to be
6 something to measure that by. Section 5 is about
7 retrogression.

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

15 MR. THURMAN: Yes, Your Honor.

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

17 MR. THURMAN: Your Honor --

18 JUSTICE BREYER: Then I'm back to my
19 problem, that sometimes the 50 percent criteria just
20 doesn't measure that first part. And so you say, well,
21 any other matter would be worse, but I bet we could
22 invent some that were actually better. Suppose you
23 wouldn't have to go to 20 percent; suppose, for example,
24 you started looking in the 40 percents, and you said,
25 you know, if the black group is going to elect the

1 candidate of their choice with 40 percent, or 45 percent,
2 they're going to need a lot of crossovers, because they
3 may only vote -- you know, only 80 percent may turn out.
4 They are going to need a lot of crossovers. And the more
5 crossovers you have to have, the harder it is to say
6 that that white group is out there trying to beat them.

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

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

1 trying to -- because what -- basically the Petitioner's
2 position is -- the State in its -- position is, you take
3 a minority group, and then you find presumably another
4 majority group that shares political and partisan goals
5 with them, and you combine those two together. So you
6 look not only to the race of one group -- that
7 predominates first. Then you go find like-minded
8 members of the majority group to join with them. And so
9 that is what is being required. At that point you are
10 not talking about them being treated less equal than
11 anyone else.

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

21 I -- I think the underlying premise -- the
22 underlying -- the premise underlying your argument is
23 that all minorities are exactly alike. That's why we
24 can have this mathematical figure, and that answers the
25 question.

1 MR. THURMAN: Your Honor, I categorically
2 reject that as a human-rights basis for our argument.
3 That is handled by the third Gingles prong and the
4 second Gingles prong. And when you look at what the
5 coalition is, what it is, and you look at how
6 politically cohesive it is. So it could be that 50
7 percent is arguably not enough under the second Gingles
8 provision.

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

22 JUSTICE GINSBURG: What -- what
23 Justice Breyer proposed a rule at the end of his
24 question. He said: Suppose you make it, the threshold,
25 instead of 50 percent, it would be twice as many in the

1 African-American population as in the crossover group.
2 That would be the threshold.

3 MR. THURMAN: But, Your Honor, first, I
4 believe as he said, as Justice Breyer said, that's an
5 arbitrary number that he picked up on, the 50 percent.
6 The reason we would submit that is not simply an
7 arbitrary number is that it does deal with them. At
8 that point there is an opportunity, regardless of
9 whether there is the -- what it certainly does not
10 exist --

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

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

25 JUSTICE SOUTER: Well, it's -- it's a

1 greater opportunity than -- than would be given to them
2 in -- in the district or a pair of districts that splits
3 the minority population in half. But how is it in some
4 abstract sense a greater opportunity?

5 MR. THURMAN: Your Honor --

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Joseffer.

18 ORAL ARGUMENT OF DARYL JOSEFFER
19 ON BEHALF OF THE UNITED STATES,
20 AS AMICUS CURAE,
21 SUPPORTING THE RESPONDENTS

22 MR. JOSEFFER: Mr. Chief Justice, and may it
23 please the Court:

24 Petitioner has proposed expansion of section
25 2's traditional coverage because of three serious

1 problems. The first is to provide State and local
2 legislatures, as well as the courts, with a baseline
3 against which to when a section 2 District must be drawn
4 in the first place, when to engage in this race-
5 conscious exercise in the first place.

6 Second, it raises the serious Constitutional
7 concerns identified in LULAC, especially because it
8 combines not only racial gerrymandering but with
9 political-party gerrymandering all at the same time.

10 And third, it requires difficult predictive
11 judgments about how people would react, how people would
12 vote in a future proposed district, something that is
13 not required under the traditional Gingles analysis.

14 And these problems would exist nationwide
15 because section 2 applies to every districting done in
16 every jurisdiction at every level nationwide, be it a
17 county, city, or locality or down to the school-board or
18 city-council level.

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

24 JUSTICE GINSBURG: I thought you were
25 conceding that it isn't a rigid rule, and that the North

1 Carolina Supreme Court should have to be -- I mean they
2 could be 48 percent, I think you said.

3 MR. JOSEFFER: We have identified two
4 narrow exceptions, neither of which the Court really
5 needs to reach in this case. The first is an inference
6 of intentional discrimination. And the important thing
7 there is, first, that's academic. Because if you can
8 prove intentional discrimination, you can proceed with a
9 constitutional claim under section 2 and not add
10 anything anyway.

11 JUSTICE KENNEDY: Intentional by those who
12 draw the district?

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

21 Our other proposed narrow exception, which
22 also is not even close to being implicated here, is
23 basically an evidentiary one: That there are close
24 cases where, when you are trying to figure out whether
25 the minority population is above 50 percent, you may not

1 be sure because these are estimates. They are very
2 reliable, but we would impose about a two percent
3 cushion there to we'd say a 48 percent rule to adjust
4 -- to account for the possibility that if there is that
5 much evidentiary uncertainty, it makes sense to say that
6 the essential tie goes to the plaintiff -- for purposes
7 of that test. However --

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

15 MR. JOSEFFER: Well, because -- I say
16 actually the opposite because -- trying to determine 48
17 percent raises no more difficulty than trying to
18 determine 50 percent.

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

21 MR. JOSEFFER: There is -- there is a slight
22 narrowing of the -- of the --

23 JUSTICE SOUTER: Two percent is pretty big
24 in an election.

25 MR. JOSEFFER: Well, in -- in practice -- I

1 mean, remember, the majority-minority rule has been
2 followed in almost every jurisdiction nationwide for
3 more than two decades, and so far I have seen one 48
4 percent case. There may have been others, but there --
5 there don't seem to have been very many.

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

12 Okay. Suppose you say, well, 42 percent.
13 That gives you down to 40, with your two thing, instead
14 of 50. But you are out anyway if the crossover vote
15 from the white part is more than half of what the
16 whole vote is with the black and white together on that
17 side. So you have a two-to-one ratio.

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

24 MR. JOSEFFER: Well, there -- there are a
25 couple of things. The first is that, textually

1 speaking, what the statute refers to is an equal
2 opportunity to elect the -- the representative of their
3 choice. And at least the most principal blind is the
4 majority-minority rule. Because if you have by
5 yourselves the majority of the electorate, you have at
6 least in theory the opportunity to elect the
7 representative of your choice. When you go beyond that,
8 there really is at that point --

9 JUSTICE BREYER: It takes into account the
10 realistic fact that in every group, including lots of
11 African-American groups, there is -- it is not
12 100 percent African American at all. There are -- there
13 are a few others who will come along, and -- and that's
14 still the candidate of that community's choice.

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

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

18 MR. JOSEFFER: Yes. The problem is once you
19 go below what is at least a principled 50 percent
20 line, it's not clear where -- where one would ever stop.
21 And under your approach, I think two exceptions: One,
22 you definitely open the door down to potentially below
23 42, especially -- in this case, especially --

24 JUSTICE BREYER: You can't get below 42.
25 I'm not going to get below 40 no matter what, even with

1 your thumb on the scale.

2 MR. JOSEFFER: I mean --

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

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

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

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

21 JUSTICE KENNEDY: I'd hoped that
22 you could have a brief time to discuss your third
23 rationale because it's going to require determination of
24 how people would vote.

25 MR. JOSEFFER: Under Gingles one typically

1 looks at what actually happened in the past. The third
2 Gingles factor looks, for example, to whether
3 white bloc voting in actual elections has generally been
4 sufficient to prevent the election of the minority
5 group's candidate of choice in the past. So, it's a
6 straightforward historic-based inquiry.

7 Here, however, the state or local
8 legislature at the outset is looking to trade a new
9 district based on the prediction that it will elect the
10 minority group's candidate of choice.

11 So, as a practical matter, you start with
12 the racial makeup of some people and the political
13 partisanship of others. But you can't stop there,
14 because you then have to predict turnout by each
15 group, crossover voting by each group.

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

24 If I could also turn to the Constitutional
25 avoidance point. In that perspective, this proposal is

1 really the worst of all worlds, because the way you
2 construct a district is to take some people based on race,
3 others based on political party affiliation, and race
4 can't predominate and the majority of courts have also
5 held that purely partisan gerrymandering, at least if
6 you set just usability aside, is also unconstitutional.

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

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

15 MR. JOSEFFER: I think the easy way to cut
16 through is that a state Supreme Court respond and remand
17 all arguments other than the first Gingles factor. So,
18 the first Gingles factor, based on what happened in the
19 state Supreme Court is the only thing that is before the
20 Court.

21 What would remain potentially on remand is that
22 if this Court were to -- would ban the traditional
23 understanding of the first Gingles factor and impose a
24 new understanding, then the adjudication of that might
25 be open on remand. But Respondents have abandoned

1 everything else in the state Supreme Court.

2 Finally, I also can't help but mention that
3 there is a great irony here in that Petitioners'
4 essential position is that back when race relations were
5 worse and back when there's much more racial bloc
6 voting, minority-majority districts worked okay.

7 But now that race relations have improved
8 and there is much more crossover voting, we should now
9 require greater consideration of race as well as
10 partisanship than had ever been done before under the
11 same unamended statute.

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

22 And the 50 percent rule, as a practical
23 matter, has worked for a couple of decades in this
24 respect. And if one goes beyond that, there is also no
25 principled stopping point. Here's 39 percent, which

1 doesn't seem close to me or under Justice Breyer's
2 rationale --

3 JUSTICE STEVENS: You mention how well it
4 worked. Did you see the graphs -- one of Amicus briefs
5 have the graph showing what the 50 percent rule did for
6 one gerrymander and how the lesser percentage worked
7 out -- remember which were much more -- not using the 50
8 percent rule produced much more compact districts?

9 MR. JOSEFFER: There are three things about
10 the graphs. The first is that the less compact maps in
11 the League of Women Voter's briefs -- those were the
12 districts that were determined to be
13 unconstitutional.

14 JUSTICE STEVENS: But they were designed to
15 produce 50 percent, and that's why they got so -- so --
16 so grotesque.

17 MR. JOSEFFER: Right. Another thing is that
18 there seems to be a common misconception that our view of
19 section 2 prohibits the drafting of crossover districts,
20 which is not case of all.

21 The question here is whether they are required.
22 If a district -- if a jurisdiction wants to draw a
23 crossover district, then at least in principle nothing
24 is stopping it from doing so. However, if what you were
25 to do was to require the drawing these crossover districts,

1 that could create some funny maps of its own, because if
2 you have to reach out to grab jurisdiction wide, look to
3 every significant pocket of minority voters, look at
4 whatever you could put together that would vote alike,
5 which as a practical matter is the same political party,
6 then you are going to be requiring the same dynamics
7 that led to some of those very strange maps in the --
8 in the first place.

9 CHIEF JUSTICE ROBERTS: Thank you Mr.
10 Joseffer.

11 Mr. Browning, you have four minutes
12 remaining.

13 REBUTTAL ARGUMENT OF CHRISTOPHER G. BROWNING
14 ON BEHALF OF THE PETITIONERS

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

16 Let me first of all start with
17 Justice Breyer's question about the arbitrary nature of
18 the 50 percent rule. The 50 percent rule, let there be
19 no doubt, is extremely arbitrary, even under the
20 government's 2 percent cushion.

21 What would happen is you have a district
22 that is 40 percent -- 46 percent African American, that
23 district could be freely carved up into two districts
24 of 23 percent each, neither of which would provide an
25 equal opportunity to elect. Even when you are in a

1 situation like this case, where the district is actually
2 functioning and has a proven ability to elect a minority
3 preferred candidate. Moreover --

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

6 MR. BROWNING: Justice Alito, it is
7 important to recognize that there are significant
8 districts that are out there that would not be protected
9 under the 50 percent rule. And I understand the Court's
10 desire to have some sort of limitation on the size of
11 the district. We believe it is already in there, in
12 place as a result of the LULAC decision.

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

16 JUSTICE GINSBURG: But this -- but yours is
17 below? Just slightly below.

18 MR. BROWNING: The voting age population is
19 39.36 percent based upon the census data. The
20 government wants to use a 2 percent cushion as their
21 threshold. But there is some significant problems with
22 that, because when you look at the overcount of white
23 voters, the Census Bureau recognizes the over count is
24 basically 2 percent there in and of itself, and the
25 undercount of black voters is a 1 percent

1 undercount. So even a 48 percent doesn't even get
2 anywhere close.

3 Moreover, you have districts where there are
4 a number of eligible -- number of people that are
5 counted in the census that are not truly eligible to
6 vote. That is reflected in the brief by the States at
7 page 28 in footnote 2. The States make the point that
8 there are many districts where we have military bases,
9 we have colleges that cause this to be an extremely
10 arbitrary rule.

11 And in North Carolina there are districts
12 where once you remove the military base where most of
13 the population will not be voting in that district,
14 there is a shift of even 12 percent in the minority
15 voting age population increasing by 12 percent once you
16 just remove the military bases from the equation.

17 JUSTICE BREYER: The rule I suggested,
18 though there are arbitrary aspects is a better targeted,
19 more administrable -- or equally administrable or not
20 much worse administrable arbitrary rule.

21 MR. BROWNING: Justice Breyer, in our view
22 the rule that should be applied is consistent with the
23 rule of LULAC, that the minority group is substantially
24 larger than its coalition partner.

25 Here the minority group is 39.36 percent

1 African American. It only requires an additional
2 roughly 11 percent white crossover voting. So the white
3 crossover voting that is needed is only a third of the
4 size of the minority group.

5 JUSTICE BREYER: There must be somebody
6 there to get you over 50 percent.

7 MR. BROWNING: I'm sorry?

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

10 MR. BROWNING: Your Honor, this district is
11 39.36 percent African American.

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

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

16 JUSTICE BREYER: If all they vote
17 cohesively.

18 MR. BROWNING: Yes, Your Honor. Here the
19 minority group, the expert's testimony is that they do
20 vote cohesively.

21 CHIEF JUSTICE ROBERTS: But it's a necessary
22 predicate to this very question that the majority group,
23 the white group does not vote cohesively. Under your
24 hypothetical at least 11 percent have to swing over.

25 MR. BROWNING: The -- the white vote does

1 not vote 100 percent cohesively. But it is still at
2 such high levels, there is only a limited amount of
3 crossover voting. It is still very racially polarized.
4 And if district lines are not taken into account, the --
5 the votes of black voters in the district will be
6 drowned out by the white voters that are voting against
7 that minority candidate simply because that candidate is
8 a minority.

9 There is some crossover voting, but not
10 enough to make the -- for us to lose on the third
11 Gingles prong.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

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

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<p>25:17 31:20 bound 24:14 brave 5:20 Breyer 32:25 33:7,14 34:2 34:11 35:8,16 35:18 38:23 39:4 44:6 45:9 45:16,24 46:3 53:17,21 54:5 54:8,12,16 Breyer's 39:14 50:1 51:17 52:4 brief 28:10 29:20 46:22 47:21 53:6 briefly 31:13 briefs 50:4,11 bright 12:12 bright-line 8:8 15:1 bring 3:15,20 brings 3:24 broad 17:14,16 broadly 7:14 brother 24:13 brown 29:21 Browning 1:18 2:3,11 3:6,7,9 4:2,17,23 5:3,8 5:12,21,23 6:10,15,19 7:1 7:15 8:6,16 9:4 9:17,22 10:2 10:13,19 11:2 11:6,10,15,25 12:4,17 13:24 14:12,18 15:12 15:17 16:3,16 17:10,25 18:21 19:14 20:9,15 21:4,15,23 22:6,9,15,21 23:10,24 51:11 51:13,15 52:6 52:18 53:21</p>	<p>54:7,10,14,18 54:25 Bureau 52:23</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculate 10:6 called 32:7 candidate 7:20 8:14,15 9:12 10:9,12 12:20 13:6 18:3 22:18 30:9 33:9 34:6,23 36:1 45:14 47:5,10,19 52:3 55:7,7 candidates 9:14 28:11,11 29:9 35:11 38:16 47:17 CARL 1:20 2:5 24:1 Carolina 1:5 3:13 4:10 7:5 12:25 13:1 18:22 20:10,16 23:4,11,16 24:19 26:12,15 42:1 52:13 53:11 Carolina's 22:17 carved 28:6 51:23 case 3:4 6:18 7:9 8:7 9:9,21,23 10:21 11:11,17 12:5 18:17 19:8,9,24 20:7 24:6,14 25:6 26:16,23 31:11 31:17 32:1,4 33:4 37:20 38:20 42:5 44:4 45:23 46:14 50:20</p>	<p>52:1 55:13,14 cases 9:10 24:24 32:23 33:3 42:24 44:22 categorically 38:1 cause 4:6 53:9 causes 4:12 census 52:19,23 53:5 certain 44:10 certainly 6:11 7:16 15:13 22:10 23:11 24:10 32:10 33:24 39:9 challenge 13:17 chance 17:7,8 33:19 34:5 43:20 49:18 changes 34:1 changing 21:2 Chief 3:3,9,23 4:3,14,21,24 7:10,15 8:1,12 11:7,12 13:16 14:7 15:16 20:20 21:13,21 22:4,7 23:23 24:3 26:4,17 40:16,22 48:13 51:9,15 54:21 55:12 choice 4:8 13:23 16:13 17:22 18:3 22:19 33:10 34:24 35:11 36:1,22 45:3,7,14 47:5 47:10,19 choose 17:24 22:18 choosing 9:13 CHRISTOPH... 1:18 2:3,11 3:7 51:13 circumstances</p>	<p>17:15 31:11 cite 6:7 cited 28:10 city 25:17 41:17 city-council 41:18 Civil 47:22 claim 33:4,12,15 36:18 42:9 claims 25:7,8,11 25:16,20 32:24 33:1 43:13 clear 5:4,13 9:5 13:8 17:23 18:9 31:21,25 32:7,18 45:20 49:17 clearly 17:16 31:14 clear-edged 32:16 clients 26:13 close 18:10 19:17 42:22,23 50:1 53:2 closer 3:21,24 coalition 3:14,15 3:18 4:9,18 5:7 5:20 7:11,16 7:21 8:5 11:18 12:21 13:11,19 13:19 14:3 15:20 17:3 38:5 53:24 cohesive 35:12 38:6 cohesively 54:17 54:20,23 55:1 colleges 53:9 color 29:20 combination 38:13 combine 37:5 combines 41:8 combining 38:13,14 come 32:23</p>	<p>45:13 54:9 comes 30:10 coming 46:11 Committee 47:22 common 14:8 25:10 50:18 communities 37:14 community's 45:14 compact 14:6 35:12 50:8,10 compactness 15:5 comparable 12:14 completely 9:18 complicated 26:18 complied 20:23 complies 26:14 comply 27:6 comprises 28:14 concede 43:11 conceded 12:8 24:13 conceding 31:6 41:25 concentrate 28:20 concerns 41:7 conclude 8:14 concluded 13:2 20:17 condition 10:25 confidently 12:3 confused 33:2 Congress 5:13 17:11,12,16,19 46:18 Congress's 3:15 7:17 congruency 15:5 connection 17:13</p>
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