IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 46, Original

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UNITED STATES, Plaintiff,

vs.

STATE OF ARIZONA, Defendant

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Motion to Intervene by Frederick J. Christopher, Jr., Benton Cole, Salvatore Lo Dico, George C. Smith, and Raymond J. Meredith, as Defendants

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not to be reported
with counsel on
argument

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UNITED STATES, Plaintiff,
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Motion for Leave to Intervene by Frederick J. Christopher, Jr., Benton Cole, Salvatore Lo Dico, George C. Smith and Raymond J. Meredith, as defendants.

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Frederick J. Christopher, Jr. is a candidate for the New York State Senate from a part of New York County (Manhattan), New York City, New York, on the Conservative Party ticket, for the general election on November 3, 1970. Salvatore Lo Dico is a candidate for U.S. House of Representatives on the Conservative Party ticket from the 19th Congressional District of New York State, a part of New York County. They, along with Benton Cole, are voters and officials of the New York County Conservative Party. George C. Smith and Raymond J. Meredith are voters in Queens County, New York City. They move to intervene in this action seeking to establish the constitutionality of the literacy test ban in the Voting Rights Act Amendments of 1970. Reference is herewith made to the motion and brief of the New York City Board of Elections filed in the above case with the request to intervene in Nos. 43 and 44, showing that the new federal law suspends the New York State literacy test for voting.

The practical difference in campaigning for public office between the New York metropolitan area and a small, still semi-

rural state such as Arizona with only three congressional districts is so great as to warrant separate consideration. The New York City area contains about 15 million people, or about 30 congressional districts, with up to 100 districts for the lower house of the New York, New Jersey, and Connecticut state legislatures. To reach illiterate voters by radio or television would require the purchase of air time to cover the entire metropolitan area, because the metropolitan stations reach this far. This would waste 97% of a congressional candidate's expenditure, and 99% of a legislative candidate's expenditure, so it is almost never done.

Sound trucks, street corner rallies, etc. will reach a few voters, but in New York City, as a practical matter, after a working day and a ride home in a crowded subway, most voters want to go home and do not stop to hear speeches by candidates. Unlike rural areas, where farmers work and live in the same place, urban workers are away from home during working hours and can only be seen in evening hours (about 7-10 p.m.). After people return from vacation on Labor Day, there are usually about two months of campaign time in September and October before election. The evening hours of these 60 days amounts to about 200 hours. No candidate can possibly see the 200,000 voters per congressional district in so little time. To give each voter one hour of explanation orally requires a campaign army of1,000 voters as workers. No political party in New York has a machine like that any more.

Moreover, Manhattan is an unusually transient borough. It contains many sing-

le persons, as well as a disproportionate number of business executives, airline personnel, diplomats, actors, and seamen, as well as others whose occupation requires extensive travel, and who are often not home even in evening hours. As a practical matter, reaching the mass of Manhattan voters orally is hopeless. For this reason, the principal campaigning in Manhattan is done by mail and by giving out of leaflets at subway exits. Buttons, bumper stickers, and posters are more often found in the more suburban parts of the New York metropolitan area. The suggestion that legislative candidates can actually explain their positions to illiterate voters during the course of a normal campaign in New York City is utterly unrealistic. Such voters will be voting for legislators in complete ignorance of their stands on the issues.

The President signed the Voting Rights Act Amendments into law on the afternoon of June 22, 1970. At 9:15 a.m., June 23, 1970, the five proposed intervenors, as New York City voters, filed an action in the United States District Court for the District of Columbia, entitled Christopher et al. v. Mitchell et al., 1862-70 Civ., to enjoin the enforcement of the new law by United States Attorney General John N. Mitchell, and obedience to it in preference to the New York law, by the New York City Board of Elections. While that suit challenged the whole new law, including age, and residence provisions, particular stress was laid on the literacy test ban.

After a conference among attorneys for the parties, during which plaintiffs' at-

torney urged July deadlines, the attorney for the Justice Department, on July 17, 1970, wrote Chief Judge David L. Bazelon, who had appointed himself as presiding judge of the three-judge court designated to hear this case pursuant to 28 U.S.C. § 2284, that counsel for all parties had agreed that all motions and briefs should be filed by August 3rd and reply briefs by August 11th, and noted: "It is our hope that the hearing on the merits could be held as soon after August 11th as is convenient for the Court." On July 27th the Court responded by lengthening the time for filing briefs (although not requested by any party), and setting September 10th for argument. No reason for the delay was given.

Between August 8th and September 2nd the New York City Board of Elections conducted a special mobile summer registration drive which added 136,282 voters. The Board registered voters who did not pass New York's literacy test provisionally, so they could vote in the November election if Christopher v. Mitchell was not finally decided. Three more registration days remain, October 3, 5 and 6, and a new drive is on to register more voters. See N.Y. Times, Sept. 10, 1970, p. 57, col. 1.

Learning of this drive, on August 18th plaintiffs moved the District Court for an interlocutory injunction pending hearing on the merits. To date, this motion has neither been granted nor denied. On August 28th, plaintiffs moved for an order prior to opinion. This motion, too, has neither been granted nor denied. On oral argument on Sept. 10th, plaintiffs' attorney urged the three-judge court to take

some action in this case, either by way of granting plaintiffs relief, or denying it and allowing plaintiffs to appeal to this Court. Chief Judge Bazelon replied that "The Court will handle this in its own way." Plaintiffs therefore share the evident frustration of Hon. J. Lee Rankin, Corporation Counsel of New York City and former Solicitor-General of the United States, who moved on behalf of the New York City Board of Elections to intervene in this Court, in the studied failure of the District Court to act expeditiously. Nothing the District Court has done to date leads to the presumption that it will dispose of Christopher v. Mitchell before election day, and certainly nothing leads to the belief that it will act in time for this Court to hear any appeal therefrom when it hears this case. The District Court's delay, and the inability of plaintiffs to obtain either relief or a ruling there justifies intervention here.

The recent Republican party primary for United States Representative from western North Dakota, won by a vote of 17,382 to 17,381, reminds us that even a single vote can change an election. N.Y. Times, Sept. 11, 1970, p. 17, col. 1. In 1965, in the Borough of the Bronx, as a result of Sec. 4(e) of the Voting Rights Act of 1965, over 4,000 new Spanish-speaking voters were registered, almost all of whom were reputed to have voted for Herman Badillo, the only Spanish-speaking candidate for Borough President. Badillo's winning margin was 2,086 votes against the incumbent, Joseph F. Periconi, the vote being 198,499 to 196,413. N.Y. Times, Dec. 9, 1965, p. 50, col. 1-4. The New York courts held

that Periconi had no remedy. Periconi v. Power, 48 Misc.2d 391, 265 N.Y.S.2d 22 (1965). While the constitutionality of the federal law was ultimately upheld in this Court (Katzenbach v. Morgan, 384 U.S. 641), had this Court ruled otherwise Periconi would have been unlawfully deprived of his election without remedy. An infusion of illiterate voters could have the same effect. Whatever may be the situation in Arizona, plaintiffs desire to demonstrate that it is so obviously reasonable for the New York legislature to bar illiterate voters from voting in New York because they will be unfamiliar with the issues that Congress could not have justly determined otherwise.

Proposed intervenors are filing herewith the brief originally prepared for the appeal in this matter in Christopher v. Mitchell as proposed brief in intervention. Should that case be decided below every effort will be made to expedite the appeal prior to October 19th, or subsequent to it. In view of the long argument schedule already ordered in the four voting cases, proposed intervenors request 15 minutes for argument. If Christopher v. Mitchell can be brought up, proposed intervenors are willing to rest on the argument made herein without further oral argument.

Sept. 15,1970 Respectfully submitted,

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