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-Applicants for Intervention,

v.

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

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, et al.,
Appellants-Applicants for Intervention,

v.

UNITED STATES OF AMERICA,
Appellee.

MOTION TO DISMISS OR AFFIRM

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INDEX

TABLE OF AUTHORITIES

Cases:

Statutes:

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Pursuant to Rule 16 of the Revised Rules of this Court, appellee State of New York, on behalf of New York, Bronx and Kings Counties, moves to dismiss or affirm on the grounds that the questions presented by this appeal are not justiciable and/or are so unsubstantial as not to require further argument.

Statement

This action was commenced by the service of a complaint by the appellee State of New York on the appellee United States of America on December 3, 1971.* The relief sought in the complaint was for a declaratory judgment under § 4(a) of the Voting Rights Act of 1965, Public Law 89-1101, 70 Stat. 438, 42 U.S.C. § 1973(b) as amended by Public Law 91-285, 94 Stat. 315, that during the ten preceding years, the voting qualifications prescribed in the laws of New York did not deny or abridge the right to vote of any individual on account of race or color, and that the provisions of §§ 4 and 5 of the Voting Rights Act were, therefore, inapplicable in the Counties of New York, Bronx, and Kings in the State of New York.

The aforementioned counties had come within the purview of the Voting Rights Act, because of a determination made by the Bureau of Census that in 1968 less than 50% of the persons of voting age residing in those counties had voted in the Presidential election,** and since New York State, during the years prior to 1970, imposed a literacy requirement as a qualification for voting. N.Y. State Const. Art. II, § 1; N.Y. Election Law §§ 150, 168.

On March 10, 1972 the United States filed an answer to the amended complaint which did not deny the allegations

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* An amended complaint dated December 16, 1971 was subsequently filed.

** The percentage of the voting age population who voted for president in 1968 was determined by the Bureau of the Census to be 45.7% in New York County, 47.4% in Bronx County and 46.4% in Kings County. When the number of voters who participated in the 1968 general election in New York but who did not vote for the office of president is added, the percentage of voting age population who voted in the 1968 election would be 47.7% in New York County, 49.6% in Bronx County and 48.5% in Kings County. Amended Compl., para. 14.

of said complaint except that with respect to a few specific allegations concerning the administration of the literacy test, the answer stated that defendant was without knowledge or information sufficient to form a belief.

Subsequently, on March 17, 1972, the appellee New York moved for summary judgment. Appellees' moving papers included an affidavit from Winsor A. Lott, chief of the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department which annexed copies of all the literacy tests that were used during the years 1961 through 1969 and which attested to the fact that less than 5% of the applicants who have taken these tests have failed. It was also established that in 1968, less than 5% of the applicants who took the literacy test in each of the three affected counties failed. Amended Compl., para. 12, see also Exh. "1" to the answer of the defendant United States of America. Affidavits in support of the motion for summary judgment were also submitted by representatives of the Boards of Elections in each of the three affected counties attesting to the manner in which satisfaction of literacy was established prior to 1970 when the literacy test was suspended, and attesting to registration drives that were conducted during the 1960's, particularly in predominantly black and Puerto Rican areas of New York City seeking to encourage minority members to register.

After a four-month investigation by attorneys from the Department of Justice which included an examination of registration records of selected persons in New York, Bronx and Kings Counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties (Juris. State., p. 8a), an affidavit was filed on April 4, 1972 by David L. Norman, Assistant Attorney General in charge of the Civil Rights Division. The Norman affidavit stated that on the basis of that investigation conducted by the Department of

Justice "there was 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, under present practice cannot reoccur." Accordingly, the United States consented to the entry of the declaratory judgment.

Although the nature of this action was public knowledge shortly after it was filed with the Department of Justice (an article concerning the nature of the action appeared in the *New York Times* on February 6, 1972), appellees did not move to intervene as defendants in this action until April 7, 1972. On April 11, 1972 appellee New York filed an affidavit and memorandum in opposition to the motion to intervene. On April 13, 1972 the three-judge federal court denied without opinion appellant's motion to intervene and granted appellee New York's motion for summary judgment.

On April 24, 1972 appellants moved to alter the prior judgment. The motion was denied on April 25, 1972. Thereafter appellants filed a notice of appeal with this Court with respect to the order denying this application to intervene on April 13, 1972 and the order denying their motion to alter judgment.

APPELLANTS HAVE FAILED TO ESTABLISH THAT THE COURT BELOW ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO INTERVENE OR THAT THEIR APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION

Section 4(a) of the Voting Rights Act of 1965 and as amended by the Voting Rights Act of 1970 provides a state or subdivision with the right to request declaratory judg-

ment so that it may be exempted from the compliance requirements of § 5. See cases cited in *Gaston County* v. *United States,* 288 F. Supp. 678, 679 n. 1 (D.D.C. 1968). The determination as to whether the test or device, which triggered the applicability of § 4, has been used to deny or abridge an individual's right to vote on account of race or color rests with the United States District Court, although the United States Attorney General may consent to the entry of such a judgment.

The Voting Rights Act "makes no express provision for intervention", but "rather contemplates that the Attorney General will protect the public interest in defending section 4(a) actions." *Apache County* v. *United States,* 256 F. Supp. 903, 906 (D.D.C. 1966). While there is no statutory or absolute right to intervene in § 4(a) actions, the district courts have recognized the right of private parties to seek permissive intervention pursuant to FRCP Rule 24(a)(2) where the requirements of that section have been satisfied and where the applicant for intervention can establish that the Attorney General has been derelict or deficient in protecting the public interest. But "such intervention is not to be permitted except upon a strong showing." *Apache County* v. *United States, supra,* at 908.

Upon the record before it, the District Court had no choice other than to deny appellants' motion for intervention where (1) appellants did not establish that they had standing, (2) the motion was not timely and would have seriously disrupted New York's electoral processes, (3) appellants have other adequate legal means of protecting their interests, and (4) where appellants failed to establish that the Justice Department had not adequately protected the public interest or (5) that New York's literacy test had denied any individual the right to vote on account of race or color.

(1)

Every one of the named individual appellants were and are duly registered voters in the State of New York. Appellants' papers submitted to the District Court fail to establish how any of these individuals would be directly injured by the entry of the declaratory judgment in this action.

Since appellants are assuming that they have the same rights as the original parties in this action, they must be held to the same standards in determining whether they have proper standing. "Mere concern without a more direct interest cannot constitute standing in the legal sense" sufficient to challenge the exercise of responsibility of the Justice Department in this action. *Sierra Club* v. *Morton,* 401 U.S. 907.

(2)

Although the institution of this action was public knowledge since the filing of a complaint on December 3, 1971 and was mentioned in prominent newspaper articles (see New York Times, Feb. 6, 1972), appellants did not move to intervene until April 7, 1972. Appellants' contention that it waited until the Justice Department's defense was completed before seeking to intervene is a patently baseless excuse for delay. If such a contention were to be sustained, it would require a plaintiff to win two separate rounds in every lawsuit: first against the named defendant, and secondly against the intervenors who were watching from the sidelines until the defense's case was completed.

In determining whether to exercise its discretion to permit intervention, a district court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FRCP Rule 24(b); see *Allen Company* v. *National Cash Register Company,* 322 U.S. 137.

The granting of appellants' motion to intervene at the time it was brought would have seriously disrupted New York's electoral process. A legislative redistricting statute providing for new assembly and senate districts in the State of New York based on 1970 census figures was enacted in January, 1972 and new congressional districts were provided by a statute enacted in March, 1972.* The State of New York was aware of the fact that a detailed Justice Department investigation into the consequences of each of the new assembly, senate and congressional lines in three large counties within New York City might require several months to complete which would have prevented the use of the new district lines in the Spring, 1972 primary elections. Since there was no question that the filing requirements of § 5 of the Voting Rights Act were due to the statistical presumptions imposed by § 4 rather than by any evidence that New York's literacy test had discriminated against any individual by reason of race or color, the present lawsuit was instituted to prevent any delay in having the legislative and congressional districts at stake in the 1972 elections governed by 1970 census figures.

The delay sought by appellants' belated intervention would have unquestionably resulted in the holding of primary and general elections in New York State based on population figures that were 12 years out of date.

(3)

The denial by the District Court of appellants' motion for intervention has not prevented them from their purportedly ultimate objective of protecting the voting rights of black citizens. If they believe that any of the new

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* Correct 1970 census figures for the State of New York were not supplied to the New York Joint Legislative Committee on Reapportionment by the United States Bureau of the Census until October 15, 1971.

assembly, senate or congressional district lines were the product of racial discrimination and violative of the Fourteenth and/or Fifteenth Amendments they may seek remedial relief in a civil rights action in one of the federal district courts in the State of New York. *Cf. Gomillion* v. *Lightfoot,* 364 U.S. 339. Indeed, there is no reason why appellants could not have amended their present action in the Southern District of New York (*NAACP* v. *New York City Board of Elections,* 72 Civ. 1460) to seek such relief unless their reluctance to do so results from a lack of evidence to support such charges.

(4)

Appellants have failed to sustain their heavy burden of proof of showing that the Justice Department was derelict or deficient in protecting the public interest in its defense of this action. *Cf. Apache County* v. *United States, supra.*

The Justice Department conducted a four-month investigation into the allegations of the complaint before consenting to the entry of a declaratory judgment. As noted in the affidavit of the Assistant Attorney General in charge of the Civil Rights Division (Juris. State. 8a-11a), attorneys from the Department of Justice examined registration records of selected persons in each covered county, conducted interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties. In answer to the Justice Department's request, the Board of Elections supplied the Department with selected election districts in each of the three affected counties that were predominantly white, predominantly black, predominantly Puerto Rican and districts that contained mixed populations. The Justice Department was unable to uncover any evidence that would indicate that the predominantly black or Puerto Rican districts suffered

as a result of the imposition of English language literacy tests or were treated any differently than predominantly white election districts.

If appellants were in possession of any evidence that individuals were subjected to discrimination by reason of their race or color in the conduct of the literacy tests, they could have presented such evidence to the Justice Department. None of appellants' papers indicate that they are in possession of such evidence.

(5)

Certainly, the mere fact that New York imposed an English literacy requirement cannot be cited as evidence of racial discrimination. The right of a state to impose an English literacy requirement has been sustained by this Court. *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45. Although New York's literacy requirements may no longer be enforced to the extent that they are inconsistent with 42 USC § 1973(b)(c), courts have refused to declare that New York's literacy requirements constituted a denial of equal protection. *Camacho* v. *Rogers,* 199 F. Supp. 155 (S.D.N.Y. 1961); *Socialist Worker Party* v. *Rockefeller,* 314 F. Supp. 984, 999 (S.D.N.Y., 1970); *Cardona* v. *Power,* 384 U.S. 672.

It may be remembered that when South Carolina attacked the constitutionality of the 1965 Voting Rights Act on the grounds that § 4 actions would place an impossible burden of proof upon states and political subdivisions, this Court noted that the Attorney General had pointed out during hearings on the Act that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 332.

The State of New York clearly met its burden entitling it to a declaratory judgment.

The affidavit of Winsor A. Lott, which contains copies of all literacy tests that were given by the State of New York from 1961 to 1969 shows that the literacy tests consisted of a short paragraph in simple English followed by eight questions which could be answered in one or a few words. The answers were found in the paragraph. No outside knowledge was required. The tests were distributed with corresponding answer keys geared to minimize the discretion of the graders. Anyone with a minimal amount of English comprehension should have been able to pass the test. The evidence established that over 95% of the applicants each year who took the literacy test passed it throughout the State and in each of the three affected counties.

The failure of any person to register and vote in the Counties of New York, Bronx and Kings is and was in no way related to any purpose or intent on the part of the officials of those counties or the State of New York to deny or abridge the right of any person to vote on account of race or color.

Indeed, the named counties have in the past actively encouraged the full participation by all of its citizens in the affairs of government.

Central registration takes place throughout the year at the Board of Elections. Local registrations are also conducted every October for a three or four day period. In each county in New York City and in each election district in each county are polling places designated for local registration. See affidavit of Alexander Bassett, sworn to March 16, 1972, p. 3.

To further expand the number of registrants in New York, since 1966, if the prospective registrant demonstrated

by certificate, diploma or affidavit that he had completed the sixth grade in a public school in, or private school accredited by any State of the Commonwealth of Puerto Rico, in which the pre-administrative language was Spanish, he was permitted to register without proof of literacy in English. July 28, 1966, Op. Atty. Gen., 121. The Attorney General of New York set forth guidelines recommending that the affidavits be printed in English and Spanish to avoid language difficulties. In 1967, this became the practice (See affidavit of Bassett, *supra,* p. 2).

Moreover, beginning in 1964, New York City embarked upon an intensive effort to gather new voters at considerable expense. Every year since, except 1967, the Board of Elections has sponsored *summer* registration drives to encourage more people to register. In 1964, registrations were conducted in local firehouses throughout the City (Affidavit of Beatrice Berger, sworn to March 17, 1972). In 1965, mobile units were sent out into very populated areas containing a high density of blacks. Thereafter, local branches of the Board of Elections were set up throughout the City. These branches were specifically set up also in areas with a high population of black residents. With each new voter registration drive came a waive of publicity in the news media requesting citizens to register (Berger affidavit, p. 2).

Thus, far from discriminating against new voters by reason of race or color, the State of New York has actively sought to encourage members of minority groups to register and vote.

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, New York, August 21, 1972.

Respectfully submitted,

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