IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

## No. 804

KENNETH W. COLEGROVE, PETER J. CHAMALES and KENNETH C. SEARS,

*Petitioners,*

vs.

DWIGHT H. GREEN, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois, EDWARD J. BARRETT, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois and ARTHUR C. LUEDER, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois,

*Respondents.*

# PETITION FOR REHEARING.

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## PETITION FOR REHEARING.[1]

*To the Supreme Court of the United States:*

Come now the above named Petitioners and in support of, and in justification of this Petition for Rehearing, humbly and respectfully submit the following considerations and points:

[1] Through the kind consideration of this Court, based on the Verified Motion and Suggestions therefor, heretofore filed herein by Counsel for the Petitioners, the usual time of 25 days for filing Petition for Rehearing after the date of the decision herein on June 10, 1946, was extended by a special Order of this Court granting 45 additional days therefor, and enlarging the time for this Petition for Rehearing to August 21, 1946.

**General Considerations.**

1. This case (including the several opinions of this Court in the premises) is bound to become one of the outstanding Constitutional Law cases of modern time, regardless of the outcome of this Petition for Rehearing. This result is due primarily to the uniqueness of the constitutional issues presented in this case; but in a realistic sense it is due even more to the wide and far-reaching and precedent-fixing implications which will flow for many years to come from this Court's decision.

2. It is most unfortunate all around that the case necessarily had to be decided by seven Justices out of a full Bench of nine It is even more unfortunate all around that the opinions of the seven Justices, passing upon this case, should be divided three ways; so that only three Justices of this Court are "in accord in opinion" (to use Chief Justice Marshall's classical phrase) in support of the final judgment of the Court.

There is a famous maxim of Lord Coke's that is pertinent to this decision:

*"Paribus sententiis reus absolvitur."*

That is a Maxim of Logic, as well as of criminal law. For our present purposes it may be translated—

> "Where the opinions of the Court are equally divided the judgment of the Court must be stayed."

3. It is obvious to the Justices of this Court who heard the oral Argument (and it is strongly borne in upon the Counsel for the Petitioners who argued the case and who is writing this Petition for Rehearing) that many of the facts and legal points discussed in the

opinion of Mr. Justice Frankfurter, and indeed most of the matters and things discussed by Mr. Justice Rutledge in his opinion, were only hurriedly and inadequately touched upon by Counsel for the Petitioners upon the oral Argument before the Court. There simply was not time, within the hour granted to state the facts adequately and to explain satisfactorily even the theories of Law relied upon by the Petitioners. This was nobody's fault—it was simply inevitable The realistic result is that this case has largely been decided upon grave and serious issues about which Counsel for the Petitioners was unable, fairly and fully to advise the Court, since the pressure upon Counsel in his limited time prevented a reasonable presentation of many important issues [2] Nevertheless Counsel thanks the Court for the very considerate hearing which was given him.

The fact that the case has now been decided (as above suggested) largely upon issues that were only fragmentarily discussed upon oral Argument, shows on the one hand the complexities of this case, and on the other hand the desirability that the Court should hear further oral Argument in the case.

4. The resulting decision in this case, with its three separate opinions, none of which are in accord, even on the prevailing side, leaves the Courts and the Bar of this country, and indeed the public generally, in a condition of uncertainty as to what the law really is, about

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[2] Incidentally the Record in this cause before this Court will show that Counsel for Petitioners asked this Court by Special Motion to grant him additional time for oral Argument, because of the complicated and serious nature of the case The Court upon that Motion could not measure and appraise the complicated nature of this case, and therefore the Court gave only the usual traditional time of one hour to each side

the guaranties of the Federal Constitution, with respect to equality of voting in Congressional Elections.[3]

5. We respectfully say therefore, that in the light of the two prevailing opinions handed down by this Court in this case, the liberal and progressive doctrines of this Court, in analogous cases, and particularly as established in the recent cases of *United States* v. *Classic,* 313 U. S. 299, and *Smith* v. *Allwright,* 321 U. S. 649, have now been put into a condition of partial eclipse. No lawyer can say what is the dividing line, in principle, between the doctrine of the case at bar, and the doctrines of those two leading cases.

6. The Bench and Bar of this country will be compelled hereafter to think and to hold that the dominant doctrine laid down by this Court in *Smiley* v. *Holm,* 285 U. S. 355, is now, at least partially, overruled and reversed by this case. Thus the opinion of Mr. Justice Rutledge in this case frankly suggests that the basic holding in the *Smiley* v. *Holm* case may now indirectly "be brought into question." We respectfully suggest that this Court, in this case, should somehow say directly whether or not the rule of the *Smiley* v. *Holm* case is still the law or has been abandoned.

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[3] This point is made abundantly clear by the Digests of those three opinions, and the resulting meagreness of the "Head-Notes" which will go into the Books—as shown by the two semi-official Reports of this case, which are already printed and in the hands of the Bench and Bar of the Country. See the case as reported in 66 S Ct. 1198, et seq., Advance Sheet of July 1, 1946; also L Ed, Advance Sheet, July 1946, p. 1242, et seq. It will be observed that both these Reports give a mere "Result" memorandum, as the publishers call it, and neither of them attempt to digest the several opinions in the usual way, since there is no *majority* opinion, or the usual "Opinion of the Court".

**The "Timing" Factor in This Case.**

7. No one can read the prevailing opinions in this case without being favorably impressed with the implicit but obvious desire, in those opinions, to refrain from bringing about any confusion or public disorder, in Illinois, in the November 1946 Congressional Elections. Each of those opinions expressly refers to the danger of such a possibility. Indeed the Petitioners in their Complaint (Tr. pp. 22 and 23) anticipated such an objection and showed that "No Public Confusion or Disorder" would actually result or follow, if the Court granted the relief prayed. This point is again stressed in our Main Brief (pp. 133 to 134).

Further, as shown by our Brief at the place last cited, these self-same Defendants will be in office until January 1949. This Court we say, with all due respect, has now avoided all possible chance of causing the election of 26 Members of the House of Representatives "*at-large*", at the 1946 Congressional Elections in Illinois.

*If this Petition for Rehearing should now be granted, and thereafter the Court should grant the relief prayed by these Petitioners, then the Illinois Legislature would have two full years to comply with the Law, before the next Congressional Elections would come round.*

In other words, the "Timing" factor in this case is now much stronger in favor of this Court granting relief than it would have been at the time this decision first came down in June 1946.

## Points of Law.

Accordingly we make the following specific Points of Law in support of this Petition for Rehearing.

### I.

**Each of the prevailing opinions in this case is based primarily on the theory and idea that this case involves "political questions" to such an extent that the Court either cannot, or should not, take jurisdiction of the merits of the case. In reality the case merely involves the validity of a State Congressional Districting Act, which is now unchanged in a very large and populous State, after forty-five years since its enactment. We respectfully say that if given the opportunity we could convince this Court (we believe) that many other cases more "political" than this one have been decided by this Court. This is a point upon which we were hardly heard at all upon the oral Argument. If this decision is to stand it amounts to a withdrawal, we respectfully say, from the progressive stand of this Court in several leading cases, as for example United States v. Classic (1940), 313 U. S. 299, and Smith v. Allwright (1944), 321 U. S. 649. This point should be reheard by the full Court.**

*McPherson* v. *Sec. of State,* 146 U. S. 1.
*Ex parte Yarbrough,* 110 U. S. 651.
*Ex parte Siebold,* 100 U. S. 371.
Willoughby, "Constitutional Law of United States," 2nd Ed. 1929, Vol. 3, pp. 1326 to 1328.

## II.

Both of the prevailing opinions in this case make the unrealistic and futile suggestion (we say with all due respect) of sending these Petitioners back to the defiant Illinois Legislature for relief. The outspoken opinion of the three able Judges below (See our Main Brief, Appendix A), who have long been personally familiar with the historic struggle in Illinois to correct the wrongs and evils set forth in the Complaint, shows clearly that such is a forlorn hope. Legislative Despotisms like that in Illinois tend strongly to be self-perpetuating; since the power and control of those in office, and their political allies, depends on maintaining the present status quo. There never will be any relief in Illinois (we firmly believe) until this Court lays down what may be called the "Law of the Land", in the premises, and condemns the practices which have hitherto existed in this particularly unregulated and lawless field of Federal Elections.

Appendix I, Opinion of Mr. Justice Frankfurter, in this case.

Article on "Parliament", Enc. Brit., 13th Ed, 1926, Vol. 20, p. 843.

"The Rise and Development of the Gerrymander", Elmer C. Griffith, (1907), in his "Introduction".

"Congressional Apportionment", L. F. Schmeckebier (1941), p. 127.

## III.

In both of the "prevailing" opinions in this case, the second major objection (after the point about "political questions") is the contention that this particular case is not one for Equitable Jurisdiction and should therefore be "dismissed for want of equity," and without any hearing on the merits. Under the present state of the law there are two Schools of Thought on this particular point and no man can say that the law is settled either way. There are, however, several cases in this Court, and several other dissenting opinions, (as well as a number of cases in the lower Federal courts) strongly suggesting that the precise question in the case at bar is one in which these Petitioners are entitled to Equitable relief. Because of the serious and crucial adverse results for the future, in other cases broadly affecting the entire field of Civil Rights, this question of Equitable Jurisdiction should be fully and carefully reconsidered by this Court on this Petition for Rehearing.

## IV.

The two prevailing opinions in this case (and the ruling of four Justices out of nine) raises squarely the question whether the case of Smiley v. Holm from Minnesota, 285 U. S. 255, is now overruled or at least partially abandoned. In the weeks since the decision of this Court came down in this case we have heard that precise point argued pro and con by very able lawyers. We on our own part respectfully but frankly say the answer to that question is "yes", and that the future will so prove. If this is the intent of the Court, a majority of a full Bench should specifically so declare.

## V.

In both of the prevailing opinions in this case there is a positive and strong suggestion that Congress itself could somehow come directly to the relief of the citizens of Illinois in the premises. That view has never before been suggested (so far as we know) by any decision of this Court. Indeed the House of Representatives for more than one hundred years has directly held in several leading Contested Election Cases that the seat of members could not be challenged on the mere ground that they were elected "at large", when the Act of Congress of 1842 specifically required them to be elected by Districts.

See for example "Hind's Precedents", Vol. 1, p. 170, for "Election Contest" of State delegations, elected in 1843 "at large" from States of New Hampshire, Georgia, Mississippi and Missouri

See also comment on this 1843 "Election Contest" in Schmeckebier, "Congressional Apportionment," p. 135—the work cited by the opinion of Mr. Justice Frankfurter.

See particularly H. R. Rep. No. 3000, 56th Cong. 2nd, Sess. 1901, and comment by Schmeckebier, p. 137.

But regardless of legal theory, we respectfully but earnestly suggest, that the Congressional construction for more than 150 years (plus the dominant "States-Rights" tradition in Congress) makes it utterly unrealistic to say there could ever be direct relief by Congress in the premises.

## VI.

**The opinion and views of Mr. Justice Rutledge (we respectfully and earnestly suggest) are decisive and controlling in this case. Indeed the balance is tipped by him, and it is much the same as if this case had been decided by a one-judge Court. Accordingly this particular opinion deserves close and careful analysis. This opinion holds that this Court should not take this case, even under the doctrine of the Smiley v. Holm case, ante, because it is said these Petitioners have a "tenable alternative" remedy. They can go back, it is said, to the Illinois Legislature or to Congress itself. This is a point that was never discussed in the Briefs of either side, or upon the oral Argument by either Counsel. We respectfully say that we should be entitled to our "day in court" on this proposition and idea. We desire the opportunity of showing that there is no "tenable alternative" to relief in this Court.**

See Willoughby, work cited in Point 1 above, Vol. 3, Ch. 73.

See especially recent (1944) authoritative work of Charles Grove Haines, "The Role of the Supreme Court in American Government and Politics," p. 41 *et seq.*

## VII.

The opinion of Mr. Justice Frankfurter has inadvertently and unwittingly done the Declaratory Judgment a grievous injury, by suggesting in a dictum that a Declaratory Judgment "in such case" as this depends on the possibility of obtaining an injunction. In support of that statement the opinion quotes out of context part of a sentence from the opinion of the late Chief Justice Stone in Nashville, etc. Ry. v. Wallace, 288 U. S. 249, at 264. Thus the opinion, purportedly speaking for two other Justices and by implication for a fourth Justice, comes to a result exactly opposite to the one intended by this Court in the case last above cited. This will be apparent, we say, from a comparison of the text of this particular opinion in this case on this point, with the language and the context of Justice Stone's opinion. In no case is the Declaratory Judgment dependent on the possibility of obtaining an injunction or other coercive relief. In fact, as the Tennessee statute showed, in the case last above cited, no injunction to prevent the collection of taxes was possible, and it was for that reason that a Declaratory Judgment was sought. Had the statement of the opinion in the present case, to which reference is made, been correct, no Declaratory Judgment could have been granted in the Tennessee case. This particular dictum in this case is so obviously without foundation (and is so unnecessary) that as a pronouncement of the Supreme Court it may, unless corrected, work havoc to the Declaratory Judgment Procedure. We therefore respectfully urge this statement to be reconsidered upon this Petition for Rehearing.

## Conclusion.

Now the first observation which a neutral critic would make (we think it is fair to say) is that Mr. Justice Frankfurter's opinion, and particularly the graphic Tables and Charts set forth in its Appendix, *prove the Petitioner's case on the facts.* Indeed we freely admit that these Tables do that more strongly and convincingly than we were able to do on our own behalf. No one can read the discreditable "story" of such States as Illinois, Ohio, Maryland, Texas and Missouri, as set forth in "Appendix I" to that opinion, without being convinced that these "glaring inequalities," of which this opinion speaks with evident repugnance, are bound to grow worse rather than better, unless and until this Court condemns such "lawlessness by Lawmakers," and lays down some Rule of Law in this hitherto unregulated and uncontrolled field of Federal Election Law.

### Illinois Again Refuses.

And yet it cannot be that the four distinguished Jurists who have joined in the prevailing opinions in this case fully realize that crucial fact in the case at bar. We cannot believe that these two prevailing opinions would have been written in the fashion in which they appear, unless those Justices, or some of them, were actually still hopeful of "Legislative" relief; and that somehow, they believe that after the grave warning to the State of Illinois in the words of the Opinion below, and after that State had been held up to the scorn of the World by the implicit "story" of this case in this Court, the General Assembly of Illinois would repent and do its duty. Those Justices may perhaps have felt

that the example of Minnesota, after the *Smiley* v. *Holm* case, and the example of New York after the *Koenig* v. *Flynn* case, and the example of Missouri after the *Carroll* v. *Becker* case, would work out an *ad hominem* judgment, so to speak, in Illinois, and without intervention by this Court. But it will not be out of order for us to say that such hopes, if they existed, have already been truculently defied. This Court can if it will, take judicial notice of the fact that since the oral Argument of this cause in March, 1946, and down to the filing of this Petition for Rehearing in August, 1946, the General Assembly of Illinois has twice been called into Special Session, and has twice adjourned; but that no hint or suggestion of a new Congressional Apportionment Act, was made either by the Governor of the State (one of the Defendants here) in his "Call" for those Sessions, or by any of the leaders in the dominant Party in either House of the Illinois General Assembly.

Nothing, we believe, could have been more law-abiding, and indeed more respectful and deferential to this Honorable Court; but unfortunately nothing could be further from the intent and purpose of the Illinois General Assembly, as it is now constituted.

The plain fact is that Illinois has had two formal opportunities, *since this case has been pending in this Court,* of following the example of the States we have mentioned; but Illinois has again refused to act in the premises.

**The "Law of the Land" Should Be Laid Down.**

The outstanding legal fact in this case is the great need of an authoritative pronouncement of the "Law of the Land" in the premises, by this Honorable Court.

Nothing else will suffice. As matters now stand there is no Commandment of the Law, so to speak, which can be held up before the Illinois General Assembly, as the Voice of Authority. Because of that fact the office-holders and their allies in Illinois, who continue to profit by the present *status quo,* and who are insured of re-election by the continued gerrymandering of these Congressional Districts, are able to defy public opinion and to say they are breaking no law by their arbitrary action. The Members of the Illinois State Legislature are themselves profiting by a similar outrageous gerrymandering of their own Districts These Districts also have not been changed since 1901, although the State Constitution requires, expressly, a reapportionment of the Legislative Districts every 10 years. See our Main Brief, p. 18, *et seq.* And now they will have the Decision in this case to point to and to cite, in support of that contention. They may even use this Decision in their future campaigns.

But if this Honorable Court were to announce the Law of this case, its judgment would go far toward galvanizing the slothful Illinois Legislature into performing its duty in the premises. As we have seen, that was the prompt and realistic effect of the judgment of this Court in the analogous cases of *Smiley* v. *Holm,* 285 U. S. 355, in Minnesota, of *Koenig* v. *Flynn,* 285 U. S. 315, in New York, and *Carroll* v. *Becker,* 285 U. S. 380, in Missouri. The strongly entrenched Legislative bastion in Illinois would fall before the judgment and pronouncement of this Court like the Walls of Jericho before the trumpets of Joshua.

Wherefore the Petitioners respectfully urge upon this Court that this case be further heard.

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Chicago, Illinois.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

URBAN A LAVERY,
*Attorney for Petitioners.*

Chicago, August 14th, 1946.