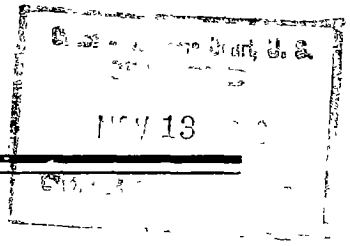

IN THE

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.

MOTION FOR CONSIDERATION BY THE FULL COURT OF A MOTION HERETOFORE FILED AND STILL PENDING AND UNDISPOSED OF.

URBAN A. LAVERY,
Attorney for Petitioners,
Chicago, Illinois.

Of Counsel:

EDWIN BORCHARD,
New Haven, Connecticut.

JOHN S. MILLER,
Chicago, Illinois.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

(November, 1946)

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To the Full Bench of this Honorable Court:

Come now the above named Petitioners (after the formal denial by this Court of their "**Petition for Rehearing**" herein on October 28, 1946) and respectfully show unto the Court as follows:

DEPARTURE FROM COURT'S TRADITIONAL POLICY.

I. The denial of the "**Petition for Rehearing**" in this matter, without disposition of the pending "**Motion For Reargument Before The Full Bench**", is a departure from

the traditional policy of this Court, adhered to since 1834, and first declared by Chief Justice Marshall that—

> "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where Constitutional questions are involved, unless four Judges [now five] concur in opinion, thus making the decision that of a majority of the whole Court."

Has not the Court, by its action *sub silentio* in this case, abandoned, or at least put in question, that doctrine of Chief Justice Marshall?[1]

MINORITY VETO POWER.

II. On August 17, 1946 (and within the time especially allowed therefor after the decision of this cause on June 10, 1946) the Petitioners presented and filed in the Clerk's Office two separate printed Pleadings or Proceedings in this cause as follows, to-wit:

> *First:* The usual and customary **"Petition for Rehearing"** filed in compliance with Rule 33 of this Court concerning *"Rehearings."* That Rule provides among other things that
>
> > "Such a Petition * * * will not be granted unless a Justice who concurred in the judgment desires it * * *."
>
> Such language as applied to the case at bar, which had been decided by only seven members of this Court, meant that the four Justices who supported the Judgment in this case on that decision, would have a *minority veto power* over the granting of any *Petition*

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1 See *Briscoe* v *Commonwealth Bank of Kentucky etc* (1834) 8 Peters 118, 8 L. Ed 887, also the *"Legal Tender Cases"* (1872) 79 U S 457, 12 Wall 457, 20 L Ed 287; see also *Home Ins Co.* v. *New York* (1890), first decision, 119 U. S 129, 30 L Ed 350 and the Rehearing and final decision, 134 U. S. 594, 33 L Ed 1025, also *"Income Tax Cases"* (1895), first decision, 157 U. S 429, 39 L. Ed. 759, 15 S Ct 673, Rehearing and final decision, 158 U S. 601, 39 L. Ed 1108, 15 S Ct 912 These four important and controlling cases and their background are fully analyzed and discussed in the **"Suggestions"** attached to Petitioners' **"Motion for Reargument before the Full Bench"** heretofore filed herein.

for Rehearing in this case, even though a Majority of the full bench of this Court should be in favor of such *Rehearing*. That fact constituted a substantial handicap against these Petitioners on any "Rehearing" Proceedings *per se,* in this case.

Second. Accordingly for the particular purpose of avoiding such *minority veto power,* and avoiding such *handicap,* the Petitioners also filed at the same time an additional Pleading or Proceeding entitled "**Motion for Reargument before the Full Bench**". That "Motion" or Proceeding was filed in accordance with Rule 7 of this Court concerning "*Motions*", and under that Rule this second Proceeding would not be subject to such *minority veto power.* In other words the vote of the *Majority of this Court* would then prevail in the premises; with the result that these Petitioners might properly be granted a Reargument by the five Justices who have not concurred in the judgment of June 10, 1946.[2]

NEED OF A MAJORITY DECISION BY NINE JUSTICES.

III. As will more particularly appear from the pending "**Motion for Reargument**" above mentioned, and especially from the "**Suggestions**" appended thereto, it was the intent and purpose and desire of Counsel for the Petitioners that such "Motion" should be heard and considered by the full Bench of nine members of this Honorable Court; *and that this should be done independently of, and separate and apart from, the hearing upon the aforesaid "Petition for Rehearing."* In other words your Petitioners' "**Motion**

2 The opening sentence of your Petitioners' **"Motion for Reargument before the full Bench"** made its purposes and objectives clear and precise by reciting that it was presented, and was intended to be, *"in addition to their Petition for Rehearing concurrently filed herein"* Moreover the differing effects of Rule 33 and of Rule 7 of this Court in the premises, are particularly pointed out in the **Note** appended to that opening sentence of your Petitioners' Motion The said **"Motion"** has attached thereto certain **"Suggestions"** in support thereof to which we respectfully call the attention of this Honorable Court, upon the consideration of the present **Motion.**

for Reargument'' (for the reasons suggested in Paragraph I above) deserves and should now receive the particular consideration and appraisal and judgment of the two learned Justices of this Court who so far have not participated in the consideration of this grave and important case.

As a matter of procedure, the presentation to this Court of a separate and independent **''Motion for Reargument''**, as distinguished from a **''Petition for Rehearing''**, is clearly authorized and justified by the traditional practice of this Court, going back more than 100 years.[3]

REHEARING ORDER OBSCURE.

IV. Notwithstanding the matters and things set forth in Paragraphs I, II, and III above, and notwithstanding the distinction and difference, under the established practice of this Court, between a **''Petition for Rehearing''**, and a **''Motion for Reargument''**, this Honorable Court nevertheless has entirely overlooked or passed by the latter Proceeding filed in this case. Because on October 28, 1946, this Court merely entered the following Order herein:

> ''Leave granted to file brief of the Civil Liberties Union as *amicus curiae* The petition for rehearing is denied. The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of these applications.''

That Order, it is respectfully urged, is obscure and ambiguous. Indeed, since that Order makes no reference whatever to your Petitioners' **''Motion For Reargument Before The Full Bench''**, but is concerned only with the **''Petition for Rehearing''**, *per se,* the rule of *''expressio unius''* excludes the idea or construction that this Court was intending to include such *''Motion''* also, within the purview of that Order.

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[3] See Note 1, page 2, of pending **"Motion for Reargument"**, etc.

THE BENCH AND BAR ENTITLED TO RECONSIDERATION BY THE FULL COURT.

V. This case clearly demonstrates the wisdom of this Court's traditional policy that no judgment should be made in cases involving important Constitutional questions by less than a majority of the full Court. Here not only was the decision rendered by less than a majority, but the three separate opinions filed in the case are so conflicting and irreconcilable that the result is confusing and uncertain. No Rule of Law whatever is established in this case.[4]

We therefore respectfully submit that not only the parties to the cause, but the Bench and Bar of the country, are entitled to a reconsideration of this important case by the full Court, including the two Justices who were not present at the argument and did not participate in the decision.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Petitioners,
Chicago, Illinois.

Of Counsel:
EDWIN BORCHARD,
New Haven, Connecticut.
JOHN S. MILLER,
Chicago, Illinois.

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

URBAN A. LAVERY,
Attorney for Petitioners.

November 12, 1946.

[4] The grave defeats of the minority decision in this case, and the confusion in the Law which it portends are pointed out and analyzed in the **"Suggestions"** already mentioned, particularly at pages 35 and 36 thereof.