IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *etc., et al.*,

Appellants,

—v.—

NEW YORK, *et al.*

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

BRIEF FOR APPELLANTS

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Opinion Below

The District Court for the District of Columbia issued no opinion in connection with this case. The order of the District Court, entered April 13, 1972, 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 the printed Appendix, pp. 71a and 117a.

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 1965, as amended. 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 timely 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 this Court is discussed in detail at pp. 13-16, infra.

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?

Statutes Involved

The statutes involved are Section 1973b and 1973c, 42 United States Code, sections 4 and 5 respectively of the 1965 Voting Rights Act as amended, and are set out in the Statutory Appendix hereto, pp. S.A.1-S.A.5.

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, 42 U.S.C. §§1973b and 1973c. 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 prohibits the use of literacy tests and other tests and devices. 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).

On December 3, 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.[1] The United States answered on March 10, 1972.[2] On March 17, 1972, New York moved for summary judgment.[3]

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 advised 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,

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[1] The amended complaint is set out on pp. 2a-11a.

[2] The answer is set out on pp. 12a-14a.

[3] The motion and supporting papers are set out on pp. 15a-32a.

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.[4] Counsel for appellants also informed 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 several occasions 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.[5]

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[4] The complaint in that action is set out on pp. 52a-62a.

[5] Affidavit of Eric Schnapper dated April 7, 1972, pp. 48a-51a.

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, p. 44a. 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, p. 40a. 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.

The United States did not oppose the motion to intervene. That motion was opposed, however, by New York.[6]

On April 13, 1972, the District Court denied without opinion appellant's motion to intervene and granted summary 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. This appeal followed.[7]

Summary of Argument

I. At stake in the instant case is whether the protections of sections 4 and 5 of the Voting Rights Act will continue to apply to over 2 million blacks and Puerto

[6] See Affidavit of John Proudfit, pp. 67a-70a.

[7] 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.

Ricans in New York, Kings and Bronx counties, New York. The protections of those sections include the requirement that changes in election laws obtain federal approval before being implemented, and a continuing prohibition against the use of literacy tests after the national ban on such tests expires in 1975.

II. Section 4(a) of the Voting Rights Act, regarding litigation seeking an exemption from sections 4 and 5, provides expressly and without limitation "any appeal shall be to the Supreme Court". 42 U.S.C. §1973b(a). Because this provision refers to appeals generally rather than appeals by "parties", this Court need not decide whether an unsuccessful applicant for intervention is a party within the meaning of statutory provisions authorizing appeals by a "party". Compare 28 U.S.C. §1253. An unsuccessful applicant for intervention has a well established right to appeal the denial of intervention, and the recent practice of this Court has been to take jurisdiction over such appeals regardless of whether the applicant might prevail on appeal on the merits.

III. Congress expressly intended to place Kings, Bronx and New York counties under sections 4 and 5. Under the original 1965 Act states and subdivisions were subject to sections 4 and 5 if, as of 1964, they met certain criteria regarding voter registration and turnout and the use of literacy tests. When the 1965 Act came up for renewal, it was pointed out that certain areas, particularly these three counties, met the specified criteria in the 1968 election although they had not met them in 1964. Accordingly Senator Cooper proposed that sections 4 and 5 apply to states and subdivisions which met the criteria in either 1964 or 1968. The Cooper Amendment was passed by the Senate and the House, both of which were advised during the relevant debates that the Amendment would bring

under sections 4 and 5 Kings, Bronx, and New York Counties.

IV A. Applicants for intervention in this case have a substantial interest herein. First, these applicants are plaintiffs in a pending action in the Southern District of New York, *N.A.A.C.P.* v. *New York City Board of Elections,* in which they seek to compel the three counties to comply with the provisions of section 5 and submit the changes in legislative and congressional district lines in the counties for federal approval. Applicants New York litigation will necessarily fail if an exemption from sections 4 and 5 is granted to the counties in the instant case. Applicants herein—including blacks, Puerto Ricans, public officials, and a civil rights organization—also have a substantial interest in opposing the exemption because it will deprive them for all time of the protections of sections 4 and 5. Both this Court and appellees have recognized the inadequacies of applicants' rights under the Fifteenth Amendment if denied the special remedies of the Voting Rights Act.

IV B. The United States did not adequately represent applicants' interests in this case. The United States refused to offer any defense whatever to New York's claim for exemption—calling no witness, filing no document, briefing not a single legal issues in opposition to that claim. This capitulation is clearly inadequate representation within the meaning of Rule 24, Federal Rules of Civil Procedure. *Trbovich* v. *United Mine Workers,* 404 US 528, 538 (1972)

The cursory investigation lending to this capitulation was itself plainly inadequate. The United States did not inquire into either the facts or legal theories which the Senate considered before passing the Cooper Amendment. Nor did the United States bring to the attention of the

District Court any of the evidence or legal arguments weighing against the exemption which the Attorney General had earlier used in testimony on the Voting Rights Act and which the Solicitor had earlier employed in litigation under that statute.

IV. C. The motion to intervene was timely filed only 2 days after applicants learned that the United States had reversed its position and declined to defend this action. It is well established that a party need not seek to intervene until events reveal a need to do so to protect his interests. The contrary rule would flood the courts with protective motions for intervention, most of them unnecessary and none of them ripe for decision. In the instant case applicants had every reason to believe that the United States would protect their interests until the government announced that it would consent to the exemption.

IV D. Intervention should have been granted by the District Court to assist it in carrying out its responsibilities under the Voting Rights Act. Under section 4 an exemption may not be granted until and unless the District Court finds as a matter of fact that the jurisdiction involved had not within the last decade used its literacy test with the purpose or effect of denying or abridging the right to vote. In the instant case New York offered evidence that it had not applied its test in a discriminatory manner, and the United States offered no evidence at all. The District Court thus had no evidence whatever from the original parties regarding the problems which led to the Cooper Amendment—the purpose of New York's literacy test, the differences in literacy rates between whites and non-whites, inferior educational opportunities for non-whites of voting age in New York or their native state, the deterrent effect of literacy tests. Applicants offered the District Court extensive documentary evidence on several of these issues.

For the District Court to refuse to inform itself about these matters and to grant an exemption was clear error. The resolution of the merits of this case by the District Court fell far short of the careful scrutiny which Congress must have contemplated would be exercised before the elaborate protections of sections 4 and 5 were withdrawn from more than 2 million blacks and Puerto Ricans.

ARGUMENT

I.

Introduction.

At stake in this litigation is whether the protections of sections 4 and 5 of the Voting Rights Act will continue to apply to New York, Kings and Bronx Counties in the State of New York. As is set out infra, pp. 17-21, Congress amended the coverage formula or trigger of the Voting Rights Act in 1970 for the express purpose of applying sections 4 and 5 to those three counties. The counties have a total black population of 1.4 million and another 800,000 Puerto Ricans.[8] 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. Prior to the instant action, which threatens to withdraw the protections of the act from 2.2 million minority group members, the total number of minority group members affected by all previous exemptions combined was less than 100,000.

The protections afforded by sections 4 and 5 to blacks and Puerto Ricans in the three counties are of great im-

[8] See Jurisdictional Statement, p. 16.

portance. Under these provisions all changes in the election laws and practices in the three counties cannot be put into operation unless approved by the Attorney General or sanctioned by the United States District Court for the District of Columbia. Congress only established this unusual procedure after concluding that private and government litigation under the Fifteenth Amendment and a variety of earlier civil rights statutes had proved inadequate to protect the rights involved. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 309-315 (1966); *Allen* v. *Board of Elections,* 393 U.S. 544, 556 n.21 (1969). Under section 5 the burden of proof is shifted to the jurisdiction involved, and it must prove not only that the new law or practice have no discriminatory purpose, but also that the law or practice will not have the *effect* of denying or abridging the right to vote on account of race. In the instant case, for example, the NAACP objects to the recent redistricting in the three counties as discriminatory. Were the NAACP required to establish a constitutional violation, it would have to prove the new boundaries were "the product of a state contrivance to segregate on the basis of race," a practically insurmountable obstacle. Compare *Wright* v. *Rockefeller,* 376 U.S. 52, 58 (1964).[9] Under section 5 the test which redistricting must meet is very different from that under *Wright,* and the difference is one of great practical importance to blacks or Puerto Ricans who believe their right to vote will be abridged by the new laws.

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[9] Justice Goldberg noted in his dissent in *Wright,* "To require a showing of racial motivation in the legislature would place an impossible burden on complainants. For example, in this case the redistricting bill was recommended and submitted to the legislature on November 9, 1961, passed on November 10, 1961, and signed by the Governor on that date. No public hearings were had on the bill and no statements by the bill's managers or published debates were available." 376 U.S. at 73-74.

In addition the national ban on literacy tests, and certain other tests and devices, will expire in two and one-half years on August 6, 1975. If New York obtains the exemption sought, it will thereafter be able to reinstate the application of literacy tests not only for new voters, but for previously registered voters as well. 42 U.S.C. §1973aa. However, if New York does not obtain the exemption sought in this action, the ban on literacy tests and other test devices will remain in effect at least until 1980 and probably indefinitely. 42 U.S.C. §1973b(a)[10] The exemption would also deny blacks and Puerto Ricans their right to the appointment of Federal voting examiners under 42 U.S.C. §1973d(b).

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[10] Section 1973b(a) prohibits the use of literacy by any state or subdivision covered by section 4 and 5. Since an exemption may be obtained by proving that literacy tests have not been used with discriminatory purpose or effect in the last 10 years, New York would be able to obtain an exemption ten years after the date in 1970 when it ceased to use literacy tests at all. However, as the Attorney General himself has suggested, the very use of literacy tests in 1980 would have the effect of discriminating on the basis of race in view of the many blacks in the three counties who were illiterate because of inferior education in New York or elsewhere. Thus an exemption granted in 1980 would be immediately revoked for another decade as soon as New York attempted to use its literacy tests. Compare Hearings Before a Subcommittee of the House Judiciary Committee on H.R. 4249, 91st Cong., 1st and 2nd Sess. (1969), (hereinafter "House Hearings"), p. 222 (Testimony of Mr. Mitchell). The ban on literacy tests would presumably remain in effect, in the Attorney General's words, "for the foreseeable future," "until the adult population were composed of persons who had equal educational opportunities", *id.*

See also Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 818 (1969-70), 91st Cong. 1st and 2nd Sess. (hereinafter "Senate Hearings"), pp. 185, 191 (Testimony of Attorney General Mitchell).

II.

The Court Has Jurisdiction Over This Case.

Section 1973b(a), section 4(a) of the Voting Rights Act, provides that an action brought to obtain an exemption from sections 4 and 5 of the Voting Rights Act shall be heard and determined by a court of three judges. That section states that such a three judge court shall be composed in accordance with 28 U.S.C. §2284. Section 1973b(a) further provides expressly and without limitation that *"any appeal shall lie to the Supreme Court."* (Emphasis added) This provision is modeled after the appeal provision regarding government initiated anti-trust actions, and refers to appeals generally and not to appeals by "parties." Compare 15 U.S.C. §29.[11] It is well established that unsuccessful applicants for intervention may appeal directly to this Court from a denial of intervention in such anti-trust cases. *Sutphen Estates* v. *United States,* 342 U.S. 19, 20 (1951); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967). Section 1973b(a) referring to "any appeal" is readily distinguishable from appeal statutes applicable to "any party." Compare 28 U.S.C. §1253.[12]

While Congress incorporated by reference the Judiciary Code's provisions regarding the method of establishment of certain three judge courts, 28 U.S.C. §2284, Congress

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[11] "In every civil action brought in any district court of the United States under any of said [anti-trust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

[12] "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

declined to incorporate or even refer to the Code's provisions regarding appeals by "parties" from such courts, but wrote a more broadly worded section directing all appeals to this Court. The congressional desire for a prompt final adjudication of appeals in actions for exemptions under the Voting Rights Act is equally applicable whether that appeal is taken by a state, the United States, or a successful or unsuccessful applicant for intervention. Compare *Apache County* v. *United States,* 256 F. Supp. 903, 907 (D.D.C., 1966). Intervention or not under the circumstances of this case is no mere ancillary issue, but controls whether or not New York was properly awarded an exemption from sections 4 and 5 and thus falls well within the mainstream of issues which section 1973b was intended to cover. Accordingly the Court is not called upon to determine in this case whether an unsuccessful applicant for intervention is a "party" for purposes of appeal,[13]

[13] Appellants would urge, were that question reached, that such an unsuccessful applicant must be treated as a party. In language paralleling section 1253, section 1254 limits petitions for writs of certiorari and appeals from state courts and courts of appeals to "any party." This Court has never doubted its jurisdiction over such petitions and appeals by unsuccessful applicants for intervention. See e.g. *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972). If an unsuccessful applicant for intervention is "any party" within the meaning of section 1254, he is also "any party" within that of section 1253. The Judiciary Code and the various Federal rules constantly refer to those taking part in litigation as parties, and were applicants for intervention not parties until and unless their applications were granted, most of the existing provisions regarding the procedures in the district courts, the courts of appeal, and this Court itself would be inapplicable. See e.g. 28 U.S.C. §1252, 1654, 2107, 2108; Federal Rules of Civil Procedure 5(a), 5(b), 5(c), 5(d), 6(e), 8(b), 8(c), 8(e)(2), 9(a), 10(a), 11, 12(a), 12(b), 12(c), 12(e), 12(f), 12(g), 13(a), 13(b), 13(c), 13(g), 15(a), 15(b), 12(c), 12(d), 17(a), 18(a), 19(a), 20(a), 20(b), 21, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43(b), 46, 52(b), 60, 61, Federal Rules of Appellate Procedure, 2, 3(b), 3(c), 3(d), 4(a), 5(a), 5(b), 6(a), 6(b), 10(b), 10(d), 10(e), 11(b), 11(c), 11(e), 11(f), 11(g), 12(b), 13(a), 15(a), 15(c),

since applicants' direct appeal to this Court is clearly authorized by section 1973.

An unsuccessful applicant for intervention has an established right to appeal the denial of that application.[14] The appeal lies regardless of whether the applicant asserted he was entitled to permissive or mandatory intervention.[15] Where as here the appeal in the main proceeding goes directly to the Supreme Court, an appeal from an order denying intervention also goes directly to this Court.[16]

At one time this Court held that it only had jurisdiction in a case such as this if intervention were erroneously denied below, thus postponing a decision on jurisdiction until and resting it upon the resolution of the merits of the case. See e.g. *Fox Publishing Co.* v. *United States,* 366 U.S. 683, 687-8 (1961). That the denial of intervention in the instant case was improper is detailed infra, pp. 22-41, and this Court's jurisdiction is thus clear. The procedure

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15(d), 16(b), 17(b), 18, 21(b), 24(a), 24(b), 24(c), 25(b), 26(c), 27(a), 27(b), 28(b), 29, 31(b), 32(a), 33, 34(a), 34(b), 34(d), 35(b), 35(c), 36, 39(c), 42(b), 43(a), 43(b), 43(c), 44, Rules of the Supreme Court 10(2), 10(4), 12(1), 12(4), 14(1), 16(5), 21(1), 21(3), 21(5), 21(6), 24(5), 26, 29(3), 33(1), 33(2), 33(3), 34(2), 34(3), 34(4), 34(5), 35(2), 35(4), 36(2), 36(3), 36(4), 36(5), 40(2), 41(5), 42(2), 42(3), 45(1), 45(3), 46, 48(1), 48(2), 48(3), 48(4), 50(2), 50(5), 53(1), 53(2), 59, 60(1), 60(3), 60(4).

[14] Whether an applicant can take an interlocutory appeal from that denial or must await final judgment is a matter of some dispute. 3B Moore's Federal Practice ¶24.15. In the instant case that issue need not be resolved, since the denial of the motion to intervene and the final judgment were contained in the same order.

[15] *Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961), *Brotherhood of RR Trainmen* v. *Baltimore & Ohio RR,* 331 U.S. 519 (1947).

[16] *United States* v. *California Coop. Canneries,* 279 U.S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Registers,* 322 U.S. 137 (1944); *Fox Publishing Co.* v. *United States,* 366 U.S. 683 (1961).

followed in *Fox Publishing* has been criticized, 7A *Wright and Miller, Federal Practice and Procedure,* §1923, and was apparently abandoned by this Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), an appeal from a denial of intervention where the Court noted probable jurisdiction rather than postponing jurisdiction pending a resolution of the merits. 382 U.S. 970 (1966). Similarly in *Syufy Enterprises* v. *United States,* 404 U.S. 802 (1971), the Court affirmed the denial of intervention below rather than dismissing the appeal for want of jurisdiction. Federal appeals courts in seven of the circuits have assumed that they have jurisdiction to hear an appeal from a denial of intervention regardless of whether that denial was proper. Where the denial of intervention was correct, these courts have affirmed the judgment below rather than dismissing the appeal.[17] The practical consequences are the same whether or not the practice in *Fox Publishing* is followed, for an unsuccessful applicant for intervention can only prevail on appeal by showing that the denial of intervention below was erroneous.[18]

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[17] *FMC Corp.* v. *Keizer Equip. Co.,* 433 F.2d 654 (6th Cir. 1970); *Bumgarner* v. *Ute Indian Tribe,* 417 F.2d 1305, 1309 (10th Cir. 1969); *Martin* v. *Kalvar Corp.,* 411 F.2d 552, 553 (5th Cir., 1959); *Edmondson* v. *State of Nebraska,* 383 F.2d 123, 128 (8th Cir., 1967); *Union Cent. Life Ins. Co.* v. *Hamilton Steel Prods., Inc.,* 374 F.2d 820, 824 (7th Cir., 1967); *Reich* v. *Webb,* 336 F.2d 153, 160 (9th Cir., 1964), cert. den. 380 U.S. 915); *Philadelphia Elec. Co.* v. *Westinghouse Elec. Corp.,* 308 F.2d 856, 861 (3d Cir., 1962), cert. den. 372 U.S. 936.

[18] If, however, this Court were to conclude that the appeal in this case should have been to the Court of Appeals for the District of Columbia, it should vacate the judgment below and remand the case to the district court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. Compare *Phillips* v. *United States,* 312 U.S. 246, 254 (1941); *Pennsylvania Public Utility Commission* v. *Pennsylvania Railroad Co.,* 382 U.S. 281, 282 (1965); *Wilson* v. *City of Port Lavaca,* 391 U.S. 352 (1968).

III.

Congress Expressly Intended to Place Kings, Bronx and 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 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 discrimina-

tory regional legislation. Renewal of the sections was initially rejected by the House on this ground.[19] When the measure was considered by the Senate, the same argument was advanced.[20] Critics of sections 4 and 5 reiterated that discrimination was a national problem and could be found even in the city of New York.[21] 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.[22]

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 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.
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[19] 115 Cong. Rec. 38485-38537 (1969).

[20] See generally 116 Cong. Rec. 5516—6661 (1970).

[21] 116 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).

[22] 116 Cong. Rec. 5546 (Remarks of Senator Ervin), 6151-52 (Remarks of Senator Ellender), 6623-25 (Remarks of Senator Allen) (1970).

> 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.
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> * * *
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> 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.
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> * * *
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> 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. 116 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. 116 Cong. Rec. 6661. When the Senate bill was brought up for consideration in the House, 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 Atc was not "aimed at any one section." [23] The House, which had earlier re-

[23] 116 Cong. Rec. 20161 (Remarks of Rep. Celler), 20165 (Remarks of Rep. Albert) (1970).

jected renewal of sections 4 and 5, acquiesced in their reenactment as thus modified.[24]

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.[25] (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.[26] (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.[27] (4) Again quoting the Attorney General, Senator Hruska suggested that the mere use of literacy tests had a psychological effect which tended to deter blacks who might seek to register and thus have a racially discriminatory effect.[28] (5) Several Senators sug-

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[24] 116 Cong. Rec. 20199 (1970).

[25] 116 Cong. Rec. 6660 (1970); see also 116 Cong. Rec. 6659 (Remarks of Senator Murphy).

[26] 116 Cong. Rec. 6661; see also 116 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).

[27] 116 Cong. Rec. 5533 (1970).

[28] 116 Cong. Rec. 5533; see also 116 Cong. Rec. 6152 (Remarks of Senator Eastland) (1970).

gested that literacy tests were discriminatory in effect merely because the rate of illiteracy was higher among blacks or other minorities than among whites.[29]

The requested exemption of Bronx, Kings and New York counties amounts, for all practical purposes, to a repeal of the Cooper amendment. Neither the Department of Justice nor the courts, not to mention the state of New York, have a general warrant to revoke Congressional decisions with which they may not happen to agree. Such an exemption for the three counties should only have been considered after it was conclusively proved that each of the five legal and factual theories which led Congress to enact the Cooper amendment was without rational foundation. In fact, however, the record in this case reveals that New York offered neither factual evidence nor legal argument relevant to the congressional concerns behind the Cooper amendment, and that the United States in its abortive investigation pursued not a single one of five theories on which congress had acted and some of which, as will be seen, had been advanced by the Attorney General himself.[30]

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[29] 116 Cong. Rec. 5532-3) (Remarks of Senator Hruska), 6152 (Remarks of Senator Eastland), 6156 (Remarks of Senator Gurney) (1970).

[30] See pp. 30-36, infra.

IV.

The District Court Erred In Denying the Motion to Intervene.

A. Applicants Have a Substantial Interest In the Continued Applicability of Sections 4 and 5 to Kings, Bronx and New York Counties.

Rule 24(a) provides, inter alia, that an applicant may intervene as of right if he "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. . . ."

The record in the instant case demonstrates that the NAACP and others seeking intervention have two interests in the instant litigation, either of which would be sufficient to give rise to a right to intervene. First, the applicants for intervention in this case are the plaintiffs in a pending action in the United States District Court for the Southern District of New York to compel New York to comply with section 5. In that action, *N.A.A.C.P.* v. *New York City Board of Elections,* 72 Civ. 1460, the NAACP and other plaintiffs alleged that New York was implementing changes in its legislative and congressional district lines in violation of the Voting Rights Act, and sought an injunction to prevent any implementation of the new redistricting laws until and unless New York obtained approval of those changes in its election laws from either the Attorney General or the district court for the District of Columbia.[31] The record also demonstrates that, once

[31] Complaint in *NAACP* v. *New York City Board of Elections,* pp. 52a-62a. The Congress which enacted the Cooper Amendment was of course aware that section 5 had been applied by the courts to redistricting. See Senate Hearings, p. 507 (Testimony of Mr. Norman).

New York has been compelled to submit its redistricting for approval, the NAACP intended to vigorously oppose such approval.[32] This litigation, which was pending in the Southern District of New York when the NAACP and others moved to intervene, must of necessity fail if an exemption is granted in the instant case.[33] The NAACP cannot enforce in the New York action the general obligation of the three counties to comply with sections 4 and 5 if the District Court in the instant case grants those counties an exemption from that very obligation. Not only does an exemption in this case sound the death knell of the New York action, but under the Voting Rights Act the NAACP and other applicants can only oppose the exemption by intervening in the instant case. A more compelling case for intervention as of right is difficult to imagine.

Applicants also are entitled to intervene as of right to protect their more general interest in retaining the safeguards of sections 4 and 5, with regard to all future changes in election laws, not merely those involving redistricting, as well as attempts to reintroduce literacy and other tests.[34] Applicant NAACP is an organization formed to protect the legal, social, economic and political rights and interests of black Americans, and seeks to oppose the instant exemption on behalf of its self, its constituent branches, all of its members, and all other black residents of New York, Bronx, and Kings counties. The individual appellants, black and Puerto Rican, several of them elected public officials, are all residents of the three counties.

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[32] Affidavit of Eric Schnapper, dated April 7, 1972, p. 49a.

[33] In recognition of this fact, counsel in the New York action have agreed to take no further action therein pending a final decision in the instant case.

[34] Those protections, absent an exemption, would remain in effect at least until 1980 and probably indefinitely. See p. 12, supra.

Each of these applicants for intervention will lose the various protections of sections 4 and 5 if the exemption sought by New York is granted. This Court has already held 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 § 5 approval requirements." *Allen* v. *Board of Elections,* 393 U.S. 544, 557 (1969). The interest of such an individual citizen is all the greater when his county government seeks to avoiding complying with section 5's requirements not merely in a particular case, but for all time. There is only one way in which an individual can protect that interest when an exemption is sought by his county and acquiesced in by the Attorney General—by intervening in the action seeking the exemption. The Voting Rights Act provides no other forum in which the NAACP and other applicants could have vindicated their interest in the continuing application of sections 4 and 5.[35]

The United States and New York urge that applicants will still be able to seek relief for violations of their Fourteenth and Fifteenth Amendment rights even if an exemption is granted.[36] But, as this Court has repeatedly recognized, the Voting Rights Act was enacted with the express purpose of augmenting the remedies available to blacks and other minority groups because Congress had concluded, after extensive inquiry, that suits under these

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[35] Permitting intervention would be consistent with the recognized trend towards enlarging the class of people who may protest administrative action. *Data Processing Service* v. *Camp,* 397 U.S. 150, 154 (1970). If the Voting Rights Act had authorized the Attorney General himself to grant exemptions, there would be little doubt that the applicants herein would have standing to challenge such a decision.

[36] Motion of United States to Dismiss or Affirm, pp. 5-6; Motion of New York to Dismiss or Affirm, pp. 7-8.

Amendments had proved inadequate. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 309-315 (1966); *Allen* v. *Board of Elections,* 393 U.S. 544, 556 n.21 (1969). In its brief before this Court in *Katzenbach* the United States argued:

> [T]he remedies available under law to citizens thus denied their constitutional rights—and the authority presently available to the Federal Government to act in their behalf—are clearly inadequate. . . .
>
> The . . . hearings and debates developed abundant evidence that, notwithstanding intensive litigation under the voting rights provisions of the Civil Rights Acts of 1957, 1960 and 1964, the promise of the Fifteenth Amendment remained largely unfulfilled. . . .[37]

In an amicus brief in the same case, the Attorney General of New York urged,

> After it became overwhelmingly clear that existing remedies, no matter how vigorously pursued, were inadequate, Congress had no alternative but to frame new legislation to cope with the situation.[38]

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[37] Brief of plaintiff in No. 22 Original, October 1965 Term, p. 70.

[38] Brief of the attorneys general of Massachusetts, New York, and other states, amicus curiae, in No. 22 Original, October 1965 Term, p. 3. During the hearings on the 1970 Act, it was proposed that sections 4 and 5 requirement of prior submission of new election laws be repealed.

> Senator Bayh: This would greatly increase the burden that an individual must prove. Under the present act, under the present section 5, an individual need only present to the court evidence that that legislature did not approach you as Attorney General before this act was implemented. This would not be the case now. They would have to prove the discrimination. . . .
>
> Attorney General Mitchell: This is true, and this is the issue that I raise.

Senate Hearings p. 198, see also pp. 202, 224, 233.

Only four years ago the United States urged this Court, in view of the additional rights conferred by the Act, that private litigants should be allowed to seek declaratory and injunctive relief to enforce the statute, even in the absence of express authorization of such actions. *Allen* v. *Board of Elections,* 393 U.S. at 557, n.23. That argument led this Court to conclude in *Allen* that "[t]he guarantee of §5, that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to §5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557. If, as the United States claimed in *Allen,* private individuals were entitled to force Mississippi and Virginia to comply with section 5 in a particular case, those citizens surely would have an even greater interest in preventing Mississippi or Virginia from avoiding compliance in all cases by obtaining an unopposed exemption. No different rule can apply to those three counties of New York.[39]

B. The United States Did Not Adequately Represent Applicants' Interests.

That the United States does not adequately represent applicants' interests can hardly be disputed. The requirement of Rule 24 is satisfied merely on a showing that the representation of applicants' interests "may be" inadequate. The burden of making that showing is minimal. *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972).

The United States has refused without qualification to present any defense to the instant action. The government

[39] In addition to erroneously denying intervention as of right, the District Court abused its discretion in refusing to grant permissive intervention under Rule 24(b) to obtain evidence necessary for that court to carry out its statutory responsibilities under the Voting Rights Act. See *Apache County* v. *United States,* 256 F.Supp. 903, 908 (D.D.C. 1966), pp. 42-50, infra.

has declined to call a single witness, to submit a single document, or to brief a single issue in opposition to New York's claim for an exemption. Intervention would lead to no disagreement as to how to conduct the defense since the United States has no defense to offer. In the district court the United States did not claim it adequately represented the interests of the NAACP or other applicants or otherwise oppose the motion to intervene. The United States did not even ask the District Court to retain jurisdiction over this case for the next five years, although this precautionary measure is mandatory under section 4, 42 U.S.C. § 1973b(a).

The capitulation of the United States in the instant case amounts to a complete failure to represent the interests of the applicants for intervention. Compare *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 155-6 (1967) (dissent of Justice Stewart); *Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir., 1962), *certiorari denied* 373 U.S. 915. The mere possibility that the United States would decline to contest this action would be sufficient to warrant intervention. Compare *Klein* v. *Nu-Way Shoe Co.*, 136 F.2d 986, 989 (2nd Cir., 1943). Here the danger that the government will not contest the action is not mere possibility, it is a certainty. In an action such as this under the Voting Rights Act the only role accorded the United States is to present evidence and legal argument to the district court; the government cannot settle or compromise the case, for an exemption can be granted if and only if the court makes certain findings of fact. Thus where the United States refuses to offer any such evidence or argument, its representation of the interests of the minority groups affected is inadequate per se.

The affidavit submitted by the United States below, pp. 40a-43a, acquiescing to the exemption for the three

counties, reveals an incomprehensible failure by the Department of Justice to pursue the legal and factual concerns which led to the passage of the Cooper amendment. The Department of Justice made no inquiry as to whether New York's literacy requirement was enacted with the purpose of discriminating on the basis of race. Compare remarks of Senator Cooper, supra note 25. The Department of Justice made no inquiry as to whether the rate of illiteracy was higher among blacks and Puerto Ricans than among native whites. Compare remarks of Senators Hruska, Eastland and Gurney, supra note 29. The Department of Justice made no inquiry into whether the three counties provided non-whites with an inferior education resulting in a higher rate of illiteracy. See remarks of Senator Hruska, supra note 27. The Department of Justice made no inquiry into whether there were non-whites of voting age in the three counties who had migrated there after receiving an inferior segregated education in the South. See remarks of Senator Griffin, supra note 26. The Department of Justice made no inquiry into whether the use of literacy tests had deterred blacks and Puerto Ricans from even attempting to register to vote. See remarks of Senator Hruska, supra note 28.

The investigation conducted by the Department "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." (p. 40a.) 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." (p. 41a.)[40]

The failure of the Department of Justice to investigate any type of discrimination other than purposeful misapplication of literacy tests is all the more inexplicable and unjustifiable because the investigations and theories deliberately not pursued had been repeatedly advocated by the Attorney General before Congress and by the Solicitor General before this Court in the years immediately preceding this action.

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[40] Compare the following dialogue in the House Hearings, p. 230.

> The Chairman: So far as you know, no civil rights groups or individuals have brought suits in those areas [the northern states] and hardly any complaints have been filed in those areas as to irregularities? Is that the situation?
>
> Attorney General Mitchell: Mr. Chairman, the fact that we have received few complaints does not necessarily establish the fact that there are not inequalities in the application of the literacy tests.

(1) During the 1970 Senate hearings on renewal of the Voting Rights Act the Attorney General maintained that the general purpose of literacy tests was to discriminate against unpopular segments of society.

> The history of the literacy test in this country shows quite clearly that it was originally designed to limit voting by foreign-born and other minority groups.[41]

Two years ago the Solicitor took much the same position in this Court:

> The history of literacy requirements also puts the notion that the purpose of the requirements was to assure an intelligent electorate in serious doubt.
>
> As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind [literacy] requirements" was to render politically impotent various racial, ethnic . . . [and] religious . . . groups." See Voting Rights Hearings [Senate Hearings] pp. 413-414. See also *id.* at pp. 185-188 (Attorney General Mitchell); *Katzenbach* v. *Morgan, supra* 384 U.S. at 654, *Castro* v. *State;* 85 Cal.Rptr. 20, 466 P.2d 244, 248-249; Leibowitz, *"English Literacy: Legal Sanction for Discrimination",* 45 Notre Dame Law 7 (1969).[42]

The portion of *Katzenbach* v. *Morgan* referred to by the Solicitor, quotes the following remark by the sponsor of New York's literacy test:

> More precious even than the forms of government are the mental qualities of our race. While those stand

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[41] Senate Hearings, p. 185. The Attorney General cited this Court's decision in *Katzenbach* v. *Morgan,* which dealt in particular with the origin of New York's literacy test. See pp. 30-31, infra.

[42] Brief of plaintiff in United States v. Arizona, No. 46 Orig, October 1970 Term, pp. 49-50, n.47.

> unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern Europe races. . . . The danger has begun . . . We should check it.[43] 384 U.S. at 654.

That statement and other matters led this Court to conclude there was at least "some evidence suggesting that prejudice played a prominent role in the enactment of [New York's literacy] requirement", *id.* Yet the Department of Justice failed to bring any of this evidence to the attention of the District Court or to try to develop additional evidence along these lines.

(2) In *Gaston County* v. *United States,* 395 U.S. 285 (1969), the United States maintained, and this Court agreed, that a literary test discriminated in effect on the basis of race within the meaning of section 4 of the Voting Rights Act if it were applied to non-whites who had a higher rate of illiteracy than whites due to the inferior education accorded them by the jurisdiction involved. The Solicitor urged in that case:

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[43] New York has submitted 5 affidavits from employees of the New York City Board of Elections stating that New York's literacy test was not used with the purpose of denying or abridging the right to vote on account of race. Affidavit of Alexander Bassett, p. 16a; Affidavit of Winsor A. Lott, p. 20a; Affidavit of Darby M. Gaudia, p. 24a; Affidavit of Beatrice Berger, p. 27a; Affidavit of Gus Gall, p. 30a. The New York City Board of Elections is also the defendant in appellants' New York action connected with this case. In 1966, while New York was still applying its literacy tests, the New York City Board of Elections maintained in its brief in *Katzenbach* that "the New York State constitutional provision (Art. II, §1) disenfranchising all citizens 'unable to read and write English' was expressly intended to effect discrimination against certain nationalities and races based on hostility to those nationalities and races." Brief of appellant in *New York City Board of Elections* v. *Morgan,* October 1965 Term No. 877, p. 22.

> The Voting Rights Act is result oriented; its aim is to broaden the degree of Negro-citizen participation in the electoral process of the covered jurisdictions. It is directed at both the unequal administration of literacy tests and at the fact that such tests were designed to capitalize on the inferior education afforded Negroes now of voting age. If, by reason of lesser opportunities leading to levels of educational attainment below or only bordering on literacy . . . the test has had a greater impact on Negro registration than white registration, the County is not entitled to removal from the Act's coverage. . . . The phrasing of the provision, particularly the use of the words "effect" and "abridging," makes clear that a covered jurisdiction cannot escape Section 4's reach simply by showing the absence of deliberate discrimination during the pertinent five-year period.[44]

The Department was under no misapprehension that unequal educational opportunities occurred only in the South. Attorney General Mitchell testified during hearings on the 1970 Act that "inferior education for minority groups is not limited to any one section of the country."[45] In that same year the Solicitor pointed out to this Court that in New York the proportion of blacks with less than four years of schooling, the practical equivalent of illiteracy, was substantially higher than the comparable rate among

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[44] Brief of appellant in No. 701, October 1968 Term, pp. 15-16, 19-20. Even earlier, in *South Carolina* v. *Katzenbach,* Orig. No. 22, 1965 Term, the Solicitor had maintained with regard to the states covered by the Act, "[I]n light of educational differences attributable to the public policies of the states involved, even a nondiscriminatory application of the tests would abridge Fifteenth Amendment rights." Brief of defendant, pp. 51, 65-68.

[45] House Hearings, p. 224.

whites.[46] Yet the Department of Justice failed to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

(3) The Department of Justice has heretofore consistently maintained that, under *Gaston County,* a jurisdiction discriminates in the use of its literacy tests if it applies those tests to non-whites who received an inferior education in another jurisdiction. Attorney General Mitchell testified in the 1970 hearings on the Voting Rights Act

> I believe that the *Gaston County* case . . . would bar the imposition of new literacy tests in those areas outside of the seven States covered by the 1965 act where publicly proclaimed school segregation was prevalent prior to 1954. This would include all or part of Florida, Arkansas, Texas, Missouri, Maryland, the District of Columbia, Kentucky and Tennessee. . . .
>
> Many Negroes, who received inferior educations in these States, have moved all over the Nation. The Bureau of the Census estimates that between 1940 and 1968, net migration of nonwhites from the South totaled more than 4 million persons. . . .
>
> Thus, following the Supreme Court's reasoning, it would appear inequitable for a State to administer a literacy test to such a person because he would still be under the educational disadvantage offered in a State which had legal segregation.
>
> The thrust of my statement was to the effect that the Negroes who have migrated to northern cities, particularly New York, do not have the educational qualifications to pass literacy tests. . . .

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[46] Brief of plaintiff in United States v. Arizona, October 1970 Term No. 46 Orig., p. 45 n.41.

> [W]e firmly believe that the principle of the *Gaston County* case may very well be extended beyond the seven Southern States that are currently under the inhibitions of the 1965 Act because we believe that it can be argued that it is equally applicable in the other States that have literacy tests where it can be shown that the proposed voter was discriminated against in his education either in the northern or the western schools in the States where the literacy tests exist, or more directly perhaps the fact that he is a transient from the Southern States where they had unequal education and where, through that process, he is denied the equal protection of the literacy test laws even though he may be voting in the State that did not provide him with the education.[47]

In his brief in *United States* v. *Arizona,* the Solicitor read this Court's decision in *Gaston County* to apply where persons received an inferior education in one jurisdiction and were then subjected to a literacy test in another:

> The Court further indicated that it was immaterial where the educational "inequities" arose, although it was assumed that most of the adult residents of Gaston County had been educated there, "[i]t would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems."[48]

The Solicitor also pointed out to the Court census data showing substantial migration from the South to New York. *Id.* at 44 n.36. Yet the Department of Justice failed

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[47] House Hearings pp. 222-4, 228, 285. See also Senate Hearings, pp. 207-08, 243, 504, 512, 663.

[48] Brief of plaintiff in No. 46 Orig., October 1970 Term, pp. 41-42.

to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

(4) Throughout his testimony on the 1970 Voting Rights Act the Attorney General repeatedly maintained that literacy tests such as those in New York deterred blacks from attempting to register to vote.

> Little more than one-third of the voting-age Negro population cast 1968 ballots in Manhattan, the Bronx, or Brooklyn, New York City, and this amounted to only one-half the local white turnout. . . .
>
> [T]hese facts might well support the conclusion that literacy tests in a State like New York do discourage persons from voting since the ratios of Negro registration are higher in the South. . . .
>
> In many instances [Negroes] do not even apply to take those tests because of their educational deficiencies.
>
> I believe the literacy test is an unreasonable physical obstruction to voting even if it is administered in an evenhanded manner. It unrealistically denies the franchise to those who have no schooling. It unfairly denies the franchise to those who have been denied an equal educational opportunity because of inferior schools in the North and South.
>
> But, perhaps most importantly, it is a psychological obstruction in the minds of many of our minority citizens. I don't have all the answers. But I suggest to this committee that it is the psychological barrier of the literacy test—long associated with the poll tax as a discriminatory toll to keep the Negro from the ballot box—that may be responsible for much of the low Negro voter registration in some of our major cities. . . .

> [T]his is a psychological barrier for people without education, the fact that they have to take literacy tests. It keeps them from going to the polls where they would have to take a literacy test in order to comply with the State statutes if they don't have a sufficient educational basis. . . .
>
> [I]t is clear that Negro voting in most Deep South Counties subject to both literacy test suspension and on-scene enrollment by Federal registrars is now *higher* than Negro vote participation in the ghettos of the two Northern cities—New York and Los Angeles—where literacy tests are still in use. In non-literacy test Northern jurisdictions like Chicago, Cleveland and Philadelphia, Negro registration and voting ratios are higher than in Los Angeles and (especially) New York. . . .
>
> In 1968 the two congressional districts in the nation with the lowest turnout were not in the Deep South; they were in the heart of New York's black, literacy-test handicapped ghetto. The two districts were the 12th (Bedford-Stuyvesant)[49] and the 18th (Harlem).[50]

Yet the Department of Justice failed to bring any of this information to the attention of the District Court or to try to develop additional evidence along these lines.

C. The Motion to Intervene Was Timely.

Rule 24 requires that an application to intervene, whether the intervention sought is permissive or of right, must be timely.

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[49] In Kings County.

[50] In New York County. House Hearings, pp. 227, 278, 296-7. See also Senate Hearings, p. 187.

The relevant facts were undisputed before the District Court. The amended provisions of the Voting Rights Act, including the Cooper amendment, was signed into law on June 22, 1970. Although it was known prior to enactment that sections 4 and 5 of the Act as modified covered the three counties of New York, the Attorney General did not formally issue the required determination of coverage until nine months later, March 27, 1971. 36 Fed. Reg. 5809.[51] Yet another eight months passed until on December 3, 1971, when New York finally brought this action to exempt the three counties from coverage by sections 4 and 5. Still another three months passed with the express consent of the plaintiff until, on March 10, 1972, the United States filed its answer. New York moved for summary judgment on March 17, 1972.

Counsel was first engaged by applicants in the middle of March, 1972, to protect their rights under sections 4 and 5 of the Act by compelling New York to submit to the Department of Justice for its approval the state's newly enacted legislative redistricting statutes. Counsel for the NAACP was first advised of the pendency of this action on March 21, 1972, during a telephone discussion with an attorney at the Department of Justice. On that occasion, and on March 23, 29 and April 3, three different Justice Department attorneys assured counsel for the NAACP that the United States would oppose New York's motion for summary judgment.[52] Counsel advised the Depart-

[51] In sharp though inexplicable contrast, when the 1965 Act was enacted on August 5, 1965, the Attorney General formally issued the required determinations with regard to several southern states *one day* later. 30 Fed. Reg. 9897 (August 6, 1965).

[52] Affidavit of Eric Schnapper, April 7, 1972, p. 48a. This affidavit was filed in support of the motion to intervene. The United States neither opposed the motion to intervene nor objected in any way to the contents of the affidavit. *Five months later,* for

ment, as requested by the Department's regulations, 36 Fed. Reg. 18189, that the NAACP planned to bring suit to prevent New York from implementing its redistricting without the requisite approval. Counsel discussed with Justice Department attorneys the nature of the objections to the redistricting which the NAACP contemplated filing with the Department when New York finally submitted its new election laws for approval. Counsel also advised the Department that the United States Civil Rights Commission planned to hold hearings on April 19, 1972 to enable it to decide whether it too would oppose the new district lines when they were submitted to the Justice Department. At no time did any Department representative indicate in any way that the litigation, objections or hearings might soon be rendered pointless by the government's action in the instant case.[53]

On April 4 the United States filed a one sentence memorandum in the District Court consenting to the entry of a declaratory judgment exempting the three New York Counties from the Voting Rights Act.[54] On April 5 counsel for the NAACP and other applicants was informed of this action by a telephone call from an attorney at the Department of Justice. On April 6 counsel was advised by the law clerk to one of the members of the panel that any

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the first time in this litigation, the United States informally stated in its Motion to Dismiss or Affirm that it is its position that the affidavit is not "an accurate representation of the conversations between counsel for appellants and attorneys for the government." The United States explains neither why it did not so inform the District Court in April, nor in what respect it now alleges the affidavit was inaccurate. This Court sits to review the decisions of the lower federal courts based upon the record before those courts, not to afford any party a second chance to present evidence which it failed to give to the courts below.

[53] See affidavits of Eric Schnapper, April 7, 1972 and April 24, 1972, pp. 48a and 91a.

[54] Appendix, p. 39a.

motion to intervene should be filed, with all supporting papers, on the next day.[55] On April 7 the instant motion to intervene was filed in the District Court.

The federal courts have always recognized that the timeliness of a motion to intervene under Rule 24 depends upon the date when the applicant for intervention learned that intervention was necessary to protect his interests. *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir., 1970). In *Pyle-National Co.* v. *Amos,* 172 F.2d 425 (7th Cir., 1949), 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 litigation had commenced and a matter of weeks before the scheduled commencement of trial. The Court of Appeals held the application for intervention timely because the stockholder had moved to intervene promptly upon learning that the corporation was about to consent to judgment for much less than the full amount allegedly misappropriated by the defendants. 172 F.2d 428. In *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Company,* 386 U.S. 129 (1967), intervention was sought eight years after the filing of the initial complaint, and long after the case had gone to judgment and been successfully appealed to this Court. Several states and other parties sought to intervene when they learned that the United States sought to settle the case on terms which did not adequately protect their interests. Although the district court disapproved intervention because, inter alia, the motions were made long after the initial judgment, 37 F.R.D. 330 (D. Utah 1965), this Court approved intervention and no member of the Court suggested that the motions to intervene ought have been made earlier. Similarly in another voting rights case, *Apache County* v. *United States,* 256 F.Supp. 903 (D.D.C., 1966) where inter-

[55] Affidavit of Eric Schnapper, April 24, 1972, p. 92a.

vention was sought five days after the United States declined to defend an action for exemption from sections 4 and 5, neither the court nor the United States questioned the timeliness of the motion.

In the instant case the NAACP moved to intervene a mere two days after it had learned the United States would not oppose the exemption, and only three days after the government consented to the motion for summary judgment. Both the United States and New York urge that the NAACP should have moved to intervene before the United States consented to the motion for summary judgment, indeed even before it had actual knowledge that this action was pending.[56] Under the procedure urged by the United States and New York a private party interested in the subject matter of any pending litigation would be required to file a precautionary motion to intervene immediately upon learning of the litigation and even though he might have no objection at that time to the adequacy of those representing his interests. Thus the NAACP, instead of intervening in those few civil rights cases in which it actually disagreed with the position being taken by the United States, would be required to move to intervene in every one of the hundreds of school desegregation, employment and housing discrimination cases brought by the United States. Consumer groups interested in anti-trust matters would have to intervene, not in the rare anti-trust cases which they thought were being mishandled, but in all anti-trust cases. Compare *Nader* v. *United*

[56] Motion of United States to Dismiss or Affirm, pp. 3-4; Motion of New York to Dismiss or Affirm, pp. 6-7. Both the United States and New York maintain that intervention should have been sought after a February 6, 1972, newspaper article describing this action. The uncontradicted affidavit filed by counsel for the NAACP in the district court shows that neither he nor any of his clients had read the article or were aware of this litigation until mid-March. Affidavit of Eric Schnapper, April 24, 1972, p. 91a.

States, No. 72-823. Such a massive increase in intervention motions, most of them entirely unnecessary, would only further crowd already congested court dockets. Even if such motions were made at the very threshold of an action, they could not be effectively disposed of when filed. Had the NAACP moved in February 1972 to intervene in this action, it could have made no substantial showing that the United States had not adequately represented its interests; the United States was still maintaining at that time that it would oppose the exemption, and had not even filed its answer. If the District Court had denied a motion to intervene in February, it would clearly have been obliged to reconsider its decision in April after the United States consented to the exemption. If the District Court had granted the motion, the intervenors would have been able to take little if any further action until April when the government's conduct indicated the extent to which their interests were not adequately protected. In either event, the only practical effect of requiring the NAACP to move to intervene *before* April 4 would have been to sidetrack the district court and the other parties to deal with an issue not then ripe for decision.

When the NAACP moved to intervene the only substantive papers which had been filed in the district court were the complaint, the answer, the motion for summary judgment, and the terse consent to that motion. No motion had been decided or even argued. No depositions or other discovery had been taken. No witness had been heard. No trial had commenced, nor any trial date set. No judgment had been entered. No appeal had been sought. No steps had been taken in the case which, because of intervention, would have had to be retraced with possible prejudice to New York or the United States. The NAACP filed with its motion a proposed answer, and stood ready

and able to oppose the motion for summary judgment then pending before the District Court.

It would be particularly inappropriate to hold the instant motion untimely because the intervention sought was of right. The NAACP has no other forum to which it can turn to assure the continued applicability of sections 4 and 5 to Kings, Bronx, and New York Counties. Only the District Court hearing the instant litigation has the power to afford the blacks and other minority groups in the three counties the protections of the Voting Rights Act. To deny applicants' motion to intervene would be to cut them off absolutely and forever from any opportunity to retain for themselves the benefits which Congress sought to confer upon them in enacting the Cooper amendment. Such drastic action under the circumstances would be plainly inconsistent with "the interest of justice" which should control decisions as to timeliness. *McDonald* v. *E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir., 1970).

D. Intervention Was Necessary and Proper to Assist the District Court In Carrying Out Its Responsibilities Under the Voting Rights Act.

Under section 4 of the Voting Rights Act the responsibility for deciding whether to grant or deny an exemption lies ultimately in the hands of the United States District Court for the District of Columbia. An exemption can only be obtained if that court finds as a matter of fact that the jurisdiction involved has not, within the previous 10 years, used its literacy test, or certain other tests or devices, for the purpose or with the effect of denying or abridging the right to vote on account of race or color. The role of the Attorney General in the exemption process is limited to assisting the court by providing evidence as to the purpose and effect of the tests concerned.

An action seeking an exemption is not one which the United States has the power to compromise or settle.[57]

In the instant case, in response to New York's motion for summary judgment, the United States informed the District Court that it would not present the court with any evidence whatever. The District Court was thus asked to resolve a question of paramount importance to the legal rights of 2.2 million blacks and Puerto Ricans without the least semblance of adversary process. Under these unusual circumstances the District Court was singularly ill-equipped to resolve complicated questions of law and fact regarding the election practices and their legal consequences of an unfamiliar state several hundred miles distant. The affidavit of the Assistant Attorney General revealed on its face that the United States had failed to investigate most of the legal and factual questions raised by this action. See pp. 27-36, supra. Yet at this point in the proceedings, without first exploring ways of obtaining relevant evidence or otherwise informing itself, the District Court purported to draw the case to a close. The court entered an order not formally finding that New York's literacy test had not been used with a discriminatory purpose or effect, nor finding any facts whatever, but merely reciting that the plaintiff's motion for summary judgment was granted. The absence of such a finding called into question whether the court understood its responsibilities under the statute. It is unclear at best whether the members of the court even made any deter-

[57] Congress expressly "prevented the Attorney General from making the usual prosecutorial decision that specified individuals or areas are not covered by the statute. . . . The statute does not purport to impose on the court an absolute obligation to accept the Attorney General's determination if the court has reason to believe it is erroneous". Brief of United States in *Apache County* v. *United States,* Civil Action No. 292-66, District Court for the District of Columbia, p. 16.

mination about the use of New York's literacy test, or whether they felt authorized or even compelled by the government's position to simply grant the motion for summary judgment. The resolution of New York's exemption claim fell far short of the careful scrutiny which Congress must have contemplated would be exercised before the elaborate protections of the sections 4 and 5 of the Voting Rights Act were withdrawn from more than 2 million blacks and Puerto Ricans.

The proper course for the District Court, when confronted by the unusual circumstances of this case, would have been to seek additional evidence and legal argument before reaching any resolution on the merits. Such assistance was not hard to find: only three days after the United States declined to produce any evidence the appellants asked to intervene and to defend this action. The proposed intervenors had a great interest in the outcome of this case, both as black and Puerto Rican residents of the three counties and as plaintiffs in *NAACP* v. *New York City Board of Elections*. The proposed intervenors, local public officials and a civil rights organization of national repute, were familiar with the problems in the three counties. Neither the competence nor the good faith of the applicants for intervention or of their counsel was ever questioned. The United States did not indicate any opposition to granting the motion for intervention. The appearance of these applicants for intervention afforded the District Court an excellent and sorely needed opportunity to further inform itself before attempting to carry out its responsibilities under the Voting Rights Act.

The proposed answer filed by the NAACP and other applicants with their motion to intervene demonstrated even more clearly the need for further inquiry by the District Court. The answer alleged several specific ways

in which New York's literacy tests had been used with the purpose or effect of discriminating on the basis of race. (1) That the rate of illiteracy was substantially higher among non-white persons of voting age than among whites of voting age. (2) That the difference in literacy rates between whites and non-whites educated in New York was the result of the segregated and inferior education afforded non-whites in New York. (3) That most of the non-whites educated outside New York had been educated in the southern states where they were forced to attend segregated and inferior schools. (4) That large numbers of non-whites were deterred from seeking to register because of the literacy tests, since the tests were administered by a virtually all white staff and conducted in such a way as to humiliate those who could not pass them. These detailed allegations, any one of which if true would have been sufficient to defeat the exemption, were particularly significant because it was clear that the United States had never investigated any of the questions raised.

Additional documents filed subsequently in the District Court by the applicants demonstrated the substantiality of several of these allegations. Census data adduced by the NAACP and others demonstrated that in the decade before this action was commenced illiteracy was two to three times as high among non-whites as among native whites in each of the three counties. The differences in the illiteracy rates shown was substantially greater than that which prompted the denial of an exemption in *Gaston County* v. *United States,* 288 F. Supp. 678 (D.D.C., 1968), 395 U.S. 285 (1969).[58] The applicants for intervention also

[58] 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 proportion

offered half a dozen official and semi-official studies of the New York City educational system going back as far as 1915 documenting the extent of discrimination against minority children in the three counties. The studies revealed that throughout this period most non-white children had attended predominantly non-white schools, and that these schools, in comparison to predominantly white schools, were older, had not been renovated for a longer period, spent less per child, and had less special equipment, more teachers who were not fully licensed, and larger classes.[59]

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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 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). See Points and Authorities in Support of Motion to Alter Judgment, pp. 79a-86a.

[59] 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 Recreation" (1935); Blascoer, *Colored School Children in New York* (1915); *Bulletin*

The applicants attempted to refer the District Court to judicial decisions condemning racial discrimination in both New York City and the school systems in the south from which many black residents of the three counties had emigrated.[60] The submission of this extensive material

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of the New York Public Library, "Ethiopia Unshackled: A brief history of the education of Negro Children in New York City" (1965). The 1955 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. See pp. 93a-116a.

[60] *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

should, by itself, have prompted the District Court to insist on an extensive inquiry into the discriminatory effect of New York's literacy tests. In fact, however, that court chose to bring further proceedings to an end the day after the studies and other data were filed, without even leaving itself adequate time to examine their contents.

The mere fact that appellants sought to intervene on the side of the United States did not preclude the District Court from granting their motion and accepting their assistance. The United States itself did not oppose the motion to intervene. This Court has already held that private parties may step forward and seek to indicate their own and the public interest when dissatisfied with the government's handling of a case in which they have a substantial interest. *Cascade 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. The applicants 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). The legal and evidentiary considerations which the NAACP and others ask to present are the very theories urged by the United States before this Court, repeatedly advanced by the At-

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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.

torney General at congressional hearings leading to the instant statute, and accepted by the Congress which voted the Cooper Amendment into law.

The decision of the District Court in this case cannot be justified on the ground that the jurisdiction involved is not located in the South. Congress was well aware that it was extending coverage of the Voting Rights Act to the state of New York, and it did so after extensive testimony and debate urging that the problems of racial discrimination were national in scope. Neither the United States nor the courts may apply different standards regarding exemptions according to whether they are sought in the North or in the South, especially in view of repeated expressions of concern in Congress that this may have occurred under the 1965 Act.[61] Any such double standard would create just that appearance of regional discrimination which Congress in 1965 and 1970 was anxious to avoid.[62] If on a record as strong as that in the instant case intervention is held unavailable to stop the hasty granting of an exemption to a northern jurisdiction, negroes in the south will have no means of preventing the granting of similar exemptions to Mississippi or Alabama. If it were not reversible error to grant an exemption in 1972 to Bronx county, New York, when neither the court nor the government had made any inquiry into illiteracy rates or inequality of educational opportunity, there would be no reversible error in granting an exemption in 1973 after a similarly limited inquiry to Gaston County, North Carolina.

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[61] 116 Cong. Rec. 6166 (Remarks of Rep. Poff), 6521 (Remarks of Senator Ervin), 6621 (Remarks of Senator Ervin) (1970).

[62] Compare *South Carolina* v. *Katzenbach,* 383 U.S. 301, 360 (1966) (Dissent of Justice Black).

The District Court clearly erred in refusing to permit any inquiry in open court into the issues raised by New York's request for an exemption from sections 4 and 5. Particularly in a case such as this, involving as it does matters of great public import, the courts do not function as mere umpires or moderators bound to accept any arrangements proposed by the named parties, but sit to do justice to all those who may be affected by their decisions. Compare *Simon* v. *United States,* 123 F.2d 80, 83 (4th Cir., 1941), *certiorari denied* 314 U.S. 694. Where, as here, New York sought to withdraw protections of sections 4 and 5 from millions of blacks and Puerto Ricans, and the United States declined to either present the court with relevant evidence or to advance any related legal considerations, the responsibilities imposed upon the District Court by section 4 dictated that it accept the assistance of responsible intervenors. The District Court thus erred, not only in denying a timely motion to intervene by applicants entitled as of right to intervene, but also in failing to carry out its functions under the Voting Rights Act.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

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STATUTORY APPENDIX

Section 1973b, 42 United States Code, Section 4 of the Voting Rights Act, provides

§ 1973b. *Suspension of the use of tests or devices in determining eligibility to vote-Action by state or polititical 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 abridgements 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 addition 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, Section 5 of the Voting Rights Act, 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 objection 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.

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