IN THE

Supreme Court of the United States

October Term, 1972

No. 72 - 129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, *et al.*,

Appellants,

v.

NEW YORK, on behalf of New York, Bronx, and Kings Counties,

Appellees.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants[1] appeal from the judgment of the United States District Court for the District of Columbia, entered

[1] The appellants, applicants for intervention in the District Court, are the New York City Region of New York Conference of Branches of the National Association for the Advancement of Colored People, Simon Levine, Antonia Vega, Samuel Wright, Waldaba Stewart and Thomas Fortune.

on April 13, 1972, denying appellants' motion to intervene, and from the order of that court, entered on April 25, 1972, denying appellants' motion to alter judgment. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The District Court for the District of Columbia issued no opinion in connection with this case. The judgment of the District Court, entered April 13, 1965, denying appellants' motion to intervene, and the order of the District Court, entered April 25, 1972, denying appellants' motion to alter judgment, are set out in Appendix A hereto.

Jurisdiction

This suit was brought by the State of New York, under 42 U.S.C. §1973b, to obtain for three counties of that state an exemption from certain provisions of the Voting Rights Act of 1970. The matter was heard before a three-judge panel pursuant to 42 U.S.C. §1973b and 28 U.S.C. §2284. Shortly after the United States declined to oppose the granting of such an exemption, appellants moved to intervene as party defendants. The judgment of the District Court denying that motion and granting the exemption was entered on April 13, 1972, and the order of the District Court denying appellants' motion to alter judgment was entered on April 25, 1972. The notice of appeal was filed in that court on May 11, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 42, United States Code, section 1973b(a). The jurisdiction of the Supreme Court to review

the judgment on direct appeal in this case is sustained in *Gaston County* v. *United States,* 395 U.S. 285 (1969).

Statutes Involved

Section 1973b, 42 United States Code, provides

> §1973b. *Suspension of the use of tests or devices in determining eligibility to vote-Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court*
>
> (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under

this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addi-

tion to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any education achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher or registered voters or members of any other class.

Section 1973c, 42 United States Code, provides

§1973c. *Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of*

voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objec-

tion within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

The Question Presented

Where the State of New York sues for an exemption from sections 4 and 5 of the Voting Rights Act of 1965, as amended, and the United States expressly and without justification declines to defend the action, should intervention be granted to a civil rights group and individuals who have initiated other litigation to compel compliance with sections 4 and 5 and who offer specific allegations and substantial documentary evidence in opposition to the granting of such an exemption.

Statement of the Case

Under the 1970 amendments to the Voting Rights Act of 1965, three counties in the state of New York—Bronx, Kings (Brooklyn) and New York (Manhattan)—are subject to coverage by sections 4 and 5 of the Act. Those sections are applicable because on November 1, 1968, New York State employed a literacy test as a prerequisite to registration and less than 50 percent of the persons of voting age were registered on that date or voted in the 1968 presidential election in each of those three counties. 42 U.S.C. § 1973b(b). Section 5 provides that no changes in the election laws or practices of such covered areas may

be enforced until the state or subdivision involved has either submitted those changes to the Attorney General without his objecting to them for a period of 60 days, or has obtained a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c(a). Section 4 also provides that a state or subdivision subject to this advance clearance procedure may obtain an exemption therefrom by bringing an action for a declaratory judgment against the United States and obtaining from the United States District Court for the District of Columbia a determination that the literacy test employed by the state or subdivision has not been used during the 10 years preceding the filing of that action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973b(a).

The 1970 amendments to the Voting Rights Act of 1965, which for the first time subjected the three counties to these special procedures, became law on June 22, 1970. Although it was known at that time that the counties would be covered, that coverage did not go into effect until March 27, 1971, following the formal publication of certain determinations by the Director of the Bureau of the Census. See 36 Fed. Reg. 5809. On December 16, 1971, the state of New York brought this action in the United States District Court for the District of Columbia to secure an exemption for New York, Bronx and Kings counties. The United States answered on March 10, 1972. On March 17, 1972, New York moved for summary judgment.

During the pendency of this matter, but prior to any action therein by the District Court, the State of New

York enacted legislation altering the boundaries of the congressional, Assembly, and State Senate districts in the three counties. The statute altering the Assembly and Senate districts was enacted on January 14, 1972, and on January 24, 1972 these changes were submitted to the Attorney General by the state of New York. On March 14, 1972, the Attorney General rejected the submission on the ground that it lacked information required by the applicable regulations. 36 Fed. Reg. 18186-190. The changes in the congressional districts, enacted on March 28, 1972, were never submitted to the Attorney General. Immediately upon the passages of these two redistricting laws and despite the absence of compliance with sections 4 and 5, officials in all three counties took steps to implement the changes, including redistribution of voter registration cards among the new districts and printing and distributing nomination petitions.

On March 21, 1972, counsel for appellants informed the Department of Justice by telephone that appellants intended to bring an action to enjoin enforcement of the new district lines until section 5 had been complied with, and indicated that appellants would urge the Attorney General to object to the new district lines when they were submitted to him on the ground, *inter alia,* that the lines had been drawn in such a way as to minimize the voting strength of blacks, Puerto Ricans, and other minorities. Such an action was filed by appellants 17 days thereafter in the Southern District of New York, *National Association for the Advancement of Colored People* v. *New York City Board of Elections,* 72 Civ. 1460. Counsel for appellants also advised the Department attorneys that the New York Advisory Committee to the United States Civil Rights Commission intended to hold hearings in April, 1972 regarding the new district lines in the three counties to assist the

Commission in deciding whether to urge the Attorney General to object to those changes in New York law. During the same discussion with the Department of Justice, counsel for appellants learned for the first time of the pendency of the instant action and of New York's motion for summary judgment. On three separate occasions, March 21, March 29, and April 3, 1972, counsel for appellant was expressly assured by Justice Department attorneys that the United States would oppose any exemption for the three counties and was preparing papers in opposition to the motion for summary judgment. At no time did any representative of the Department, though fully aware of appellants interest in this action, seek from appellants or their counsel, or indicate any interest in, information regarding the central issue in the instant case—whether New York's literacy tests had been used in the three counties over the previous decade with the purpose or effect of denying or abridging the right to vote on account of race or color.

On April 3, 1972, the Assistant Attorney General in charge of the Civil Rights Division executed a 4 page affidavit on behalf of the Attorney General stating that the United States had no reason to believe that literacy tests had been used in New York, Kings or Bronx counties in the previous 10 years with the purpose or effect of denying or abridging the right to vote on account of race or color. The affidavit was filed with the District Court for the District of Columbia the next day, together with a one sentence memorandum consenting to the entry of the declaratory judgment sought by New York. (The Affidavit and Memorandum are set out in Appendix B.) On the afternoon of April 5, 1972, counsel for appellants was notified by telephone of the Justice Department's reversal of its earlier position. Appellants moved to intervene as party defendants in the instant proceeding on April 7, 1972.

Appellants' motion to intervene was opposed by New York; the United States has filed no further papers in the case. On April 13, 1972, the District Court denied without opinion appellant's motion to intervene and entered judgment in favor of plaintiff. On April 24, 1972, appellants moved the District Court to alter its judgment. That motion was denied without opinion on April 25, 1972.[2] This appeal followed.[3]

The Question Presented is Substantial

The instant action arises from an attempt by the state of New York to nullify one of the most important of the 1970 amendments to the 1965 Voting Rights Act. The amendment in question proposed on the Senate Floor by Senator Cooper, altered the formula in sections 4 and 5 of the Act with the express purpose of extending their coverage to more than 2 million blacks and Puerto Ricans in New York, Bronx and Kings counties. The United States systematically declined to investigate or present to the court below any of the factual or legal theories which had prompted Congress to extend coverage to these three counties and which had earlier been advanced by the United States before congressional committees and this Court. The Voting Rights Act does not authorize the Attorney General to grant exemptions to sections 4 and 5, but required the court below to make its own independent determination that the three counties had not used literacy tests with the proscribed purpose or effect. In the face of the

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[2] The order denying this motion was signed by only 2 members of the three judge panel. Judge Greene, for unexplained reasons, did not participate.

[3] By agreement of counsel no further action has been taken by either party in the New York action pending a final decision in the instant case.

refusal of the United States to offer to the court relevant evidence or arguments in this regard, the district court should have permitted appellants to intervene and assist it by presenting such material.

1. The Cooper Amendment was expressly intended to place three New York counties under sections 4 and 5 of the Voting Rights Act.

Under the 1965 Voting Rights Act as originally enacted the requirements of sections 4 and 5 regarding federal clearance of new voting laws and practices were applied to any state or subdivision which met two criteria: (1) on November 1, 1964, it had in effect a test or device as defined in section 4(c), 42 U.S.C. §1973b(c), such as a literacy test, and (2) less than 50 percent of the voting age population was registered on November 1, 1964, or less than 50 percent of such persons voted in the 1964 presidential election. Most of the covered areas were located in the south; Alabama, Louisiana, Mississippi, Georgia, South Carolina, Virginia, and 40 counties of North Carolina were subjected to the clearance procedures. In the north 6 scattered counties and the state of Alaska were also covered. Between the enactment of the 1965 Act and the 1970 amendments only one county in the South was able to obtain an exemption; in the north, however, Alaska and at least 4 of the affected counties obtained, with the concurrence of the Attorney General, declaratory judgments exempting them from sections 4 and 5. See 116 Cong. Rec. 5526, 6521, 6621, 6654 (1970).

Sections 4 and 5 of the 1965 Act were so framed as to automatically expire in 1970. Extension of these provisions was proposed for a period of 5 years until 1975, but both the Administration and many members of Congress opposed any such extension. The principal criticism voiced by

these opponents and recurring throughout the history of the 1970 amendments was that sections 4 and 5 applied almost exclusively to the South, and constituted discriminatory regional legislation. Renewal of the sections was initially rejected by the House on this ground.[4] When the measure was considered by the Senate, the same argument was advanced.[5] Critics of sections 4 and 5 reiterated that discrimination was a national problem and could be found even in the city of New York.[6] In particular it was repeatedly pointed out that New York, Kings and Bronx Counties, which did not fall under the 1965 Act, would have been covered by sections 4 and 5 of the Act if the formula contained therein had referred to registration and voting turnout in November 1968 instead of November 1964.[7]

In response to these arguments Senator Cook proposed that sections 4 and 5 be altered so as to cover states and subdivisions which had the specified tests or devices and low registration or presidential vote in *either* 1964 or 1968. Senator Cooper explained his amendment in the following terms:

> The pending amendment would bring under coverage of the Voting Rights Act of 1965, and under the triggering device described in section 4(b), those States or political subdivisions which the Attorney General may determine as of November 1, 1968, employed a test or

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[4] 113 Cong. Rec. 38485-38537 (1969).

[5] See generally 114 Cong. Rec. 5516—6661 (1970).

[6] 114 Cong. Rec. 5534 (Remarks of Senator Hansen), 5670 (Remarks of Senator Byrd), 5687-8 (Remarks of Senator Long), 6158 (Remarks of Senator Gurney), 6161-63 (Remarks of Senator Ellender) (1970), 6621-22 (Remarks of Senator Long).

[7] 114 Cong. Rec. 5546 (Remarks of Senator Ervin), 6151-52 (Remarks of Senator Ellender), 6623-25 (Remarks of Senator Allen) (1970).

device and where less than 50 percent of persons of voting age were registered or less than 50 percent of such persons voted in the presidential election of 1968.

* * *

One of its purposes is to establish the principle that the Voting Rights Act of 1965 and, in particular, its formula, section 4(b), which is called the trigger, is applicable to all States and political subdivisions and is not restricted to the Southern States.

* * *

The amendment also establishes the principle which has been approved in our debate—that legislation to secure the voting rights must apply to all the people of this country, and to all the States. It is not restricted to a fixed date in the past, whether 1964 or 1968. It is a continuing effort to secure and assure voting rights to all the people of our country.

* * *

The chief State involved is the State of . . . New York. Three counties of New York were involved, Bronx, Kings, and New York. In the 1964 election more than 50 percent of the voters were registered and more than 50 percent voted. However, for some reason in the 1968 election 50 percent were not registered or voting. 114 Cong. Rec. 6654, 6659 (1970).

Although opposed by the Senators from New York, the Cooper amendment was passed with the support of Senators from all regions of the country. 114 Cong. Rec. 6661. When the Senate bill was brought up for consideration, both the Chairman of the Judiciary Committee and the Majority Leader noted that the new version applied to New York, Kings and Bronx Counties, the latter noting that this

change demonstrated that the Act was not "aimed at any one section." [8] The House, which had earlier rejected renewal of sections 4 and 5, acquiesced in their reenactment as thus modified.[9]

The Senate debates leading to the passage of the Cooper amendment reveal a variety of concerns as to the manner in which New York's literacy test had had a discriminatory purpose or effect in the three counties involved. (1) Senator Cooper, referring to this Court's decision in *Katzenbach* v. *Morgan,* 384 U.S. 641, 654 n.14 (1966), urged that New York's 1922 literacy requirement was enacted, with the purpose of discriminating on the basis of race.[10] (2) Senator Griffin argued that if New York denied the vote to illiterate black applicants who had received an inferior education in a segregated southern school system, the literacy test would have the effect of discrimination on the basis of race in a manner which this Court had earlier held to constitute the type of discrimination which precludes an exemption from sections 4 and 5.[11] (3) Senator Hruska, quoting testimony by the Attorney General, suggested it would also discriminate on the basis of race to deny the franchise to illiterates who had received an inferior education in the north, without regard to whether a de jure dual school system might be involved.[12] (4) Again quoting the Attorney General, Senator Hruska suggested that the mere use of

[8] 114 Cong. Rec. 20161 (Remarks of Rep. Celler), 20165 (Remarks of Rep. Albert) (1970).

[9] 114 Cong. Rec. 20199 (1970).

[10] 114 Cong. Rec. 6660 (1970); see also 114 Cong. Rec. 6659 (Remarks of Senator Murphy).

[11] 114 Cong. Rec. 6661; see also 114 Cong. Rec. 5533 (Remarks of Senator Hruska), 6158-9 (Remarks of Senators Dole and Mitchell) (1970); *Gaston County* v. *United States,* 395 U.S. 285 (1969).

[12] 114 Cong. Rec. 5533 (1970).

literacy tests had a psychological effect which tended to deter blacks who might seek to register and thus have a racially discriminatory effect.[13] (5) Several Senators suggested that literacy tests were discriminatory in effect merely because the rate of illiteracy was higher among blacks or other minorities than among whites.[14]

The Cooper amendment expanded substantially the number of persons protected by sections 4 and 5. The three New York counties concerned have a total black population of 1.4 million and another 800,000 Puerto Ricans.[15] The combined minority population of these counties is almost double that of the largest southern state covered by the Act; Kings County alone has nearly as many black residents as do the states of Virginia and South Carolina. All the exemptions granted by the federal courts prior to the instant case affected a total of no more than 100,000 minority group members. By granting an exemption to New York, Kings and Bronx counties, the court below not only nullified the Cooper amendment, but withdrew the protection of sections 4 and 5 from an area of unprecedented size.

2. The United States improperly declined to oppose exempting the three New York counties from sections 4 and 5.

The affidavit submitted by the United States below, and set out in Appendix B, acquiescing to the exemption for the three counties reveals an incomprehensible failure by the Justice Department to pursue the legal and factual concerns which led to the passage of the Cooper amendment. The investigation conducted by the Department "con-

[13] 114 Cong. Rec. 5533; see also 114 Cong. Rec. 6152 (Remarks of Senator Eastland) (1970).

[14] 114 Cong. Rec. 5532-3 (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland), 6156 (Remarks of Senator Gurney) (1970).

[15] Unpublished figures supplied by the Bureau of the Census.

sisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties." (Appendix, p. 8a) So far as appears from the government's papers, its investigators may never have interviewed any person not interested in obtaining the exemption or even any black or Puerto Rican. None of the appellants or their counsel, all of them known to be vitally interested in this case, were ever interviewed or even informed by the Justice Department that any investigation was underway. An examination of the registration records was well calculated to reveal nothing other than clumsily concealed discrimination in the application of the literacy tests, and the legislative history of the Cooper amendment reveals that that was one of the few types of discrimination Congress did *not* consider. The results of this investigation were predictably barren. Beside detailing the extent to which election officials had failed at first to comply with the 1965 federal ban on English language literacy tests to deny the vote to Puerto Ricans with at least a sixth grade education, and with the 1970 federal prohibition against all literacy tests, the affidavit lamely recites that the interviews with election officials and other unnamed knowledgeable persons "revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color." (Appendix, p. 9a)

The most striking aspect of the government's affidavit and one page affidavit are the omissions. No inquiry was made as to whether New York's literacy tests were discriminatory because blacks or Puerto Ricans in the three counties had a higher rate of illiteracy than whites due to unequal educational opportunities in the three counties, an

approach which the United States had pressed with vigor three years before in *Gaston County* v. *United States,* 395 U.S. 285 (1969), and which the Attorney General had urged before Congress.[16] No inquiry was made as to whether the tests discriminated against blacks who had received an inferior segregated education in the south and then moved to New York, a species of discrimination which the Attorney General had condemned two years earlier in congressional testimony noted on the floor of the Senate.[17] No inquiry was made as to whether New York's literacy test had been enacted with the express purpose of disenfranchising minority groups, a matter which the United States itself had earlier brought to the attention of this Court in *Katzenbach* v. *Morgan,* 384 U.S. 641, 654 (1966). No inquiry was made into the psychological barrier to black registration inherent in literacy tests which the Attorney General had noted two years earlier.[18] And no inquiry of any kind was made of appellants in the instant case, all of whom the United States knew to be vitally interested in the pending request for an exemption from sections 4 and 5. This lack of inquiry is particularly surprising in view of the concern openly expressed in the Senate during the 1970 debates that the Attorney General had or would abuse his discretion by opposing exemptions for southern states while readily acquiescing to any similar requests from the north.[19]

Under section 4 of the Voting Rights Act the Attorney General is not vested with the authority to grant exemptions from the federal clearance procedures. Unlike sec-

[16] See 114 Cong. Rec. 5533 (1970).

[17] See 114 Cong. Rec. 6158-59 (Remarks of Senator Dole) (1970).

[18] See 114 Cong. Rec. 5533 (1970).

[19] 114 Cong. Rec. 6166 (Remarks of Rep. Poff), 6521 (Remarks of Senator Ervin), 6621 (Remarks of Senator Ervin).

tion 5, which confers upon the Attorney General discretion to object or assent to changes in voting laws, section 4 provides that exemptions may be given only by a three judge federal court, and then only after that court has made a determination of fact that the jurisdiction involved has not used any tests or devices during the previous 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color. This difference between sections 4 and 5 dictates that the Attorney General's consent cannot control the decision or alter the responsibility of the district court. Even in the face of the government's acquiescence in the requested exemption in the instant case, the court below had an unequivocal duty to make an informed and independent judgment concerning the legal and factual issues raised by that request. Particularly in a case such as this, involving as it does matters of great public import, the district court does not function as a mere umpire or moderator bound to accept any arrangement proposed by the named parties, but sits to see that justice is done not only to those parties but to all who may be affected by its decision. Compare *United States* v. *Rosenberg,* 195 F.2d 583 (2d Cir., 1952), *certiorari denied,* 344 U.S. 838. Under certain circumstances it may be proper, for example, for the district court to call and examine its own witnesses when the parties decline to do so. McCormick on Evidence, 12-14. Certainly in a case such as this, where New York seeks to withdraw the protection of sections 4 and 5 from more than 2 million blacks and Puerto Ricans, and the United States declines either to present the court with relevant evidence or to advance any related legal considerations, the responsibilities imposed upon the district court by section 4 dictate that it accept the assistance of responsible intervenors.

3. The District Court clearly erred in granting the exemption and denying appellants leave to intervene.

Rule 24(a) of the Federal Rules of Civil Procedure provides that intervention shall be permitted as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the parties." This language is the result of the 1966 amendments intended to liberalize intervention and to make it available to any party whose interests might be substantially affected by the disposition of the action. See Committee Note, 3B Moore's Federal Practice ¶ 24.01[10]. The advisory committee expressly departed from the pre-1966 requirement that the applicant for intervention show that he would be legally bound by the judgment as *res judicata.* Compare *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961). *Apache County* v. *United States,* 256 F. Supp. 903 (D.Ct. D.C., 1966). A liberal attitude toward private action to vindicate the public interest is generally desirable in litigation arising out of civil rights legislation. Compare *Allen* v. *Board of Elections,* 393 U.S. 544 (1969).

The requirements of Rule 24(a) are clearly met in the instant case. Appellants have brought suit in the United States District Court for the Southern District of New York to compel the three counties to comply with sections 4 and 5 and submit their redistricting laws for federal approval. *National Association for the Advancement of Colored People* v. *New York City Board of Elections,* 72 Civ. 1460. Unless the three counties receive an exemption from sections 4 and 5, appellants will almost certainly succeed in obtaining the injunctive relief sought in the

New York action. If, however, the counties obtain such an exemption in the instant action, appellants will of course be unable to compel the counties to submit their redistricting plans to the Attorney General. Appellants also seek to intervene on behalf of themselves, the members of appellant New York N.A.A.C.P., and all other minorities who will be denied the protections of sections 4 and 5 if the three counties are exempted from coverage. This Court has already held, at the urging of the United States, that "[i]t is consistent with the broad purpose of the [Voting Rights] Act to allow the individual citizen standing to insure that his city or county government complies with the §5 approval requirements." *Allen* v. *Board of Elections,* 393 U.S. 544, 557 (1969). That policy and appellants' interest are the same whether appellants seek to assure such compliance by suing the New York or intervening in the District of Columbia, and apply a fortiori in an intervention such as this one where appellants seek to compel compliance with sections 4 and 5 with regard to all changes in voting laws or practices which may occur in the future. Both because they will be bound in the New York litigation by an exemption in the instant case, and because of the impact on them and of those whom they represent of a withdrawal of the protections of sections 4 and 5, appellants have a substantial interest in the disposition of the instant litigation and are entitled as of right to intervene. Compare *Cascade National Gas Corporation* v. *El Paso Natural Gas Company,* 386 U.S. 129 (1967). The instant application for intervention also falls within the authority of the court to grant permissive intervention deemed helpful to the court. *Apache County* v. *United States,* 256 F.Supp. 903, 908 (D.Ct. D.C. 1966).

That the United States does not adequately represent appellants' interests can hardly be disputed. The burden

of showing adequacy of representation is on the party opposing intervention. *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967). The claim of inadequacy in the instant case is not based on a mere tactical disagreement as to how this litigation should be conducted, but upon the express refusal of the United States to present to the district court *any* factual evidence or legal argument in opposition to the requested exemption. Compare *Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir., 1962), *certiorari denied,* 373 U.S. 915; *Pellegrino* v. *Nesbit,* 203 F.2d 463 (9th Cir., 1953). The complete failure of representation revealed in the instant case far exceeds the showing of inadequacy found sufficient by this Court in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company,* 386 U.S. 129 (1967).

Nor can the timeliness of appellants' application for intervention be doubted. The motion for intervention was filed 2 days after appellants were informed that the United States had decided not to oppose the requested exemption. Prior to that time the government had consistently indicated that it would oppose the exemption; until the United States suddenly reversed its earlier position there was no reason to question the adequacy of its representation and any motion to intervene would have been premature. Compare *S.E.C.* v. *Bloomberg,* 299 F.2d 315, 320 (1st Cir., 1962). The motion was made prior to the commencement of any trial, the argument of any motion or the issuance of any orders by the district court. Compare 3B Moore's Federal Practice, ¶ 24.13[1]. The circumstances in the instant case are similar to those in *Pyle-National Co.* v. *Amos,* 173 F.2d 425 (7th Cir., 1949). In *Pyle-National,* an action by a corporation against its former officers for an accounting for certain sums, a stockholder sought to intervene as a party defendant six months after the litiga-

tion had commenced and a matter of weeks before the scheduled commencement of the trial. The stockholder only moved to intervene when he learned that the corporation was about to consent to judgment for much less than the full amount allegedly misappropriated by the defendants. The Court of Appeals held the application for intervention timely. 172 F.2d at 428.

Appellants' motion for intervention and supporting papers sought to present the theories of discrimination in the use of New York's literacy test which had been urged by the Attorney General and accepted by Congress in enacting the Cooper amendment. Appellants asked an opportunity to show that the literacy test had had the effect or purpose of discriminating on the basis of race because, *inter alia,* the rate of illiteracy was higher among nonwhites than among whites, the counties had for many years provided blacks and Puerto Ricans with an education inferior to that provided whites, that many of the black adults had emigrated to New York from southern states where they had attended inferior segregated schools, and the literacy tests were administered in such a way and with the effect of deterring minority group members from attempting to take them. To demonstrate the substantiality of these claims of discrimination, appellants furnished the district court with copies of six official and semi-official reports from 1915 to 1970 documenting the extent of discrimination against minority children in New York City schools,[20] developed extensive statistics from available

[20] Metropolitan Applied Research Center, *Selection From Stanines Study of 1969-70* (1972); United Bronx Parents, *Distribution of Educational Resources Among the Bronx Public Schools* (1968); Public Education Association, *The Status of the Public School Education of Negro and Puerto Rican Children in New York City* (1955) (A report prepared for the New York City Board of Education); *Report of the Mayor's Commission on Conditions in Harlem,* chapter 5, "The Problem of Education and

census and other data showing the resulting differences in illiteracy rates,[21] and referred the court to judicial decisions condemning racial discrimination in both the New

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Recreation" (1935); Blascoer, *Colored School Children in New York* (1915); *Bulletin of the New York Public Library,* "Ethiopia Unshackled: A brief history of the education of Negro Children in New York City" (1965). The Public Education Association Report, for example, compared facilities in schools with less than 10% blacks and Puerto Ricans (denoted Y schools) with those in schools less than 10 or 15% white students (denoted X schools). The Report found that the average Group X elementary school was 43 years old, while the average group Y elementary school was 31 years old. The average Group X junior high school was 35 years old; the average Group Y junior high school was 15 years old. Group X schools were generally equipped with fewer special rooms than Group Y schools, and principals in Group X schools were generally less satisfied with their facilities and equipment than those in Group Y schools. An average of 17.2 years had gone by since the last renovation of the Group X elementary schools and 4.3 years for the group X junior high schools; renovation had occurred on the average only 9.8 years before in the Group Y elementary schools and 0.7 years earlier in the Group Y junior high schools, even though the Group Y schools were newer to begin with. Twice as many Group X elementary teachers were on probation as in Group Y, 50% more Group Y elementary teachers had tenure than Group X, and more than twice as many Group X elementary school teachers were under-trained permanent substitutes. The Board of Education was spending an average of $8.30 per student for maintenance in Group Y elementary schools, but only $5.30 per student in Group X elementary schools. Expenditures for operation of school plant were $27.50 per child at Group Y elementary schools and $19.20 per child in Group X elementary schools. The expenditure per student for instruction was $195 in the Group Y elementary schools and $185 in the Group X elementary schools. The average class size in ordinary Group X elementary schools was 35.1, compared to 31.1 in the comparable Group Y schools. The Report also concluded that it had not been the policy of the Board of Education in drawing school district lines to seek to ameliorate the racial isolation caused by housing patterns.

[21] Those statistics revealed the following. Between 1910 and 1960, when most persons of voting age before 1972 received their education, the proportion of non-white children between 7 and 13 not enrolled in school exceeded the white rate by an average of 30%, and was higher in 1960 than ever before. In 1950 the propor-

York City school systems and in school systems in the south from which black residents of the 3 counties had emigrated.[22]

Notwithstanding the plainly adequate allegations and substantial evidence of discriminatory use and purpose of New York's literacy test, the district court ruled for the plaintiffs without ever reaching the merits of the issues

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tion of children ages 7 to 13 more than one grade behind in school was approximately 75% higher among non-white children than among white children, and the amount by which the non-white rate exceeded the white rate actually *rose* the longer the children had been enrolled in school. A more recent study showed that white students in white elementary schools were a year and a half to two years ahead of black and Puerto Rican students in non-white New York schools, and the gap in reading ability *widened* the longer the students were enrolled in school. The tendency of non-white children in non-white schools to fall further and further behind white children in white schools in New York City was noted in *Council of Supervisory Association of the Public Schools of New York City* v. *Board of Education of the City of New York*, 23 N.Y.2d 458, 463, 297 N.Y.S.2d 547, 551, 245 N.E.2d 204, 207 (1969) modified on appeal, 24 N.Y.2d 1029, 302 N.Y.S.2d 850, 250 N.E.2d 251. In 1960, while literacy tests were employed in all three counties, the rate of illiteracy among non-whites was 230% higher than among native whites in New York County, 270% higher than among native whites in Kings County, and 310% higher than among native whites in Bronx County. In *Gaston County* v. *United States* the rate of illiteracy among blacks was only 70% higher than among whites. 288 F.Supp. 678, 687 (D.C. Cir., 1968).

[22] *Chance* v. *Board of Examiners*, 330 F.Supp. 203 (S.D.N.Y., 1971) (Examinations used by 80 year old Board of Examiners of the City of New York discriminated against non-white applicants for employment in the public school system); *In Re Skipwith*, 180 N.Y.S.2d 852, 14 Misc. 2d 325 (1958); *Gaston County* v. *United States*, 395 U.S. 285 (1969). The court in *Skipwith* found *inter alia*, (a) that the New York public schools were segregated on the basis of race, (b) that this segregation, whether or not purposeful, had a harmful effect on the education of the non-white children, (c) that the use of less qualified substitute teachers was almost twice as frequent in non-white schools as in white schools in the three counties, (d) that there was a higher proportion of inexperienced teachers in the non-white schools.

raised. The motion of appellants which was accompanied by the extensive documentation and statistics noted above was denied by the court the day after it was filed. In as much as the court below issued no opinions in connection with this case, it is impossible to determine why appellants' motion to intervene was denied. The final judgment appealed from merely recites that plaintiff's motion for summary judgment is granted. There was no express determination by the district court regarding the discriminatory purpose or effect of New York's literacy test; it is unclear whether the members of the court ever made such a determination, or instead felt authorized or compelled by the government's position to simply grant the motion for summary judgment. Although section 5 requires the district court to retain jurisdiction in this action for a period of five years after judgment, the United States did not ask the court to retain jurisdiction and that court did not do so. The proceedings in the district court were, in sum, entirely devoid of the caution and scrutiny which Congress can be assumed to have contemplated would be exercised before the protections of sections 4 and 5 were withdrawn from over 2 million blacks and Puerto Ricans.[23]

The mere fact that appellants seek to intervene on the side of the United States does not preclude granting that request. This Court has already held that private parties may seek to step forward and seek to vindicate the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest. *Cascade*

[23] Since the district court never actually entered a declaratory judgment determining that no test or device as defined in the Act had been used during the previous 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color, the purported exemption does not meet even the literal requirements of the statute.

Natural Gas Corporation v. *El Paso Natural Gas Company,* 386 U.S. 129 (1967). The instant case does not involve any settlement negotiated by the United States to which a private party seeks to object and the United States did not oppose the motion for intervention. Appellants do not seek to substitute their judgment for that of the United States on some matter of public policy. Compare *Cascade Natural Gas,* 386 U.S. at 141-161 (dissent of Justice Stewart). Nor do appellants seek to introduce before the district court factual material presented earlier and without success to the United States. Compare *Apache County* v. *United States,* 256 F.Supp. 903 (D.Ct. D.C., 1966). The legal theories which appellants ask to present as to what constitutes discriminatory purpose or effect are the very theories urged by the United States before this Court in *Katzenbach* v. *Morgan* and *Gaston County* v. *United States,* advanced by the Attorney General at congressional hearings on the instant statute, and accepted by the Congress which voted the Cooper amendment into law. The evidence which appellants seek to introduce is the evidence plainly relevant under those accepted interpretations of section 4 which the United States neither sought on its own nor asked or permitted appellants to bring to its attention. Under these circumstances the decision of the district court denying appellants' motion to intervene was not only erroneous under Rule 24 but inconsistent with the policies of the Voting Rights Act.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted, and the judgment below should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2419-71

NEW YORK STATE, on behalf of New York, Bronx and Kings Counties,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE CONFERENCE OF BRANCHES, *et al.,*

Applicants for Intervention.

This matter came before the Court on Motion by plaintiff, New York State, for Summary Judgment, a response by defendant, United States of America, consenting to the entry of such judgment, and a Motion to Intervene as party defendants by the N.A.A.C.P., New York City Region of New York State Conference of Branches, et al.

Upon consideration of these Motions, the memoranda of law submitted in support thereof, and opposition thereto, it is by the Court, this 12th day of April 1972,

ORDERED that said Motion to Intervene as party defendants by N.A.A.C.P., New York City Region of New York

Order of the District Court

State Conference of Branches, et al. should be and the same hereby is denied, and it is

FURTHER ORDERED that the Motion for Summary Judgment by plaintiff, New York State, should be and the same hereby is granted.

/s/ EDWARD ALLEN TAMM
/s/ WILLIAM B. JONES
/s/ JUNE GREEN

FILED

APRIL 13, 1972

JAMES F. DAVEY, Clerk

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2419-71

NEW YORK STATE, on behalf of New York, Bronx and Kings Counties,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., NEW YORK CITY REGION OF NEW YORK STATE CONFERENCE OF BRANCHES, *et al.,*

Applicants for Intervention.

Before TAMM, Circuit Judge, JONES and GREEN, District Judges.*

ORDER

The Motion of N.A.A.C.P., New York City Region of New York State Conference of Branches, et al., to Alter the Judgment of the Court in this action, entered April 12, 1972, denying their Motion to Intervene as party defendants and granting plaintiff New York State's Motion for Summary Judgment, having come before the Court at this time; and having considered the memoranda, affidavits

* GREEN, District Judge, did not participate in this decision.

and exhibits submitted in support of the Motion to Alter Judgment, the Court enters the following Order pursuant to Local Rule 9(f), as amended January 1, 1972.

Wherefore, it is this 25th day of April, 1972.

ORDERED: That the Motion of N.A.A.C.P., et al., to Alter the Judgment of the Court in this action be and the same is hereby denied.

/s/ EDWARD ALLEN TAMM
Circuit Judge

/s/ WILLIAM B. JONES
District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civil Action No. 2419-71

NEW YORK STATE, on behalf of New York, Bronx, and Kings Counties,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant,

N.A.A.C.P., etc., *et al.,*

Applicants for Intervention.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the N.A.A.C.P., New York City Region of New York State Conference of Branches, Antonia Vega, Simon Levine, Samuel Wright, Waldaba Stewart and Thomas R. Fortune, applicants for intervention in the above mentioned action, hereby appeal to the Supreme Court of the United States from the final order entered in this action on April 13, 1972, denying applicants' application for intervention and granting a declaratory judgment in favor of the plaintiff and the final order entered in this action on April 25, 1972, denying applicants' motion to alter judgment.

This appeal is taken pursuant to 42 U.S.C. §1973b(a).

Notice of Appeal

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APPENDIX B

Memorandum of the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 2419-71

NEW YORK STATE on behalf of NEW YORK, BRONX and KINGS COUNTIES, political subdivisions of said State,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S MEMORANDUM AND AFFIDAVIT IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Based on the facts set forth in the affidavits attached to plaintiff's Motion for Summary Judgment and the reasons set forth in the attached affidavit of David L. Norman, Assistant Attorney General, the United States hereby consents to the entry of a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973 b (a)).

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

Affidavit of the Assistant Attorney General

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON,

DAVID L. NORMAN, having been duly sworn, states as follows:

My name is David L. Norman. I am Assistant Attorney General, Civil Rights Division, Department of Justice. I make this affidavit in response to the plaintiff's Motion for Summary Judgment in the case of *New York State* v. *United States of America,* Civil Action No. 2419-71, United States District Court for the District of Columbia. I am familiar with the Complaint filed by the plaintiff and with the Answer filed by the United States herein.

Following the filing of the Complaint, the United States, pursuant to the requirements of Section 4(a) of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973b(a)), undertook to determine if the Attorney General could conclude that he has no reason to believe that the New York State literacy test has been used in the counties of New York, Bronx and Kings during the preceding 10 years for the purpose or with the effect of denying or abridging the right to vote on account of race or color, and thereby consent to the judgment prayed for. At my direction, attorneys from the Department of Justice conducted an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties.

I have reviewed and evaluated the data obtained through this investigation in light of the statutory guidelines set forth in Section 4(a) and (d) of the Voting Rights Act of

1964 (42 U.S.C. 1973b (a) and (d)). In my judgment the following facts are relevant to the issue of whether the New York literacy test "has been used during the ten years preceding the filing of [this] action for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and to the question of whether the Attorney General should determine "that he has no reason to believe" that the New York literacy test has been used with the proscribed purpose or effect:

1. New York presently has suspended all requirements of literacy as a condition of registration and voting as required by the 1970 Amendments to the Voting Rights Act. Our investigation revealed no allegation by black citizens that the previously enforced literacy test was used to deny or abridge their right to register and vote by reason of race or color.

2. Section 4(e) of the Voting Rights Act of 1965 modified the New York English language literacy requirements by providing that the literacy requirement could be satisfied by proof of attendance through the sixth grade at any American-flag school, including those in Puerto Rico. This Act was passed on August 6, 1965 and was finally upheld by the United States Supreme Court (*Katzenbach* v. *Morgan,* 384 U.S. 641) on June 16, 1966. Our investigation indicated that the implementation of this provision through the use of Spanish language affidavits was not completed until the fall of 1967.

The supplemental affidavit of Alexander Bassett dated March 30, 1972, indicates that New York authorities took significant interim steps to minimize any adverse impact resulting from the delay in making available Spanish

language affidavits. Our investigation did not reveal any individual citizens whose inability to register is attributable to the absence of Spanish language affidavits.

3. The 1970 Amendments to the Voting Rights Act suspended in all jurisdictions any use of literacy tests or devices. These Amendments were effective on June 22, 1970, and were upheld by the United States Supreme Court (*Oregon* v. *Mitchell,* 400 U.S. 112), in December 1970. Our investigation included a sampling of registration records in 21 election districts in the three covered counties. While there is no evidence that the state continued to require a formal literacy test after the Act (except in isolated cases), in each election district examined, a significant percentage of those registration applications examined after June 1970 bear a notation that some proof of literacy was recorded.

The supplemental affidavit of Alexander Bassett indicates that New York authorities took reasonable steps to notify all registration workers of the suspension of all literacy requirements and that notations of proof of literacy resulted from either (a) obtaining such proof contingently in the event the courts ruled in New York's favor in the challenge of the literacy suspension or (b) isolated instances where individual registration officials continued to obtain literacy contrary to official instructions.

Based on the above findings I conclude, on behalf of the Acting Attorney General that there is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances

which have been substantially corrected and which, un present practice cannot reoccur.

DAVID L. NORMAN
Assistant Attorney Gene
Civil Rights Division

Sworn to and subscribed
before me this 3rd day
of April 1972

Notary Public
My commission expires

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