IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 44, Original

STATE OF TEXAS, *Plaintiff,*

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant.*

DAWN P. GERMAN, *Applicant for Intervention*

MOTION FOR LEAVE TO INTERVENE, MOTION FOR REHEARING, AND BRIEF IN SUPPORT OF SAID MOTIONS

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INDEX

Page

MOTION FOR LEAVE TO INTERVENE 1

MOTION FOR REHEARING 3

Certificate of Counsel 4

BRIEF:

STATEMENT OF THE CASE 5

ARGUMENT:

I—The Applicant Has a Right To Intervene 6

II—The Rehearing Should Be Granted 9

CONCLUSION 12

APPENDIX 13

TABLE OF CITATIONS

CASES:

Atlantis Development Corp. v. U.S., 379 F.2d 818 (5th Cir., 1967) 7

Case v. Bowles, 327 U.S. 92 (1946) 10

Civil Rights Cases, 109 U.S. 3 (1883) 11

Cuthill v. Ortman-Miller Machine Co., 216 F.2d 336 (7th Cir., 1954) 8

Dameron v. Brodhead, 345 U.S. 322 (1946) 10

Fleming v. Nester, 363 U.S. 603, 612 (1960), rehearing den. 364 U.S. 854 (1960) 11

Hurd v. Illinois Bell Telephone Co., 234 F.2d 943 (7th Cir., 1956), cert. den. 352 U.S. 918, rehearing den. 352 U.S. 977 8

Nebbia v. New York, 291 U.S. 502 (1934) 10

Neusse v. Camp, 285 F.2d 694; 128 U.S. App. D.C. 172 (1967) 7

Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir., 1953) 8

Page

Reid v. Covert, 354 U.S. 1 (1956) 9
Wenatchee Produce Co. v. Great Northern Railway Co., 271 F. 784 (E.D. Wash., 1921) 10
Wissner v. Wissner, 338 U.S. 655 (1950) 10
Wolpe v. Poretsky, 144 F.2d 505; 79 App. D.C. 141 (1944), cert. den. 323 U.S. 777 ..... 8, 9

CONSTITUTIONAL PROVISIONS:

Article I, Section 2 11
Article I, Section 8 ..... 2, 4, 6, 9
17th Amendment 11

NEWSPAPER ARTICLE:

White, "The Court's 'Theological Liberalism' ", New York Times 1/6/71, p. 35 12

PERIODICALS:

116 Congressional Record, S-3502, daily edition 11
39 U.S. Law Week 4027 6

RULES OF COURT:

Rule 24, Federal Rules of Civil Procedure 1, 2, 6, 9, 12
Rule 9(2) Supreme Court 1, 6
Rule 58(1) Supreme Court 3

STATUTE:

P.L. 91-285 5

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MOTION FOR LEAVE TO INTERVENE

---

1. Dawn P. German, by her attorneys, moves this Court for leave to intervene in this cause as a defendant, pursuant to Rule 9(2) of this Court and Rule 24(a) and (b) of the Federal Rules of Civil Procedure.

2. Said Dawn P. German is a citizen and resident of the State of Texas residing at 1725 Poplar Street, Dallas. She was born on August 16, 1951. Under the Court's decision in this case she will be eligible to vote in federal elections, but not in state and local elections, prior to her 21st birthday.

3. Applicant seeks leave to intervene for the purpose of moving this Court to rehear this case.

4. The basis for her motion for rehearing will be that the Congress has the power to regulate state and local elections under Article I, Section 8, clauses 1, 2, 12, 13 and 14 of the Constitution.

5. Said constitutional defense to the action was not raised by the defendant Attorney General, and the Court has not ruled thereon. To the best of applicant's information, knowledge and belief, defendant Attorney General does not intend to raise this defense by motion for rehearing or otherwise.

6. Applicant claims right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure in that she has an interest in the matter that is the subject of the action, that the disposition of the action may as a practical matter impair her ability to protect that interest, and that the defendant has not adequately represented her interest.

7. In the alternative applicant applies for leave to intervene under Rule 24(b) of the Federal Rules of Civil Procedure in that her defense has common questions of law and fact with the main action.

NATHANIEL R. JONES

CLARENCE MITCHELL

J. FRANCIS POHLHAUS

Attorneys for Applicant

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MOTION FOR REHEARING

Dawn P. German, by her attorneys, moves, pursuant to Rule 58(1) of this Court, subject to the Court's granting her leave to intervene, for rehearing of the case.

The basis for her motion is that the Court, in deciding the case, failed to consider a substantial constitutional defense to the action, namely the power of Con-

gress under Article I, Section 8, Clauses 1, 2, 12, 13 and 14 of the Constitution.

NATHANIEL R. JONES

CLARENCE MITCHELL

J. FRANCIS POHLHAUS

Certificate of Counsel

I hereby certify this motion for rehearing is submitted in good faith and not for delay.

J. FRANCIS POHLHAUS

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BRIEF OF THE APPLICANT FOR INTERVENTION IN SUPPORT OF MOTION TO INTERVENE AND MOTION FOR REHEARING

STATEMENT OF THE CASE

On June 22, 1970, President Nixon signed into law Public Law 91-285, the Voting Rights Act Amendments of 1970. Section 302 of said law provided that any citizen of the United States otherwise qualified to vote shall not be denied the right to vote in any federal, state or local election because of age if such citizen is 18 years of age or older.

The State of Texas instituted the present action to enjoin enforcement of Section 302 and other provisions of Title III of the Act. On December 21, 1970, this Court upheld the constitutionality of Section 302 as applied to state and local elections but held it un-

constitutional as applied to state and local elections. 39 *U.S. Law Week* 4027

In the course of the proceedings before this Court, the Department of Military and Veterans Affairs of the National Association for the Advancement of Colored People filed an *amicus curiae* brief in support of the Attorney General in the companion case of *State of Oregon* v. *Mitchell,* argued jointly with this case. In its brief, the NAACP proposed as a defense the authority of Congress under Article 1, Section 8, Clauses 1, 2, 12, 13 and 14, the "war" or "national defense" powers. This defense was not raised by the defendant Attorney General and was not considered by this Court.

The intervenor is a 19 year old citizen and resident of the State of Texas. Under this Court's ruling in the instant case she is eligible to vote in federal elections prior to her 21st birthday, but not in state and local elections. Relying on the constitutional issues raised in the NAACP brief, she believes this Court erred in finding the provisions of Section 302 of the Voting Rights Act Amendments of 1970 unconstitutional as applied to state and local elections. Accordingly she seeks a rehearing of the case before this Court.

ARGUMENT

I. The applicant for intervention has a right to intervene.

Rule 9 (2) of this Court provides that in original actions the Federal Rules of Civil Procedure, where their application is appropriate, may be taken as a guide to procedure.

Rule 24 (a) of the Federal Rules of Civil Procedure provides that:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (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."

The former rule requiring that the intervenor be bound by the rule of *res adjudicata* was repealed by the 1966 revision of the rule. *Atlantis Development Corporation* v. *U. S.*, 379 F.2d 818, 823-4 (5th Cir., 1967).

The necessary requirements for intervention were set out in *Neusse* v. *Camp*, 285 F.2d 694; 128 U.S. App. D.C. 172, 177 (1967) as follows:

> "(i) an interest in the transaction, (ii) which the applicant may be impeded in protecting because of the action, (iii) that is not adequately represented by others."

It is submitted that these criteria are met: 1.) The applicant has a direct interest in the transaction. It is her right to vote in state and local elections that is being denied by the Court's decision. 2.) She is being impeded in protecting this right. Although the doctrine of *res adjudicata* would not apply in the strict sense to prevent her from pursuing her right, it would apply in a practical way. The doctrine of *stare decisis* and the supremacy of this Court as the interpreter of the Constitution would preclude the applicant from obtaining any redress in any court except this one. 3.) Her interest has not been protected adequately by the defendant Attorney General in that he has not raised the constitutional defenses in the action that she proposes. Nor is there any indication that he will do so in a motion for rehearing, as will be demonstrated

more fully later herein. Accordingly the applicant has a right to intervene under Rule 24.

The "timely" provision of the Rule does not preclude intervention subsequent to judgment or decision. *Hurd* v. *Illinois Bell Telephone Co.,* 234 F.2d 943 (7th Cir., 1956), cert. den. 352 U.S. 918, rehearing den., 352 U.S. 977; *Cuthill* v. *Ortman-Miller Machine Co.,* 216 F.2d 336 (7th Cir., 1954); *Pellegrino* v. *Nesbit,* 203 F.2d 463 (9th Cir., 1953); *Wolpe* v. *Poretsky,* 144 F.2d 505; 79 App. D.C. 141 (1944), cert. den. 323 U.S. 777.

As stated in the *Pellegrino* case:

> "Intervention should be allowed even after a final judgment where it is necessary to preserve some right to which cannot otherwise be protected." p. 464

We believe the applicant has amply demonstrated that her right cannot otherwise be protected. As in *Pellegrino,* she was unable to intervene earlier because the Attorney General was pursuing a defense in the action, albeit on different grounds than those she proposes.

At the present time there is every reason to believe that the Attorney General has abandoned his defense. He has not raised, and it appears that he will not raise, the constitutional issue proposed by the applicant as a defense. Applicant's counsel, in their capacity as representatives of the NAACP, have requested the Attorney General to move for a rehearing based on Congressional national defense powers. This request was denied. A copy of their telegram containing this request is contained in an appendix to this brief.

In both *Pellegrino* and *Wolpe* the intervenors sought intervention for the purpose of appealing adverse decisions, upon showing that the principal parties would

not do so. In both cases their applications were granted. Here the applicant in effect seeks the same result, in that the only appeal from a decision of this Court is by way of a rehearing.

There is, we submit, additional relevance in the *Wolpe* case. There the principal was a municipal zoning board, an agency with the duty of protecting the public interest. The intervenors were property owners whose rights would be adversely affected by the failure to appeal. Here, the Attorney General has the same duty to protect the rights of the public, and specifically, under the statute that is the subject of this litigation, the rights of the applicant and other young people in the 18 to 20 year old age range. As in *Wolpe,* the application to intervene should be granted so public rights may be adequately protected.

Even if the Court should decide against the applicant's claim to a right to intervene, we feel it is an appropriate case for permissive intervention under Rule 24 (b) of the Federal Rules of Civil Procedure.

II. The rehearing should be granted.

Reid v. *Covert,* 354 U.S. 1 (1956) is a precedent upon which a rehearing could (and we respectfully urge should) be granted.

In *Reid* this Court reversed its prior decision upon rehearing. The rehearing had been granted because of the Court's failure in the original hearing to adequately consider a constitutional provision, namely, Article I, Section 8, Clause 14.

We submit that in this case the Court has given not inadequate, but no, consideration to Article I, Section 8, Clauses 1, 2, 12, 13 and 14 of the Constitu-

tion. As it did in *Reid,* the Court should grant a rehearing for the purpose of fully considering the constitutional issue raised by the applicant for intervention.

We do not intend here to fully argue the merits of the applicant's position. That has been done in the NAACP brief already on file in the case and will be done more fully if the applicant's motions are granted. But in the interest of demonstrating that the claim is not unsubstantial or frivolous, we wish to briefly summarize the argument:

1. The Court must give every presumption of constitutionality to legislative enactment. *Nebbia* v. *New York,* 291 U.S. 502, 538 (1934).

2. This Court and lower federal courts have sanctioned federal invasion of states rights in various ways under the national defense power: taxation, *Dameron* v. *Brodhead,* 345 U.S. 322 (1953); property law, *Wissner* v. *Wissner,* 338 U.S. 655 (1950); state constitutional provision on disposition of state land, *Case* v. *Bowles,* 327 U.S. 92 (1946); court procedures, *Wenatchee Produce Co.* v. *Great Northern Railway Co.,* 271 F. 784 (E.D., Wash., 1921).

3. Congress intended to invoke the national defense powers. With respect to those granted the franchise under Section 302, Senator Mansfield, sponsor of the 18 year old voting amendment stated:

> "They fight our wars. You can brush aside that argument all you want, but it is a most important argument, and I think these youngsters who are called because of our responsibility, because we have laid down the policy, should have

a right at least in some part, to influence the setting of that policy." 116 *Congressional Record,* S-3502, daily edition.

Many other Senators and Congressmen spoke in a similar vein, evidencing a connection between the law and national defense.

4. Even if Congress did not specifically invoke the national defense powers, if they provide a constitutional basis for the law, the Court must uphold it. This Court has said "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Fleming* v. *Nester,* 363 U.S. 603, 612 (1960), rehearing den. 364 U.S. 854 (1960).

5. Congress most likely concluded, as we and apparently eight members of this Court, that the qualification for voters in federal and state elecitons are firmly bound together by the provisions of Article I, Section 2 of the Constitution and the 17th Amendment, and that to alter the qualifications for voting in federal elections would require alteration of those for voting in state elections.

* * * * * *

Failure to resolve the constitutional issue posed here could lead to considerable confusion in the area of constitutional interpretation. One need only cite the precedent of the failure of this Court to rule on the authority of Congress to regulate commerce in the *Civil Rights Cases,* 109 U.S. 3 (1883) to demonstrate the inadvisability of the Court's failure to act on a constitutional issue properly before it.

Moreover, failure to rule here and now on the power of Congress to regulate elections under its national de-

fense powers would most likely only postpone a resolution of the problem. Further Congressional action could be expected. Already commentators are suggesting the exercise of these powers by Congress. See White, "The Court's 'Theological Liberalism' ", New York *Times,* 1/6/71, p. 35.

Proceeding without the guidance the Court could give in this case, Congress could very well again pass legislation the constitutionality of which would be in doubt pending final appeal to this Court. Such legislation could cause untold confusion in state and local elections, confusion the Court could avert by a rehearing in this case.

CONCLUSION

The applicant for intervention is entitled to intervene under Rule 24(a) of the Federal Rule of Civil Procedure. Her motion for a rehearing should be granted in order that the Court resolve a substantial constitutional issue present in this case, on which it has not ruled.

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APPENDIX

COPY

Honorable John N. Mitchell
Department of Justice
Washington, D. C.

The National Association for the Advancement of Colored People urges you to move in the Supreme Court for rehearing in *Oregon* v. *Mitchell* on the 18 year voting provisions of the Voting Rights Act Amendments of 1970 as they relate to state and local elections. The basis for such a motion would be the national defense powers of Congress embodied in Article 1, Section 8 of the Constitution. The statements of Senator Mansfield, the chief sponsor of the 18 year old voting amendment, and other Members of the Senate and House indicate to us that Congress intended to invoke these powers in passing the legislation. The Supreme Court has not ruled on this important constitutional issue. Contrary to the statement in Justice Harlan's opinion that no other constitutional basis than Section 5 of the 14th Amendment was advanced for the 18 year old voting law, reliance on the defense powers was advocated in the amicus curiae brief of the Department of Military and Veterans Affairs of the NAACP. Recent revelations in the press in connection with the Congressional investigation of Justice Douglas indicate that issues are screened before being presented to the full Court. The failure of the Court to consider this constitutional issue leads us to believe that this may have occurred in this case. Only by a full hearing on the issue can the Court determine the extent of Congressional power in this area. Failure to act will leave a serious gap in the Court's interpretation of the Constitution that could readily be settled in this case. Again we urge your action to assure that the Court will have the opportunity by means of a rehearing to

explore all possible aspects of Congressional power as it relates to the 18 year old vote.

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