

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

UNITED STATES OF AMERICA; ERIC H. HOLDER,
JR., in his official capacity as Attorney General of the
United States,

Defendant,

and

WENDY DAVIS *et al.*

Defendant-Intervenors.

Civil Action No. 1:11-cv-
01303 (RMC-TBG-BAH)

**GONZALES INTERVENORS' BENCH BRIEF REGARDING USE OF
GENERAL ELECTION DATA IN COALITION AND CROSSOVER DISTRICTS**

The State of Texas contends that only primary election data—not general election data—are probative of cohesion between voters of different races and, in turn, the existence of coalition districts. Texas's position is manifestly incorrect. The Voting Rights Act explicitly addresses equal opportunity for minority voting blocs in both primary *and* general elections. And a wealth of federal case law supports the use of data from general elections to determine the presence of cohesive minority voting blocs.

The language of the Voting Rights Act plainly contradicts Texas's position and supports the conclusion that data from general elections are not only probative of cohesive voting blocs but are necessary to such determinations. A violation of the Voting Rights Act “is established if . . . it is shown that the political processes leading to *nomination or election* in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)” 42 U.S.C. § 1973(b) (emphasis added). Thus, the Voting Rights Act, on its face, is concerned with whether minority voters have an

equal opportunity to elect the candidate of their choice in *both* primary nominations and general elections. “It is well established that, when the statutory language is plain, we must enforce it according to its terms.” *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Because the plain language of the Voting Rights Act clearly comprehends protection of minority voting rights in both primary and general elections, this Court is required to consider general election data as highly probative of cohesion between voters of different races.

Indeed, the Fourth Circuit Court of Appeals has extolled the virtues of using general election data to determine minority voter cohesion. In *Lewis v. Alamanace Cnty., N.C.*, 99 F.3d 600, 614–16 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), the court rejected out of hand the local government’s argument that the district court erred in treating as the minority-preferred candidates Democrats who received nearly all of the African-American vote in general elections: “We reject the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary.” *Id.* at 615 (internal quotation marks omitted). The Fourth Circuit held not only that exclusion of general election data was contrary to the plain language of the Voting Rights Act but also that “[s]uch a view is grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share.” *Id.* The court concluded that exclusion of general election data

ignores altogether the possibility that primary election winners will become the minority’s preferred candidate during the general election campaign, or that where, as here, the overwhelming majority of blacks vote in the Democratic primary, that a Republican could in fact become the black-preferred candidate in the general election by addressing himself to issues of interest to the minority community in a way that appeals to them as participants in the political process.

Id.; *see also id.* (“[C]andidates who receive 99+% of the black vote in general elections are the black-preferred candidate *in that election*, regardless of their level of support in the primary.”).

In fact, federal courts routinely consider statistics from general elections to determine existence of cohesive voting blocs among different minority groups. *See, e.g., Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir.) (affirming district court’s use of general election data to determine cohesive coalition district), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (*en banc*), *cert denied*, 510 U.S. 1071 (1994) (“The undisputed facts . . . are that a majority of Hispanic voters always supported the same candidate favored by black voters in every general election.”); *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1245–46 (5th Cir. 1988) (using general election data to review cohesion in a coalition district and holding that “if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.” (internal footnote omitted)); *France v. Pataki*, 71 F. Supp. 2d 317, 329 & n.13 (S.D.N.Y. 1999) (reviewing, among other things, “53 general-election contests” to conclude that there was no “coalition building process that involves white, as well as black and Hispanic voters”); *LULAC v. N.E. Independent Sch. Dist.*, 903 F. Supp. 1071, 1082 (W.D. Tex. 1995) (“Dr. Rives admitted that his analysis of the general elections showed, *inter alia*, both that Hispanics and Blacks generally vote together and that they vote differently than Anglo voters in [the North East Independent School District].”).

Federal courts, including the U.S. Supreme Court, have also analyzed general election data to determine the existence of crossover districts between Anglo and minority voters. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 93 (1997) (“The results of the 1996 general elections tend to support the District Court’s earlier finding of a general willingness of white

voters to vote for black candidates. All three black incumbents won elections under the court plan, two in majority-white districts running against white candidates.” (internal quotation marks and citation omitted)); *Large v. Fremont Cnty. Wyo*, 709 F. Supp. 2d 1176, 1211–12 (D. Wyo. 2010) (examining general election data to determine if Anglo crossover voting eliminated the possibility of defeating the minority-preferred candidate through white bloc voting).

And federal courts have repeatedly used general election data to determine the existence of voter cohesion within a single minority group. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 56 (1986) (“The District Court’s findings concerning black support for black candidates in the five multimember districts at issue here clearly establish the political cohesiveness of black voters. . . . [I]n the general elections, black support for black Democratic candidates ranged between 87% and 96%”); *Old Person v. Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000) (“The State’s expert, Dr. Jeffrey Zax, presented evidence that showed American Indians were politically cohesive in more than 70% of the general elections, retention elections and ballot issue elections that he examined in the eight House Districts.”); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 997 (D.S.D. 2004) (“Dr. Cole analyzed five interracial elections for the state senate: the 1998 general election for Districts 26 and 27, the 1994 general election for District 27, and the 1988 and 1990 general elections for District 28. He found the average estimate of Indian political cohesion in these races to be 83 percent, which is ‘highly politically cohesive.’” (internal citation omitted)); *Houston v. Lafayette Cnty.*, 20 F. Supp. 2d 996, 1001 (N.D. Miss. 1998) (“Dr. Lichtman analyzed 19 ‘black versus white’ elections from 1979 to 1991. The study focused on primary elections for the board of supervisors but also included general elections for the board of supervisors and elections for a variety of other public offices. . . .”).

The Fifth Circuit's *en banc* decision in *LULAC v. Clements*, 999 F.2d 831, is especially pertinent to Texas's effort to avoid recognition of coalition and crossover districts under the Voting Rights Act. In the context of analyzing general election data to determine cohesion among different minority voting groups, the court expressly recognized the validity of the concept of coalition districts under the Act: "If blacks and Hispanics vote cohesively, they are legally a single minority group" for Voting Rights Act purposes. *Id.* at 864. This principle had been governing law in the Fifth Circuit for more than a decade at the time the Texas Legislature took up the redistricting task. Yet, the Legislature actively worked to avoid even minimum recognition of such coalitions in its redistricting handiwork. When combined with the admonition in *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009), that the purposeful destruction of crossover districts is constitutionally suspect, Plaintiff's legislative actions, as well as its continued efforts in this Court to dodge the coalition and crossover issues presented by its enacted maps, leave the State in a legally untenable situation.

From the plain language of the Voting Rights Act as well as the numerous federal cases analyzing voter cohesion, one unmistakable conclusion appears: general election data are highly probative of minority voter cohesion—in single, coalition, and crossover districts. Accordingly, this Court should reject Texas's invitation to limit its review to primary election data. It should instead consider statistics from general elections to determine cohesive voting among different minority groups and, therefore, the existence of coalition and crossover districts.

RESPECTFULLY SUBMITTED: January 23, 2012

/s/ John M. Devaney_____

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, I electronically filed the foregoing BENCH BRIEF REGARDING USE OF GENERAL ELECTION DATA IN COALITION AND CROSSOVER DISTRICTS with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: January 23, 2012

Respectfully submitted,

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