No. 72-129

In the Supreme Court of the United States

OCTOBER TERM, 1972

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, ET AL.

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

MOTION TO DISMISS OR AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
DAVID L. NORMAN,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16 of the Rules of this Court, the United States moves that the judgment of the district court be affirmed or, in the alternative, that the appeal be dismissed.

DECISION BELOW

The order of the district court (J.S. App. 1a–2a) is not reported.

JURISDICTION

The district court entered its order denying intervention on April 13, 1972. A motion to alter judgment was denied on April 25, 1972. A notice of appeal was filed on May 11, 1972. The Jurisdictional Statement

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was filed on July 21, 1972. The jurisdiction of this Court is invoked under 42 U.S.C. 1973b(a).

QUESTION PRESENTED

Whether the district court erred in denying intervention in this suit seeking a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965.

STATEMENT

On December 3, 1971, the State of New York, on behalf of New York, Bronx and Kings Counties, filed suit in the United States District Court for the District of Columbia under Section 4(a) of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973b(a)), seeking a declaratory judgment granting an exemption from certain provisions of that Act.[1] New York filed a motion for summary judgment on March 17, 1972.

On April 3, 1972, the United States filed a memorandum consenting to the entry of a declaratory judgment under Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(a)), together with an affidavit of an Assistant Attorney General on behalf of the Acting Attorney General, stating that (J.S. App. 10a–11a):

> 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

[1] The three New York counties were made subject to the provisions of Sections 4(a) and 5 of the Voting Rights Act by the 1970 Amendments to that Act, P.L. 91–285, 84 Stat. 315; see 42 U.S.C. 1973b, 1973c, and a subsequent determination by the Bureau of the Census, see 36 Fed. Reg. 5809 (March 27, 1971).

> 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.

On April 7, 1972, the appellants herein, the National Association for the Advancement of Colored People (NAACP) and five individuals, filed a motion seeking to intervene as a party defendant. On April 13, 1972, the district court, without opinion, denied the motion to intervene and entered judgment for New York. On April 24, 1972, appellants moved the district court to alter its judgment. The district court, without opinion, denied this motion on April 25, 1972.

ARGUMENT

While the district court did not set forth the reasons for denying the motion to intervene, there are at least two sufficient bases for sustaining the court's action. First, it was within the court's discretion to hold that the motion to intervene was not timely filed. Second, the judgment of the district court does not deprive appellants of any rights.

1. The requirement that a motion to intervene be timely is applicable both to intervention as of right under Rule 24(a), Fed.R.Civ.P., and permissive intervention under Rule 24(b). *Lumbermens Mutual Casualty Company* v. *Rhodes,* 403 F.2d 2, 5 (C.A. 10), certiorari denied, 394 U.S. 965.

Although the complaint here had been filed in December 1971 and the existence of the suit was a subject of a news article in the *New York Times* in Feb-

ruary 1972,[2] appellants did not seek to intervene until several weeks after New York's motion for summary judgment had been filed. In these circumstances, it was within the discretion of the district court to determine that the application was untimely, particularly since delay in adjudication of the action for declaratory judgment might have interfered with the implementation of New York's recently adopted reapportionment plans.[3]

2. The declaratory judgment entered by the district court released the three New York Counties from the obligations of Sections 4 and 5 of the Voting Rights Act of 1965. In our view such a declaratory judgment does not affect any legal right of appellants, and, accordingly, the denial of intervention could have been appropriately predicated on that ground.

In the declaratory judgment action, the district court merely determined, in effect, whether the submission procedures required under Section 5 of the Voting Rights Act of 1965 were applicable to the

[2] See New York's Motion to Affirm or Dismiss, p. 4.

[3] In an attempt to suggest that the motion to intervene was timely, appellants state that their counsel was expressly assured by attorneys from the Department of Justice that "the United States would oppose any exemption for the three counties and was preparing papers in opposition to the motion for summary judgment" (J.S. 10, 22). While we were not called upon to present evidence on this point in the district court, it is our position that appellants' statements are not an accurate representation of the substance of the conversations between counsel for appellants and attorneys for the government. While this Court is not the appropriate place to present evidence on this question, we will, if appropriate and relevant, present such evidence in the district court should any further hearing be held in this action.

three New York counties.[4] The Attorney General, when he determined "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," 42 U.S.C. 1973b(a), consented to the entry of the declaratory judgment as required by the statute.[5]

The action of the Attorney General and the subsequent judgment entered by the district court do not impair the ability of appellants to protect their Fifteenth Amendment rights. Under the 1970 Amendments to the Voting Rights Act, see 42 U.S.C. 1973aa, New York may not impose a literacy test as a prerequisite to voting before August 6, 1975, regardless of the outcome of this litigation. With respect to reapportionment matters, which appear to be appellants' primary concern (J.S. 9, 21), appellants may seek relief in the courts without reference to the Voting Rights Act if they believe there has been a violation of their Fourteenth or Fifteenth Amendment rights. See, *e.g.*, *Wright* v.

[4] If a declaratory judgment under Section 4(a) had not been entered, the three counties would also be subject to Section 6 (examiners) and Section 8 (observers) of the Voting Rights Act, 42 U.S.C. 1973d, 1973f. (Neither New York nor appellants advert to those aspects of the statute.)

[5] 42 U.S.C. 1973b(a) provides in relevant part:

"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."

Rockefeller, 376 U.S. 52; *Gomillion* v. *Lightfoot,* 364 U.S. 339.

The district court's declaratory judgment affects appellants only with regard to their presentation of evidence either to the Attorney General or to the District Court for the District of Columbia when and if there is a change affecting voting in one of the three New York counties to which Section 5 of the Voting Rights Act would apply. But the district court could properly conclude that this was not of sufficient magnitude to require disruption of the orderly processes of the court by allowing private parties to intervene in the suit immediately prior to the entry of the judgment, particularly since the courts are, in any event, available to hear any allegation by appellants that their rights have been denied.

CONCLUSION

For the foregoing reasons, the orders of the district court denying appellants' motions to intervene and to alter judgment should be affirmed, or, in the alternative, the appeal should be dismissed.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DAVID L. NORMAN,
Assistant Attorney General.

SEPTEMBER 1972.

[6] In recent years this Court has affirmed, rather than dismissed for want of jurisdiction, when there has been an appeal from denial of a motion to intervene as of right. See our Motion to Affirm in *Syufy Enterprises* v. *United States*, No. 70–329, Oct. Term 1971, affirmed, 404 U.S. 802.

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