IN THE SUPREME COURT OF THE UNITED STATES

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

Appellants,

v. : No. 72-129

NEW YORK, et al.,

Appellees.

Washington, D. C.,

Tuesday, February 27, 1973.

The above-entitled matter came on for argument at 2:32 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ., Suite 2030, 10 Columbus Circle, New York, New York 10019; for the Appellants.

A.RAYMOND RANDOLPH, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the United States.

GEORGE D. ZUCKERMAN, ESQ., Assistant Attorney General of New York, New York City; for Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-129, NAACP against New York and others.

Mr. Greenberg.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GREENBERG: Mr. Chief Justice, and may it please the Court:

This case is here on appeal from the United States District Court for the District of Columbia, which entered a judgment for the State of New York against the United States, to which the United States consented.

The judgment did two things.

First, it exempted the State of New York from certain requirements of the Voting Rights Act of 1970, which I shall describe in more detail shortly. Briefly, the requirements from which the State was exempted were two sorts: One, it was exempted from the necessity of pre-clearance of voting law changes as required by Section 5 of the Voting Rights Act; and, secondly, it was allowed to restore its literacy tests earlier than otherwise would have been permitted under the Voting Rights Act of 1970.

The judgment below also denied intervention to the appellants here when they attempted to enter the litigation, to urge upon the Court that New York should remain subject

to the provisions of the Voting Rights Act.

In January and March 1970, New York redistricted its Assembly, State Senate, and Congressional Districts. Appellants, who are black and Puerto Rican citizens of New York City, and the National Association for the Advancement of Colored People viewed the 1970 redistricting changes as an illegal racial gerrymander.

They claim that the redistricting took most of the black and Puerto Rican population of Brooklyn, for one thing, and carved it up to distribute it in little pieces among contiguous white districts, making the black population smaller parts of the larger white population in the white districts, as part of a racial gerrymander which would dilute what otherwise would be considerable political strength held together by a bond of common factors related to race.

I want to make clear that the validity of those charges of racial gerrymander are not before the Court in this case. But the question of whether appellants can have a day in court, so to speak, to establish the validity of those claims. Now, what sort of a day that will be is of the essence of this appeal.

The day in court which appellants sought, or the days in court or before a forum which they sought, were three different kinds, all interrelated, and, again, only one of which is here today.

The adverse judgment in the District of Columbia disallowing intervention washed out all possibility of the other two. The first forum would have been before the Attorney General of the United States under Section 5 of the Voting Rights Act.

When we learned that these voting changes were in process and their implementation were in process --

QUESTION: I think we had a case argued here in Georgia vs. United States, where it was a question of whether Section 5 reached reinforcements.

MR. GREENBERG: Yes.

QUESTION: Is that involved here?

MR. GREENBERG: Yes, that is involved here. And so far as that's concerned, the government takes the same position as we do. But more than that is involved, Mr. Justice Brennan, because also there is the question of whether New York can resume its literacy tests when the 1975 ban expires.

So, even if the Georgia case were decided adversely, this case would still be here with regard to the literacy tests.

QUESTION: Yes. Thank you.

MR. GREENBERG: The first forum in which we sought to appear was before the Attorney General of the United States under Section 5 of the Voting Rights Act.

The appellants communicated with the Attorney General concerning the January and March voting changes, and said that when New York submitted its applications for clearance of these voting changes, the appellants wanted to appear as prescribed by the regulations and make representation that these changes were made with the purpose and the effect of racial discrimination.

In fact, the State of New York did submit one set of changes to the Attorney General, but they were sent back as incomplete, and they never sent them back again.

Second, the second forum in which we sought to appear, and this opportunity also was washed out by the District of Columbia judgment, was in the Southern District of New York we filed what, for purposes of brevity, I will describe as an Allen type lawsuit, a lawsuit seeking an injunction to compel the State of New York to submit its Voting Rights Act changes to the Attorney General. And, of course, when the District of Columbia judgment was entered, that exempted New York from the requirements of the Voting Rights Act, so that Allen type lawsuit essentially is wiped out also.

Thirdly, on the day that we filed the lawsuit in New York, we sought to intervene in the pending litigation between New York and the United States in the District Court for the District of Columbia.

Now, the United States did not oppose intervention, although the State of New York did. The District Court denied intervention, without opinion, and granted summary judgment for New York, without opinion. So appellants have had no hearing before the Attorney General; the appellants have had no hearing in the District Court in New York; and appellants have had no hearing in the District Court for the District of Columbia.

QUESTION: Wasn't there an action up in New York challenging the redistricting as such?

MR. GREENBERG: No, we did not. We merely filed an Allen type action in New York, urging that the changes should be submitted to the Attorney General of the United States.

The United States, as I read its brief, and what it has said in this case, does not claim that intervention in cases of this sort never can be allowed, and, indeed, it may be of some relevance that the United States did not oppose our intervention in the Court below.

Rather, as I understand the position of the government, it is two parts: One, that there was no showing of inadequate representation by the United States in the court below; and, second, that the application of the appellants was untimely.

We submit that the record makes clear: one, that representation of the claims of the intervenors, or the

appellants, by the United States was indeed inadequate, and that its timeliness, not only were we merely timely but the application was filed at the optimum, the best possible time that it could have, in the interests of the litigation, in the interests of efficient operation of the courts, in the interests of the appellants and, indeed, all the parties.

Finally, we claim, in the words of Rule 24, that the disposition below quite clearly impaired and impeded the appellants' opportunity to protect their interests.

To demonstrate that there was inadequate representation of our claim below, it is first necessary to describe what that claim is, and what adequate representation would have consisted of, and how existing representation failed.

I will first discuss this, then the issue of timeliness, and then the issue of how --

QUESTION: Mr. Greenberg, you claim intervention invokes only the discretionary action --

MR. GREENBERG: No, no. This is an application for intervention as of right.

QUESTION: As of right. Yes.

MR. GREENBERG: This is an application for intervention as of right, and we would submit that we fall squarely under the three principal requirements of that rule; that is, inadequate representation, timeliness, and impeding or impairment of our interests.

QUESTION: But, a fortiori, to the extent you're right on that, why, you would also satisfy the permissive --

MR. GREENBERG: Oh, certainly. Yes.

QUESTION: And you would say that you did, even if you weren't -- even if this is not an as-of-right case.

MR. GREENBERG: Yes. And we might take that as a protective position, Mr. Justice White, but I think we're so clearly right as to intervention as of right we have not argued that, except to mention it in our brief.

Now, as to inadequacy of representation. The claims of the intervenors arose from the Voting Rights Act of 1970, which specifically granted its protection to the black and Puerto Rican voters of Bronx, Kings, and New York counties in the State of New York. Because the amendment specifically, and the legislative history demonstrate exhaustively, carried out the design of Congress and the Administration to present the bill to Congress, to cover the north as well as the south. The 1965 law had covered the south. When time came to extend the law, it was quite clear that the general sentiment of the Administration and of Congress was that it would be extended only if it were made nationwide, and that is what was done.

The legislative history is replete with references to the fact that Bronx, Kings, and New York counties would be covered. It's designed for that very purpose.

Numerous Senators and the Attorney General so testified.

The formula that covers these counties is that in 1968 they had to have used the literacy test and fewer than fifty percent of the persons of voting age registered or voted.

Now, accomplishment meant two things: one, a colored jurisdiction may not use a literacy test while covered by Sections 4 and 5, and no changes in the voting laws may be made.

The key words in the statute, and they're in Section 4, which appears in the Statutory Appendix of our brief, is "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" -- and I'd like to underscore the word "effect" -- "of denying or abridging the right to vote on account of race or color."

Now, the meaning of the words "purpose and effect" can be found extensively throughout the legislative history and in numerous reported decisions, many of which are from this Court, which are set forth in the brief; but for purposes of brevity and just focusing on one thing about which I think there is no disagreement, I'd like to talk about this Court's opinion in Gaston County v. United States.

The meaning of "purpose and effect" is elucidated in

that opinion in several ways that are directly pertinent to this.

The Gaston County case was decided under the 1965 version of the Voting Rights Act, and the '65 version differs from the '70 version only in that no longer is Gaston County included and southern counties, but that the Congress intended to cover Bronx, Kings, and New York counties quite explicitly.

Now, the Gaston County case held that the 1965 Act applied to a jurisdiction where non-whites were more illiterate than whites, because they had received an inferior education in the county.

Justice Harlan's opinion says that he assumes that they were residents of the county at the time they received their education there, but there is a footnote which says the result would be no different if they had migrated from other counties elsewhere where they had received an education which had caused them to be illiterate.

And Attorney General Mitchell and numerous Senators testified extensively, as we have set forth in our brief, that that same principle of an inferior education leading to illiteracy or an inferior education in another jurisdiction, causing someone to become illiterate, who then moves to a northern jurisdiction, brings that jurisdiction under coverage of the Act.

Now, if we just talk briefly about this quite clear aspect of what constitutes "effect" of racial discrimination, one would think that for there to be adequate representation of the interests of the claimants in the District Court, that should have been brought to the attention of the District Court. That legal explication of the statute should have been at least presented to the District Court, if not urged upon it; and such evidence as might be available should also have been presented to the District Court. So that the court could make a judgment as to whether or not Bronx, Kings, and New York counties came under the Gaston County decision.

But that was not done at all, and we just say, one can elaborate on it a great deal, that if the key legal principle and the available facts, many of which have appeared in our motion to alter judgment when, after we were denied intervention, we came back again and said, Look, if you're taking the position that we haven't presented the evidence, we don't have to present the evidence on a motion to intervene, but, nevertheless, here is at least such of it as we can gather in this brief period of time.

If that available evidence was not also presented to the District Court, then we say that is inadequate representation per se and as a matter of law and as a matter of common sense; and we just don't see how it can be

claimed that there was such a thing as inadequate --

QUESTION: Inadequate representation of whom?

MR. GREENBERG: Of the claims of the intervenors.

QUESTION: Well, why is that the issue in the case, whether there was adequate representation or not?

MR. GREENBERG: Because that's one of the requirements of Rule 24, the intervention rule. We may intervene if our claims are being inadequately represented, if we come in a timely fashion, and if our ability to present our claims is being --

QUESTION: Yes, but the statute says for New York to sue the United States.

MR. GREENBERG: The statute allows --

QUESTION: And the statute says if the United States doesn't have reason to believe so-and-so, it's supposed to consent to the judgment.

MR. GREENBERG: Yes, but the statute does not make New York's concession conclusive as a matter of law. New York State --

QUESTION: Not New York, the Attorney General's.

MR. GREENBERG: I'm sorry. It does not make the Attorney General's concession conclusive, but when the United States concedes --

QUESTION: I agree, but it doesn't purport to say that the United States is representing a lot of other

interests.

MR. GREENBERG: The statute doesn't purport to say that the United States --

QUESTION: No.

MR. GREENBERG: -- but the United States -- the United States' position in this case --

QUESTION: No. I wouldn't think you could claim the United States is derelict in its duty if it happens to think, based on the evidence, that it doesn't have reason to believe so-and-so, and consents, it isn't derelict in its duty, it's doing the duty it's supposed to under the statute.

You may disagree with them, but how can you say that they -- they haven't any obligation to represent you, do they?

MR. GREENBERG: Well, the issue is -- I would not want to put it in the way of whether the United States is derelict in its duty, because that sounds like an accusation. We just say that this action is precluding the rights of the appellants and the intervenors here, and they seek to intervene in the action to assert their rights which are going to be affected by the judgment in this case.

It's not a question of whether the United States is derelict in its duty. That's a characterization that is not called for.

QUESTION: Nor that they aren't representing you, because they have no duty to represent you, I don't suppose.

MR. GREENBERG: Well, it may be. I would argue that perhaps --

QUESTION: But at least you --

MR. GREENBERG: -- one might assume that they would be representing us until something -- or the rights of the citizens of New York until something appears to the contrary. But certainly the citizens have a right to intervene if they are not being represented. And the United States action --

QUESTION: That's all you need, isn't it?

MR. GREENBERG: That's right; yes.

Now, the Gaston County theory is only part of it. Numerous Senators and the Attorney General testified that there is coverage of the statute if there's a differential literacy rate, if the mere existence -- and Attorney General Mitchell testified to this -- mere existence of literary test is a deterrent to registering and voting, quite apart with whether or not there is act of purposeful discrimination. And then, of course, the matters of unequal education, both within and without the jurisdiction.

Nowhere in the investigation or the submission to the court below were these standards explored, were these rules of law presented to the court, nor was evidence presented on them.

So we submit that the claims of the intervenors were not adequately represented and, as Justice White pointed out, that may be without regard to what the duty of the United States was in this case; but, in any event, the judgment in this case impairs and impedes the rights of the claimants to assert certain claims, and that the representation of the United States in this regard was --

QUESTION: I take it, under the statute -- or do you agree -- that unless the United States generates some reason for believing that this practice has had a discriminatory effect, it's supposed to consent.

MR. GREENBERG: Well, it may. Then, of course, --

QUESTION: Well, isn't that what the statute says?

MR. GREENBERG: Yes. Yes. The statute says that.

QUESTION: So that it has to, itself, assess the evidence, and if it feels it has no reason not to consent it's supposed to consent.

MR. GREENBERG: And they may be totally, and I have no doubt, totally objective and sincere in this, but still it would not be inadequate representation by the United States.

QUESTION: Right. You may just disagree with them. And you want an opportunity to present a contrary view to the court.

MR. GREENBERG: I might say, as we try to point out

in our reply brief, the brief of the United States is full of a great deal of expression that we made very serious accusations against them. We just said they have been wrong and they have not adequately represented us in this.

QUESTION: Well, I know. But I take it, from what you've now said, that on the face of the statute they didn't have to represent you.

So that if you concede that, then don't you automatically satisfy the first requisite of the intervention rule?

MR. GREENBERG: Well, that would be true. And, frankly, Mr. Justice Brennan, I don't know whether on the face of the statute they do or they don't have to represent us in the various senses that word might have. One would assume the United States would represent rights of the citizens of the United States with regard to racial discrimination.

QUESTION: Well, I know, but this statute does provide, just as Mr. Justice White said, that there is a duty on the United States to consent in certain circumstances.

MR. GREENBERG: Yes.

QUESTION: Now, if that is so and they may do this independently of any interest of yours, then I ask why don't you have -- by reason of that, haven't you satisfied the first requisite of the intervention rule?

MR. GREENBERG: Well, I would submit we certainly have. I'm certainly not going to disagree with that. But the fact is, whatever their duty might be, and it's not entirely clear on the face of the statute, in this particular case they did not present to, or argue to the court below the relative facts of the law.

Now, as to timeliness, I would just like to say a word, and that is: The briefs try to reduce this to a battle of our affidavits and their assertions in the brief as to what one lawyer said to another. In my experience, at least, that kind of dispute is quite common-place, and nobody is lying, it's just a question of subjective interpretation of what was meant. And issues of this sort should be determined, wherever possible, on objective grounds.

We can see no more timely filing than within two days after having learned of the United States consent and four days of the actual filing of the consent.

Certainly we couldn't have filed before they filed their consent or it very well might have been premature, because we didn't know what their position was going to be.

Having filed their consent, coming into court within four days, I --

QUESTION: Well, don't you think, though, Mr. Greenberg, that you would have been fully as entitled to intervene before they filed their consent as after?

I would think you would be making the same argument if you had filed before.

MR. GREENBERG: I think we might have been, but I think that if we had come in earlier and the court had said, Well, how do you know that they are not going to urge exactly all of your positions upon us. We might then argue that we represent ourselves better, we've done a more exhaustive examination, we don't know what they've done, and so forth.

But certainly I would think the optimum time to file would be when their position has become manifest. At least I would urge that, and I would think that it would have been, perhaps, an unnecessary burden on the court to come in with an intervention before their position had become manifest.

New York argues that this would have disrupted the primary process, but of course that's hardly necessary. The court could have required an accelerated hearing; it could have required the lawsuit to go on while the primary process was going on. It could have gone on simultaneously. They could have made modest adjustments in the dates. These are common-place problems with regard to voting cases.

Or the court could have done what will happen here if appellants are to prevail on this appeal, make any ruling apply to a later election, so the disruption of the

primary process is not a substantial argument.

Moreover, it should be pointed out that to the extent there is any inconvenience, we have to look at the fact that New York waited 18 months after the Voting Act was passed and nine months after the Attorney General said that it was covered to even file its action. Then it gave the United States 90 days.

If you look at all the different time sequences in this case, the time between various acts, the four days within which we acted is a small fraction of the time that anybody else took to do anything at all.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR.,

ON BEHALF OF THE UNITED STATES

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

I would like to respond, first of all, to counsel's suggestion that what this Court could do on remand is send this case back to the District Court to consider their motion to intervene while leaving the 1972 election results in New York in effect.

I would point out that that does not require any action by this Court. The substance of what Mr. Greenberg suggests, and I direct the Court's attention now to Section 4

on page S.A. 2 of their brief, which is the thick white brief, and you'll notice, in the first full paragraph, the second sentence says "The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment".

QUESTION: What page is that?

MR. RANDOLPH: S.A. 2, Mr. Chief Justice. It's the appendix to their brief.

I'm pointing now to the first full paragraph at the top of the page, the second sentence.

"The court shall retain jurisdiction of any action pursuant to this subsection ... after judgment." The second part of that allows the Attorney General to reopen the case at any time within five years.

Now, as Mr. --

QUESTION: That doesn't do him any good if he has been denied leave to intervene already.

MR. RANDOLPH: Well, I think it does him some good in the sense that I think they can renew their motion to intervene at any time within this five-year period. It's simply like a consent judgment in an antitrust case, where people intervene after the consent judgment is entered.

The potential disruption to New York's 1972 elections is now passed, as Mr. Greenberg himself has suggested. We believe that was the primary reason why the District Court

denied intervention at the time that it did.

The second thing is that the 4(a) judgment is now outstanding. Now, this is not in the record, but I understand councilmanic districts have been changed, I think counsel from New York will talk about this, in New York.

So the 4(a) judgment is now outstanding, that is, exempting New York. There won't be a disruption of elections in the future while the appellants' motion is determined.

And the timeliness problem, which we consider from the point of view of not only how long has this action been pending but what effect would allowing intervention at this time have on the State of New York. It's no longer a critical problem.

Now, I can't say what position the United States would take if they renew their motion to intervene. We didn't object before. But I think that, in line with Mr. Greenberg's suggestion, that what the Court should do in this case is to send it back to the District Court and allow the '72 elections to remain in effect; while the same result can be accomplished simply by the provisions of the statute itself.

The other point I'd like to make is that, although appellants have said in their brief, "If we can't intervene here, under what conceivable circumstances can anyone?" I think really misstates and misconceives the problem here. Because what they're contending for is intervention as of right.

There is always permissive intervention, and that is a much easier process to urge upon the Court, because the only requirement is that the claim that they have is in common with the question of fact or law in the main action.

Thus, even if they have no right to intervene, which is not our position in this case, it still leaves them the opportunity to seek permissive intervention.

QUESTION: Well, what you're suggesting is that we do not decide this case but let it go back?

MR. RANDOLPH: No. The issue before this Court is quite simply: Did the District Court err in April of 1972 in denying intervention to appellants at that time? In light of the fact that the New York -- and I'll go through the sequence of events --

QUESTION: Well, what you're suggesting, as I understood it, is if we sustain that position, sustain the lower court, you're saying it's meaningless anyway because they can go back and do it all over again?

MR. RANDOLPH: I'm saying it's without prejudice to the appellants --

QUESTION: Yes.

MR. RANDOLPH: -- to renew their motion to intervene. And the difference is --

QUESTION: Right. And then the issue, then, of intervention of right or permissive intervention, will arise

again?

MR. RANDOLPH: Well, it would depend on their claims. But we have -- our position in this case, really, our position is that we've assumed a number of things.

First of all, we didn't object below to their intervening. We considered this a matter of discretion with the District Court because of the time it was filed. That was New York's problem. They had their primary election coming up, nominating petitions circulated, the entire thing would have been thrown haywire.

But we argue this case on the basis that their application at that time was not timely.

Now, the difference would be if they now file under Section 4(a), then that argument would not be present. We didn't object before. I can't commit us to what position we'd take.

QUESTION: Might a court not hold a permissive intervenor to a stricter time requirement than to an intervenor as of right? The thought being that he really doesn't have to get in, anyway, and therefore you resolve time judgments against him, whereas in the case of intervention of right you may allow more laches, in effect?

MR. RANDOLPH: That may be true. I think that's probably true. I think the opinions may not state that, but I think the gist of them is along those lines, Mr. Justice.

And, in fact, under permissive intervention, the court, when it exercises discretion, is required to consider whether the intervention will delay the, or prejudice the adjudication parties in the case.

QUESTION: Do I understand you to imply, at least, if not say, that they can go back now on a permissive intervention and get everything that this court could give them?

MR. RANDOLPH: Well, I think that would be a matter for the District Court to determine. One of the problems -- we don't have an opinion here, but --

QUESTION: Well, but, of course, if they go back and if they get it, they will have had everything that this Court can give.

MR. RANDOLPH: With one exception, with one important exception, which now Mr. Greenberg has told us they wouldn't get anyway, which is that they would not have held up the 1972 elections in New York.

If one reads the papers in this case, if you read their motion to affirm, there's not a mention of what the issue is in this case, which is about New York's literacy test. Whether New York had applied that discriminatorily in the past years, I direct the Court's attention to that.

All it talks about is the New York primary elections.

MR. CHIEF JUSTICE BURGER: All right. We will

resume there in the morning.

[Whereupon, at 2:59 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, February 28, 1973.]