In the

Supreme Court of the United States

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

Appellants,

v.

NEW YORK, et al.,

Appellees.

No. 72-129

Washington, D. C.
February 27, 1973
February 28, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al., Appellants, v. NEW YORK, et al., Appellees.	No. 72-129

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.]

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al., Appellants, v. NEW YORK, et al., Appellees.	No. 72-129

Washington, D. C.,

Wednesday, February 28, 1973.

The above-entitled matter was resumed for argument at 10:09 o'clock, a.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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Randolph, you may resume. You have about nine minutes left.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,
ON BEHALF OF THE UNITED STATES [Resumed]

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

As I was discussing yesterday, the only issue in this case is: Did the District Court err in denying intervention in April 1972, in light of the circumstances existing at that time, in light of the allegations before it?

Under Rule 24(a) the application for intervention must be timely. It's a requirement of the rule. We think this is particularly important in Section 4(a) cases where time may, in fact, be of the essence. Congress itself recognized this by assigning these cases to three-judge district courts and allowing for direct appeal to this Court.

Now, here appellants filed their motion to intervene on April 7. The action itself had been filed by the State of New York on December 3rd. More than four months had passed since the action had originally been filed, the Justice Department had been investigating New York's complaint during this time, and had completed its investigation.

In the District Court, at this time, the only explanation appellants gave to the District Court for filing

the action at this time is contained on page 47 of the Appendix. I read from their Motion to Intervene. Paragraph 6.

"Because counsel for petitioners was only informed within the last 48 hours that the United STates would not adequately represent the interests of petitioners, and because substantial litigation ... has not yet occurred, the instant application to intervene is timely."

As against this, New York objected to the intervention, and their objections are contained on page 67 to 70 of the Appendix.

New York pointed out four basic things.

No. 1, the action had been pending for four months.

No. 2, appellants, or applicants at the time they were before the District Court, were clearly on notice in this case. The affidavit pointed to a New York Times article, where political leaders in these counties were discussing whether to take action with respect to New York's complaint, the fact that in the article itself, which is reprinted in the Reply Brief of the Appellants here, also mentioned that a Citizens Voter Education Committee chairman had mentioned the action.

The other point that New York made is that intervention at this time would disrupt and possibly preclude New York's upcoming primary election where delegates to the Democratic National Convention would be chosen, where delegates

to the State Assemby and the State Senate and congressional seats would be chosen. The reason it would have that effect is because New York had agreed that this reapportionment is covered by Section 5. Unless New York got out from the Act under 4(a), Section 5 would remain outstanding and then they would have to go through the lengthy process of having clearance through the Attorney General, which could not be completed by the time the elections were scheduled to be held.

The fourth point and from the Department of Justice's point of view, and we think the most important that New York made, is that at no time during this period did the appellants offer any evidence to the Department of Justice regarding why New York was not entitled to summary judgment.

Now, this is what was before the district court. These are the allegations that were before the district court, and of course the district court denied intervention at that time.

Now, we think that the court acted within its discretion. The only other case dealing with intervention in the Section 4(a) case, which is very close to this case, is the Apache County case, which we've cited and discussed beginning on page 22 of our brief.

Judge Leventhal, speaking for the court in that case, in discussing intervention, said that in these kinds of cases

the applicants must at least first, and I quote, "bring to the attention of the Department of Justice any instances of discrimination in the use of literacy tests."

Appellants have not done so here and, in fact, just about a year and a half before they sought to intervene, they had gone on record indicating that in fact they had no such evidence. I read from the 1969 hearings on the Extension of the Voting Rights Act, and Clarence Mitchell's testimony before the House Judiciary Committee:

"Chairman Emanuel Celler: Have --"

QUESTION: Is this something the district court considered, or not?

MR. RANDOLPH: No, it's not.

QUESTION: Well, that's all right.

MR. RANDOLPH: I'm trying to indicate why -- a possible explanation why no evidence was presented to the Justice Department. This is on record, I'm reading from pages 251 to 252 of the hearings, which are cited throughout appellants' brief.

"Chairman Celler: Have you, as one of the principal officials of the National Association for the Advancement of Colored People, had any appreciable complaints from parts of the country other than those Southern States which indicate that there are abuses of the type you have mentioned here?

"Mr. Mitchell: The answer to that question, Mr.

Chairman, is no."

It goes on to say: "I would further state that I checked with the general counsel of the NAACP Legal Defense and Education Fund, Mr. Greenberg, and asked for his permission to quote him to this subcommittee. He said we have not had any cases in the long history of our organization involving denial of the right to vote for literacy reasons outside the Southern States of this country. We have very little litigation on the question of voting in States other than those covered by the '65 Act."

QUESTION: How far outside the record are you going in viewing the district court's decision?

MR. RANDOLPH: I think that you should stay exactly within the record, Mr. Justice. I cite this because there has been an awful lot of testimony cited on the other side about what other people said during the 1969 hearings. I'm trying to set kind of the atmosphere that was present at the time when New York instituted the suit, what people concerned with these questions thought about it.

We have had allegations in the case that, well, we were interested in this case all along and no one came to us to ask us our view of the case. In fact, that's not entirely accurate.

But the point is that for four months nothing was done while the Justice Department was investigating the case.

We think that it's a particularly appropriate requirement for intervention in these kinds of cases, and the Court, in Apache County, so held. That the applicants ought first to come to the Justice Department, who is investigating the case, and present it with the evidence that they have of discriminatory use of literacy tests.

In fact, I think if you remember the argument of my colleague here yesterday, that is exactly what they were going to do with respect to the Section 5 action.

QUESTION: Did it necessarily, all you are arguing -- what you have to conclude is that it wasn't timely.

MR. RANDOLPH: That's right. That's right.

QUESTION: Now, you say it wasn't timely because the election was imminent.

MR. RANDOLPH: Right. I think that --

QUESTION: Well, it wasn't necessary to enjoin the election or interrupt it in any way to permit intervention?

MR. RANDOLPH: I don't believe that's so, Mr. Justice.

QUESTION: Why?

MR. RANDOLPH: I'll try to explain why.

QUESTION: Why, I would suppose that courts have authority to let some action proceed under some statute that might be unconstitutional.

MR. RANDOLPH: Well, first of all, the first point

I'd like to make is that that was not suggested to the district court, in fact, --

QUESTION: Well, does that make a difference?

MR. RANDOLPH: Well, I'm trying to set the stage as to what was before the district court.

Second of all, the way the Voting Rights Act is framed, changes in voting cannot be implemented until they've been cleared by the Attorney General. Now, the changes --

QUESTION: Yes, but that decision still had to be made, as to whether this State was properly subject to it.

MR. RANDOLPH: Well, the only way that requirement could be forgotten is if the State got a Section 4(a) judgment, removing it from coverage.

The appellants wanted to intervene to prevent New York from getting the Section 4(a) judgment. Without that Section 4(a) judgment, if New York sought to implement and conduct its election and, I might add, at the time that all this was going on, nominating petitions were beginning to circulate, candidates were beginning to organize campaigns and so on. If they had sought to implement those changes, that would have been a violation of Section 5 of the Voting Rights Act.

Regardless of whether appellant's action in New York, which they had implemented, had gone forward or not, it would still be a violation of the Section, because they

cannot implement those changes until or unless they have an outstanding --

QUESTION: Well, we've permitted elections to proceed under statutes that, on their face, seem to be unconstitutional.

MR. RANDOLPH: Well, in Allen, I remember --

QUESTION: It was a fortiori that made it perhaps -- I don't know, what do you suppose would have happened? I suppose the government would have consented to let the election proceed under the --

MR. RANDOLPH: Well, on the basis of hindsight, I suppose it would. I mean, we certainly wouldn't --

QUESTION: That was your case. I mean, you were consenting to take it out.

MR. RANDOLPH: Yes.

QUESTION: What would the other side have done, if they had --

MR. RANDOLPH: I think that if one reads the motion to intervene, which is contained on pages 44 to 47, appellants' motion to intervene, there's not a word in there about -- which is supposed to, under Rule 24(c) it's supposed to contain the grounds for intervention. There's not a word in there about whether New York had used its literacy test discriminatorily, which was the issue in this case. This entire motion to intervene is framed on the basis that we want

to stop New York from having these elections.

QUESTION: Well, you think, then, that was really the motivation for the motion?

MR. RANDOLPH: I don't see how anyone could reach any other conclusion if you read the motion to intervene.

QUESTION: Is it your position that because of the structure of the Voting Rights Act, New York's primaries could have gone ahead only if there was a final judgment from the district court here exempting them from the coverage?

MR. RANDOLPH: Or, in the alternative, if they had gotten clearance from the Attorney General. But the process of getting clearance, appellants have suggested that: Well, we could have -- they could have gotten expedited. The regulation that they cite in their reply brief says essentially the Justice Department would do the best it can, but the point is if it takes 50 or 40 or 60 days to investigate redistricting in New York City, then nothing can happen during that period of time, I mean the State of New York can't pass on qualified candidates, and this has an effect more like a domino effect throughout the State. If you pull out three of the congressional districts, for example, involving -- or the congressional districts in Kings County, New York County, and Bronx County, that has a snowballing effect throughout the State, because they are not done on county lines. You pull them out and then you'll affect

Richmond, you'll affect Westchester, and so on.

QUESTION: Mr. Randolph, under the state you are obligated to consent to entry of judgment here unless you had some reason to believe this test has been used discriminatorily?

MR. RANDOLPH: Right.

QUESTION: Now, isn't that very like the burden you have or the authority you have or the directions you have under Section 5, when something is presented to you?

MR. RANDOLPH: Very close. The issue is different.

QUESTION: Well, what is the issue? How is the issue different?

MR. RANDOLPH: In Section 5 the question is whether the change in voting that has just been implemented is discriminatory on racial grounds.

QUESTION: That's right; that's right, but --

MR. RANDOLPH: In Section 4(a) the question is --

QUESTION: I'll put it to you this way: If you consent to entry of judgment in a suit such as we have here, wouldn't you have passed the New York law if it had been submitted to you?

MR. RANDOLPH: I don't think that follows at all, Mr. Justice.

QUESTION: No, it doesn't.

MR. RANDOLPH: No. Because the issue in this case is: Where the literacy tests in the past ten years used to

discriminate on the basis of race?

The question in the Section 5 cases is --

QUESTION: Is the new statute.

MR. RANDOLPH: -- is the new statute going to discriminate on the basis of race?

Now, I would hope that a State that would get out from under Section 5 --

QUESTION: At least it's very unlikely that you would consent in the one case and hold the law to be --

MR. RANDOLPH: It would be unlikely only for the reason that if the State is not discriminated in the use of its literacy case can one conclude that it wouldn't discriminate on the basis of districts that it draws. I don't know whether that's a valid conclusion.

QUESTION: I see. I see.

MR. RANDOLPH: For these reasons, we think that the district court acted within its discretion. As we said before, we did not object to the motion to intervene. After the motion to intervene was denied, we looked at the case and we believe that they acted within their discretion in denying it at that time.

QUESTION: What is your fundamental reason for saying that it's not an intervention as of right, as compared with permissability?

MR. RANDOLPH: Well, in the first place, the

individual appellants in this case are five people only from Kings County, New York. None of them claim to be victims of voting discrimination. All of them, in fact, say they are duly qualified voters.

The organization represented is the NAACP, which is the 18 branches of the NAACP in New York City. What they're purporting to represent, Mr. Justice, is simply the right of minority groups not to be discriminated on the basis of race. But that's precisely what the Attorney General is charged with representing under the Act.

We don't think their interest is any different from the Attorney General's, that is, to represent the public interest.

Now, I know of only one case, really, where an intervenor has been allowed to come in to represent the public interest, and that is the El Paso case. If that case is not restricted, if it's not restricted to situations where the government has violated a prior mandate of the court, then we would agree that in certain circumstances we think that people can come in to intervene as of right in Voting Rights Act cases. I mean we would have no other choice but to say that.

But we think that as a prerequisite they ought to at least submit evidence to the Department of Justice, which is investigating the matter, and say: Look, this is why we

think New York is not entitled to a 4(a) judgment.

We don't think that a person should be allowed to just simply sit back, have the evidence, wait for the government to complete its investigation, wait, push it all the way to the moment before primary elections were going to be held, and then suddenly say, Hey, we have this evidence, and we don't think New York is entitled to the summary judgment it seeks; we think they ought to have an obligation to come in earlier and present us with it.

That's what appellants were going to do under their Section 5 submission. Mr. Greenberg mentioned that yesterday. The first step is they were going to present the government with its submission about why.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF GEORGE D. ZUCKERMAN, ESQ.,

ON BEHALF OF THE APPELLEE

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

I'd like to begin on this timeliness question, and try to explain the serious harm that the State of New York would have faced if the delayed intervention of the applicants had been allowed in this case.

To understand this, you have to begin with the fact

that, through no fault of its own, the State of New York was not supplied with a complete set of census statistics by the United States Bureau of the Census until October 15th, 1971, and it was only after that date that the STate could begin the task of drawing 150 new assembly districts, 60 new State Senate districts, and then subsequently 39 new congressional districts.

Now, it was recognized that the time involved in drawing these districts, based on the principle of one-man-one-vote, which would cut across county lines, could not be completed before the early part of 1972, at the earliest. And the State feared that a lengthy process involved in getting this cleared through the Justice Department might delay the applicability of these new districts in the 1972 elections. And thus this Section 4(a) suit was commenced.

As it turned out, our fears were realized, since the Assembly and Senate districting statute was enacted on January 14th of 1972. It was submitted pursuant to Section 5 on January 24th. We did not hear anything further from the Justice Department until more than seven weeks later, when, on March 14th, we received a letter saying that they wanted further information, particularly demographic information, as to the population and registration by race and by Puerto Rican ancestry in each of the districts in the three affected counties.

I may add that information as to registration is not supplied by the Census Bureau, this requires extra information which would have taken weeks to complete. And therefore, when we come to the date of April 7th, when appellants are first seeking to intervene, any delay at that point would have caused chaos in the electoral processes in the State of New York.

On April the 4th, the first day for circulating petitions for the spring primary had already commenced. Without a Section 4(a) judgment, all these new lines would have been subject to an injunction. As a matter of fact, the appellants, at the same time that they filed their suit in WAshington, had filed a suit in the Southern District of New York to halt the elections until the new Assembly, Senate, and congressional district lines.

Now, what would have happened, we would have had to go back to the old districts, which were based on population figures on the 1960 Census that were 12 years out of date.

Now, against the serious harm that the State of New York would have suffered by this delayed intervention, what do appellants' papers show? Do they show thousands of cases in which individuals have been discriminated against, in the application of a literacy test?

No. They don't even show a single instance in which any New Yorker has been discriminated in a conduct of

literacy tests.

Apparently the thing that appellants are most worried about is their claim that the new congressional lines might have been based on racial gerrymandering. They cite no specific evidence for this, but even if this was the case, there is no reason why they couldn't have brought a civil rights action under section 1983 in the district courts in New York, and tried to prove their case, as would have been done -- as we know from the Gomillion case and Wright v. Rockefeller, and has been done in many other instances.

Instead, what they really have tried to do is take the easy way out by a Section 5 action, where you don't have to prove discrimination; all you have to prove is that the State did not comply with the clearance procedures of Section 5 of the Voting Rights Act.

May I remind the Court that in the case of South Carolina v. Katzenbach, at that time the State of South Carolina was attacking the constitutionality of the Voting Rights Act of 1965, in particular Section 4 and 5, and they made the argument that these sections were unconstitutional because for a State to prove a lack of discrimination would involve an almost impossible burden, since it is very difficult to prove the negative of a proposition rather than the positive.

This Court answered that contention by relying primarily on the testimony of then Attorney General Katzenbach,

and said: All a State need do is submit affidavits from their voting officials attesting to the fact that there has been no discrimination in a conduct of literacy tests, and then answer any evidence that the Justice Department might uncover during the course of their investigation.

And that was the situation here. This is what the State of New York did. They submitted to the district court every literacy test that was given within the past ten years. And they submitted affidavits from election officials to show that not only did New York City just sit back and wait until people came to it to register, on the contrary, since 1964, the Board of Elections of the City of New York has sent mobile registration units into the heart of the inner city areas, into the areas where there is a high density of black population, and through the use of sound trucks, have encouraged people to come and register and vote.

I dare say I know of no other city in the country which has done as much to try to encourage minority citizens to vote. And therefore we feel that this particular action is particularly unfair, that is, the consequences of Section 4 are based on a purely statistical presumption, which we believe we have rebutted.

Now, in appellants' briefs before this Court, although there was no evidence presented by them to the district court, they have tried to draw an analogy to the

Gaston County case, trying to argue that if you can prove educational inequality in New York, you can somehow try to raise an argument of discrimination in the conduct of a literacy test.

But the Gaston case can be easily distinguished from the situation in New York. First of all, in Gaston, no matter what the educational background of a person was, he had to pass the literacy test, even if he had a Ph.D. degree. In the State of New York, prior to 1965, if you completed eight grades of school and since 1965 if you completed only six grades of school you did not have to take a literacy test.

So even if they could show -- which we don't believe they could -- that there was inequality in various schools in the City of New York, this is irrelevant, since anyone who has completed six grades of school would not have to take a literacy test.

It has also been shown that throughout the ten-year period leading up to the institution of this action less than five percent of those who took the literacy test failed it.

Appellants have also tried to raise an argument that Congress, in enacting the 1970 Amendments to the Voting Rights Act, sought to include New York State because of some evidence of discrimination, and yet nothing in the record of Congress in the hearings on the 1970 Extensions points to this

thing.

The purpose of the 1970 Amendment, and using 1968 as a standard, was simply because it would be illogical to extend the Act's protection for an additional five years without updating the date of the election which would serve as a standard in measuring voter participation. Not because of any evidence that there had been any discrimination in New York State.

And, indeed, as the Solicitor General has pointed out, Clarence Mitchell, in his testimony before the House Judiciary Committee, admitted that he had no evidence of any discrimination in New York State.

Now, one other argument I'd like to just point to on the question of the remand: It has been blithely assumed that there would be no dire consequences if this thing was remanded to the district court to take further testimony.

May I point out that if the judgment below was vacated, we would now have a cloud of doubt as to the validity of all the existing Assembly, Senate, and congressional districts. More than that, in this past year, we had a new councilmanic statute adopted for the City of New York, 33 new councilmanic districts, which have never been cleared, of course, by the Justice Department, and therefore all these new councilmanic districts for this year's election would be subject to an injunction.

In addition, all the election laws that have been passed, including the runoff provisions for the mayoralty election of New York City this year, would be subject to a Section 5 injunction, and therefore we view the consequences of a remand as causing considerable chaos in the electoral processes in the State of New York.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Greenberg.

REBUTTAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE APPELLANTS

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

In reply I would like to touch on several points. The first is timeliness, and apparently the time, the appropriateness of the time is being measured by two ways in the assumptions that counsel for respondents are making as to what was the reason for the district court judgment, which it never articulated.

First, as to the time in which we filed after the government's position became manifest, we filed within two days after learning it and four days after filing it, I can't imagine anyone doing anything speedier.

Secondly, as to the time before the primary election, counsel for the government has referred to our action being on the eve of the primary. In fact, it was 74 days in advance

of the primary. And I submit that any court can tell counsel that if you want to intervene in this case, and if you want to have your hearing, get your case in within so many days so that we can go on with the problem or we will make other arrangements, if necessary, and counsel would have been ready and willing to do it. And of course we do that sort of thing all the time.

QUESTION: When do you have to file?

MR. GREENBERG: When do you have to file what?

QUESTION: In order to run in the primary, you ought to know what districts you're going to run in.

MR. GREENBERG: That's correct, Mr. Justice, --

QUESTION: Well, when was the filing date?

MR. GREENBERG: The filing date, I believe, was considerably earlier. It was April 4th.

And we filed our application for intervention, I think, on April 4th or 5th. But the two could have gone on simultaneously. If it was illegal, the court then could have taken some appropriate measures to deal with that, either, as you suggested in your question, let things stand for the time being or order some alternative procedures to be decided. The case could have been decided in a matter of days or weeks.

QUESTION: Are you that sure, Mr. Greenberg, that short of a final judgment by the District of Columbia Court,

that New York didn't have to comply, that it could have granted some sort of interim permission for it not to comply?

MR. GREENBERG: New York was indeed proceeding at that time, and it did not yet have a final judgment. New York had been proceeding since at least a month earlier, with filing petitions and getting them out and so forth. So New York was that sure, and obviously they were going on ahead with it.

If their procedures had been validated, and I submit that the proposed answer and our motion to alter judgment and the materials submitted indicate that we would have won that case if we had been permitted to intervene.

QUESTION: What was New York's approach that they didn't need to submit?

MR. GREENBERG: New York's approach was that they had not used the -- they had urged that they had not used the literacy test for ten years earlier, with the purpose or the effect of racialdiscrimination.

QUESTION: So coverage wasn't --

MR. GREENBERG: Right.

QUESTION: Coverage wasn't automatically admitted, but by its terms the Act did cover it?

MR. GREENBERG: Oh, yes. Yes. But they said they had not used the Act with the purpose or the effect of racial discrimination. Their only allegations, their only evidence

was concerning effect, and evidence on effect, if we're going to follow the Gaston County case, was all on the papers, and in census reports and various published reports which we have attached with our motion to alter judgment.

So the timeliness thing, there were 74 days in there, and many a court has told many a litigant to get something settled in a great deal shorter time than 74 days. And I submit if the court had said that here, and the parties hadn't complied, they could have, at that point, denied intervention and not allowed the intervenors to proceed further.

None of that was -- there was no reason, it was just that: you can't intervene; you can't appear. That's the only thing that was said.

Secondly, there's been some suggestion about standing here, and we submit that applicents here have precisely the same standing as any voter in any reapportionment case, and indeed the standing of the applicants Wright and Fortune is additional -- they have additional standing in that they are office holders, they are State Assemblymen, they are asserting the public interest, I guess, as any litigant does in a constitutional case. They're doing far more than that, they're asserting their own personal interest in the rights that have been vindicated and recognized by the court.

QUESTION: Is it your suggestion now, Mr. Greenberg,

that the Court must always write an opinion explaining, when it acts in a situation like this?

MR. GREENBERG: No, obviously courts have --

QUESTION: Maybe they thought the appeal was -- maybe they thought the motion was frivolous.

MR. GREENBERG: Well, perhaps they might have. I think that then we would have to look at the objective record we have before us, and we would submit: on the assertions here it was not frivolous, it was quite serious, and the litigants were serious litigants, they were State office holders and voters, the counsel were counsel that the courts were familiar with, and not anyone who acted in a frivolous manner. And the allegations were serious and serious exhibits were submitted along with the motion to alter judgment.

So we just have to look at the papers we have before us to come to a conclusion as to what the court meant.

As to the legislative history, which Clarence Mitchell purports to quote me, I think he did quote me, and that's been cited to the Court. I imagine that that was a tactical situation in which he was aruing that the law should go forward, the Congress should go forward and pass the law to cover only the South and not the North.

Whatever Mr. Mitchell thought and whatever I thought at that moment, Congress thought otherwise, and they passed

the law to cover the North as well as the South, and indeed the very provision we're talking about is the Cooper amendment, and it just didn't advantageously touch upon New York, on page 19 of our brief, Senator Cooper said "The chief State involved is the State of New York. Three counties of New York were involved, Bronx, Kings, and New York. In the 1964 election more than 50 percent of the voters were registered and more than 50 percent voted. However, for some reason in the 1968 election 50 percent were not registered or voting."

And so New York was not covered casually. That is the intent of Congress, and we submit that if the intent of Congress is not being carried out by a litigant in a lawsuit, be it the United States or anyone else, and that lawsuit will affect a party, Rule 24 quite explicitly provides that there may be intervention. That's what applicants attempted to do. That's what they were not permitted to do. It being a matter of application for intervention as of right, it should have been allowed and we submit that the judgment below should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:42 o'clock, a.m., the case was submitted.]