IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-129

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

Appellants-Applicants for Intervention,

v.

NEW YORK, on behalf of New York, Bronx, and Kings Counties, *et al.*,

Appellees.

BRIEF FOR APPELLEE STATE OF NEW YORK

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Statement

This action was commenced in the United States District Court for the District of Columbia by the service of a complaint by appellee State of New York on appellee United States of America on December 3, 1971. An amended complaint dated December 16, 1971 was subsequently filed (2a-11a).[1]

[1] Numerals in parentheses refer to the Appendix in this appeal.

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

The aforementioned counties had come within the purview of the Voting Rights Act, because of a determination made by the Bureau of Census that in 1968 less than 50% of the persons of voting age residing in those counties had voted in the Presidential election,[2] and since New York State, during the years prior to 1970, imposed a literacy requirement as a qualification for voting. N.Y. State Const. Art. II, § 1; N.Y. Election Law §§ 150, 168.

On March 10, 1972 the United States filed an answer to the amended complaint which did not deny the allegations of said complaint except that with respect to a few specific allegations concerning the administration of the literacy test, the answer stated that defendant was without knowledge or information sufficient to form a belief (12a-14a).

Subsequently, on March 17, 1972, appellee New York moved for summary judgment (15a). Appellee's moving papers included an affidavit from Winsor A. Lott, chief of

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[2] The percentage of the voting age population who voted for president in 1968 was determined by the Bureau of the Census to be 45.7% in New York County, 47.4% in Bronx County and 46.4% in Kings County. When the number of voters who participated in the 1968 general election in New York but who did not vote for the office of president is added, the percentage of voting age population who voted in the 1968 election would be 47.7% in New York County, 49.6% in Bronx County and 48.5% in Kings County. Amended Compl., para. 14 (7a).

the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department which annexed copies of all the literacy tests that were used during the years 1961 through 1969 and which attested to the fact that less than 5% of the applicants who have taken these tests have failed (20a-23a). It was also established that in 1968, less than 5% of the applicants who took the literacy test in each of the three affected counties failed. Amended Compl., para. 12 (6a). Affidavits in support of the motion for summary judgment were also submitted by representatives of the Boards of Elections in each of the three affected counties attesting to the manner in which satisfaction of literacy was established prior to 1970 when the literacy test was suspended, and attesting to registration drives that were conducted during the 1960's, particularly in predominantly black and Puerto Rican areas of New York City seeking to encourage minority members to register (24a-38a).

After a four-month investigation by attorneys from the Department of Justice which included an examination of registration records of selected persons in New York, Bronx and Kings Counties, interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties, an affidavit was filed on April 4, 1972 by David L. Norman, Assistant Attorney General in charge of the Civil Rights Division (40a-43a). The Norman affidavit stated that on the basis of that investigation conducted by the Department of Justice "there was no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." Accordingly, the United States consented to the entry of the declaratory judgment (39a).

Although the nature of this action was public knowledge shortly after it was filed with the Department of Justice (an article concerning the nature of the action appeared in the New York Times on February 6, 1972), appellants did not move to intervene as defendants in this action until April 7, 1972 (44a-47a). On April 11, 1972 appellee New York filed an affidavit and memorandum in opposition to the motion to intervene (67a-70a). On April 13, 1972 the three-judge federal court denied without opinion appellant's motion to intervene and granted appellee New York's motion for summary judgment (71a-72a).

On April 24, 1972 appellants moved to alter the prior judgment (73a-74a). The motion was denied on April 25, 1972 (117a-118a). Thereafter appellants filed a notice of appeal with this Court with respect to the order denying their application to intervene on April 13, 1972 and the order denying their motion to alter judgment (119a-120a). By order of this Court, entered on November 6, 1972, probable jurisdiction was postponed to the hearing of this case on the merits (121a).

Question Presented

Where the State of New York sued for an exemption from the filing requirements of §§ 4 and 5 of the Voting Rights Act of 1965, as amended, and where the submission of affidavits and exhibits from New York election officers and a separately conducted four-month investigation by the United States Department of Justice led that Department to conclude that there was no reason to believe that a literacy test had been used in the past 10 years in the Counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, and to consent to the entry of declaratory judgment, and where the District Court, accordingly, granted the State's motion for summary judg-

ment, did the District Court err in denying appellants' motion for intervention where such motion was brought after the filing of the Justice Department's consent, where appellants' papers did not show that the Justice Department had not adequately protected the public interest, and where appellants have other adequate legal means of protecting their interests?

Statutes Involved

Sections 4 and 5 of the 1965 Voting Rights Act as amended, 42 U.S.C. § 1973b and 1973c, are set out in the statutory appendix to appellants' brief (pp. S.A. 1-S.A. 5).

Rule 24, Fed. Rules Civ. Proc., 28 U.S.C., provides:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application

may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

* * *

ARGUMENT

I. The declaratory judgment was issued by the Court below in accordance with the procedure authorized by Section 4 of the Voting Rights Act of 1965.

The procedure followed by the State of New York in obtaining declaratory judgment exempting three New York counties from the filing requirements of the Voting Rights Act is fully authorized by section 4 of the Voting Rights Act of 1965, as amended by the Voting Rights Act of 1970. 42 U.S.C. § 1973(b).[3] The applicable provisions of that section were described by this Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301, 318 (1966), as follows:

> "Statutory coverage of a State or political subdivision under § 4(b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years (now ten years) to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. § 4(a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been

[3] The section is reprinted in the statutory appendix to the Brief for Appellants.

promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. * * *''

Other states or political subdivisions which have obtained declaratory judgments in similar actions include *Wake County, North Carolina* v. *United States,* D.D.C., Civil Action No. 1198-66 (January 23, 1967) (plaintiff's motion for summary judgment granted with consent of Government); *Elmore County, Idaho* v. *United States,* D.D.C., Civil Action No. 320-66 (September 22, 1966) (plaintiff's motion for summary judgment granted with consent of Government); *State of Alaska* v. *United States,* D.D.C., Civil Action No. 101-66 (August 17, 1966) (plaintiff's motion for summary judgment granted with consent of Government); *Apache County* v. *United States,* D.D.C., 256 F. Supp. 903 (1966) (plaintiffs' motion for summary judgment granted with consent of Government and motion by Navajo Tribe of Indians and 31 members of Navajo Tribal Council to intervene denied).

Appellants do not challenge the procedure followed below, but base their appeal on the contention that their application to intervene, filed three days after the United States consented to the entry of declaratory judgment, should have been granted by the District Court. Appellants' contention ignores the facts that on the record before it, the District Court had no choice other than to deny the motion for intervention where (1) their motion was not timely and would have seriously disrupted New York's electoral process, (2) appellants did not show any practical impairment of their interests, (3) appellants failed to establish that the Justice Department had not adequately protected the public interest or (4) there was no evidence that New York's literacy test had denied any individual the right to vote on account of race or color.

II. Appellants' application to intervene was not timely.

An application to intervene, whether sought as of right under F.R.C.P., Rule 24(a), or as permissive under Rule 24(b) must be timely or it must be denied. *Alleghany Corp.* v. *Kirby,* 344 F. 2d 571 (2nd Cir., 1965); *McKenna* v. *Pan American Petroleum Corp.,* 303 F. 2d 778 (5th Cir., 1962). A motion to intervene after the parties to a proceeding have agreed to the entry of a consent decree is looked on with particular disfavor by the courts and will be denied in other than the most unusual circumstances. See *United States* v. *Blue Chip Stamp Company,* 272 F. Supp. 432, 436 (D.C. Cal. 1967).

The particular need for promptness in the disposition of section 4 actions brought under the Voting Rights Act was recognized by the District Court in *Apache County* v. *United States,* 256 F. Supp. 903, 907 (D.D.C. 1966), where it stated:

> "It is true, too, that speedy determination of section 4(a) suits brought by state or local governments is desirable. The very existence of this remedy reflects an awareness by Congress that the broad statutory suspension of tests may have an overbroad reach which requires corrective procedures to avoid unintended incursions on legitimate state policy. The special three judge court has a statutory obligation to give the case precedence 28 U.S.C. § 2284."

Although the nature of the instant action was public knowledge since the filing of the complaint on December 3, 1971, appellants did not move to intervene until April 7, 1972. A newspaper article in the *New York Times* on February 6, 1972, p. 48, mentioned the fact that the Citizens Voter Education Campaign of New York State under the chairmanship of Rev. Carl McCall, and that

Representative Herman Badillo, and Borough Presidents Percy E. Sutton of Manhattan and Robert Abrams of the Bronx, had been aware of this action. During the week after the *New York Times* article appeared, the American Civil Liberties Union requested a copy of the amended complaint for possible intervention, but declined to intervene after studying the papers.

In attempting to justify the delay of appellants in moving to intervene in the instant proceeding, appellants' counsel in his affidavit of April 24, 1972 (91a) stated that he had no knowledge of the existence of this action until March 21, 1972. The reason for this lack of knowledge, according to appellants' counsel, was that during the months of December, 1971 and January and February, 1972, he was in the State of New Hampshire, where the only daily paper that he regularly read was the *Concord Daily Monitor and Patriot.* By this story, appellants expected the Court below to believe that no one else in the legal staff or membership of the National Association for the Advancement of Colored People was aware of this action in the three months prior to March 21, 1972 despite the February 6th *New York Times* article and the knowledge of other civil rights organizations and public officials.

After appellants became aware of the above action, they still did not move to intervene until three days after the Justice Department filed its consent to the entry of the requested declaratory judgment. Appellants argue that this delay was occasioned by their belief that the Justice Department would oppose New York's motion for summary judgment. The Justice Department has denied that they ever gave any assurance to appellants that they would contest the motion for summary judgment. See motion to dismiss or affirm filed by the United States Department of Justice in this action, p. 4n.3. In any event, appellants' contention that it waited until the Justice Department's

defense was completed before seeking to intervene is a patently baseless excuse for delay. If such a contention were to be sustained, it would require a plaintiff to win two separate rounds in every lawsuit: first against the named defendant, and secondly against the intervenors who were watching from the sidelines until the defendant's case was completed.

Involved in the issue of timeliness is the question as to "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties". F.R.C.P., Rule 24(b); see *Allen Company* v. *National Cash Register Company,* 322 U.S. 137 (1944); *Diaz* v. *Southern Drilling Corp.,* 427 F. 2d 1118, 1125 (5th Cir., 1970).

In the instant case, the granting of appellants' motion to intervene at the time it was brought would have seriously disrupted New York's electoral process.[4] As soon as corrected 1970 census figures for the State of New York were supplied to the New York Joint Legislative Committee on Reapportionment by the United States Bureau of the Census on October 15, 1971, new legislative district lines were drawn by the Legislature for the 150 assembly and 60 senate districts in the State of New York and for 39 new congressional districts. The legislative redistricting statute was enacted on January 14, 1972 (L. 1972, ch. 11) and new congressional districts were provided by a statute enacted on March 28, 1972 (L. 1972, chs. 76, 77, 78).

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[4] Although only three out of New York's sixty-two counties were covered by the Voting Rights Act Amendments of 1970, the statewide application of most New York election laws required that they all be submitted for approval prior to the entry of the judgment below. Thus, in *Aponte* v. *O'Rourke,* S.D.N.Y., Civ. No. 1971-3200, an order was entered enjoining the enforcement, pending Justice Department approval, of Ch. 424 of the Laws of 1971 which added to the number of signatures on designating petitions for certain officers in New York State and Ch. 1096 of the Laws of 1971 which amended the definition of a resident for purposes of voting.

The State of New York was aware of the fact based on the experiences reported by other states that a detailed Justice Department investigation into the consequences of each of the new assembly, senate and congressional lines in three large counties within New York City might require several months to complete which would have prevented the use of the new district lines in time for the spring, 1972 primary elections.[5] This belief was confirmed by the fact that although the Attorney General of the State of New York submitted to the Justice Department copies of the new legislative redistricting statute and the maps and descriptions of the assembly and senate districts in each of the three counties on January 26, 1972, no reply was received from the Justice Department until March 14, 1972 when the Justice Department advised the State of New York that it had not yet begun its investigation and requested additional information including population and registration statistics by race of each district within the three covered counties.

Since there was no question that the filing requirements of § 5 of the Voting Rights Act were due to the statistical presumptions imposed by § 4 rather than by any evidence that New York's literacy test had discriminated against any individual by reason of race or color, the present lawsuit was instituted to prevent any delay in having the legislative and congressional districts at stake in the 1972 elections governed by 1970 census figures.

The delay sought by appellants' belated intervention in the entry of the judgment relieving New York from the

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[5] The new state legislative and congressional district lines, in order to comply with the principle of "one man, one vote" do not coincide with county lines. Districts in the Bronx include portions of Westchester County, while portions of Kings County are joined to Queens and portions of New York County are joined to Richmond. Accordingly, it would be impossible to immediately implement the new district lines for the other fifty-nine counties of the State while suspending the effective date for the district lines in the three covered counties.

filing requirements, would have unquestionably resulted in the holding of primary and general elections in New York State in 1972 based on population figures that were 12 years out of date.

III. Appellants do not have an absolute right to intervene.

A. No statute of the United States confers an unconditional right to intervene in a Section 4 action.

The Voting Rights Act "makes no express provision for intervention", but "rather contemplates that the Attorney General will protect the public interest in defending section 4(a) actions". *Apache County* v. *United States,* 256 F. Supp. 903, 906 (D.D.C., 1966). No other statute of the United States provides for an unconditional right to intervene in a § 4(a) action. Thus, appellants' application to intervene cannot rest upon F.R.C.P., Rule 24(a)(1).

B. Appellants have failed to establish a significant impairment of their interests to warrant intervention as of right.

To intervene pursuant to Rule 24(a)(2), in addition to the requirement of timeliness, "the applicant must generally show three things: 1) that he has a recognized interest in the subject matter of the primary litigation, 2) that his interest might be impaired by the disposition of the suit, and 3) that his interest is not adequately protected by the existing parties". *Edmondson* v. *State of Nebraska,* 333 F. 2d 123, 126 (8th Cir., 1967); see also *United States* v. *Atlantic Richfield Company,* 50 F.R.D. 369 (S.D.N.Y., 1970), aff'd *Bartlett* v. *United States,* 401 U.S. 986 (1971).

When Rule 24(a)(2) speaks of "an interest relating to the property or transaction which is the subject of the action", "[w]hat is obviously meant there is a significantly

protectable interest". *Donaldson* v. *United States,* 400 U.S. 517, 531 (1971). Appellants have failed to show such a "significantly protectable interest" as to warrant their right to intervene as of right.

Every one of the named individual appellants were and are duly registered voters in the State of New York (54a-55a). Appellants' papers submitted to the District Court fail to establish how any of these individuals would be directly injured by the entry of the declaratory judgment in this action. Indeed, there is not a single shred of evidence in any of the papers submitted by appellants to the District Court to indicate that any citizen has been denied the right to vote in the State of New York on account of his race or color.

Since appellants are assuming that they have the same rights as the original parties in this action, they must be held to the same standards in determining whether they have proper standing. "Mere concern without a more direct interest cannot constitute standing in the legal sense" to justify intervention. *Sierra Club* v. *Morton,* 405 U.S. 727 (1972); *Boston Tow Boat Co.* v. *United States,* 321 U.S. 632 (1944); see also *Spangler* v. *Pasadena City Board of Education,* 427 F. 2d 1352 (9th Cir., 1970), where parents of school children dissatisfied with a desegregation decree accepted by the School Board were held to have no right to intervene; *Hatton* v. *County Board of Education of Maury County, Tenn.,* 422 F. 2d 457 (6th Cir., 1970), involving a similar denial of a motion by parents to intervene in a desegregation proceeding; *Horton* v. *Lawrence County Board of Education,* 425 F. 2d 735 (5th Cir., 1970), where a motion of the National Education Association to intervene in a school desegregation case was denied; *Chance* v. *Board of Examiners,* 51 FRD 156 (S.D.N.Y., 1970), involving a denial of a motion to intervene by the Council of Supervisory Associations in a suit challenging testing procedures for principals.

Appellants base their argument that they have a substantial interest warranting their intervention as of right upon two contentions. First, they purport to rely on their presence as plaintiffs in a pending proceeding in the United States District Court for the Southern District of New York to compel New York to comply with § 5. That action, *NAACP* v. *New York City Board of Elections,* 72 Civ. 1460 (52a-62a), was not filed until April 7, 1972—the same date that appellants moved to intervene in the intant action in the District of Columbia. The same failure on the part of appellants to show significant injury to their interests in the principal action or to comply with requirements of timeliness cannot be salvaged by the boot-strap attempt to bringing a similar action in another court.

The second allegedly significant interest that appellants cite as a basis for intervention is their "general interest" in protecting black citizens from legislation which they believe may result in racial discrimination. However, appellants have failed to show how the District Court's denial of their motion to intervene has prevented them from their purported objective of protecting the rights of black citizens. If they believe that any of the new assembly, senate or congressional district lines were the product of racial discrimination, and violative of the Fourteenth and/or Fifteenth Amendments, they may seek remedial relief in a civil rights action in one of the federal district courts in the State of New York. *Cf. Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960); *Wright* v. *Rockefeller,* 376 U.S. 52 (1964). Indeed, there is no reason why apellants cannot amend their present action in the Southern District of New York to seek such relief unless their reluctance to do so results from a lack of evidence to support such charges. Similarly, appellants are well aware that they are not precluded by the declaratory judgment in this action from challenging any future New York statute or regulation

affecting the electoral process by bringing a civil rights action in the state or federal courts. The availability of these alternative remedies negate appellants' contention that their interests have been significantly impaired[6] by the disposition of this suit. See *Edmondson* v. *State of Nebraska, supra;* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harvard L.R. 721, 750 (1968).

C. Appellants have failed to show inadequate representation by the United States Department of Justice.

(1) *The Justice Department investigation*

An applicant seeking intervention is required under Rule 24(a)(2) to establish that its interest is not being adequately represented by existing parties. *Edmondson* v. *Nebraska, ex rel. Meyer,* 333 F. 2d 123 (8th Cir., 1967). Where the proposed intervenor seeks to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party, it has been the general policy of this Court to deny intervention. See *In re Engelhard & Sons Company,* 231 U.S. 646 (1914); *City of New York* v. *Consolidated Gas Company of New York,* 253 U.S. 219 (1920); *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137 (1944); *Ball* v. *United States,* 338 U.S. 802 (1949), Mr. Justice Stewart dissenting in *Cascade Natural Gas*

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[6] According to the Advisory Committee which drafted the 1966 revision of Rule 24:

> Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be *substantially impaired by the disposition of the action,* he ought to have a right to intervene in the action on his own motion. Advisory Committee, Note 3B Moore, Federal Practice, § 24.01[10], p. 24-16. (Emphasis added.)

Corp. v. *El Paso Natural Gas Company,* 386 U.S 129, 149, 155-159 (1967).[7]

In denying intervention to the Navajos in a section 4 proceeding under the Voting Rights Act in *Apache County* v. *United States,* 256 F. Supp. 903 (D.D.C., 1966), the District Court stated that:

> "* * * Congress assigned to the Attorney General the primary role in vindicating the public interest under the Act. We should be reluctant indeed to permit intervention in a section 4(a) action in the absence of a plausible claim that the Attorney General is not adequately performing his statutory function, and that intervention is needed to enable the court properly to perform its declaratory function or in some other way to protect the public interest."

The Court went on to declare that the proposed intervenors would have a heavy burden of proof in showing that the Justice Department had been derelict or deficient in protecting the public interest in the defense of the action so as to warrant intervention.

In the instant action, the Justice Department conducted a four-month investigation into the allegations of the complaint before consenting to the entry of a declaratory judgment. As noted in the affidavit of the Assistant Attorney General in charge of the Civil Rights Division (40a-43a), attorneys from the Department of Justice examined registration records of selected persons in each covered county, conducted interviews with election and registration officials and interviews with persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties.

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[7] Unlike the facts in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Company, supra,* the instant case does not present the question as to whether the original parties to the action have complied with prior directives of this Court.

In answer to the Justice Department's request, the Board of Elections supplied the Department with selected election districts in each of the three affected counties that were predominantly white, predominantly black, predominantly Puerto Rican and districts that contained mixed populations. The Justice Department was unable to uncover any evidence that would indicate that the predominantly black or Puerto Rican districts suffered as a result of the imposition of English language literacy tests or were treated any differently than predominantly white election districts (42a). Accordingly, the Justice Department concluded that "there was no reason to believe that a literacy test has been used in the past ten years in the Counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which under present practice cannot reoccur."[8]

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[8] The isolated instances referred to in the Norman affidavit (41a-42a) raised questions which were answered to the Justice Department's satisfaction by the affidavit of Alexander Bassett of March 30, 1972 (33a-38a). The Justice Department's investigation found that Spanish-language affidavits to assist voting registrations were not fully available until the fall of 1967. However, the Bassett affidavit pointed out that inspectors during the fall of 1966 were instructed to permit Spanish-speaking persons to have affidavits concerning proof of literacy filled out outside the presence of the inspectors so that individuals could obtain assistance in translation (33a). The Justice Department investigation "did not reveal any individual citizens whose inability to register is attributable to the absence of Spanish-language affidavits" (42a).

A further question was raised in the Justice Department's investigation in finding that proof of literacy was indicated on certain registration records after August 7, 1970. The Bassett affidavit explained that while proof of literacy was not required after the passage of the 1970 amendments to the Voting Rights Act, inspectors were advised to ask for proof of literacy *after* a new voter was registered to be kept on record in the event that the new Voting Rights Act amendments, which were then being tested before this Court in *Oregon* v. *Mitchell*, 400 U.S. 112 (1971), were held invalid.

(2) *The application of New York's literacy test*

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

In their initial motion to intervene, appellants offer no factual proof to substantiate a claim of discrimination in the conduct of literacy tests. In their "motion to alter judgment", which appellees did not have an opportunity to respond to, appellants raised the argument that purportedly unequal conditions in the New York City schools (based on a 1955 study, 93a-116a) would handicap black and Puerto Rican citizens in meeting New York's literacy requirement. What appellants have conveniently ignored in raising such an argument is the fact that the State of New York, until the time that literacy tests were suspended in 1970, accepted as proof of literacy, the completion of six grades of elementary school (prior to 1965, proof of completion of eight grades of elementary school was required). See New York Election Law, § 168; affidavit of Darby M. Gaudia (24a-26a). Thus, the argument that students attending predominantly black or Puerto Rican schools in New York City or elsewhere would face a handicap in passing New York's literacy test, is irrelevant as well as baseless since by their completion of six grades, there would be no need for them to pass a literacy test to register to vote. By no stretch of the imagination can the situation of New York be compared to the facts in *Gaston County* v. *United States,* 395 U.S. 285 (1969), where the official policy of the State had been to maintain separate and inferior schools for blacks and where even the attainment of a high school diploma did not relieve black citizens from the requirement of passing literacy tests.

Certainly, the mere fact that New York imposed an English literacy requirement cannot be cited as evidence of racial discrimination. The right of a state to impose an English literacy requirement has been sustained by this Court. *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959). Although New York's literacy requirements may no longer be enforced to the extent that they are inconsistent with 42 USC §1973(b)(c), courts have refused to declare that New York's literacy requirements constituted a denial of equal protection. *Camacho* v. *Doe,* 31 Misc.2d 692, 221 N.Y.S.2d 262 aff'd 7 N.Y.2d 762, 163 N.E.2d 140 (1959); *Camacho* v. *Rogers,* 199 F. Supp. 155 (S.D.N.Y., 1961); *Socialist Worker Party* v. *Rockefeller,* 314 F. Supp. 984, 999 (S.D.N.Y., 1970); *Cardona* v. *Power,* 384 U.S. 672 (1966).

It may be remembered that when South Carolina attacked the constitutionality of the 1965 Voting Rights Act on the grounds that section 4 actions would place an impossible burden of proof upon states and political subdivisions, this Court noted that the Attorney General had pointed out during hearings on the Act that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina* v. *Katzenbach,* 383 U.S. 301 332 (1966).

The State of New York clearly met its burden entitling it to a declaratory judgment. The affidavit of Winsor A. Lott (20a-23a), which contains copies of all literacy tests that were given by the State of New York from 1961 to 1969 shows that the literacy tests consisted of a short paragraph in simple English followed by eight questions which could be answered in one or a few words. The answers were found in the paragraph. No outside knowledge was required. The tests were distributed with corresponding

answer keys geared to minimize the discretion of the graders. Anyone with a minimal amount of English comprehension should have been able to pass the test. The evidence established that over 95% of the applicants each year who took the literacy test passed it throughout the State and in each of the three affected counties.

In speaking of the New York literacy test for voting, McGovney, in his study, *The American Suffrage Medley* (1949), stated (p. 62) that:

> "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible."

See also Justice HARLAN dissenting in *Katzenbach* v. *Morgan,* 384 U.S. 641, 663-664 (1966).

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

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

Central registration takes place throughout the year at the Board of Elections. Local registrations are also conducted every October for a three or four day period. In each county in New York City and in each election district in each county are polling places designated for local registration. See affidavit of Alexander Bassett, sworn to March 16, 1972 (16a-19a).

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

strated by certificate, diploma or affidavit that he had completed the sixth grade in a public school in, or private school accredited by any State or the Commonwealth of Puerto Rico, in which the predominant language was Spanish, he was permitted to register without proof of literacy in English. July 28, 1966, Op. Atty Gen., 121. The Attorney General of New York set forth guidelines recommending that the affidavits be printed in English and Spanish to avoid language difficulties. In 1967, this became the practice (See affidavit of Bassett, *supra,* 17a).

Moreover, beginning in 1964, New York City embarked upon an intensive effort to gather new voters at considerable expense. Every year since, except 1967, the New York City Board of Elections has sponsored *summer* registration drives to encourage more people to register. In 1964, registrations were conducted in local firehouses throughout the City (Affidavit of Beatrice Berger, sworn to March 17, 1972, 27a-29a). Since 1965, mobile units have been sent out into areas containing a high density of black residents and local branches of the Board of Elections have been added to those areas (18a-19a, 25a, 28a, 31a). With each new voter registration drive came a wave of publicity in the news media requesting citizens to register (28a, 31a).

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

IV. Appellants have failed to establish that the Court below abused its discretion in denying appellants' motion to intervene.

Where there is no absolute right to intervene under Rule 24(a), an applicant's right to intervention is, at best, permissive and depends upon the discretion of the trial court.

An order denying permissive intervention is not appealable unless it can be clearly shown that the Court abused its discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519, 524-525 (1947); *United States* v. *California Canneries*, 279 U.S. 553, 556 (1929); *Stadin* v. *Union Electric Company*, 309 F. 2d 912, 920 (8th Cir., 1962), cert. denied 373 U.S. 915 (1963).

As this Court stated in *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R., supra,* at p. 524:

> "Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States* v. *California Canneries,* 279 U.S. 553, 556. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. * * *"

It has already been seen that no significant interest of appellants has been injured by the decree below. They remain free to challenge any New York election law or regulation that they believe may be racially discriminatory in any appropriate civil rights action in the federal or state courts.

It further has been shown (POINT II, *supra*) that appellants' application to intervene was not timely and that its belated intervention would have seriously disrupted New York's electoral processes by delaying the applicability of new assembly, senate and congressional district lines beyond the 1972 elections. Under these circumstances, there can be no legitimate claim that the District Court

abused its discretion in denying appellants' application for intervention.

Since appellants have not established an absolute right to intervene and there has been no showing of an abuse of discretion by the District Court in denying them intervention, this appeal must be dismissed. *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R., supra; Sam Fox Publishing Company* v. *United States,* 366 U.S. 683, 687-688 (1961).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed, or in the alternative, the judgment below should be affirmed.

Dated: New York, New York, January 17, 1973.

Respectfully submitted,

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